No. _____

In The

Supreme Court of the United States

October Term: 2018

RAFAEL QUIROZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari
To The United States Court of Appeals, Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a federal prisoner have a constitutional right to raise a freestanding claim of actual innocence in a federal habeas corpus proceeding?

2. Can a prisoner establish a freestanding claim of actual innocence by showing that he or she is probably innocent and, if not, what showing is required?

3. Is a prisoner whose habeas petition contains facts which, if true, would establish probable innocence entitled to an evidentiary hearing?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rafael Quiroz respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered and filed in the above proceedings on December 15, 2017.

OPINIONS BELOW

The Memorandum opinion of the United States Court of Appeals for the Ninth Circuit appears at Appendix A to the petition and was designated not for publication. The order of the United States District Court for the Eastern District of California appears at Appendix B to the petition and is also unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Ninth Circuit decided this case was December 15, 2017. A copy of that decision appears at Appendix A.

This Court's jurisdiction is invoked under 28 U.S.C. section 1254, subdivision (1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. section 2244

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255....

(b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless – ...

(B)(I) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(b)(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense....

(b)(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

28 U.S.C. section 2255

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United

States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence hm or grant a new trial or correct the sentence as may appear appropriate....

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of – ...

(f)(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence....

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(h)(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense;...

STATEMENT OF THE CASE

A. Trial Proceedings

In 1989, Petitioner won $1,000,000 in the Big Spin California Lottery. Volume 3, Excerpts of Record ("3-ER") 467. From 1989 until 1998, Petitioner received an annual check for approximately $40,000. 3-ER 467-468. Although he initially stopped working, he later became a partner in a car business in Redwood City. 3-ER 472-473, 488-489. He

eventually went back to work running a La Huesteca restaurant in San Jose, and in March 1994 purchased the La Huesteca restaurant in Menlo Park. 3-ER 436, 469-470, 473-474, 487.

Sometime during 1993-1995, a federal task force began investigating Petitioner based on what it believed were suspicious financial dealings, including purchasing two residential properties using checks originating from cash deposits of under $20,000, and making large deposits, often in cash, into his bank accounts. 3-ER 429-430, 433-437, 494.

In August 1993, officers stopped four men as they left the La Huesteca restaurant where Petitioner was working, and discovered a significant amount of cash, a list of chemicals used to manufacture methamphetamine, and a ledger. 3-ER 418-420, 492-493.) Petitioner denied knowing the men to officers, but one testified at trial that he and the others had just had lunch with Petitioner. 3-ER 343-347, 421, 492-493. Petitioner later claimed $15,000 involved in forfeiture proceedings that had been seized following a stop during which a trained dog had located the money in a duffle bag, though no narcotics were found in the car. 3-ER 413-417, 493-494.

After 1994, Petitioner went back to Mexico, where he bought and

sold cattle, occasionally returning to the United States to visit until his arrest. 3-ER 478-481, 486, 491. On January 19, 1995, a San Jose undercover officer bought one ounce of methamphetamine from a person who then drove to La Huesteca where he met with Petitioner, and gave him something. 3-ER 337-338, 406-409. Officers searching an apartment connected with a proposed methamphetamine deal found a pager which had Petitioner's home telephone number in its memory. 3-ER 342. An Internal Revenue Service informant testified that Petitioner and others brought him United States currency, exchanged it for Mexican currency, and then deposited the money in Mexican bank accounts using names of family members, in a series of transactions totaling over $200,000. 3-ER 385-402.

When Bureau of Narcotic Enforcement (BNE) Case Agent Robert Mecir could not find Petitioner in this country, he used a ruse to get him to come back on March 1, 1999, convincing lottery officials to send Petitioner a letter stating that he had to be present to receive his payment that year. 2-ER 171-174, 177; 3-ER 481.

After his arrest, Petitioner learned that one of his younger brothers, Roberto Quiroz, was using false driver's license in Petitioner's name but using Roberto Quiroz's photograph and fingerprints. 3-ER

356-359, 361-363, 368-370, 464-466, 486. Prior to that time Petitioner had no idea Roberto Quiroz was using his identity without his permission. 3-ER 485-486. At the time of trial in 2001, Petitioner did not know where Roberto Quiroz lived, had not seen him since Christmas of 1998 in Mexico, and had not seen him in the United States since 1996 or 1997. 3-ER 466.

During his investigation, Mecir discovered that Roberto Quiroz had used a false driver's license to impersonate Petitioner at a Los Angeles area casino and purchase nearly $20,000 in chips, for a currency transaction report in excess of $10,000, and to purchase some chemicals. 3-ER 363-365, 368-342. Roberto Quiroz had a no-bail warrant. 3-ER 370.

In a Fifth Superseding Indictment filed in the Eastern District of California on August 24, 2000, the Government charged Petitioner and others with a total of twenty-nine counts related to the manufacture, distribution and possession of methamphetamine. 3-ER 507-516. At trial, the Government relied heavily on the testimony of Ernesto Plancarte to establish that Petitioner was a drug kingpin, telling jurors in the opening statement that they would be hearing testimony from:

> a witness who is going to tell you how the organization

> worked, and that is Ernesto Plancarte. Mr. Plancarte is going to testify for you that he worked for [Petitioner] since 1994 and that his primary duties were to buy chemicals used to make methamphetamine from these various companies and to deliver them to the laboratory site. So he was able to identify at least six laboratory sites where he had delivered chemicals for [Petitioner].

2-ER 138.

Petitioner acknowledged knowing Plancarte, but denied ever asking him to purchase chemicals or introducing him to anyone involved in the drug trade. 3-ER 475-476.

Plancarte testified that he met Petitioner in 1995, and immediately began working with him in the manufacture of methamphetamine. 2-ER 214, 217-218. Prior to meeting Petitioner, Plancarte had suffered multiple convictions for possessing controlled substances for purposes of sale, and one conviction for conspiring to commit a crime. 2-RT 260-261. In March of 1998 he was arrested on new drug charges that resulted in a sentence of thirty years. 2-ER 212-216. Plancarte told Mecir he knew Roberto Quiroz, 3-ER 367, but did not discuss Petitioner with any law enforcement officials until Mecir specifically asked him about Petitioner in July 1998. 2-ER 262, 263-264.

As a result of Plancarte's cooperation in showing Mecir where laboratories were located and in prosecuting Petitioner, among other

people, Plancarte's sentence was being reduced to ten years. 2-ER 212-216, 259, 271-272; 3-ER 348-354.

According to Plancarte, from 1995 until March 1998, Petitioner regularly provided him with large amounts of cash to purchase specified chemicals needed to make methamphetamine, along with instructions for delivering the chemicals after they were purchased. 2-RT 214, 219, 224. Plancarte told Mecir about seven different locations used to make methamphetamine: Sutter County, Yuba City/Sutter County, Madera, Pescadero, El Monte, Ontario, and San Bernardino. 2-ER 225; 3-ER 348-355. According to Plancarte, Roberto Quiroz worked for Petitioner, and he had seen Roberto Quiroz at the Ontario laboratory, and discussing methamphetamine manufacturing with Petitioner. 2-ER 220-224,248-249. The "Cash Sales" database, a database compiled and reported to law enforcement by chemical supply companies about purchasers of certain chemicals associated with methamphetamine production, listed Plancarte as buying such chemicals between 200 and 400 times. 2-ER 151.

Plancarte provided testimony about two separate laboratories in Sutter County that formed the basis for substantive Counts 3-15 against Petitioner for manufacturing methamphetamine. 2-ER 226-228, 232,

235-239, 270-271; 3-ER 349-350, 507-516. At a laboratory on Oswald Road, officers found 75 gallons of liquid methamphetamine, seven pounds of finished methamphetamine, and other chemicals and equipment used to make methamphetamine. 3-ER 282, 304-315. No latent fingerprints of Petitioner or documents in Petitioner's name were found at Oswald Road. 3-ER 318. Officers did find a white Dodge van which contained other chemicals and equipment associated with methamphetamine manufacture, and which Plancarte said Petitioner owned. 2-RT 285; 3-RT 305-307.

Plancarte also testified that Petitioner was manufacturing methamphetamine at a site in Pescadero where he delivered chemicals which produced 50-70 pounds of methamphetamine from each cook. 2-ER 242-243. Officers seized an operational methamphetamine laboratory in Pescadero, 3-ER 295-296, but except for Plancarte's testimony, there was no evidence linking the Pescadero laboratory to Petitioner. 3-ER 298.

Plancarte testified that he delivered chemicals to a laboratory in Ontario nine or ten times over a four to six month period, that each time he saw Petitioner's brother-in-law there, and that Petitioner's uncle transported finished methamphetamine. 2-ER 245-255, 274; 3-ER 471,

508. A search revealed an operational methamphetamine lab, including chemicals, equipment and 25 pounds of liquid methamphetamine in solution. 2-ER 166-167. Officers arrested a total of seven people, who were charged and convicted in state court. 2-ER 157-160, 168. No vehicles, fingerprints, or documents were found with Petitioner's name at the Ontario site. 2-ER 168 -170.

Plancarte testified that he brought chemicals to a laboratory in El Monte on five or six occasions, with 60 to 80 pounds of methamphetamine produced each time. 2-ER 246, 256-258. On March 18, 1998, BNE agents searched a residence in El Monte and seized a working methamphetamine laboratory, including 50 gallons of methamphetamine in solution and $50,330 in cash. 3-ER 410-411, 412.

Petitioner entered into an agreement to purchase property located in Perris, making the down payment with his lottery winnings. 2-ER 181-185; 3-ER 175-176. He purchased the property as an investment and intended to rent it out, not to live there. 3-ER481-485. In April 1998, officers arrested a co-defendant who was staying at Petitioner's property and consented to a search of the property. 2-ER 190-197, 209. The officers found an operational methamphetamine laboratory on the property, along documents showing Petitioner's telephone numbers, but

no personal effects of Petitioner or his family. 2-ER 199-210.

A jury found Petitioner not guilty on Counts 3-7 and 16-22, but guilty of Counts 1, 2, and 8-15. 3-RT 46-49, 64-65. On July 2, 2001, the District Court sentenced Petitioner to concurrent life sentences on Counts 1 and 8-15, or alternatively to concurrent life sentences on Counts 2 and 8-15, with the conviction as to Count 2 to be vacated upon conclusion of any appeal provided that Count 1 was not reversed; the Court also ordered the forfeiture of $4,300,000. 3-ER 505-506 .

B. Initial Post-Trial Proceedings

After Petitioner filed a timely notice of appeal on July 3, 2001, the Ninth Circuit affirmed the judgment on February 27, 2003. CR 280; *United States v. Quiroz*, 60 Fed. Appx. 61 (9th Cir. 2003). This Court denied Petitioner's petition for writ of certiorari on October 6, 2003. *Quiroz v. United States*, 540 U.S. 850 (2003).

On October 5, 2004, Petitioner timely moved for relief in the Eastern District of California pursuant to 28 U.S.C. § 2255. District Court Clerk's Record ("CR") 279, 374. The Eastern District denied the motion, which was based on ineffective assistance of counsel during plea negotiations, on May 26, 2005. CR 388; 2-ER 113-136.

C. Current Federal Habeas Petition

After the Ninth Circuit granted leave to file a second or successive motion pursuant to 28 U.S.C. § 2255 (h), 2-RT 112, Petitioner on March 6, 2013, filed a Motion to Vacate, Set Aside or Correct Sentence By a Person In Federal Custody ("Motion") in the Eastern District pursuant to 28 U.S.C. § 2255. CR 413, 2-ER 36-111. The motion was based on the following new evidence. In 2011, Petitioner's family retained attorney Jeffrey D. Schwartz to assist Petitioner with his case. Thereafter, a relative of Plancarte contacted Schwartz to relay information from Plancarte to counsel. Plancarte had finished his 10-year prison sentence and wanted to give information related to Petitioner's case. Declaration of Jeffrey D. Schwartz ¶¶ 3, 7-8 and fn. 2-3; 2-ER 71-72.

Plancarte's relative told counsel that when government agents approached him about assisting them in prosecuting Petitioner, the purported "kingpin" of the methamphetamine manufacturing business, he told them they had their facts wrong, and that Roberto Quiroz, not Petitioner, was the mastermind of the operation and the person with whom Plancarte was working. 2-ER 72. But the government agents had been focusing on Petitioner due to his financial transactions, and insisted that Plancarte testify against Petitioner, which Plancarte did to

obtain the reduced ten year sentence. 2-ER 71-72. Plancarte also told counsel through the relative that Roberto Quiroz had assumed Petitioner's identity while Petitioner was in Mexico on his ranch, because Roberto Quiroz had been charged with methamphetamine manufacturing and there was a no-bail bench warrant issued for his arrest in the County of Santa Clara. 2-ER 73, 75, 78-98.

Schwartz did not know where Roberto Quiroz was, except that he was in Mexico. In August 2011, he learned that Roberto Quiroz had heard about the effort to contact Plancarte and wanted to see if he could help. After exhaustive efforts to reach Roberto Quiroz, his Mexican counsel contacted Petitioner's counsel and they arranged a meeting in Mexico. 2-ER 74. Schwartz went to Mexico with his investigator and met with Roberto Quiroz in an extremely paranoid situation in which Roberto Quiroz had armed guards. 2-ER 75. Roberto Quiroz admitted that the methamphetamine operation was his, and that he had assumed his brother's identity in the United States and committed the crimes for which his brother was imprisoned. 2-ER 75. He not only provided a sworn and signed statement that he prepared with his Mexican attorneys confessing the identity theft and methamphetamine operations, Affidavit of Roberto Quiroz ¶¶ 1-13, 2-ER 51-61, but also

provided documentation confirming the identity theft. 2-ER 62-70.

In the affidavit, Roberto Quiroz explained that he had hired Plancarte to manufacture methamphetamine for him in the early 1990's, but was arrested in 1996, bailed out of jail, and became a fugitive in Mexico. Affidavit of Roberto Quiroz ¶¶ 4-5; 2-ER 51. In order to return to the United States to resume manufacturing methamphetamine, he assumed the identity of Petitioner, who had moved back to Mexico and bought a cattle ranch with his lottery winnings. 2-ER 51-52. Roberto Quiroz applied for a permanent residence card while impersonating Petitioner, and received from the United States Department of Justice a receipt and an I-551 temporary visa stamp while waiting for the decision on the residence card. 2-ER 52, 63. Using Petitioner's military service card at the Mexican Consulate in Los Angeles, Roberto Quiroz obtained a short term passport and other documentation pending the issuance of a permanent card in Petitioner's name, which allowed him to impersonate Petitioner and to apply for a Green Card in Petitioner's name. 2-ER 52, 64-68. The Mexican Consulate later issued another one-year passport, which Roberto Quiroz further used in impersonating Petitioner. 2-ER 52, 70. Roberto Quiroz was fingerprinted when applying for the Green Card, so his fingerprints became Petitioner's, and

Roberto Quiroz was able to obtain a California Driver's License in Petitioner's name, but with Roberto Quiroz's fingerprints. 2-ER 52.

Using Petitioner's identity, Roberto Quiroz purchased chemicals to manufacture methamphetamine, purchased the white Dodge van used at the Yuba City/Sutter County laboratory, and engaged in "wire transfers, real estate transactions, including house leases, at least two of which were used as meth labs, club memberships and for casino gambling transactions in excess of ten thousand dollars. In effect, I became my brother for all aspects." 2-ER 52-53. Roberto Quiroz, not Petitioner, was engaged with Plancarte in the manufacture of methamphetamine, and Petitioner was unaware of the identity theft because, from 1996 until his arrest, he was living on his cattle ranch in Mexico. 2-ER 53.

The Eastern District denied the motion without ordering an evidentiary hearing. Appendix B; 1-ER 1-13.

D. Ninth Circuit Affirms

The Ninth Circuit issued a certificate of appealability, 2-ER 14-15, but affirmed the denial of Petitioner's motion on December 15, 2017. Appendix A at 3. The Court noted that neither this Court nor the Ninth Circuit had recognized freestanding actual innocence claims as legally

cognizable, but found that "neither the declaration of Quiroz's brother, Roberto, nor Plancarte's alleged recantation is reliable evidence that would undermine the jury's finding of guilt." Appendix A at 2. The Court further found that the Eastern District had not abused its discretion in denying Petitioner's request for an evidentiary hearing. Appendix A at 3.

Petitioner is currently serving a life sentence with no projected release date in the United State Penitentiary located in Atwater, California.

REASONS FOR GRANTING THE WRIT

1. This Court Has Raised but Never Decided the Question of Whether The Constitution Requires the Ability to Raise Freestanding Actual Evidence Claims

As the appellate court noted, neither the Ninth Circuit "nor the Supreme Court has recognized freestanding actual innocence claims as legally cognizable." Appendix A at 2. Like the lower courts, this Court has repeatedly considered the issue, particularly in the context of capital cases, but has never actually determined whether the Constitution prohibits the punishment or even execution of a prisoner who has made a compelling showing of actual innocence.

It has now been more than a quarter century since this Court raised but did not decide the issue in *Herrera v. Collins*, 506 U.S. 390 (1993). *Herrera* found that a state prisoner facing execution was not entitled to habeas relief, noting that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Id.,* at 400. "[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact," and such courts "'are not forums in which to relitigate state trials.' [Citation.]" *Id.,* at 400-401. Assuming that in a capital case, "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," the Court found the petitioner fell "far short" of the threshold showing for such an assumed right, which "would necessarily be extraordinarily high." *Id.,* at 417.

The majority opinion in *Herrera* was only one of five. Two justices would have preferred the Court to decide the issue, arguing there was "no basis in text, tradition, or even in contemporary practice ... for finding in the constitution a right to demand judicial consideration of

newly discovered evidence of innocence brought forward after conviction." *Herrera*, 506 U.S. at 427-428 (Scalia, J., concurring).

But most of the justices specifically disagreed with that assessment.[1] In another concurrence, two justices stated that "the execution of a legally and factually innocent person would be a constitutionally intolerable event. Dispositive to this case, however, is an equally fundamental fact: Petitioner is not innocent, in any sense of the word." *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring). Those justices agreed it was not necessary to determine the precise showing that a petitioner in such a case would have to make. *Id.*, at 420-421. Justice White, who did not join the majority decision, wrote a separate concurrence in which he "assume[d] that a persuasive showing of 'actual innocence' made after trial, ... would render unconstitutional the execution of petitioner in this case," but argued that to obtain relief a petitioner would at least have to show that "'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'" *Id.*, at 429 (Kennedy, J., concurring), quoting *Jackson v. Virginia*, 443 U.S. 307,

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[1] In *Herrera*, "a majority of the Supreme Court assumed, without deciding, that execution of an innocent person would violate the Constitution. A different majority of the Justices would have explicitly so held." *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997).

324.

Three dissenting justices argued that executing "a person who is actually innocent" would violate the Eighth Amendment's prohibition on "cruel and unusual punishments," which extends beyond the valid conviction and sentencing of a defendant, and "is equally offensive to the Due Process Clause of the Fourteenth Amendment." *Herrera*, 506 U.S. at 430-437 (Blackmun, J., dissenting). To obtain relief, they believed a "truly persuasive demonstration" of innocence meant that a petitioner "must show that he is probably innocent." *Id.*, at 442.

Two years later, the Court held that a showing of actual innocence could be used to overcome procedural obstacles in advancing two accompanying constitutional claims, but distinguished *Herrera* as involving a "claim of innocence to support a novel substantive constitutional claim, namely, that the execution of an innocent person would violate the Eighth Amendment." *Schlup v. Delo*, 513 U.S. 298, 314 (1995). The petitioner's "claim of innocence does not by itself provide a basis for relief," but was instead a procedural "gateway" though which the petitioner had to pass to establish that in order to have a court consider his constitutional claims by showing that failing to do so would implicate a fundamental miscarriage of justice. *Id.*, at 314-

316. The Court held that, in order to establish actual innocence as a gateway to considering constitutional claims, a petitioner had to show that "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Id.*, at 317, quoting *Murray v. Carrier*, 477 U.S. 478, 496.

In *House v. Bell*, 547 U.S. 518 (2006), the Court held that the petitioner had established a gateway claim of innocence under *Schlup*, determining that, "although the issue is close, we conclude that this is the rare case where – had the jury heard all the conflicting testimony – it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." *Id.*, at 554. The Court declined to decide whether a freestanding innocence claim was cognizable, reasoning that "*Herrera* requires more convincing proof of innocence than *Schlup*. It follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera*." *Id.*, at 555.

In a non-capital case involving a 26 year sentence, the Court acknowledged that the question of whether there was a federal constitutional right to release upon proof of actual innocence "is an open question. We have struggled with it over the years, in some cases

assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet." *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 71 (2009), citing *House* and *Herrera*. Considering a state case involving recantations of key witnesses, implications of the principal witness as the shooter, and the lack of any judicial review of postconviction affidavits, the Court transferred the case to the Southern District of Georgia to "receive testimony and make findings of fact,..." *In re Davis*, 557 U.S. 952 (2009). Justice Scalia dissented, arguing that the Court was sending the lower court "on a fool's errand," and urging the Court to set the case on its own docket to determine whether actual innocence could be raised at any time in capital cases. *Id.* at 957-958 (Scalia, J., dissenting).

Citing *Herrera*, the Court most recently acknowledged, in a case involving a life sentence, "We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). The Court reaffirmed the viability of relief under the miscarriage of justice gateway, and found that, though the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") had established a higher burden of proof

and a diligence requirement on second or successive habeas petitions, in "a first petition for federal relief, the miscarriage of justice exception survived AEDPA's passage intact and unrestricted." *Id.*, at 397.

2. The Absence of a Ruling from this Court has Resulted in Conflicts and Confusion Among the Courts of Appeals, and Among Legal Scholars, on this Critical Issue

Without clear direction from this Court, the lower courts have inevitably arrived at conflicting decisions as to whether petitioners are "entitled to habeas relief based on a freestanding claim of actual innocence," *McQuiggin v. Perkins*, 569 U.S. at 392, and many have simply misinterpreted *Herrera* to the severe detriment of defendants facing lengthy prison sentences or even death.

The First Circuit, for example, has stated that the "actual innocence rubric ... has been firmly disallowed by the Supreme Court as an independent ground of habeas relief, save (possibly) in extraordinary circumstances in a capital case." *David v. Hall*, 318 F.3d 347-348 (1st Cir. 2003), citing *Herrera*. The Third Circuit similarly dismissed a claim of innocence based on new evidence as simply not cognizable, also relying on *Herrera*. *Fisher v. Varner*, 379 F.3d 113, 122 (3rd Cir. 2004). While acknowledging that *Herrera* left the question open, the "Fifth Circuit has rejected this possibility and held that claims of actual

innocence are not cognizable on federal habeas review." *Graves v. Cockrell*, 351 F.3d 143, 351 (5th Cir. 2003); see also *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009).

The Sixth District concluded that the "Supreme Court has held that newly discovered evidence does not constitute a freestanding ground for federal habeas relief, but rather that the newly discovered evidence can only be reviewed as it relates to an 'independent constitutional violation occurring in the underlying stat criminal proceedings.'" *Zuern v. Tate*, 336 F3d 478, 482, fn. 1 (6th Cir. 2003), quoting *Herrera,* 506 U.S. at 400. In a case where the petitioner had not been sentenced to death, the Seventh District found this Court's precedent "does not allow a federal court to issue a writ of habeas corpus only on the ground that [appellant] is, or might be, innocent of ... murder." *Milone v. Camp*, 22 F.3d 693, 700 (7th Cir. 1994). More recently, the Seventh Circuit limited evidence of factual evidence to gateway claims, stating "[w]e know from *Herrera* ... that a conviction does not violate the Constitution (or become otherwise subject to collateral attack) just because newly discovered evidence implies that the defendant is innocent." *United States v. Evans*, 224 F.3d 670, 674 (7th Cir. 2000).

Some circuits have produced conflicting outcomes within their own jurisprudence. The Fourth Circuit, for example, has relied on *Herrera* to deny "the requested habeas relief based simply on [appellant's] assertion of actual evidence due to newly discovered evidence," because the state had an executive clemency process and "[p]recedent prevents us from granting [petitioner's] habeas writ on this basis alone," *Royal v. Taylor*, 188 F.3d 239, 243. (4th Cir. 1999). That court has also characterized *Herrera* as holding "that claims of actual innocence are not ground for habeas relief even in a capital case." *Rouse v. Lee*, 339 F.3d 238, 255 (4th Cir. 2003). But as one of its district courts recently observed, "in later cases the court appears to have assumed, without deciding, that such claims are cognizable." *United States v. MacDonald*, 32 F. Supp.3d 608, 706. As *MacDonald* noted, the Fourth Circuit had since stated in *dicta* that a "petitioner may also raise a freestanding innocence claim in a federal habeas petition." *Teleguz v. Pearson*, 689 F.3d 322, 328, fn.2 (4th Cir. 2012). "Like the Supreme Court and the Fourth Circuit, this court will assume, *arguendo*, that a freestanding actual innocence claim is cognizable." *MacDonald*, 32 F. Supp.3d at 707.

The Eighth Circuit believed a petitioner's claim of actual innocence "has considerable intuitive appeal, for, to some extent, the

very purpose of a writ of habeas corpus is to forestall the unjustified punishment of the innocent," but denied habeas relief based on *Herrera* in *Burton v. Dormire*, 295 F.3d 839, 848 (8th Cir. 2002). That court similarly found it was "without jurisdiction" to treat a factual innocence claim in the absence of an alleged constitutional violation in *Clayton v. Roper*, 515 F3d 784, 793 (8th Cir. 2008), but a different panel later said it was "unsure why the *Clayton* panel thought it lacked jurisdiction, so we follow the approach of *Herrera*, 506 U.S. at 417-19, in addressing Dansby's claim." *Dansby v. Norris*, 682 F.3d 711, 716-717.

The Eleventh Circuit has characterized *Herrera* as "holding that no federal habeas relief is available for freestanding non-capital claims of actual innocence." *Rozzelle v. Secretary, Florida Department of Corrections*, 672 F.3d 1000, 1010 (11th Cir. 2012). But in *In re Lambrix*, 624 F.3d 1365 (11th Cir. 2010), the Court actually followed *Herrera*, determining that the petitioner had not made an adequate factual showing "even assuming Lambrix can make a freestanding actual innocence claim." *Id.*, at 1367.

The Ninth Circuit, like this Court, has consistently assumed without deciding that "a freestanding actual innocence claim is cognizable in a federal habeas corpus proceeding ..." *Jones v. Taylor*,

763 F.3d 1242, 1246 (9th Cir. 2014). Like this Court, the Ninth Circuit has not established the precise showing required on such a claim, but following the standard proposed by the dissenters in *Herrera* stated as a minimum that "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Carriger*, 132 F.3d at 476, relying on *Herrera*, 506 U.S. at 442 (Blackmun, J., dissenting).

The issue has confused and divided scholars as well as the courts. While a number of scholars have advocated for a specific holding acknowledging the cognizability of freestanding actual innocence claims on federal habeas corpus,[2] or even argued that Congress should establish such a right,[3] more than ten "have advanced the erroneous

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2 *See, e.g.,* Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. Pa. J. L & Soce. Change 1 (2016); Shannon Laoye, *Innocent Beyond a Reasonable Doubt: Granting Federal Habeas Corpus Relief to State Prisoners With Freestanding Actual Innocence Claims*, 36 T. Jefferson L. Rev. 309 (2014); Page Kaneb, *Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim*, 50 Cal W. L. Rev. 171 (2014);Nicholas Berg, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 Am. Crim. L. Rev.121 (2005)

3 Caroline Livett, *28 U.S.C. § 2254(j): Freestanding Innocence as a Ground for Habeas Corpus Relief: Time for Congress to Answer the Court's Embarrassing Question*, 14 Lewis & Clark L. Rev. 1649 (2010)

claim that the Supreme Court held in *Herrera* that innocence is not a freestanding constitutional claim." Kaneb, *supra*, at 192.

3. This Court Should Hold that Freestanding Actual Innocence Claims are Legally Cognizable on Federal Habeas Corpus Petitions filed by Federal Prisoners Who Can Establish that They Are Probably Innocent

Only this Court can resolve the conflicting decisions of the Courts of Appeals and end the confusion among courts and commentators regarding the right to bring freestanding actual innocence claims. When this Court decided *Herrera*, "very few people had been exonerated by DNA evidence. Today, however, at least 316 people have been exonerated by DNA evidence; nearly one thousand have been exonerated without DNA evidence." Kaneb, *supra*, at 202. There have now been more than 2,000 exonerations.[4] Those exonerations have occurred in state courts, all of which now provide a mechanism for establishing actual innocence, and all but one place no time limits on setting those procedures in motion. *Id.*, at 203-208, fn. 140.

State procedures for proving freestanding actual innocence are not, of course, available to federal prisoners like Petitioner.

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[4] The Exoneration Registry, Nat'l Reg'y of Exonerations, http://www.law.umich.edu/special/ exoneration/Pages/about.aspx (last visited March 15, 2018).

Establishing a much-needed procedure for federal prisoners to prove they were actually innocent of the crimes that have placed them in custody for decades would not raise the federalism issues that concerned the Court in *Herrera*. There would be no risk that federal courts would become "forums in which to relitigate state trials.' [Citation.]" *Herrera,* 506 U.S. at 400-401.

Particularly in light of the huge increase in state exonerations since *Herrera* was decided, this Court should re-examine its determination twenty-five years ago that the Eighth and Fourteenth Amendments did not mandate that prisoners have a viable procedure for proving their innocence. *Herrera,* 506 U.S. at 405-408. As previously noted, a majority of the justices at the time believed that the Constitution at least prevented the execution of an innocent person, *id.*, at 419 (O'Connor, J., concurring), 429 (White, J., concurring), 430-437 (Blackmun, J,, dissenting), and as the majority reasoned, it would be a "strange jurisprudence" if an innocent prisoner "could not be executed, but that he could spend the rest of his life in prison." *Id.*, at 405.

When *Herrera* was handed down, states provided only short periods of time after conviction for prisoners to attempt to show actual innocence, and the Court's refusal to establish a federal remedy was

consistent with those practices. *Id.*, at 410-411. Now that the states no longer place severe time constraints on people's ability to prove their innocence, the lack of any comparable federal procedure is contrary to a "widely shared practice," which under the Fourteenth Amendment is one of the "concrete indicators of what fundamental fairness and rationality require." *Schad v. Arizona*, 501 U.S. 624, 640 (1991); see also Kaneb, *supra*, at 209-212. The flexible, evolving nature of due process should prompt a new approach to the Fourteenth Amendment underpinnings of federal prisoners' right to bring freestanding actual innocence claims. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003); see also Kaneb, *supra*, at 211-212. As the Court has shown most dramatically in the transformation of its treatment of juvenile criminals, *Miller v. Alabama,* 567 U.S. 460 (2012), our concept of what constitutes "cruel and unusual punishment"under the Eighth Amendment also changes with ""the evolving standards of decency that mark the progress of a maturing society.' [Citation.]" *Id.,* at 469; see also *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988); Kaneb, *supra*, at 212-216.

This case, like the vast majority of cases that result in exonerations, Kaneb, *supra*, at 202, does not involve scientific evidence. Although Petitioner has come forward with reliable evidence of probable

innocence, the lower courts did not even grant him an evidentiary hearing before rejecting his attempt to escape a life sentence for crimes he did not commit.

"In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schiro v. Landrigan*, 550 U.S. 465, 474 (2007). Under *Schlup*, a petitioner must support his allegations "with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Schlup*, 513 U.S. at 324. The court should consider all evidence, even if inadmissible, that bears on actual innocence, *id.,* at 327-328, and unlike reviews for insufficiency of evidence, "the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial." *Id.,* at 330. The court should focus on what reasonable factfinders are likely to do. *Ibid.* An evidentiary hearing in this case could have enabled Petitioner to prove factual allegations which, if true, would entitle him to federal habeas relief. *Schiro,* 550 U.S. at 474.

Petitioner's factual allegations included the facts set forth in the

affidavit of Roberto Quiroz, which if true established that he, not Petitioner, had hired Plancarte to manufacture methamphetamine in the early 1990's, and established further that after Roberto Quiroz became a fugitive in Mexico he assumed Petitioner's identity in order to return to the United States and resume manufacturing methamphetamine. 2-ER 51-53. Roberto Quiroz became his brother "in all aspects," making chemical purchases, initiating wire transfers, leasing property and laundering money while engaging in the manufacture and distribution of methamphetamine with Plancarte, but without his brother. 2-ER 51-53, 63. Plancarte is expected to confirm that evidence, acknowledging that he had been pressured into accusing Roberto Quiroz instead of Petitioner. 2-ER 71-72. The facts relayed from Plancarte's relative to defense counsel Schwartz confirmed the facts in the Roberto Quiroz affidavit regarding Roberto Quiroz's status as the mastermind of the methamphetamine operation. 2-ER 51-53, 71-75.

The Ninth Circuit completely discounted Petitioner's evidence, noting that the Roberto Quiroz affidavit "fails to demonstrate that he knew of [Petitioner's] activities and whereabout during the relevant time period," and was contradicted by other evidence. Appendix A at 2-

3. But Roberto Quiroz did not need to be aware of Petitioner's whereabouts during this time, as long as he could prove he was the person running the methamphetamine operation with Plancarte. The Court also found the evidence was not new because the government had known about his use of Petitioner's driver's license and carefully distinguished between the two men at trial. Appendix A at 3. But there was actually little evidence at trial regarding Roberto Quiroz's use of false documents, and the government did not tie Roberto Quiroz's use of a driver's license in Petitioner's name with Petitioner's activities. 3-ER 356-357, 361-372. Petitioner had no idea until after his arrest that Roberto Quiroz was using his identity without permission. 3-RT 466, 485-486.

Plancarte was the one witness who could tell the jury "how the organization worked," 2- ER 138, and the witness who tied Petitioner himself, rather than relatives and acquaintances, to the drug manufacturing activity that formed the basis for his conviction and life sentence. The Ninth Circuit also dismissed this evidence, Appendix A at 3, but testimony from Roberto Quiroz and Plancarte that Petitioner was not involved in the methamphetamine operation, and that Roberto Quiroz was actually the mastermind behind it, would "show that

[Petitioner] is probably innocent." *Herrera*, 506 U.S. at 442 (Blackmun, J., dissenting).

CONCLUSION

This Court should grant certiorari in this case to end the confusion in the lower courts and affirm that federal prisoners have a constitutional right to bring freestanding claims of actual innocence.

Respectfully submitted,

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