

No. 12-117

IN THE
Supreme Court of the United States

ROSA ESTELA OLVERA JIMÉNEZ,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

**BRIEF OF DALLAS COUNTY DISTRICT
ATTORNEY AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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Statement of Interest

With the 2007 institution of its Conviction Integrity Unit and an open file policy for reviewing claims of wrongful conviction, the Dallas County District Attorney has been in the vanguard of reviewing and re-investigating legitimate post conviction claims of actual innocence, particularly in the context of DNA testing.¹ Our office embraces the American Bar Association's standard that "the duty of the prosecutor is to seek justice, not merely to convict" and is mindful of its obligations to protect the innocent, as well as convict the guilty; guard the rights of the accused, as well as enforce the rights of the public; and maintain unwavering commitment to legal and ethical standards. Although this office's recent experience with claims of actual innocence has predominantly been in the context of DNA testing and exonerations, our specialized and nationally-recognized interest in justice for the wrongly convicted extends to any substantive claim of actual innocence, and we support the Petitioner in her bid for the formulation of a uniform, nationwide standard for evaluating free-standing post conviction claims of actual innocence.

¹ *Amicus curiae* affirms that he timely notified the parties more than ten days before this brief's due date of his intention to file and received the parties' written consent. *Amicus* also affirms that, pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* or his counsel has made a monetary contribution to the preparation or submission of this brief.

Summary of the Argument

The United States Supreme Court has not thus far explicitly recognized free-standing, or substantive, claims of actual innocence. Yet, it has impliedly regulated the applicable standard of review by stating in dicta that any such standard would be “extraordinarily high” and demand a “truly persuasive demonstration of ‘actual innocence.’” *Herrera v. Collins*, 506 U.S. 390, 417 (1993). It has also stated in dicta that any such standard would exceed the preponderance standard for procedural claims of actual innocence. *Schlup v. Delo*, 513 U.S. 298, 316 (1996) (stating that “Schlup’s evidence of innocence need carry less of a burden” than a claim based upon an error-free trial). In refraining from explicitly recognizing free-standing claims of actual innocence but in concomitantly regulating them, *Herrera v. Collins* and its progeny have spawned a variety of state tests that are both confusing and inconsistent. Considering the states’ widely divergent standards and the specific procedural posture of this case as a petition from the denial of state habeas relief from a state court conviction, the Dallas County District Attorney contends that the issue is ripe for review and urges the Court to explicitly recognize free-standing post conviction claims of actual innocence and, in keeping with the regulations it has already imposed, issue without reservation a nationwide uniform standard of review and remedy.

Argument

I. The Supreme Court Has Shaped the States' Substantive Actual Innocence Jurisprudence and Should Seize the Opportunity to Unify their Standards.

Through a body of case law that spans nearly 20 years, this Court has already shaped the standards of review that states apply to free-standing claims of actual innocence; it seems only logical that the Court would seize this opportunity to recognize free-standing claims of actual innocence in capital and non-capital cases, unify the standards among the states for evaluating such claims, and prescribe the remedy for an applicant who prevails on a free-standing claim of actual innocence. Because Jimenez's petition emanates from the denial of state habeas relief from a state court conviction, the posture of this case does not implicate the concerns for comity and federalism inherent in federal habeas review of a state court conviction. Her petition therefore affords the Court a unique opportunity to rule on the standard of review applicable to the states for free-standing claims of actual innocence without the prism of the AEDPA.

Five Supreme Court cases, in particular, have informed the trend toward recognizing free-standing claims of actual innocence and implicitly prescribed the standards that states have used. In *Herrera*, the Court first noted the "elemental appeal" of the propositions that the Eighth and Fourteenth Amendments prohibit the execution or imprisonment of anyone who is innocent of the crime for which he was convicted. *Herrera*, 506 U.S. at 398. The

Herrera majority assumed for the sake of argument that a truly persuasive demonstration of actual innocence in a capital case would render an execution unconstitutional and warrant federal habeas relief in the absence of a state avenue for processing the claim. *Id.* at 417. Justice O'Connor agreed that "[i]f the federal courts are to entertain claims of actual innocence, their attention, efforts, and energy must be reserved for the truly extraordinary case." *Id.* at 427 (O'Connor, J., concurring). Justice White concurred and proposed a beyond-a-reasonable-doubt standard of review: "petitioner would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond reasonable doubt.'" *Id.* at 429 (White, J., concurring) (citation omitted). And the *Herrera* dissent advocated a showing of probable innocence based upon a "case-by-case determination" of reliability and a balancing of evidence of innocence against evidence of guilt. *Id.* at 442-43 (Blackmun, J., dissenting).

Three years later, the *Schlup* Court examined a procedural claim of actual innocence as a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits. *Schlup*, 513 U.S. at 315 (citation omitted). The *Schlup* Court differentiated at length between substantive and procedural claims of actual innocence and rejected *Sawyer v. Whitley*'s more rigorous "clear and convincing" standard of review for claims of erroneous sentence in favor of *Murray v. Carrier*'s "probably resulted" standard for overcoming procedural default. *Schlup*, 513 U.S. at

326-27; *see also* *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992) and *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Citing considerations of finality, comity, conservation of judicial resources, and individual interests in justice, it therefore effected the “floor” standard—“more likely than not that no reasonable juror would have convicted [petitioner] in light of the new evidence”—for evaluating procedural claims of actual innocence. *Schlup*, 513 U.S. at 327.

Eleven years later, the Court in *House v. Bell* passed on the issue again, noting that House had cast considerable doubt on his guilt—doubt sufficient to satisfy *Schlup*’s gateway standard for obtaining federal review despite a state procedural default—but had not met the extraordinarily high threshold showing for any free-standing innocence claim. *House v. Bell*, 547 U.S. 518, 555 (U.S. 2006). The majority reiterated that “[t]he sequence of the Court’s decisions in *Herrera* and *Schlup*—first leaving unresolved the status of freestanding claims and then establishing the gateway standard—implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*.” *Id.* It went on to note that in House’s case, because of the closeness of even the *Schlup* question, his showing fell short of the threshold implied in *Herrera*. *Id.*

Remarkably, in 2009, the Court opened the door to recognizing free-standing claims of actual innocence. In *District Attorney’s Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 71 (2009), the Court appeared conflicted over its years-long struggle with whether to recognize a free-standing claim of actual innocence. It assumed without deciding that such a claim exists and, more saliently, elaborated that habeas would be the avenue for

bringing it and that federal procedural rules would permit discovery “for good cause.” *Id.* at 72. Two months later, in *In re Davis*, this Court exercised its original habeas jurisdiction and transferred Davis’s habeas petition to the federal district court for consideration of whether evidence “that could not have been obtained at the time of trial clearly establishes petitioner’s innocence.” 557 U.S. 952 (2009). In his concurrence, Justice Stevens excoriated the dissent for advocating that a petitioner be put to death without consideration “for a petitioner in Davis’s situation who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man.” *Id.* at 954 (Stevens, J., concurring). He argued that “decisions of this Court clearly support the proposition that it ‘would be an atrocious violation of our Constitution and the principles upon which it is based’ to execute an innocent person.” *Id.* at 953 (Stevens, J., concurring) (citations omitted).

Although this Court’s jurisprudence is trending toward recognition of free-standing claims of actual innocence, the absence of explicit recognition and a uniform standard has generated a scattershot of state tests that are generally inconsistent on their faces and in their applications. The Court has prescribed a range from “extraordinarily high,” “truly persuasive,” and “clearly establishes” to “probably resulted,” in which the state tests generally fall, but in the interest of equal justice, it should prescribe a uniform, nationwide standard for determining free-standing post conviction claims of actual innocence.

II. The Standards of Review Among the States are Disparate in Their Sources, Considerations, Standards, and Remedies.

The various state standards of review range from “completely undermine the structure of the case” to “clear and convincing” to “preponderance,” although the Court has arguably precluded by its language in *Schlup* any standard that hovers around preponderance. At the most rigorous end of the spectrum, California enacted a standard that exceeds the clear and convincing test and, invoking a 1947 state court case, required that newly discovered evidence cast “fundamental doubt on the accuracy and reliability of the proceedings” and “completely undermine the entire structure of the case upon which the prosecution was based.” *In re Lawley*, 179 P.3d 891, 898 (Cal. 2008) (quoting *In re Lindley*, 177 P.2d 918 (Cal. 1947)). It cited in support of a higher standard the presumption of correctness the courts afford criminal judgments rendered after procedurally fair trials and society’s interest in the finality of criminal proceedings. *Id.* at 898.

In *Lawley*, petitioner presented evidence that inmate witness Brian Seabourn had long claimed guilt for the subject capital murder with evidence that the Aryan Brotherhood had ordered him to murder the victim. *Lawley*, 179 P.3d at 899-902. Seabourn had for a decade maintained Lawley’s innocence to others and in letters to Lawley’s counsel, and the habeas referee acknowledged the voluminous evidence indicating the Aryan Brotherhood’s involvement. *Id.* at 899. The *Lawley* court performed the reasonable jury test and

determined that a reasonable jury might have disbelieved Seabourn and the Aryan Brotherhood members supporting him and instead credited the numerous witnesses at Lawley's trial who testified that Lawley bore a grudge against the victim, wanted him dead, and paid to have him killed. *Id.* It could also have believed Seabourn but still believed that Lawley had participated and was culpable. *Id.* The court considered Seabourn's history of mendacity, evidence that he was seeking a reduction in sentence or hoping to escape, and his misrepresentation of the murder weapon's location. *Id.* at 900-902. The court ultimately concluded that Lawley had failed to cast fundamental doubt on the accuracy and reliability of his proceedings and denied relief on his claim of actual innocence. *Id.* at 902.

Immediately thereunder, Texas, New Mexico, New York, Connecticut, and Missouri have adopted "clear and convincing" standards of review.² When the Texas Court of Criminal Appeals initially recognized habeas corpus as the appropriate vehicle for an inmate to assert an actual innocence claim, it set an exceedingly high burden of proof for applicants. *See State ex rel. Holmes v. Honorable Court of Appeals for Third District*, 885 S.W.2d 389, 399 (Tex. Crim. App. 1994). The court held that "in order to be entitled to relief on a claim of factual innocence the applicant must show that based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable

² Utah and Virginia have codified "clear and convincing" standards of review. *See* Utah Code Ann. § 78B-9-404 (2012); Va. Code Ann. § 19.2-327.13 (2012).

doubt.” *Id.* (adopting the burden of proof set forth by Justice White in his concurrence in *Herrera*, 506 U.S. at 429). Citing the federal due process clause as prohibiting the incarceration of innocent persons, the court later modified the burden in *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996) (superseded on other grounds by statute) and determined that a burden of proof “conditioned upon a finding that no rational juror could convict the applicant after introduction of the newly discovered evidence” was too high. *Id.* at 205. It noted that under the *Holmes* standard, relief would be impossible because exculpatory evidence can never outweigh inculpatory evidence. *Id.* Under the proper standard for evaluating free-standing claims of actual innocence, the court would determine on a case-by-case basis the reliability of the new evidence and weigh the new, exculpatory evidence against the evidence of guilt adduced at trial. *Id.* at 207. The court acknowledged the presumption of validity afforded the jury’s conviction at trial and clarified that the appellate court’s job “is not to review the jury’s verdict” but to look backwards and decide whether the newly discovered evidence would have convinced the jury of applicant’s innocence. *Id.* The court would grant relief only if applicant demonstrated his claim “by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence.” *Id.* at 209.

Elizondo was convicted of aggravated sexual assault of his eight- and ten-year-old stepsons. The *Elizondo* court evaluated a recantation from one of the now-adult victims who indicated that his father had coached his trial testimony, in which he described multiple sex acts that his mother and

stepfather Elizondo had inflicted on him and his younger brother, as revenge against his mother and Elizondo. *Id.* at 210. The trial court weighed the victim's recantation against his trial testimony and found that the recantation was more credible than his trial testimony. It concluded that the victim had testified falsely at trial. The Court of Criminal Appeals determined that applicant had met the clear and convincing test because the record supported the trial court's credibility finding. It held that the recantation both voided the trial testimony and constituted affirmative evidence of applicant's innocence and remanded the cause for a new trial. *Id.*

In concluding that the conviction, incarceration, or execution of an innocent person violated all notions of fundamental fairness implicit within due process, New Mexico recognized a free-standing claim of actual innocence under its state constitution. *Montoya v. Ulibarri*, 163 P.3d 476, 484 (N.M. 2007). It also rejected *Holmes'* "beyond-a-reasonable-doubt" test and adopted a "clear and convincing" standard of review. *Id.* at 486. It noted that its own standard for evaluating newly-discovered evidence in a motion for new trial—"will probably change the result if a new trial is granted"—was not rigorous enough for habeas petitioners. *Id.* It cited two reasons: (1) the lower standard did not "go far enough to protect the public's interest in the finality of a conviction obtained after a petitioner has been afforded all constitutional rights required by law," and (2) "because the relief extended to habeas petitioners asserting claims of actual innocence is extraordinary, the standard applied to such claims should be more

demanding than the standard that must be met by defendants motioning for a new trial.” *Id.* (citations omitted). New Mexico also determined that it would not value whether petitioner exercised due diligence in discovering the evidence; rather, the court would focus on its reliability. *Id.* at 487.

Montoya was convicted of murder and two counts of aggravated assault with a deadly weapon. *Id.* at 478. At trial, he, his older brother, his twin brother, and three friends testified that Montoya was not at the scene of the offense. *Id.* at 479. At a hearing on the motion for new trial, which the trial court ultimately denied, his twin brother testified that he committed the offense but claimed it was an accident and that he never pointed the gun directly at anyone. *Id.* At the habeas evidentiary hearing, the twin brother again testified that he committed the offense and claimed this time that he intended to kill the victim and that he intended to fire at the two others. *Id.* at 480. Montoya and a polygraph examiner also testified in a manner that corroborated his twin brother’s new testimony. *Id.* The *Montoya* court therefore held that even though it could not construe his twin brother’s testimony as newly-discovered, it would evaluate its reliability. The court then determined that Montoya’s and his twin brother’s credibility was “suspect in light of the fact that they testified that they colluded to lie under oath at [Montoya’s] trial in an effort to absolve themselves of the charged crime.” *Id.* at 487. It further determined that their collusive effort, if true, “was an attempt to intentionally deceive the trial court and manipulate the judicial process,” leaving the court with a persistent doubt as to the truth of the habeas version of events. *Id.* at 489. It therefore

held that Montoya had not established by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence. *Id.*

New York's seminal case addressing actual innocence also held that the conviction and/or punishment of an innocent person violated state constitutional prohibitions against deprivation of liberty without due process and the imposition of cruel and unusual punishment. *People v. Cole*, 765 N.Y.S.2d 477, 485 (N.Y. Sup. Ct. 2003). The function of any standard of proof is to instruct the factfinder about the degree of society's confidence in the correctness of its factual conclusion. *Id.* Balancing the government's interest in the finality of conviction with the absence of any societal interest in the conviction or punishment of an innocent person and the innocent person's liberty interests, the supreme court determined that a movant making a free-standing claim of actual innocence must establish "by clear and convincing evidence (considering all pleadings, the trial and hearing evidence) that no reasonable juror could convict the defendant of the crimes for which the petitioner was found guilty." *Id.* at 486.

Cole was convicted of manslaughter in the first degree and related charges for a 1:00 p.m. street-corner shooting in Brooklyn. *Id.* at 479. At a hearing on his motion to vacate judgment, Cole presented four alleged eyewitnesses who identified a person named "Denzel" as the shooter and an audio- and video-taped recantation by a now-deceased inmate witness who had identified Cole as the shooter at trial. *Id.* at 479. The court held that the "newly-discovered" evidence did not meet the statutory hurdle for newly-discovered evidence

claims. *Id.* at 481. It therefore balanced eight factors—including the credibility of Cole’s witnesses in general and in light of their extensive criminal histories and delay in raising the claim, evidence that initial witness-descriptions to police did not match Cole’s appearance, that Cole’s new witness accounts matched each other and his trial witness accounts, and evidence that Cole’s witness testimony was inconsistent with police testimony and documentary evidence—and concluded that he had not met the clear and convincing standard for free-standing claims of actual innocence. *Id.* at 487. The *Cole* court noted that if it had sustained a free-standing claim of actual innocence, it would have vacated the conviction and dismissed the accusatory instrument. *Id.*

Connecticut cited the petition for writ of habeas corpus itself as its source for recognizing a substantive claim of actual innocence, reaffirming that “habeas corpus is designed to remedy fundamental miscarriages of justice.” *Summerville v. Warden, State Prison*, 641 A.2d 1356, 1369 (Conn. 1994). “Even the strong interest in the finality of judgments, and the state’s interest in retrying a defendant with reasonably fresh evidence, does not require the continued imprisonment of one who is actually innocent.” *Id.* In addressing claims of actual innocence emanating from recantations, Connecticut adopted the Ninth Circuit’s requirement that the petitioner demonstrate actual innocence by affirmative proof that petitioner did not commit the crime and noted that no other jurisdiction had, to its knowledge, granted habeas relief on a free-standing claim of actual innocence in the absence of such affirmative evidence. *Gould v. Comm’r of Corr.*, 22

A.3d 1196, 1206 (Conn. 2011) (citing *Carriger v. Stewart*, 132 F.3d 463, 476-77 (9th Cir. 1997)). In adopting the “clear and convincing” test, Connecticut did not require the petitioner to establish that his or her guilt is a factual impossibility. *Id.* at 1208. It did, however, require that affirmative evidence of actual innocence accompany any stand-alone recantation. *Id.* After examining trial and habeas evidence, the court therefore rejected the habeas court’s findings of actual innocence on the basis of two recantations alone without any accompanying affirmative evidence that petitioners did not commit the crime. *Id.* at 1209. It held that “once properly convicted, the petitioners no longer are cloaked in the mantle of the presumption of innocence. . . . Discrediting the evidence on which the conviction rested does not revive the presumption of innocence.” *Id.* at 1209-10.

Missouri also invoked the petition for writ of habeas corpus and its own statutory mandate to consider not just the sufficiency but “the strength of the evidence” in state death penalty cases as the state avenue for processing a substantive claim of actual innocence. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. 2003). In adopting the “clear and convincing” standard of review, the Missouri Supreme Court weighed the competing considerations, in a death case, of whether the evidence of actual innocence is strong enough to undermine the basis of conviction and make the petitioner’s incarceration and eventual execution manifestly unjust against the nearly irrebuttable presumption of validity afforded to a conviction on a direct appeal challenging the sufficiency of the evidence. *Id.* at 548. It determined that because an

actual innocence claim implies a breakdown in the adversarial process, the conviction was not entitled to a nearly irrebuttable presumption of validity. *Id.* The court also noted that the burden of proof should be heavier than the “more likely than not” standard governing gateway claims because gateway claims imply a serious underlying constitutional defect and a conviction worthy of less confidence by a habeas court. *Id.* Of all the states, it has most clearly articulated the “clear and convincing” standard as heavier than “preponderance of the evidence” and less than “beyond a reasonable doubt.” “Evidence is clear and convincing when it ‘instantly tilts the scales in the affirmative when weighted against the evidence in opposition, and the fact finder’s mind is left with an abiding conviction that the evidence is true.’” *Id.* (citation omitted).

The Missouri court then applied the clear and convincing standard and determined that petitioner Roper had demonstrated actual innocence. Roper was convicted on the basis of the testimony of three purported eyewitnesses to the crime who had identified him as the perpetrator. *Id.* at 544. No physical evidence otherwise linked him to the crime. *Id.* At his habeas trial, Roper proffered recantations from all three witnesses. *Id.* at 544-45. Significantly, although Roper presented no affirmative evidence of innocence at the habeas trial, he had produced alibi witnesses and eyewitnesses to the crime who inculpated a third party at the criminal trial. *Id.* at 548. Thus, the entire record from both the criminal and the habeas trials clearly and convincingly established Roper’s actual innocence, and the court ordered him “conditionally discharged from Respondent’s custody thirty days from the date the

mandate issues in this case unless the state elects to file new charges” *Id.* at 549. Interestingly, the Connecticut Supreme Court approved, in this context, Missouri’s application of the clear and convincing test to free-standing recantations. *Gould*, 22 A.3d at 1208.

In an initial habeas petition from a first-degree premeditated murder conviction for which the defendant received the death penalty, the Tennessee Supreme Court, citing an analogous statute, also expressly adopted the “clear and convincing” standard of review. *Dellinger v. State*, 279 S.W.3d 282 (Tenn. 2009). It determined that the Tennessee Post-Conviction Act expressly provided for free-standing claims of actual innocence based on new scientific evidence but assumed without deciding that a petitioner might obtain post conviction review of a free-standing constitutional claim of actual innocence. *Id.* at 290. The Tennessee Post-Conviction Act prescribed a clear and convincing standard that Dellinger failed to meet in what the state and court termed a “classic ‘battle of the experts’” with regard to the time of death relative to the decomposition of the victim’s body. *Id.* at 292.

On the opposite end of the spectrum, Illinois has crafted a standard that bears a remarkable similarity to the preponderance standard. Invoking the due process clause of its state constitution, the Illinois Supreme Court has held that no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence. *People v. Washington*, 665 N.E.2d 1330, 1336-37 (Ill. 1996) (citations omitted). The *Washington* court stated, “Given the limited avenues that our legislature has so far seen fit to provide for raising

free-standing claims of innocence, that idea—but for the possibility of executive clemency—would go ignored in cases like this one.” *Id.* Illinois excuses a petitioner who raises a free-standing claim of actual innocence in a successive post conviction petition from making the requisite showing of cause and prejudice and has repeatedly held that “[s]ubstantively, the evidence in support of the claim must be newly discovered; material and not merely cumulative; and ‘of such a conclusive character that it would probably change the result on retrial.’” *People v. Ortiz*, 919 N.E.2d 941, 950 (Ill. 2009) (quoting *People v. Morgan*, 817 N.E.2d 524, 527-28 (Ill. 2004)).

In *Ortiz*, the trial court convicted Ortiz of murder based on the testimony of eyewitnesses Estavia and Villariny. *Id.* at 943-44. Estavia testified at trial that after imbibing cocaine and six to eight beers, he saw multiple members of the Latin Eagles street gang, including Ortiz, beating the victim in a park. *Id.* He also admitted giving a written statement in which he claimed to have seen Ortiz pull a weapon from his body and fire it at the victim. *Id.* at 944. Villariny denied observing the offense at trial but, in a prior statement to police, had indicated that following the beating, he witnessed Ortiz fire a single shot at the victim. *Id.* No physical evidence linked Ortiz to the murder. *Id.* at 952. Ortiz presented one alibi witness, but the trial court found little believability to his testimony. *Id.* It also found little believability to Estavia’s and Villariny’s recantations of their prior statements to police and noted that their police statements corroborated each other. *Id.* at 944-45. After various failed attempts at habeas relief, Ortiz finally

produced three statements that triggered an evidentiary hearing. The trial court excluded one affiant's statement, another affiant did not show, and the third testified credibly that he observed both the beating and the shooting and that Ortiz had been present at neither. *Id.* at 946. Because the evidence of Ortiz's innocence would now be stronger when weighed against Estavia's and Villariny's recantations, the court remanded the cause for a new trial. *Id.* at 952.

The Supreme Court of Montana had the opportunity to craft a hybrid standard in the context of a time-barred and successive petition for habeas corpus. In *Beach*, petitioner argued that his newly discovered evidence allowed him to pass through the *Schlup* gateway and overcome the procedural bars; he also relied on the same newly-discovered evidence to prove his actual innocence. *Beach v. State*, 220 P.3d 667, 672 (Mont. 2009). His evidence was effectively the gateway and the underlying fundamental error. *Id.* For the substantive claim of actual innocence, the court concluded that petitioner "must show by clear and convincing evidence that, but for a procedural error, no reasonable juror would have found him guilty of the offense." *Id.* at 673. To prevail on the procedural claim, it prescribed a "reasonable probability" standard. *Id.* at 674. It also noted that a successful substantive claim would result in petitioner's release. *Id.*

Louisiana has not yet fully vetted a free-standing actual innocence claim. It has, however, assumed without deciding the viability of a free-standing claim of actual innocence, exclusive of a DNA claim, as long as it involves new, material, noncumulative, and conclusive evidence that meets

an extraordinarily high standard and undermines the prosecution's entire case. *State v. Conway*, 816 So.2d 290, 291 (La. 2002) (citations omitted). The Louisiana Supreme Court cursorily re-examined the standard in the context of a second-degree murder in which defendant had acted as a party. *State v. Matthis*, 970 So.2d 505, 510-11 (La. 2007). The *Matthis* court held that an assistant detective's (1) subjective belief that defendant appeared honest in his accounting of the offense and (2) testimony that he would have charged defendant with accessory after the fact instead of second-degree murder did not meet the *Conway* threshold. *Id.*

Conclusion

Intentionally or not, this Court has cabined between *Herrera* and *Schlup* the range of standards of review from which the states may individually fashion theirs. States have since failed to reach any uniform methodology in deciding their standards, a uniform standard, or a uniform remedy. States source their authority to recognize free-standing claims of actual innocence to the federal constitution, their own state constitutions, statute, and the great writ itself. They cite as their equitable considerations the presumption of validity afforded a jury's conviction, the public's and government's interests in finality of conviction, the state's interest in retrying a defendant with reasonably fresh evidence, the absence of a societal interest in the conviction or punishment of an innocent person, the innocent person's liberty interest, and the inadequacy of executive clemency. Their standards range from "completely undermine the structure of

the case” to “preponderance.” They adopt backward- and forward-looking reasonable juror tests or no reasonable juror test at all. They differ in whether they will accept free-standing recantations as alone sufficient to meet a threshold standard. And their remedies vary from remand to vacation and dismissal. Indeed, the *Herrera* dissent first articulated the inherent problem with prescribing a remedy for actual innocence relief: “Given the passage of time, it may be difficult for the State to retry a defendant who obtains relief from his conviction or sentence on an actual-innocence claim. The actual-innocence proceeding thus may constitute the final word on whether the defendant may be punished.” *Herrera*, 506 U.S. at 443 (Blackmun, J., dissenting). Their widely divergent formulations beg for guidance and necessarily call into question whether inmates have equal access to justice if they are actually innocent.

The Dallas County District Attorney reiterates that the Court should embrace this opportunity to recognize free-standing claims of actual innocence in capital and non-capital cases, unify the standards among the states for evaluating such claims, and prescribe the remedy for an applicant who prevails on a free-standing claim of actual innocence. The petition for writ of certiorari should be granted.

Respectfully Submitted,

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