No. 07-199

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES D. MARSHALL, WARDEN, *Petitioner,*

v.

ROBERT HENRY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court may order an evidentiary hearing on a freestanding claim of actual innocence by a noncapital habeas applicant making a "reasonably low threshold" showing of "a colorable claim for relief and the lack of a factual finding" in the state court.

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No.

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v.

ROBERT HENRY, *Respondent.*

Charles D. Marshall, Warden,[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, and its order denying rehearing and rehearing en banc, are unreported. (Petition Appendix ["App."] 1a, 5a.) The opinion of the United States District Court for the Eastern District of California denying the petition for writ of habeas corpus is unreported. (App. 6a.) The opinion of the California Court of Appeal affirming the judgment of conviction is unreported. (App. 23a.) The orders of the California Supreme Court denying direct review and two petitions for writ of habeas corpus are unreported. (App. 56a - 58a.)

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1. Warden Charles D. Marshall was respondent's custodian during the federal habeas proceedings below. Warden Tony Hedgpeth is respondent's current custodian.

STATEMENT OF JURISDICTION

The opinion of the court of appeals was filed on March 12, 2007. The order denying the State's petition for rehearing and rehearing en banc was filed on May 16, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Respondent Robert Henry recruited Francis Lee Brewer to avenge a drug-related robbery, but the wrong man died in the murder-for-hire. Respondent, Brewer, and Jester Taggart were tried for the murder in three separate California jury trials over a two-year period. This habeas corpus case arises from respondent's claim that testimony from Brewer's trial and his own post-trial declaration now show him to be factually "innocent" of the murder.

1. The evidence presented at respondent's trial—primarily testimony from eyewitnesses and respondent's statements to police—showed the following. Early on Thanksgiving Day 1985, Cedric Turner and a cohort robbed respondent at gunpoint, taking respondent's money and the cocaine he sold. Respondent, along with his 17-year-old cousin Jester Taggart and his 16-year-old brother Jeffrey Taggart, decided Turner had to die. Respondent met with Brewer and Bernard Oden, and hired Brewer to kill Turner. After Thanksgiving dinner, respondent and the Taggarts confronted Turner on the street, saying he "was gonna die."

A large crowd gathered, and Turner fled to a nearby house, where Andre Johnson offered to help him get away. Turner got into Johnson's car. Johnson stood outside his car, arguing with respondent and members of the crowd.

Brewer drove up in another car with Oden in the passenger seat. Respondent pointed out Turner to Brewer, saying, "That's the guy." Brewer reached over Oden and fired a sawed-off .22-caliber rifle out the passenger window. Three bullets hit the car and four hit Johnson, killing him.

The next day, Brewer sought payment from respondent, saying he had "taken care of it," but respondent said he had shot the wrong person and reduced the fee. Respondent later was arrested. The police asked him, in a tape-recorded interview, if he had offered Brewer $200 to shoot Turner. Respondent replied, "I didn't offer him $200 . . . I offered him $50." Respondent also told the police, "I hired Lee Brewer to *kill Cedric Turner. He killed the wrong guy. I can't* understand why I'm being charged." (See App. 23a - 26a.)

Respondent did not testify at his 1986 murder trial. His defense was that Brewer shot Johnson on purpose for some unknown independent reason of his own, and thus the doctrine of transferred intent did not apply to respondent. In support of that defense, a criminalist testified that the bullet trajectories suggested Johnson was the intended target. The defense also presented a psychologist who testified that Henry's I.Q. was 75. (See App. 26a - 27a.) Respondent was convicted of first degree murder and sentenced to prison for life without the possibility of parole.

2. Jester Taggart was tried as an adult ten days after respondent's trial and convicted of second degree murder. In 1988, at a third trial, Brewer also was convicted of second degree murder. Brewer's jury found an allegation that he personally used a firearm in Johnson's killing not true.

3. Jeffrey Taggart testified at all three trials under a grant of transactional immunity. His statements changed with each telling. Days after the killing, Jeffrey told the police that he was in the crowd, approached Brewer's car and saw the rifle between the seats, and witnessed Brewer fire shots out the driver's side window. At respondent's trial, Jeffrey

testified that he saw Oden fire the shots out the driver's side window. While there is no available record of Jester Taggart's trial, Jeffrey indicated at Brewer's trial that his testimony at Jester's trial was similar to his testimony at respondent's trial. At Brewer's trial, Jeffrey stated for the first time that he was actually in the car with Brewer and Oden, and that Oden shot Johnson on purpose for "talking too much." Jeffrey claimed he had identified Oden as the shooter to the police, despite a tape-recording of Jeffrey's 1985 interview showing he had identified Brewer.

Charles Austin, a convicted felon, testified only at Brewer's trial. He had discussed the case with Brewer in jail and again after Austin's release. Austin testified that he was selling cocaine on the street when he saw the passenger in the car fire the shots. Austin, however, could not describe the shooter, the victim, the gun, the shooter's car, or the victim's car. Austin's testimony also contradicted Jeffrey Taggart's version of events; Austin knew Jeffrey, but said he did not see Jeffrey at the scene.

4. In 1988, the California Court of Appeal affirmed respondent's judgment of conviction. (App. 23a.) In 1989, the California Supreme Court denied review. (App. 58a.) Respondent subsequently filed a habeas corpus petition in state court, claiming that newly discovered evidence from Brewer's trial showed him to be innocent. In 1989, the California Supreme Court denied relief. (App. 57a.)

5. In 1994, respondent filed a federal habeas corpus petition in the district court claiming, inter alia, actual innocence based on evidence from the Brewer trial.[2/] While the federal case was pending, respondent filed another habeas corpus petition raising actual innocence in the California Supreme Court, which was denied. (App. 56a.) The State contended in district court that *Herrera* v. *Collins*, 506 U.S. 390 (1993), barred freestanding actual innocence claims in noncapital cases.

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2. Accordingly, this case is not governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214.

In 2005, the district court denied respondent's petition. It assumed the actual innocence claim was cognizable. However, after considering Jeffrey Taggart's and Charles Austin's testimony at the Brewer trial, the verdicts at the various trials, and respondent's statements to the police, the district court found that respondent did not meet the heavy burden of proof required for such a claim. (App. 10a - 13a.)

6. Respondent asserted the actual innocence claim as an uncertified issue in the court of appeals. Pursuant to Ninth Circuit Rule 22-1(f), the State did not address that claim, until the court invited oral argument on whether to certify and order an evidentiary hearing on the claim. In a letter brief filed pursuant to Federal Rule of Appellate Procedure 28(j), and at oral argument, the State again relied on *Herrera* v. *Collins*, 506 U.S. 390, to argue that respondent's freestanding actual innocence claim was not cognizable on federal habeas corpus.

10. On March 12, 2007, without seeking further supplemental briefing, the Ninth Circuit filed a memorandum opinion certifying the claim and remanding for an evidentiary hearing. Citing *Herrera,* 506 U.S. at 417-419, the Ninth Circuit held that respondent could have a "valid freestanding claim of actual innocence," and that he had met a "'reasonably low threshold' to receive an evidentiary hearing, [by] showing only a colorable claim for relief and the lack of a factual finding below." The Ninth Circuit concluded simply that, "If truthful, the testimony of Jeffrey Taggart and Charles Austin would prove that [respondent], while possibly guilty of solicitation, conspiracy, and attempt for hiring a hit man, is not guilty of first degree murder." (App. 3a - 4a.)

The State petitioned for panel rehearing and rehearing en banc. Besides explaining that *Herrera* prohibits freestanding actual innocence claims in noncapital federal habeas cases, the State observed that the panel's decision conflicted with published circuit law, *Coley* v. *Gonzales*, 55 F.3d 1385, 1387 (9th Cir. 1995), as well as decisions by every other circuit court to address such a claim, and that the decision granted relief based on a "new rule" in violation of *Teague* v. *Lane*,

489 U.S. 288 (1989). The State further argued that petitioner had failed to make a "truly persuasive" showing that "unquestionably establishes innocence." (App. 5a..) The Ninth Circuit, however, denied rehearing.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S ERRONEOUS DECISION CONFLICTS WITH THIS COURT'S DECISION IN *HERRERA* V. *COLLINS* AND WITH DECISIONS OF OTHER CIRCUITS AND IMPLICATES PROFOUND QUESTIONS OF FEDERALISM AND COMITY UNDERLYING FEDERAL HABEAS CORPUS

1. The Ninth Circuit's decision to order an evidentiary hearing on a freestanding factual innocence claim by a noncapital state prisoner is, so far as the State knows, unprecedented. *Herrera* v. *Collins*, 506 U.S. at 400, recognized what the court of appeals did not: "Claims 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." The Ninth Circuit erred by relying, apparently, on an assumption in *Herrera* that a freestanding actual innocence claim in a capital case might warrant habeas relief "if there were no state avenue open to process such a claim." *Id.* at 417. But this is not a capital case; and California affords several avenues of remedy for innocence claims.

In noncapital cases at least, freestanding innocence claims are the exclusive province of state courts. By exposing a long final state criminal judgment of first degree murder to retrial before a federal habeas court, the Ninth Circuit usurped the role of California's criminal courts and ignored the finding of a jury that fairly determined respondent's guilt. The Ninth Circuit's decision profoundly erodes the States' significant interests in federalism, comity, finality of criminal convictions, and the primacy of the jury as the truthfinding entity in the criminal justice process.

The decision below, moreover, conflicts with that of every

other circuit court respecting freestanding innocence claims in noncapital habeas corpus cases.

2. In any event, the Ninth Circuit erroneously applied what it acknowledged to be a "low" standard for ordering an evidentiary hearing. But *Herrera* held that "the threshold showing for such an assumed right would necessarily be extraordinarily high." 506 U.S. at 417. The Ninth Circuit also made no effort to assess the reliability or probative force of the proffered evidence of respondent's innocence, or to evaluate that evidence against the evidence of guilt adduced at his trial. See *Schlup* v. *Delo*, 513 U.S. 298, 324, 332 (1995).

Even at a "reasonably low" level of scrutiny, the testimony by Jeffrey Taggart and Charles Austin at the Brewer trial did not approach a showing of respondent's actual innocence. Moreover, the Ninth Circuit failed to consider the strong evidence of respondent's guilt, including his own statements, introduced at his trial.

The Ninth Circuit's decision threatens innumerable federal retrials of state judgments in the future. Based on the trivial fact of different testimony and findings at a codefendant's trial in this case, it compels the State to expend substantial state resources to duplicate its proof beyond a reasonable doubt that respondent committed first degree murder for financial gain. Per curiam reversal is warranted on that basis alone.

A. In Accepting a Freestanding Claim of Innocence in this Noncapital Case, The Ninth Circuit's Decision Conflicts With *Herrera* v. *Collins*

Citing *Herrera* v. *Collins*, 506 U.S. at 417-19, the Ninth Circuit held that a noncapital prisoner may have a "valid freestanding claim of actual innocence" on federal habeas review. (App. 3a.) But *Herrera* recognizes that freestanding claims of actual innocence "have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state

criminal proceeding." *Herrera,* at 400; accord, *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963) ("the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus"); see *Bradshaw* v. *Stumpf*, 545 U.S. 175, 191 (2005) (Thomas, J., concurring) ("At most, the evidence and purportedly inconsistent theory presented at Wesley's trial would constitute newly discovered evidence casting doubt on the reliability of Stumpf's death sentence, a sort of claim that our precedents and this Nation's traditions have long foreclosed.").[3/]

This Court in *Herrera* relied on several important principles. First, "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Herrera,* at 400. Second, "in state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant." *Id.* at 416; accord, *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983) ("Federal courts are not forums in which to relitigate state trials."). Third, federal freestanding actual innocence claims implicate the States' "powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations." *Herrera* at 421 (O'Connor, J., concurring). For these reasons, the Court warned that "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." *Id.* at 401. In contrast, the Ninth Circuit's holding seriously undermines these principles of federalism, comity, finality, and the jury's fact-finding primacy, by allowing a federal court, not a state jury, to determine a defendant's guilt.

It is true that this Court in *Herrera* assumed, without deciding, that "*in a capital case* a truly persuasive demonstration of 'actual innocence' made after trial would

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3. Federal habeas courts may consider actual innocence claims that are offered to overcome a procedural bar, or are linked to a constitutional violation. See *Schlup* v. *Delo*, 513 U.S. at 314-15. Respondent's claim falls into neither category; it has always been a freestanding claim.

render the execution of a defendant unconstitutional, and warrant federal habeas relief *if there were no state avenue open to process such a claim.*" *Herrera,* at 417, emphasis added; see *id.* at 426 (O'Connor, J., concurring) (actual innocence claims should be "reserved for 'extraordinarily high' and 'truly persuasive demonstrations of "actual innocence"' *that cannot be presented to state authorities,*" emphasis added). But this case is not a capital case. And California affords respondent state avenues for pursuit of his freestanding innocence claim. These include state-court collateral review, Cal. Const., Art. VI § 10; Cal. Penal Code § 1473(a); *In re Hall*, 30 Cal.3d 408, 637 P.2d 690 (1981), and executive clemency, Cal. Govt. Code § 12020(a).[4] Thus, to the extent *Herrera* suggests an exception to the general bar on federal freestanding innocence claims, it does not apply here. See *Felker* v. *Turpin*, 83 F.3d 1303, 1312 (11th Cir. 1996) (innocence claim not cognizable because petitioner could file new trial motion); *Lucas* v. *Johnson*, 132 F.3d 1069, 1075 (5th Cir. 1998) (innocence claim not cognizable because petitioner could seek clemency).

B. The Ninth Circuit Decision Also Conflicts With Those of Other Circuits, None of Which Treats Innocence Claims as Cognizable in Noncapital Federal Habeas Proceedings

The State has not found another federal appellate court decision granting an evidentiary hearing on a noncapital habeas applicant's freestanding claim of innocence. On the contrary, they prohibit it. As noted, the Ninth Circuit itself has disavowed the cognizability of such claims in noncapital cases. *Coley* v. *Gonzales*, 55 F.3d at 1387 ("Coley seems to be making the claim that he is factually innocent—but that

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4. The fact that respondent's state habeas petitions were denied does not suggest the state court acted arbitrarily or violated procedural due process. The California Supreme Court permitted respondent to present his actual innocence claim, and denied relief because respondent's showing was insufficient.

claim alone is not reviewable on habeas," citing *Herrera*). Nor, so far as the State can determine, have other circuits found such claims cognizable after *Herrera*. See *David* v. *Hall*, 318 F.3d 343, 347-48 (1st Cir. 2003) ("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."); *Fielder* v. *Varner*, 379 F.3d 113, 122 (3d Cir. 2004) (sole timely claim of innocence based on newly discovered evidence was properly dismissed as not cognizable); *Rouse* v. *Lee*, 339 F.3d 238, 255 (4th Cir. 2003) (en banc) ("claims of actual innocence are not grounds for habeas relief even in a capital case"); *Foster* v. *Quarterman*, 466 F.3d 359, 367 (5th Cir. 2006) ("actual-innocence is *not* an independently cognizable federal-habeas claim" in capital case); *Zuern* v. *Tate*, 336 F.3d 478, 482 n.1 (6th Cir. 2003) (no freestanding actual innocence claim in capital case); *Johnson* v. *Bett*, 349 F.3d 1030, 1038 (7th Cir. 2003) ("For claims based on newly discovered evidence to state a ground for federal habeas relief, they must relate to a constitutional violation independent of any claim of innocence."); *Burton* v. *Dormire*, 295 F.3d 839 (8th Cir. 2002) ("we have squarely rejected the notion that a prisoner may receive a writ simply because he claims he is innocent"); *LaFevers* v. *Gibson*, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001) ("an assertion of actual innocence, although operating as a potential pathway for reaching otherwise defaulted constitutional claims, does not, standing alone, support the granting of the writ of habeas corpus"); *Brownlee* v. *Haley*, 306 F.3d 1043, 1065 (11th Cir. 2002) (no freestanding actual innocence claim in capital case).

Here, the Ninth Circuit took the extraordinary step of recognizing and directing an evidentiary hearing on a new species of federal habeas claim via an uncertified appellate issue without full briefing or consideration of the significant policy considerations at issue. The result contravenes this Court's habeas jurisprudence, as well as the national consensus interpreting *Herrera*. While the panel's order is unpublished, it undoubtedly will be cited to authorize federal courts within the Ninth Circuit to consider freestanding

actual innocence claims in noncapital cases. See Fed. R. App. P. 32.1(a) (permitting citation of unpublished federal decisions issued on or after January 1, 2007); Ninth Circuit Rule 36-3(b); see also *Herrera*, 506 U.S. at 428 (Scalia, J., concurring) (expressing concern that, by deciding case only by assuming arguendo that actual innocence claim is cognizable, the lower federal courts will face newly-discovered-evidence-of-innocence claims, "in which event such federal claims, it can confidently be predicted, will become routine and even repetitive"). It is untenable to subject long final criminal judgments in the nine States and two Territories within the Ninth Circuit to federal retrials, while the rest of the country properly entrusts the question of guilt to state trial, habeas corpus, and clemency procedures that are more than adequate to ensure against conviction of the innocent.

C. The Ninth Circuit Ignored This Court's Requirement That The Showing Necessary For Obtaining An Evidentiary Hearing On An Innocence Claim Must Be "Extraordinarily High"

1. The Ninth Circuit held that respondent was entitled to an evidentiary hearing by meeting only a "reasonably low threshold" showing of "a colorable claim for relief and the lack of a factual finding below." (App. 3a.) That was error. This Court in *Herrera* explained that, "because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high," and the evidence would have to be "truly persuasive." 506 U.S. at 417. In *Schlup* v. *Delo*, 513 U.S. at 317, this Court added that a "*Herrera*-type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish [defendant's] innocence." Most recently, in *House* v. *Bell*,

126 S. Ct. 2064, 2087, 126 L. Ed. 2d 1 (2006), this Court held that a habeas applicant's showing to overcome a procedural default—that more likely than not no reasonable juror would have convicted in light of the new evidence—did not suffice for a freestanding innocence claim.

The Ninth Circuit's approach disregards these holdings, which collectively make clear that a freestanding actual innocence claim may proceed in federal court, if at all, only on the most compelling of factual showings. Otherwise, innumerable claims of actual innocence will satisfy a "reasonably low threshold" and necessitate evidentiary hearings. Justice O'Connor's warning in *Herrera* appears to have been directed against precisely the kind of unacceptable result mandated by the Ninth Circuit in this case. *Herrera*, 506 U.S. at 426 (O'Connor, J., concurring) ("Unless federal proceedings and relief—if they are to be had at all—are reserved for 'extraordinarily high' and 'truly persuasive demonstration[s] of "actual innocence"' that cannot be presented to state authorities, *ante*, at 417, the federal court will be deluged with frivolous claims of actual innocence.").

2. Further, the Ninth Circuit erroneously failed to evaluate the reliability or probative force of the proffered evidence of innocence, or to consider the evidence of respondent's guilt. The Ninth Circuit simply made the uncritical observation that, "[i]f truthful," the testimony of Jeffrey Taggart and Charles Austin at the Brewer trial would prove that respondent is not guilty of first degree murder. *Schlup* v. *Delo*, 513 U.S. 298, exposes the Ninth Circuit's error.

Schlup concerned a habeas applicant's effort to overcome a procedural default by seeking an evidentiary hearing to show factual innocence. Comity and federal-state relations are placed less intensely in issue by factual innocence claims in a gateway case like *Schlup* than when the applicant seeks outright habeas relief on such claims. Yet, even in the gateway context, *Schlup* clearly rejected the notion that new evidence should be tested under a summary judgment standard, where the court determines only whether there is a genuine issue of fact. *Id.* at 331-32. Instead, the federal

habeas court "must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." *Id.* at 332; *Herrera*, 506 U.S. at 418 ("the affidavits must be considered in light of the proof of petitioner's guilt at trial"). In making this initial assessment, the court "may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." *Schlup*, 513 U.S. at 332. The type of newly discovered evidence that may amount to an "extraordinarily high" showing of innocence includes "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Id.* at 324. "In short, the new evidence is not simply taken at face value." *House* v. *Bell*, 126 S. Ct. at 2088 (Roberts, C.J., concurring and dissenting).

Similarly, in denying relief without an evidentiary hearing, this Court in *Herrera* judged that the affidavits in support of the innocence claim lacked reliability and were inconsistent, while the proof of guilt at the state trial, including the petitioner's own statements, was compelling. *Herrera*, 506 U.S. at 417-18. Circuit courts engage in the same process in rejecting freestanding innocence claims without a hearing. See, *e.g.*, *Cress* v. *Palmer*, 484 F.3d 844, 855 (6th Cir. 2007) ("the new evidence proffered in this case simply cannot satisfy the hypothetical *Herrera* [extraordinarily high] standard."); *In re Brown*, 457 F.3d 392, 396 (5th Cir. 2006) ("Brown's evidence falls far short of any such [extraordinarily high] threshold."); *Stafford* v. *Saffle*, 34 F.3d 1557, 1561 (10th Cir. 1994) ("if we similarly assume such a right, Stafford's asserted 'newly-discovered evidence' falls considerably short of the 'extraordinarily high' showing of actual innocence that would be required.").

Here, however, the Ninth Circuit failed to consider the patent unreliability of the testimony of Jeffrey Taggart and Charles Austin at the Brewer trial. Jeffrey Taggart, respondent's brother, gave inconsistent accounts of the killing at his interview with the police, respondent's trial, and Brewer's trial. Jeffrey's explanation for allegedly lying to police was unsatisfactory: he claimed the police yelled at

him, cursed, threatened to charge him with murder, and threw their guns on the table during the interview, but the tape of that interview reveals no such intimidation. In addition, it defies belief that Brewer and Oden were driving by Cedric Turner—the person respondent had hired Brewer to kill—when Oden independently and spontaneously shot Johnson instead, because Johnson was "talking too much."

Likewise palpably insufficient is the testimony of respondent's former jailhouse companion, Charles Austin, who claimed he saw the passenger in the car fire the shots. Even if not otherwise suspicious, Austin's testimony was, at best, generic. He could not describe the persons or objects he claimed to have seen. Further, his testimony was inconsistent with Jeffrey Taggart's version of events, as Austin said Jeffrey was *not* present. See *Herrera*, 506 U.S. at 418 ("the affidavits themselves contain inconsistencies, and therefore fail to provide a convincing account of what took place").

Nor is respondent's own post-trial declaration compelling. Respondent disavowed hiring Brewer to kill Turner, indicated he was surprised when shots were fired, and claimed he thought he himself might have been the intended target because of an ongoing feud with another family in the neighborhood. He also claimed he told police what they wanted to hear because he was sure he had not done anything wrong, which utterly failed to explain his statements that he offered Brewer $50 to shoot Turner, and that Brewer "killed the wrong guy." See *Herrera*, 506 U.S. at 424 (O'Connor, J., concurring) ("petitioner offers no plausible excuse for the most damaging piece of evidence," a letter in which he implicitly admitted responsibility for one of the murders).

Moreover, the proffered evidence of innocence in *Herrera* was stronger than that presented by respondent, yet still did not suffice to warrant an evidentiary hearing. In *Herrera*, the defendant asserted that his deceased brother had committed the murder, through affidavits from the brother's son who said he had witnessed the killing, and from an attorney, a family friend, and an inmate who stated the

brother confessed to the killing. A fortiori, if that showing did not merit further examination, respondent's does not.

Accordingly, neither Charles Austin, Jeffrey Taggart, nor respondent provided "trustworthy eyewitness accounts" amounting to "truly persuasive" evidence of respondent's actual innocence. And the sheer possibility that the Brewer trial jury might not have decided whether Brewer or Oden was the actual shooter, and therefore did not find that Brewer personally used a gun in Johnson's murder, detracts little or not at all from the verdict in respondent's trial. See *Bradshaw* v. *Stumpf*, 545 U.S. at 191 (Thomas, concurring). No jury necessarily rejected Brewer as an accomplice to respondent's murder-for-hire scheme, let alone determined that Johnson was killed independently of that scheme.

The Ninth Circuit also failed to assess the probative value of the Brewer trial evidence against the evidence of guilt adduced at respondent's trial. In particular, the Ninth Circuit ignored the fact that respondent admitted his involvement in the murder. As noted, in respondent's taped police interview he said he offered Brewer $50 to shoot Turner, and also stated, "I hired Lee Brewer to kill Cedric Turner. He killed the wrong guy." Also, when Brewer went to respondent's house the next day to get paid and said he had taken care of it, respondent informed him that he killed the wrong man and that the fee would be reduced. This evidence strongly supports a conclusion that Brewer accidentally killed Johnson instead of Turner. Respondent's liability for first degree murder is clear.

In sum, in light of all the circumstances, respondent has not met the "extraordinarily high" showing that would justify a hearing on his freestanding actual innocence claim. "If the federal courts are to entertain claims of actual innocence, their attention, efforts, and energy must be reserved for the truly extraordinary case; they ought not be forced to sort through the insubstantial and the incredible as well." *Id.* at 426-27 (O'Connor, J., concurring).

Finally, an evidentiary hearing conducted on respondent's actual innocence claim would be extremely disruptive, highly burdensome, and unlikely to result in a more reliable

determination than the one reached by respondent's jury 21 years ago. See *Herrera*, 506 U.S. at 403-04 ("the passage of time only diminishes the reliability of criminal adjudications"). The State would have to expend significant resources to reinvestigate the killing, locate any witnesses who might still be available to testify, and litigate anew respondent's factual guilt of first degree murder. Certiorari should be granted to stem the inevitable tide of evidentiary hearings on freestanding actual innocence claims that will result from the Ninth Circuit's unprecedented and unwarranted order in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: August 13, 2007

Respectfully submitted,

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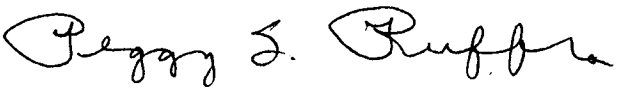

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