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SUPREME COURT  
STATE OF WASHINGTON

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re Personal Restraint Petition of

CHARLES WEBER,

Petitioner.

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**STATE'S RESPONSE TO BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF CRIMINAL  
DEFENSE ATTORNEYS**

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A. ISSUES PRESENTED.

1. Whether this Court should decline the invitation to recognize for the first time a "freestanding" claim of actual innocence where the petitioner has fallen far short of providing clear and convincing evidence of actual innocence.

2. Whether this Court should conclude that any equitable exception that allows time-barred constitutional claims to be addressed under the actual innocence doctrine does not apply in this case because petitioner has failed to present clear and convincing evidence of actual innocence.

B. SUPPLEMENTAL STATEMENT OF THE CASE.

As set forth in the State's Response to Personal Restraint Petition, filed July 19, 2011, this petition is an untimely, successive petition.

The following facts, which are also set forth in the State's Response to Personal Restraint Petition, are important to consider in considering Weber's claim of actual innocence. There is no dispute that the victim in the case, Gabriel Manzo-Vasquez, was shot in the early morning hours of March 18, 2003. RP 6/18/03 118, 123; 6/19/03 15-17, 19-20. There is no dispute that the

shooting occurred outside Rhonda Encinas's apartment, or that Nick Renion, an active gang member in the "Barrios Locos" street gang, was present at the time of the shooting. RP 6/10/03 22, 88-92; RP 6/18/03 128-43. There is no dispute that the shooter is a person known by the street name "Guero Loco." RP 6/17/03 40-41; RP 6/28/03 131. There is no dispute that the victim provided the police with a description of the shooter that matches Weber's physical description, including a large, distinctive "206" tattoo on the back of his neck. RP 6/17/03 39, 83; RP 6/18/03 86.

Charles Weber has numerous tattoos indicating his membership in the "Barrios Locos" street gang. RP 6/10/03 88. When Weber was arrested during a traffic stop the day after the shooting, the police found a piece of paper with the name "Rhonda" and Rhonda Encinas's phone number on it in his car. RP 6/25/03 112. An independent witness identified a picture of Weber's car as similar to and consistent with the style and color of the car she saw leaving the parking lot after hearing the gunshots. RP 6/18/03 15-16.

The victim's identification of Weber was not based on a brief encounter with a complete stranger. The victim testified that he had met Weber on a previous occasion. RP 6/18/03 129. When

Weber first arrived at the party occurring at Rhonda Encinas's apartment, he stayed for approximately 30 minutes, and then left.

RP 6/18/03 136. He returned later, and Weber, the victim and others remaining at the party socialized for a while before an argument broke out, eventually resulting in the shooting.

RP 6/18/03 137-45.

C. ARGUMENT.

1. THIS CASE IS NOT ONE IN WHICH THIS COURT SHOULD CONSIDER RECOGNIZING A "FREESTANDING" CLAIM OF ACTUAL INNOCENCE BECAUSE THERE IS NO COMPELLING OR CREDIBLE EVIDENCE THAT WEBER IS ACTUALLY INNOCENT.

In federal collateral attacks, petitioners have asserted what has been termed a "freestanding" claim of innocence to support what the Supreme Court has termed "a novel substantive constitutional claim . . . that the execution of an innocent person would violate the Eighth Amendment." Schlup v. Delo, 513 U.S. 298, 314, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). However, in Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), a majority of the Court rejected such a claim, holding that a claim of actual innocence is not in itself a cognizable

constitutional claim. The Court then went on to surmise that, assuming such a claim were cognizable, the threshold showing would be "extraordinarily high." Id. at 417. See also District Attorney's Office v. Osborne, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2308, 2321, 174 L. Ed. 2d 38 (2009) (noting that the existence of federal constitutional right to be released upon proof of actual innocence remains "open to question"). In sum, the United States Supreme Court has never recognized a freestanding claim of actual innocence as a basis for relief in a collateral attack.

In In re Personal Restraint of Carter, 2011 WL 4992970 (October 20, 2011), this Court addressed the question of whether, under Washington law, a claim of actual innocence may operate as a "gateway" that allows a petitioner to avoid procedural bars that prevent judicial review of a constitutional error. This Court noted that the petitioner in Carter was not raising a freestanding claim of actual innocence, and thus this Court did not address whether such a claim should be recognized under Washington law.

State courts that have approved of a freestanding claim of actual innocence under state constitutional principles have set a very high standard for such a claim. See Montoya v. Ulibari, 142 N.M. 89, 97-99, 163 P.3d 476 (N.M. 2007). Other courts have

noted that the standard for proving a freestanding claim of actual innocence is higher than the standard for establishing newly discovered evidence. Ex parte Spencer, 337 S.W.3d 869 (Tex.Crim.App. 2011); Montoya, 142 N.M. at 99; Summerville v. Warden, 229 Conn. 397, 641 A.2d 1356 (Conn. 1994). California requires petitioners to present evidence that "undermines the entire prosecution case and points unerringly to innocence and reduced culpability." In re Clark, 5 Cal.4<sup>th</sup> 750, 21 Cal. Rptr.2d 509, 855 P.2d 729, 739 (1993). Connecticut, Missouri, Montana, New Mexico and New York require a petitioner to show by clear and convincing evidence that no reasonable juror would have convicted in light of new evidence presented. Beach v. State, 353 Mont. 411, 421, 220 P.3d 667 (2009); Montoya, 142 N.M. at 99; State ex. rel. Amrine v. Roper, 102 S.W.3d 541, 548 (Mo. 2003); People v. Cole, 765 N.Y.S.2d 477, 486 (2003); Miller v. Comm'r of Corr., 242 Conn. 745, 700 A.2d 1108, 1132 (1997). Texas requires a petitioner to establish that newly available evidence "unquestionably" establishes the petitioner's innocence. Spencer, 337 S.W.2d at 878.

This Court should not use this case to adopt a freestanding claim of actual innocence. Weber has fallen far short of meeting

the extraordinarily high burden of proving his actual innocence, or establishing that no reasonable juror could have found him guilty in light of new evidence. Weber relies primarily on affidavits from what appear to be three associates of Nick Renion, a known gang member. Not one of the affiants claims to have witnessed the shooting in question. The affidavits, taken together, suggest that an *unnamed* person from another state who looks like Weber, has the same gang moniker as Weber, who socializes with the same people as Weber and has the same distinctive "206" tattoo on the back of his neck as Weber was present on the night of the shooting. Weber has presented no potential witness who can identify the shooter. This Court has previously noted that post trial affidavits casting blame on third parties, particularly *unidentified* third parties, must be viewed with a "fair degree of skepticism." State v. Riofta, 166 Wn.2d 358, 372-73, 209 P.3d 467 (2009) (quoting Herrera v. Collins, 506 U.S. at 399). The affidavits provided by Dr. Loftus and Marty Hayes provide no evidence that Weber is innocent, but only speculation about the strength of the State's evidence at trial. As argued in the State's Response to Personal Restraint Petition, the affidavits that have been submitted fail to meet the standard for newly discovered evidence. They also

therefore necessarily fall far short of establishing a credible showing of actual innocence.

2. WEBER HAS FAILED TO SHOW THAT ANY  
EQUITABLE EXCEPTION TO THE TIME BAR  
SHOULD APPLY IN THIS CASE.

In In re Personal Restraint Carter, *supra*, this Court stated that the actual innocence doctrine may provide an equitable exception to the time bar of RCW 10.73.090 if the petitioner can show by clear and convincing evidence that, but for a constitutional error, the petitioner would have been found factually innocent.<sup>1</sup> Used in this way, the claim of actual innocence would work as a "gateway" to review an otherwise procedurally barred constitutional claim. The underlying constitutional claim asserted in this case is ineffective assistance of counsel. In order for Weber to obtain review of his untimely claim of ineffective assistance of counsel, he must first present clear and convincing evidence that he is factually innocent.

However, as argued above, Weber has fallen far short of providing clear and convincing evidence that he is factually

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<sup>1</sup> In a concurrence, Justice Stephens stated that the discussion of the parameters of the actual innocence doctrine in the majority opinion is dictum.

innocent. As the United States Supreme Court has stated, in regard to the showing required for a gateway claim of actual innocence, "[t]o be credible' a gateway claim requires 'new reliable evidence—whether it be exculpatory scientific evidence, *trustworthy eyewitness accounts*, or critical physical evidence—that was not presented at trial.'" House v. Bell, 547 U.S. 518, 537, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (emphasis added). Having failed to provide clear and convincing evidence of innocence, Weber's untimely petition remains procedurally barred.

D. CONCLUSION.

This petition should be dismissed as untimely.

DATED this 24th day of October, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
ANN SUMMERS, WSBA #21509  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Todd Maybrown, the attorney for Amicus Curiae, at Allen, Hansen and Maybrown, P.S., 600 University Street, Suite 3020, Seattle, WA 98101, containing a copy of the State's Response to Brief of Amicus Curiae, in IN RE PERSONAL RESTRAINT OF WEBER, Cause No. 85992-2-I, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
Name \_\_\_\_\_ Date 10-25-11  
Done in Seattle, Washington

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to James Lobsenz, the attorney for Amicus Curiae, at Carney Badley Spellman, P.S., 701 Fifth Avenue, Suite 3600, Seattle, WA 98104, containing a copy of the State's Response to Brief of Amicus Curiae, in IN RE PERSONAL RESTRAINT OF WEBER, Cause No. 85992-2-I, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
Name \_\_\_\_\_ Date 10-25-11  
Done in Seattle, Washington

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Michael Kahrs, the attorney for petitioner, at 5215 Ballard Avenue NW, Suite 2, Seattle, WA 98107, containing a copy of the State's Response to Brief of Amicus Curiae, in IN RE PERSONAL RESTRAINT OF WEBER, Cause No. 85992-2-I, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
Name \_\_\_\_\_ Date 10-25-11  
Done in Seattle, Washington