No. _____

IN THE

Supreme Court of the United States

RIGOBERTO AVILA, JR.,

Petitioner,

V.

THE STATE OF TEXAS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does a conviction violate the Due Process Clause if a key part of the prosecution's case was scientific evidence that later developments have proven false?

   If so, what legal standard governs this claim?

2. Does the Constitution forbid criminal punishment of an innocent person?

   If so, what legal standard governs this claim?

PARTIES TO THE PROCEEDING

AND RULE 29.6 STATEMENT

Petitioner, Rigoberto Avila, Jr., is a prisoner under sentence of death in the custody of Respondent, the State of Texas. There are no corporate parties involved in this case.

LIST OF RELATED PROCEEDINGS

41st Judicial District Court of El Paso County, Texas

State of Texas v. Rigoberto Avila, Jr., No. 20000D01342 (trial)

Ex parte Avila, No. 20000D01342-41-1 (initial state post-conviction proceeding)

Ex parte Avila, No. 20000D01342-41-2 (second state post-conviction proceeding)

Court of Criminal Appeals of Texas

Avila v. State, No. 74,142 (on direct review)

Ex parte Avila, No. WR-59,662-01 (initial state post-conviction proceeding)

Ex parte Avila, No. WR-59,662-02 (second state post-conviction proceeding)

United States District Court, Western District of Texas, El Paso Division:

Avila v. Quarterman, No. 3:04-cv-00419-FM (federal habeas proceeding)

United States Court of Appeals for the Fifth Circuit:

Avila v. Quarterman, No. 07-70028 (federal habeas appeal)

Supreme Court of the United States

Avila v. Texas, No. 03-850 (certiorari from direct review)

Avila v. Thaler, No. 09-5070 (certiorari from federal habeas)

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PETITION FOR A WRIT OF CERTIORARI

Rigoberto Avila, Jr., petitions this Court for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas (TCCA) in this case.

OPINIONS BELOW

The convicting court's unpublished order making factual findings and legal conclusions regarding Petitioner's claims for post-conviction relief and recommending a new trial, *Ex parte Avila*, No. 20000D01342-41-2 (41st Dist. Ct., El Paso Co., Tex., Oct. 9, 2018), is attached as App. 1. The TCCA's unpublished per curiam order rejecting that recommendation and denying relief, *Ex parte Avila*, No. WR-59,662-02 (Tex. Crim. App., Mar. 11, 2020), is attached as App. 2. Its unpublished per curiam order originally authorizing further proceedings on Petitioner's claims, *Ex parte Avila*, No. WR-59,662-03 (Tex. Crim. App., Mar. 9, 2016), is attached as App. 3.

STATEMENT OF JURISDICTION

The TCCA entered judgment on March 11, 2020. *See* App. 2. On March 19, in response to the COVID-19 pandemic, this Court entered an Order applicable by its terms to this case and extending the time for petitioning for certiorari to 150 days from the date of the relevant lower court judgment.[1] This petition is timely filed pursuant to the Court's March 19, 2020 Order.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

[1] *See* https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VIII, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution, Amendment XIV, provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Introduction.

Petitioner Rigoberto Avila, Jr., a 27-year-old Navy veteran with no prior criminal history nor any history of violence toward children, was charged with killing N.M., a nineteen-month-old infant who had been left in Petitioner's care by his mother, Petitioner's girlfriend. At trial, the State told the jury that Petitioner was the only person who was physically capable of inflicting N.M.'s fatal injury. Petitioner maintained his innocence and testified—consistent with numerous other statements he had made—that he had done nothing to harm N.M. Instead, he was unaware that N.M. had been injured until D.S., N.M.'s four-year-old brother, came and told him that N.M. was not breathing. The jury, however, rejected Petitioner's testimony after hearing from the State's multiple expert witnesses, who agreed that it was scientifically impossible for anyone other than Petitioner to have generated the force necessary to inflict N.M.'s injury.

Yet, as the years passed since Petitioner's trial, what was once believed scientifically impossible was revealed as possible. Advances in biomechanical engineering now show that, in fact, D.S. was physically capable of causing the injury to N.M. and could have done so in the course of normal but risky play in which they

regularly engaged: emulating professional wrestlers. This newly available scientific evidence thus both strongly supports Petitioner's testimony from trial and shows that his conviction is tainted by false testimony.

This case squarely presents this Court with two questions of great significance: Whether due process is violated when scientific advancements establish that important trial testimony was demonstrably false, and whether the Constitution prohibits criminally punishing the innocent. Petitioner's case comes to this Court with rich factual development below and merits rulings on both issues, making it an optimal vehicle for resolving these important questions. It also comes in a precarious posture, because absent intervention from this Court, an innocent man may be executed.

B. Prior proceedings.

In May 2001, a jury in El Paso County, Texas, convicted Petitioner of capital murder and sentenced him to death. The judgment was affirmed on appeal. *Avila v. State*, No. 74,142 (Tex. Crim. App. July 2, 2003) (unpublished). After Petitioner unsuccessfully sought state post-conviction relief, *Ex parte Avila*, No. 59,662-01 (Tex. Crim. App. Sept. 29, 2004) (unpublished), a federal habeas court granted sentencing relief, but that decision was reversed on appeal. *Avila v. Quarterman*, 499 F. Supp. 2d 713 (W.D. Tex. 2007); *rev'd sub nom. Avila v. Thaler*, 560 F.3d 299 (5th Cir. 2009).

In 2013, Petitioner filed the second state habeas application that gives rise to this petition. In 2016, the TCCA authorized review of the merits of the claims raised therein. *Ex parte Avila*, No. 59,662-02 (Tex. Crim. App. Mar. 9, 2016) (unpublished). *See* App. 3. In March 2017, the convicting court conducted a multi-day evidentiary

hearing. In October 2018, it entered findings of fact and conclusions of law recommending that Petitioner receive a new trial. *See* App. 1. On March 11, 2020, the TCCA rejected that recommendation and denied relief on the merits. *Ex parte Avila*, No. 59,662-02 (Tex. Crim. App. Mar. 11, 2020). This petition follows.

C. How the Questions Presented were raised and decided below.[2]

1. The evidence at trial.

Petitioner was accused of killing N.M., a nineteen-month-old child temporarily in his care, who died in February 2000 of internal injuries from a single blunt force trauma to his abdomen. The only people home when N.M. was injured were N.M., his four-year-old brother D.S., and Petitioner.[3] Petitioner insisted he didn't harm N.M. and consistently explained that he learned of the injury only when D.S. came to him in the living room, from a bedroom where he and N.M. had been playing together, and said N.M. had stopped breathing.[4]

Petitioner was a 27-year-old Navy veteran with no prior criminal history nor any history of violence toward children, and nothing plausibly suggested why he

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[2] We cite the record of testimony at Petitioner's trial as "[volume #] RR [page #]." Trial exhibits are in Vol. 26 and are cited as "[party] Tr. Ex. [number]." Exhibits to Petitioner's subsequent state-court habeas application are cited as "SHA Ex. [number]"; appendices to that pleading are cited as "SHA App. [number]".

[3] Both children belonged to Petitioner's girlfriend Marcelina Macias, who often left her kids with him. (24 RR 75). According to Ms. Macias, Petitioner played with them, helped them with homework, and did a lot of good things with her family. (*Id.* at 76–80). He never got mad at her children, hit them, or acted inappropriately toward them. (*Id.* at 76, 88).

[4] That is what Petitioner told, *inter alia*, the 911 operator he called seeking medical help for N.M. ((24 RR 26–27; 26 RR (State Tr. Ex. 23, 911 Call)); EMT Farina, who treated N.M. (19 RR 198); Officer Lopez, who responded to the scene (19 RR 87–89); and Det. Tabullo in his custodial interview (19 RR 46).

would have exploded with deadly violence toward N.M. At trial, the State claimed that Petitioner had stomped the child to death because he was jealous of N.M. for monopolizing his mother's attention, supporting that theory with a custodial statement to that effect bearing Petitioner's signature. That purported statement, however, was rebutted by numerous other consistent and exculpatory accounts by Petitioner, including an earlier formal custodial statement.[5] Moreover, Petitioner

[5] Petitioner's first statement to Det. Tabullo reflects—as Petitioner had consistently told everyone else the night N.M. was injured, *see* n. 4 *supra*—that the boys had gone into a bedroom together to play, and that D.S. came out and told him that N.M. was not breathing, as well as Petitioner's recollection that en route to the hospital, when he again asked D.S. what had happened, D.S. told Petitioner that he and N.M. had been "wrestling." (*See* 19 RR 46; *see also* 26 RR State Ex. 1 at 2; 19 RR 198 (paramedic's testimony that Petitioner told the EMTs at the scene that D.S. had said he and his brother were "jumping up and down on the bed and . . . playing around"). This exculpatory account was reduced to writing and Petitioner signed it, carefully placing his initials next to each paragraph and where the starting and ending times were noted. (26 RR (State Tr. Ex. 1)).

According to Det. Tabullo, however, events did not end there. Det. Tabullo testified that after taking the initial statement, he learned that there was a bruise on N.M.'s abdomen that was being described as shoe-shaped (by, e.g., the treating paramedics). (*See* 19 RR 29–30; *id.* at 172–74). Supposedly, Det. Tabullo then asked Petitioner for his tennis shoes and confronted him with a photo of the bruise. (19 RR 61, 30). At that point, Det. Tabullo claimed, Petitioner got "kind of sad" and "did cry slightly." (*Id.* at 30). A "good" and "pleasant" conversation followed, after which Det. Tabullo prepared a second statement. (*Id.* at 30, 33, 41–46). According to this version (*see* 26 RR State Ex. 2), Petitioner had walked into the bedroom where N.M. was lying on the floor. (19 RR 44). Petitioner then "walked over to [N.M.] and stamped on him with [his] right foot." (*Id.*) According to Det. Tabullo, Petitioner said he stomped N.M. to death because he was jealous of the attention Ms. Macias paid to N.M. (*Id.* at 46; 26 RR State Ex. 2.) Det. Tabullo claimed that Petitioner demurred when asked to initial each paragraph, as on the first statement: "I'm done and I trust you Tony. That's it." (19 RR 37). Two additional officers attested to seeing Petitioner put his signature on the second statement, but neither was present when Petitioner supposedly recounted that version to Det. Tabullo, and neither testified to seeing Petitioner read the second statement or otherwise acknowledge its contents. (19 RR 40–41, 91; 21 RR 119–21).

testified in his own defense, telling the jury he did not make the claimed confession and flatly denying that he had caused N.M.'s death.[6]

The State's case also included testimony from five-year-old D.S. His confused testimony reflected distraction as well as lack of comprehension, and was marred by continuous admonitions and entreaties from the prosecutor (to pay attention, to stop playing, to remember what happened, to tell him the truth, etc.).[7] The prosecutor began by telling D.S. that he wanted to talk about the day N.M. got hurt. (19 RR 128). D.S. testified that N.M. was in the living room. (*Id. at* 131).[8] Asked how N.M. got there, D.S. replied, "He walked. He crawled over there." (*Id.*). The prosecutor unsuccessfully tried to probe how N.M. had gotten hurt, urging D.S. three different times, "I need to have you remember." (*See* 19 RR 131–32). While on the stand, D.S.

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[6] Petitioner testified that after he signed the first statement, Det. Tabullo left him in an interview room. (22 RR 122). Det. Tabullo later returned, telling Petitioner that he had a photo to show him. (*Id.*). Holding it up, he told Petitioner there were "two things wrong in this picture": first, "the baby is dead," and second, "your footprint is on there." (*Id.*). Petitioner and Det. Tabullo went back and forth, with Petitioner insisting he had not harmed N.M. (*Id.* at 123). At some point, Petitioner testified, Det. Tabullo told him that he (Tabullo) needed to make some changes to the statement and that Petitioner, who by this point was exhausted, could go ahead and sleep. (*Id.* at 124). Petitioner fell asleep; when he woke, Det. Tabullo was there, telling him that he just needed to sign the second statement and then could leave. (*Id.* at 124–25). Immediately after placing his signature on that statement, Petitioner was arrested. (*Id.* at 125). As noted, unlike Petitioner's first statement, the inculpatory one does not bear his initials on each paragraph nor reflects when it was completed; it bears only his signature at the end. (*Compare* 26 RR (State Tr. Ex. 1), with *id.* (State Tr. Ex. 2)).

[7] Before D.S. took the stand, the trial judge questioned him briefly outside the jury's presence to test his competency to testify. (19 RR 110–11, 113–20). It deemed D.S. competent even though he stated that he did not know the difference between the truth and a lie. (*Id.* at 114).

[8] Contrary to D.S.'s claim that N.M. was in the living room when he was hurt, both custodial statements attributed to Petitioner, *including the inculpatory one*, say that N.M. was injured in the bedroom.

demonstrated using two of his own wrestling-figure dolls. (19 RR 132–34, 144, 147; *see also* Defense Tr. Ex. App. 7, photo of dolls). Without success, the prosecutor repeatedly tried to elicit from D.S. what had happened to N.M.[9] D.S. finally offered that Petitioner had "stepped on him," after a few more questions adding, "with his shoe," (*Id.* at 131–37). During his brief cross-examination, D.S. confirmed that the wrestling dolls he was holding belonged to him, that he and N.M. had played "wrestling," and that he had watched wrestling on TV. (19 RR 144). When defense counsel offered that wrestlers "throw each other down and that sort of thing," D.S. responded, "Um-hmm." (*Id.* at 145). A few questions later, the judge interjected that D.S. should "put those dolls down," telling him that he could "play with them later," at which point the prosecutor retrieved them. (*Id.*).

Given the credibility questions about Petitioner's supposed "confession" and the distracted and confused testimony from its five-year-old purported eyewitness, the State rested its case on expert medical testimony from pediatric surgeon Dr. Raschbaum (who operated on N.M. after his injury) and pathologist Dr. Contin (who autopsied his body). Dr. Contin testified that he observed a large bruise on the right side of N.M.'s abdomen during the autopsy and thought it was consistent with a shoe print. (20 RR 26–29). Dr. Contin said inflicting N.M.'s injury—his organs had been transected against his spine—would have taken "considerable force," seen "mainly in traffic accidents, children who are not buckled." (*Id.* at 51–52). Asked whether the

[9] For example, using the dolls, D.S. placed one doll's foot onto the other's *back*, even though N.M.'s fatal injury was to his abdomen only. (*See* 19 RR 136–37).

blow could have been accidental, Dr. Contin responded, "I don't think so." (*Id.* at 52). Dr. Raschbaum testified that the extent of injury suggested trauma and described N.M.'s injury as "not . . . uncommon" when "very high velocity" is involved, as in "high-speed accidents where impact is taken bluntly and quickly to the abdomen." (21 RR 32–33). He testified that he had "seen almost identical injuries" from "jump[ing] out of a vehicle going 60 miles an hour," and that N.M.'s injuries would require "a strong force, like a stomping force." (*Id.*; *see also id.* at 44).

The prosecution specifically asked Dr. Raschbaum whether "a four year old," (i.e., D.S.) would be "capable of causing these types of injuries." (*Id.* at 43). The surgeon responded that it would be unlikely, indeed impossible, unless the four-year-old were dropped "from a height of 20 feet." (*Id.* at 43). He emphatically rejected any possibility that "normal playing in a household" could have caused the injuries, adding that the impact was so great that he could not "imagine that this could be any kind of accident." (*Id.*).

In closing, the State hammered home that either D.S. or Petitioner must have inflicted N.M.'s injury, and that according to "[a]ll the doctors," it had to be Petitioner because "a little four year old with [D.S.'s] weight is *incapable* of doing it." (23 RR 57) (emphasis added). Acknowledging that Petitioner had repudiated from the witness stand his purported "confession" to the police, the State asked incredulously, "Well, how can you not believe [the confession] when *there's no other way the kid could have died*?" (*Id.*) (emphasis added). Petitioner's guilt, the State insisted, was confirmed by "the physical evidence," the "one thing that cannot lie," and ratified by "absolutely

everything the doctors found." (23 RR 58; *see also id.* at 75 (D.S. could not have caused the injuries because "[w]hen we asked the doctors," they said it was impossible unless D.S. jumped onto N.M. from a height of 20 feet); *id.* at 81 ("Everyone has testified that [Petitioner is] *the only person capable of causing that injury*[.]") (emphasis added); *id.* at 76 (twice calling Petitioner "*the only person*" who could "generate that much force") (emphasis added); *id.* at 82 (urging jurors to "look at the physical evidence [and] the damage to that child" and conclude that Petitioner was "[t]he only person possible" who could have generated the necessary physical force); *see also* App. 1 at 16 (finding # 50) ("The only scientific evidence before the jury at the trial in 2001 was that [Petitioner's] account of what had occurred was scientifically impossible.")).

Unable to credit Petitioner's testimony in the face of that scientific testimony and lacking any competing explanation for N.M.'s fatal injury, the jury found Petitioner guilty and sentenced him to death.

2. The evidence developed after trial.

In 2013, Petitioner was scheduled to be executed and new counsel entered the case. Reinvestigation produced new evidence, some of it available for the first time, pointing to Petitioner's innocence:

- a reconstruction by a biomechanical engineer proving that a child the size of D.S. could have generated the necessary force to cause N.M.'s fatal injury by jumping onto his abdomen from a height of just 18 inches;[10]

[10] The significance of this finding, of course, depends on whether N.M.'s injury could have been the product of a single blow and thus could have been caused accidentally by D.S. At trial, the defense's forensic pathologist Dr. Rodriguez testified that a single blow could have done it. *See* App. 1 at 25, ¶ 33. After trial, it was discovered that the State had never disclosed to the defense that a prominent pediatric forensic pathologist with whom prosecutors were consulting had told them that a single blow could have caused N.M.'s injury. *See Avila*, 499 F. Supp. 2d at 759 (granting habeas relief as to Petitioner's sentence on that account).

- an analysis by shoeprint expert Dr. William Oliver indicating that the bruise on N.M.'s abdomen was not, in fact, a shoeprint;[11]

- extensive circumstantial evidence establishing that D.S. and N.M. frequently wrestled with one another in a dangerously rough manner, imitating adult wrestlers they watched on TV, and

- expert analysis of how D.S.'s testimony was developed and how he was questioned on the witness stand, identifying numerous reasons for grave doubt about the reliability of D.S.'s claim that he saw Petitioner stomp N.M. to death.[12]

Petitioner also developed expert evidence showing that his trial predated the forensic application of biomechanical analysis to determine potential causes in cases of infant injury or death. *See* App. 1 at 17–20 (Section III) (court's findings regarding

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Although the Fifth Circuit overturned the grant of relief, it reasoned that the suppressed opinion was cumulative because the single-blow theory was already before the jury. *Avila*, 560 F.3d at 309. Evidence at the post-conviction evidentiary hearing in 2017 was unanimous that a single traumatic impact could have caused N.M.'s injuries. *See* Transcript of Proceedings of March 21, 2017, *Ex parte Avila*, No. 20000D01342-41-2 (41st Dist. Ct. of El Paso Co., Tex.) at 12 (Drs. Contin and Plunkett); *id.* at 58 (Dr. Ophoven); *see also* Applicant's Ex. 35 (Dr. Wilson).

[11] Dr. Oliver comprehensively analyzed the bruise on N.M.'s abdomen in 2013 to determine whether it was "consistent with a shoe imprint," whether it was "consistent with being made by [the shoes Petitioner was wearing that night]," and whether it is "possible for a four-year-old jumping on this infant to make this bruise." (SHA Ex. F (Report of Dr. William Oliver, Forensic Pathologist and Pattern Analyst) at 2). Dr. Oliver concluded that "[t]here are features in the mark that are not consistent with a shoe" and other nonspecific features that are "consistent with any of an almost infinite number of objects, including shoes of many sorts. (*Id.* at 9.). In particular, Dr. Oliver acknowledged that, while some features of the bruise (such as its oval shape and small contusions) might appear to resemble a shoe, a comprehensive evaluation "demonstrate[s] that the initial visual impression would be mistaken." (*Id.*). Dr. Oliver noted that the conclusion that the bruise was not a shoeprint was reinforced when he compared it against a known exemplar (i.e., Petitioner's actual shoes). His final expert judgment was that the bruise was not a shoe mark at all. (*Id.* at 1). Although he allowed for the possibility that this conclusion was wrong, he also emphasized that if the bruise were a shoe mark, it would be inconsistent with the shoes Petitioner is known to have been wearing that night. (*See id.* at 19). And he agreed that a four-year-old jumping on N.M.'s abdomen could have produced the bruise. (*Id.* at 20).

[12] *See generally* SHA Ex. G (report of psychologist Dr. James H. Wood, Ph.D.).

evolution of the forensic application of biomechanics); *id.* at 40 (trial court's conclusion that "the relevant new science at issue here," "the application of biomechanics to the assessment of serious or fatal abdominal injuries in infants," was "not ascertainable through . . . reasonable diligence" in 2001, when Petitioner was tried, or in May 2003, when he first sought state post-conviction relief).

The evidence strongly suggesting that D.S. could have injured N.M. while the two were wrestling includes the following:

- The children's mother Ms. Macias speculated to first responders that D.S. had bruised N.M.'s stomach by head-butting him while they were wrestling. (SHA App. 6 at 2).

- Later, at the hospital, Ms. Macias told a detective that she believed the boys "had been jumping on the bed and *[D.S.] accidentally jumped on [N.M.].*" (SHA App. 7 at 2 (emphasis added)).

- In a family court hearing initiated by Child Protective Services after N.M.'s death, the children's uncle Michael Macias testified that Ms. Macias's children had regularly watched wrestling on television and that they "all wrestled. They all got into it. They all wrestled. And there's several times that we had to stop them from wrestling because they were getting really bad." (SHA App. 5 at 258). Mr. Macias also testified in family court that when he heard at the hospital about the bruise on N.M.'s stomach, "the only thinking that came to my mind was the kids wrestling, because they wrestle day and night." (*Id.* at 263). He stated that he had previously seen the children jumping on each other to the point that it caused bruising. (*Id.*). Mr. Macias recounted a night shortly before the fatal incident where the children were at his house watching wrestling on pay-per-view and the kids, including N.M., were wrestling. (*Id.* at 263–64).

- The pay-per-view program the children likely watched at their uncle's house involved wrestlers who jumped onto one another from the ropes surrounding the ring. *See* Ex. 2 to Petitioner's post-evidentiary-hearing Corrected Bill of Exceptions (filed Mar. 28, 2017) (wrestling video "No Way Out," which aired on pay-per-view on February 27, 2000, two days before N.M. was injured).

- N.M. routinely showed up bruised at daycare. (SHA App. 5 at 52–54 (N.M. had bruises variously on his face, body, legs, and torso)); *id.* at 55–57 (mystery injury to feet; N.M. could not walk); *id.* at 57 (in fall 1999, "incidents, more bruises,

unusual things" were "escalating"); *id.* at 46–48, 59, 62). N.M.'s mother told CPS workers that N.M.'s siblings could be responsible for the bruises. (*See* SHA App.10 at 5, 9–11). In January 2000, the daycare called CPS to report bruises on N.M.'s head and ears; Ms. Macias told CPS investigators that D.S. probably caused them picking up N.M. by his ears. (*Id.* at 16).

- The night of N.M.'s death, D.S. was interviewed on video by a police detective at the Advocacy Center. D.S. said that he had been wrestling with N.M. and that he had placed his hand over his brother's mouth. (SHA App. 9; SHA App. 8a at 1). In that interview, D.S. did not accuse Petitioner of any wrongdoing. (*See id.*).

- Injuries, including fatal ones, caused by unsupervised children imitating television wrestlers were increasingly common at the time of N.M.'s death in 2000. (*See* SHA App. 13 (articles describing, *inter alia*, an incident in which a four-year-old boy, apparently imitating wrestling videos, killed a fifteen-month-old by stamping on him)).[13]

3. Petitioner's second state habeas proceeding.

Armed with this new evidence, Petitioner filed a new application for state post-conviction relief raising three claims: (1) that newly available scientific evidence (the biomechanical analysis) contradicted the medical testimony presented by the State at trial;[14] (2) that the State's presentation of false or misleading testimony violated due process; and (3) that Petitioner's "execution would violate the United States

[13] Petitioner's trial counsel did not pursue this evidence, likely because their own expert, consistent with prevailing scientific opinion at the time, told them it was physically impossible for a child the size of D.S. to generate the force necessary to inflict N.M.'s injury. *See* App. 1 at 26 ¶ 35 (in 2001, defense pathologist Dr. Rodriguez "did not believe it was physically possible" for a four-year-old child to cause an injury as severe as the one N.M. sustained).

[14] This claim was brought via then-recently-enacted Tex. Code Crim. Proc. art. 11.073, which makes relief available where a claimant shows (1) relevant scientific evidence is now available and could not have been ascertained through reasonable diligence at the time of trial; (2) the new scientific evidence would be admissible under the Texas Rules of Evidence; (3) had the new scientific evidence been presented to a jury, it is more likely than not that the claimant would not have been convicted. *See* Tex. Code Crim. Proc. art. 11.073(b)(1)(A) – (C).

Constitution because he is innocent," citing, *inter alia*, *Herrera v. Collins*, 506 U.S. 390 (1993). Claim Two presented three distinct allegations of false or misleading testimony based on the newly developed evidence, arguing that (1) contrary to the trial testimony of the State's medical experts, four-year-old D.S. *could* have generated the force necessary to cause N.M.'s injury; (2) the bruise on N.M.'s body was not, in fact, a shoe print; and (3) the testimony of five-year-old D.S. that he saw Petitioner cause N.M.'s death was false. Claim Three, the actual innocence claim, invoked the sum total of all the newly developed evidence as the basis for relief—both the evidence not previously available (the biomechanical analysis of D.S.'s capacity to have caused N.M.'s injury) and the evidence previously available but never previously presented (the expert analyses of the claimed "shoeprint" and of the reasons to doubt that D.S.'s testimony was true).

In early 2016, finding that "the application satisfie[d] the requirements" for "consideration on the merits," the TCCA remanded to the convicting court. *See* App. 3. The TCCA having authorized further proceedings on "the application," Petitioner anticipated being allowed to present all his newly developed evidence (described above), all of which had been properly pleaded in his second habeas application, in support of his three claims for relief.[15] During a colloquy over the scope of the upcoming evidentiary hearing, however, the convicting court revealed that it had

[15] *See* Transcript of Proceedings of Nov. 17, 2017, *Ex parte Avila*, No. 20000D01342-41-2 (41st Dist. Ct. of El Paso Co., Tex.), at 12–22; *see also* Nov. 21, 2017 letter from Petitioner's counsel to the convicting court (filed of record in *Ex parte Avila*, No. 20000D01342-41-2 (41st Dist. Ct. of El Paso Co., Tex.).

contacted the TCCA privately to seek clarification of the scope of the remand and had been told by a staff attorney that notwithstanding the language of the remand order, further proceedings had been authorized on all three claims only insofar as each claim implicated the new biomechanical analysis.[16] At the evidentiary hearing ultimately held in March 2017, the convicting court enforced those limits, refusing to allow Petitioner to prove the claims as he had alleged them in his foundational pleading.[17]

Even with Petitioner blocked from presenting a fully developed version of his case, the witness testimony and extensive documentary evidence presented at the hearing convinced the convicting court that the jury's verdict was unworthy of confidence. In October 2018, it entered detailed factual findings, supported by ample citations to the hearing record, *see* App. 1 at 17–37, and recommended that the TCCA grant Petitioner a new trial based on his first and second claims for relief. *Id.* at 47–48. In assessing Petitioner's second claim (that the State had presented false testimony in violation of due process), the convicting court—having barred Petitioner from presenting evidence to prove his allegation that the "shoeprint" testimony and the purported eyewitness account of D.S. were also false—considered only Petitioner's newly available biomechanical analysis evidence and how it bore on the trial testimony of the State's medical experts. *See generally* App. 1. It nevertheless

[16] *See* Transcript of Proceedings of Feb. 8, 2017, *Ex parte Avila*, No. 20000D01342-41-2 (41st Dist. Ct. of El Paso Co., Tex.), at 7.

[17] Petitioner preserved his objection to these restrictions, arguing that he should be allowed to present all the evidence supporting his due process claim and his claim of actual innocence. *See* Transcript of Proceedings of Feb. 8, 2017, *Ex parte Avila*, No. 20000D01342-41-2 (41st Dist. Ct. of El Paso Co., Tex.), at 5–13.

agreed that the hearing had "established that the central premise of the State's case—that [Petitioner] was the only person who could have caused N.M.'s injuries—could scientifically be refuted with present-day biomechanical science," App. 2 at 28 ¶ 53, and that had Petitioner's new scientific evidence been available at trial, "it is more likely than not that the jury would have harbored reasonable doubt about [Petitioner's] guilt, resulting in his acquittal." *Id.* ¶ 54. It also agreed that Petitioner had "proven that the State presented false and misleading evidence and argument" that was reasonably likely to have affected the jury's judgment. *Id.* at 47–48. As to Petitioner's third claim (his "actual innocence" claim), the convicting court considered only his newly available biomechanical evidence—and not, e.g., his never-presented expert evidence about the credibility problems with D.S.'s trial testimony or the so-called "shoeprint" on N.M.'s abdomen, or the evidence corroborating the boys' frequent and dangerous wrestling—and found that the new scientific evidence, standing alone, was insufficient to prove Petitioner's innocence. App. 1 at 47.

The case was returned to the TCCA, which in Texas is the final arbiter of whether post-conviction habeas relief will issue. *See* Tex. Code Crim. Proc., Ch. 11. Eighteen months later, without briefing or argument, the TCCA issued an eight-page unpublished per curiam order denying relief. *See* App. 2. Its order did not identify any fact-findings by the convicting court as unsupported by the record or otherwise unworthy of deference. *Id.*[18] Nor did it meaningfully engage with the implications of

[18] In *Ex parte Reed*, the TCCA acknowledged that in a post-conviction proceeding the convicting court is "[u]niquely situated" to observe witnesses' demeanor firsthand, and thus "in the best position to assess [their] credibility," and accordingly expressed its expectation that "in most circumstances" it would "defer to and accept a trial judge's findings of fact and

those fact-findings for the ultimate reliability of the verdict. Instead, in rejecting Petitioner's first two claims, the TCCA essentially performed a sufficiency-of-the-evidence analysis of the trial record, *see* App. 2 at 6–7, noting that (1) the State's medical experts from trial refused to change their opinions based on the new scientific evidence presented by Petitioner in post-conviction; (2) the jury heard a purported confession by Petitioner; (3) D.S. testified to seeing Petitioner stomp on N.M.; and (4) the purported bruise on N.M.'s abdomen corroborated D.S.'s testimony. As a result, the TCCA stated, it could not find that Petitioner's newly available biomechanical evidence would probably have left the jury with reasonable doubt about his guilt, or that the false/misleading testimony of the State's medical experts that D.S. was physically incapable of generating the force necessary to cause N.M.'s injury was material to his conviction. *Id.* at 7.

The TCCA nowhere mentioned any of the following facts:

- That the convicting court found Dr. Contin's trial testimony "not reliable" based on his "unqualified statement [at the hearing] that he accept[ed] the validity of [the] report and conclusions" by Petitioner's biomechanical expert, and his general agreement that using biomechanical analysis to assess causation in child injury cases was appropriate today (App. 1 at 23–25);

- That the convicting court found Dr. Raschbaum unqualified to offer an expert opinion about how much force would have been required to inflict N.M.'s injury, based on his sworn statement that he neither "consult[s] with physicians or biomechanical engineers" in his medical practice nor

conclusions of law." 271 S.W.3d 698, 727–28 (Tex. Crim. App. 2008). Indeed, the TCCA forecast that it would "refuse to accord any deference whatsoever to [such] findings and conclusions as a whole" only in "the rarest and most extraordinary of circumstances." *Id.* Nowhere in its brief, superficial order rejecting the trial court's carefully considered findings in Petitioner's case did the TCCA identify what rare and extraordinary circumstances might justify its approach here.

"consult[s] literature on the physics or biomechanics of injuries," and the absence of any evidence that he possesses specialized knowledge about injury causation;

- That at trial the State emphatically and repeatedly insisted to the jury that it was *physically impossible* for D.S. to have caused N.M.'s injury (an argument that Petitioner's biomechanical evidence—as a matter of simple physics—reveals as factually false);

- That on the basis of this purported (but false) "physical impossibility," the State urged the jury to reject Petitioner's trial testimony, in which he denied having made any confession and repeated the exculpatory account he had consistently told multiple times on the night N.M. was injured;

- That Petitioner had proffered and been prepared to present at the March 2017 hearing extensive circumstantial evidence to support the inference that in fact N.M. was injured while wrestling roughly with D.S.;

- That the methods used to develop and elicit D.S.'s trial testimony were likely to produce a false account; and

- That Petitioner had proffered and been prepared to present evidence at the March 2017 hearing to debunk the claim that the bruise on N.M.'s abdomen was a shoeprint and was consistent with Petitioner's shoes.

Rejecting Petitioner's actual innocence claim, the TCCA applied its caselaw requiring such a claimant "to prove by clear and convincing evidence that no reasonable juror would have convicted him based on the new evidence." App. 2 at 7. The TCCA agreed with the convicting court that Petitioner had not carried what it called this "Herculean" burden, *id.*, but did not acknowledge that Petitioner had been foreclosed—over objection—from presenting much of the available evidence that could have satisfied it.

REASONS FOR GRANTING THE WRIT

I. This Court should grant review to address the appropriate standard for determining whether testimony proven false by post-trial scientific advancements violates due process.

Petitioner raised a due process claim based on substantial evidence that the application of biomechanical analysis to infant cause-of-death determinations had significantly advanced since the time of his trial. After extensive factual development, the state habeas court found, based on these advances, that the key testimony of the State's trial experts—that D.S. could not have produced the force necessary to cause N.M's fatal injury—was false. App. 1 at 28 ¶ 53. It further found "a reasonable likelihood that [this] false and misleading testimony affected the judgment of the jury." App. 1 at 47–48. The TCCA invoked a heightened "preponderance of the evidence" analysis to deny Petitioner relief rather than the "reasonable likelihood" standard drawn from federal false testimony cases. Texas's standard is at odds with that of other jurisdictions, which vary significantly regarding the appropriate standards for resolving such claims. This Court should grant review to determine whether a conviction that rests on scientific testimony later proven false violates due process and, if so, the appropriate standard for a court to apply when determining whether a violation occurred and requires a new trial.

A. This Court should resolve whether due process requires relief from a criminal conviction that depends on scientific testimony revealed after trial to be patently false.

As scientific discovery inevitably advances, it will reveal some criminal convictions—once thought to be grounded in sound science—as unreliable. That is just what happened here—not a battle of the experts, but advances in scientific

knowledge established that the key part of testimony given by the State's medical experts at trial was objectively false. As it stands, there is no uniform federal remedy for someone whose conviction rests on such testimony. But leaving undisturbed a conviction that turns on false evidence unquestionably invokes concerns of basic fairness and thus of due process.

Due process "is not a technical conception with a fixed content unrelated to time, place and circumstance." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quotations omitted). Rather, due process is "flexible" to respond "as the particular situation demands." *Id.* (quotations omitted). But this Court's due process jurisprudence has not yet caught up to the quandaries posed in the criminal legal system by outdated or superseded science. Because of this gap, wrongly convicted individuals lack a clear constitutional remedy to obtain post-conviction relief based on scientific advancements.

In post-conviction proceedings, a convicted person may obtain relief where the prosecution presented or failed to correct testimony it knew was false. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Presenting false testimony violates due process even if it goes only to a witness's credibility. *Id.* at 269–70 ("A lie is a lie, no matter what its subject[.]" (quotations omitted)). Or, if it is discovered after trial that the prosecution withheld materially favorable evidence, the convicted person may establish a due process violation even if the prosecutor did not act in bad faith. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Neither of these frameworks squarely applies

where post-trial scientific advances reveal evidence once thought to be scientifically sound to be, in fact, unreliable.

But at its core, due process as guaranteed by the Fourteenth Amendment is meant to ensure fairness. *See Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (rejecting the state's argument that due process permits the "pretense of a trial" through perjured testimony); *Napue*, 360 U.S. at 270 (analyzing whether false testimony rendered trial unfair). Thus, the touchstone of this Court's due process teaching is "avoidance of an unfair trial[.]" *Brady*, 373 U.S. at 87 (discussing *Mooney*). This Court should grant certiorari to consider whether the outcome of a criminal trial tainted by demonstrably false scientific evidence satisfies this test of basic fairness. *See Mesarosh v. United States*, 352 U.S. 1, 9, 14 (1956) (granting new trial when prosecutors learned, after trial, that a key witness had given false testimony in other proceedings that "wholly discredited" the witness); *Giglio v. United States*, 405 U.S. 150, 155 (1972) (granting new trial when trial prosecutor unknowingly presented false testimony).

B. Absent guidance from this Court, the lower courts are applying disparate standards in reviewing due process claims based on testimony proven false by advances in science.

As there is not yet any uniform federal standard governing a post-trial change in science, courts have improvised inconsistent standards to resolve such claims. These standards range from extremely rigorous—requiring the convicted person to show that his entire trial was fundamentally unfair—to the more flexible *Napue* standard, which requires a claimant to establish a reasonable likelihood that the false

testimony could have affected the jury's judgment. This Court's guidance is needed to ensure a unified and consistent approach.

1. Texas applies a heightened "preponderance of the evidence" standard to false testimony claims.

The TCCA has interpreted the Fourteenth Amendment's Due Process Clause to protect against both knowing and unknowing presentation of false testimony. *Ex parte Chabot*, 300 S.W.3d 768, 770–71 (Tex. Crim. App. 2009). In reviewing such claims, while purporting to interpret the federal Constitution, the TCCA requires a convicted person "to prove by a preponderance of the evidence that the error contributed to his conviction or punishment." *Id.* at 771 (quotations omitted). This preponderance standard imposes a higher burden to show harm than is actually required under federal law. *See Giglio*, 405 U.S. at 154 (holding the materiality standard for false testimony is whether the testimony "'could . . . in any reasonable likelihood have affected the judgment of the jury'" (quoting *Napue*, 360 U.S. at 271)). The federal "reasonable likelihood" standard for false testimony is lower than the *Brady* materiality standard and is akin to the *Chapman* harmless-error standard: "It is a brother, if not a twin, of the standard ('harmless beyond a reasonable doubt') for determining whether constitutional error can be held harmless." *United States v. Barham*, 595 F.2d 231, 242 (5th Cir. 1979).

Here, the convicting court found that Petitioner established "the central premise of the State's case—that [Petitioner] was the only person who could have caused N.M.'s injuries—could scientifically be refuted with present-day biomechanical science." App. 1 at 28 ¶ 53. The TCCA, however, denied relief, applying

its heightened standard, because it concluded that the new scientific evidence "did not refute the *possibility*" that Petitioner had intentionally injured N.M., nor conclusively prove that D.S. had accidentally caused the injury. App. 2 at 7 (emphasis added; citation omitted). Thus, under Texas's interpretation of the Due Process Clause, a convicted person who has "scientifically . . . refuted" the key testimony of the prosecution's trial experts must nevertheless carry a colossal burden—one essentially requiring proof of actual innocence—to win relief.

2. Multiple federal circuits have employed a range of due process frameworks to address advances in science that undermine a conviction.

Several federal circuits have created disparate standards to determine whether testimony proven false by a change in science violates due process. In so doing, the courts have placed a range of burdens on claimants to prove their claims merit relief.

For instance, some circuits impose a high burden requiring a convicted person to show that the false testimony rendered the entire trial fundamentally unfair. In *Lee v. Superintendent Houtzdale SCI*, Lee brought a due process claim arguing that his conviction for arson and murder was based primarily on fire-science and gas-chromatography evidence that had been discredited by later scientific developments. 798 F.3d 159, 161 (3d Cir. 2015). The Third Circuit affirmed the district court's grant of relief, concluding that Lee demonstrated that the admission of the false testimony "undermined the fundamental fairness of the entire trial because [its] probative value . . ., though relevant, [was] greatly outweighed by the prejudice to the accused from its admission." *Id.* at 166, 169.

Similarly, the Ninth Circuit imposes a fundamental fairness test on due process claims based on new science. In a case where the science surrounding so-called "Shaken Baby Syndrome" evolved post-trial, the court permitted a claim to proceed under a due process framework: "[C]ourts have long considered arguments that the introduction of faulty evidence violates a petitioner's due process right to a fundamentally fair trial—even if that evidence does not specifically qualify as false testimony." *Gimenez v. Ochoa*, 821 F.3d 1136, 1143 (9th Cir. 2016). The court required the convicted person to show that the scientific evidence "'undermined the fundamental fairness of the entire trial'"—meaning that the testimony was "'so extremely unfair'" as to "'violate[] fundamental conceptions of justice.'" *Id.* at 1145 (quoting *Lee*, 798 F.3d at 162, and *Dowling v. United States*, 493 U.S. 342, 352 (1990), respectively); *see Coble v. Davis*, 728 F. App'x 297, 302 (5th Cir. 2018) (noting that a claim based on unreliable scientific evidence may be cognizable under the Due Process Clause "when evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice'" (quoting *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012)). Notably, the *Gimenez* court refused to apply the *Napue* framework, noting "[w]e have found due process violations from the introduction of false testimony only where a *fact* witness told lies (even unknowingly so) or the prosecution relied on phony documents." *Id.* at 1142–43 (emphasis in original); *see Wyatt v. State*, 71 So.3d 86, 101–02 (Fla. 2011) (denying relief under *Giglio* because new evidence establishing that the FBI no longer considered ballistics evidence used at trial to be

valid did not qualify as false testimony when the report establishing that the science was wrong came out after trial).

On the other hand, the D.C. Circuit has applied the lower *Napue* standard to a new science claim when the prosecution conceded error. In *United States v. Ausby*, the prosecution secured a murder conviction based on forensic expert testimony claiming that hairs found at the crime scene were microscopically identical to Ausby's own. 916 F.3d 1089, 1090 (D.C. Cir. 2019). Four decades after trial, the FBI determined that its forensic hair analysis was flawed and the United States conceded that it knew or should have known. *Id.* at 1091–92. The circuit court held the false testimony was material and granted a new trial. *Id.* at 1095; *see United States v. Butler*, 278 F. Supp. 3d 461, 476 (D.D.C. 2017) (discussing a letter from the Department of Justice noting that the government would not assert procedural defenses in cases where a conviction was obtained by microscopic hair comparison testimony).

Finally, some circuits have eliminated the "knowing" requirement for all false testimony claims while still applying the *Napue* harm standard. *See*, *e.g.*, *Sanders v. Sullivan*, 863 F.2d 218, 224 (2d Cir. 1988) ("There is no logical reason to limit a due process violation to state action defined as prosecutorial knowledge of perjured testimony[.] . . . It has long been axiomatic that due process requires us 'to observe that fundamental fairness essential to the very concept of justice.'" (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941))); *United States v. Young*, 17 F.3d 1201 (9th Cir. 1994) ("[A] government's assurances that false evidence was presented in good

faith are little comfort to a criminal defendant wrongly convicted on the basis of such evidence.").

At present, courts lack any uniform federal standard to apply when trial testimony has been proven false by post-trial scientific advances, leaving the lower courts struggling to address such claims. This Court's guidance is needed.

II. This Court should grant review to answer the open questions whether criminally punishing a convicted person who is innocent of the offense of conviction violates the United States Constitution and what showing would justify relief on such a claim.

This Court should grant certiorari to make clear what it has assumed for decades: that the Constitution prohibits the criminal punishment of an innocent person. The Court should also grant review to address the appropriate standard for proving a convicted person's innocence.

A. This Court should make clear that the Constitution forbids criminally punishing a convicted person who can show that he is actually innocent of the crime.

The Court should address the recurring and open question whether an actual innocence claim lies under the Constitution. In each case where it has confronted a freestanding claim of actual innocence (that is, a claim not tethered to a claim of the denial of some other constitutional right), this Court has always assumed, without deciding, that the Constitution would bar executing someone who can persuasively demonstrate his innocence. The first case to present such a claim was *Herrera v. Collins*, 506 U.S. 390 (1993). There, the majority opinion "assume[d], for the sake of argument . . . that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant

unconstitutional . . . ." *Id.* at 417. A different majority of Justices, though, would have explicitly held that the Constitution bars the execution of an innocent person. *See id.* at 419 (O'Connor, J., joined by Kennedy, J., concurring) (executing "a legally and factually innocent person" is "constitutionally intolerable"); *id.* at 430 (Blackmun, J., joined by Stevens and Souter, JJ., dissenting) ("Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience," than executing "a person who is actually innocent." (internal citations omitted)).

Decisions since *Herrera* have likewise noted that whether the Constitution prohibits incarcerating an innocent person remains an open question. *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence."); *Dist. Atty's Office v. Osborne*, 557 U.S. 52, 71 (2009) (noting that whether constitutional right of actual innocence exists "is an open question"); *House v. Bell*, 547 U.S. 518, 554 (2006) (assuming without deciding such a claim exists); *Schlup v. Delo*, 513 U.S. 298, 314 n.28 (1995) (assuming *arguendo* that a truly persuasive demonstration of actual innocence would render defendant's execution unconstitutional); *see also In re Davis*, 557 U.S. 952, 130 S. Ct. 1, at *3 (2009) (mem.) (Scalia, J., joined by Thomas, J., dissenting) (observing that this Court "ha[s] repeatedly left that question unresolved . . . ."). Now is the time to answer this unresolved question, and this is the case in which to do so.

Settling whether the Constitution prohibits the criminal punishment of an innocent person is also important because jurists on this Court have expressed

diametrically opposed views on this question, contributing to lower courts' uncertainty in an area where clarity is essential. Like the *Herrera* majority, the *House* majority assumed without deciding that the Constitution forbids incarcerating an innocent person. *See House*, 547 U.S. at 554. Concurring in the Court's judgment concerning House's *Herrera* claim, Chief Justice Roberts assumed likewise. *See id.* at 556 (Roberts, C.J., concurring in part and dissenting in part).

But a stark difference of views emerged only four years later when this Court transferred to the Southern District of Georgia an original habeas petition filed in this Court by a prisoner claiming wrongful conviction. *Davis*, 130 S. Ct. at *1–4. Three Justices observed that the Court was correct in rejecting the view that a petitioner could be put to death even if new evidence "conclusively and definitively" proved him innocent. *See id.* at *2 (Stevens, J., joined by Ginsburg and Breyer, JJ., concurring). Two Justices vigorously disagreed, noting that "[t]his Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent." *Id.* (Scalia, J., joined by Thomas, J., dissenting) (emphasis in original). These considered but starkly opposing views about the scope of the constitutional protections afforded to a convicted person who may nevertheless be factually innocent illustrate the need for the Court to put the matter to rest.

Centuries of jurisprudence in the Anglo-American tradition reflect an assumption that no competing legal interest should outweigh vindicating a valid claim of innocence. Blackstone famously opined in the mid-eighteenth century that

"it is better that ten guilty persons escape, than that one innocent suffer." 4 William Blackstone, Commentaries *352 (Chapter 27). Less than a century later, another prominent British legal scholar noted that "The maxim of the law is, that it is better that ninety-nine . . . offenders should escape than that one innocent man should be condemned." Thomas Starkie, A Practical Treatise of the Law of Evidence and Digest of Proofs in Civil and Criminal Proceedings 756 (London, J. & W. T. Clarke 1824). The American Constitution instantiates these same values and thus should be read to incorporate a prohibition on the criminal punishment of a demonstrably innocent person.

To whatever extent this principle has not always been clear, answering this question in the affirmative is also supported by this Court's Eighth and Fourteenth Amendment teachings. The Eighth Amendment's prohibition on cruel and unusual punishment "is not static," *Herrera*, 506 U.S. at 431 (Blackmun, J., dissenting), but rather "draws its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958). It "'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Hall v. Florida*, 572 U.S. 701, 708 (2014) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)). To measure a society's evolving standards of decency, this Court looks to objective evidence of contemporary values. *See Ford v. Wainwright*, 477 U.S. 399, 406 (1986).

Since *Herrera*, at least two state courts have held that freestanding actual innocence claims are cognizable in state post-conviction proceedings as violations of

the Constitution. *See State v. Beach*, 302 P.3d 47, 54 (Mont. 2013), *abrogated on other grounds by Marble v. State*, 355 P.3d 742 (Mont. 2015); *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). In addition, at least six states have recognized freestanding claims of actual innocence based on their state constitutions. *See In re Lawley*, 42 Cal. 4th 1231, 1238 (2008); *Miller v. Comm'r of Corrr.*, 700 A.2d 1108, 1110 (Conn. 1997); *People v. Washington*, 665 N.E.2d 1130, 1136–37 (Ill. 1996); *Schmidt v. State*, 909 N.W.2d 778, 781 (Ia. 2018); *Montoya v. Ulibarri*, 163 P.3d 476, 478 (N.M. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543 (Mo. 2003) (en banc). And eight additional states have enacted statutory provisions allowing defendants to challenge their convictions based on claims of innocence. *See* Ala. R. Crim. P. 32.1(e); Alaska Stat. § 12.72.020; Ariz. R. Crim. P. 32.1(e); Md. Crim. P. Code § 8-301(a); 22 Okl. St. § 1089; Utah Code § 78B-9-402(2)(a)(i)–(v); Va. Code § 19.2-327.11; Wyo. Stat. § 7-12-403(b)(i)–(v). Collectively these cases and statutes mark an unmistakable trend recognizing the intolerance of allowing an innocent person to remain incarcerated.[19]

The Due Process Clause of the Fourteenth Amendment likewise precludes the incarceration of a factually innocent person. That clause is violated when the government engages in conduct that "shocks the conscience," *Rochin v. California*,

[19] To be sure, other courts have declined to hold that the criminal punishment of an innocent person violates the Eighth Amendment. *See, e.g.*, *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009) ("The Fifth Circuit does not recognize freestanding claims of actual innocence on federal habeas review."); *Tompkins v. State*, 994 So.2d 1072, 1089 (Fla. 2008) (citing *Rutherford v. State*, 940 So.2d 1112, 1117 (Fla. 2006)); *State v. Watson*, 710 N.E.2d 340, 344–45 (Ohio Ct. App. 1998). This disagreement among the lower courts only compounds the need for this Court to grant certiorari and qualify what protections the constitution affords a person who is innocent but wrongly convicted.

342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937). A freestanding claim of actual innocence falls precisely in this line of substantive due process claims because it does not rest on a deprivation of some procedural safeguard guaranteed by the Constitution to an accused at trial. Instead, it assumes that the government's power to punish has a limit, whether or not procedural protections were afforded at trial. Simply put, the presentation of evidence demonstrating the innocence of a convicted person deprives the government of its authority to continue to subject that person to criminal punishment. Refusing relief to someone who has made a compelling showing of factual innocence shocks the conscience precisely because it is "implicit in the concept of ordered liberty" that judicial review of such a claim should be available.

B. This Court should also grant review to clarify the required burden for vindicating a post-conviction claim of actual innocence.

In addition to making clear that the Constitution precludes the continued incarceration of a convicted person who can show factual innocence, this Court should grant certiorari to clarify the appropriate standard for resolving such a claim, for two reasons. First, although the TCCA purports to apply a clear-and-convincing-evidence standard to such claims, its cases in fact impose a burden even higher than the one contemplated by the *Herrera* majority. Moreover, the TCCA has never clarified the scope of the evidence that a court considering an actual innocence claim is required to consider (i.e., how should such a court balance the weight of the trial record against new evidence adduced post-trial?). Second, the lower courts that do recognize freestanding innocence claims under the federal Constitution disagree about what

standard to employ. This Court should clarify the burden a person asserting an innocence claim must meet and require the reviewing court to consider *all* the evidence before it, without arbitrarily excluding probative evidence that was unknown to the factfinder at trial.

Although the *Herrera* majority assumed that incarcerating a provably innocent person would be unconstitutional, it did not articulate what standard would apply to such a claim. *Herrera* contemplated "a truly persuasive demonstration" of innocence for which "the threshold showing . . . would be extraordinarily high." *Herrera*, 506 U.S. at 417. Concurring in the judgment, Justice O'Connor contemplated a standard that would make relief available only in "truly extraordinary" cases, which she contrasted to "insubstantial and [] incredible" ones. *Id.* at 426–27 (O'Connor, J., concurring). For his part, Justice White assumed "a persuasive showing of 'actual innocence' made after trial" would be enough, *id.* at 429 (White, J., concurring), whereas Justice Blackmun would have required a claimant to show that he "probably is innocent," *id.* at 442 (Blackmun, J., dissenting). Thus, even though each of these Justices assumed the right existed, they were squarely at odds about what showing would be necessary to vindicate it. *Davis*, where the Court remanded for a hearing on an "actual innocence" claim, did not provide greater clarity; there, this Court directed the federal district court to determine after a full hearing whether the evidence "clearly establishes petitioner's innocence." *Davis*, 130 S. Ct. 1, at *1. As it stands, then, this Court has not articulated a single standard for evaluating post-conviction claims of actual innocence.

At first blush, the TCCA appears to apply a clear-and-convincing-evidence standard to *Herrera*-type innocence claims. *See*, *e.g.*, *Elizondo*, 947 S.W.2d at 209. In practice, however, it applies a standard that exceeds even the most stringent one contemplated by this Court. The TCCA has repeatedly characterized the claimant's burden as "Herculean," a qualitative assessment that cannot be squared with a clear-and-convincing-evidence standard and has proven nearly impossible to meet, especially in capital cases. *See, e.g.*, App. 2 at 7; *see also Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006) ("Establishing a bare claim of actual innocence is a Herculean task."); *Ex parte Robbins*, 360 S.W.3d 446, 464 (Tex. Crim. App. 2011) (Price, J., concurring) ("That is a 'Herculean' burden, we have said, and it is meant to be."); *Ex parte Henderson*, 384 S.W.3d 833, 835 (Tex. Crim. App. 2012) (noting "Herculean burden associated with a bare claim of actual innocence"). Given the TCCA's emphatic description of its understanding of its own standard as "Herculean," there is a grave question whether it is in fact evaluating innocence claims under a clear-and-convincing-evidence standard.

Moreover, this Court should make clear that in applying this standard, courts are required to consider *all* relevant evidence. First, of course, that means including evidence adduced after the conclusion of trial, as this Court directed the district court to do in *Davis*. *See Davis*, 130 S. Ct. at *1 (court should consider "whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence"). But a reviewing court should not close its eyes to *other* probative evidence of innocence that may have been available at the time of trial but was not,

for whatever reason, presented to the factfinder. Indeed, this Court has made clear that in the context of gateway innocence claims, "the District Court must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." *Schlup*, 513 at 331–32 (1995); *see House*, 547 U.S. at 538 ("Because a *Schlup* claim involves the evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record."). Substantive innocence claims demand, at a minimum, that all newly presented evidence be considered.

Finally, granting certiorari to determine the relevant constitutional standard for actual innocence claims is warranted because lower courts are already entertaining such claims, but resolving them according to widely disparate standards.[20] Intervention by this Court can thus bring uniformity to this important area of the law. In so doing, the Court is not correcting an "error[] of fact," *Herrera*, 506 U.S. at 400, but rather examining how a legal standard is instantiated in particular facts. Such an analysis, modeling the correct application of a legal rule, will guide the lower courts in maintaining a consistent approach. The Court has regularly granted certiorari from state post-conviction decisions in other areas of the

[20] *Compare Elizondo*, 947 S.W.2d at 209, and *Beach*, 302 P.3d at 54 (requiring defendant to prove by clear and convincing evidence that no reasonable juror would have convicted), *with Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (requiring claimant to "affirmatively prove that he is probably innocent"), *Cornell v. Nix*, 119 F.3d 1329, 1335 (8th Cir. 1997) (standard is "at least as exacting" as clear and convincing evidence, "and possibly more so"), *and United States v. McDonald*, 32 F. Supp. 3d 608, 707 (E.D.N.C. 2014) (requiring claimant 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 a reasonable doubt" (internal quotations omitted)).

law for the same purpose. *See, e.g.*, *Moore v. Texas*, 139 S. Ct. 666 (2019); *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 572 U.S. 701 (2014); *see also Danforth v. Minnesota*, 552 U.S. 264, 291–92 (2008) (Roberts, C.J., dissenting) ("State courts are the final arbiters of their own state law; this court is the final arbiter of federal law."). Certiorari is appropriate where, as here, petitioner seeks clarification of standards under the Constitution.

C. Under this standard, Petitioner presented compelling evidence of his innocence.

Had the TCCA not held Petitioner to a "Herculean" burden, App. 2 at 7, the evidence Petitioner presented in state post-conviction proceedings demonstrates his innocence of the crime—if the TCCA had considered all the available evidence.

The State's case at trial rested on expert testimony that Petitioner was the only person in the apartment who could have caused N.M.'s fatal injury. After trial, however, Petitioner developed substantial evidence that the convicting court found had "scientifically . . . refuted" that claim: the conclusion of biomechanical experts, based on carefully controlled experiments, that a child the size of four-year-old D.S. could have caused N.M.'s fatal injury. App. 1 at 40 ¶ 23. Although the prosecution's case also contained other evidence—the shoe print evidence, the testimony of D.S.—those pieces of evidence are fatally flawed, and Petitioner was prepared to prove that via expert analyses. *See* SHA Ex. F; SHA Ex. G. And there was extensive corroboration, not just from other family members but from documents and independent witnesses and from D.S. himself, that the boys regularly wrestled violently and in fact had done so on the night N.M. was injured. *See supra* pp. 11–12.

All that would remain is Petitioner's purported "confession": taken under suspicious circumstances, vigorously repudiated from the witness stand, and never plausible in any event. *See supra* nn. 5–6. A court considering the totality of the evidence in this case could certainly find by "clear and convincing evidence" that N.M. died as the result of a tragic accident involving his brother.

III. Both legal questions presented are recurring and of national importance, and Petitioner's case presents an optimal vehicle for this Court to resolve them.

The questions presented here urgently deserve the Court's attention because, as forensic science advances, the factual basis of an increasing number of criminal convictions will be called into question. All those convicted persons will not be innocent, but some will be, and at present those wrongfully convicted individuals have no clear path to judicial review of their claims. In the modern era, this Court's guidance is sorely needed to provide an avenue for relief:

> To achieve justice, the law must serve as the vehicle through which imperfect institutions strive for greater justice through a more perfect understanding of the truth. Therefore, as our understanding of scientific truth grows and changes, the law must follow the truth in order to secure justice.

Lee v. Tennis, 4:08-cv-1972, 2014 WL 3894306, at *19 (M.D. Penn. June 13, 2014) (Carlson, Mag. J.), *adopted by* 2014 WL 3900230 (W.D. Penn. Aug. 8, 2014).

In recent years, both the scientific community and the courts have begun to recognize that flawed forensic science seriously affects the integrity of the criminal justice system. Vincent P. Iannece, Comment, *Breaking Bad Science: Due Process as a Vehicle for Postconviction Relief when Convictions are Based on Unreliable*

Scientific Evidence, 89 St. John's L. Rev. 195, 197 (2015) (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009) (warning of "[s]erious deficiencies" in forensic evidence in criminal trials)). In 2009, the National Academy of Sciences (NAS) released a comprehensive report critiquing many fields of forensic science as unreliable. *See* National Research Council, National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward (2009). The NAS report identified numerous problematic forensic fields, including firearms identification,[21] hair and fiber evidence,[22] and arson science.[23] *See id.* at 150–63, 171–73. The NAS made multiple recommendations to improve forensic disciplines, particularly noting that more research is needed in many fields accepted by the courts. *See id.* at 187.

Since the NAS report was issued, post-conviction petitions have increasingly included challenges to the prosecution's scientific evidence at trial by comparing that evidence to scientific advancements in the years since. Valena E. Beety, *Changed Science Writs and State Habeas Relief*, 57 Hous. L. Rev. 483, 486 (2020); *see also*

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[21] *See* Michael L. Huggins, *Freedom after 28 Years on Death Row*, American Bar Association (Apr. 6, 2015) (discussing exoneration of Anthony Hinton in Alabama, whose conviction relied on false ballistics evidence).

[22] *See* Spencer Willems, *Lawyers for 2 convicts join in bad-science retrials push*, Arkansas Democrat Gazette (Apr. 3, 2016), available at https://bit.ly/3fpxCSA (last visited Aug. 3, 2020) (discussing two convictions based on FBI microscopic hair analysis, which the FBI later conceded was unsupported by science).

[23] *See* Hannah Yi, *Should people convicted on unsound science be given new trials?*, PBS (Apr. 9, 2016), available at https://to.pbs.org/2Dg5pRf (last visited Aug. 3, 2020) (discussing parole grant after Texas State Fire Marshall issued a report disavowing arson evidence presented at trial).

Liliana Segura, Jordan Smith, *Bad Evidence: Ten Years After a Landmark Study Blew the Whistle on Junk Science, the Fight Over Forensics Rages On*, The Intercept (May 5, 2019) (available at https://bit.ly/3kfDNMX (last visited Aug. 3, 2020)). Unsurprisingly, as forensic science progresses, the number of wrongful convictions revealed has dramatically increased. The National Registry of Exonerations determined that false or misleading forensic testimony accounts for 24% of wrongful convictions.[24] In death penalty cases, false or misleading forensic evidence contributed to 32.4% of wrongful convictions.[25] And there have been at least 375 post-conviction DNA exonerations, of which 43% involved the misapplication of forensic science.[26]

This Court has not yet explicitly recognized that due process is violated when post-trial advancements prove that a person, like Petitioner, was convicted based on false scientific testimony. Nor has it held that the conviction and execution of an innocent person violates the Constitution. There is a compelling need for the Court to resolve these questions and ensure that a federal constitutional fail-safe exists for wrongfully convicted individuals to obtain judicial review of such claims. Petitioner's case is uniquely suited as a vehicle for doing so.

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[24] *See* National Registry of Exonerations, *% Exonerations by Contributing Factor* (available at https://bit.ly/3kb76jm) (last visited Aug. 3, 2020).

[25] Death Penalty Information Center, *DPIC Analysis: Causes of Wrongful Convictions* (available at https://bit.ly/2XojT8A) (last visited Aug. 3, 2020).

[26] Innocence Project, *DNA Exonerations in the United States* (available at https://bit.ly/30qHJSM) (last visited Aug. 3, 2020); *see also* Iannece, *Breaking Bad Science*, *supra*, at 200 ("One empirical study found forensic science errors in sixty-three percent of all cases resulting in wrongful convictions.").

Foremost, the post-conviction factual record in Petitioner's case is exceptionally well developed. After the TCCA remanded his case for review on the merits, the convicting court held an evidentiary hearing at which three experts testified regarding the field of biomechanical analysis, how the field had advanced since Petitioner's trial, its application to pediatric forensic pathology, and its specific application to the evidence in Petitioner's case. App. 1 at 21. The convicting court also received extensive evidence in the form of lay and expert testimony, as well as documentary proof, showing that reasonable counsel at the time of Petitioner's trial would not have known how biomechanical science might establish possible causes of injury or death in infant victim cases. The trial court made extensive and detailed findings of fact and conclusions of law based on the evidence. Although the TCCA denied relief, it identified no factual findings by the trial court with which it disagreed, meaning that for the purposes of its own due process analysis, this Court may take those facts as undisputed.

Moreover, this case comes directly to the Court from a merits ruling by the TCCA rather than via federal habeas. Accordingly, there is no concern that 28 U.S.C. § 2254(d) might block consideration of the underlying constitutional claims, and the Court is unconstrained by any state procedural ruling that might bar review. And although this petition arises from a state post-conviction proceeding in a capital case, there is no scheduled execution date. Thus, the Court can consider the significant Eighth and Fourteenth Amendment issues presented here without either the impending pressure of an approaching execution, or the overlay of legal deference

that can complicate getting to the underlying legal questions in a case arising from federal habeas.

The rich factual development below and the procedural posture of Petitioner's case will enable this Court to answer for the first time the precise questions of whether due process is implicated when scientific advancements establish that trial testimony was demonstrably false and whether the Constitution prohibits executing the innocent, and to model the application of the appropriate legal standard for resolving such claims.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted this 7th day of August, 2020.

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