No. 20–5342

IN THE

Supreme Court of the United States

RIGOBERTO AVILA, Jr.,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Avila filed a subsequent habeas application in the Texas Court of Criminal Appeals (CCA) seeking relief from his death sentence pursuant to Texas Code of Criminal Procedure Article 11.073. Article 11.073 provides, in part, that the CCA may grant relief if a petitioner files a subsequent application demonstrating that previously unavailable, relevant and admissible scientific evidence would contradict scientific evidence relied upon by the State at trial, and the court determines that, "had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted." In his application, Avila argued that newly-discovered scientific evidence—a biomechanical analysis supposedly showing that the victim's injuries could have been caused by someone other than Avila—proved that the State's experts gave false testimony regarding the level of force necessary to cause the victim's fatal injuries. Additionally, Avila argued that he is actually innocent of capital murder in light of such newly available scientific evidence. The CCA disagreed, denying all of Avila's claims. *See Ex parte Avila*, No. WR-59,662-02, 2020 WL 1163909 (Tex. Crim. App. Mar. 11, 2020). The following questions are presented.

1. Whether the Court possesses jurisdiction over claims that rely solely on a state law basis for relief?

2. Whether the Court should expend its limited resources to consider claims where there is no basis for federal relief and, in any event, where such claims are meritless?

LIST OF ALL PROCEEDINGS

State of Texas v. Rigoberto Avila, Jr., No. 20000D01342 (41st District Court of El Paso County May 7, 2001)

Avila v. State, No. 74,142 (Tex. Crim. App. July 2, 2003)

Ex parte Avila, No. WR-59,662-01 (Tex. Crim. App. Sept. 29, 2004)

Ex parte Avila, No. WR-59,662-02 (Tex. Crim. App. Mar. 11, 2020)

Avila v. Quarterman, No. 3:04-cv-00419-FM (W.D. Tex. July 13, 2007)

Avila v. Quarterman, No. 07-70028 (5th Cir. Feb. 17, 2009)

Avila v. Texas, No. 03-850 (U.S. Mar. 22, 2004)

Avila v. Thaler, No. 09-5070 (U.S. Nov. 2, 2009)

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INTRODUCTION

In 2001, Avila confessed to stomping nineteen-month old N.M to death. "I. . . got up and went to the bedroom where [the victim] was in. I saw him laying on the floor. I don't know what came over me[,] but I walked over to him and st[o]mped on him with my right foot. I know I st[o]mped on him hard but he didn't scre[a]m or say anything. I saw that his eyes were open [,] but he didn't move." An autopsy revealed several of N.M.'s major organs were split in two from blunt-force trauma consistent with a strong stomping force from an adult. The emergency room surgeon who attempted to save N.M.'s life compared the injuries to those seen when someone jumps out of a car moving sixty mph or being dropped from a height of twenty feet.

Now, Avila claims that newly available scientific evidence undercuts key testimony given at his trial relating to the force necessary to cause the infant's death, and that he is actually innocent of his capital crime. The lower court disagreed. Not only do Avila's current claims fail to implicate federal constitutional principles, so too do they fall short of showing that the testimony at his trial was false or that he is actually innocent of murdering N.M.

Accordingly, Avila's petition should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

Sometime between 6:00 and 6:15 pm on February 29, 2000, Marcelina Macias left her home to attend a class, leaving her nineteen-month-old son, N.M., along with his 4-year-old brother, D.S. in the care of Avila. 22 RR 116, 138; 24 RR 47–53. At that time, N.M. was fine. 22 RR 138–41.

At 7:02 pm, Avila called 911 and told the operator that N.M. was not breathing. 19 RR 227–29; 24 RR 26–27. When the paramedics arrived, Avila told them that N.M. and D.S. had been playing in another room and that D.S. came to where Avila was and told him that D.S. had covered N.M.'s mouth and that N.M. was no longer breathing. 19 RR 157–65, 225–28. The paramedics found N.M. unconscious, not breathing, and with no pulse. 19 RR 161–63. The paramedics also observed a bruise on N.M.'s stomach in the shape of a shoeprint, but when they asked Avila about it, he denied any knowledge of the injury. 19 RR 170–74.

At the hospital, surgical attempts to repair N.M.'s internal injuries were unsuccessful, and N.M. died. 19 RR 18–42. The autopsy revealed that major organs in N.M.'s body had been severed by considerable blunt-force trauma consistent with being stomped by an adult. 20 RR 28–32, 44, 53; 21 RR 43–44, 75–78. The surgeon who operated on N.M. likened his internal injuries

to those caused by such events as jumping out of a vehicle at sixty mph or being dropped from a height of twenty feet. 21 RR 31–33, 43.

Avila gave two written statements to the police. In the first statement, he denied causing the injuries and claimed that D.S. told him that D.S. and N.M. were wrestling, that D.S. put his hand over N.M.'s mouth, and that N.M. fainted. SX 1.

In his second statement, Avila confessed that he stomped on N.M. and that D.S. did not cause N.M.'s injuries:

> I was in the living room watching the basketball game. [D.S.] and [N.M.]were in the bedroom playing. [D.S.] then came to the living room with me. I then got up and went to the bedroom where [N.M.] was in. I saw him laying on the floor. I don't know what came over me but I walked over to him and stamped [sic] on him with my right foot. I know I stamped [sic] on him hard but he didn't screem [sic] or say anything. I saw that his eyes were open but he didn't move. . . .
>
> I do want to say that [D.S.] never put his hand on [N.M.'s] mouth and made him stop breathing. On the way to the hospital I told [D.S.] to say that he had put his hand on [N.M.'s] mouth and that he has stopped breathing. I told [D.S.] that when he asked what happened that he need to tell the doctors and whoever asked him about [N.M.].
>
> I was asked the reason for hurting [N.M.]. I want to say that since the time that [N.M.] had bruises on his ears and we all got called to the CPS office for interview, Marcelina has been paying a lot of attention to [N.M.]. She hardly has time for me. I got very jealous of [N.M.] and that is why I did what I did. I never meant to kill or hurt [N.M.].

SX 2.

A. Eyewitness testimony

N.M.'s brother, D.S., who was five years old at the time of trial, testified that he remembered when N.M. got hurt. 19 RR 128.[1] With the aid of wrestling-figure dolls, D.S. testified that Avila stepped on N.M. 19 RR 133–38. Specifically, D.S. first demonstrated with the dolls what Avila did:

> [Prosecutor]: No. Okay. What–happens to [N.M] at that point? What does [Avila] do?
> [D.S.]: (Demonstrating with dolls).
>
> [Prosecutor] Okay. Just–for the record, Your Honor, he just placed the right foot of the figurine as [Avila] on the stomach of—of the figuring that is—that is [N.M.].

19 RR 136. When defense counsel objected to the prosecutor's characterization of D.S. showing Avila stepping on N.M.'s stomach, D.S. orally clarified that N.M. was on his back when Avila stepped on him. 19 RR 136–37. D.S. then orally testified that Avila stepped on N.M. with his shoe. 19 RR 137.

On cross, D.S. testified that he watched wrestling on television and that the wrestlers throw each other down. 19 RR 144.

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[1] While Avila considers the testimony from D.S. to be "distracted and confused," Pet. at 7, the CCA disagreed on direct appeal, holding the trial judge did not abuse his discretion in finding D.S. competent to testify. *Avila v. State*, No. 74142, 2003 WL 21513440, at *9 (Tex. Crim. App. July 2, 2003). To the extent Avila purports to otherwise challenge the reliability of D.S.'s testimony, such challenge should have been done at trial, and raised on direct appeal. *See Ex parte Richardson*, 201 S.W.3d 712, 713–14 (Tex. Crim. App. 2006).

Avila testified that the children's mother left the apartment at approximately 6:00 or 6:15 pm, leaving Avila to care for N.M. and D.S. 22 RR 116. According to Avila, N.M. and D.S. went into the bedroom while he stayed in the bedroom watching a basketball game. 22 RR 116. At approximately 7:00 pm, D.S. came out of the bedroom and told Avila that N.M. was not breathing. 22 RR 116. Avila rushed to N.M. and called 911. 22 RR 116–17. Avila testified that he asked D.S what happened to N.M. , but that D.S. did not answer him. 22 RR 116–17.

Avila's first written statement was fairly consistent with his trial testimony. SX 1. However, in his second written statement Avila confessed that he stomped on N.M. and that D.S. did not cause N.M.'s injuries. SX 2.

At trial, Avila attempted to repudiate the accuracy and voluntariness of his second statement, claiming that he did not read it before signing it. 22 RR 122–25; *see also* Pet. at 5–6, n. 5– 6. However, both the trial court and the CCA found that the record revealed Avila made both of his statements "without compulsion or persuasion" and that he was adequately apprised of his rights—which he "unequivocally admitted that he was familiar" with. *Avila v. State*, 2003 WL 21513440, at *3–4.[2]

[2] The CCA summarized the series of events leading to Avila's second statement—his confession—as follows:

B. The medical evidence at trial

Dr. Juan Contin, a long-time medical examiner for El Paso County, performed the autopsy on N.M. 20 RR 26. Dr. Contin testified that upon

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> After taking [Avila's] first statement, [Detecive] Tabullo told [Avila] that his mother was outside. [Avila] asked Tabullo to tell his mother that he would call her when he was finished. He also asked Tabullo if he was still free to leave at any time; Tabullo told him that he was. At 2:25 a.m., Tabullo again had [Avila] read his rights and sign, date, and place the time on the card noting that he understood those rights. Tabullo again asked [Avila] if he wanted an attorney, and [Avila]told him that he did not. [Avila] noted that he was willing to continue talking to Tabullo. Shortly thereafter, Tabullo received from other detectives polaroid photographs which appeared to show an adult-sized footprint on Nicholas' stomach. Tabullo confronted [Avila] with the photographs, after which [Avila] orally admitted to stomping Nicholas. Tabullo asked [Avila] for his shoes, which [Avila] gave him. Tabullo then took [Avila] to be fingerprinted and photographed. [Avila] signed a document indicating that he knew that he could refuse to be fingerprinted and photographed. After these procedures were completed, Tabullo and [Avila] returned to the interview room and continued talking. [Avila] never asked to terminate the interview, and he willingly talked to Tabullo.
>
> Tabullo began typing the second statement at 5:46 a.m. [Avila's] legal rights again appeared at the top of this statement. After he finished typing the document, Tabullo handed the statement to [Avila] and advised him to read it. [Avila] signed the document, but did not write the ending time on the document or initial the individual paragraphs. In response to questions from [Avila's] counsel, Tabullo admitted that [Avila] could have slept between the statements. However, Tabullo never saw him sleep, and [Avila] was "fully awake" when he signed the second statement. Tabullo's partner, Detective Terry Kozak, and Officer Lopez witnessed the signing of the second statement. Lopez testified that [Avila] did not appear to be under duress when he signed the second statement. Lopez further opined that [Avila]was not forced or coerced into signing the statement.

Avila, 2003 WL 21513440, at *3.

examination of N.M., he observed a large, oval-shaped bruise on N.M.'s abdomen that was consistent with a shoe. 20 RR 28–30. He testified that the bruise, and the corresponding internal injuries to N.M.'s organs, were the result of blunt-force trauma. 20 RR 32. Dr. Contin testified that the force required to inflict such injures would be "considerable." 20 RR 44, 51–52.

On cross-examination by defense counsel, Dr. Contin agreed that N.M.'s mother could have generated sufficient force to have caused the injuries. 20 RR 52–53. He then agreed that he could not specifically identify the bruise pattern on N.M.'s abdomen as being a shoeprint, but that it was generally consistent with the shape of a shoe. 20 RR 53–57.

Dr. George Raschbaum, the surgeon who operated on N.M., testified at trial that N.M.'s intestines and pancreas were literally split in two against his spine and that his colon had been torn from its blood supply. 21 RR 31–32. Dr. Raschbaum compared the injuries to injuries he had seen when a person jumped out of a car at sixty mph. 21 RR 32–33. As for whether four-year old D.S. could have caused the injuries, or whether an adult could have accidentally caused the injuries, Dr. Raschbaum testified that it was highly unlikely. 21 RR 43–44. Dr. Raschbaum also testified that the external bruise on N.M.'s abdomen was consistent with a shoe. 21 RR 78.

Avila's expert pathologist, Dr. Fausto Rodriguez, testified that he reviewed Dr. Contin's autopsy report and Dr. Raschbaum's surgical report, and he also performed a second autopsy on N.M. 22 RR 12, 16. Dr. Rodriguez concurred that the cause of N.M.'s death was "massive injuries to the abdominal organs secondary to the blunt force trauma to the abdomen." 22 RR 16. In his opinion, the injuries could have been caused by a single event of trauma—one blow to the abdomen. 22 RR 16. When asked if he could determine whether the injuries were accidental or not, Dr. Rodriguez testified that he could not make such a determination, despite describing himself as an expert on accidental injuries. 22 RR 18, 38. But Dr. Rodriguez subsequently testified that N.M.'s injuries "could [be] explained in an accidental manner." 22 RR 23. He also testified that although he did not know what caused the bruising on N.M.'s abdomen, the bruise resembled a shoeprint. 22 RR 24. On cross, Dr. Rodriguez testified that although it was possible that the bruise was caused by something else, it was a "footprint." 22 RR 48.

II. Evidence Relating to Punishment

At the sentencing phase of trial, the State introduced evidence that after N.M. had been injured, Avila asked D.S. to step on his brother, in an apparent attempt to shift the blame away from Avila and toward D.S. 24 RR 15. The State also introduced a recording of the "911" telephone call by Avila. 24 RR

25. The 911 operator testified that during the call Avila sounded calm. 24 RR 34. A friend of N.M.'s family testified that since the death of N.M., D.S. had been restless, unable to sleep, and had lost his appetite. 24 RR 37. N.M.'s mother frequently cried. 24 RR 38.

The defense offered evidence of Avila's peaceful nature, his lack of a criminal record, his good character, and his reputation as a loving father. 24 RR 96–97, 100, 116–17, 120–21, 125, 130.

III. Conviction and Postconviction Proceedings

Avila was convicted of capital murder and sentenced to death in May 2001. *Ex parte Avila*, 2020 WL 1163909. The CCA affirmed. *Avila*, 2003 WL 21513440.

In his initial state habeas application filed in 2003, Avila raised eight grounds for relief. *See Ex parte Avila*, No. WR-59, 662-01 (Tex. Crim. App. Sept. 29, 2004) (not designated for publication). Notably, Avila alleged the State committed a *Brady*[3] violation for failing to disclose information tending to prove that the fatal injuries inflicted on N.M. were the result of a single blow to the abdomen and not multiple blows, as argued by the prosecutors at trial. *Id.* The CCA denied Avila's application. *Id.*

[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

Avila then filed a federal habeas petition in 2005, raising five grounds for relief, including the alleged *Brady* violation raised in state court. Based on the alleged *Brady* violation, the federal district court conditionally granted relief as to punishment. *See Avila v. Quarterman*, 499 F. Supp. 2d 713 (W.D. Tex. 2007). The Fifth Circuit reversed the district court's grant of habeas relief as to punishment and reinstated Avila's death sentence, noting that Avila failed to show "that the state court's conclusion was an unreasonable application of clearly established Federal law." *Avila v. Quarterman*, 560 F.3d 299, 312 (5th Cir. 2009).

In 2013, Avila filed a subsequent state application in the trial court alleging that: (1) newly available scientific evidence entitled him to relief; (2) he was convicted based on false and misleading scientific evidence at trial, in violation of due process; and (3) he is actually innocent of capital murder. SHCR at 4445–515. On March 9, 2016, the CCA held that Avila had "alleged prima facie facts sufficient to invoke Article 11.073." Pet. App. 3 at 3, and remanded the case to the convicting court for consideration on the merits. *Id.*[4]

[4] Avila appears to take issue with the scope of the remand. The remand was authorized on all three of his claims only insofar as each claim "implicated the new biomechanical analysis." Pet. at 14. Because of this, Avila intimates that he was "blocked from presenting a fully developed version of his case." *Id.* Avila does not otherwise directly challenge the procedural aspects of his state habeas proceedings. *See generally* Pet. Still, it is important to note that "[s]tate collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Murray v.*

After holding a hearing in March 2017, SHCR Supp. at 748–2989, the trial court signed findings of fact and conclusion of law recommending that relief be granted on Avila's new science claim and false evidence claim, but not as to his actual innocence claim. Pet. App. 1 at 1–48. The CCA disagreed, denying each of Avila's claims on the merits. *Ex parte Avila*, 2020 WL 1163909.[5] The present petition follows.

REASONS FOR DENYING THE WRIT

The questions that Avila presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for

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Giarratano, 492 U.S. 1, 10 (1989). Indeed, this Court has explained that "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are . . . sufficient to assure the reliability of the process by which the death penalty is imposed." *Id*. But more importantly, where a State allows for post-conviction proceedings, "the Federal Constitution [does not] dictate[] the exact form such assistance must assume." *Pennsylvania v. Finley*, 481 U.S. 551, 555, 557, 559 (1987). As the Court has clarified, "[f]ederal courts may upset a State's postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

[5] Contrary to Avila's assertions, Pet. at 15, n. 18, in disagreeing with the findings and conclusions of the trial court, the CCA simply served its function as the "ultimate factfinder" in Texas state habeas proceedings. *See Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008); *see also Ex parte Thuesen*, 546 S.W.3d 145, 157 (Tex. Crim. App. 2017) ("[W]hen our independent review of the record reveals circumstances that contradict or undermine the trial judge's findings and conclusions, we have exercised our authority to enter contrary findings and conclusions.").

"compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*.

Here, Avila advances no compelling reason to review his case, and none exists. Indeed, the crux of Avila's complaints stem from the lower court's application of Article 11.073—which provides a purely statutory, non-constitutional pathway to habeas relief in cases involving newly available scientific evidence. To that end, this Court lacks jurisdiction to hear them. Even more, Avila provides no basis for federal relief for his unknowing use of false testimony claim—which stems solely from state law. And this Court has never recognized a freestanding claim of actual innocence. Put plainly, Avila's requested relief in the present petition finds no footing in federal constitutional law. Beyond that, all of Avila's claims presented to this Court are unsupported by the record below.

Additionally, as Justice Stevens noted, concurring in the denial of an application for a stay in *Kyles v. Whitley*, 498 U.S. 931, 932 (1990):

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Finally, Avila's conviction and sentence became final when this Court denied certiorari review on direct appeal on March 22, 2004. *Avila v. Texas*, 541 U.S. 935 (2004).Thus, the State's interest in finality outweighs Avila's interest in the retroactive application of any new rule of constitutional law. *Teague v. Lane,* 489 U.S. 288, 309-10 (1989) (plurality opinion). Although Avila's claims are not raised in a federal habeas petition, a grant of certiorari review in this Court would have the same impact upon the finality of Avila's conviction and sentence. Thus, the Court is bound to consider the issues raised *only* in light of clearly established constitutional principles dictated by precedent as of March 22, 2004. *Penry v. Lynaugh,* 492 U.S. 302, 314 (1989). With this in mind, it is clear that Avila's Petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction.

I. The Court Lacks Jurisdiction over Wholly State Law Claims

Because Avila's current complaints are predicated on a purely state law avenue for relief—Article 11.073 of the Texas Code of Criminal Procedure—jurisdiction is lacking in this Court.[6]

In his subsequent state application, Avila asserted that "newly available scientific evidence" showed that D.S. could have caused N.M.'s injury by

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[6] Article 11.073 provides, in relevant part:

> (a) This article applies to relevant scientific evidence that:
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> (1) was not available to be offered by a convicted person at the convicted person's trial; or
>
> (2) contradicts scientific evidence relied on by the state at trial.
>
> (b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:
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> (1) the convicted person files an application, in the manner provided by [Article 11.071], containing specific facts indicating that:
>
> (A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and
>
> (B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and
>
> (2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.
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> ***

jumping from a height of eighteen inches and landing on N.M.'s abdomen.[7] In turn, Avila argued that this newly available scientific evidence not only proved that Contin and Raschbaum unknowingly gave false testimony regarding the force required to cause N.M.'s fatal injuries, but that it also showed Avila was actually innocent of the capital crime. SHCR at 4485, 4487, 4497. In other words, all of Avila's requested relief flows from a solely-state law source—Article 11.073. To that end, this Court lacks jurisdiction to consider the claims.

Indeed, "[e]nacted in 2013. . . Article 11.073 provides a *statutory, non-constitutional* pathway to habeas relief in cases in which 'relevant scientific evidence' was not available to be offered at a convicted person's trial or contradicts scientific evidence the state relied on at trial.'" *Ex parte Kussmaul*, 548 S.W.3d 606, 633 (Tex. Crim. App. 2018) (emphasis added). Since the CCA denied all of Avila's arguments predicated on Article 11.073 on the merits, such a substantive state law ruling precludes this Court from entertaining these claims. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991), *holding modified by Martinez v. Ryan*, 566 U.S. 1 (2012); *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977) ("[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from

[7] According to Avila's expert—biomechanical engineer Dr. Chris Van Ee—eighteen inches was the approximate height of the bed in the room where the children were playing the night N.M. died. SHCR at 4469.

review in the federal courts."); *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."). Accordingly, a writ of certiorari should be denied on all the claims brought in the present petition.

II. Avila's False Testimony Claim Fails to Show a Federal Constitutional Violation. Alternatively, Avila's False Testimony Claim Is Unsupported by the Record Below

Even assuming Avila's claim that the State unknowingly presented false testimony is not predicated on the purely state law mechanism of Article 11.073 for relief, his challenge faces another problem. Specifically, the CCA's decision denying this claim did not involve a recognized constitutional claim. Indeed, the false testimony claim raised by Avila in state court alleged a due process deprivation through the State's *unknowing* presentation of false scientific evidence. *See* SHCR at 4485, 4487–88; Pet. at 18–25. Such a claim exists under the CCA's interpretation of the Constitution. *See Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009). But this Court has "never held" that the unknowing use of false testimony violates the Due Process Clause and it is "unlikely ever to do so." *Cash v. Maxwell*, 565 U.S. 1138 (2012) (Scalia, J., dissenting from denial of certiorari). "All we have held is that 'a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.'" *Id.* (quoting *Napue v.*

Illinois, 360 U.S. 264, 269 (1959)) (emphasis in original). Here, the Texas courts have recognized a due process protection in excess of that recognized by this Court. Still, Avila attempts to constitutionalize his unknowing use of false testimony claim by arguing that *Chabot's* "preponderance of the evidence" harm standard "imposes a higher burden to show harm that is actually required under federal law." Pet. at 21–22. Specifically, Avila urges that the federal "reasonable likelihood" standard for false testimony is "akin to the "*Chapman* harmless-error standard." Pet. at 21. But harmless-error is the standard contemplated by *Chabot*, regardless of whether the State knows of the false testimony. *See Chabot*, 300 S.W.3d at 771 ("The knowing use of perjured testimony is a trial error that is subject to a harmless error analysis. . . [a]lthough the present case involves unknowing, rather than knowing, use of testimony, we see no reason for subjecting the two types of errors to different standards of harm.").[8]

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[8] As noted previously, this Court has never held that the State's unknowing use of false evidence can constitute a due process violation. *Cash,* 565 U.S. 1138. And Avila points to no jurisdictions applying the *Chapman* standard of materiality to the unknowing use of false evidence. Pet. at 21–25. Instead, courts that recognize a due process violation based upon the unknowing use of false evidence appear to agree that a due process violation based on unknowing use requires an even higher standard of materiality. *See Sanders v. Sullivan*, 863 F.2d 218, 222–23 (when a credible recantation "would most likely change the outcome of the trial"); *Lewis v. Erickson*, 946 F.2d 1361, 1362 (8th Cir.1991) (if the new evidence "would probably produce an acquittal on retrial"); *Commonwealth v. Spaulding*, 991 S.W.2d 651, 657 & n. 1 (Ky.1999) (In unknowing use cases, "the burden remains on the defendant to show. . . that the conviction probably would not have resulted had the truth been known." This

Additionally, Avila's citations to various federal circuit court decisions, Pet. at 22–25, fail to change the fact that "[t]here is a long line of unbroken precedent from. . . the U.S. Supreme Court holding that false trial testimony does not implicate a defendant's due process rights if the State was unaware of the falsity at the time the testimony was given." *Pierre v. Vannoy*, 891 F.3d 224, 230 (5th Cir. 2018) (Ho, J., concurring), *as revised* (June 7, 2018), *cert. denied*, 139 S. Ct. 379 (2018). "That ends this case[.]" *Id.* at 227 (majority opinion).

Still, the cases Avila relies on lend little to his argument about disparate standards of harm as they all present facts and procedural postures inapposite his case.

For instance, in *Han Tak Lee v. Houtzdale SCI,* 798 F.3d 159 (3d. Cir. 2015), Pet. at 22, the court granted habeas corpus relief to a defendant based on new developments in the field of fire science that undermined the reliability of expert testimony about arson provided at the defendant's trial. *Id.*

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part of the "test places a heavier burden on the defendant than does the test used when perjured testimony is introduced with knowledge or acquiescence of the prosecution."); *Case v. Hatch*, 144 N.M. 20, 24–26 (2008) (holding that "we must distinguish between a 'knowing prosecutorial use of perjured testimony'. . . and a 'mere repudiation of former testimony or admission of perjury,' " and emphasizing the need in the latter context for a "firm belief" that the defendant would most likely not have been convicted); *see also Ex parte Napper*, 322 S.W.3d 202, 242 n. 151 (Tex.Crim.App.2010) (recognizing that "[t]he Second Circuit has suggested that the unknowing use of perjured testimony violates due process if a stronger showing of materiality or harm is made than is required by the *Chapman* standard.").

at 167. There, the Third Circuit determined that the expert testimony on arson "constituted the principal pillar of proof tying [the defendant] to th[e] arson fire and the death of [the victim]," and the remaining evidence at his trial was insufficient to prove the defendant's guilt beyond a reasonable doubt. *Id.* at 167–69. The State conceded that "due to scientific developments since Lee's trial in 1990, the basis for all of this [fire science] evidence is now invalid." *Id.* at 167. Without this invalid evidence, the remaining evidence at trial was insufficient to show that the petitioner was guilty beyond a reasonable doubt. *Id.* at 169. In other words, in *Lee*, the scientific advancement rendered the trial testimony invalid. Here, and as discussed in more detail below, Avila's "newly available" evidence does not render the trial testimony in his case invalid because the biomechanical analysis does not foreclose the possibility that N.M.'s injuries could have been intentionally inflicted.

Next, Avila points to *Gimenez v. Ochoa*, 821 F.3d 1136 (9th Cir. 2016), Pet. at 23. In *Gimenez*, the petitioner presented affidavits from new experts to argue that the prosecution's experts offered false testimony. *Id.* at 1142. The court observed that any contradictions in expert testimony amounted to "a difference of opinion—not false testimony." *Id.* The petitioner had presented "a battle between experts who have different opinions about how [the victim] died." *Id.* at 1143. Gimenez was not entitled to relief because he "presented

literature revealing not so much a repudiation of triad-only ["Shaken Baby Syndrome"], but a vigorous debate about its validity within the scientific community" that "continues to the present day." *Id*. at 1145. Ultimately, the court held that the petitioner could not prove by "'clear and convincing evidence' that 'no reasonable factfinder' would have found him guilty but for the introduction of purportedly flawed SBS testimony." *Id*. (quoting 28 U.S.C. § 2244(b)(2)(B)(ii)). To be sure, Avila's experts disagree with the testimony of Contin and Raschbaum concerning the level of force necessary to cause N.M.'s fatal injuries. But as the court noted in *Gimenez*, "[i]ntroducing expert testimony that is contradicted by other experts, whether at trial or at a later date, doesn't amount to suborning perjury or falsifying documents; it's standard litigation." *Id*. at 1143.

Lastly, Avila looks to *Sanders v. Sullivan*, 863 F.2d 218, 224 (2d Cir. 1988), Pet. at 24–25, noting that "some circuits have eliminated the 'knowing' requirement for all false testimony claims. . ." Pet. at 24. *Sanders* involved a manslaughter conviction predicated upon the testimony of two principal witnesses, a common-law married couple. *Sanders*, 863 F.2d at 219. After his wife died, the husband recanted his testimony and implicated his now deceased wife. *Id*. The husband then signed five typewritten affidavits indicating that he had given false testimony at Sanders's trial. *Id.* at 220. Ultimately, in

relevant part, the Second Circuit found that Due Process was violated when, after a credible recantation of material testimony, the court is left with a "firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." *Id.* at 226. In other words, *Sanders* stands for the proposition that a due process violation occurs when a state leaves a conviction in place after credible recantation of material trial testimony. *Id.* at 225. Here, there has been no such recantation. Rather, as discussed below, both Contin and Raschbaum stood by their trial testimony during Avila's state habeas proceedings.

Even if Avila's unknowing use of false testimony argument involved a recognized constitutional claim worthy of this Court's review, he wholly fails to show the complained of testimony in his case was false. Indeed, Avila's entire argument on this point assumes that the scientific testimony at his trial was "patently false." Pet. at 18. But this is not the case.

The State denies a criminal defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *Giglio v. United States*, 405 U.S. 150 (1972); *Napue*, 360 U.S. 264; *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996). However, to obtain relief on such a claim, a petitioner must show the following: (1) the testimony was actually false, (2) the prosecutor knew it was false, and (3) the testimony was material.

Kirkpatrick v. Whitley, 992 F.2d 491, 497 (5th Cir. 1993). That is, "[c]onflicting or inconsistent testimony is insufficient to establish perjury." *Kutzner v. Johnson*, 242 F.3d 605, 609 (5th Cir. 2001). And further, the perjured testimony is only material if it is also shown that there was any reasonable likelihood that it affected the jury's verdict. *Giglio*, 405 U.S. at 153–154; *see also Barrientes v. Johnson*, 221 F.3d 741, 753, 756 (5th Cir. 2000).

Here, Avila posits that this Court should "grant review to determine whether a conviction that rests on scientific testimony later proven false violates due process." Pet. at 18. Specifically, Avila urges—as he did below—that "[a]dvances in biomechanical engineering now show that. . . D.S. was physically capable of causing the injury to N.M." by accident—such as through horseplay or wrestling—thus rendering contrary testimony by Contin and Raschbaum false. Pet. at 2–3. But the record refutes any notion that Contin or Raschbaum testified falsely with regard to the level of force necessary to cause N.M.'s fatal injuries.

At trial, neither doctor definitively stated with absolute certainty that N.M.'s injuries could not have been accidentally caused. To the contrary, both doctors testified that *they did not believe* the injuries to N.M. could have been accidentally inflicted. *See* 20 RR at 51–52 (Dr. Contin indicating that he did not think "someone accidentally harmed a child to [the] degree" in which N.M.

was injured); 21 RR at 43–44 (Dr. Raschbaum stating that "[t]he magnitude of impact is so dramatic that I can't imagine that this could be any kind of accident."). However, in his subsequent application, Avila presented testimony from three experts that "unequivocally concluded that the infant *could* have died as a result of being jumped on by his older brother." SHCR at 4488 (emphasis added). This, of course, does nothing to refute the possibility that the injury to N.M. could have been intentionally inflicted by Avila. More than that, when faced with the opinions and reports of Avila's new experts, both Contin and Raschbaum stood by their trial testimony. *See* SHCR Supp. 407–08 (excerpts from Raschbaum's affidavit marked as SX 13); SHCR Supp. at 1047 (Contin indicating that even when presented with the affidavits and reports from the defense that his trial testimony would not have changed at all).

Indeed, the simple fact that Avila's state habeas experts disagreed with the testimony of Contin and Raschbaum regarding the level of force necessary to cause the infant's injuries is not dispositive of anything. That is because attempts to prove that evidence was false based on the dueling testimony of experts is generally not sufficient to show a due process violation. *See Boyle v. Johnson*, 93 F.3d 180, 186 (5th Cir. 1996) (holding that "the fact that other experts disagreed" was insufficient to show the State's expert testimony to be

false or misleading); *Campbell v. Gregory*, 867 F.2d 1146, 1148 (8th Cir. 1989) (presenting differing testimony from new expert in motion for new trial did not establish falsity of prior expert's opinion offered at trial).

Even assuming Contin and Raschbaum testified falsely regarding their belief that the injuries to N.M. could not have been accidentally inflicted, it was not material given all the other evidence that Avila intentionally killed N.M. For instance, in addition to there being no evidence in the trial record from Avila or D.S. that D.S. jumped from the bed onto N.M.—Avila admitted to police that he "stamped" on N.M.'s stomach "hard." *See* SX 2. Even more, D.S. testified that Avila stepped on N.M. 19 RR at 133–38. And several witnesses described the bruising on N.M.'s abdomen as resembling a shoeprint. *See* 19 RR at 170–74; 20 RR at 28–30, 53–57; 21 RR at 78. Even Avila's own defense expert testified that the bruising resembled a shoeprint. *See* 22 RR at 24, 48.[9] What is more, the jury had already heard the crux of what Avila's "new" scientific evidence purports to demonstrate—that is, that N.M.'s death could have been accidental. *See* 22 RR at 23 (defense expert Dr. Rodriguez testifying that N.M.'s injuries "could [be] explained in an accidental manner"). And they rejected that premise.

[9] Another defense expert, Juan Rojas, a DPS criminalist trained in footwear analysis, countered this evidence by testifying that Avila's shoes did not match the "impression" on N.M.'s body. 21 RR at 154, 173.

Put plainly, Avila's confession, coupled with the other direct and circumstantial evidence that he intentionally killed N.M. renders him unable to show "any reasonable likelihood" that the complained of testimony from Contin and Raschbaum "could have affected the jury's verdict." *Giglio*, 405 U.S. at 153–54. Thus, even if the Court recognized a claim based on the unknowing use of false testimony, Avila would not benefit from it.

III. This Court Has Not Accepted Actual Innocence as a Cognizable Ground for Habeas Corpus Relief. In Any Event, Avila Fails to Show He Is Actually Innocent of His Capital Crime

Like his unknowing use of false testimony claim, Avila's allegation that he is actually innocent falls flat. In his subsequent application, Avila alleged that the newly available scientific evidence showed he was actually innocent of his capital crime, citing *Herrera v. Collins*, 506 U.S. 390, 400 (1993). SHCR at 4497. But this Court has never recognized a standalone actual innocence ground for relief. *See Herrera*, 506 U.S. at 400. Indeed, a federal habeas court does not concern itself with the petitioner's guilt or innocence—that is an issue of fact for determination by the state courts, not the federal courts on habeas review. *Id*. Rather, the sole question a federal court considers on habeas review is whether the petitioner's federal constitutional rights were violated. *Id*; *see, e.g., Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923) (Holmes, J.) ("[W]hat we have

to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved.").

What is more, in *Hererra*, this Court made plain that even if federal habeas relief could be granted for a standalone actual innocence claim, such relief would be predicated on there being "no state avenue open to process such a claim." *Herrera*, 506 U.S. at 417. Texas has an avenue by which to pursue innocence claims. *Ex parte Elizondo*, 947 S.W.2d 202, 208–09 (Tex. Crim. App. 1996). Federal relief is therefore not permitted.

But even if this Court recognized a freestanding claim of actual innocence as a standalone ground for relief, Avila would not prevail under any standard he posits. *See* Pet. at 30–34. For instance, Avila complains of the "Herculean" burden imposed on him by the CCA's "clear and convincing standard" for deciding such claims. Pet. at 34; App. 2 at 7; *see Ex parte Elizondo*, 947 S.W.2d at 210. But he fails to show that he would fare better under the "extraordinarily high" threshold contemplated by this Court in *Herrera*, 506 U.S. at 417; Pet. at 30–35. In other words, even if this Court wanted to recognize a freestanding claim of actual innocence, Avila's case presents a poor vehicle for achieving that end. That is because, even accepting Avila's new biomechanical analysis evidence, there is nothing in the record indicating that no reasonable juror would have convicted him based on such

evidence. As discussed above, Avila's "new" scientific evidence, at most, shows that it is possible that D.S. could have caused N.M.'s injuries by jumping on him. When that evidence is considered in light of the trial record as a whole—specifically, Avila's confession to intentionally stomping on N.M. and D.S's testimony that he saw Avila stomp on the infant—it "falls far short" of showing Avila is actually innocent of capital murder. *Herrera*, 506 U.S. at 417.

CONCLUSION

For the reasons set forth above, Avila's petition for a writ of certiorari should be denied.

Respectfully submitted,

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