No. 20-5342

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. Introduction

Petitioner Rigoberto Avila, Jr., seeks certiorari from this Court to answer two questions of national importance: (1) whether due process is violated if a key part of the prosecution's case was scientific evidence that later developments have proven false, and (2) whether the Constitution prohibits criminally punishing the innocent. On the first question, his Petition demonstrated that this Court has not yet addressed the scope of due process protections when it can be shown that a fact-finder relied on demonstrably false scientific evidence and that lower courts—both federal and state—employ wildly different standards to resolve this question, thereby requiring intervention from this Court. On the second question, his Petition likewise showed that although this Court has assumed for decades that the Constitution prohibits the criminal punishment of an innocent person, it has never definitively resolved the question; this has resulted in lower courts applying varied standards to determine a matter of fundamental fairness that ought to be governed by a single, uniform national standard. Petitioner also demonstrated that each of these questions has recurring and national importance and that his case presents an ideal vehicle for this Court to resolve them.

Respondent's Brief in Opposition ("Br."), however, fails to respond to these points and instead relies on misrepresenting Petitioner's claims and this Court's jurisdiction to entertain them. At the outset, and contrary to Respondent's brief, the questions presented for certiorari—based on the claims litigated below by Petitioner

and decided by the Texas courts—depend on the scope of protections afforded Petitioner by the Eighth and Fourteenth Amendments to the United States Constitution. As such, this Court plainly has jurisdiction to decide the federal-law questions raised by the Petition.

Respondent's arguments about the substance of Petitioner's claims are likewise misplaced. First, rather than address the issue of whether due process is violated when the scientific evidence used to convict a defendant at trial is later discredited, Respondent's brief instead attempts to cabin this claim within the confines of false testimony jurisprudence. This misses the mark: although Petitioner's claim is *related* to false testimony claims, the import of the federal question presented here is that clarification from this Court is required precisely because due process claims based on later-disproved scientific evidence do not fit comfortably within the analysis traditionally applied to false testimony cases. Moreover, Respondent gamely ignores the new scientific developments richly established by the record of the proceedings below, relying instead on the plainly discredited trial testimony, which misses Petitioner's entire point.

Second, Respondent's argument regarding the constitutional protections afforded an innocent person likewise misunderstands the question presented and the implications of the procedural posture of this case. Contrary to Respondent's suggestion, this is not a claim arising from federal habeas review of a state judgment; this is a petition for certiorari arising from *state* post-conviction proceedings. In such a case, no technical barriers prevent this Court from squarely confronting a question

whose answer it has assumed for decades: whether the United States Constitution prohibits the criminal punishment of an innocent person—and then provide guidance about how to apply that rule.

II. This Court has jurisdiction over Petitioner's claims, which arise under the United States Constitution.

Respondent's assertion that Petitioner's claims arise purely from state law (Br. at 14) is flatly contradicted by the record. Petitioner's First Subsequent Application for Post-Conviction Writ of Habeas Corpus asserted that the State's reliance on scientific evidenced used against him at trial, and later disproven, violated his due process rights—a federal claim distinct from his state-law claim under Article 11.073 of the Texas Code of Criminal Procedure. Habeas App. at 6, 28–52. The convicting court's recommended findings of fact and conclusions of law explicitly ruled on Petitioner's federal due process claim based on the use of this scientific evidence, App. 1 at 47–48 (citing *Ex parte Chavez*, 371 S.W.3d 200, 208 (Tex. Crim. App. 2012) (citing U.S. CONST. AMEND. XIV)), as did the Court of Criminal Appeals of Texas (TCCA), App. 2 at 7 (citing *Ex parte Robbins*, 360 S.W.3d 446, 460–62 (Tex. Crim. App. 2011) (citing, *inter alia*, *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Alcorta v. Texas*, 355 U.S. 28, 78 (1957))). Respondent is simply wrong in claiming that this claim is based purely on state law.

Likewise, it is beyond dispute that Petitioner's claim that criminally punishing an innocent person would violate the United States Constitution is also a federal question. Petitioner's innocence claim in his subsequent state habeas application cited the Fourteenth Amendment, *Herrera v. Collins*, 506 U.S. 390 (1993) (citing the

Eighth and Fourteenth Amendments), and *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994) (en banc) (citing *Herrera*). Habeas App. at 6. The convicting court held that it would consider Petitioner's actual innocence claim in light of the new scientific evidence Petitioner proffered, but ultimately concluded that Petitioner did not meet his burden for this claim. App. 1 at 8, 47. In evaluating Petitioner's innocence claim, the TCCA cited both *Herrera* and *Schlup v. Delo*, 513 U.S. 298 (1995). App. 2 at 7.

In sum, it cannot be disputed that both Petitioner's claims arise under the United States Constitution (and were raised and decided on those grounds in the courts below) and accordingly this Court has jurisdiction. 28 U.S.C. § 1257(a).[1]

III. Respondent's arguments on the merits of Petitioner's claims likewise lack merit.

A. Respondent's attempt to argue that certiorari should not be granted on Petitioner's due process claim falls flat.

The crux of Respondent's argument as to why certiorari should be denied with respect to Petitioner's due process claim revolves around the fact that this Court has not yet elucidated the scope of due process protections for scientific evidence that has been demonstrated to be false. Br. at 17–18. But that is precisely why certiorari

[1] Respondent also curiously argues that review by this Court is inappropriate at this time because Petitioner seeks certiorari from a state court decision denying state post-conviction relief. Br. at 12–13. This complaint ignores the fact that this Court regularly grants certiorari from state post-conviction decisions when it deems it appropriate to do so. *See, e.g.*, *Andrus v. Texas*, 140 S. Ct. 1875 (2020); *Moore v. Texas*, 139 S. Ct. 666 (2019); *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). In addition, Respondent's suggestion that *Teague v. Lane*, 489 U.S. 288, 309–10 (1989), should somehow bar review, *see* Br. at 13, likewise lacks merit, as this Court has announced and applied new rules in cases arising from state collateral review, *see, e.g.*, *Montgomery*, 136 S. Ct. at 732.

should be granted; as the Petition explains, guidance from this Court is necessary to determine the contours of these due process protections. Pet. at 18.

Respondent's remaining arguments likewise lack merit. At the outset, Respondent fails to acknowledge that Petitioner seeks certiorari based on the existence of new scientific evidence that demonstrates that the evidence used to convict him at trial was false. As the Petition makes clear, this situation does not present a garden-variety false testimony claim. In addition, Respondent also fails even to acknowledge the new scientific evidence on which Petitioner relies, focusing instead solely on the now-discredited testimony that was adduced at trial. But it is precisely that new testimony that establishes a due process violation arising from Petitioner's conviction. And in fact, the trial testimony on which Respondent relies actually supports, rather than refutes, Petitioner's claim that later-developed scientific evidence fatally undermines the testimony used to convict him at trial. For example, Respondent points to trial testimony that neither doctor who testified believed that the injuries to N.M. could have been accidentally inflicted. Br. at 22 (citing 20 RR 51–52, 21 RR 43–44). This just proves Petitioner's point: the information presented to the jury about the amount of force required to produce the injuries to N.M. was simply incorrect.

In addition, Respondent's labored attempt to distinguish the cases cited in the Petition misses Petitioner's point and again actually *supports* this Court granting the Petition. *See* Br. at 18–21. Petitioner's cases demonstrate that lower courts are applying widely different standards in evaluating due process claims based on

advances in science that undermine a conviction. *See* Pet. at 22–25; *compare Lee v. Superintendent Houtzdale SCI*, 798 F.3d 159, 161 (3d Cir. 2015) (employing fundamental fairness test), with *United States v. Ausby*, 916 F.3d 1089, 1090–92 (D.C. Cir. 2019) (applying *Napue* standard), and *Sanders v. Sullivan*, 863 F.2d 218, 224 (2d Cir. 1988) (applying "knowing" requirement while still applying *Napue* standard). That the factual circumstances of these cases differ, *see* Br. at 18, is coincidental, unremarkable, and beside the point at the certiorari stage. What these cases demonstrate is that guidance from this Court is needed, to provide courts a uniform standard to use in resolving such claims.

B. Respondent's arguments regarding the actual innocence question fare no better.

Respondent's brief assumes the opposite of what decades of this Court's cases have presumed: that the United States Constitution prohibits the criminal punishment of a person who is actually innocent of the crime of conviction. *See* Br. at 25; *cf. McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013); *Dist. Atty's Office v. Osborne*, 557 U.S. 52, 71 (2009); *House v. Bell*, 547 U.S. 518, 554 (2006); *Schlup v. Delo*, 513 U.S. 298, 314 n.28 (1995). If anything, Respondent's position only confirms the argument made in Petitioner's petition for certiorari—review should be granted to settle this important and recurring constitutional question once and for all. This Court's intervention is likewise warranted to resolve the question of what standard a defendant should be required to meet to prevail on such a claim. Although Respondent claims that Petitioner cannot meet his burden, Br. at 26, Respondent's Brief concedes that different courts have imposed different burdens; if anything, this

demonstrates the need for clarity from this Court to resolve the scope of constitutional protections afforded an innocent person.

Respondent's arguments concerning the procedural posture of Petitioner's case are also misplaced. *See* Br. at 25–26. First, this Court is not, contrary to Respondent's assertion, *see* Br. at 25, sitting in federal habeas; this action arises from a state court decision in post-conviction proceedings. Thus, the notions of comity that limit the role of federal courts when reviewing state court proceedings are absent here. Second, to the extent Respondent claims that federal courts should consider only whether a defendant's federal constitutional rights are being violated, *see* Br. at 25, that is precisely what Petitioner is asking this Court to do: to determine the scope of constitutional protections to which Petitioner is entitled. This Court is the final arbiter of the scope of those guarantees, and has a duty to confront and resolve disputes about how they should be interpreted.

CONCLUSION

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

Respectfully submitted this 1st day of December, 2020.

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