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20-7802

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL GREEN — PETITIONER
(Your Name)

vs.

ILLINOIS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

ILLINOIS SUPREME COURT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael Green, pro-se
(Your Name) #K-91229

P.O. BOX 112
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Joliet, IL 60434
(City, State, Zip Code)

(none)
(Phone Number)

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Illinois Appellate Court court appears at Appendix B to the petition and is

- ☒ reported at 2020 IL App. (5th) 170462-4; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from state courts:

The date on which the highest state court decided my case was 11/18/20.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

QUESTION(S) PRESENTED

(1) Whether there exists a Fundamental Miscarriage of Justice where the Petitioner's conviction rested on Testimony concerning "Shaken Baby Syndrome" that a jury could find unreliable in light of the New Scientific and legal developments cited in his state post-conviction petition and attached documentations?

(2) Whether there exists a Substantial Constitutional Right Under Due Process of Law

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment of the United States Constitution (Due Process)

Sixth Amendment of the United States Constitution (Fair Trial)

Fourteenth Amendment of the United States Constitution (Due Process Clause)

725 ILLCS 5/122-1 (West 2017)

STATEMENT OF THE CASE

On April 1, 2004, the State charged the Petitioner, Michael Green with first degree murder in the death of his two-year-old step-daughter Zariah Harrison. (R. 21) The night of the incident, petitioner's cousin and his girlfriend were at the house with Green, Zariah's mother, and the two children. (R. 409-11, 424) In the night, Jason saw Green taking Zariah back upstairs to bed. (R. 418) He did not see any injuries or think anything was wrong. (R. 422) His girlfriends also did not think Zariah seemed injured. (R. 430) Jason said that he likely told police that Green was upset because Zariah was crying, and he had to keep getting up to take care of her. (R. 417) Petitioner "always took care of the kids." (R. 417).

Thereafter, once Zariah was found not breathing, petitioner was interrogated by the police three times. (R. 468) In the first interrogation, Green denied any involvement. (R. 400-01, 468). In the second one, petitioner indicated that he hit Zariah in the face and that she fell

off of the counter; and in the final interrogation, he added that he punched her in the stomach. (R. 454-55, 472-74) The state played the video of the third interrogation at trial. (R. 473-74)

The pediatric neurosurgeon testified that Zariah had injuries to both hemispheres of her brain and a possible non-displaced skull fracture, a large complex liver laceration, and a rib fracture but no skull fracture. (R. 293-94, E134, V2) He testified that being hit in the face and falling from a kitchen counter would not explain these injuries, which were similar to those resulting from a high speed car accident. (R. 300-01)

The doctor testified that shaken infant syndrome ("SIS") refers to "a constellation of symptoms that occur after a child has suffered a non-accidental trauma," including retinal hemorrhages and subdural hematomas. (R. 302) Zariah's injuries had "some element of impact

injury to them," but some of the injuries could be explained by "being violently shaken." (R. 303) He suspected, via an affidavit, that Zariah was "in all likelihood the victim of non-accidental trauma." (R. 304) In his opinion "[t]he magnitude of force required to produce these would be of sufficient magnitude that a reasonable adult could realize that it would likely cause injury or death to a child" and that Zariah's injuries had to have been sustained within a day or so before he saw her. (R. 305-07)

A forensic pathologist testified that retinal hemorrhages are "one of the markers of shaken baby syndrome," and that Zariah "was vigorously shaken" and also "sustained blunt force injury." (R. 384-85). She testified that a blow would probably have caused the abdominal injuries, those injuries could have caused death alone, and that

zariah died from a closed head injury and blunt abdominal trauma. (R. 394, 396)

The defense did not put on evidence. (R. 483) Counsel requested instructions on involuntary manslaughter-- which the court denied, concluding that the severity of the injuries negated recklessness. (R. 487, 492) The jury found Green guilty of first degree murder. (R. 544). At sentencing, the trial court stated only that it had accepted and reviewed the PSI, heard the arguments, and considered all the mitigating and aggravating factors. (R. 564) Green was then sentenced Green to 60 years in prison. (R. 564)

Direct appeal and initial post-conviction:

On direct appeal, Green claimed in the denial of his motion to suppress statements and denial of instructions on involuntary manslaughter, which the Illinois Appellate Court affirmed.

On May 19, 2008, Green filed a

pro-se post-conviction petition.

He presented claims concerning jury selection and admission of prejudicial photographs, the trial court dismissed the petition during the first stage.

On appeal, counsel moved to withdraw, and the Illinois Appellate Court allowed it, thereby affirming the dismissal.

Successive post-conviction proceedings:

On May 1, 2017 Green filed a pro-se Motion For Leave to file a successive post-conviction petition challenging his 60 year prison term as unconstitutional as applied to him based on his age of 22 and his characteristics. He submitted facts indicating a troubled childhood, and filled with abuse and unresolved trauma. He claimed he was immature and should not have received a de facto life sentence.

Green later filed a supplemental

petition asserting a claim of actual innocence supported by the "advances in medical science regarding 'Shaken Baby Syndrome / Abusive Head Trauma' since his trial. In the addendum, he set forth both an actual innocence and an effective assistance of counsel claim based on this science. He submitted the statements of witness referencing pre-existing injuries or falls and an amicus brief outlining the relevant scientific developments. The trial court denied Green's leave to file his petition. He appealed and on June 10, 2020 the Illinois Appellate Court affirmed the denial of the Motion for Leave. People v. Green, 2020 IL App (5th) 170462-4. He then filed a petition for Rehearing which the Appellate Court denied on July 31, 2020. Green's subsequent PLA was denied by the Illinois Supreme Court on 11/18/20

REASONS FOR GRANTING THE PETITION.

I.

THERE EXISTS A FUNDAMENTAL MISCARriage OF JUSTICE WHERE THE PETITIONER'S CONVICTION RESTED ON TESTIMONY CONCERNING "SHAKEN BABY SYNDROME" THAT A JURY COULD FIND UNRELIABLE IN LIGHT OF THE NEW SCIENTIFIC AND LEGAL DEVELOPMENTS CITED IN HIS STATE POST-CONVICTION PETITION.

Michael Green maintains that he is actually innocent of the offense of first-degree murder of Zariah Harrison. Newly discovered scientific evidence concerning

Sudden "Shaken Baby Syndrome" supports his claim and shows that there does exist a Fundamental Miscarriage of Justice of one who is actually innocent. Green's Rights to Due Process of Law and a Fair Trial were violated under the United States Constitution where his conviction was based on unreliable neurological and forensic evidence. The Illinois reviewing courts declined to grant relief on this substantial constitutional claim, so he implores this Court to Grant review.

Green presented this claim in his successive post-conviction petition filed in May of 2017 with Circuit Court of Madison County, Illinois. As required under Illinois Law, Green filed a motion

requesting Leave to File and proceed with his successive petition pursuant to 725 ILCS 5/122-1.2 (c). He attached an exhibit of a Brief detailing the new developments in "SBS" which clearly supported his allegations. The trial court denied Green's Motion for Leave to file his successive petition. Subsequently the Illinois Appellate Court for the Fifth Judicial District Affirmed the denial order. (see People v. Green, 2020 IL App. (5th) 170462-4, Appendix A). The Illinois Supreme Court denied Green's Petition For Leave to Appeal. (see Appendix B).

The United States Supreme Court has recognized that the

facts upon which the claim of actual innocence is based upon could not have been discovered previously through due diligence to demonstrate a "fundamental miscarriage of justice" and that absent constitutional error, "no reasonable juron would have convicted him in light of the new [reliable] evidence." McQuiggin v. Perkins, 569 U.S. 383, 396 (2013). This Court set forth the above standard in Schlup v. Delo, 513 U.S. 298, 327 (1995).

More importantly, in Herrera v. Collins 506 U.S. 390, 417 (1993) the Supreme Court left open the possibility that ~~if~~ there was no avenue of post-conviction relief in the State Court, a petitioner could

bring a claim of "actual innocence" to the Federal Court. Although a petitioner would have to make "a truly persuasive demonstration of actual innocence." Herrera id.

Green contends that his claim of actual innocence is based on newly discovered - reliable scientific evidence which debunks the evidence at trial on "SBS," see Keith A. Findley, Patrick D. Barnes, David A. Moran, Waney Sgaler ("Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting it Right") 12 Hous. J. Health L. & Policy 209, 214 (2012). This science was not presented at Green's trial, in fact it was not available until at least seven-to-eight years after his conviction.

At trial the prosecution theorized that petitioner's statement to the police during his second interrogation (where a 'Detective' told Green his original statement was not matching medical evidence) that Zariah had fallen off the counter and his third video taped statement were false because a fall could not cause the child's death. The State presented two witnesses: Dr. Jeffrey Leonard the attending pediatric neurosurgeon who testified that Zariah's death and her injuries were "non-accidental" and were caused by SBS as if she was "violently shaken. The second witness was Dr. Raj Nanduri, a forensic pathologist who testified that in his opinion sustain injuries and died from SBS.

The new scientific evidence detailed in Green's post-conviction petition and Appeal placed the medical evidence - and put the evidence on mens rea and causation as a whole - in a new light. The factual allegations and supporting materials were taken as true by the Illinois Courts, however they ignored the obvious unreliability of the trial testimony based on said new evidence. The State Court's refusal to hear this new evidence rendered the State process "ineffective". The prosecution relied on this flawed opinion testimony for their argument of Green's guilt of first-degree murder, inter alia that a fall could not cause these injuries. Thus, this Court should grant review of a seriously flawed conviction.

It is also noteworthy that the trial court relied on this questionable opinion testimony to deny Green a lesser degree instruction of involuntary manslaughter. Instead, the judge succumbed to the presentation of the flawed science at trial.

The state relied heavily on testimony from a treating doctor and the medical examiner that attributed the decedent's brain injuries and retinal hemorrhages were to SBS and claimed that the force necessary to cause these injuries meant not only that she was abused but that the person responsible must have known that his actions would cause great bodily harm. (R. 300-06, 522, 525, E52). These opinions were grounded in research that has

Since come under much scrutiny and has been rejected by many in the medical field. The scientific advancements are well-documented in case law decided long after his trial, and after he filed his initial post-conviction proceedings.

See e.g. State v. Edmonds, 2008 WI App 33 ¶¶ 12, 15, 23 (reversing and remanding for a new trial, noting "a shift in mainstream medical opinion" regarding traumatic head injuries and shaken baby Syndrome over the past decade); People v. Bailey, 999 N.Y.S.2d 713 (Co. Ct. 2014), (noting "there now is general agreement that short distance falls can cause death," and that "even falls of just a few feet generate levels of force and velocity that exceed known thresholds for brain injury, which

is far more force than an adult human can generate by shaking). The problems with SBS diagnosis and research is detailed at length in the Article cited by petitioners, "Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting it Right" (Findley Keith, et al., 12 Hous. J. Health L. & Policy 209 (2012)). It outlined how "it is no longer generally accepted that short falls can never cause the triad, that there can be no period of lucidity between injury and collapse (a key element in identifying the perpetrator), or that massive force - typically described as the equivalent of a multi-story fall or car accident - is required." Id. at 214. These were exactly the basis of Drs. Leonard and Nauduri's opinion at trial!

"[I]t is more likely than not that no reasonable juron would have convicted him in the light of the new evidence," Schlup v. Delo, 513 U.S. 327. The scientific evidence cited in Green's state successive petition undercuts the medical examiner's trial testimony and strengthens the credibility of petitioner's previously unsupported statements. This is exactly the sort of factual issues envisioned in Schlup and its progeny. In sum, Green has not afforded the opportunity to proceed in his successive post-conviction petition. The new evidence does support his claim of Actual Innocence. His Rights to Due Process and a Fair trial were violated under the 5th, 6th and 14th Amendments.

Green's case should be reviewed by the Supreme Court based

Not only on the new reliable scientific evidence on SBS, but because such science must be accepted by all courts. Similar to the science of DNA or Brain Maturity which this Court recognized and adopted, it should now undertake Green's case to establish same. This case demands review also where states like Illinois refuse to be in lock-step with the science of SBS.

II.

PETITIONER HAS A SUB-
STANTIAL RIGHT UNDER
DUE PROCESS OF LAW TO
HIS FREESTANDING CLAIM
OF ACTUAL INNOCENCE.

Michael Green asserts a free-standing claim of actual innocence and that his substantial right to Due Process of Law under the 14th Amendment of the United States Constitution was violated. As detailed in Ground I. herein, the claim is supported by new and reliable scientific evidence. The actual question before this court is whether a petitioner can assert such a claim of innocence based on new evidence under the 14th Amendment.

This Court has left this question open since its decision in Herrera v. Collins, 506 U.S. 390 (1993). The Herrera court held that "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Id.* at 417. The high court did not say it was impossible to show a due process violation for actual innocence. Thereby it left the door open for such a challenge. In less than two years this Court decided Schlup v. Delo, 513 U.S. 298 (1995) and established what was necessary to establish a fundamental miscarriage of Justice, albeit on procedural grounds. Then in McQuiggin v. Perkins, 569 U.S. 383 (2013) the Court touched on a free standing claim, but declined to squarely address it. The most recent

Decision by this Court came in Howe v. Bell, 547 U.S. 518 (2006), there the majority held that a petitioner who was actually innocent should be allowed to proceed with his claim. See State v. Edmonds, 2008 WI App 33

Since this Court has never ruled that such a freestanding claim is barred for a non-capital sentenced defendant, Green asks review where his right to due process of law was violated by the use of flawed opinion testimony by a treating physician and a medical examiner on SBS as a cause of injury and/or death of the victim. It defies logic to preclude the instant claim. Our system of justice should not tolerate

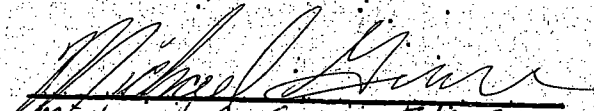
a fundamental miscarriage
justice of an innocent person.
Indeed our American jurisprudence
requires proof beyond a reason
doubt on reliable and/or credibility
evidence - to allow a conviction
like Green's to stand in the
face of new reliable scientific
evidence thwarts our system
of justice.

This Court should allow
review, if nothing else, to
establish an avenue for peti-
tioners like Green to present
a claim of actual innocence
under the 14th Amendment.
Justice Demands it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Michael A. Green #K-91229

Date: February 16, 2021