No. 22-569

In the
Supreme Court of the United States

IN RE CHRISTOPHER DUNN,
Petitioner.

On Petition for a Writ of Habeas Corpus in the
Supreme Court of the United States

BRIEF OF MISSOURI IN OPPOSITION

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QUESTION PRESENTED

1. Does the Constitution require a State to set aside a jury's verdict, rendered after a trial that was free from constitutional error, based on unreliable evidence presented decades after the original trial?

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STATEMENT OF THE CASE

Christopher Dunn is not innocent and no court has said otherwise. In 1990, Dunn shot at Ricco Rogers, Demorris Stepp, and Michael Davis, three young boys who were sitting on a porch. *State v. Dunn,* 889 S.W.2d 65, 69 (Mo. App. 1994). Dunn's shots hit and killed Rogers and narrowly missed Stepp and Davis. The two surviving boys knew Dunn from the neighborhood, immediately identified him as the shooter, and testified against him at trial. *Id.* The jury believed their testimony and found Dunn guilty of first-degree murder, two counts of first-degree assault, and three counts of armed criminal action. *Id.*

Over the years, Dunn has pressed uncredible and contradictory theories challenging his convictions.

During the initial state collateral-review proceedings, Dunn called his mother and sister to testify that he had been home and talking on the phone around midnight on the night of the murder. *Id.* at 77–78. But Dunn's mother had told police that Dunn left the house around 11:00 p.m. on the night of the murder and had not returned until 2:00 a.m. *Id.*; PCR Tr. at 11–12. She also provided police with clothes Dunn had been wearing that matched the description of clothes Dunn was wearing when he shot Rogers. *Dunn,* 889 S.W.2d at 78.

Dunn also claimed that Nicole Williams[1] would testify that she was talking with him on the phone near the time of the murders, but Williams never testified on Dunn's behalf—even after the hearing was continued in an attempt to secure her testimony. *Id.*

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[1] Nicole Williams did testify at the habeas hearing, but her name was Nicole Bailey by that time.

Dunn testified that, while he was in prison, he heard from other inmates that Dwayne Rogers, Ricco's brother, had told people that Dunn was not the person who killed Ricco, and that Dwayne knew who the identity of the "real" killer. *Id.* at 76. But Dunn's trial counsel testified that she had tried to contact Dwayne before trial and Dwayne's mother had told counsel that "[Dwayne] had nothing to say and knew nothing about it." *Id.*

Dunn's collateral-review evidence was unpersuasive, so he changed his claims over time.[2] In 2017, Dunn filed a state petition for a writ of habeas corpus and the habeas court held an evidentiary hearing. App. 3a. In the intervening twenty-seven years, the boys who had testified against him—Stepp and Davis—had become hardened criminals. App. 9a–12a.

At the time of the state habeas hearing, Stepp was serving life without parole for killing his girlfriend, and Davis could not appear at the hearing because he was evading law enforcement in the state of California. *Id.* Stepp and Davis[3] have now told inconsistent

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[2] As Dunn notes, the habeas court found that Dunn's claim of innocence was "corroborated" by evidence from the initial-review collateral proceeding, but the only court to observe the testimony of the witnesses in that case apparently did not find them to be credible. Further, this evidence was not new evidence as Dunn knew about it at the time of trial but chose not to present it for strategic reasons.

[3] Davis has never given testimony recanting his trial testimony, but Dunn submitted written statements purportedly made by Davis.

stories about Rogers's death in which Stepp has sometimes recanted his identification of Dunn as the shooter. App. 9a–13a. Their statements have shown a willingness to say anything in hopes of some perceived benefit. App. 9a–10a.

Dunn also presented testimony from Eugene Wilson, who recently claimed to be a third witness to the shooting of Rogers. App. 13a–14a. But Wilson's testimony does not support Dunn's claims because Stepp and Davis have always maintained that they were the only people present at the scene of the murder. App. 10a. Indeed, in one of the few consistencies for Stepp between his two testimonies, he expressly denied that Wilson could have been an eyewitness to the crime. Habeas Hr. Tr. at 35. And during the initial investigation, another witness told police that Wilson was with a group of boys *who were not present* when Rogers was shot. Habeas Resp. Ex. I at 22.

After reviewing all the evidence, the habeas court did not find that Dunn was innocent. App. 19a–20a. The court found that it would be difficult for the State to convict Dunn nearly three decades after his original trial. App. 22a. From Stepp's uncredible hearing testimony and Davis's alleged affidavits, the habeas court found it was "next to impossible to determine which version of events . . . [was] the most credible." App. 10a.

The habeas court found that Dunn's evidence showed gateway innocence sufficient to allow review of his defaulted constitutional claims. App. 22a. But that procedural finding was not a finding that Dunn was factually innocent of his crimes.[4] The court then

[4] Under Missouri law, a finding of gateway innocence is a procedural finding permitting review of defaulted claims of constitutional error and "should

found that Dunn's constitutional claims were meritless and there was no basis to set aside his conviction. App. 22a–28a.

The habeas court denied Dunn's claims for relief. App. 28a. Dunn filed subsequent habeas petitions in the Missouri Court of Appeals and the Missouri Supreme Court, and those petitions were summarily denied.[5] Dunn sought permission from the United States Court of Appeals for the Eighth Circuit to file a successive federal habeas petition, but the Court did not authorize a successive petition. App. 1a.

REASONS FOR DENYING THE PETITION

Dunn's petition is not about "actual innocence." Instead, the petition presents a claim from a "convicted defendant who has had a full and fair trial but later [was] able to convince a habeas court" that the State would not be likely to convict him at a trial held today. *See In re Davis,* 557 U.S. 952, 955 (2009) (Scalia, J., dissenting). So Dunn really asks this Court to create a right to supplant the jury's verdict with alternative factfindings made by a habeas court decades after the original trial.

Dunn's request for a constitutional right to alternative factfindings is foreclosed by the high standards

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not be trumpeted as a declaration of innocence." *State ex rel. Koster v. McElwain,* 340 S.W.3d 221, 244 n.23 (Mo. App. 2011).

[5] In Missouri, an "appeal does not lie from the denial of a petition for a writ of habeas corpus[,]" *Bromwell v. Nixon,* 361 S.W.3d 393, 397 (Mo. 2012), but prisoners are able to file subsequent petitions in the Missouri Court of Appeals and the Missouri Supreme Court.

that AEDPA[6] imposes on this Court's review of state convictions. This Court cannot disturb the habeas court's decision denying Dunn's state petition unless that decision contradicted or unreasonably applied this Court's "clearly established" precedent. 28 U.S.C. § 2254(d); *White v. Woodall,* 572 U.S. 415, 426–27 (2014). Even if this Court were inclined to reconsider or extend its holding in *Herrera v. Collins,* 506 U.S. 390 (1993), this Court would still be required to deny Dunn's petition. *White,* 572 U.S. at 426–27.

I. The Court should deny the petition to respect our system of dual sovereignty.

"To respect our system of dual sovereignty," this Court and Congress have "narrowly circumscribed" federal habeas review of state convictions. *Shinn v. Ramirez,* 142 S. Ct. 1718, 1730 (2022). The States are responsible for enforcing criminal law and for "adjudicating constitutional challenges to state convictions." *Id.* at 1730–31 (quotations and citations omitted). Federal intervention intrudes on state sovereignty, imposes significant costs on state criminal justice systems, and "inflict[s] a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* at 1731 (quotations and citations omitted).

To avoid the harms of unnecessary federal intrusion, "Congress and federal habeas courts have set out strict rules" requiring prisoners to present their claims in state court and requiring deference to state-court decisions on constitutional claims. *Id.* at 1731–32; § 2254(d), (e).

Dunn petitioned for federal habeas review, his

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[6] The Antiterrorism and Effective Death Penalty Act of 1996.

claims were denied, and that denial was affirmed by the United States Court of Appeals for the Eighth Circuit and this Court. *Dunn v. Dormire,* 532 U.S. 928 (2001). Dunn sought successive federal habeas review, based on his claims that the jury's verdict was wrong, but he did not meet the applicable standard. App. 1a. Though AEDPA's bar on successive petitions does not apply directly to petitions filed in this Court, the limits in 28 U.S.C. § 2244(b) "certainly inform [this Court's] consideration of original habeas petitions." *Felker v. Turpin,* 518 U.S. 651, 663 (1996).

Congress has decided that federal courts should not grant successive habeas relief based solely on factual challenges to the jury's verdict following a trial free from constitutional error. § 2244(b)(2)(B). Although Dunn claims he could present new evidence that could satisfy part of the applicable standard, he admits he cannot show that "*but for constitutional error,* no reasonable factfinder would have found [Dunn] guilty of the underlying offense." § 2244(b)(2)(B)(ii) (emphasis added). This Court may only grant habeas relief if it finds that Dunn's custody violates "the Constitution or laws or treaties of the United States." § 2254(a).

Dunn's request for a re-do of his error-free trial does not entitle him to federal habeas review. Dunn's 1991 trial in state court was a "decisive and portentous event." *Wainwright v. Sykes,* 433 U.S. 72, 90 (1977). That trial was "the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury." *Id.*

> To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the

> witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens.

Id. The focus of state and federal post-conviction review is to ensure that state trial proceedings "be as free from error as possible." In his petition before this Court, Dunn admits that he cannot show any constitutional or procedural error during his trial. Dunn's failure to allege or show a constitutional error at his trial should end this Court's review.

Dunn seeks an end-run around the rules that Congress and federal courts have crafted to maintain our federalist system of government. To respect "Our Federalism," *Younger v. Harris,* 401 U.S. 37, 44 (1971), as well as "finality, comity, and the orderly administration of justice," this Court should enforce the limits on federal review of state convictions and deny Dunn's petition. *Shinn,* 142 S. Ct. at 1733 (quoting *Dretke v. Haley,* 541 U.S. 386, 388 (2004)).

II. The Constitution does not require states to set aside jury verdicts rendered after a fair trial based on unreliable evidence presented decades later.

Dunn claims that, even though his trial was free of constitutional error, his conviction should be set aside because he claims the jury was wrong to find that he was guilty of the underlying offenses. But factual challenges to the jury's verdict do not state a basis for federal habeas relief absent an independent constitutional violation. *Herrera,* 506 U.S. at 417; *see also Dansby v. Hobbs,* 766 F.3d 809, 816 (8th Cir. 2014);

Burton v. Dormire, 295 F.3d 839, 848 (8th Cir. 2002); *Meadows v. Delo,* 99 F.3d 280, 283 (8th Cir. 1996).

Federal courts may only grant habeas relief to state prisoners if their custody violates "the Constitution or laws or treaties of the United States." § 2254(a). "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera,* 506 U.S. at 400; *Burton,* 295 F.3d at 848; *Meadows,* 99 F.3d at 283.

Given the panoply of constitutional rights that apply in criminal trials, the jury's verdict in Dunn's case is the most reliable determination of his guilt, and the Constitution provides no basis for this Court to supplant that verdict. *Herrera,* 506 U.S. at 401. When a criminal defendant is convicted by an impartial jury in a fair trial, there is no reason to think a court reviewing the case decades later could make a more accurate decision. *Id.* at 403–404.

The American justice system carries a strong presumption of innocence *before trial*. *Id.* at 399 (citing *In re Winship,* 397 U.S. 358 (1970)). In addition, the Constitution includes several other provisions to ensure against the risk of convicting an innocent person. *Id.* These provisions include, among others, the right to confront adverse witnesses, the right to compulsory process, the right to an attorney, the right to effective assistance of counsel, the right to jury trial, the right to discover exculpatory evidence from the prosecution, and the right to a neutral judge. *Id.*

Missouri has introduced additional procedural safeguards including the right to an appeal and the

right to post-conviction review with appointed counsel. The rights of the accused place a heavy burden on the State, and they are meant to. *Id.* But "due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person" because that framework would "all but paralyze our system for enforcement of the criminal law." *Id.*

Although it is possible for factfinders to be incorrect, our legal system strongly presumes that a trial by jury, with all of the procedural safeguards the Constitution requires, is the most accurate way to determine the truth of criminal charges. *Id.,* at 403–04; *Neder v. United States,* 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part, dissenting in part) (trial by jury is the "spinal column of democracy"). For that reason, when a court is presented with new-found evidence and believes a jury might not find the defendant guilty at a second trial, there is "no guarantee that the guilt or innocence determination would be any more exact." *Herrera,* 506 U.S. at 403. "To the contrary, the passage of time only diminishes the reliability of criminal adjudications." *Id.*

Dunn has presented no reason to doubt that his trial was fair. Every claim of error he has asserted on direct appeal, post-conviction review, and habeas review has been without merit. If Dunn were to have a new trial today, the result would be *less reliable* than the trial he has already had. *Herrera,* 506 U.S. at 403.

As this Court has found, "When previously convicted perpetrators of violent crimes go free merely because the evidence needed to conduct a retrial has become stale or is no longer available, the public suffers, as do the victims." *Edwards v. Vannoy,* 141 S. Ct. 1547, 1555 (2021).

At trial, Dunn's guilt was supported by the eyewitness accounts of two young boys who watched their friend die as they scrambled for cover from gunfire. They immediately told police that Dunn was the shooter and testified against him. The jury believed those boys. Dunn's claims of innocence are supported by two hardened criminals, one of whom could not even attend the habeas hearing because he was fleeing from justice.

Dunn was found guilty after a fair trial, and the Constitution does not require Missouri to disregard the result of that trial because—thirty years later—a habeas judge is no longer as certain of Dunn's guilt as the jury was in 1991.

III. Dunn's claims fail under clearly established federal law.

Dunn's questions present no basis for this Court's review. His first question asks this Court to change the law to grant him relief and his second and third questions ask what standards this Court would apply if it changed the law. AEDPA provides the clear answer to all three questions: because the state court's decision to deny Dunn relief correctly applied clearly established federal law, this Court must deny the petition. § 2254(d); *White,* 572 U.S. at 426–27.

"The Antiterrorism and Effective Death Penalty Act of 1996 modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under the law." *Bell v. Cone,* 535 U.S. 685, 693 (2002). Under AEDPA, this Court must defer to a state court merits decision unless that decision was contrary to or involved an unreasonable application of federal law as

determined by this Court, or that decision involved an unreasonable determination of fact. *See* § 2254(d).

State courts are required to apply federal law that is clearly established by this Court's precedents. *White,* 572 U.S. at 419. Clearly established federal law, for the purposes of § 2254(d)(1) includes only "the holdings, as opposed to the dicta, of this Court's decisions." *Id.* (quoting *Howes v. Fields,* 565 U.S. 499, 505 (2012)). State courts are not required to "extend [this Court's] precedent" and federal courts cannot "treat the failure to do so as error." *White,* 572 U.S. at 426.

A state court's application of federal law is not unreasonable simply because it is incorrect. *Williams v. Taylor*, 529 U.S. 362, 410 (2000). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fair-minded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Here, the habeas court found that, as a matter of state law, Dunn's freestanding innocence claim did not state a basis for relief. App. 18a–19a (citing *State ex rel. Lincoln v. Cassady,* 517 S.W.3d 11, 20–21 (Mo. App. 2016)). So this Court must deny Dunn's freestanding actual innocence claim here unless the habeas court's decision unreasonably applied clearly established federal law.

"Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera,* 506 U.S. at 400. Though Missouri allows freestanding innocence claims in capital cases, that review is based in the Missouri Supreme Court's statutory responsibility to

review the proportionality of evidence presented in capital cases. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546–547 (Mo. 2003). Neither this Court nor Missouri courts have interpreted the federal constitution to require an avenue for freestanding factual challenges to a jury's verdict.

Dunn's arguments for relief rely almost exclusively on a concurring opinion in *In re Davis,* this Court's dicta in *Herrera,* and gateway innocence analysis from *House v. Bell,* 547 U.S. 518 (2006), *Schlup v. Delo,* 513 U.S. 298 (1995), and *Sawyer v. Whitley,* 505 U.S. 333 (1992). But Dunn cites no clearly established federal law that would have required Missouri to grant his state habeas petition. There is none. *Herrera,* 506 U.S. at 400.

Dunn mistakenly claims that *Sawyer* provided a standard for freestanding actual innocence claims. Pet. at 28. But the *Sawyer* standard applies to allow review of a procedurally defaulted claim where a prisoner presents new evidence that shows he is ineligible for the death penalty under state law. *Sawyer,* 505 U.S. at 348. That is not the case here. Dunn's citation to *Cornell v. Nix,* 119 F.3d 1329, 1334 (8th Cir. 1997), is similarly misplaced. Even if circuit precedent could overturn a state court's decision under § 2254(d)(1), which it cannot, *Cornell* did not recognize a freestanding innocence claim or decide what the standard would be for such a claim.

Because no clearly established federal law required the habeas court to entertain Dunn's factual challenge to the jury's verdict, § 2254(d) requires this Court to deny Dunn's petition.

IV. Dunn's petition is a poor vehicle to answer the question reserved in *Herrera*.

Even if this Court were not required to deny the petition under § 2254(d)(1), and even if the Court were inclined to consider answering questions left open by *Herrera,* Dunn's petition does not present an opportunity to do so.

In *Herrera,* this Court reserved the question of whether "in a capital case, a truly persuasive demonstration of 'actual innocence' made after trial would . . . warrant federal habeas relief if there were no state avenue to process such a claim." 506 U.S. at 417. But that question is not presented here: Dunn is not sentenced to death,[7] Missouri law allows avenues for Dunn to press his claims, and the state habeas court did not find that he had presented "persuasive" evidence of his innocence.

Missouri provides a couple of avenues for Dunn to press his claims. Like all Missouri prisoners, Dunn may petition the Governor of Missouri for clemency. The clemency process has a central, traditional role in reviewing claims of innocence. *Herrera,* 506 U.S. at 411–415. Missouri's governor has broad clemency powers and exercises them as a matter of grace "upon such conditions and with such restrictions and limitations as he may think proper." *State ex rel. Lute v. Missouri Bd. of Prob. and Parole,* 218 S.W.3d 431, 435 (Mo. 2007).

Missouri also allows for a local prosecutor to seek

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[7] If Dunn were sentenced to death, he could raise a freestanding claim of innocence in the Missouri Supreme Court. *State ex rel. Barton v. Stange*, 597 S.W.3d 661, 663 (Mo. 2020); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546–549 (Mo. 2003).

review of a conviction if "he or she has information that the convicted person may be innocent or may have been erroneously convicted." Mo. Rev. Stat. § 547.031 (2021).

Dunn does not agree with Missouri's choice to trust decisions about claims of actual innocence made by noncapital offenders to state executives rather than solely to the judiciary. *See* Pet. at 25, n.5. Still, his complaints that he "should not have to" use avenues of review available under state law present nothing for this Court's review. *See Shinn,* 142 S. Ct. at 1731–32.

If this Court were to establish a judicial standard for constitutional claims of innocence, Dunn could not meet it. Given the "enormous burden that having to retry cases based on often stale evidence would place on the States" the threshold for freestanding factual challenges to a jury's verdict would be "extraordinarily high." *Herrera,* 506 U.S. at 390. So, Dunn's freestanding challenge to the jury's verdict must fail unless Dunn shows that "new facts *unquestionably* establish [his] innocence." *Schlup,* 513 U.S. at 317 (emphasis added).

Dunn cannot meet that standard. At the state habeas hearing, Dunn proved, at most, that Stepp and Davis have now given inconsistent statements that made it "next to impossible" for the habeas court to determine which version of events was the most credible. App. 10a. That is hardly persuasive evidence of innocence. As in *Herrera,* Dunn's evidence "falls far short" of meeting whatever standard a constitutional claim would require. *Herrera,* 506 U.S. at 418–19.

Dunn places far too much import on whether the State could convict him if his trial were held for the first time today. The State has already proven Dunn's

guilt beyond a reasonable doubt. If Dunn's 1991 jury could have watched Stepp and Davis testify and then traveled through time to watch the testimony from the 2018 evidentiary hearing, they would have had to decide which version of events was the most credible. Still, the jury may well have believed the two young boys who watched Dunn kill Rogers and who immediately and consistently identified Dunn as the shooter.

At any rate, Dunn failed to show that he was innocent in state-court proceedings, and his petition presents no basis for any further review.

CONCLUSION

This Court should deny the petition for a writ of habeas corpus.

Respectfully submitted,

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