No. _____

In The
Supreme Court of the United States

JOE D. BRYAN,

Petitioner,

v.

TEXAS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question Presented Number 1

Does the criminal punishment of an innocent person violate the Substantive Due Process Clause of the Constitution?

Question Presented Number 2

If the criminal punishment of an innocent person is unconstitutional under the Substantive Due Process Clause, what standard of review governs the claim?

PARTIES TO PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioner Joe D. Bryan, is currently on parole monitored by Respondent, the State of Texas. This Petition arises from a state habeas corpus proceeding in which Petitioner, Joe D. Bryan, sought relief from the Texas Court of Criminal Appeals. There are no corporate parties involved in this case.

LIST OF RELATED PROCEEDINGS

Ex parte Bryan, No. WR-89,339-01 (Tex. Crim. App. July 1, 2020) (SUGGESTION FOR RECONSIDERATION DENIED)

Ex parte Bryan, No. WR-89,339-01, Trial Court Case No. CR-01319-A (Tex. Crim. App. Jan. 15, 2020) (PETITION FOR WRIT OF HABEAS CORPUS DENIED WITHOUT WRITTEN ORDER)

State v. Bryan, 11-17-00236-CR, 2019 WL 6337604 (Tex. App.—Eastland Nov. 27, 2019, no pet.)

State v. Bryan, 11-17-00236-CR, 2019 WL 4135464 (Tex. App.—Eastland Aug. 30, 2019), *opinion withdrawn and superseded on denial of reh'g*, 11-17-00236-CR, 2019 WL 6337604 (Tex. App.—Eastland Nov. 27, 2019, no pet.)

Ex parte Joe Bryan, No. 11-17-00236-CR, Trial Court Case No. CR-01319-A (Tex. App.—Eastland Sept. 13, 2019) (MOTION FOR REHEARING)

Ex parte Joe Bryan, No. WR-89,339-01, Trial Court Case No. CR-01319-A (Tex. Crim. App. Dec. 21, 2018) (WRIT OF HABEAS CORPUS FILED)

Ex parte Joe Bryan, No. 11-17-00236-CR, Trial Court Case No. CR-01319-A (Tex. App.—Eastland Sept. 18, 2017) (ORDER)

Bryan v. State, 837 S.W.2d 637 (Tex. Crim. App. 1992)

Bryan v. State, 804 S.W.2d 648 (Tex. App.—Eastland 1991), aff'd, 837 S.W.2d 637 (Tex. Crim. App. 1992)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joe D. Bryan respectfully petitions for a writ of certiorari to review the order of the Court of Criminal Appeals of Texas.

OPINION BELOW

The July 1, 2020, Order denying Petitioner's Suggestion for Reconsideration and the January 15, 2020 Order, under review, are unreported. (App. 1a, 2a).

STATEMENT OF JURISDICTION

On July 1, 2020, the Court of Criminal Appeals of Texas denied reconsideration. The petition is timely filed per the Court's March 19, 2020 order extending the time to file any petition to 150 days after denial of rehearing.

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

CONSTITUTIONAL PROVISIONS

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

STATEMENT OF THE CASE

A. Factual Background

In 1989, a jury found Petitioner Joe D. Bryan guilty of murdering his wife of seventeen years, Mickey. One morning, Mrs. Bryan was discovered murdered—shot in the middle of the night in the bedroom of the house she shared with Petitioner. At the time of the murder, Petitioner was two hours away attending a teacher's conference in Austin, Texas. The State's theory was that Petitioner drove his car overnight, through thunderstorms, from Austin back to his home, shot his wife, and drove back to Austin to be seen the next morning. *Bryan v. State*, 804 S.W.2d 648, 650 (Tex. App.—Eastland 1991, pet. denied). The State never presented a murder weapon. It never found any eyewitnesses. It had no theory of motive. (III RR 89–90, App. 4a-5a). Instead, the State's case relied on four pieces of circumstantial evidence: (1) a jar of money,[1] (2) a flashlight with purported blood splatter,[2] (3) a story involving Jack Shaw,[3] an employee at the hotel where Petitioner was staying, and (4) underwear that purportedly had a moist semen stain on them.[4]

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[1] The jar of money, which was usually located in the bedroom safe, was originally reported as missing by Petitioner. Petitioner later located it in his car and reported the finding to authorities himself. (III RR 218, App. 8a; VIII RR 287, App. 43a).

[2] Mrs. Bryan's brother, James Charles Blue, had borrowed Petitioner's car after the murder. After driving it around for five days, he found a flashlight in the trunk. Mr. Blue believed the flashlight had blood and blue fragments on it. (V RR 58-60, App. 17a-19a). Tests identified the "blood" as type O, which was the same as the victim. They could not prove the source of the blood. (VI RR 191, App. 38a). New scientific testing in 2018, however, established the material was not even blood and, whatever it was, it did not belong to Mrs. Bryan. *State v. Bryan*, No. 11-17-00236-CR, at *12, 2019 WL 6337604, at *6 (Tex. App.—Eastland Nov. 27, 2019) (App. 48a-62a).

[3] After Petitioner's arrest, he shared a story that a man by the name of Jack Shaw had asked Petitioner to help him catch housekeeping staff that were suspected of stealing. *Bryan*, 804 S.W.2d at 651. Mr. Shaw was never found.

[4] *See* (IV RR 225-26, App. 11a-12a) The State's expert could only testify that the semen was the same type of secretor as Petitioner. (VI RR 162-66, App. 30a-34a). The State used this to indicate Petitioner was recently in the house because of its moist condition. *Id.*

Petitioner proved from his odometer and his gas purchases that he had only made one trip—from his home to Austin. Moreover, there was a good deal of blood at the scene. The murderer did not clean up in the house, and there was no evidence indicating someone had cleaned up outside the house. However, there was no blood inside Petitioner's car. (V RR 239-40, App. 22a-23a; 284-85, App. 26a-27a).

B. Procedural Background

A jury found Petitioner guilty of murdering his wife in 1985. *State v. Bryan*, No. 11-17-00236-CR, 2019 WL 6337604, at *1 (Tex. App.—Eastland Nov. 27, 2019) (App. 48a-62a). That conviction was reversed. *Id.* Petitioner was found guilty on retrial in 1989. That conviction withstood direct appeal. *Id.*

In 2011 and 2017, Petitioner filed a motion for postconviction DNA testing. *Id.* The 2017 motion for DNA testing was granted, but the State appealed. *Id.* The appellate court vacated the trial court order granting testing and remanded the matter back to the trial court. *Id.*

While the 2017 motion for DNA testing was making its way through the system, Petitioner filed an Application for a Writ of Habeas Corpus. The trial court conducted extensive habeas hearings in 2018. It ultimately recommended denial of relief. On January 15, 2020, the Texas Court of Criminal Appeals issued a "postcard denial" of the application, i.e. it denied the application without written order. Petitioner immediately asked the court to reconsider its denial. On July 1, 2020, the Texas Court of Criminal Appeals refused to reconsider its actions. The instant petition now follows.

I. THE COURT SHOULD GRANT REVIEW TO ADDRESS THE OPEN AND CONTENTIOUS ISSUE OF WHETHER THE CRIMINAL PUNISHMENT OF AN INNOCENT PERSON VIOLATES THE CONSTITUTION

A. The Court has not yet resolved this issue

A.1. *Herrera v. Collins*, where the majority assumed a sufficient showing of actual innocence would render a criminal conviction unconstitutional

In each case where it has confronted a freestanding claim of actual innocence—that is, a claim not tethered to an additional claim regarding the denial of some other constitutional right—this Court has always assumed, without deciding, that the Constitution would bar punishing someone who can persuasively demonstrate his innocence. The first case to present such a claim was the capital murder case of *Herrera v. Collins*, 506 U.S. 390 (1993). There, the majority opinion "assume[d], for the sake of argument . . . that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional . . . . " *Id.* at 417.

Other *Herrera* Justices, though, would have explicitly held that the Constitution bars the execution of an innocent person. Justice O'Connor, joined by Justice Kennedy, observed "the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Id.* at 419. The dissenting Justices—Justices Blackmun, Stevens, and Souter—were even more appalled: "Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience," than executing "a person who is actually innocent." *Id.* at 430 (citing *Ford v. Wainwright*, 477 U.S. 399, 406 (1986); *Rochin v. California*, 342 U.S. 165, 172 (1952)). Nevertheless, the majority assumption without decision prevailed.

A.2. *Schlup v. Delo*, where the Court took a procedural view to craft the gateway use for actual innocence claims

Just two years after *Herrera*, in *Schlup*, the Court crafted a different use for proof of actual innocence. *Schlup v. Delo*, 513 U.S. 298, 416–17 (1995). Mr. Schlup asserted a claim of procedural innocence, as opposed to the substantive claim asserted by Mr. Herrera. *Id.* at 314. "His constitutional claims [were] based not on his innocence, but rather on his contention that the ineffectiveness of his counsel and the withholding of evidence by the prosecution denied him the full panoply of protections afforded to criminal defendants by the Constitution." *Id.* at 315. The Court in *Schlup* was adamant in emphasizing that it was in no way creating a freestanding claim of innocence: "Schlup's claim of innocence does not by itself provide a basis for relief . . . [i]nstead, his claim for relief depends critically on the validity of his *Strickland* and *Brady* claims." *Id.*

A.3. The availability of a freestanding actual innocence claim remains an open question post-*Herrera* and *Schlup*

Decisions since *Herrera* and *Schlup* have likewise observed that whether the Constitution prohibits incarcerating an innocent person remains an open question. As the Court itself has explained,

> Whether a federal right [to be released upon proof of actual innocence] exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo,* that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet. In this case too we can assume without deciding that such a claim exists . . .

Dist. Atty's Office v. Osborne, 557 U.S. 52, 71 (2009) (internal citations omitted).

Just seven years ago, the Court brought up the matter again, saying "[w]e have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013); *see House v. Bell*, 547 U.S. 518, 554 (2006) (assuming without deciding such a claim exists); *In re Davis*, 130 S. Ct. 1, at *3 (2009) (mem.) (Scalia, J., joined by Thomas, J., dissenting) (observing this Court "ha[s] repeatedly left that question unresolved . . . .").

Now is the time to answer this unresolved question. In 2019 *alone*, 150 innocent people were exonerated. *Exonerations Overview,* THE NATIONAL REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=Exonerated&FilterValue1=8%5F2019 (last visited Oct. 27, 2020). Even before DNA set off an avalanche of exonerations based on incontrovertible proof, Justice O'Conner opined, "[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed." *O'Conner Questions Death Penalty*, N.Y. TIMES, July 4, 2001, at A9.

Faced with the fact that the criminal justice system fails, every judicial avenue should remain open for the innocent to remedy such a mistake. Indeed, "[i]n a society devoted to the rule of law, the difference between [actually] violating or not violating a criminal statute cannot be shrugged aside as a minor detail." *Dretke v. Haley*, 541 U.S. 386, 400 (2004) (Kennedy, J., dissenting). As more convictions come under scrutiny, the need to have definitive guidance on the issue continues to grow.

B. Jurists on this Court have disagreed on this issue

Settling whether the Constitution prohibits the criminal punishment of an innocent person is also important because jurists on this Court have expressed diametrically opposed views on this question, contributing to lower courts' uncertainty in an area where clarity is a matter of life and liberty. Like the *Herrera* majority, the *House* majority assumed without deciding that the Constitution forbids incarcerating an innocent person. *See House*, 547 U.S. at 554. Concurring in the Court's judgment concerning Mr. House's *Herrera* claim, Chief Justice Roberts assumed likewise. *Id.* at 556 (Roberts, C.J., concurring in part and dissenting in part).

That same year, Justice Scalia took the opposite approach. In *Marsh*, he acknowledged "[l]ike other human institutions, courts and juries are not perfect." *Kansas v. Marsh*, 548 U.S. 163, 199 (2006) (Scalia, J., concurring). He persisted, however, that punishment of the innocent was simply an evil necessity of the system, saying "[o]ne cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly." *Id.*

Four years later, this Court transferred to the Southern District of Georgia an original habeas petition filed in this Court by a prisoner claiming wrongful conviction. *Davis*, 130 S. Ct. at *1–4. Three Justices observed the Court was correct in rejecting the view that a petitioner could be put to death in the face of new evidence "conclusively and definitively" proving him innocent. *Id.* at *2 (Stevens, J., joined by Ginsburg and Breyer, JJ., concurring). Two Justices vigorously disagreed, noting "[t]his Court has *never* held that the Constitution forbids the execution of a convicted

defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent." *Id.* (Scalia, J., joined by Thomas, J., dissenting) (emphasis in original). The considered but starkly opposing views about the scope of the constitutional protections afforded to a convicted person who may nevertheless be factually innocent illustrates the need for the Court to put the matter to rest.

C. This issue has split the lower federal and state courts

C.1. The federal courts are split

Different federal circuit courts have different interpretations of *Herrera*, which has resulted in inconsistent rules and results. Some circuit courts interpret *Herrera* as creating a total bar to freestanding claims of actual innocence. Others do not take their interpretation of *Herrera* as far. These courts recognize the threshold while describing it as "high" and yet imprecisely defined. Each circuit court treats the matter differently, creating an unequal opportunity to assert actual innocence by prisoners purely due to jurisdiction.

Specifically, some circuit courts interpret *Herrera* to categorically establish there is no such thing as freestanding claims of actual innocence in federal habeas. In the Third Circuit, for example, "[i]t has long been recognized that 'claims of actual innocence based on newly discovered evidence' are never grounds for 'federal habeas relief absent an independent constitutional violation.'" *Fielder v. Varner,* 379 F.3d 113, 122 (3d Cir. 2004) (quoting *Herrera*, 506 U.S. at 400). Likewise, "[t]he Fifth Circuit has rejected this possibility and held that claims of actual innocence *are not cognizable* on federal habeas review." *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003) (emphasis added).

Other circuit courts read *Herrera* a little less strictly. The Sixth Circuit reads *Herrera* as holding "newly discovered evidence does not constitute a freestanding ground for federal habeas relief." *Zuern v. Tate*, 336 F.3d 478, 482 n. 1 (6th Cir. 2003). That said, the Sixth Circuit will still permit *Herrera* claims if the petitioner can link newly discovered evidence to an "independent constitutional violation occurring in the underlying state criminal proceeding." *Id.* (quoting *Herrera*, 506 U.S. at 400). The Seventh Circuit's caselaw is very similar to the Sixth Circuit's caselaw. *See Milone v. Camp*, 22 F.3d 693, 701 (7th Cir. 1994) (citing *Herrera*, 506 U.S. at 400) (establishing that court would consider new evidence of actual innocence "only insofar as it bears upon his [independent] constitutional claims").

Other courts have an even more liberal interpretation of *Herrera*—interpretations *opposite* that of the Third and Fifth Circuits. In the Fourth Circuit, for example, petitioners can "raise a freestanding innocence claim in a federal habeas petition, alleging that, irrespective of any procedural errors, petitioner is innocent . . . ." *Teleguz v. Pearson*, 689 F.3d 322, 328 n. 2 (4th Cir. 2012). The Eighth Circuit likewise recognizes freestanding actual innocence grounds, but it has expressed uncertainty as to the standard of review on such claims. *Cornell v. Nix*, 119 F.3d 1329, 1335 (8th Cir. 1997) (stating the standard "is at least as exacting as the clear and convincing evidence standard, and possibly more so").

And finally, there are circuit courts taking the middle ground and following this Court's lead in recent years. They simply assume without deciding that a freestanding claim of actual innocence is cognizable. The Ninth Circuit falls into this

category. *Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014) ("We have not resolved whether a freestanding actual innocence claim is cognizable in federal habeas corpus proceeding in the non-capital context, although we have assumed that such a claim is viable . . . ."). The Eleventh Circuit takes this middle-of-the-road approach, too. *In re Lambrix*, 624 F.3d 1355, 1367 (11th Cir. 2010).

This issue has had decades of percolation with the circuit courts. The results have been disparate. Some courts will reject a freestanding actual innocence claim outright. Others welcome it with open arms. And still others will acknowledge it but not actually rule on it. The time has come for this Court to intervene and set a standard applicable across the nation's circuit courts.

C.2. The state courts are split, both between themselves and with the federal circuits

The jurisprudence coming from the state courts reflects the federal circuit courts. Some will hear freestanding claims based on this Court's jurisprudence, others forthrightly refuse, and still others fall somewhere in the middle.

The Supreme Court of Montana, for example, reads *Herrera* and *Schlup* together to establish a way of presenting a freestanding actual innocence claim. "To overcome the presumption of guilt that comes with conviction at trial, an actual innocence petitioner must show that new *reliable* evidence, when weighed against the *trial* evidence, demonstrates he is actually innocent of the crime he was convicted of." *State v. Beach*, 302 P.3d 47, 54 (Mont. 2013), *abrogated on other grounds by Marble v. State*, 355 P.3d 742 (Mont. 2015) (emphasis in original).

Texas takes it one step further. There, the Court of Criminal Appeals has explicitly held the incarceration of an innocent person is a violation of the Due Process Clause of the United States Constitution. *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996) (superseded on other grounds by statute). "It follows that claims of actual innocence are cognizable by this Court in a postconviction habeas corpus proceeding whether the punishment assessed is death or confinement. In either case, such claims raise issues of federal constitutional magnitude." *Id.*

At least six states—California, Connecticut, Illinois, Iowa, New Mexico, Missouri—have sidestepped the issue by simply recognizing freestanding claims of actual innocence based on their own state constitutions. *See In re Lawley*, 179 P.3d 891, 897 (Cal. 2008); *Miller v. Comm'r of Corr.*, 700 A.2d 1108, 1110 (Conn. 1997); *People v. Washington*, 665 N.E.2d 1130, 1136–37 (Ill. 1996) (holding "relief has been held to require that the supporting evidence be new, material, noncumulative and, most importantly, of such conclusive character as would *probably* change the result on retrial") (emphasis added); *Schmidt v. State*, 909 N.W.2d 778, 781 (Ia. 2018); *Montoya v. Ulibarri*, 163 P.3d 476, 478 (N.M. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543 (Mo. 2003) (en banc).

At least nine additional states—Alabama, Alaska, Arizona, Hawaii, Maryland, Oklahoma, Utah, Virginia, and Wyoming—have enacted statutory provisions allowing defendants to challenge their convictions based on claims of innocence. *See* Ala. R. Crim. P. 32.1(e); Alaska Stat. § 12.72.020; Ariz. R. Crim. P. 32.1(e); Haw. Rev. Stat. Ann. § 844D-123(a)(5) (giving courts discretion to "order testing after a hearing

if it finds that [among other things,] [t]he application for testing is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice"); Md. Crim. P. Code § 8-301(a) (creating a writ for people claiming "there is newly discovered evidence that . . . if the conviction resulted from a trial, creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined . . . ."); 22 Okl. St. § 1089; Utah Code § 78B-9-402(2)(a)(i)–(v); Va. Code § 19.2-327.11; Wyo. Stat. § 7-12-403(b)(i)–(v).

Collectively, these cases and statutes mark an unmistakable trend of not tolerating the criminal punishment of an innocent person. This approach, however, is not universal. Some states strictly *prohibit* freestanding assertions of actual innocence. Just last year, the Supreme Court of Georgia noted claims of actual innocence are not cognizable in writs of habeas corpus in that state. *Mitchum v. State*, 834 S.E.2d 65, 68 n. 2 (Ga. 2019) (citing *Herrera*, 506 U.S. at 398–417) ("Traditionally, a free-standing actual-innocence claim has not been cognizable as a constitutional claim in habeas corpus, although that remains an unsettled area of the law."). Florida also "does not recognize an independent claim of actual innocence in postconviction proceedings." *Sweet v. State*, 293 So.3d 448, 453 (Fla. 2020), *cert. pending*, No. 20-5786 (Sept. 18, 2020).

Again, there is a wide spectrum of how the state courts approach this issue. Most have ruled on the matter, but how they rule varies widely. At this point, the nation needs the Court to intervene and set a baseline for actual innocence claims.

D. Constitutional rights protecting life and liberty are at stake because punishment of the innocent violates the Substantive Due Process Clause

Apart from the fact of the serious federal and state court splits, the issue at bar implicates constitutional rights designed to protect life and liberty. Centuries of jurisprudence reflect an assumption that no competing legal interest should outweigh vindicating a valid claim of innocence. Blackstone famously opined in the mid-eighteenth century that "it is better that ten guilty persons escape, than that one innocent suffer." W. BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 352 (Joseph Chitty ed.) (London) (1826). Less than a century later, another prominent British legal scholar noted, "[t]he maxim of the law is, that it is better that ninety-nine . . . offenders should escape than that one innocent man should be condemned."[5] THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE AND DIGEST OF PROOFS IN CIVIL AND CRIMINAL PROCEEDINGS 756 (London, J. & W. T. Clarke 1824).

The American Constitution instantiates these same values and thus should be read to incorporate a prohibition on the criminal punishment of a demonstrably innocent person. To whatever extent this principle has not always been clear, answering this question in the affirmative is also supported by this Court's Fourteenth Amendment teachings.

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[5] While well-established in the foundations of English law, the principle of not punishing the innocent is much more ancient. Aristotle himself argued "every one of us would rather acquit a guilty man as innocent than condemn an innocent man as guilty. . . ." 2 ARISTOTLE, PROBLEMS bk. 29.13, at 144–45 (W.S. Hett trans., Harvard Univ. Press 1937). In the Twelfth Century, the Jewish philosopher Maimonides argued "it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death." 2 MOSES MAIMONIDES, THE COMMANDMENTS 270 (Charles B. Chavel trans., 1967). This is a principle as old as civilized humanity.

The Substantive Due Process Clause of the Fourteenth Amendment ought to preclude the incarceration of a factually innocent person. That clause is violated when the government engages in conduct that "shocks the conscience," *Rochin*, 342 U.S. at 172, or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937). Specifically, this Court—when examining a state's criminal procedural process—will ask this fundamental question: was the individual exposed to a procedure offensive to a fundamental principle of justice. *Medina v. California*, 505 U.S. 437, 446 (1992). Traditionally, "[h]istorical practice is probative of whether a procedural rule can be characterized as fundamental." *Id.* While this Court affords deference to a state's decisions regarding crime, it also recognizes an exception when the federal government should impact the state's decision regarding its criminal processes. *Id.* at 445. The incarceration of the innocent without any means of recourse is undoubtedly within the scope of that exception. This Court, in *Medina*, stated,

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Medina, 505 U.S. at 445 (internal citations omitted).

This profound truth is simply put: the authority the people give to the government does not extend so far as to justify punishing the innocent. The

Constitution of the people consequently cannot countenance the government's power to wrongly convict and incarcerate innocent people. Just preservation of life is the irreducible promise of the government to the people upon entry into organized society. This is not an ideal extraneous to the social contract drawn up in the Constitution. Rather, it is one so basic—so human—that articulation of it would have been redundant to common sense. One would never enter a social contract with a government that refuses to commit absolutely to the protection of the innocent. Sacrifice of the innocent offends not only this country's institutional procedural protections but its norms of fairness.[6] And if, given the opportunity to articulate this basic truth, the government refuses to do so, it loses its moral authority.

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[6] Some have asserted, "if some kind of very cruel crime becomes common, and none of the criminals can be caught, it might be highly expedient . . . to hang an innocent man, if a charge against him could be so framed that he were universally thought guilty." John Rawls, *Two Concepts of Rules*, 64 PHILOSOPHICAL REV. 3, 10 (1955) (quoting EDGAR CARRITT, ETHICAL AND POLITICAL THINKING 65 (Oxford, 1947)). Apart from some minor downsides, Carritt posited, sacrificing the innocent would "be perfectly deterrent and therefore felicific." *Id.* At first blush, this argument might inform the social contract construct of the Constitution, i.e. upon entry into society, its members accept that occasional wrongful punishment of the innocent is the necessary price of an otherwise tolerable system benefiting the whole. As Rawls points out, however, an *institution* permitting its officials such authority has "enormous risks." *Id.* at 12. Such a position puts too much power in the hands of government officials. *Id.* Moreover, the governed will not know whether the condemnation of individuals is truly just. *Id.* They will worry that if it could happen to one of their fellow citizens it could just as easily happen to them. These concerns destabilize the confidence of the governed in their governors, to the detriment of the entire institution. *Id.*

Notice, these risks are not based on the efficacy of the procedure by which the government punishes in the innocent, but in the action itself of wrongfully punishing. The problem is not rooted solely in the possibility of wrongful conviction or a process that may result in wrongful convictions, but also in the possibility that a wrongful conviction, once obtained, becomes irrevocable. Rawls found these risks intolerable and concluded such a *system of governance* seeking to "justify taking an action which would be generally condemned" is insupportable even in the cold calculations of the utilitarian tradition. *Id.* at 10, 12. The "disfranchisement of the virtuous" and the "*wrongful* banishment of a citizen" strike deeper than procedural protections. Walter Long, *Appeasing a God: Rawlsian Analysis of* Herrera v. Collins *and a Substantive Due Process Right to Innocent Life*, 22 AM. J. CRIM. L. 215, 231 (1994) (emphasis in original). Even accepting the possibility of wrongful conviction, there must be safeguards in place beyond mere procedural fealty to protect the innocent. Procedure protects against wrongful convictions on the front end of the criminal justice process. But the right not to be wrongly punished is so fundamental to society that it must also have the protection of substantive due process as the ultimate failsafe following a procedurally correct but factually incorrect conviction.

This Court has never directly addressed whether there is a substantive due process right to a freestanding claim of actual innocence. Historical practice of post-conviction relief, however, indicates such a claim is so deeply rooted "in the traditions and conscience of our people" that it is *fundamental*. *Medina*, 505 U.S. at 446. The term "habeas corpus" is a general term that originated from English statutory and common law but has since become enshrined in the Constitution. U.S. CONST. art. I, § 9, cl. 2.; *Carbo v. United States*, 364 U.S. 611 (1961). The purpose of the writ is to ensure the integrity of imprisonment by inquiring into the legality of the individual's confinement. W. DUCKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 3 (1980). This allows the writ to function as a writ of error, with the cornerstone of review being to ensure the constitutional efficacy of each individual's confinement. *Herrera*, 506 U.S. at 400–01.

This history instructs but one logical conclusion: fundamental to the principles of justice and deeply rooted in American history is the legal and moral injunction against punishing the factually innocent. Because of this deeply rooted tradition, the principles of justice require an attainable redress for those wrongly convicted, regardless of whether the procedure used in obtaining the conviction was somehow infirm. A freestanding claim of actual innocence qualifies as a substantive due process claim because it does not rest on a deprivation of a procedural safeguard guaranteed by the Constitution to an accused at trial. Instead, it assumes the government's power to punish has a limit, regardless of whether procedural protections were afforded at trial.

Congress's power to procedurally bar untimely claims must likewise yield for the benefit of the innocent. *McQuiggin*, 569 U.S. at 396 ("Sensitivity to injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations"). The presentation of evidence demonstrating the innocence of a convicted person deprives the government of its authority to continue to subject that person to criminal punishment. Refusing relief to someone who has made a compelling showing of factual innocence shocks the conscience precisely because it is "implicit in the concept of ordered liberty" that judicial review of such a claim should be available.

E. Without a ruling from the judiciary, the actually innocent have little hope for relief in other forms

Up to this point, rather than recognize a freestanding claim of actual innocence the Court has suggested clemency is the appropriate remedy. *See Herrera*, 506 U.S. at 417 ("History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency."). For the first half of the twentieth century, clemency was a regular feature of the criminal justice system. James R. Acker & Charles S. Lanier, *May God—or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200, 212–13 (2000). In modern times, though, "state clemency grants have all but disappeared from the political landscape." Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. STATE UNIV. L. REV. 1121, 1122 (2012) (citation omitted).

This is due, in large part, to years of conventional wisdom and mainstream press accounts presenting executive clemency as political suicide. Michael A.G. Korengold, Todd A. Noteboom & Sara Gurwitch, *And Justice for the Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 363–65 (1996). For example, last year in Texas, traditionally a very politically conservative state, the Board recommended clemency in thirty-eight noncapital cases and did not recommend clemency in any capital cases. The Texas Board of Pardons and Paroles Annual Statistical Report FY 2019, at *23. The Governor did not grant a single petition. His predecessor, in fifteen years of service, granted just seventeen pardons for innocence. Jessica Hamel & Ryan Murphy, *Pardons by Gov. Rick Perry*, THE TEX. TRIBUNE (Aug. 6, 2014), https://www.texastribune.org/library/data/search-texas-governor-rick-perry-pardons/.

So, while there was a time when clemency would have been a legitimate function the Court could rely on to avoid establishing a federal standard for freestanding actual innocence claims, statistics counsel against the wisdom of doing so now. Moreover, and more importantly, the resolution of wrongful convictions falls on the shoulders of the judiciary. As Justice Blackmun observed, "[a] pardon is an act of grace. The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal." *Herrera*, 506 U.S. at 440 (Blackmun, J., dissenting) (internal quotation and citation omitted). This is a matter for the judiciary. No other branch can afford the actually innocent the help they deserve. It is up to this Court to act.

II. THE COURT'S INTERVENTION IS NEEDED BECAUSE JURISDICTIONS RECOGNIZING A FREE-STANDING CLAIM OF ACTUAL INNOCENCE VARY GREATLY IN THE STANDARD OF REVIEW THEY EMPLOY AND HOW THEY APPLY THOSE STANDARDS IN PRACTICE

Even where there is a consensus, there is divergence within that consensus. Among the jurisdictions that do recognize some form of freestanding actual innocence claim, the burdens of proof vary greatly. Moreover, in Texas the court purports to apply the standard of "clear and convincing evidence." In practice, however, it imposes a burden even higher than the one contemplated by the *Herrera* majority. Also, the Texas court has never clarified the scope of the evidence that a court evaluating an actual innocence claim is required to consider, i.e., how should such a court balance the weight of the trial record against new evidence adduced post-trial.

A. The Court has loosely suggested a variety of potential standards, with indications that "clear and convincing" is the most appropriate one for evaluating freestanding claims of actual innocence

For its part, the Court has offered a smattering of loose ideas on the burden standard. Concurring in *Herrera*, Justice O'Connor contemplated a standard that would make relief available only in "truly extraordinary" cases, which she contrasted to "insubstantial and [] incredible" ones. *Herrera*, 506 U.S. at 426–27 (O'Connor, J., concurring). Justice White sought "a *persuasive showing* of 'actual innocence' made after trial." *Id.* at 429 (White, J., concurring) (emphasis added). Justice Blackmun would have required a claimant to show he "*probably* is innocent." *Id.* at 442 (Blackmun, J., dissenting) (emphasis added). In *Davis*, the Court directed the district court to determine whether the evidence "*clearly establishes* petitioner's innocence." *Davis*, 130 S. Ct. 1, at *1.

In *Schlup*, the Court explained not all actual innocence claims are created equal. There are actually two kinds of claims: (i) a freestanding claim of actual innocence stemming from a constitutionally sound trial and (ii) a claim of actual innocence stemming from a constitutionally infirm trial. 513 U.S. at 315–16. The latter is a *Schlup* claim. The standard of proof for this type of claim is that it "is more likely than not that no reasonable juror would have convicted [the petitioner] in the light of the new evidence." *Id.* at 327. In other words, a *Schlup* claim is weighed against a preponderance of the evidence standard. *See id.* at 316.

Freestanding actual innocence claims do not enjoy that same standard. Convictions stemming from a trial that in all other ways was constitutionally acceptable have a higher burden of proof when seeking reversal based solely on actual innocence. *Id.* The Court has never articulated what that burden is, just that it is higher than a preponderance of the evidence. *Id.* The next step up in the schema of burdens of proof is typically the clear and convincing standard.

B. Lower courts recognizing the cognizability of freestanding actual innocence claims utilize a range of different standards

Lower courts already entertaining freestanding actual innocence claims resolve them according to widely disparate standards. Intervention by this Court can thus bring uniformity to this important area of the law. In so doing, the Court is not correcting an "error[] of fact," *Herrera*, 506 U.S. at 400, but rather examining how a legal standard is instantiated in particular facts. Such an analysis, modeling the correct application of a legal rule, will guide the lower courts in maintaining a consistent approach.

Overwhelmingly, the standard of review in courts recognizing freestanding claims of actual innocence is clear and convincing. *See U.S. v. Jones*, 758 F.3d 579, 585 (4th Cir. 2014); *Gibbs v. U.S.*, 655 F.3d 473 (6th Cir. 2011); *Schmidt v. State*, 909 N.W.2d 778 (Ia. 2018); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003); *State v. Beach*, 302 P.3d 47 (Mont. 2013); *Montoya v. Ulibarri*, 163 P.3d 479 (N.M. 2007); *People v. Bryant*, 986 N.Y.S.2d 287 (N.Y. App. Div. 2014); *Courtney v. State*, 307 P.3d 337 (Okla. 2013); *Engesser v. Young*, 856 N.W.2d 471 (S.D. 2014); *Delliger v. State*, 279 S.W.3d 282 (Tenn. 2009); *Elizondo*, 947 S.W2d at 202; *In re Brown*, 810 S.E.2d 444 (Va. 2018); *In re Carter*, 263 P.3d 1241 (Wash. 2011); *Sullivan v. State*, 444 P.3d 1257 (Wyo. 2019). This standard requires the petitioner show no reasonable juror could have found him guilty in light of the newly discovered evidence.

This is not, however, the universal standard across courts accepting freestanding actual innocence claims. In the Eighth Circuit, the standard is "at least as exacting" as clear and convincing "and possibly more so." *Cornell*, 119 F.3d at 1335. The Ninth Circuit (which again simply assumes but has never affirmatively held freestanding claims are cognizable) requires the claimant to "affirmatively prove that he is probably innocent." *Carriger v. Steward*, 132 F.3d 463, 476 (9th Cir. 1997). The opinion in *Carriger* was an en banc opinion where the panel opinion had attempted to establish a clear and convincing standard. *Id.* Therefore, like the Eighth Circuit, the Ninth Circuit has inarticulately indicated the standard of proof is likely higher than clear and convincing. *See id.*

At the state level, some courts demand a standard higher than clear and convincing. For example, in California, evidence of innocence must, if credited, "undermine the entire prosecution case and point unerringly to innocence or reduced culpability." *Lawley*, 179 P.3d at 897 (citation omitted). Connecticut state court imposes a clear and convincing standard and additionally requires the claimant to show the evidence from both the trial and writ proceedings, taken as a whole, is insufficient to support a finding of guilt. Florida, on the other hand, appears to utilize a standard lower than clear and convincing. *Tompkins v. State*, 994 So.2d 1072, 1089 (Fla. 2008) (citing *Rutherford v. State*, 940 So.2d 1112, 1117 (Fla. 2006)) ("[T]he standard in Florida for a newly discovered evidence claim is more liberal than the standard for raising an actual innocence claim in federal courts."). Simply put, federal and state courts are all over the place on the standards they use in evaluating freestanding actual innocence claims. Certiorari is appropriate clarify and unify the standard of review for freestanding claims of actual innocence.

Apart from announcing a universal standard of review of freestanding actual innocence claims, the Court should make clear which evidence the reviewing court should consider in applying the standard. This should include evidence adduced after the conclusion of trial, as this Court directed the district court to do in *Davis*. 130 S. Ct. at *1 (instructing the court to consider "whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence"). But a reviewing court should not close its eyes to other probative evidence of innocence that may have been available at the time of trial but was not presented to the factfinder.

In *Schlup* settings, in fact, the Court has instructed lower courts to make "a holistic judgment about 'all the evidence.'" *House*, 547 U.S. at 539. More recently, Justice Sotomayor, in commenting on denial of a petition for writ of certiorari, observed

> I assume, moreover, that in evaluating a claim of actual innocence as a substantive basis for habeas relief, habeas courts do not blind themselves to evidence of actual innocence presented in prior habeas applications. When confronted with actual-innocence claims asserted as a procedural gateway to reach underlying grounds for habeas relief, habeas courts consider all available evidence of innocence . . . That includes evidence offered in prior habeas applications.
>
> Presumably, the same principle informs a habeas court's evaluation of a substantive claim of actual innocence. If evidence of actual innocence presented in a habeas applicant's earlier habeas applications otherwise satisfies the requirements applicable to a substantive innocence claim, that evidence should not, in my view, be cast off merely because the applicant identified it for the first time in an earlier habeas application.

Reed v. Texas, 140 S.Ct. 686, 689 (2020). Substantive innocence claims demand, at a minimum, that all newly presented evidence be considered.

C. Despite espousing a clear and convincing standard, the court below in practice routinely applies a much higher standard

When it comes to the review of freestanding actual innocence claims, the Texas Court of Criminal Appeals (TCCA) routinely imposes a standard much higher than the clear and convincing standard it purportedly adheres to. "Clear and convincing" is the second lowest standard of review in criminal cases. The TCCA, however, routinely refers to the burden as "Herculean." *Ex Parte Harleston*, 431 S.W.3d 67, 70 (Tex. Crim. App. 2014); *Ex parte Robbins*, 360 S.W.3d 446, 464 (Tex. Crim. App. 2011) (Price, J., concurring) ("That is a 'Herculean' burden, we have said,

and it is meant to be."); *see also Ex parte Henderson*, 384 S.W.3d 833, 835 (Tex. Crim. App. 2012) (noting the "Herculean burden associated with a bare claim of actual innocence"); *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006) ("Establishing a bare claim of actual innocence is a Herculean task."). This, in turn, has created a standard that nearly no convicted individual can overcome unless he or she obtains nothing short of exonerating DNA evidence, or other evidence of that beyond-question caliber. The incongruency between the meaning of the clear and convincing standard and the actual application of the Herculean standard warrants the Court's attention.

Petitioner Joe Bryan has made a credible showing of his actual innocence. The Texas court has adjudicated the claim on the merits. Accordingly, the Court should grant review on the Questions Presented and (i) conclusively establish the criminal punishment of an innocent person violates the Substantive Due Process Clause of the Constitution and (ii) articulate the correct standard of review governing such claims.

CONCLUSION

For the foregoing reasons, Petitioner Joe D. Bryan asks this Court to issue a writ of certiorari to the Texas Court of Criminal Appeals.

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Respectfully submitted,

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