No. 12-117

IN THE

Supreme Court of the United States

ROSA ESTELA OLVERA JIMÉNEZ,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Innocence Network ("the Network") is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The 65 current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as in Canada, the United Kingdom, and Australia. The Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the criminal justice system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented. As perhaps the nation's leading authority on wrongful convictions, the Network and its founders are regularly consulted by officials at the state, local and federal levels.

In this case, the Network requests the Court's review to determine the burden of proof that applies

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[1] *Amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission. *Amicus curiae* further states that petitioner and respondent have provided their consent to the filing of this brief which is being served herewith.

when an individual with a freestanding actual innocence claim is seeking a new trial in a state court habeas proceeding. There is a clear split among state and federal courts on this issue, with some courts applying a preponderance of the evidence standard, some applying a clear and convincing standard, and others exhibiting confusion as to what standard should govern. Where, as in this case, an individual has shown by reliable evidence that it is more likely than not that no reasonable juror would have convicted her had it heard such evidence, the insistence on an inappropriately high burden of proof—one requiring a showing of actual innocence by clear and convincing evidence —cannot be justified. Such a standard will result in the continued incarceration, and in capital cases the execution, of individuals who could be found innocent if they received a new trial. The Network therefore has a particularly strong interest in ensuring that the proper standard of review is applied consistently to all freestanding actual innocence claims.

SUMMARY OF ARGUMENT

Jiménez's petition presents a question of exceptional importance arising from this Court's repeated references to the existence of a freestanding constitutional claim of actual innocence. In recognition of the violation of due process that occurs when an innocent person is executed or imprisoned, this Court has implied, and many other courts have embraced, the existence of freestanding actual innocence claims under the United States Constitution. Indeed, in 1994, the lower court here—the Texas Criminal Court of Appeals ("CCA")—

recognized the existence of freestanding constitutional claims of innocence. *Texas ex rel. Holmes v. The Hon. Ct. of App. For the Third District*, 885 S.W.2d 389, 398 (Tex. Crim. App. 1994).

While the viability of Jiménez's constitutional claim is not contested, what remains to be determined is the standard of proof applicable to such claims when a state habeas petitioner presents reliable evidence of innocence so persuasive that the habeas court determines that she is more likely than not innocent, but nevertheless declines to grant her relief because that evidence cannot clear a "clear and convincing" hurdle. On this issue of great import, this Court has not yet made clear what standard of proof should apply to such claims. As a result, both state and federal courts have articulated different standards, varying between preponderance of the evidence and more stringent clear and convincing standards, and even permutations thereof. These differing standards have evolved as courts have struggled to interpret this Court's prior decisions and dicta contained therein concerning the burden of proof that must be met.

The monumental impact the standard that is imposed can have is clearly illustrated in Jiménez's case. In what the Texas court aptly called "a tragic case," a toddler choked on a wad of paper towels while in Jiménez's care. App. 1. Determination of whether Jiménez caused the child's death rested primarily on circumstantial evidence and the strength and credibility of expert testimony. App. 5-9. As the only "expert" Jiménez could afford lacked critical credentials and launched a belligerent tirade

against the prosecutors, Jiménez was unable to convince the jury that the child's death was accidental, and was therefore found guilty of felony murder and injury to a child. App. 2-5, 72-75, 125-27.

In her habeas hearing, Jiménez's new, highly qualified experts credibly testified that the victim's death was accidental. App. 50, 77-79. The habeas court determined that this new scientific evidence proved, by a preponderance of the evidence, that "a reasonable jury would probably not have convicted [Jiménez] had it heard all of the evidence presented in this habeas proceeding." App. 79. Nevertheless, the habeas court denied Jiménez relief on her actual-innocence claim because it concluded that she failed to show "by clear and convincing evidence that no reasonable juror would have convicted her," as required in Texas. App. 77-79 (citing *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996)). The CCA subsequently affirmed, noting that it too was "legally constrained" concerning the standard of proof. App. 17. Thus, but for use of a more stringent clear and convincing evidence standard to her actual innocence claim, Jiménez would have been entitled to a new trial in which a jury could have heard her compelling expert evidence.

Such disparate outcomes—turning exclusively on the standard of proof employed—highlight the significance of the issue presented by this petition. This Court frequently grants certiorari to resolve conflicts, such as this one, among federal and state

courts.[2] The Court should likewise do so here because the lack of uniformity can and does have a profound impact on fundamental constitutional rights. None of the goals of the criminal justice system, including those of fairness and accuracy, are advanced when, as here, a habeas petitioner shows by a preponderance of the evidence that no reasonable juror would have found her guilty, but nevertheless is refused relief for failing to meet an onerous clear and convincing standard. To the contrary, faith in the criminal justice system is undermined when a person remains incarcerated despite proving her innocence by a preponderance of the evidence.

Nor is a clear and convincing standard justified by principles of federalism or concerns about disturbing the finality of state convictions based on frivolous claims. Not only does the State of Texas recognize a freestanding constitutional claim of actual innocence, but the Texas courts afforded Jiménez an evidentiary hearing in which she proved her claim was wholly meritorious. The only reason she did not receive a new trial and will remain incarcerated is that the Texas courts held her to an unnecessarily stringent standard of proof that is not dictated by this Court's decisions and is at odds with the constitutional interests at stake. This case thus presents the ideal vehicle for the Court to clarify what standard of proof applies and to hold that, when a petitioner presents reliable evidence of actual

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[2] *E.g.*, *Jones v. Flowers*, 547 U.S. 220, 225 (2006) (granting certiorari to resolve conflict among circuit and state courts).

innocence, he or she need only prove "it is more likely than not that no reasonable juror would have convicted [petitioner]." *Schlup v. Delo*, 513 U.S. 298, 329, 332 (1995).

Amicus curiae therefore respectfully requests that the Court safeguard Jiménez's constitutional rights by recognizing her freestanding claim of actual innocence and clarifying that the appropriate standard of proof is a preponderance of the evidence.

ARGUMENT

I. THE COURT SHOULD EXPRESSLY RECOGNIZE THAT FREESTANDING ACTUAL INNOCENCE CLAIMS ARE COGNIZABLE.

The Due Process Clause prohibits a state from convicting a person without adequate evidence of guilt, and is concerned not only with the procedures used to determine guilt, but also with whether the evidence actually supports a finding of guilt. *See In re Winship*, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). The Constitution's protections for the innocent must not vanish simply because a person received a fair trial and the evidence at trial was sufficient to support a finding of guilt at that time. Such a person retains an undeniably powerful liberty interest in securing his freedom based on new evidence. Thus, the Court should, as many other courts across the United

States have, finally embrace the existence of a freestanding actual innocence claim.

Several of the Court's decisions have assumed that freestanding actual innocence claims are cognizable under the Constitution. In *Herrera v. Collins,* the Court assumed, *arguendo*, that a "truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." 506 U.S. 390, 417 (1993).[3] Although the majority opinion fell short of expressly recognizing such a claim, six Justices would have recognized it because a contrary conclusion would be unjust. *Id.* at 419 (O'Connor, J., concurring) (joined by Kennedy, J.); *id.* at 429 (White, J., concurring); *id.* at 435 (Blackmun, J., dissenting) (joined by Stevens, J., and Souter, J.).

In *Schlup*, the Court presumed the existence of freestanding innocence claims when it compared them to "gateway" actual innocence claims. 513 U.S. at 313-17. The Court again in *House v. Bell* suggested the existence of a freestanding actual innocence claim rooted in due process while ultimately determining that "whatever burden a

[3] Although *Herrera* involved an individual facing execution, the principle at stake is no different for one who has been sentenced to extended incarceration. *Herrera*, 506 U.S. at 405 ("It would be a rather strange jurisprudence . . . which held that under our Constitution [a petitioner demonstrating actual innocence] could not be executed, but that he could spend the rest of his life in prison.").

hypothetical free-standing innocence claim would require, this petitioner has not satisfied it." 547 U.S. 518, 555 (2006). Several years later, the Court reiterated that it had, in prior cases, assumed, without deciding, the existence of such a claim, and did so again in a case involving access to DNA evidence. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71 (2009). Most recently, the Court, on a petition asking the Court to exercise its original jurisdiction, transferred the petition to a district court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence." *In re Davis*, 130 S. Ct. 1, 1 (2009). If a freestanding innocence claim were not independently viable, the remand would have been pointless. That the Constitution bars punishment of the innocent, at this stage in the Court's jurisprudence, should not be controversial. The Court should therefore not be reluctant to expressly recognize the claim here.

Courts and legislatures across the country have recognized the existence of freestanding innocence claims as well. Indeed, at least 41 states and the District of Columbia recognize freestanding claims of actual innocence as a basis for habeas relief on constitutional or statutory grounds.[4] At least seven

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[4] Brief of Innocence Project and Innocence Network as *Amici Curiae* Supporting Petitioner, *Swearingen v. Thaler*, 421 F. App'x 413 (5th Cir. 2011) (No. 09-70036), 2010 WL 5306521, at *13 n.6 (Apr. 26, 2010) (collecting sources to conclude that 35 states and the District of Columbia recognize freestanding claims of actual innocence). Additional research reveals an additional six states: Ariz. R. Crim. P. 32.1(h); ARK. CODE ANN.

federal circuit courts[5] and three district courts from other circuits[6] have either acknowledged the existence of a freestanding actual innocence claim or grappled with its elements. Because the claim is already recognized across the country, the Court need not be concerned that recognition of the claim here will open the proverbial floodgates.

Following Texas precedent, the habeas court in this case expressly concluded that Jiménez "raises a freestanding claim of innocence." App. 77 (citing *Elizondo*, 947 S.W.2d at 202). The CCA did not specifically reject the habeas court's findings regarding her claim of actual innocence. App. 2. Moreover, the government did not argue that such a claim was untenable under the Constitution. Under these circumstances, there is no reason why the Court should not clearly and expressly recognize that freestanding actual innocence claims are constitutionally cognizable.

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§ 16-112-103(a)(1); MD. CODE ANN., CRIM. PROC. § 8-301 (West 2010); *Louisiana v. Conway*, 816 So. 2d 290, 291 (La. 2002); *Missouri ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546-47 (Mo. 2003); *Dellinger v. Tennessee*, 279 S.W.3d 282, 295 (Tenn. 2009).

[5] *See, e.g.*, *Boyde v. Brown*, 404 F.3d 1159, 1168 (9th Cir. 2005); *Whitfield v. Bowersox*, 324 F.3d 1009, 1019-20 (8th Cir. 2003); *Clayton v. Gibson*, 199 F.3d 1162, 1180 (10th Cir. 1999); *O'Dell v. Netherland*, 95 F.3d 1214, 1246-47 n.25 (4th Cir. 1995); *Albrecht v. Horn*, 485 F.3d 103, 122, 124 (3d Cir. 2006); *Gomez v. Jaimet*, 350 F.3d 673, 679 n.1 (7th Cir. 2003); *Rivas v. Fischer*, No. 10-1300-pr, 2012 WL 2686117, at *23 (2d Cir. July 9, 2012).

[6] *Goldman v. Winn*, 565 F. Supp. 2d 200, 223 n.11 (D. Mass. 2008); *Howard v. Warren*, No. 08-10222, 2011 WL 1598414, at *7-8 (E.D. Mich. Apr. 28, 2011); *In re Davis*, No. CV409-130, 2010 WL 3385081, at *41-43 (S.D. Ga. Aug. 24, 2010).

II. THE COURT SHOULD CLARIFY THE STANDARD APPLICABLE TO REQUESTS FOR A NEW TRIAL ON THE BASIS OF FREESTANDING CLAIMS OF ACTUAL INNOCENCE WHEN ASSERTED IN STATE HABEAS PROCEEDINGS.

A. Federal and State Courts Use Inconsistent Standards of Proof to Evaluate Freestanding Claims of Actual Innocence.

Federal and state courts that have dealt with freestanding actual innocence claims have struggled to formulate the appropriate standard of proof that should apply when a petitioner seeks a new trial. Courts are split on whether to apply a preponderance of the evidence standard, the more onerous clear and convincing evidence standard, or something else altogether. The Court should provide guidance so that courts adjudicating these important claims will apply a standard of proof that fully protects the constitutional interests at stake.

The Court has yet to decide what standard is required to obtain a new trial when a habeas petitioner asserts a freestanding claim of actual innocence. In *Herrera*, the Court initially hinted that a petitioner's burden in a federal habeas proceeding would hypothetically be "extraordinarily high" and would require a "truly persuasive demonstration of 'actual innocence.'" *Herrera*, 506 U.S. at 417. Two years later, the Court intimated that a petitioner asserting a freestanding innocence

claim would have to "unquestionably establish" his innocence. *Schlup*, 513 U.S. at 317. A decade later, the Court hypothesized that a freestanding claim of actual innocence may require "more convincing proof of innocence than *Schlup*." *House*, 547 U.S. at 555. Again, the Court failed to specify a standard. *Id.* In the absence of a clear rule, and left with cryptic hypothetical observations by the Court, state and federal courts struggle to define the proper standard.[7]

There are courts that have appropriately concluded that a petitioner needs to meet the preponderance of evidence standard to be awarded a new trial. The Supreme Court of Illinois recognized that "the more likely it is that a convicted person is actually innocent – the weaker is the legal construct dictating that the person be viewed as guilty." *People v. Washington*, 665 N.E.2d 1330, 1336-37 (Ill. 1996) (granting new trial). Therefore, "[a] 'truly persuasive demonstration of innocence' would effectively reduce the idea [of a petitioner's guilt] to legal fiction." *Id.* (citations omitted). The court then reasoned that a petitioner whose new evidence "would 'probably change the result on retrial'" has the right to a new trial. *Id.* at 1337 (citations omitted). The Court of Appeals for the Ninth Circuit similarly decided that affirmative proof by a petitioner "that he is probably innocent" warrants a new trial. *Carriger v. Stewart*, 132 F.3d 463, 476

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[7] *See, e.g.*, Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1671 (2008) (although states have long allowed new trials based on evidence of innocence, "[s]tatutes or case law allowing for such motions vary widely in their standards").

(9th Cir. 1997) (granting new trial). The court reasoned that requiring a defendant to affirmatively prove his own innocence, rather than merely attacking the sufficiency of the evidence, is in itself an extraordinarily high requirement. *Id.* at 476-77.

Other courts require the more demanding standard of clear and convincing proof. Texas requires a showing by clear and convincing evidence that no reasonable juror would have convicted in light of new evidence. *Elizondo*, 947 S.W.2d at 209. The Texas court concluded this was the appropriate test by reasoning that it was synonymous with a standard mentioned by the Court in dicta—that a petitioner invoking a freestanding innocence claim would have to "unquestionably establish" innocence.[8] *Id.* Similarly, the clear and convincing standard was adopted by courts in New Mexico and Connecticut, and by the Eighth Circuit.[9] A New York trial court, concluding that an actual innocence claim existed under New York's constitution, held that the

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[8] The adoption of the clear and convincing standard appears to have been a departure from what the CCA suggested the standard should be in a prior decision; the court said a petitioner had to "create[] a doubt as to the efficacy of the verdict sufficient to undermine confidence in the verdict and [show] that it is probable that the verdict would be different." *Holmes*, 885 S.W.2d at 398. Jiménez created just such a doubt, yet was denied relief.

[9] *Montoya v. Ulibarri*, 136 P.3d 476, 478 (N.M. 2007); *Miller v. Comm'r of Corr.*, 700 A.2d 1108, 1108 (Conn. 1997) (finding standard to be functionally equivalent to those suggested in the majority and concurring opinions in *Herrera*); *Cornell v. Nix*, 119 F.3d 1329, 1334-35 (8th Cir. 1997).

defendant must show by clear and convincing evidence that no reasonable juror could convict him, but noted that once this standard is met, the remedy is not a new trial but rather vacation of the conviction. *People v. Cole*, 765 N.Y.S.2d 477, 486-87 (Sup. Ct. 2003). Nonetheless, expressing doubt about the appropriateness of this stringent standard, the court alternatively found, under a preponderance of evidence standard, that the defendant "has shown that he is probably innocent (more likely than not approximating 55%)" so as to facilitate appellate review. *Id.* at 486-88 & n.13.

Another court blurred the distinction between freestanding and "gateway" innocence claims by purporting to apply *Schlup*, but then requiring the petitioner to meet the tougher clear and convincing standard when seeking release. *Beach v. Montana*, 220 P.3d 667, 673-75 (Mont. 2009). The court concluded that to be released, the petitioner "must show by clear and convincing evidence that, *but for a procedural error*, no reasonable juror would have found him guilty of the offense in order for him to prevail on his *substantive innocence claim*." *Id.* at 673 (emphasis added). Although the court seemed to intermingle the standards to evaluate procedural and substantive claims, it nevertheless noted that a lower standard would be required for a petitioner seeking a new trial, as opposed to release. *Id.* at 674 (claim that results in release "justifies a different standard of proof" than one that results in new trial); *see also Cole*, 765 N.Y.S.2d at 486-87 (where no new trial, but rather vacatur of conviction, is relief, clear and convincing evidence standard applicable).

Finally, the Supreme Court of California formulated the most demanding test thus far. There, a petitioner must set forth new evidence that "completely undermine[s] the entire structure of the case upon which the prosecution was based" and "point[s] unerringly to innocence or reduced culpability" to obtain a new trial. *In re Lawley*, 179 P.3d 891, 897 (Cal. 2008) (citations omitted). The petitioner in *Lawley* argued for the "more lenient preponderance of the evidence standard," but the court rejected that standard. 179 P.3d at 898.

Given the inconsistency that exists among state and federal courts concerning what burden of proof to impose on someone who raises a freestanding actual innocence claim and, as here, seeks only a new trial, the Court should grant this petition to resolve this issue.

B. The Use of Different Standards Leads to Inconsistent Outcomes That Undermine the Goals of Fairness and Accuracy and Weaken the Public's Faith in the Criminal Justice System.

The disparate standards used by federal and state courts to assess freestanding actual innocence claims lead to inconsistent and unpredictable outcomes, which undermines the goals of fairness and accuracy as well as faith in the criminal justice system.

This case shows why that is true. Under the test used by the habeas court below, Jiménez could not

obtain a new trial despite the habeas court's conclusion that (i) "a reasonable jury would probably not have convicted [Jiménez]"; (ii) Jiménez's experts credibly testified that the victim's death was accidental; and (iii) this expert testimony was not credibly rebutted by the State's witnesses. App. 56-72, 79. These findings were not expressly disturbed on appeal. App. 17. Nevertheless, Jiménez was denied a new trial on her actual innocence claim, despite a finding that she had proved her actual innocence by a preponderance of the evidence. App. 17. This injustice occurred because both courts below believed they were "legally constrained" to require Jiménez to prove her innocence by clear and convincing evidence. App. 17. Thus, because Jiménez was prosecuted in Texas, she remains incarcerated for the rest of her life without the chance for a new trial. The result would have been very different had her actual innocence claim been heard in a jurisdiction where a preponderance of the evidence standard prevails. Such divergent outcomes based solely on where a defendant happens to be convicted cannot be squared with due process notions of fairness and accuracy in the criminal justice system.

C. This Case Presents the Opportunity for the Court to Determine the Proper Standard of Proof.

The habeas court's findings of fact make this an ideal case for the Court to consider the standard that applies when a petitioner seeks a new trial on the basis of a freestanding actual innocence claim. The

court found that Jiménez had not met the burden of establishing, by clear and convincing evidence, that no rational juror would have convicted her in light of newly discovered evidence. App. 77-78 (citing *Elizondo*, 947 S.W.2d at 209). However, the court alternatively concluded that Jiménez had proved "by a preponderance of the evidence that no rational juror could have found [her] guilty beyond a reasonable doubt." App. 78-79. The CCA did not specifically reject the factual underpinnings of that conclusion. Thus, the Court is presented with a unique case in which a petitioner has met one standard, but not the other.

Moreover, because this case presents a state habeas petition, the federalism and AEDPA concerns are not present. The "substantial deference" federal courts give to the states "in matters of criminal procedure" has frequently been a concern for federal courts evaluating freestanding claims of actual innocence. *Herrera*, 506 U.S. at 407 (citation omitted). In fact, the Court has confronted such concerns in every freestanding claim of innocence case it has considered. *Id.* (discussing deference given to state court judgments); *House,* 547 U.S. at 536 (referencing "comity and respect" accorded to state-court judgments); *Schlup*, 513 U.S. at 324 (weighing interests of comity against the "individual interest in avoiding injustice"); *Osborne*, 557 U.S. at 53 (acknowledging "[f]ederal courts may upset a State's post-conviction relief procedures only if they are fundamentally inadequate"); *compare In re Davis*, 130 S. Ct. at 1-2 (Stevens, J., concurring) (AEDPA may not apply to an exercise of Court's original jurisdiction), *with id.* at 2-4 (Scalia, J.,

dissenting) (AEDPA should preclude granting habeas relief). But these concerns have no place in a state habeas petition. Thus, the procedural posture of this case makes it an ideal vehicle for the Court to determine what standard of proof the Constitution demands.

III. A PREPONDERANCE OF THE EVIDENCE STANDARD SHOULD BE ADOPTED FOR REQUESTS FOR A NEW TRIAL ON THE BASIS OF FREESTANDING CLAIMS OF ACTUAL INNOCENCE WHEN ASSERTED IN STATE HABEAS PROCEEDINGS.

It should not be open to serious question that a finding by a preponderance of the evidence that no reasonable juror would have convicted Jiménez based on evidence of actual innocence creates a sufficient lack of confidence in her guilty verdict to warrant a new trial. In our system of justice, "it is better that ten guilty persons escape, than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 (Clarendon Press, 1769). This bedrock principle of fairness is certainly implicated when an individual can—as Petitioner did here—show it is more likely than not that she is innocent based on reliable evidence. There is no principled reason why an individual who seeks simply to present compelling evidence of innocence at a new trial—as opposed to immediate reversal of her conviction and release from prison—should be forced to prove her entitlement to that remedy by something other than a preponderance of the evidence.

A. The Absence Here of Federalism Concerns Weighs in Favor of a Preponderance of the Evidence Standard.

Where a petitioner can, by a preponderance of the evidence, show it is more likely than not that he is innocent based on reliable evidence, denying a new trial is a violation of due process. *See, e.g., Washington*, 665 N.E.2d at 1336-37 (petitioner whose new evidence "would 'probably change the result on retrial'" has the right to a new trial because "a 'truly persuasive demonstration of innocence' would . . . undermine the legal construct precluding a substantive due process analysis"); *Carriger*, 132 F.3d at 476 (affirmative proof "that [petitioner] is probably innocent" warrants a new trial, and "no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence.").

However, as noted, the Court's decisions suggest that federalism concerns and AEDPA deference might justify a higher standard of review in a federal habeas proceeding because of federal courts' respect for the state criminal process and reluctance to intrude collaterally into settled factual and legal determinations. *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (habeas corpus "imposes special costs on our federal system," in which "States possess primary authority for defining and enforcing the criminal law."). These considerations seem to have been relevant in those decisions that addressed (in dicta) the appropriate standard for freestanding claims of

innocence, since they all concerned *federal* habeas proceedings. *See, e.g., Herrera*, 506 U.S. at 416-17. But the converse must equally be true. Where, concerns about federalism and comity, as well as the strictures of AEDPA, are not present, there is no compelling reason to impose a stringent "clear and convincing" standard. *See Amrine*, 102 S.W.3d at 548 (state courts are not "required to impose as high a standard as would a federal court" when considering actual innocence claims because they are "not affected by the federalism concerns that limit the federal courts' jurisdiction").

These federalism concerns are not present in state habeas proceedings like the one in which Jiménez proved her innocence by a preponderance of the evidence. Yet, even some state supreme courts evaluating state habeas petitions place unwarranted reliance on dicta in *Herrera* and other cases that hinted that a heightened standard of review ought to apply to actual innocence claims. *See Lawley*, 179 P.3d at 899; *Beach*, 220 P.3d at 673-74. Indeed, even the Texas CCA in *Elizondo*, upon whose articulation of the applicable standard the lower courts in this case relied, failed to assess this important question without filtering out the federalism and comity concerns that so influenced the Court in *Schlup*. *Elizondo*, 947 S.W.2d at 209. Those concerns—present in federal review of state convictions—should have no place in deciding what standard applies to constitutional claims of actual innocence that are being pursued first in state courts.

Where, as here, a state acknowledges a constitutional claim of actual innocence, and hears

reliable evidence that proves a petitioner is more likely than not innocent, concerns over federalism and comity do not dictate the imposition of a higher burden of proof.

B. Several Powerful Constitutional Considerations Warrant the Application of a Preponderance of the Evidence Standard.

A preponderance of the evidence standard is also appropriate in light of several powerful constitutional considerations. First, along with the advent of DNA and other scientific forms of evidence has come the realization that hundreds of people have been wrongly convicted based on traditionally relied upon forms of evidence. *See* Robert Smith, *Recalibrating Constitutional Innocence Protection*, 87 Wash. L. Rev. 139, 147-68 (2012). Given the known fallibility of the trial process, the burden of proof should not be so high as to preclude a new trial even where it appears, based on reliable evidence, someone is likely innocent. As the second Justice Harlan observed, "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Winship*, 397 U.S. at 364 (Harlan, J., concurring). Imposing an onerous burden of proof on those who can otherwise prove that no reasonable juror would have convicted them had the jury heard their new evidence serves no penal or moral purpose. Second, scientific evidence does not diminish in reliability over time. Indeed, such evidence changes the evidentiary landscape of a case; it brings to bear on the truth-finding trial

process a brighter light and the focus of a more finely honed lens. So if this type of evidence, or similarly reliable evidence, tends to prove innocence, a new trial should be granted to permit the wrongly convicted their day in court with the full range of evidence that exists to support their more than plausible claims of innocence. And the equitable nature of habeas corpus claims—which influenced the rejection of a clear and convincing standard in *Schlup*—makes it critically important to maintain standards for evaluating innocence claims that afford petitioners a "meaningful avenue by which to avoid manifest injustice."[10] *Schlup*, 513 U.S. at 319, 323, 327.

Another factor supporting a preponderance of the evidence standard is that a petitioner with a freestanding actual innocence claim has the same individual liberty interests as a petitioner with a gateway actual innocence claim. *See id.* at 325 ("concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."). The absence of constitutional error at trial should not alter one's entitlement to be free from unlawful incarceration.[11]

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[10] *See* Mark Oh, *The Gateway for Successive Habeas Petitions: An Argument for* Schlup v. Delo*'s Probability Standard for Actual Innocence Claims*, 19 CARDOZO L. REV. 2341, 2363 (1998) ("Using the probability standard rather than the clear and convincing standard for evaluating claims of innocence serves the principles of equity upon which the writ of habeas corpus is based, and protects the fundamental interests of the individual in avoiding unjust conviction and punishment.").

[11] *See Davis*, 2010 WL 3385081 at *42 ("It is unclear why a patently erroneous, but fair, criminal adjudication would change the

So as *Schlup* dictates that gateway claims should be evaluated under the preponderance of the evidence standard, so should freestanding actual innocence claims. To hold otherwise would mean that in the rare circumstance, such as here, where the habeas court holds a hearing and Petitioner establishes her likely innocence through reliable scientific evidence, the State may nonetheless detain her without offending the Constitution. That should not be the law.

Moreover, the relief that Jiménez seeks mitigates toward a preponderance of the evidence standard. The typical relief in a habeas case is conditional release, *see Herrera*, 506 U.S. at 403, whereas Jiménez is only asking for a new trial. This alone warrants a lower standard, as the remedy sought is "inextricably linked to the relevant interests of the litigants and to the functions of the burden of proof." *Miller*, 700 A.2d at 1131-32. Some courts that have adopted a clear and convincing standard have justified that decision on the basis that those who meet that burden of proof are entitled to more than just a new trial. *See, e.g., Cole*, 765 N.Y.S.2d at 486-87.

Concerns for finality likewise do not warrant a clear and convincing standard. Although a state has a strong interest in a final conviction, it has no interest in preserving the conviction of someone who can show she is innocent by a preponderance of the evidence. The state's interest, after all, "is not that it

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transcendental fact that one who has not actually murdered cannot be executed.").

shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Recognizing this principle, the vast majority of states recognize freestanding claims of actual innocence, many states exempt motions based on new DNA evidence from their statute of limitations, and other states excuse late post-conviction filings that are based on evidence of innocence. Garrett, *supra* note 7, at 1671-75. Moreover, since claims of innocence are, as the Court has acknowledged, relatively rare, granting a new trial where a petitioner can show innocence by a preponderance of the evidence will not overly tax the criminal justice system. *Schlup*, 513 U.S. at 321 n.36.

A lower standard is further justified here because Jiménez has a well-defined and powerful individual liberty interest that outweighs a state's interest in finality. Jiménez convinced the habeas court during a four-day evidentiary hearing that "a reasonable jury would probably not have convicted [Jiménez]" given the additional expert testimony she was able to present. App. 79. The injustice that would result from imposing a higher standard is in direct conflict with the core interests of our criminal justice system. *See Winship*, 397 U.S. at 372 (Harlan, J., concurring) ("the social disutility of convicting an innocent man [is not] equivalent to the disutility of acquitting someone who is guilty."); Oh, *supra* note 11, at 2359 (a clear and convincing standard "necessarily implies that an erroneous decision against the petitioner is more desirable than an erroneous decision against the government.").

Finally, a preponderance of the evidence standard is a difficult burden to meet. It is more than just a "reasonable probability." *See Carriger*, 132 F.3d at 479. Such a burden will deter frivolous claims, and will not unnecessarily undermine the confidence that society may have in a conviction. In a criminal trial, the *State* must prove guilt beyond a reasonable doubt; on habeas relief, requiring the *petitioner* to affirmatively prove his actual innocence is an incredibly weighty requirement that only the few, truly innocent will be able to satisfy. The preponderance of the evidence standard therefore strikes the appropriate balance of affording relief to those who make truly persuasive showings of innocence based on reliable evidence, while also screening out frivolous claims and protecting the State's interest in the finality of convictions. The alternative result—that a petitioner establishing a claim of innocence remains incarcerated for life simply because the State imposes an unjustifiably high standard—is intolerable.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the Innocence Network as amicus curiae respectfully requests that the petition for certiorari be granted.

Respectfully submitted,

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