No. 12-117

IN THE

Supreme Court of the United States

ROSA ESTELA OLVERA JIMÉNEZ,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

BRIEF OF *AMICI CURIAE* ERWIN CHEMERINSKY, ERIC M. FREEDMAN, BRANDON L. GARRETT, LEE KOVARSKY, TERRY A. MARONEY, ROBERT J. SMITH AND JORDAN M. STEIKER, SUPPORTING PETITIONER

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INTERESTS OF *AMICI CURIAE*

Amici curiae identified in the Appendix are law professors with a primary expertise in constitutional law and federal jurisdiction. *Amici* have a professional interest in the development of federal law in the state courts, and, in particular, federal habeas law. This case asks the Court to determine the federal rule of decision for a state post-conviction claimant who raises a freestanding claim of actual innocence. To date, state courts have addressed this question inconsistently, leading to the uneven application of federal law. *Amici* thus have an interest in the Court hearing this case, clarifying the appropriate standard, and establishing a uniform rule to resolve the divergence of authority among state courts. Absent action by this Court, clarification of this question will not occur.

Amici state that, pursuant to Supreme Court Rule 37(2)(a), they timely notified counsel of record of all parties of their intent to file this brief in support of the Petitioner; both parties indicated their consent.[1]

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[1] Pursuant to Supreme Court Rule 37(6), *amici* state that no party, in whole or in part, authored this brief; nor has any party made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Twenty years after the Court first assumed the existence of a freestanding actual innocence claim in *Herrera v. Collins*, 506 U.S. 390 (1993), state courts remain divided over the content of that rule. Because the Court assumed the existence of freestanding innocence claims but did not decide what they required a prisoner to show, each state has developed its own take on the federal standard for adjudicating them in post-conviction proceedings. This varied post-conviction practice has resulted in an entrenched jurisdictional fragmentation over the content of the freestanding innocence rule.

Only this Court can resolve this open question. No other forum can determine the appropriate federal rule of decision—that to be used in state post-conviction proceedings—because federal habeas review requires deference to state decisions. *See* 28 U.S.C. § 2254(d).

The instant Petition is an ideal vehicle for considering the uneven application of the federal rule in state courts. The Petition is not in a federal habeas posture. Jiménez seeks certiorari review of a state post-conviction decision where the state court held expressly that, although she had met a "preponderance of the evidence" standard in demonstrating her innocence, because she did not meet a "clear and convincing" standard she was not entitled to a new trial.

This Court should grant the Petition to ensure equal treatment of state post-conviction claimants.

ARGUMENT

I. The Supreme Court should grant the Petition to promote uniform state treatment of federal freestanding innocence claims.

A. States are divided on the federal rule of decision for "freestanding" innocence claims.

1. The explosion of exonerations in the two decades since *Herrera v. Collins* highlights the need for a clear freestanding innocence rule.

"[T]he central purpose of any system of criminal justice is to convict the guilty and free the innocent." *Herrera v. Collins*, 506 U.S. 390, 398 (1993). Although this "central purpose" remains salient some twenty years after *Herrera*, the American criminal justice system continues to struggle with efforts to separate the guilty from the innocent. Divergent state standards for adjudicating "freestanding" claims of actual innocence complicate the picture. This Petition sets out an opportunity for the Court to provide clear guidance on what a state post-conviction claimant must prove to obtain relief on a freestanding innocence claim asserted under the federal constitution.

Uncertain and conflicting freestanding innocence jurisprudence is particularly problematic in an era of advancing technology in DNA testing. Exoneration data demonstrate the frequency of wrongful convictions. In the years since the first DNA exon-

eration in 1989, state post-conviction litigation reflects what is now an obvious and well-documented truth: the criminal justice system sometimes produces erroneous convictions.[2] There now have been at least 300 post-conviction DNA exonerations in the United States. *See* Innocence Project Case Profiles, http://www.innocenceproject. org/know/ (accessed Oct. 10, 2012); *see also* Joseph L. Hoffman, "Innocence and Federal Habeas after AEDPA: Time for the Supreme Court to Act," 24 *Fed. Sentencing Reporter*, 300 (April 2012). DNA evidence, however, is only one type of proof used to demonstrate a wrongful conviction; other forms of exculpatory evidence exist, and are frequently pivotal in establishing the innocence of wrongfully-convicted inmates. *Id.* The past two decades have underscored the importance of clear rules for reconsidering guilt and innocence, even after a conviction becomes final.

Whatever the reasons for wrongful convictions, state courts have struggled, since *Herrera*, to identify the federal rule of decision for freestanding innocence claims. They have had little guidance. This Court has consistently assumed only *arguendo* the existence of a freestanding innocence claim. A "freestanding" claim is one in which the evidence of innocence does more than satisfy a "gateway" for overcoming a defect in an otherwise-barred post-conviction application. Instead, the evidence of innocence itself constitutes the federal constitutional claim. But state courts have been forced to answer, without guidance from this Court, the next question

[2] Many exonerees had been convicted of the most serious offenses (such as aggravated rape and murder), and they spent an average of thirteen years in prison. *See* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 5 (2011).

necessary to adjudicate such claims: what standard must a claimant meet to be granted relief? State courts are divided over the answer to this question.

2. Questions left open by *Herrera* and its progeny.

Herrera, and the decisions that follow it, assumed that a freestanding innocence claim exists—that a claimant presenting sufficient exculpatory evidence states a cognizable basis for relief. *See Herrera*, 506 U.S. at 398. *Herrera* involved a state capital prisoner who sought *federal* post-conviction relief. There, this Court assumed "that in a capital case 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 to process such a claim." *Id*. Having made the assumption, the Court went on to deny Herrera relief, holding that he did not meet the "threshold showing" of innocence that such a claim would require. *Id.*

The *Herrera* Court fractured on the content of the *federal* innocence standard in *federal* habeas proceedings.[3] The Court suggested that a "truly persuasive demonstration" would require a petitioner to meet an "extraordinarily high burden," but did not elaborate further. *Id.* In his *Herrera* dissent, Justice Blackmun thought the appropriate standard would be a showing that the petitioner "probably is innocent." *Id*. at 420 (Blackmun, J., dissenting). In

[3] A majority of the Court (Justices O'Connor, Scalia, Kennedy, and Thomas, joining Chief Justice Rehnquist's opinion), assumed, *arguendo*, the cognizability of a federal freestanding innocence claim without holding squarely that such a claim existed.

Herrera's wake, this Court has not indicated what showing of innocence would support relief on a federal freestanding innocence claim that is considered during *state* post-conviction review.

This Court has not announced a clear rule even though state and federal courts largely behave as though freestanding innocence claims exist. The lack of clarity for the freestanding innocence standard contrasts starkly with the extensive decisional law devoted to the "gateway"[4] innocence standard—the innocence showing necessary to allow a court to consider *some other* constitutional claim on the merits. For example, in *Schlup v. Delo*, the Court held that a habeas petitioner using a claim of actual innocence as a "gateway" to allow adjudication of an otherwise procedurally-barred claim must show that "a constitutional violation has *probably resulted* in the conviction of one who is actually innocent." 513 U.S. 298, 327 (1995) (emphasis added). This is a "preponderance of the evidence" standard: "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* In such cases, the state post-conviction court does not render its own judgment; instead, it steps into the shoes of the jury to make "a probabilistic determination about what

[4] The concept of an actual innocence "gateway" had its origins, in part, in an article written by Judge Henry Friendly. *See* Hon. Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970). The Court allowed for a habeas petitioner to overcome a procedurally-barred claim through a showing of "factual innocence" in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). The "gateway" concept thus emerged as a way of providing for an exception, albeit a narrow one, to overcoming procedural barriers to obtaining habeas relief.

reasonable, properly instructed jurors would do," *id.* at 329, and grants relief accordingly.

The Court had occasion to revisit both this "gateway" standard, as well as the question of freestanding innocence claims, in *House v. Bell*, 547 U.S. 518 (2006). In *House*, the Court reaffirmed that the *Schlup* standard continued to control the innocence gateway in procedural default cases, even after the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 110 Stat. 1214 (1996). *House* remanded the case to the lower federal court, allowing the petitioner to use an innocence gateway to excuse the procedural default. *Id.* at 555.

In *House*, the Court took the same tack in addressing freestanding innocence claims that it took in *Herrera*: it explicitly declined to resolve the issue of whether a freestanding claim exists, but concluded "that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it." *Id.* Although the Court did not formally announce a rule, it suggested without deciding that *Herrera* "requires more convincing proof of innocence than *Schlup*." *Id.* Thus, although House had satisfied the gateway standard from *Schlup*, he failed to clear the potentially-higher bar set for a freestanding claim.

The Court continued to defer express recognition of a freestanding innocence claim in the *Troy Davis* case. See *In re Davis*, 130 S.Ct. 1 (2009). In *Davis*, this Court remanded an "original" habeas petition—one filed, in the first instance, in the Supreme Court—to a district court for factfinding on a freestanding innocence claim. *See id.* The remand order, however, declined to identify or specify the

applicable standard for granting relief on such a claim.

The Court's opinions in *Schlup*, *House*, and *Davis* highlight the disparity between the relatively well-developed jurisprudence of "gateway" innocence claims—where proof to a preponderance of the evidence for an actual innocence claim allows a petition to overcome a procedural barrier that would otherwise preclude habeas review and relief—and "freestanding" claims, where an actual innocence claim is presented for substantive review, on the merits. This disparity has led to inconsistency at the state level, where states have crafted divergent standards for actual innocence claims. This latter inconsistency is at issue in Jiménez's Petition, and requires this Court's guidance.

3. States interpret the federal rule of decision for freestanding innocence claims in very different ways, requiring guidance from this Court.

Over the course of the last two decades, state courts have been forced to develop, on their own, various standards for adjudicating freestanding innocence claims in state post-conviction proceedings.

Freestanding innocence standards proposed to and applied in state courts exercising their jurisdiction under state procedures for post-conviction relief vary, but fall generally into five categories, with some states not yet having considered the question:

1. Preponderance of the evidence;[5]

2. Clear and convincing evidence;[6]

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[5] *See, e.g.*, Alabama (*Arthur v. State*, 71 So. 3d 733, 741 (Ala. Crim. App. 2010) (in a proceeding for post-conviction relief the petitioner must plead and prove by a preponderance of the evidence the facts necessary to entitle the petitioner to relief)); Florida (*Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324-25 (Fla. 1994) (stating that, to gain relief, a petitioner's new evidence "must be of such nature that it would probably produce an acquittal on retrial")); Illinois (*People v. Washington*, 665 N.E.2d 1330, 1337 (Ill. 1996) (using a preponderance standard to evaluate a freestanding claim under the state constitution)); Kentucky (*Moore v. Comm.*, Nos. 2008-SC-000860-MR, 925, 957, 2011 Ky. LEXIS 91 at *45-46 (Ky. June 16, 2011) ("It is well-accepted that the standard for adjudging whether a new trial is warranted based upon newly discovered evidence is whether such evidence carries a significance which would with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted.") (quotations omitted)).

[6] *See, e.g.*, Alaska (Alaska Stat. 12.72.020(b)(2), 12.72.010(4)(those who "establis[h] by clear and convincing evidence that [they are] innocent" may obtain "vacation of [their] conviction or sentence in the interest of justice.")); Arkansas (*Tyron v. Hobbs*, 2011 Ark. 76 at *n.1 (Ark. 2011)(concluding that a state habeas petitioner who alleges actual innocence must establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense)); Delaware (*State v. Wright*, No. 91004136DI, 2012 Del, Super. LEXIS 3 at *61-62 (Del. Super. Ct. Jan. 3, 2012)("A prisoner must show, *by clear and convincing evidence*, that no reasonable juror could find him guilty beyond a reasonable doubt." (emphasis in original)); District of Columbia (*Bell v. U.S.*, 871 A.2d 1199, 1201-02 (D.C. 2005)(Where a petitioner seeks to vacate his conviction, he must demonstrate actual innocence by clear and convincing evidence)); Montana (*Beach v. State*, 220 P.3d 667, 671 (Mont. 2009) (recognizing showing of actual innocence requires petitioner to show "by clear and convincing evidence that, but for a constitutional error, no reason-

3. An intermediate standard between "preponderance of the evidence" and "clear and convincing;"[7]

4. A standard greater than "clear and convincing " (sought in some jurisdictions);[8] and

5. No standard as yet articulated.

The lack of clarity from the Court has led to ambiguity and divergence in the applicable standard among the states. Embracing a preponderance of the evidence standard, the Minnesota Supreme Court, for example, describes actual innocence as "more than an uncertainty about guilt," and requires only "evidence that renders it more likely than not that no reasonable jury would convict." *Riley v. State*, 819 N.W.2d 162, 170 (Minn. 2012). But Kentucky's standard carries more ambiguity; although seeming to establish a preponderance standard, it also appears to grant deference to the trial court.

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able juror would have found the petitioner guilty.") (citations omitted)).

[7] *See, e.g.*, California (*In re Lawley*, 179 P.3d 891, 897 (Cal. 2008) ("[a] criminal judgment may be collaterally attacked on habeas corpus on the basis of newly discovered evidence if such evidence casts fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability.") (citation omitted)).

[8] *See, e.g.*, the standard sought by respondent in Connecticut (*Miller v. Comm'r of Corr.*, 700 A.2d 1108, 1130-1131 (Conn. 1997) (respondent sought application of a clear and convincing standard combined with a requirement that all evidence viewed cumulatively be insufficient)).

The Supreme Court of Kentucky has held that a new trial is warranted "in circumstances wherein a defendant was somehow prevented from having a fair trial, or *if otherwise required in the interests of justice*." *Bedingfield v. Commonwealth*, 260 S.W.3d 805, 809 (Ky. 2008) (emphasis added). The court went on to state that, to warrant a new trial, evidence must be of a character that "would with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted." *Id.* at 810.

This divergence among states also leads to unequal treatment among similarly-situated criminal defendants. Where Minnesota would provide a preponderance standard, Iowa adopts a stricter approach when a claimant seeks a new trial, explaining that "motions for new trials based upon newly discovered evidence are not favored in the law and should be closely scrutinized and granted sparingly." *State v. Compiano*, 154 N.W.2d 845, 849 (Iowa 1967).

Some states recognize freestanding innocence claims, but have no clearly-developed or articulated standard. For example, the Colorado post-conviction statute requires a petitioner to show "[t]hat there exists evidence of material facts, not theretofore presented and heard," but has not defined the quantum of innocence that a prisoner must show to obtain relief. *See* Colo. Rev. Stat. 18-1-410.

Moreover, states also diverge on how or whether the standard should vary with respect to the relief requested—an order to conduct a new trial or an outright dismissal of the conviction and indictment. In *People v. Washington*, for example, the Illinois Supreme Court noted that "where a review-

ing court determines that no rational trier of fact could find the defendant guilty beyond a reasonable doubt, the proper remedy is not a new trial but an acquittal on the charges for which there was insufficient evidence to convict the defendant." 665 N.E.2d 1330, 1340 (Ill. 1996). By contrast, when the relief requested is a new trial, the Illinois court concluded that a preponderance of the evidence standard was appropriate. *See id.* at 1341. Here, the Petitioner seeks only a new trial. State courts need guidance on the question of whether post-conviction claimants seeking new trials need only to satisfy a lower evidentiary threshold than do post-conviction claimants seeking outright dismissal.

Finally, some state courts have considered adopting an even higher standard. In *Montoya v. Ulibarri*, the New Mexico Supreme Court considered an argument that it adopt a "reasonable doubt" standard. 163 P.3d 476, 485 (N.M. 2007).[9] After examining the approaches of different states, it rejected this argument in favor of adopting a "clear and convincing" standard. *Id.* at 99. As another example, the respondent in a Connecticut case argued not only for a "clear and convincing evidence" standard for adjudication of freestanding actual innocence claims, it also explicitly sought a requirement that no reasonable jury "could" have convicted the petitioner—essentially a requirement that the post-conviction court find that the evidence in the combined record be insufficient to support a finding of guilt. *Miller*, 700 A.2d at 1130. This proposed rule

[9] New Mexico specifically considered an approach Texas took in *State ex. rel. Holmes v. Hon. Court of Appeals for Third District*¸ 885 S.W.2d 389, 399 (Tex. Crim. App. 1994), which by that time had already been abrogated by *Ex parte Elizondo*, 947 S.W.2d 2020 (Tex. Crim. App. 1996).

confuses the freestanding innocence standard with the constitutional requirements for collaterally challenging sufficiency of the evidence for conviction under *Jackson* v. *Virginia*, 443 U.S. 307 (1979). Freestanding innocence challenges almost always involve evidence outside the trial record. Adding *Jackson* requirements would mean that a prisoner would have to show innocence based *both* on the evidence in the trial record and outside of it—a standard that is logically impossible to meet. Such a standard would preclude exonerations based on new DNA tests—by definition, the new DNA evidence could not affect the *Jackson* prong of the standard. Although the Connecticut court ultimately did not adopt such an onerous standard, absent a federal rule of decision, it, or another state, could do so.

Of course, the fact that states have varying standards is not in and of itself problematic. State experimentation is desirable, as long as (1) state variation does not persist *because* the states cannot identify the constitutional rule itself; and (2) all state rules are above the constitutional floor. State law does not always express the source of the freestanding claim (state or federal), but such ambiguity persists precisely *because* the federal rule of decision remains unclear. Moreover, there remains no settled constitutional floor against which to measure the strictest state rules. State courts do not know (1) how decisive the evidence of innocence must be; (2) whether they are to consider all evidence, new evidence, or evidence that was reasonably discoverable at trial; or (3) whether the rule of decision varies with respect to the relief the state post-conviction claimant seeks.

4. Only this Court can provide guidance to the states.

A holding clarifying the showing necessary to satisfy a freestanding actual innocence claim, decided on certiorari review of a state post-conviction proceeding, would promote uniformity among the states without adding to their dockets. As demonstrated above, states already recognize and adjudicate freestanding innocence claims. Unfortunately, they are forced to expend significant energy discerning, defining, and justifying the appropriate standard before they can turn to a substantive review of the claim's merits.

Only this Court can provide guidance; there is no other forum for deciding the federal rule of decision to be used in state post-conviction proceedings. Such a rule—at least for use during state post-conviction proceedings—cannot be announced in a federal habeas case because of the deference and comity built into federal habeas review. *See* 28 U.S.C. § 2254(d) (requiring federal habeas deference to state decisions). Given the importance of this issue, granting the Petition would help ensure that state courts apply a consistent federal rule to similarly-situated state prisoners.

II. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING INCONSISTENT STATE APPLICATION OF THE FEDERAL STANDARD.

Ordinarily, federal courts encounter the issue that this case presents in a federal habeas posture. The federal habeas standard for freestanding claims reflects not only the quantum of innocence that proves a constitutional claim, but also the additional

deference built into federal habeas review of state decisions. In particular, AEDPA creates numerous barriers affecting adjudication of freestanding innocence claims on federal habeas review. Most importantly, a state prisoner must do more than state a meritorious constitutional claim; the prisoner cannot obtain federal habeas relief without showing that the state decision, including its construction of applicable federal law, was either legally or factually unreasonable. *See* 28 U.S.C. § 2254(d). Section 2254(d) reflects the deferential principle that federal habeas courts "operate[] within the bounds of comity and finality." *Williams v. Taylor*, 529 U.S. 362, 381 (2000). By contrast, Jiménez seeks certiorari review of a state post-conviction judgment. Because the issue does not arise under the federal habeas statute, this Court can separate the federal rule of decision for freestanding innocence claims from any additional requirements attendant to federal habeas deference.

More importantly, in this particular case, the Texas post-conviction proceeding explicitly identified the quantum of evidence which it deemed necessary to support a freestanding innocence claim. The state court held that, although the Petitioner would not have succeeded under a "clear and convincing" standard, Jiménez would have succeeded under a "preponderance of the evidence" standard. App'x. 78-79. The Texas Court of Criminal Appeals, for its part, applied only the clear and convincing evidence standard and, using that standard, rejected the Petitioner's claims. App'x. 16-17.

In short, the Petition is an attractive vehicle for the Court to decide this issue, both because the decision below (1) is not in a federal habeas posture; and (2) involves a clean holding that "clear and con-

vincing" evidence of innocence entitles a prisoner to a new trial but that a "preponderance" of such evidence does not. Both attributes make this case the right vehicle for deciding the Question Presented.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court grant the Petition for Certiorari.

Respectfully submitted,

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