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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This case presents a well-defined and vitally important issue on which lower courts have divided—whether the Due Process Clause requires proof of an actual-innocence claim by a preponderance of the evidence or an even heavier standard. It likewise raises a *Strickland* error—which prevented the presentation at trial of the new evidence of actual innocence—that also justifies review or summary reversal.

Unlike the Court's prior cases addressing actual-innocence claims, this case arises from state collateral review, meaning that the correctly formulated burden of proof does not incorporate the insulating effect of deference to state-court judgments constitutionally and statutorily required in federal habeas proceedings. And as the Texas courts found, Jiménez's actual-innocence claim satisfies a preponderance-of-the-evidence burden but was held insufficient under a higher clear-and-convincing-evidence standard. This case accordingly offers an exceptional—and exceedingly rare—opportunity to articulate the burden of proof without distraction, in an instance where selection of the proper standard is likely determinative.

The Travis County district attorney's scattershot arguments against review lack merit. Jiménez's actual-innocence claim is extraordinary and compelling, as the one judge

to hear first-hand from all of the experts determined. That claim was properly presented and addressed below. Neither *Teague* v. *Lane* nor the district attorney's abandonment of the argument that no such claim exists bars consideration. And the type of evidence required to satisfy the burden of proof is a federal-law, not state-law, issue subsumed within the question presented and thus cannot preclude review. The Court should grant certiorari.

ARGUMENT

I. THE COURT SHOULD REVIEW JIMÉNEZ'S ACTUAL-INNOCENCE QUESTION.

A. This Is The Ideal Vehicle To Address Actual Innocence.

Jiménez presents an ideal vehicle for deciding the burden-of-proof question. The district attorney offers no convincing rebuttal to the considerations favoring review.

1. The Question Is Properly Presented.

Jiménez's federal actual-innocence claim was both "addressed by" and "properly presented to" the CCA, and the district attorney does not argue otherwise. *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997). Her claim "was raised at the time and in the manner required by the state law," *id.*, at 87 (quotation marks omitted); App.120, and both the habeas judge and the

CCA addressed it on the merits. App.16-17, 77-79. Because preservation operates on a claim-by-claim, not argument-by-argument, basis, "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United* v. *FEC*, 130 S.Ct. 876, 893 (2010) (quotation marks omitted). Though the CCA did not address the burden-of-proof issue, Jiménez's *claim* was undisputedly preserved. There is no bar to reaching the question presented. *Ibid.*

Even if a granular preservation requirement applied, however, there is no bar to review because the CCA denied Jiménez a chance to raise the argument before that court. The CCA sat as the court of first instance and "ultimate fact finder" over Jiménez's habeas application. Tex. Code Crim. Proc. art. 11.07, §5; App.2. The relationship between the CCA and the habeas judge was thus akin to that between a federal district court and a magistrate judge. In that posture, the CCA has plenary authority and takes up de novo pure legal questions that are independent of witness credibility determinations, as the burden-of-proof issue is. See *Ex parte Martin*, 6 S.W.3d 524, 526 (Tex. Crim. App. 1999). Accordingly, the law allowed Jiménez to raise the burden-of-proof issue before the CCA. Cf. *Thomas* v. *Arn*, 474 U.S. 140, 153-154 (1985) (requiring issues be raised

in district court, not before magistrate, to preserve appellate review).

But the CCA, despite addressing the merits of Jiménez's actual-innocence claim, neither requested nor allowed briefing or argument from the parties on that claim. Rather, it expressly limited briefing to Jiménez's *Ake* v. *Oklahoma* and ineffective-assistance claims. Order, at 2 (Nov. 2, 2011). Jiménez was thus denied a chance to address the burden-of-proof issue before the CCA; she did not deny that court the opportunity to address it. See *Adams*, 520 U.S., at 87. And Jiménez could not waive an issue she could not raise. Ruling otherwise would allow the CCA to evade this Court's review by simply refusing briefing of legal issues parties are entitled to raise.

2. No Jurisdictional Or Prudential Considerations Counsel Against Review.

The BIO's procedural arguments offer no basis for denying review. The CCA's requirement of "newly discovered" evidence to satisfy the federal-law burden of proof for constitutional actual-innocence claims is not an adequate and independent state ground. Likewise, the district attorney's failure to press alternative arguments in support of the CCA's decision does not preclude or militate against review. And the fact that the CCA did not

expressly adopt the habeas judge's *Schlup* finding is immaterial.

a. The CCA's conclusion that the evidence presented on habeas was not newly discovered as a matter of Texas law does not prevent the Court from reaching the question presented.

Whether the Due Process Clause requires evidence be newly discovered, newly available, or newly presented—and what the scope of those categories may be—is a question of federal, not Texas, law. See *Schlup* v. *Delo*, 513 U.S. 298, 324 (1995). So is whether Jiménez's evidence fits within the appropriate category—i.e., whether medical expert testimony she could have presented at trial but for the alleged *Ake* violation and the ineffectiveness of her counsel qualifies as newly available or discovered, within the meaning the Constitution gives the relevant term. That issue—the type of evidence required to carry the burden due process imposes—is a necessary component of the burden-of-proof question itself. Pet.31, n.13. Thus, regardless of whether the CCA's conclusion was "dictated by its own precedent," BIO.21, it is no bar to review.

Even were this an issue on which state and federal law intermixed, it cannot serve as an adequate and independent state ground without a clear statement from the CCA articulating its reliance on state-law grounds alone. *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983); see *Ex*

parte Elizondo, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (deriving "newly discovered" evidentiary requirement from federal precedents). There is none. App.14-17.

b. The BIO faults Jiménez for not framing a question specifically asking whether due process embraces actual-innocence claims. But there was no obligation to present a point not in contention below and resolved in Jiménez's favor to boot. Existence of an actual-innocence claim is a necessary predicate to the question presented—meaning it is fairly included within the question. See Pet.32 (acknowledging resolution of this point is necessarily implicated); Sup. Ct. Rule 14.1(a). Indeed, nonexistence of the claim would present an alternative ground for affirmance—one the district attorney could have argued in opposition, but did not. The district attorney cannot avoid review by strategically declining to press dispositive issues, then claiming that the absence of a party supporting that position raises a purported justiciability problem. That tactic is particularly inappropriate when it simultaneously refuses to concede the point, intimates that the "supposed," "presumed," "hypothetical" claim's nonexistence justifies denial, and hedges on whether it will change positions at some later point. See BIO.18 (noting it "is not presently challenging *Elizondo*"). The better practice when a party abandons a potentially dispositive issue is to

appoint amicus curiae to argue it, not to deny review. *E.g.*, Order, *U.S. Dept. of Health & Human Servs.* v. *Florida*, No. 11-398 (U.S. Nov. 18, 2011).

c. This case's suitability for review does not turn on whether the CCA adopted the habeas judge's *Schlup* finding.[1] The habeas judge is the only judge to have evaluated first-hand both the trial and habeas records, including hearing all the experts and observing their credibility and demeanor. The fact that he found Jiménez's claim meritorious when evaluated under the *Schlup* standard indicates the strength of her claim,[2] but it is not technically necessary for Jiménez to raise the

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[1] Jiménez never stated that the habeas judge ordered a new trial based on actual innocence; the record is clear he did not. It is equally clear, however, that he determined *Schlup* was satisfied by the joint trial and habeas record. App.78-79. Thus, if *Schlup* states the burden of proof for a federal actual-innocence claim in state proceedings, at least for a new trial, Jiménez's habeas evidence justifies that outcome.

[2] Judge Wisser, the trial judge, has also stated publicly that the habeas evidence "undermines [his] confidence in the verdict" and that he believes Jiménez is likely innocent. See Smith, Judge To DA: Woman Likely Not Guilty In Toddler's Death, Austin Chronicle (Oct. 3, 2012).

burden-of-proof issue or "have an interest" in the outcome of the petition.

Regardless, the CCA's treatment of that finding was less dismissive than the district attorney supposes. The CCA's precedents do not suggest that its silence on a finding implies or automatically constitutes rejection. See *Ex parte Reed*, 271 S.W.3d 698, 728 (Tex. Crim. App. 2008). The CCA said it adopted the habeas judge's findings except "when necessary" to make alternative findings. App.2. The BIO offers no reason not to take the CCA at its word.

It is, anyhow, indisputable that the CCA never expressly disagreed with the habeas judge's finding under the *Schlup* standard—that, by a preponderance of the evidence, no rational juror would convict Jiménez on the combined trial and habeas record. Any failure to expressly adopt that finding means nothing more than that remand may be required should Jiménez prevail, not that review is inappropriate.

3. *Teague* Does Not Foreclose Review.

Teague v. *Lane* holds that, unless an exception applies, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. 288, 310 (1989). *Teague* does not apply to certiorari

review of state collateral proceedings.[3] But even if it did, *Teague* does not thwart review, for at least three reasons.

a. Actual innocence is not a "rule of criminal procedure" but a substantive principle. An actual-innocence claim does not rest on a procedural error in the trial-court process; thus, *Teague* does not apply by its own terms. Indeed, the Court has never—in *Davis*, *House*, *Schlup*, *Herrera*, or elsewhere—suggested that *Teague* precludes addressing actual-innocence claims even on federal habeas review. That makes sense: *Teague*'s bar, erected to screen out non-innocence-based habeas claims, should not prevent review of the type of innocence-focused claim *Teague* intended to favor. See *id.*, at 313; see generally Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970).

The district attorney's argument simply proves too much. If *Teague* limits this Court, as AEDPA limits lower courts, "to consider[ing] the issues raised only in light of clearly established constitutional principles dictated by precedent" as of a conviction's finality, BIO.16, the Court

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[3] Neither precedent nor practice suggests its extension to that context. See, *e.g.*, *Roper* v. *Simmons*, 543 U.S. 551 (2005) (announcing new constitutional rule in review of state habeas petition without mentioning or applying *Teague*).

can never reach the question whether the Constitution authorizes actual-innocence claims. Such claims by their nature arise only on collateral review. And given that the Court has not yet recognized such a claim, the district attorney's reading of *Teague* would bar the Court from doing so in any case, state or federal. That cannot be the law.

b. The retroactive-application concern animating *Teague* is absent. Because actual-innocence claims are raised only on collateral review, a decision recognizing actual innocence's availability on habeas would apply to similarly situated litigants whose actual-innocence claims are being heard for the first time, just as this Court's rulings take effect in pending direct appeals of live claims. See *Teague*, 489 U.S., at 305-306 (determination of retroactivity depends "on the nature, function, and scope of the adjudicatory process in which such cases arise"). Failing to apply a new rule to claims pending on direct review (as actual-innocence claims are on state collateral review) would "violate[] basic norms of constitutional adjudication." *Id.*, at 304.

c. Recognizing a constitutional actual-innocence claim would fall under one or both of *Teague*'s exceptions. Announcing that due process bars punishment of the actually innocent would by definition place some individuals beyond the power of the criminal

law. *Id.*, at 311. And as a component of basic due process, it would constitute a "watershed" rule as well. *Ibid.* The BIO fails even to mention these limits to *Teague*'s reach.

B. The Unresolved Split Among Lower Courts Merits Review.

This Court has never answered the question at issue—what burden of proof the Constitution requires to prevail on an actual-innocence claim on state collateral review, without the insulating effect of deference paid on federal habeas review. Pet.24-26.[4] *House* might resolve this question were Jiménez a federal petitioner, but the district attorney ignores that she is not. The contention that *House* "definitively resolved" the question in favor of a clear-and-convincing-evidence standard, BIO.28, is no more plausible than the notion that *Schlup* definitively resolves it against that standard.

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[4] According to the district attorney, federalism-based deference cannot cause differences in the effective burdens of proof in federal- versus state-court collateral review. That is precisely what AEDPA requires. See 28 U.S.C. §2254(d)(1). Federalism, a structural feature of our constitutional system, may likewise give due process and other principles varied applications across those distinct contexts. Indeed, the BIO concedes that a baseline constitutional standard coexists with a varying degree of deference granted to state-court decisions when applying it. BIO.29, n.17.

See 513 U.S., at 323-326 & n.44 (rejecting *Sawyer* v. *Whitley*'s clear-and-convincing-evidence standard). The Court's precedents simply do not answer the question presented, and its silence has left state and federal courts in serious disarray.

The district attorney can label that split of authority "illusory," BIO.30, only by ignoring the inconvenient cases. It omits any mention of *Carriger* v. *Stewart* or *Cornell* v. *Nix*, two federal circuit-court cases contributing directly to the split. Pet.28. And its attempted distinction of other states' cases is inaccurate, claiming statutory bases for their recognition of actual-innocence claims that are in fact grounded in due process. See *State ex rel. Amrine* v. *Roper*, 102 S.W.3d 541, 546-547 & n.3 (Mo. 2003) (interpreting state statute to require cognizance of actual-innocence claims because of perceived federal constitutional command); *Summerville* v. *Warden*, 641 A.2d 1356, 1368-1369 (Conn. 1994) (citing *Murray* v. *Carrier*, 477 U.S. 478 (1986), in recognizing actual-innocence claim); *Ex parte Lindley*, 177 P.2d 918 (Cal. 1947) (citing no statutory basis for determination that new evidence may justify habeas relief). The district attorney's superficial reading of these cases—and utter failure to grapple with their federal counterparts—cannot explain away the split among the lower courts.

C. Jiménez Is Actually Innocent.

Assessed under the proper standard, the record assembled in the state habeas proceedings establishes a rare and exceptional case of actual innocence, as the habeas judge recognized. App.78-79; see Pet.8-20. The evidence supporting conviction is anything but persuasive in light of the new expert evidence exonerating Jiménez (and previously unavailable to her because of the *Ake* violation and counsel's ineffectiveness). And beyond tallying up the number of experts for each side at the habeas hearing, the district attorney offers no reason to second-guess the habeas judge's factual findings, based on his first-hand evaluation of the witnesses' demeanor and credibility, that the district attorney "did not credibly rebut" Jiménez's evidence of innocence. App.65-72.

Yet the question presented does not require the Court to weigh the merits of her actual-innocence claim, as the district attorney claims. If Jiménez prevails on the burden-of-proof question, remand to the Texas courts to reevaluate her claim under the proper standard will likely be appropriate.

Nor should the Court deny Jiménez's petition in favor of potential future federal habeas review. That repeated suggestion by the district attorney ignores both the potential unavailability of an actual-innocence claim

under AEDPA and the Court's pronouncements on the comparative intrusiveness of federal collateral review. See Pet.28-29.

II. THE COURT SHOULD REVIEW, OR SUMMARILY REVERSE ON, JIMÉNEZ'S *STRICKLAND* CLAIM.

Jiménez's ineffective-assistance claim is worthy of the Court's attention both because of the intertwined *Ake* violation that went unpreserved because of her trial counsel's errors, and because of the serious impact that failing had on the presentation of the evidence that underlies her actual-innocence claim.

The facts defining Jiménez's *Strickland* claim are not in dispute. Martinez's failure to formally request additional expert assistance was not merely "purported." BIO.36. There was no possible strategic reason for that failure. And the prejudice accruing from it is unmistakable—that failure, the CCA held, left Jiménez's meritorious *Ake* claim unreviewable.

The BIO does not dispute these points. Indeed, the single argument it offers against review—that the trial judge's affidavit questions whether a separate, informal request for *Ake* assistance occurred—strengthens the case for granting certiorari.

If considered,[5] Judge Wisser's affidavit highlights counsel's starkly deficient performance. If correct, Martinez made *no* request for additional resources despite knowing of Dr. Kanfer's inadequacy to counter the State's case. Moreover, Wisser's averment that he would have appointed additional experts if asked, Resp. App.39-40, removes any possible doubt that Martinez's constitutionally inadequate performance prejudiced Jiménez, denying her the opportunity to present the type of expert testimony that fills the habeas record.

Martinez's failure denied Jiménez "the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Crane* v. *Kentucky*, 476 U.S. 683, 690-691 (1986) (quotation marks omitted). No formal *Ake* request was made. Jiménez was constitutionally entitled to expert assistance, and the trial judge agrees he would have appointed additional experts if requested. Martinez's deficient performance thus denied Jiménez the chance to present testimony that, as the habeas judge found by a preponderance of the evidence, would have precluded any rational juror from finding guilt beyond a reasonable doubt. Under these circumstances, review or summary reversal is justified.

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[5] The affidavit was not evidence in Jiménez's habeas proceeding. See Pet.22, n.9.

CONCLUSION

The Court should grant the petition and issue a writ of certiorari to review the final judgment of the Court of Criminal Appeals.

Respectfully submitted,

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