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FEDERAL HABEAS CORPUS AND POSTCONVICTION CLAIMS OF ACTUAL INNOCENCE BASED ON DNA EVIDENCE

*J. Brent Alldredge**

I. INTRODUCTION

SINCE the early 1990s, deoxyribonucleic acid ("DNA") testing has become the "most reliable forensic technique for identifying criminals" and is "increasingly commonplace in pretrial investigations."[1] Despite its increasing role in criminal investigations, however, DNA testing was not generally available prior to 1994.[2] As the use of DNA testing has become more widespread, state and federal prisoners have sought to employ the technology to produce evidence of actual innocence in the hope that it will lead to postconviction exoneration. This hope is based upon the potential of DNA testing to yield a greater amount of highly-accurate information and, by doing so, "provide[ ] a more reliable basis for establishing a correct verdict than any evidence proffered at the original trial," even with decades-old biological material.[3] As of November 2002, in fact, there have been a number of high-profile crimes in which 115 wrongfully-convicted men and women have been exonerated through the use of DNA testing.[4]

The large number of postconviction exonerations has piqued the public interest and prompted the question: Why do inmates remain in prison despite DNA evidence that would otherwise exonerate them if the sci-

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1. Innocence Protection Act, S. 486, 107th Cong. § 101(a)(1), (3) (2001); *see also* Innocence Protection Act, H.R. 912, 107th Cong. (2001).

2. S. 486 § 101(a)(3). DNA evidence was first introduced in a United States Court in 1986 and, after numerous court challenges, is now admitted in all United States jurisdictions. NAT'L INST. OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 1 (1999), *available at* http://www.ncjrs.org/pdffiles1/nij/177626.pdf (last visited Jan. 3, 2003) [hereinafter RECOMMENDATIONS].

3. S. 486 § 101(a)(3), (4).

4. *Man Freed by DNA Test After 20 Years*, CNN.com, Nov. 7, 2002, *at* http://www.cnn.com/2002/LAW/11/07/DNA.freed.ap/index.html (last visited Nov. 13, 2002). It is also significant to note that "[i]n more than a dozen cases, post-conviction DNA testing that has exonerated an innocent person has also enhanced public safety by providing evidence that led to the identification of the actual perpetrator." S. 486 § 101(a)(6). *See, e.g.*, *DNA Evidence That Freed One Man in Rape Case Leads to Another's Arrest*, CNN.com, Nov. 19, 2002, *at* http://www.cnn.com/2002/US/Northeast/11/19/dna.arrest.ap/index.html (last visited Nov. 19, 2002); Jodi Wilgoren, *DNA That Freed Three Matches New Suspects*, N.Y. TIMES, Feb. 8, 2002, at A18.

ence of DNA testing can now establish with near certainty who did or did not commit a crime?[5] Renewed concerns about the inefficiencies of the criminal justice system and the appropriateness of the death penalty are the inevitable results of such a question. Emphasizing the tragedies replayed in the headlines,[6] for example, authors have undertaken the task of illustrating the sometimes less-than-reliable tools employed by police and prosecutors and how some criminal trials go awry;[7] a number of these authors have also called for a nationwide moratorium on the death penalty until these problems can be adequately addressed.[8] Illinois and Maryland have already instituted death penalty moratoria and two federal district courts have gone as far as to declare the Federal Death Penalty Act unconstitutional because it creates an undue risk that innocent persons are being convicted of capital crimes. While one of these decisions has already been reversed by the Second Circuit and the other is being challenged on similar grounds, it is clear that the law is far from settled.[9]

Responding to the onslaught of unpleasant media and judicial revelations, particularly with respect to the possibility of innocent people being executed or incarcerated for extended sentences, the public has also become wary of the serious problems facing the criminal justice system. In a bipartisan survey conducted for The Justice Project, for example, public concerns were reflected in finding that "80% of Americans support reforming or abolishing the death penalty, and 64% support suspending executions entirely until issues of fairness in capital punishment can be resolved."[10] Even former Attorney General Janet Reno has voiced her concerns. Spurred by a 1996 research report issued by the National Institute of Justice ("NIJ"),[11] she acknowledged the fallibility of the criminal justice system and requested that the NIJ establish a National Commission on the Future of DNA Evidence to identify ways to maximize the value of DNA testing and immediately address the issues surrounding

5. *See The Case for Innocence*, PBS Frontline, *at* http://www.pbs.org/wgbh/pages/frontline/shows/case/etc/synopsis.html (last visited Jan. 3, 2003).

6. *See, e.g.*, *Man Freed by DNA Test After 20 Years*, *supra* note 4; Sara Rimer, *DNA Testing in Rape Cases Frees Prisoner After 15 Years*, N.Y. TIMES, Feb. 15, 2002, at A12; *see also* Wilgoren, *supra* note 4.

7. *See, e.g.*, BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

8. *See id.*

9. DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2002: YEAR END REPORT 3-4 (2002), *at* http://justice.policy.net/relatives/21160.pdf (last visited Jan. 3, 2003).

10. *New Survey Shows Overwhelming Majority Supports Changes to Death Penalty*, The Justice Project, *at* http://justice.policy.net/proactive/newsroom (last visited Jan. 3, 2003). *But cf.* Interview by John Ydstie, NPR: All Things Considered, with Andrew Kohut, Director, Pew Research Center for The People & The Press (Apr. 15, 2002) (indicating that most other polls show that about two-thirds of the public still favor the use of the death penalty).

11. NAT'L INST. OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996), *available at* http://www.ncjrs.org/pdffiles/dnaevid.pdf (last visited Jan. 3, 2003) (presenting case studies of twenty-eight inmates for whom DNA testing was exculpatory).

postconviction application of evidence resulting from such testing.[12]

Why, then, do inmates remain in prison despite DNA evidence that would otherwise exonerate them?[13] The answer to this question is not as simple as it may intuitively seem. Because of the constitutional safeguards that make it more difficult for a state to overturn the presumption of innocence and establish guilt beyond a reasonable doubt, and because of the accused's right to appellate review in both state and federal courts, it is also more difficult for the legal system to subsequently ignore the fact that the accused was found guilty despite these safeguards. Chief Justice Harlan Stone appropriately asked: "Is it not desirable that at some point of time further consideration of criminal cases by the court should be at an end, after which appeals should be made to Executive clemency alone?"[14] In other words, where is the line to be drawn?

Writing for the court in *Herrera v. Collins*, Chief Justice Rehnquist clearly answered this question.[15] He reaffirmed the fact that the determination of an accused's guilt or innocence in a state criminal trial is "a decisive and portentous event" and that state trials were not meant to be relitigated in the federal courts.[16] Because "[s]ociety's resources have been concentrated [in a state criminal trial] in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens,"[17] Rehnquist continued, "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of free-standing claims of actual innocence."[18]

II. FEDERAL HABEAS CORPUS

A. THE GREAT WRIT

Although the term *habeas corpus* is technically a general term referring to a number of different writs originating under English statutory and common law, it is used most frequently in reference to the writ of habeas corpus ad subjiciendum.[19] This writ provides an extraordinary remedy that was neither designed to compensate for past injustice nor to penalize the responsible government agent, but to ensure the integrity of the process resulting in imprisonment by inquiring into the legality of an individ-

12. RECOMMENDATIONS, *supra* note 2, at iii.

13. *The Case for Innocence*, *supra* note 5.

14. Herrera v. Collins, 506 U.S. 390, 409 n.7 (1993) (quoting 7 DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 3, 7 (M. Wilken & N. Triffin eds., 1991) (Chief Justice Harlan Stone responding to the second preliminary draft of the Federal Rules of Criminal Procedure)).

15. *Herrera*, 506 U.S. 390 (1993).

16. *Id.* at 401 (quoting Barefoot v. Estelle, 463 U.S. 880, 887 (1983)).

17. *Id.* (quoting Wainwright v. Sykes, 433 U.S. 72, 90 (1977)) (internal quotation marks omitted).

18. *Id.*

19. Carbo v. United States, 364 U.S. 611 (1961). This is the application of the term as it will be employed in this paper; references to habeas corpus should be understood as habeas corpus ad subjiciendum.

ual's confinement.[20] Blackstone observed that

> the flagrant abuse of any power . . . has always been productive of a struggle; which either discovers the exercise of that power to be contrary to law, or (if legal) restrains it for the future. . . . The oppression of an obscure individual gave birth to the famous habeas corpus act, which is frequently considered another magna carta . . . and by consequence . . . has reduced the method of proceeding . . . to the true standard of law and liberty.[21]

For these reasons, habeas corpus is sometimes referred to as "the great writ of liberty"[22] or, simply, the "Great Writ."[23]

Despite the Federal Constitution's mandate that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended,"[24] it was generally understood that the Constitution guaranteed only that state habeas corpus be available to federal prisoners—probably because the states were considered the primary protectors of individual liberty.[25] As a result, Congress initially refused to grant federal courts habeas jurisdiction in state cases.[26] In 1789, however, Congress authorized the federal courts to grant writs of habeas corpus to federal prisoners[27] and, in 1867, extended the courts' jurisdiction to encompass state prisoners as well.[28] As currently codified, the writ of habeas corpus extends to anyone "in custody in violation of the Constitution or laws or treaties of the United States."[29]

The writ itself is essentially a writ of error, which brings up the body of the person alleging illegal confinement;[30] however, it is a new lawsuit, collateral in nature,[31] and in no way appellate for the purpose of reviewing errors.[32] This means that the court exercising jurisdiction sits to ensure that individuals are not confined in violation of the Constitution, as opposed to weighing the evidence in order to correct errors of fact or determine anew the guilt or innocence of a prisoner.[33] By restricting federal habeas review to issues of Constitutional concern, a court need only address whether the custodian has the authority to deprive the petitioner of his constitutionally-protected liberty.[34]

To reach this stage of review, however, a state prisoner petitioning a federal court for a writ of habeas corpus must first exhaust all available

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20. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 3 (1980).
21. 3 WILLIAM BLACKSTONE, COMMENTARIES *135 (internal citation and emphases omitted).
22. *Id.*
23. Stone v. Powell, 428 U.S. 465 (1976).
24. U.S. CONST. art. I, § 9, cl. 2.
25. DUKER, *supra* note 20, at 181.
26. *Id.*
27. *Id.* at 182-86 (discussing the Judiciary Act of 1789).
28. *Id.* at 189-99 (discussing the Habeas Corpus Act of 1867).
29. 28 U.S.C. §§ 2241(c)(3), 2254(a) (2002).
30. *Ex parte* Watkins, 28 U.S. 193 (1830).
31. Goto v. Lane, 265 U.S. 393 (1924).
32. *Ex parte* Terry, 128 U.S. 289, 305 (1888).
33. *Herrera*, 506 U.S. at 400-01.
34. Reed v. People, 745 P.2d 235, 238 (Colo. 1987).

state remedies, demonstrate that there is no available state corrective process, or demonstrate that circumstances exist that would render such a process ineffective.[35] This means that the petitioner must exhaust three distinct judicial processes before a federal court will entertain the possibility of issuing a writ: (1) trial and direct appeal, (2) state postconviction review, and (3) federal habeas corpus review.[36] Procedurally, it did not appear that it would be difficult to comply with these requirements following the Supreme Court's 1963 decision in *Fai v. Noia*.[37] In *Fai*, the Court acknowledged the federal courts' broad powers to grant a writ of habeas corpus for "whatever society deems to be intolerable restraints."[38] This expansive and empowering view, however, lent itself to much criticism. Critics contended, for example, that "when used 'improperly,' [habeas corpus] impedes finality in state court judgments" and "violates federalism-based principles of state sovereignty."[39]

The broad view of federal habeas jurisdiction, with all of its attendant problems and criticisms, began to be construed much more narrowly in 1977. In *Wainwright v. Sykes*,[40] the Court started to move toward a somewhat more "rigid . . . enforcement of state procedural rules based on notions of federalism, comity and finality,"[41] indicating that it would afford greater deference to state procedural requirements. If a petitioner did not follow proper procedure in raising a claim within the state system on either direct appeal or postconviction review, the claim was considered procedurally flawed. The Court said that such a procedurally defective claim could only be heard if the petitioner could subsequently demonstrate cause for failure to comply with state rules and that actual prejudice resulted.[42]

The obstacles faced by a petitioner claiming actual innocence based on DNA evidence are further complicated by these requirements because the newly-discovered evidence at issue does not fit well into existing procedural schemes or established constitutional doctrine.[43] Under common law, for example, the availability of habeas corpus was extremely narrow in that it was usually time barred following the term of the court in which the judgment of conviction was entered.[44] Although most states have altered their statutory schemes to provide extended periods in which a peti-

35. 28 U.S.C. § 2254(b)(1) (2002).

36. Lisa R. Duffett, Note, *Habeas Corpus and Actual Innocence of the Death Sentence After* Sawyer v. Whitley*: Another Nail in the Coffin of State Capital Defendants*, 44 CASE W. RES. L. REV. 121, 126-27 (1993).

37. Fai v. Noia, 372 U.S. 391 (1963).

38. *Id.* at 401-02.

39. Duffett, *supra* note 36, at 127 (citing IRA P. ROBBINS, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 42 (1990) ("Some members of the state judiciary . . . view federal habeas corpus review of state court criminal convictions as an affront to their sovereignty.")).

40. Wainwright v. Sykes, 433 U.S. 72 (1977).

41. Duffett, *supra* note 36, at 129-30.

42. *Sykes*, 433 U.S. at 84-87.

43. RECOMMENDATIONS, *supra* note 2, at 10.

44. *Id.* at 9.

tioner can bring a claim, only fifteen states permit new trial motions based on newly-discovered evidence made more than three years after conviction.[45] This means that if a prisoner sought to discover DNA evidence that could prove potentially exonerative, generally speaking, he would be barred from doing so.

The reasoning behind these commonly-accepted restrictions on federal habeas corpus review is typically attributed to several factors:

— The strong presumption that the verdict is correct because the accused was found guilty by a jury of peers after a trial conducted with full constitutional protections.
— The need for finality.
— The recognition that the likelihood of more accurate determinations of guilt or innocence diminishes over time as memories fade, witnesses disappear, and the opportunity for perjury increases.
— The need to conserve judicial resources by not opening the floodgates to meritless and costly claims.[46]

This traditional understanding of the need to limit the availability of habeas corpus, coupled with the assumption that there can be no relief granted where there is no constitutional error, affords little hope to the petitioner claiming actual innocence based on DNA evidence. Despite the exonerative potential of DNA testing, the need for finality and the fact that the petitioner is no longer approaching the courts as one presumed innocent in the eyes of the law, requires that the evidence meet an extraordinarily high threshold.[47]

While concerns regarding states' rights, judicial conservation, and the value of finality in the criminal justice system are still valid, DNA testing poses a serious challenge to the other commonly-accepted restrictions on federal habeas corpus. For example, the arguments favoring the strong presumption that a verdict is correct and the likelihood that more accurate determinations of guilt or innocence diminishes with time are weakened by the advent of DNA testing.[48] The presumption that verdicts are correct is contradicted by the fact that there is a growing number of cases that have been vacated by exclusionary evidence resulting from DNA testing.[49] It also appears that the results of DNA testing not only maintain their evidentiary significance over extended periods of time, but also increase in probative value as "technological advances and growing databases amplify the ability to identify perpetrators and eliminate suspects."[50]

Although DNA testing challenges the traditional understanding of the need to limit the availability of habeas corpus, it is difficult to reconcile

45. *Id.*
46. *Id.* (internal citation omitted).
47. *See Herrera*, 506 U.S. at 417.
48. RECOMMENDATIONS, *supra* note 2, at 9-10.
49. *Id.* at 9.
50. *Id.*

the approach petitioners would have the courts take with state and federal postconviction procedures. In both state and federal court, it is assumed that a petitioner for a writ of habeas corpus already has, in hand, newly-discovered evidence that will prove his innocence.[51] A petitioner in a postconviction DNA case, however, invariably attempts to procure evidence that he can only hope will help to prove his innocence.[52] The difficulty is that it is not clear as to the legal theory or procedure that might entitle a petitioner, first, to discover the evidence and, second, to present any favorable results in a judicial proceeding.[53]

B. *Brady*: A Right to Testing?

Even in the absence of formal, postconviction discovery procedures, some petitioners have been successful in gaining access to DNA testing under *Brady v. Maryland*.[54] In *Brady*, the petitioner was found guilty of murder in the first degree and his conviction was affirmed by the Maryland Court of Appeals.[55] After his conviction was affirmed, however, the petitioner discovered that the prosecutor withheld a statement made by the petitioner's confederate.[56] The statement contained an admission of the actual homicide and, based on this newly-discovered evidence, the petitioner moved for a new trial.[57]

The motion for a new trial was denied by the trial court and was dismissed without prejudice by the Court of Appeals, as to relief under Maryland's postconviction relief statute. Appealing from an unfavorable ruling in the trial court, the petitioner again reached the Court of Appeals. This time, the court held that the prosecutor's suppression of the statement denied the petitioner due process of law.[58] On certiorari, the Supreme Court agreed, holding "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[59]

Relying on *Brady*, the court in *Dabbs v. Vergari* permitted postconviction DNA testing as a prelude to a possible motion to vacate a conviction based on newly-discovered evidence.[60] This extended application of *Brady* initially appears to provide a constitutional avenue for access to DNA testing; however, other courts have found that to refuse testing is not necessarily violative of *Brady*.[61] When faced with such a decision, for

51. *Id.*
52. *Id.*
53. *Id.*
54. Brady v. Maryland, 373 U.S. 83 (1963).
55. *Id.* at 84.
56. *Id.*
57. *Id.*
58. *Id.* at 85.
59. *Id.* at 87.
60. Dabbs v. Vergari, 570 N.Y.S.2d 765 (1990).
61. *See, e.g.*, Ohio v. Wogenstahl, No. C-970238, 1998 WL 306561, at *2-3 (Ohio Ct. App. June 12, 1998) (unpublished opinion).

example, the Ohio Court of Appeals determined that the request for DNA testing was nothing more than a request for discovery and stated: "We have repeatedly held that the trial court is not required to grant discovery during the initial stages of postconviction proceedings."[62]

While it is quite clear that a defendant has a constitutional right to be informed of and provided exculpatory evidence, it is unclear how this right applies to DNA testing. The United States Court of Appeals for the Seventh Circuit, for example, recently noted that due process is satisfied as long as the ultimate disclosure in question is made before it is too late for the defendant to make use of it.[63] If a petitioner's trial took place prior to 1994, even if the state produced favorable information resulting from DNA testing, it is unlikely that it would have proven beneficial at the time of trial.[64] This creates a problem when the decision in *Brady* requires that "the prosecutor must disclose evidence if, without such disclosure, a reasonable probability will exist that the outcome of a trial in which the evidence had been disclosed *would have been different.*"[65]

It is difficult to apply this rule to DNA testing because, only with the clarity of hindsight, is it obvious that favorable DNA evidence could easily have considerable impact on the outcome of a case decided before DNA evidence was admissible at trial. The United States Court of Appeals for the Second Circuit noted, however, that it is not feasible to specify the timing of disclosure as required under *Brady*, "except in terms of the sufficiency, *under the circumstances*, of the defense's opportunity to use the evidence when disclosure is made."[66] For this reason, and because DNA evidence was not generally admissible before 1994, the existence of the evidence would not have altered the outcome of a trial and would not, therefore, be subject to the requirements laid out in *Brady*.

C. *Carrier*: Actual Innocence Exception

Due to the reluctance of courts to allow collateral remedies to relitigate a petitioner's guilt or innocence, the traditional black-letter rule stated that claims of actual innocence based on newly-discovered evidence were insufficient for postconviction relief.[67] Emphasizing this point in *Townsend v. Sain*, the Supreme Court stated that "the existence . . . of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus" unless accompanied by a constitutional violation.[68] In *Murray v. Carrier*, however, the Court changed its focus from seemingly-inflexible procedures to the issue of innocence as the inquiry of primary importance, at least as it pertains to habeas

62. *Id.* at *1.
63. United States v. Reyes, 270 F.3d 1158, 1166-67 (7th Cir. 2001).
64. *See supra* note 2 and accompanying text.
65. *In re* United States, 267 F.3d 132, 142 (2d Cir. 2001) (emphasis added).
66. *Id.* (emphasis in original).
67. Henry Pietrkowski, Note, *The Diffusion of Due Process in Capital Cases of Actual Innocence After* Herrera, 70 Chi.-Kent L. Rev. 1391, 1393 (1995).
68. Townsend v. Sain, 372 U.S. 293, 317 (1963).

claims based on a fundamental miscarriage of justice.[69]

The Court's change of focus was somewhat subtle in that it did not alter any existing procedural requirements. In order to obtain review of a procedurally defaulted petition, for example, a petitioner was still required to show cause for the default and that prejudice resulted.[70] Since the petitioner in *Carrier* was unable to show cause, the Court refused to entertain his petition.[71] The Court reasoned that if the procedural default resulted from ineffective assistance of counsel, as the petitioner argued, then the requirements of the Sixth Amendment impute responsibility to the state, and the petitioner, therefore, failed to exhaust all available state remedies.[72] The finality that underlies the exhaustion doctrine would be ill served "if a petitioner could raise his ineffective assistance claim for the first time on federal habeas in order to show cause for a procedural default [and would deny] 'an opportunity to the state courts to correct a constitutional violation.'"[73]

For a petitioner seeking to discover and introduce favorable results from DNA testing, the procedural requirements reaffirmed in *Carrier* offer little hope. Addressing the question of actual innocence, however, the Court was more generous. Justice O'Connor wrote that "[i]n appropriate cases the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration."[74] The Court went on to say that it expected the majority of victims claiming a fundamental miscarriage of justice would still be able to meet the cause and prejudice standard.[75] In an extraordinary case, however, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ *even in the absence of a showing of cause for the procedural default.*"[76]

This exception demonstrates the Court's willingness to consider the petitioner's claim of innocence and, if necessary, "yield to the imperative of correcting a fundamentally unjust incarceration."[77] Unfortunately for the petitioner seeking DNA testing to challenge his incarceration, *Carrier*'s adherence to postconviction procedure still does not make clear that the petitioner has any right to discover DNA evidence so that he can potentially demonstrate that his incarceration is fundamentally unjust. In addition, even if a court were to waive the show-cause and prejudice requirements, unless the petitioner could demonstrate that his incarceration was the result of a constitutional violation, the exception would not

69. Duffett, *supra* note 36, at 132-33.
70. *Sykes*, 433 U.S. at 87.
71. *Carrier*, 477 U.S. at 489.
72. *Id.* at 488-89.
73. *Id.* at 489 (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)).
74. *Id.* at 495 (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982) (internal quotation marks omitted)).
75. *Id.* at 495-96.
76. *Id.* at 496 (emphasis added).
77. *Engle*, 456 U.S. at 135.

apply.[78]

D. *Sawyer*: Defining Actual Innocence

In *Sawyer v. Whitley*, the Supreme Court further defined the fundamental miscarriage of justice, or actual innocence, exception.[79] This case is instructive in that it helps to explain the reasoning behind the actual innocence exception. It is important to note, however, that the Court's analysis deals with actual innocence *of the death sentence*, a closely-related but different application of the exception as it would be employed by a petitioner seeking complete exoneration. The issue before the Court was whether a petitioner bringing a successive, abusive, or defaulted federal habeas claim was actually innocent.[80] If so, the Court would be able to reach the merits of a claim that would otherwise have been barred.

After the Supreme Court of Louisiana affirmed the petitioner's conviction of capital murder, the petitioner filed his first federal habeas petition, which was denied on the merits.[81] After granting a stay and holding an evidentiary hearing on the second petition for postconviction relief, the United States District Court for the Eastern District of Louisiana denied one claim on the merits and held that the other claims were barred as either abusive or successive.[82] Undeterred, the petitioner applied for a certificate of probable cause on the issue of whether he had demonstrated that he was "actually innocent of the death penalty" so that the court could reach the merits of his second petition.[83]

By the time this issue reached the Supreme Court, the exception to the *Sykes* requirement that a federal habeas petitioner demonstrate cause and prejudice had already been established. Three cases in particular, *Kuhlmann v. Wilson*,[84] *Murray v. Carrier*,[85] and *Smith v. Murray*,[86] extended the actual innocence exception to encompass successive, abusive, and procedurally defaulted claims, provided that "failure to hear the claims would constitute a 'miscarriage of justice.'"[87] This meant that in order for the Court to reach the merits in *Sawyer*, the petitioner would have to demonstrate that he fell within the exception.

The Court had already decided a number of cases prior to *Sawyer* in which it emphasized the narrow scope of the actual innocence exception,

78. "[W]here a *constitutional violation* has probably resulted in the conviction of one who is actually innocent . . . ." *Carrier*, 477 U.S. at 496 (emphasis added). Denying a petitioner access to DNA evidence is not, in and of itself, a constitutional violation. *See infra* Section E.

79. Sawyer v. Whitley, 505 U.S. 333 (1992).

80. *Id.* at 335.

81. *Id.* at 337.

82. *Id.* at 338.

83. *Id.*

84. Kuhlmann v. Wilson, 477 U.S. 436 (1986).

85. Murray v. Carrier, 477 U.S. 478 (1986).

86. Smith v. Murray, 477 U.S. 527 (1986).

87. *Sawyer*, 505 U.S. at 339.

but had never defined what it meant to be "actually innocent."[88] In the context of *Sawyer*, however, the Court was required not only to define its meaning, but also to make its application workable through relatively objective standards.[89] To do so, the Court adopted the objective factors that the Courts of Appeals for the Fifth and Eleventh Circuits employed as requirements that must be shown to exist before a defendant is "eligible" to have the death penalty imposed.[90]

The Eleventh Circuit's determination of a petitioner's eligibility for the death sentence was based upon the following:

> [A] petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates *all* of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body *could not* have found *any* aggravating factors. . . . [and therefore] lacked the discretion to impose the death penalty.[91]

The Supreme Court defined actual innocence and stated the rule using similar language. In order to determine whether the petitioner is actually innocent of the death sentence, he must show "by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty."[92]

Despite *Sawyer*'s expanded analysis of the actual innocence exception, it affords little more to a petitioner seeking exoneration through DNA testing than does *Carrier*. Assuming exculpatory evidence results from DNA testing and provides clear and convincing evidence such that no reasonable juror would vote to convict, unless this evidence is couched in a claim of constitutional error, the actual innocence exception would, once again, not apply.

E. *HERRERA*: A GLIMMER OF HOPE?

The actual innocence exception represents the courts' willingness to consider a claim of actual innocence in order to correct convictions that would otherwise be fundamentally unjust. Even so, courts have refused to entertain such claims in the absence of an underlying constitutional violation.[93] This means that even if a petitioner can prove through newly-discovered evidence that he did not commit the crime for which he was convicted, unless the claim is coupled with a showing of constitutional error, there can be no relief.

This result, while harsh, is consistent with precedent. In 1963, Chief Justice Warren stated that where newly-discovered evidence is alleged in

88. *Id.* at 340.
89. *Id.* at 341.
90. *Id.* at 347.
91. *Id.* at 347 n.15 (quoting Johnson v. Singletary, 938 F.2d 1166, 1183 (11th Cir. 1991) (emphasis in original)).
92. *Id.* at 348.
93. *Herrera*, 506 U.S. at 400.

a federal habeas application, if the evidence could not reasonably have been presented to the trier of facts, the court must grant an evidentiary hearing.[94] "Of course," he continued, "such evidence must bear upon the constitutionality of the applicant's detention."[95] In *Herrera*, the Court simply reemphasized this rule by declaring that "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."[96]

Although this rule is well established, *Herrera* presented the Court with a unique opportunity in that it was the first time a petitioner sought relief relying solely on a claim of actual innocence based on newly-discovered evidence.[97] Without an accompanying claim that a constitutional violation occurred in the underlying state criminal proceeding, the Court was forced to rely on earlier cases that, while allowing for the actual innocence exception, did so with the understanding that it was available "only where a prisoner *supplements* his constitutional claim with a colorable showing of factual innocence."[98]

Ten years after his capital murder conviction, the petitioner in *Herrera* again sought relief in federal court.[99] He had already unsuccessfully challenged his conviction in state appeals and collateral proceedings and in a previous federal habeas petition.[100] In his second petition, however, the petitioner claimed that he was actually innocent and was, for this reason, entitled to the Eighth and Fourteenth Amendments' guarantees of protection against cruel and unusual punishment and due process of law.[101] Writing for the Court, Chief Justice Rehnquist noted that the argument had an "elemental appeal," but ultimately rejected it.[102]

The Court quickly rejected the petitioner's Eighth Amendment claim by distinguishing it from every case upon which the petitioner relied.[103] As for the Fourteenth Amendment claim, the Court said that since the petitioner had already been afforded the presumption of innocence at a fair trial, and because he was found guilty of capital murder beyond a reasonable doubt, the presumption of innocence disappeared.[104] The petitioner, therefore, came before the Court not as one who was "innocent," but as "one who ha[d] been convicted by due process of law of two brutal murders."[105] For this reason, the Court found that the petitioner was no longer entitled to the Fourteenth Amendment's due process guarantee.

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94. *Townsend*, 372 U.S. at 317.
95. *Id.*
96. *Herrera*, 506 U.S. at 400.
97. Pietrkowski, *supra* note 67, at 1397.
98. *Herrera*, 506 U.S. at 404 (quoting *Kuhlmann*, 477 U.S. at 454) (emphasis added)).
99. *Id.* at 393.
100. *Id.*
101. *Id.*
102. *Id.* at 398.
103. *Id.* at 405-07.
104. *Id.* at 399.
105. *Id.* at 399-400.

This reasoning would apply just as well to a petitioner seeking review of a claim of actual innocence based on DNA evidence. Such a petitioner, having been convicted at a fair trial, would no longer enjoy the presumption of innocence and would not be entitled to judicial review of his claim. The Court suggested, however, that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional."[106] Although this statement had no practical effect for the petitioner in *Herrera* because his newly-discovered evidence was insufficient to satisfy the extraordinarily high threshold showing set by the Court,[107] it suggests that a petitioner who could prove his actual innocence through DNA testing would be entitled to judicial review of his claim.

On the other hand, the Court was clear that a state's refusal to entertain a claim based on newly-discovered evidence does not transgress any "principle of fundamental fairness 'rooted in the traditions and conscience of our people.'"[108] Furthermore, the Court observed that "'[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.' To conclude otherwise would all but paralyze our system for enforcement of the criminal law."[109]

These statements emphasize the fact that while an exception may be available in extraordinary circumstances, it is far from the rule. The actual innocence exception is based on the "equitable discretion" of habeas courts simply to ensure that an innocent person is not incarcerated as the result of federal constitutional error.[110] In short, a claim of actual innocence is not a constitutional claim in itself, but merely "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."[111]

Over the cries of a passionate dissent, Chief Justice Rehnquist made the argument that federal habeas corpus is simply not the correct mechanism for relief absent a claim of constitutional error. Justice Blackmun, writing for the dissent, said that "[n]othing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent."[112] He went on to argue that if a prisoner was actually innocent of the crime for which he

106. *Id.* at 417.

107. *Id.* at 417-19.

108. *Herrera*, 506 U.S. at 411 (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

109. *Id.* at 399 (quoting *Patterson*, 432 U.S. at 208).

110. *Id.* at 404.

111. *Id.* In a recent, separate opinion respecting the denial of a petition for rehearing en banc, Judge Luttig of the Fourth Circuit Court of Appeals directly addressed whether there exists a constitutional right to postconviction DNA testing and concluded that such a right does, in fact, exist. Harvey v. Horan, 285 F.3d 298, 310-12 (4th Cir. 2002) (Luttig, J., concurring in judgment).

112. *Herrera*, 506 U.S. at 430 (Blackmun, J., dissenting) (internal citations omitted).

was convicted, then to execute, and possibly even incarcerate,[113] such a person would undeniably violate the Eighth Amendment's proscription against cruel and unusual punishment.[114] The problem with this argument is that a court cannot reach the issue of innocence before considering whether the petitioner's due process rights were violated because the petitioner is not "legally innocent," having been convicted at a fair trial.[115] Since these rights can only be properly analyzed in terms of procedural, as opposed to substantive, due process, the only question properly before a federal habeas court is whether the petitioner is entitled to judicial review of his claim.[116]

The more appropriate channel for reviewing a claim of actual innocence is an appeal to executive clemency. This, Rehnquist argued, not habeas corpus, is the traditional remedy for preventing miscarriages of justice when the judicial process has been exhausted.[117] Justice Scalia was less apologetic in stating his concurrence:

> There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction. In saying that such a right exists, the dissenters apply nothing but their personal opinions to invalidate the rules of more than two-thirds of the States, and a Federal Rule of Criminal Procedure for which this Court itself is responsible.[118]

Describing executive clemency as the "fail safe" in our criminal justice system, Rehnquist explained that history is replete with examples of newly-discovered evidence leading to the exoneration of wrongfully-convicted individuals.[119] Therefore, while procedurally barred from judicial review, a prisoner seeking exoneration based on newly-discovered DNA evidence can always seek extra-judicial review by appealing to executive clemency.

The dissent argued, and critics agree,[120] that executive clemency is insufficient and that constitutional guarantees were not meant to rest upon the unreviewable discretion of the executive branch.[121] If so, the remedy for the violation of a vested legal right would depend upon an "act of grace" and we would cease to live under a government of laws.[122] The fact of the matter, however, is that "it is improbable that evidence of

113. *Id.* at 432 n.2.
114. *Id.* at 431.
115. *Id.* at 408 n.6.
116. *Id.*
117. *Id.* at 411-12.
118. *Id.* at 427-28 (Scalia, J., concurring).
119. *Id.* at 415.
120. *See, e.g.*, Pietrkowski, *supra* note 67, at 1401-14 (arguing that executive clemency is inherently arbitrary because there are no established standards that an executive official is bound to follow, and decisions may be based on any number of factors including morality, personal preference, and political persuasion).
121. *Herrera*, 506 U.S. at 439-40 (Blackmun, J., dissenting).
122. *Id.* at 440 (Blackmun, J., dissenting).

innocence as convincing as [*Herrera*] requires would fail to produce an executive pardon."[123] This is particularly true in light of the accuracy of DNA testing. A petitioner who can prove his innocence through exculpatory DNA evidence, despite having been convicted in a court of law beyond all reasonable doubt, is likely to be granted clemency.

Unless a petitioner is able to gain access to postconviction DNA testing, however, the availability of extra-judicial review is relatively meaningless.

> It is one thing to say that further access to the apparatus of the criminal justice system must at some point be curtailed in the indisputable interest of finality. It is another altogether to say that, having curtailed that access to the courts, one will even be denied access to evidence in the government's hands that he could present to the executive in an effort to prevent a miscarriage of justice, after he has been told that it is the role of the executive, not the courts, to prevent miscarriages of justice which, because of finality, are no longer remediable through the judicial process. Not only would such be fundamentally unfair; it would[ ] constitute, by definition, wholly arbitrary governmental conduct.[124]

III. CONCLUSION

Even though executive clemency appears promising to a prisoner claiming actual innocence based on DNA testing, discovery of such evidence is still problematic. It is unclear from the discussion in *Brady* whether DNA testing would fall under the constitutionally-protected right to be informed of and provided exculpatory evidence before it is too late for the defendant to make use of it.[125] If a court were to grant a request for discovery based on *Brady*, a prisoner would then be able to use any favorable evidence in his filing for executive clemency. As for pursuing federal habeas relief, however, should a court grant a request for postconviction discovery, it would then be faced with the issue of whether the petitioner has a constitutional right to judicial review. If the petitioner could not provide a separate constitutional basis for his claim, his lack of access to DNA evidence would, by itself, be an insufficient basis for relief.

In *Sykes*, the Supreme Court acknowledged the actual innocence exception, which allows for judicial review in a situation where a petitioner can prove his innocence despite a failure to meet other requirements typically associated with federal habeas jurisprudence, namely, cause for failure to comply with state rules and a showing that actual prejudice resulted.[126] The requirement that a claim of actual innocence be accompanied by an underlying claim of constitutional error, however, could not

123. *Id.* at 428 (Scalia, J., concurring).
124. *Harvey*, 285 F.3d at 320 (Luttig, J., concurring in judgment).
125. *See Reyes*, 270 F.3d at 1166-67.
126. *Sykes*, 433 U.S. at 84-87.

be set aside. Faced with this issue in *Herrera*, the Court reaffirmed earlier rulings holding that absent a constitutional violation in the underlying state proceedings, claims of actual innocence based on newly-discovered evidence have never been held to state a ground for federal habeas relief.[127]

Even so, if a petitioner could gain access to DNA evidence and demonstrate that he is actually innocent of the crime for which he was convicted, given the high level of accuracy in DNA testing, it is likely that he would be able to meet the extraordinarily high threshold showing set by the Court in *Herrera*. If a petitioner could meet this standard, it seems clear that a claim of actual innocence alone would warrant federal habeas review. Instead of requiring an accompanying claim of constitutional error, the innocence claim itself would be considered a constitutional claim demanding the attention of the Court.

Unwilling to wait for the appropriate fact situation to test the potential for review made available in *Herrera*, however, a number of Congressional bills were introduced in 2001 that were designed to provide more reliable remedies.[128] These bills represent a bipartisan effort to reduce the risk of wrongful convictions, particularly in capital cases, and even enjoy the support of a number of those who support capital punishment.[129]

The best supported of the proposed legislation is the Innocence Protection Act ("IPA"). Referring to *Herrera*, and to the suggestion that a persuasive showing of innocence after trial would render the execution of a prisoner unconstitutional,[130] the IPA, as it was originally introduced, proposes to:

(1) [S]ubstantially implement the Recommendations of the National Commission on the Future of DNA Evidence . . . by authorizing DNA testing in appropriate cases;
(2) prevent the imposition of unconstitutional punishments . . . and
(3) ensure that wrongfully convicted persons have an opportunity to establish their innocence through DNA testing, by requiring the preservation of DNA evidence for a limited period.[131]

The IPA has since been modified by the Senate Judiciary Committee,[132] but maintains its principal features, including guidelines for the courts,

127. *Herrera*, 506 U.S. at 400.

128. *See, e.g.*, Innocence Protection Act, S. 486, 107th Cong. (2001); National Death Penalty Moratorium Act, S. 233, 107th Cong. (2001); Accuracy in Judicial Administration Act, H.R. 321, 107th Cong. (2001); Criminal Justice Integrity and Innocence Protection Act, S. 800, 107th Cong. (2001).

129. For example, since the Innocence Protection Act takes no position on the death penalty itself, it has gained the support of Senator Smith (R-OR), Senator Lieberman (D-CT), Representative LaHood (R-IL), and others. *The Innocence Protection Act of 2001*, National Association of Criminal Defense Lawyers, *at* http://www.nacdl.org/public.nsf/legislation (last visited Jan. 4, 2003).

130. S. 486 § 101(a)(13).

131. S. 486 § 101(b)(1)-(3).

132. The IPA was reported with an amendment in the nature of a substitute and was placed on the Senate Legislative Calendar on October 16, 2002.

funding for testing, better standards for representation, and even compensation for the wrongfully convicted. If enacted, the IPA will provide a distinctly superior alternative to filing a federal habeas petition or a request for executive clemency when asserting a postconviction claim of actual innocence based on DNA evidence. Rather than trying to incorporate a claim of actual innocence into ill-fitting existing procedural schemes or established constitutional doctrine, the IPA will offer a procedure customized for reviewing such a claim. By doing so, federal habeas courts' unanswered questions concerning time bars, the right to discovery and testing, and the availability of a judicial proceeding in which to present favorable evidence, will become moot.

Casenotes


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