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The Paradox of Actual Innocence in Federal Habeas Corpus after Herrera v. Collins

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NOTE

The Paradox of "Actual Innocence" in Federal Habeas Corpus After *Herrera v. Collins*

Were one to ask any American citizen whether our Constitution permits the government to execute someone who can prove his innocence with newly-discovered evidence, the response likely would be a quick and resounding "No!" Intriguingly, when the Supreme Court was presented with that question, its answer was not nearly so certain. Traditionally, the writ of habeas corpus has guarded against such apparent miscarriages of justice. Over the past decade, however, the Court has curtailed access to federal habeas corpus relief to the extent that now, after the decision in *Herrera v. Collins*,[1] it is not clear whether federal habeas corpus can save a state prisoner from execution—even when he can produce evidence of his innocence.

The *Herrera* case presented the Court with the question of whether the Constitution prohibits a state from executing a prisoner, without judicial consideration of his claim of newly discovered exculpatory evidence, when that claim is brought eight years after a procedurally fair trial.[2] In an opinion written by Chief Justice Rehnquist, the Court avoided answering that question directly. To some members of the sharply divided Court,[3] the answer was clear; other Justices did not reach the question at all. In the end, the central point of agreement among a majority of the Court was that the State of Texas was free to execute Leonel Herrera.[4]

After briefly summarizing the *Herrera* case,[5] this Note sketches the development of federal habeas corpus relief, focusing on the Supreme Court's decisions of the last decade limiting its availability.[6] The Note then examines the *Herrera* opinion in detail,[7] concluding that the Court refused to address the critical issue of the case.[8] Instead, the Court perpetuated the uncertainty confronting both lower federal courts and federal habeas petitioners who bring claims based solely on new evidence of "actual inno-

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1. 113 S. Ct. 853 (1993).

2. *Id.* at 874 (Scalia, J., concurring in judgment).

3. Justices O'Connor, Scalia, Kennedy, and Thomas joined in the Chief Justice's opinion. Justices O'Connor and Scalia wrote separate concurring opinions; Justice White concurred only in the judgment; and Justice Blackmun, joined by Justices Stevens and Souter, dissented.

4. Herrera was executed by lethal injection on May 12, 1993. *Protesting Inmate Executed in Texas*, WASH. POST, May 13, 1993, at A4.

5. *See infra* notes 11-37 and accompanying text.

6. *See infra* notes 38-78 and accompanying text.

7. *See infra* notes 79-133 and accompanying text.

8. *See infra* note 99 and accompanying text.

cence."[9] The ultimate question—whether a state can execute a prisoner who has convincing evidence of his innocence without judicially considering that evidence—remains open.[10]

Leonel Herrera was sentenced to death in January 1982 for the murder of Texas police officer Enrique Carrisalez.[11] In July of that year, Herrera pleaded guilty to the related murder of another Texas law enforcement official, David Rucker.[12] Herrera unsuccessfully challenged the Carrisalez conviction and sentence on direct appeal and in collateral state court proceedings.[13] He then filed a federal habeas petition, which was denied.[14] In 1991, Herrera directed a second habeas petition to the state court, raising a claim of actual innocence based on newly discovered evidence.[15] The Court also denied this petition.[16]

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9. *See infra* notes 134-38 and accompanying text.

10. *See infra* notes 139-54 and accompanying text.

11. *Herrera*, 113 S. Ct. at 857. Carrisalez was shot in the chest after stopping Herrera for speeding outside Los Fresnos, Texas. Before stopping, Carrisalez radioed a description of the car and its license plates to the police station. The car belonged to Herrera's girlfriend, but Herrera had the only keys to the vehicle. He had a set in his pocket at the time of his arrest. *Id.* at 872 (O'Connor, J., concurring). Carrisalez lived long enough to identify Herrera as his assailant, and an eyewitness riding in Carrisalez's patrol car also identified Herrera as the killer. *Id.* at 871-72 (O'Connor, J., concurring).

12. *Id.* at 857. Rucker's body was found lying beside his patrol car; he had been shot in the head. Herrera's Social Security card was found nearby. *Id.* Blood found on Herrera's clothing matched Rucker's blood type, which was different from Herrera's. *Id.* Splatters of the same blood type and strands of hair matching Rucker's were found in the vehicle involved in the shooting. *Id.* Perhaps the most damning piece of evidence was a handwritten and signed letter found on Herrera's person at the time of his arrest. In it, Herrera implied that he killed Rucker and offered to turn himself in. Indicating that he and Rucker were in the same "business," he wrote that Rucker had "violated some of its laws and suffered the penalty, like the one you have for me when the time comes." *Id.* at 857 n.1.

13. *Id.* at 858; *see* Herrera v. State, 682 S.W.2d 313 (Tex. Crim. App. 1984). The Supreme Court denied certiorari. Herrera v. Texas, 471 U.S. 1131 (1985). Herrera's state habeas petition was also denied. *Herrera*, 113 S. Ct. at 858.

14. *Herrera*, 113 S. Ct. at 858. The Supreme Court again denied certiorari. *See* Herrera v. Collins, 498 U.S. 925 (1990).

15. *Herrera*, 113 S. Ct. at 858. In support of his petition, Herrera presented the affidavit of Hector Villarreal, an attorney who had once represented his brother, Raul Herrera, Sr. *Id.* Villarreal attested that Raul, Sr. told him that Leonel Herrera, Raul Herrera, Sr., Officer Rucker, and a local sheriff were all involved in a drug-trafficking scheme and that Raul said that he was the one who shot Officers Rucker and Carrisalez. *Id.* at 858 n.2. According to Villarreal's affidavit, Raul, Sr. told him this when he was representing him on a charge of attempted murder in 1984. Raul, Sr. claimed that he never told anyone the truth because he expected his brother to be acquitted. *Id.* After Leonel Herrera's conviction, Raul, Sr. began blackmailing the sheriff. According to Villarreal, Raul, Sr. was killed by Jose Lopes, a comrade of the sheriff who assisted with drug-trafficking activities. *Id.* Lopes allegedly was present at the murders of Rucker and Carrisalez. *Id.* Herrera also presented an affidavit by a former cellmate of Raul, Sr., who attested that Raul, Sr. told him that he, not Leonel Herrera, shot Officers Rucker and Carrisalez. *Id.* at 858.

16. *Id.* The Texas Court of Criminal Appeals affirmed. *Ex parte* Herrera, 819 S.W.2d 528 (Tex. Crim. App. 1991). The U.S. Supreme Court denied certiorari. Herrera v. Texas, 112 S. Ct. 1074 (1992).

Herrera filed a second federal habeas petition in 1992, some ten years after his conviction. In this petition, he alleged that "he [was] innocent of the murders of Carrisalez and Rucker, and that his execution would thus violate the Eighth and Fourteenth Amendments."[17] He supported his petition with the affidavit of an eyewitness to the crime and other affidavits tending to show that his deceased brother had committed the murders.[18] The district court granted Herrera a stay of execution so that he could present affidavits supporting his claim of actual innocence in state court.[19] The United States Court of Appeals for the Fifth Circuit vacated the stay of execution,[20] however, and the United States Supreme Court granted certiorari.[21]

In *Herrera v. Collins*,[22] a sharply divided Court held that Herrera's claim of actual innocence did not entitle him to federal habeas relief.[23] The majority found that "[c]laims of innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."[24] The Court ruled that executive clemency was the traditional remedy for claims of innocence like Herrera's.[25] Then, however, the majority assumed *arguendo*—but declined to hold—that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim."[26] The Court noted, however, that even if such a right existed, Herrera had failed to

17. *Herrera*, 113 S. Ct. at 858.

18. In addition to the affidavits of Raul, Sr.'s attorney and former cellmate, *see supra* note 15, Herrera presented an affidavit of Raul Herrera, Jr., the son of Raul, Sr. The affidavit claimed that Raul, Jr. witnessed his father kill Officers Rucker and Carrisalez and that Leonel Herrera was not present during the murders. *Herrera*, 113 S. Ct. at 858. At the time of the killings, Raul, Jr. was nine years old. Herrera also presented the affidavit of a former schoolmate of the Herrera brothers. The schoolmate claimed that Raul, Sr. told him in 1983 that he had shot the two officers. *Id.* Herrera alleged in his petition that law enforcement officials were aware of this evidence and had unlawfully withheld it in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the prosecution's withholding of evidence favorable to the defendant constitutes a violation of due process). *Herrera*, 113 S. Ct. at 858-59.

19. *Herrera*, 113 S. Ct. at 859. The district court granted an evidentiary hearing on Herrera's claim of unlawfully withheld evidence. *Id.*

20. *Id.* The Fifth Circuit concluded that there was no evidentiary basis for Herrera's claim of unlawfully withheld evidence. The court also held that Herrera's claim of actual innocence was not a valid ground for relief under federal habeas corpus law in the absence of an independent constitutional error in the underlying state proceedings. Herrera v. Collins, 954 F.2d 1029, 1032, 1034 (5th Cir. 1992), *aff'd*, 113 S. Ct. 853 (1993).

21. Herrera v. Collins, 112 S. Ct. 1074 (1992).

22. 113 S. Ct. 853 (1993).

23. *Id.* at 857.

24. *Id.* at 860.

25. *Id.* at 869.

26. *Id.*

make a sufficiently persuasive demonstration of his actual innocence to merit such relief.[27] While opining that the threshold showing of actual innocence would of necessity be "extraordinarily high,"[28] the decision failed to elaborate on exactly where such a threshold would lie.

Justice White concurred with the majority's assumption that a persuasive showing of actual innocence made after trial would make Herrera's execution unconstitutional.[29] He supported his finding that Herrera's evidence was insufficient for habeas relief by testing it against the standard generally used by the Court to reach the merits of a habeas petition that challenges the constitutional sufficiency of the evidence—whether any rational trier of fact could find proof of guilt beyond a reasonable doubt.[30] Two other members of the Court, Justices O'Connor and Kennedy, filed a separate opinion that concurred on the basis that federal habeas proceedings and relief should be reserved for "extraordinarily high" and "truly persuasive demonstration[s] of 'actual innocence.'"[31] The Justices agreed that Herrera was not entitled to relief because he was clearly not innocent.[32] Nevertheless, their separate concurrence suggests that they were uncomfortable with the Court's reluctance to state that executing an innocent person would be unconstitutional. Finally, Justices Scalia and Thomas joined in the majority's opinion, but explicitly found no constitutional right "to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."[33]

The three remaining members of the Court dissented.[34] Justice Blackmun, writing for the dissenters, argued that Herrera could raise an Eighth

27. *Id.* at 869-70.

28. *Id.* at 869.

29. *Id.* at 875 (White, J., concurring in the judgment) ("I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case.").

30. *Id.* (White, J., concurring in the judgment). The standard suggested by Justice White would require a federal habeas petitioner whose case was in the procedural posture of *Herrera* to show, at a minimum, that "based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'" *Id.* (White, J., concurring in judgment) (quoting Jackson v. Virginia, 443 U.S. 307, 324 (1979)).

31. *Id.* at 874 (O'Connor, J., concurring) (citation omitted).

32. *Id.* at 870 (O'Connor, J., concurring). The Justices agreed that "the execution of a legally and factually innocent person would be a constitutionally intolerable event," but declared that the "[p]etitioner is not innocent, in any sense of the word." *Id.* (O'Connor, J., concurring).

33. *Id.* at 874-75 (Scalia, J., concurring).

34. *Id.* at 876 (Blackmun, J., dissenting). The dissenting opinion was written by Justice Blackmun, with Justices Stevens and Souter joining four of its five parts. Part V of the dissenting opinion, which Justices Stevens and Souter declined to join, characterized the execution of a person who can show his innocence as "com[ing] perilously close to simple murder." *Id.* at 884 (Blackmun, J., dissenting).

Amendment challenge as well as a substantive due process challenge to his punishment on the ground that he was actually innocent.[35] The dissenting Justices articulated a standard of proof under which a petitioner would be required to show "probable innocence" in order to obtain relief.[36] The dissenters would have remanded the case to the district court to consider whether Herrera met the standard.[37]

This splintered decision reflects modern developments in a writ that is rooted in ancient common law.[38] The writ of habeas corpus, which was incorporated into the United States Constitution as well as the constitutions of all fifty states, is regarded as a fundamental safeguard of personal liberty.[39] The primary function of the writ is to release a prisoner who is confined unlawfully.[40] It tests the legality of the prisoner's detention or confinement, not his guilt or innocence.[41] Although originally understood to be a protection by which a prisoner could challenge a state conviction on constitutional grounds related only to the jurisdiction of the state court, the writ now extends to all constitutional challenges[42] and is extolled as a "bulwark against convictions that violate 'fundamental fairness.' "[43]

Federal courts have had the power to issue the writ of habeas corpus for persons in state custody for well over a century.[44] Under federal law, a

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35. *Id.* at 878-79 (Blackmun, J., dissenting).

36. Under Justice Blackmun's approach, a petitioner claiming actual innocence would have to show that he "probably is innocent" to obtain habeas relief. In considering the actual innocence claim, a court "should take all the evidence into account, giving due regard to its reliability." *Id.* at 883 (Blackmun, J., dissenting). This would entail a case-by-case determination of the reliability of the newly discovered evidence under the circumstances. *Id.* (Blackmun, J., dissenting). The court then would weigh the evidence of innocence against the evidence of guilt. *Id.* (Blackmun, J., dissenting). Justice Blackmun would hold that the district court retains the discretion to order discovery when necessary to help the court with its determination, but would not grant the petitioner discovery as a matter of right. *Id.* (Blackmun, J., dissenting).

37. *Id.* at 884 (Blackmun, J., dissenting).

38. BLACK'S LAW DICTIONARY 491 (abridged 6th ed. 1991). The use of "habeas corpus" in this Note refers to the common law writ of habeas corpus *ad subjiciendum*, the writ to secure release from unlawful confinement. *See* Stone v. Powell, 428 U.S. 465, 474-75 n.6 (1976).

39. BLACK'S LAW DICTIONARY, *supra* note 38, at 491.

40. *Id.*

41. *Id.*

42. *Id. But cf.* Teague v. Lane, 489 U.S. 288 (1989) (holding that new constitutional rules of criminal procedure generally will not be applied retroactively to cases that have become final before the new rules were announced); *Stone*, 428 U.S. at 494-95 (limiting scope of federal habeas review of Fourth Amendment violations).

43. Sawyer v. Whitley, 112 S. Ct. 2514, 2530 (1992) (Stevens, J., concurring) (citations omitted).

44. The Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385 (codified as amended at 28 U.S.C. § 2254 (1988)) was the first act empowering federal courts to issue a writ of habeas corpus for persons in state custody. It imposed an automatic stay of execution pending disposition of an appeal in capital cases. Barefoot v. Estelle, 463 U.S. 880, 892 n.3 (1983) (citing Rogers v. Peck, 199 U.S. 425, 436 (1905)).

federal court may entertain a state prisoner's claim that he is being held "in custody in violation of the Constitution or laws or treaties of the United States."[45] Unless the State elects to hold a new trial, the typical relief granted to a successful federal habeas corpus petitioner is a conditional order of release.[46] In a capital case in which the evidence presented on habeas review relates only to the sentence, the usual remedy is a conditional order vacating the death sentence.[47]

Federal statute and judicial doctrine limit a state prisoner's access to the writ of habeas corpus.[48] A petitioner who fails to follow state procedures in presenting a constitutional claim to the state court may lose the right to federal habeas review under the rules governing procedurally defaulted claims.[49] At one time, only "deliberate bypassing" of state procedural rules could forfeit the right to federal habeas review.[50] In 1977, however, the Supreme Court held in *Wainwright v. Sykes*[51] that procedural default—whether deliberate or not—may be excused only when the petitioner is able to show "cause and prejudice."[52]

A petitioner who brings a second or successive[53] petition may encounter another limitation on access to federal habeas corpus. Statutory rules governing the exercise of federal habeas corpus provide that "[a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief . . . [or if] the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."[54]

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45. 28 U.S.C. § 2254(a) (1988). A federal habeas claim is cognizable only if all state remedies have been exhausted or if there is no adequate state remedy available. 28 U.S.C. § 2254(b) (1988).

46. *Herrera*, 113 S. Ct. at 862.

47. *Id.*

48. This Note addresses only the limitations on federal habeas corpus that are germane to the analysis of the Court's decision in *Herrera*. For an extensive treatment of current federal habeas corpus jurisprudence, see Kathleen Meagher & Geo. F. Hobday, *Habeas Relief for State Prisoners*, 81 GEO. L.J. 1562 (1993). Encyclopedic coverage of federal habeas corpus procedural issues is available in JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (1988 & Supp. 1992).

49. *See* Murray v. Carrier, 477 U.S. 478, 488 (1986).

50. This principle was established in Fay v. Noia, 372 U.S. 391, 438 (1963), *overruled by* Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991).

51. 433 U.S. 72 (1977).

52. *Id.* at 87. The standard for "cause," as developed in later cases of procedural default, generally requires that some force outside the control of the petitioner have caused the default. *See, e.g.*, *Murray*, 477 U.S. at 488; *accord* McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991). "Prejudice" requires a showing of "'reasonable probability that, but for [the alleged] erro[r], the result of the proceeding would have been different.'" Sawyer v. Whitley, 112 S. Ct. 2514, 2532 (1992) (Stevens, J., concurring) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

53. "Successive claims" raise issues "identical to those raised and rejected on the merits on prior petition." Kuhlmann v. Wilson, 477 U.S. 436, 445 n.6 (1986) (plurality opinion).

54. 28 U.S.C. § 2254 Rule 9(b) (1988). "Abuse of the writ" may arise when one makes a new claim not previously raised. *McCleskey*, 111 S. Ct. at 1468.

This provision protects the legitimate state interest in orderly criminal procedure by inhibiting needless, piecemeal presentation of constitutional claims.[55] It also assures that a state court, rather than a federal court, will have the first opportunity to hear and consider a petitioner's claims.[56]

If a petitioner is unable to establish cause and prejudice, a federal court may nevertheless review his procedurally defaulted, abusive, or successive claims if the failure to do so would "thwart the 'ends of justice'"[57] or work a "fundamental miscarriage of justice."[58] This latter exception rests on the principle of "fundamental fairness," which is central to habeas corpus review.[59] Under the traditional view, "a 'fundamental miscarriage of justice' occurs whenever a conviction or sentence is secured in violation of a federal constitutional right."[60] Justice Holmes emphasized that the concern of a federal habeas corpus court reviewing the validity of a conviction and death sentence is "solely . . . whether [the petitioner's] rights have been preserved."[61] Thus, habeas corpus relief traditionally extended equally to the innocent petitioner and to the admittedly guilty petitioner who was attempting to vindicate his constitutional rights.[62]

Over the last decade, however, the Supreme Court has shifted the focus of habeas review from the pure preservation of constitutional rights to a fact-based inquiry into the petitioner's innocence or guilt.[63] A trio of cases decided in 1986 broke from the traditional view and signalled a trend toward sharply restricting access to federal habeas relief. The first of these decisions, *Kuhlmann v. Wilson*,[64] narrowed the reviewability of successive petitions by holding that, in the absence of a showing of cause and prejudice, "the ends of justice" require consideration of a successive claim only if the petitioner "establish[es] that under the probative evidence he has a

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The Supreme Court restricted the federal judge's discretion under this rule by subjecting abusive claims to the "cause and prejudice" requirement of Wainwright v. Sykes, 433 U.S. 72 (1977), *see supra* notes 51-52 and accompanying text. *See McCleskey*, 111 S. Ct. at 1470.

55. Townsend v. Sain, 372 U.S. 293, 317 (1963).

56. *McCleskey*, 111 S. Ct. at 1470.

57. Sawyer v. Whitley, 112 S. Ct. 2514, 2525 (1992) (Blackmun, J., concurring in judgment) (quoting *Kuhlmann*, 477 U.S. at 455 (plurality opinion)).

58. *Id.* at 2525 (Blackmun, J., concurring) (citing *McCleskey*, 111 S. Ct. at 1470; Dugger v. Adams, 489 U.S. 401, 412 n.6 (1989); Smith v. Murray, 477 U.S. 527, 537-38 (1986); Murray v. Carrier, 477 U.S. 478, 495-96 (1986)).

59. *Id.* at 2530 (Stevens, J., concurring in judgment).

60. *Id.* at 2525 (Blackmun, J., concurring in judgment) (citing 28 U.S.C. § 2254(a) (1988)); *Smith*, 477 U.S. at 543-44 (Stevens, J., dissenting)).

61. Moore v. Dempsey, 261 U.S. 86, 87-88 (1923).

62. *See* Kuhlmann v. Wilson, 477 U.S. 436, 467 (1986) (Brennan, J., dissenting); Kimmelman v. Morrison, 477 U.S. 365, 380 (1986).

63. *Sawyer*, 112 S. Ct. at 2526 (Blackmun, J., concurring in judgment) (citing *Kuhlmann*, 477 U.S. at 454) (plurality opinion).

64. 477 U.S. 436 (1986) (plurality opinion).

colorable claim of factual innocence."[65] In *Murray v. Carrier*,[66] the Court announced that under the "miscarriage of justice exception" to the rule requiring a petitioner to show "cause and prejudice," a federal habeas court could reach the merits of a procedurally defaulted claim "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent."[67] The third case in the 1986 trilogy, *Smith v. Murray*,[68] emphasized that the miscarriage of justice exception addressed actual, as compared to legal, innocence.[69] Subsequent Supreme Court opinions have continued to equate "miscarriage of justice" with "actual innocence,"[70] but have done so without clearly defining that concept.[71]

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65. *Id.* at 454 (Powell, J., concurring). The Court relied on the standard for reversals in habeas corpus developed by Judge Henry Friendly in his classic work, Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970). *Kuhlmann*, 477 U.S. at 454.

66. 477 U.S. 478 (1986).

67. *Id.* at 496; *accord* Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991) (holding that federal habeas review of procedurally defaulted claims is precluded unless petitioner can demonstrate cause and prejudice or show that failure to consider the claims will result in a "fundamental miscarriage of justice").

68. 477 U.S. 527 (1986).

69. *Id.* at 538-39 (stating that a procedural default will not be excused in the absence of cause and prejudice "in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination"). The Court applied the concept of actual innocence to an alleged error at the sentencing phase of a trial on a capital offense and found that no miscarriage of justice would result from the alleged error because it "neither precluded the development of true facts nor resulted in the admission of false ones." *Id.* at 538.

70. *See, e.g.*, Dugger v. Adams, 489 U.S. 401, 412 n.6 (1989) (stating that an error which might have affected the accuracy of a death sentence does not demonstrate actual innocence of the sentence); McCleskey v. Zant, 111 S. Ct. 1454, 1474 (1991) (holding an alleged constitutional violation inconsequential because, even if true, it did not affect the reliability of the determination of petitioner's guilt.)

71. In Sawyer v. Whitley, 112 S. Ct. 2514 (1992), the Court considered the meaning of actual innocence in the context of capital punishment:

> A prototypical example of "actual innocence" in a colloquial sense is the case where the State has convicted the wrong person of the crime. . . . In rare instances it may turn out later, for example, that another person has credibly confessed to the crime, and it is evident that the law has made a mistake.

Id. at 2519-20. The *Sawyer* Court applied the concept of actual innocence to innocence of the death penalty. *See infra* notes 77-78 and accompanying text.

Commentators have explored the meaning of "actual" as compared to "legal" innocence. *See, e.g.*, Stephen P. Garvey, *Death-Innocence and the Law of Habeas Corpus*, 56 ALB. L. REV. 225 *passim* (1992); Bruce Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 18 N.Y.U. REV. L. & SOC. CHANGE 415 *passim* (1991). One commentator suggests that the distinction between the types of innocence derives from their different evidentiary bases. Garvey, *supra*, at 248. A claim of "legal" innocence is one that "but for some error infecting the trial, the jury would have found the defendant not guilty based on *all the legally admissible evidence*." *Id.* (emphasis added). In contrast, a claim of "actual" innocence is one that "but for the error, the jury would have found the defendant not guilty based on *all relevant and probative evidence, legally admissible or not*." *Id.* (emphasis added).

In addition to changing the focus of its inquiry in federal habeas cases, the Court has hinted that, in the future, it may demand that a petitioner present more evidence to avoid summary dismissal of a successive, abusive, or defaulted habeas claim.[72] Under the federal statute, a habeas petition may be summarily dismissed only "[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief."[73] When reviewing successive, defaulted, and abusive claims under the miscarriage of justice exception, the Court generally has required a more substantial showing before reaching the merits of the claim.[74] The standard typically applied requires a petitioner to show that the alleged constitutional error *probably* resulted in a fundamental miscarriage of justice.[75] The Court demanded more than this customary standard, however, in *Sawyer v. Whitley*,[76] a 1992 habeas case challenging the propriety of a petitioner's death sentence.[77] It declared that actual innocence of a death sentence requires a showing of "clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[78]

The *Herrera* opinion confirms that actual innocence remains the dominant consideration in the Court's analysis of successive, abusive, and defaulted federal habeas claims when the petitioner is unable to show cause

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This description of actual innocence accords with Judge Friendly's formulation of a "colorable showing of innocence":

> A defendant would not bring himself within this criterion by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained. . . . [T]he petitioner . . . must show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.

Friendly, *supra* note 65, at 160.

72. *See Sawyer*, 112 S. Ct. at 2523.

73. 28 U.S.C. § 2254 Rule 4 (1988).

74. *See, e.g., Sawyer*, 112 S. Ct. at 2522 ("If federal habeas review of capital sentences is to be at all rational, petitioner must show something more in order for a court to reach the merits of his claims on a successive habeas petition than he would have had to show to obtain relief on his first habeas petition.").

75. *Id.* at 2532 (Stevens, J., concurring in judgment).

76. 112 S. Ct. 2514 (1992).

77. *Id.* at 2517.

78. *Id.* "Innocence of the death penalty" can be shown by proof that there were no aggravating circumstances present or that other requirements necessary for death penalty eligibility were not met. *Id.* at 2522.

The *Herrera* Court did not specify whether the "clear and convincing evidence" standard of *Sawyer* was applied to Herrera's claim that he was actually innocent of the offense. It would have made little sense to apply it in his case, since it requires a showing of constitutional error in the state trial or proceedings. Herrera's claim was that such error need not be demonstrated, because his actual innocence made his execution itself unconstitutional. *Herrera*, 113 S. Ct. at 856-57.

and prejudice.[79] For the first time, a death-sentenced petitioner presented the Court with a free-standing habeas corpus claim of actual innocence—one unsupported by an underlying constitutional error in the proceedings below.[80] Ironically, the Court's response in *Herrera* suggests that even convincing proof of actual innocence may not suffice to save such a petitioner from execution.[81] The opinion teaches little about the standard to be applied to these claims, focusing instead on the justifications for proscribing federal habeas review in the absence of an underlying constitutional error.[82]

The principal issue in *Herrera* was whether Leonel Herrera's claim of actual innocence, based on newly discovered evidence, constituted grounds for federal habeas relief.[83] This question was properly analyzed under the "miscarriage of justice" exception governing federal habeas review of defaulted, abusive, and successive claims.[84] Because the underlying claim in a habeas proceeding is an allegation of constitutional error, the Court has considered such an error in the state court proceedings below a prerequisite to any habeas claim.[85] A claim of actual innocence is an additional requirement for relief imposed by the Court when a petitioner would otherwise be subject to state defenses of abusive or successive use of the writ.[86] Leonel Herrera did not claim that there was constitutional error in the Texas proceedings themselves.[87] Instead, the crux of his argument for habeas relief was that his actual innocence of the murders for which he was convicted both created constitutional error—by making his execution unconstitutional—and satisfied the actual innocence requirement imposed by the Court.[88]

The Supreme Court failed to address directly whether, in a capital case, a claim of newly discovered evidence of actual innocence raises a constitutional challenge sufficient to provide federal habeas corpus review. Instead, the majority espoused the traditional view that federal habeas re-

79. *See Herrera*, 113 S. Ct. at 862, 873 (O'Connor, J., concurring).

80. *Id.* at 862.

81. *See infra* notes 92, 100, 105 and accompanying text.

82. *See infra* notes 89-104 and accompanying text.

83. *See supra* text accompanying note 2.

84. This was Herrera's second federal habeas petition. *See supra* text accompanying note 17; *see also supra* notes 49-71 and accompanying text (discussing defaulted, successive, and abusive claims). He did not show "cause and prejudice." *Herrera*, 113 S. Ct. at 872 (O'Connor, J., concurring) (stating that affidavits produced in support of petitioner's claim were "suspect" because they were produced at "the eleventh hour with no reasonable explanation for the nearly decade-long delay").

85. *Herrera*, 113 S. Ct. at 869 ("Federal habeas review of state convictions has traditionally been limited to claims of constitutional violations occurring in the course of the underlying state criminal proceedings.").

86. *Id.* at 862.

87. *Id.*

88. *See supra* text accompanying note 17.

view is not proper without an underlying constitutional claim.[89] The Court presented a number of justifications supporting its conclusion that Herrera failed to establish an Eighth or Fourteenth Amendment violation and thus had no underlying constitutional claim to support habeas review. First, the Court noted that federal habeas courts do not sit to relitigate state trials.[90] Second, although Herrera failed to describe precisely the type of federal relief he sought, the Court found that the usual remedy in capital cases—a conditional order of release—would require the state to retry Herrera ten years after his first trial. This new trial consequently would not guarantee a more reliable jury verdict.[91] Third, the Court concluded that previous cases have established that actual innocence is not itself a constitutional claim, but rather a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."[92] Although this last argument comes close to addressing the issue the petitioner raised, it fails to confront directly the question of whether Herrera's claim—that his execution would be unconstitutional because he is actually innocent—is itself a constitutional claim sufficient to entitle him to habeas relief. The Chief Justice and a majority of the Court seemed to view Herrera's petition as contesting his guilt rather than his punishment.[93]

The Court then disposed of Herrera's Fourteenth Amendment claim by finding that Texas's refusal to consider the new evidence eight years after Herrera's conviction did not transgress "a principle of fundamental fairness"[94] in view of the practices of a majority of the states.[95] Moreover, the

89. *See infra* text accompanying note 92. The Chief Justice did not consider a claim of actual innocence, standing alone, to be a constitutional claim. *Herrera*, 113 S. Ct. at 862.

90. *Herrera*, 113 S. Ct. at 861 (citing Barefoot v. Estelle, 463 U.S. 880 (1983)). Chief Justice Rehnquist distinguished Herrera's case from Jackson v. Virginia, 443 U.S. 307 (1979), in which the Court held that federal habeas relief is appropriate for a claim brought on the ground that "the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt." *Id.* at 322. The *Jackson* case limited federal habeas review to the record evidence produced at trial. *Id.* at 324.

91. *Herrera*, 113 S. Ct. at 862.

92. *Id.* at 862.

93. The Chief Justice characterized Herrera's claim in this way: "[P]etitioner's claim is not that some error was made in imposing a capital sentence upon him, but that a fundamental error was made in finding him guilty of the underlying murder in the first place." *Id.* at 863. Justice O'Connor's description of his claim was: "Petitioner . . . does not appear before us as an innocent man on the verge of execution. He is instead a legally guilty one who, refusing to accept the jury's verdict, demands a hearing in which to have his culpability determined once again." *Id.* at 870 (O'Connor, J., concurring).

94. *Id.* at 866 (citing Patterson v. New York, 432 U.S. 197, 202 (1977) (holding that the Due Process Clause is not violated unless state action offends a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental")).

95. At the time *Herrera* was decided, only fifteen states allowed a new trial motion based on newly discovered evidence to be filed more than three years after conviction. Of those, only nine states had no time limits whatsoever. *Id.* at 866.

Court explained that the traditional remedy for claims of innocence based on new evidence is executive clemency.[96] The Court noted that clemency provides the "'fail safe' in our criminal justice system" for claims of innocence based on new evidence that are advanced too late to file a new trial motion.[97] The majority observed that Herrera could request a pardon from the governor on the grounds of innocence.[98]

Having found that Herrera had no claim based on a violation of the Eighth or Fourteenth Amendment, and thus no constitutional right to demand that his claim of actual innocence be considered, the majority then assumed, *arguendo*, an affirmative answer to the very question it had refused to confront earlier—whether evidence of actual innocence presented after trial could render the execution of a defendant unconstitutional and warrant federal habeas relief.[99] The Court noted that, even if a "truly persuasive demonstration of 'actual innocence'" would create a right to federal habeas review, Herrera's claim fell short of the "extraordinarily high" threshold that would necessarily be required.[100] The decision failed to discuss precisely where that threshold would lie; furthermore, it is unclear whether the opinion was referring to the threshold necessary to allow a court to reach the merits or to the threshold demonstration necessary to obtain relief.[101] The Court faulted the defects in Herrera's evidence, noting that Herrera presented only affidavits in support of his innocence.[102] The affidavits consisted primarily of hearsay and contained inconsistencies.[103] Further, Herrera failed to explain adequately why he had not produced the affidavits earlier and why he had pleaded guilty to Rucker's murder.[104]

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96. *Id.* at 866-69.

97. *Id.* at 869 (citing KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 131 (1989)). Texas law requires that a new trial motion based on newly discovered evidence be made within sixty days of judgment. *Id.* at 865.

98. *Id.* at 868-69. At the time of the decision, Herrera had not applied for a pardon or commutation. *Id.*

99. *Id.* at 869.

100. *Id.*

101. *Id.* at 870 ("[T]his showing of innocence falls far short of that which would have to be made to trigger the sort of constitutional claim which we have assumed *arguendo* to exist.").

102. *Id.* at 869. Justice Blackmun chastised the Court for criticizing Herrera's evidence, noting that affidavits are commonly relied upon at the preliminary stage of a habeas proceeding. He stated:

> It makes no sense for this Court to impugn the reliability of petitioner's evidence on the ground that its credibility has not been tested when the reason its credibility has not been tested is that petitioner's habeas proceeding has been truncated by the Court of Appeals and now by this Court. In its haste to deny petitioner relief, the majority seems to confuse the question whether the petition may be dismissed summarily with the question whether petitioner is entitled to relief on the merits of his claim.

Id. at 884 (Blackmun, J., dissenting).

103. *Id.* at 869; *see supra* notes 15, 18.

104. *Herrera*, 113 S. Ct. at 869-70; *see supra* text accompanying note 12.

The Court's position creates a paradox for a federal habeas corpus petitioner who faces a death sentence and tries to bring a successive, defaulted, or abusive claim solely on grounds of actual innocence. Under the Court's *arguendo* analysis, a truly persuasive showing of innocence would render the petitioner's execution unconstitutional and give rise to habeas relief; but, since a constitutional claim is a prerequisite to habeas review, the petitioner is not entitled to a habeas forum in which to make his "truly persuasive" showing of innocence.[105]

In a concurring opinion, in which Justice Kennedy joined, Justice O'Connor acknowledged that executing a legally and factually innocent person is unconstitutional.[106] She also expressed reservations about holding that a legally guilty prisoner sentenced to death would never be entitled to another judicial proceeding in the absence of an underlying constitutional error.[107] Nonetheless, she easily determined that Herrera's case was not the proper one for deciding this issue.[108] Finding that the overwhelming evidence of Herrera's guilt precluded any further proceedings in his case,[109] Justice O'Connor argued that the Court should reserve federal proceedings and relief for "'truly persuasive demonstration[s]'" of innocence.[110]

Joined by Justice Thomas in his concurring opinion, Justice Scalia would have preferred to address the central issue of the case, finding the answer "perfectly clear": Newly discovered evidence relevant only to a state prisoner's guilt or innocence is not a basis for federal habeas corpus relief under any circumstances. Therefore, Herrera had no constitutional right to demand judicial consideration of his newly discovered evidence.[111]

To Justice White, who concurred in the judgment but did not join the majority's opinion, the answer was equally clear, though antithetical to Justice Scalia's solution.[112] Justice White would allow federal habeas relief

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105. The irony of this position was not lost on Justice Blackmun, who observed:

> [H]aving held that a prisoner who is incarcerated in violation of the Constitution must show he is actually innocent to obtain relief, the majority would now hold that a prisoner who is actually innocent must show a constitutional violation to obtain relief. The only principle that would appear to reconcile these two positions is the principle that habeas relief should be denied whenever possible.

Herrera, 113 S. Ct. at 880-81 (Blackmun, J., dissenting).

106. *Id.* at 870 (O'Connor, J., concurring).

107. Justice O'Connor commented: "The question is a sensitive and . . . troubling one. It implicates not just the life of a single individual, but also the State's powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations." *Id.* at 871 (O'Connor, J., concurring).

108. *Id.* (O'Connor, J., concurring).

109. *Id.* (O'Connor, J., concurring); *see supra* notes 11-12.

110. *Herrera*, 113 S. Ct. at 874 (O'Connor, J., concurring) (quoting the majority's opinion, *id.* at 869). Justice O'Connor did not articulate more specific requirements for such a demonstration.

111. *Id.* at 874-75 (Scalia, J., concurring).

112. *See supra* text accompanying note 111.

for a prisoner in Herrera's position if new evidence, on balance with the evidence originally put before the jury, was so strong that "'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'"[113] Justice White found Herrera's evidence insufficient to meet this standard.[114]

The three remaining members of the Court, Justices Blackmun, Stevens, and Souter, found authority for Herrera's claim in both the Eighth and Fourteenth Amendments. Using the "evolving standards of decency"[115] test for Eighth Amendment challenges, Justice Blackmun argued that "the execution of an innocent person is 'at odds with contemporary standards of fairness and decency.' Indeed, it is at odds with any standard of decency that I can imagine."[116] According to Justice Blackmun, Herrera could have raised a substantive due process challenge to his punishment on the grounds that he was actually innocent; the execution of an innocent person, he argued, is the "ultimate 'arbitrary impositio[n]'" since there is no recovery from it or adequate compensation for it.[117] Justice Blackmun would adopt the "fair probability" test as the threshold for a court to reach the merits of a petitioner's claim.[118] For relief on the merits, the dissenters would require a petitioner to show that he is "probably innocent."[119]

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113. *Herrera*, 113 S. Ct. at 875 (White, J., concurring in judgment) (quoting Jackson v. Virginia, 443 U.S. 307 (1979) (establishing standard to merit relief in habeas proceeding)); *see also supra* note 30 and accompanying text (describing "no rational trier of fact" standard).

114. *Herrera*, 113 S. Ct. at 875 (White, J., concurring in judgment).

115. This standard was described by the Court as taking into account "objective evidence of contemporary values" in evaluating whether a particular punishment is compatible with Eighth Amendment protections of "fundamental human dignity." *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 406 (1986) (citing Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

116. *Herrera*, 113 S. Ct. at 876 (Blackmun, J., dissenting) (citation omitted).

117. *Id.* at 879 (Blackmun, J., dissenting) (alteration in original) (citing Planned Parenthood v. Casey, 112 S. Ct. 2791, 2805 (1992) (noting that the Due Process Clause includes freedom from all substantial arbitrary impositions and purposeless restraints)).

118. *Id.* at 882 (Blackmun, J., dissenting). The "fair probability" standard requires a petitioner to show a "'fair probability that, in light of all the evidence . . . the trier of facts would have entertained a reasonable doubt of his guilt.'" *Id.* (Blackmun, J., dissenting) (quoting Kuhlmann v. Wilson, 477 U.S. 436, 455 n.17 (1986) (plurality opinion)). This is the standard that the Court has applied to "actual innocence" habeas claims. *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 496 (1986) (holding that the actual-innocence exception applies when a constitutional violation probably resulted in a mistaken conviction); McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991) (holding that the exception applies when a constitutional violation probably has caused a mistaken conviction); *see also supra* notes 65-67 and accompanying text (applying the "reasonable doubt" standard).

119. *See supra* note 36 and accompanying text. In support of this higher threshold, Justice Blackmun argued two points: First, a state is unlikely to retry a habeas petitioner who is successful in an actual-innocence proceeding, so the conviction or sentence should not be set aside lightly. Second, because the petitioner has been duly convicted, he loses the presumption of innocence, making it fair to place on him the burden of proving his innocence. *Herrera*, 113 S. Ct. at 882-83 (Blackmun, J., dissenting).

Thus, while six Justices[120] agreed that *Herrera* was a relatively easy case to decide on its facts, their opinions suggest that several of these Justices might approach a more difficult case very differently.[121] A separate group of six Justices[122] intimated or stated that they would recognize, in an appropriate capital case, a constitutional right to habeas relief based on newly discovered evidence of actual innocence.[123] Still, these Justices differed in what they would demand of the habeas petitioner's evidence of actual innocence; requirements ranged from the relatively lax standard urged by Justice White[124] to the vague "truly persuasive demonstration" proposed by Justice O'Connor[125] and the "fair probability" and "probable innocence" tests advocated by Justice Blackmun.[126]

The Court's split in the *Herrera* case reveals both the ideological differences dividing the Court and the difficulty of resolving issues that pit states' interests in the finality of criminal judgments against justice in individual cases.[127] *Herrera* gave the Court an opportunity to establish that, when necessary, individual justice will prevail over rigid rules controlling

120. These include Chief Justice Rehnquist and Justices White, O'Connor, Scalia, Kennedy, and Thomas.

121. The opinions of Justices O'Connor, Kennedy, and White implied that they would not absolutely preclude consideration of new evidence of actual innocence in all cases. *See supra* notes 107, 113 and accompanying text.

122. This group included Justices White, Blackmun, Stevens, O'Connor, Kennedy, and Souter.

123. *See supra* notes 107, 113, 116-19 and accompanying text.

124. *See supra* note 30.

125. *See supra* text accompanying note 110.

126. *See supra* notes 36, 117-18 and accompanying text.

127. Compelling state and social interests are at stake in federal habeas review. In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), Justice Powell identified the "costs" associated with federal habeas corpus: (1) the cost to finality in criminal litigation, *id.* at 262 (Powell, J., concurring) ("No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey . . . that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen."); (2) the ineffective use of judicial resources that results from duplicated effort and that threatens the federal system's capacity to resolve primary disputes, *id.* at 260-61 (Powell, J., concurring); and (3) the subversion of the constitutional balance between state and federal governments that occurs when state criminal convictions are subjected indefinitely to repeated federal oversight, *id.* at 263 (Powell, J., concurring).

The Supreme Court has raised several other concerns related to the effect of habeas corpus on finality in criminal justice. First, easy access to habeas corpus may "degrade the prominence of the trial itself." Engle v. Isaac, 456 U.S. 107, 127 (1982). Second, habeas corpus often causes society to lose the right to punish admitted offenders because conviction on retrial may be difficult or impossible due to the passage of time. *Id.* at 127-28. Last, the absence of finality may frustrate deterrence and rehabilitation. *Id.* at 127 n.32.

These concerns of finality, conservation of judicial resources, and comity are magnified in the case of second and subsequent habeas petitions. McCleskey v. Zant, 111 S. Ct. 1454, 1469 (1991) ("Perpetual disrespect for the finality of convictions disparages the entire criminal justice system.").

access to federal habeas corpus relief. Thus, one troubling aspect of the *Herrera* decision is the Court's apparent reluctance to accept that when an individual's life is at stake, compliance with rules must yield to justice for the individual.[128] Even more disturbing, Justices Scalia and Thomas clearly believe that the Constitution provides no protection whatsoever to a condemned innocent person for whom the justice system has failed—even when the result is the taking of an innocent life.[129]

While the *Herrera* case was disposed of readily on its facts, the next case may be closer to the "archetypal"[130] case of manifest miscarriage of justice—a credible confession, obtained years after the crime, that exonerates a prisoner under sentence of death. Under the Court's analysis, it seems possible that, even with an undisputed confession from the actual perpetrator in hand, a truly innocent prisoner might not be granted a federal habeas hearing in which to present his evidence of actual innocence if he were unable also to show some underlying error—in his trial or other state court proceedings—that independently made his conviction unconstitutional. If the Court demands that its high standard of proof be met *before* it will allow the prisoner to develop his evidence at an evidentiary hearing, then the prisoner would be restricted to the proof presented with his habeas petition. That limited evidence may well fail to meet the majority's standard, and consequently, the factually innocent prisoner would be denied habeas review and could be executed.

Such a result hardly would comport with the notion of our Constitution as a guardian of individual freedom. Furthermore, it is difficult to think of anything that would more readily undermine confidence in our judicial system than for the Court to be perceived as allowing an innocent person to be executed in the name of strict allegiance to abstract legal principles. It would not be surprising if the average citizen found it both perplexing and alarming that such apparently patent unfairness could go uncorrected.

Further, the Court's reliance on executive clemency as the appropriate safeguard to catch and correct such injustices is unconvincing.[131] There is little or no reason to believe that a state governor is in a better position to

128. This statement is not intended to suggest that stringent criminal procedural rules should be ignored in order to punish the "actually guilty" defendant who would otherwise escape penalty, even when this might effect "justice" for the defendant's victim or for society. The purpose of adhering to criminal procedural rules on the one hand, and subordinating the federal habeas rules when necessary, on the other, is to reach a common goal—to avoid punishing the innocent.

129. Apparently, to these Justices, death is not so "different" after all. Compare this view with Justice Stewart's opinion in Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (noting that the "qualitative difference" between death and all other penalties requires a greater degree of "reliability in the determination that death is the appropriate punishment in a specific case").

130. *See supra* note 71 (describing Court's prototypical example of actual innocence).

131. *See supra* text accompanying notes 96-98.

decide the merits of a prisoner's claim than a federal judge would be.[132] Furthermore, clemency decisions are highly vulnerable to political manipulation; their use as a safety net may premise a prisoner's rights on the direction of the prevailing political winds. Convicted murderer Gary Graham's recent, highly publicized effort to obtain a Texas clemency hearing highlights the obstacles that a prisoner may confront in his bid to present new evidence of actual innocence to a governor or parole board.[133]

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132. *But cf.* Louis D. Bilionis, *Legitimating Death*, 91 MICH. L. REV. 1643 (1993). Professor Bilionis argues that governors are constitutionally obligated to conduct critical independent assessments of capital clemency applications. *Id.* at 1698. In his view, governors, as well as state courts, are bound to enforce the Eighth Amendment norms of moral appropriateness, rational orderliness, and procedural fairness in the administration of the death penalty. *Id.* at 1682. The Supreme Court fails to fully enforce Eighth Amendment values in capital cases, he explains, because it balances the promotion of Eighth Amendment norms with the competing objectives of respect for state autonomy and conservation of judicial resources. *Id.* at 1674-75, 1680. Because governors and state courts are not subject to the same constraints as the Supreme Court, they should not uncritically accept the limitations on Eighth Amendment values that are produced by those constraints. *Id.* at 1685, 1692, 1698-99. Governors have an obligation under Article VI of the Constitution to use their clemency power as a "powerful complementary force in society's effort to ensure that basic Eighth Amendment values are realized in individual death cases." *Id.* at 1699.

133. *See* State *ex rel.* Holmes v. Third Court of Appeals, No. 25,214-01, 1993 WL 312288 (Tex. Crim. App. Aug. 16, 1993). Graham's execution was scheduled for August 17, 1993. *Id.* at *1. In July of 1993, Graham sued the Texas Board of Pardons and Paroles in Texas state court, claiming to have new evidence of actual innocence and alleging that the Texas Constitution required the Board to grant him a hearing on his claim of innocence. *Id.* Ultimately, his case went to the Texas Court of Criminal Appeals, which ruled that continuing with the execution without a hearing would violate Graham's constitutional rights. *Id.* at *3.

Judge Baird of the Texas Court of Criminal Appeals indicated in his concurring opinion that the *Herrera* decision was controlling in Graham's case, making executive clemency the only relief available to Graham. *Id.* at *3-5. Judge Baird found it unclear, however, whether the state of Texas provided a procedure by which a condemned person could obtain that relief. *Id.* at *5. In Texas, the governor can exercise clemency upon the recommendation of the Board of Pardons and Paroles. *Id.* In the case of an application for full pardon based on actual innocence, the Board requires the applicant to submit "a written recommendation from the current trial officials of the convicting court, and/or a certified order accompanied by findings of fact, and affidavits from witnesses 'upon which the finding of innocence is based.'" *Id.* at *5. According to Judge Baird, the documents contemplated in this rule are *prerequisites* to having a claim of actual innocence considered by the board. *Id.* at *5. He raised these questions:

> Query: how does Graham get access to these documents? From what are these documents generated? . . . [T]he real issue which needs to be addressed . . . is one of procedural due process, viz: does Texas provide a procedure by which a condemned person may institute consideration of his innocence claim by the Board of Pardons and Paroles?

Id. Then, referring to the *Herrera* Court's threshold showing of innocence, he stated:

> What is of utmost importance is that if Graham can meet the threshold showing (whatever that may be), the State of Texas [must provide] a vehicle by which his evidence may be heard and a finding may be rendered regarding his claim of innocence. . . . [I]f there is no vehicle then there is no due process for Graham.

Id. at *6.

Another difficulty imposed by the *Herrera* decision is that the Court may have opened the door to successive federal habeas claims based on newly discovered exculpatory evidence by assuming, even *arguendo*, that the execution of a person who can make a persuasive demonstration of actual innocence would be unconstitutional and give rise to federal habeas relief.[134] After inviting such claims in its opinions, the Court failed to provide any direction to judges in the lower federal courts, who now must decide whether such claims can be entertained and, if so, what standards should be applied for reaching the merits and for granting relief. The judges also will have to decide what type of relief is appropriate.

If the Court ultimately decides that federal habeas claims of actual innocence based on evidence discovered long after trial can be entertained, then the tests suggested by Justice White and the dissenting Justices[135] may provide a foundation for the formulation of standards for review of claims in capital habeas cases. The more difficult question of whether relief should be provided in the form of a new trial or release from incarceration remains open. If the test of probable innocence suggested by the dissent[136] is adopted for determining which cases warrant relief, it would seem rational that the relief should be release from incarceration. The proposed probable innocence standard takes into account all evidence adduced at trial plus the newly discovered evidence, according due regard to reliability.[137] If this evidence establishes probable innocence, it follows that the original jury, if it had heard all of the presently available evidence, almost certainly would not have concluded that the defendant was guilty beyond a reasonable doubt. Although this standard demands much more from the defendant than would have been required at trial, it strikes a balance between the defendant's compelling interest in obtaining his liberty and the state's strong interest in the finality of criminal judgments.[138]

Several members of the Court expressed confidence that the Constitution's procedural protections, combined with the historical safeguards of executive clemency and pardon, will allow the Court to avoid ever reaching the most difficult question presented in *Herrera*: whether federal courts may entertain convincing claims of actual innocence on habeas review, absent an independent constitutional violation.[139] Perhaps this prediction will

134. *See supra* text accompanying notes 99-101.

135. *See supra* notes 30, 36, 113, 118-19 and accompanying text.

136. *See supra* notes 36, 119.

137. *See supra* note 36.

138. *See supra* note 127.

139. "If the Constitution's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, it may never require resolution at all." *Herrera*, 113 S. Ct. at 874 (O'Connor, J., concurring). "With any luck, we shall avoid ever having to face this embar-

prove correct, but a decision following shortly after *Herrera*, *Delo v. Blair*,[140] suggests that the issue will continue to occupy the Court.

Walter Blair was sentenced to death for murder.[141] In his third habeas petition to the District Court for the Western District of Missouri, he claimed to have new evidence—seven affidavits—which proved his actual innocence of the crime.[142] Five of the affiants alleged that another man, Ernest Jones, admitted in their presence that he had killed the victim and framed Blair.[143] Unlike the affidavits in *Herrera*, these did not rely on hearsay,[144] and there were no internal inconsistencies on the relevant points among the seven affidavits.[145] There also was a plausible explanation for the delay in bringing forth the evidence—all seven affiants testified they feared Jones because they knew he previously had committed multiple murders.[146] One affiant was a trial witness; her affidavit claimed that she had falsified her trial testimony at Jones' direction because she feared him.[147]

The district court denied Blair's habeas petition.[148] The United States Court of Appeals for the Eighth Circuit granted a temporary stay of execution and ordered a hearing on the merits of the appeal, indicating a need to study Blair's claims in light of the *Herrera* decision.[149] One judge noted

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rassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon." *Id.* at 875 (Scalia, J., concurring).

140. 113 S. Ct. 2922 (1993) (per curiam). Justice Blackmun wrote a dissenting opinion in which Justice Stevens joined.

141. Blair v. Delo, No. 93-2824, 1993 WL 281858, at *1 (8th Cir. July 20, 1993) (2-1 decision), *vacated*, 113 S. Ct. 2922 (1993) (per curiam).

142. *Id.* (Heaney, J., concurring). Blair first raised this claim in state court, but it was denied without comment. Missouri rules require that a new trial motion be made within 15 to 25 days of the trial verdict; claims of newly discovered evidence are not cognizable in Missouri habeas corpus proceedings. *Id.* at *2 (Heaney, J., concurring).

143. *Id.* at *3 (Heaney, J., concurring).

144. *Id.* (Heaney, J., concurring). Admissions are not excludable hearsay under the Federal Rules of Evidence. FED. R. EVID. 801(d)(2)(A).

145. *Blair*, 1993 WL 281858, at *3 (Heaney, J., concurring).

146. *Id.* (Heaney, J., concurring).

147. *Id.* (Heaney, J., concurring).

148. *Id.* at *1.

149. *Id.* The court noted that it could dismiss an appeal on motion for stay if the appeal was "frivolous and entirely without merit" and that a successive petition like Blair's required "the presence of substantial grounds upon which relief might be granted." *Id.* (quoting Barefoot v. Estelle, 463 U.S. 880, 894, 895 (1983)). Judge John R. Gibson then stated:

> The entire question is whether Blair's third petition states a claim that survives the Supreme Court's decision in *Herrera v. Collins*. In *Herrera* there were three separate opinions concurring in the judgment, and there was also a dissent. While we question whether Blair's claim survives *Herrera*, because of the differing views of the several Justices, we cannot conclude without more detailed study that Blair's claim is "frivolous and entirely without merit" or that there is not a substantial question upon which relief might be granted.

Id. (internal citations omitted).

that Blair's evidence was "considerably more persuasive" than Herrera's.[150] The United States Supreme Court vacated the stay of execution, however, and held in a per curiam opinion that the Court of Appeals abused its discretion by granting a stay when the claims were "for all relevant purposes indistinguishable" from those rejected in *Herrera*.[151]

The *Blair* decision illustrates the uncertainty that lower courts face as they grapple with free-standing claims of actual innocence in the wake of *Herrera*. After this decision it is only slightly clearer when—if ever—a petitioner's evidence of actual innocence will be persuasive enough to merit federal habeas review. The Court hinted in *Blair* that a petitioner's evidentiary showing of innocence will have to cross a formidably high threshold before a federal district court will grant an evidentiary hearing to further evaluate the petitioner's evidence.[152] Yet, paradoxically, the proof presented with a habeas petition generally is limited to affidavits; if habeas review is denied, the appellate court likewise will be limited to reviewing those affidavits.[153] As Judge Heaney of the Eighth Circuit explained in *Blair*, the petitioner "could only present us with something else if the district court were to grant . . . an evidentiary hearing."[154] That remark underscores the troublesome legacy of *Herrera*—the incongruity of demanding extraordinarily persuasive evidence of actual innocence while, at the same time, denying the petitioner a forum to present that evidence. In short, Judge Heaney's comment exposed the paradox of actual innocence in federal habeas corpus.

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150. *Id.* at *2 (Heaney, J., concurring).

151. Delo v. Blair, 113 S. Ct. 2922, 2923 (1993) (per curiam).

152. *See supra* text accompanying notes 142-47 (describing evidence presented); *supra* text accompanying note 151 (finding abuse of discretion for granting stay to consider this evidence).

153. Blair v. Delo, No. 93-2824, 1993 WL 281858, at *2 (8th Cir. July 20, 1993) (2-1 decision), *vacated*, 113 S. Ct. 2922 (1993) (per curiam). The petitioner could submit a deposition or the transcript from a state court hearing to support his habeas petition, if the state had offered him either opportunity.

154. *Id.*