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Responding to *Herrera v. Collins*: Ensuring That Innocents are Not Executed

Tara L. Swafford

RESPONDING TO *HERRERA V. COLLINS*: ENSURING THAT INNOCENTS ARE NOT EXECUTED

I. INTRODUCTION[1]

"Death is . . . different."[2] Since the Supreme Court decision in *Furman v. Georgia* invalidating all state death penalty statutes,[3] the American system of capital punishment has been held to a higher standard of reliability. Due to the nature of the punishment itself and the procedural safeguards it is expected to carry,[4] the administration of capital punishment deserves the closest scrutiny. If the death penalty is carried out unjustly, then what does that say about the rest of the American justice system? This Note will examine the most egregious error in death penalty cases: a failure to ensure that innocent persons have not been sentenced to die.

In *Herrera v. Collins*,[5] the Supreme Court held that a capital defendant is not entitled to federal habeas corpus review for a claim of actual innocence based on newly discovered evidence unless there is an independent constitutional violation. While those who see the habeas process as a perversion of justice due to its delay and expense[6] heralded the decision, the decision also ini-

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1. This note utilizes only male pronouns throughout. Female pronouns would be misleading in the context of capital defendants since 98% of the prisoners in death penalty litigation are male. Bruce Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 18 N.Y.U. REV. L. & SOC. CHANGE 415, 415 (1990-1991).

2. Woodson v. North Carolina, 428 U.S. 280, 303 (1976). The Court further stated that "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Id.* at 305.

3. 408 U.S. 238 (1972) (holding that the means of applying the State of Georgia's death penalty violated the Eighth and Fourteenth Amendments). This decision invalidated all state death penalty statutes and vacated the sentences of over 600 death row inmates. *Id.* at 316.

4. *Woodson*, 428 U.S. at 305 (reasoning that due to the qualitative difference between a sentence of death and a sentence of life imprisonment, the imposition of the death penalty deserves extra reliability).

5. 113 S. Ct. 853, 860 (1993).

6. *See infra* note 34 and accompanying text.

tiated a public outcry. The nation was stunned that a capital defendant alleging new evidence of innocence could not obtain review from federal courts since a claim of innocence is not a constitutional claim. Newspapers across the nation were flooded with harsh criticisms of the *Herrera* decision: "state murder,"[7] "[m]urder by the highest court in the land,"[8] "[t]he error of this decision . . . will be measured in lives,"[9] "callous and cruel,"[10] "expediency over justice . . . the court [has] further cheapened its already degraded view of the value of life,"[11] "deplorable illogic,"[12] a "ghoulish" decision that is a casual disregard for the power of life and death,"[13] "unconscionable . . . stupid and pernicious,"[14] "allegiance to procedure above . . . justice,"[15] "a slap in the face" to the legacy of Thurgood Marshall,[16] the Supreme Court is a "stickler for rules,"[17] and the federal courts are "too busy" for constitutional protection.[18] Few recent Supreme Court decisions have garnered such vigorous attacks.[19] In response to this decision, Congress has proposed a statutory provision which would override *Herrera*.[20]

This Note examines whether Senate Bill 1441, the Habeas Corpus Reform Act of 1993,[21] and its provision allowing for re-

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7. James C. Harrington, *Court Has Made It Easier to Execute Innocent*, HOUSTON CHRON., Feb. 4, 1993, at A25.

8. Nat Hentoff, *When Guilt or Innocence 'Doesn't Matter'*, WASH. POST, Feb. 13, 1993, at A31.

9. *Don't Make It Easier to Execute the Innocent*, USA TODAY, Jan. 26, 1993, at 10A.

10. *Not Guilty? It Doesn't Matter*, ATLANTA CONSTITUTION, Jan. 28, 1993, at A12.

11. *Perilously Close to Murder*, ST. LOUIS POST-DISPATCH, Jan. 29, 1993, at 2C.

12. *Appalling Limit on Death Appeals*, PLAIN DEALER, Jan. 30, 1993, at B6.

13. *See Rehnquist Court's Unseemly Zeal for Executions*, NEWSDAY, Jan. 28, 1993, at 52.

14. *Rehnquist's Catch-22*, SACRAMENTO BEE, Jan. 28, 1993, at B6.

15. *Guilty Regardless of New Evidence*, HARTFORD COURANT, Feb. 1, 1993, at C10.

16. Kathy Fair, *Death Penalty Foes Decry Rulings*, HOUSTON CHRON., Jan. 26, 1993, at A19.

17. Marshall Ingwerson, *Supreme Court Limits Death-Penalty Appeals*, CHRISTIAN SCIENCE MONITOR, Jan. 27, 1993, at 2.

18. *'Actual Innocence' and Death*, ST. PETERSBURG TIMES, Jan. 27, 1993, at 14A.

19. *See, e.g.*, Cruzan v. Cruzan, 497 U.S. 261 (1990) (denying petitioner's request to refuse medical treatment); Roe v. Wade, 410 U.S. 113 (1973) (upholding a woman's right to have an abortion).

20. David G. Savage, *Plan Could Let Condemned Get Hearing for Fresh Facts*, LOS ANGELES TIMES, Aug. 27, 1993, at A12.

21. S. 1441, 103d Cong., 1st Sess. (1993) [hereinafter S. 1441]. Section V explains that Senate Bill 1441 did not pass in the 103rd Congress. *See infra* notes 150-52 and accompanying text. Another Senate bill, Senate Bill 1657, contains the same provision

view of new evidence claims in death penalty cases, answers the protests that followed *Herrera.* Section II will detail the importance of federal habeas corpus doctrine. Section III examines the *Herrera* decision itself. Section IV surveys treatment of *Herrera* in subsequent cases. Section V demonstrates that innocents are in fact executed in the United States. Section VI critically analyzes the provisions of Senate Bill 1441, and Section VII presents an alternative proposal to Senate Bill 1441 that more effectively reduces the risk of executing innocents in the United States.

II. THE IMPORTANCE OF FEDERAL HABEAS CORPUS

Providing a habeas corpus hearing for claims of innocence based on new facts is essential given that appeals to federal courts are the most effective vehicle a capital defendant has to ensure due process.[22] As the following facts indicate, the state systems are unreliable and clemency is not the "fail-safe" it is claimed to be.[23]

A. A Brief Explanation of Federal Habeas Corpus

Federal habeas corpus,[24] "the Great Writ,"[25] is a right provided for in the suspension clause of the Constitution.[26] It is so critical to the rights of criminal defendants that it has been called a "'safety valve' for innocent defendants."[27] With the 1953 case of *Brown v. Allen,*[28] habeas corpus relief began expanding, in part, to

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allowing for review of new evidence claims, however, reference will only be made to Senate Bill 1441 since it was the original bill. *See* S. 1657, 103d Cong., 1st Sess. (1993) [hereinafter S. 1657].

22. *See* discussion *infra* parts II.B-C. Even if one is not persuaded of the deficiencies of the state criminal justice system and executive clemency, an extra check on these processes serves to reduce the fallibility of the system and to ensure fairness.

23. Herrera v. Collins, 113 S. Ct. 853, 868 (1993).

24. Federal habeas corpus gives state prisoners the right to collaterally attack their conviction in federal court if a constitutional claim is involved. Federal habeas corpus is the only real means state defendants have of obtaining federal review since direct review by the Supreme Court is highly unlikely. *See* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE § 33.01 (2d ed. 1986).

25. This phrase was used to refer to the writ of habeas corpus by Chief Justice Marshall in *Ex Parte* Bollman, 8 U.S. (4 Cranch) 75, 95-100 (1807).

26. U.S. CONST. art. I, § 9, cl. 2 (providing "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.") The right to federal habeas corpus is now codified in 28 U.S.C. §§ 2241-55 (1988).

27. Ledewitz, *supra* note 1, at 415.

28. 344 U.S. 443 (1953) (establishing that federal habeas corpus included all federal constitutional claims raised by state prisoners).

achieve uniformity in federal constitutional law.[29] Following *Brown*, a series of cases further broadened federal habeas corpus, most notably the 1963 case of *Fay v. Noia*.[30] As a result of this expansion, federal habeas corpus has come to play such a major role in protecting state criminal defendants' constitutional rights, and especially capital defendants' constitutional rights, that some states' rights advocates have questioned its use.[31] Its importance to the rights of death row inmates has made habeas corpus the center of an intense debate alleging that the capital appeals process takes too long.[32] The debate is waged in courts over finality, in legislatures over expenses, and, most prominently, among the American people over justice.[33]

In legal circles, three principal arguments are asserted for restricting federal habeas corpus: a desire to promote "comity" between the state and federal systems, the need for finality in criminal convictions, and the goal of decreasing the burdens on federal court dockets.[34] Protectors of the Great Writ focus on the importance of individual liberty and the safeguards provided by federal habeas corpus.[35] Those who would like to restrict federal habeas corpus are currently winning the battle with legislative proposals

29. *Id.* at 510.

30. 372 U.S. 391, 438 (1963) (allowing a prisoner to make claims in habeas that had not been made in the state court so long as the state procedures were not deliberately avoided), *overruled by* Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992).

31. Joseph L. Hoffmann, *Starting From Scratch: Rethinking Federal Habeas Review of Death Penalty Cases*, 20 FLA. ST. U. L. REV. 133, 134 (1992). *See also* Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1666 (1990) (stating that some regard federal habeas corpus as a "slap in the face of federalism").

32. Hoffmann, *supra* note 31, at 134; *see also* AD HOC COMM. ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, JUD. CONF. OF THE U.S., COMM. REPORT AND PROPOSAL [1989] 45 Crim. L. Rep. (BNA) 3239 (Sept. 27, 1989) (charging that the present system of habeas corpus "has led to piecemeal and repetitious litigation, and years of delay").

33. *See generally* Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015, 1016 (1993). So intense is this debate that Chief Justice Rehnquist formed the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases headed by Retired Associate Justice Lewis F. Powell. *Id.* at 1048. The report from this Committee, commonly known as the Powell Committee Report, is a forerunner of S. 1441. *See generally* Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 941, 1065 n.680 (1991).

34. *See* WHITEBREAD & SLOBOGIN, *supra* note 24, § 33.01(b); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 28.2(e) (2d ed. 1992).

35. *See generally* LAFAVE & ISRAEL, *supra* note 34, § 28.2(e)-(f) (discussing the arguments for expanding and restricting federal habeas corpus and the manifestations of these arguments in case law).

curtailing the availability of federal habeas corpus[36] and Supreme Court decisions impose a myriad of procedural obstacles on the exercise of the Great Writ.[37]

B. The State Criminal Justice System

Any restriction on the right of habeas corpus is most alarming when one realizes the unreliability of the alternatives: the state criminal justice system and executive clemency. As of 1982, federal courts granted relief for constitutional error in sixty to seventy-five percent of capital cases in habeas.[38] As of 1983, the rate was seventy percent, and by 1986 the rate was sixty percent.[39] The rate of reversal in capital cases has decreased in recent years due to at least two factors: the law has begun to settle and the procedural barriers to habeas review generated by the Supreme Court have restricted appeals.[40] These statistics underscore the need for liberalized federal review of capital cases to ensure justice.

Another pitfall of state criminal justice systems is the time limit imposed on motions for a new trial after a guilty verdict. In thirteen out of the thirty-seven states with the death penalty, a motion based on new evidence of innocence must be presented within sixty days of the verdict.[41] Mississippi even requires that a

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36. *See, e.g.*, S. 1441 and S. 1657 (placing a "statute of limitations" on habeas corpus appeals). *See infra* notes 156-59 and accompanying text.

37. *See* Joseph L. Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L.J. 817, 819 (1993) (stating that the Supreme Court has responded to the growth of habeas cases with procedural restrictions); Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 460 (1990-1991) (noting the Supreme Court's "relentless creation of procedural barriers to federal review of constitutional claims"). *See also* Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) (stating in reference to the Court's habeas corpus rules that they are "a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights").

38. Mello & Duffy, *supra* note 37, at 459-60.

39. *Id.* The rate of reversal in non-capital habeas cases was only 0.25% to 7.0% as of 1983. Murray v. Giarratano, 492 U.S. 1, 24 (1989) (Stevens, J., dissenting). The low rate of reversals in non-capital cases is most likely because, on the average, more qualified attorneys are supplied for capital appeals. Regardless of that fact, there is still a great need for better representation in capital appeals. *See infra* notes 231-32 and accompanying text.

40. Mello & Duffy, *supra* note 37, at 460.

41. *See* ALA. CODE § 15-17-5 (1982) (30 days); ARIZ. R. CRIM. P. 24.2(a) (60 days); ARK. R. CRIM. P. 36.22 (30 days); FLA. STAT. ANN. R. CRIM. P. 3-590 (West 1992) (10 days; ILL. ANN. STAT. ch. 725, ¶ 5/116-1 (Smith-Hurd 1993) (30 days); IND. R. CRIM. P. 16 (30 days); MO. R. CRIM. P. 29.11(b) (15-25 days); MONT. CODE ANN. § 46-16-702(2)

motion for new trial be made during the term in which judgment was announced.[42] In light of *Herrera*, death row inmates in these thirteen states are effectively precluded from ever presenting new evidence of innocence since any evidence of innocence most often arises well beyond sixty days after trial.[43] One strains to see the logic of even having these time limits since they basically operate as a total bar to new evidence petitions.

C. *Executive Clemency*

The other vehicle whereby capital defendants can try to achieve justice for claims of innocence is executive clemency. However, any hope that innocents will be protected through executive clemency is even more dim than the hope that they will be protected through state criminal justice systems. As executions have increased over recent years, the exercise of clemency has decreased.[44] The facts illustrate that governors rarely use their clemency powers for fear of appearing soft on crime.[45] One author concluded that "[f]or all practical purposes [clemency] is no longer

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(1993) (30 days); S.D. CODIFIED LAWS ANN. § 23A-29-1 (1988) (10 days); TENN. R. CRIM. P. 33(b) (30 days); TEX. R. APP. P. 31(a)(1) (30 days); UTAH R. CRIM. P. 24(c) (10 days); VA. S. CT. R. 3A:15(b) (21 days). While the Texas rule of appellate procedure limits motions for new evidence to within 30 days of trial, it should technically not be numbered with the above listed states due to the recent ruling in State *ex. rel.* Holmes v. 3d Court of Appeals, No. 71,764, 1994 WL 135476 (Tex. Crim. App. Apr. 20, 1994) which overruled Texas's 30-day limit.

42. MISS. CIR. CT. CRIM. R. 5.16 (providing that the motion must be filed during term in which judgment is rendered, except on an order from the court to permit filing during a later term).

43. *See infra* note 172 and accompanying text.

44. Paul Whitlock Cobb, Jr., *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 393-94 n.25 (1989) (presenting statistics showing the simultaneous increase in executions and decrease in commutations).

45. *See id.*; Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 608 (1991); *Don't Make It Easier to Execute the Innocent*, *supra* note 9, at 10A. Perhaps the best example of executives fearing a public image of being "soft on crime" is President Bill Clinton's behavior while governor of Arkansas. During his first term as governor, he commuted several death sentences. Cobb, *supra* note 44, at 394 n.26. After defeat in his re-election bid, Clinton ran again promising "'not to commute so many sentences if . . . given another chance.'" *Id.* For further examples of governors who have shied away from their clemency powers for political reasons and for examples of governors who have been politically punished for exertion of their clemency powers, see *id.* at 393-95. *See also* Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 270 (1990-1991) (stating that governors usually only commute death sentences after further political aspirations have ceased and providing examples).

available from the executive branch."[46] This is ironic when one considers Chief Justice Rehnquist's assurances in *Herrera* that clemency is the vehicle that prevents the erroneous execution of death row inmates.[47] On the contrary, the trend in clemency indicates that executives are increasingly ignoring clemency pleas.[48] Since both the executive and judicial branches are abdicating their roles as protectors of justice, Congress has had to intervene with the new evidence provisions in Senate Bill 1441.[49]

III. THE *HERRERA* DECISION

The *Herrera* decision was a habeas corpus appeal from Texas. A death row inmate, Leonel Herrera, claimed actual innocence based on newly discovered evidence.[50] This new evidence, first presented eight years after trial, essentially alleged that Herrera's dead brother, Raul, had killed the two police officers Herrera was convicted of murdering.[51] Four affidavits were offered to prove Raul had committed the murders. Three affidavits—from Raul's attorney, cellmate, and schoolmate—all contained testimony that Raul had confessed the killings to the affiants.[52] The fourth affidavit was from Raul's son who testified that he witnessed his father's slaying of the police officers and that the petitioner had not even been present.[53] At trial, Herrera had been convicted based on a

46. Cobb, *supra* note 44, at 395.

47. Herrera v. Collins, 113 S. Ct. 853, 868 (1993).

48. *See supra* note 44 and accompanying text.

49. It is interesting to note that when Justice Ginsburg was questioned in her Senate confirmation hearings on her opinion of *Herrera*, she told the Senate that what happens next to the issue of innocence claims based on new evidence is a question as to the balance between justice and finality that is Congress's call—not the Court's. *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings before the Committee on the Judiciary United States Senate*, 103d Cong., 1st Sess. 294-95 (1993).

50. *Herrera*, 113 S. Ct. at 856.

51. *Id.* at 858. Essentially, it is alleged in the affidavits that Raul was part of a drug trafficking scheme with the Hidalgo County Sheriff and kept silent about his slaying of the officers because he thought his brother would be acquitted. *Id.* at 858 n.2. After his brother was found guilty, Raul began blackmailing the sheriff. *Id.* It is further alleged that Raul was killed by one of the sheriff's cronies in the drug trafficking scheme to silence him. *Id.*

52. *Id.* at 858. Raul's attorney, Hector Villarreal, gave his affidavit on December 11, 1990. *Id.* at 858 n.2. Raul's cellmate, Juan Franco Palacious, gave his affidavit on December 10, 1990. *Id.* Raul's and Leonel's schoolmate, Jose Ybarra, Jr., gave his affidavit on January 9, 1991. *Id.* at 858 n.3.

53. *Id.* at 858. Raul Jr.'s affidavit was dated January 29, 1992. *Id.* at 859 n.3. Raul Jr. was nine years old at the time of the murders. *Id.* at 858.

self-incriminating letter and an assortment of circumstantial evidence.[54]

The district court granted Herrera an evidentiary hearing to present his new evidence of innocence.[55] The ruling was made by Judge Ricardo Hinojosa, a Reagan appointee not characterized as soft on crime, who decided Herrera should have a chance to present his new evidence out of a "'sense of fairness and due process.'"[56] The Fifth Circuit vacated the stay of execution, holding that a claim of actual innocence, by itself, is not a constitutional claim.[57] The Supreme Court granted certiorari but did not grant Herrera a stay of execution to hear his appeal.[58] Without the intervention of the Texas Court of Criminal Appeals, Herrera would have been executed before the Supreme Court even heard his claim of innocence.[59] The Supreme Court affirmed the holding by the Fifth Circuit in an opinion by Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas.[60]

The thrust of Chief Justice Rehnquist's opinion was that the Supreme Court has never understood actual innocence based only on newly discovered evidence to be a constitutional claim.[61] Ac-

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54. *Id.* at 857. A handwritten letter which Herrera had at the time of his arrest implied he had killed the first police officer, David Rucker. *Id.* The circumstantial evidence included the identification of Herrera by the second police officer, Enrique Carrisalez, before his death and the identification of Herrera by a police officer who witnessed Carrisalez's slaying. *Id.* The car identified as the one from which the shots were fired belonged to Herrera's girlfriend, and strands of Rucker's hair were found in it. *Id.* Also Herrera's Social Security card was found alongside Rucker's car, and blood splatters, the same as Rucker's blood type, were on Herrera's jeans and wallet. *Id.*

55. Herrera v. Collins, 113 S. Ct. 853, 859 (1993). Herrera could not bring his claim in state court due to Texas's rule requiring that new evidence of innocence be presented within 30 days of trial. TEX. R. APP. P. ANN. 31(a)(1) (West 1992). That law has since been overruled. State *ex rel.* Holmes v. 3d Court of Appeals, No. 71,764, 1994 WL 135476 (Tex. Crim. App. Apr. 20, 1994).

56. Hentoff, *supra* note 8, at A31.

57. *Herrera*, 113 S. Ct. at 859.

58. Herrera v. Texas, 112 S. Ct. 1074 (1992) (denying application for stay of execution presented to Justice Scalia). Only four votes are needed to grant certiorari; five votes are needed to stay an execution. *Ex parte* Herrera, 828 S.W.2d 8, 9 (Tex. Crim. App. 1992). Justices Blackmun, Stevens, O'Connor, and Souter would vote to grant the stay. *Herrera*, 112 S. Ct. at 1074.

59. *See Ex parte Herrera*, 828 S.W.2d at 9 (holding that it would be improper for the execution to be carried out before the petition for writ of certiorari is reviewed by the Supreme Court). In fact, in Hamilton v. Texas, 497 U.S. 1016, 1017 (1990), the Supreme Court voted to review a capital case but did not grant a stay, and the petitioner was executed before the Court could hear the case.

60. *Herrera*, 113 S. Ct. at 856.

61. *Id.* at 860 (citing Townsend v. Sain, 372 U.S. 293, 317 (1963)).

cording to the Rehnquist opinion, interests of finality in adjudication and the fact that Herrera is now presumed guilty must predominate.[62] "Few rulings would be more disruptive of our federal system than to provide for federal habeas review of free-standing claims of actual innocence."[63] The Court refused to hold that Texas's law, requiring that a motion for new trial be made within thirty days of conviction,[64] violated either the Eighth Amendment or the Fourteenth Amendment Due Process Clauses.[65] The Rehnquist opinion pointed to the "fail-safe" of clemency as the best alternative for capital defendants with strong claims of innocence.[66]

In a curious discussion, the Rehnquist opinion then assumed "for the sake of argument" that the Constitution does encompass claims of innocence such as Herrera's.[67] In that event, the state's interests of finality and manageability of court dockets would require an "extraordinarily high" showing of innocence to obtain habeas relief.[68] Herrera would not meet that standard based on his "disfavored" use of affidavits,[69] the inconsistencies within the affidavits, and the weight of the evidence presented against Herrera at trial.[70]

Despite the Rehnquist opinion, six justices expressed through concurrences and dissents a willingness to allow claims of actual innocence into habeas corpus.[71] However, the justices varied widely on what should be the proper standard for such a claim. Moreover, the majority opinion's "extraordinarily high" standard presents a Court predisposed to disallow hearings for actual innocence based on new evidence.[72]

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62. *Id.* at 861.

63. *Id.*

64. TEX. R. APP. P. ANN. 31(a)(1) (West 1992).

65. *Herrera*, 113 S. Ct. at 866.

66. *Id.* at 868.

67. *Id.* at 869.

68. *Id.*

69. The use of affidavits is called "disfavored" in the Rehnquist opinion because the statements are not subject to cross-examination, and there is no opportunity to judge the affiants' credibility. *Id.*

70. Herrera v. Collins, 113 S. Ct. 853, 869-70 (1993). The inconsistencies within the affidavits included discrepancies as to how many were in the vehicle from which the shots were fired, in which direction the car was heading, Herrera's whereabouts on the night of the murders, and when the murders occurred. *Id.* at 870. The Court also emphasized that the affidavits were filed at the "eleventh hour." *Id.* at 869.

71. *Id.* at 870 (O'Connor & Kennedy, JJ., concurring); *id.* at 875 (White, J., concurring); *id.* at 876 (Blackmun, Stevens, & Souter, JJ., dissenting).

72. *See* Thomas J. Sullivan, *A Practical Guide to Recent Developments in Federal*

Justice O'Connor's concurrence, joined by Justice Kennedy, stated that "the execution of a legally and factually innocent person would be a constitutionally intolerable event."[73] Justice O'Connor refused, however, to answer the question of whether a fairly convicted person is entitled to another hearing to adjudicate his guilt.[74] In fact, she believed that such a question may never have to be addressed by the Court given the safeguards of clemency.[75] The concurrence emphasized Herrera's overwhelming guilt based on all the evidence and concluded that whatever the standard for obtaining further review would be, Herrera would not meet it.[76]

Justice White, who concurred only in the judgment, assumed that executing an innocent person is unconstitutional.[77] He enunciated a standard whereby a convicted defendant could receive review of new evidence.[78] That standard would require that, after the new evidence is considered, "'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'"[79] Justice White concluded Herrera did not meet that standard.[80]

Justice Scalia's concurrence, joined by Justice Thomas, bluntly stated that "[t]here 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."[81] Justice Scalia's determination rested on dictum in *Townsend v. Sain*[82] and his concern for the burden that would be imposed on lower federal courts to analyze new evidence of innocence claims on a regular basis.[83]

Habeas Corpus for Practicing Attorneys, 25 ARIZ. ST. L.J. 317, 337-38 (1993) (finding that the Court would only review actual innocence claims in an "extraordinary factual circumstance").

73. *Herrera*, 113 S. Ct. at 870 (O'Connor, J., concurring).

74. *Id.* at 870-71 (stating that normally a fairly convicted person is not entitled to another hearing to adjudicate his guilt, but that this claim is disturbing).

75. *Id.* at 874.

76. *See id.* at 871-73 (finding that the affidavits pale when compared to the proof at trial).

77. *Id.* at 875 (White, J., concurring in judgment).

78. Herrera v. Collins, 113 S. Ct. 853, 875 (1993).

79. *Id.* (quoting Jackson v. Virginia, 443 U.S. 307, 324 (1979)).

80. *Id.*

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

82. 372 U.S. 293, 317 (1963). This dictum is the statement from *Townsend* that "newly discovered evidence relevant only to a state prisoner's guilt or innocence is not a basis for federal habeas corpus relief." *Herrera*, 113 S. Ct. at 875 (Scalia, J., concurring).

83. Herrera v. Collins, 113 S. Ct. 853, 875 (1993) (Scalia, J., concurring). But note

Justice Blackmun's dissent, joined by Justices Stevens and Souter, was an unusually harsh criticism of the majority's conclusion. The dissent concluded that the Eighth and Fourteenth Amendments forbid "the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence."[84] Clemency was rejected by the dissent as an "act of grace" insufficient to satisfy a capital defendant's constitutional claims.[85] According to the dissent, the petitioner should have the burden of proving that, based on all of the new and old evidence, he is "probably innocent."[86] As for Herrera's situation, the dissent would have remanded to the district court for a decision on Herrera's claim since district courts are the proper forum for evaluation of evidence.[87]

The last portion of the dissent[88] contained perhaps the most strident protest to the majority decision. Justice Blackmun disapproved of the Court's continued refusal to restrict the states' power to execute and its abandonment of its duty to safeguard justice.[89] He concluded with a stinging remark on the effect of the majority's holding: "The execution of a person who can show that he is innocent comes perilously close to simple murder."[90]

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that the much belabored burden on federal courts as a result of habeas petitions is only around 5% of all civil actions filed in federal court. Lay, *supra* note 33, at 1044 n.162.

84. *Herrera*, 113 S. Ct at 876 (Blackmun, J., dissenting).

85. *Id.* at 881.

86. *Id.* at 882-83.

87. *Id.* at 884. The dissent also faults the majority for dismissing Herrera's evidence because it came from affidavits. *Id.* (stating that since Herrera has not been allowed a hearing, affidavits are the only means whereby he could present any evidence at this stage of appeal).

88. *See id.* at 876 (explaining that Justices Stevens and Souter did not join this portion).

89. Herrera v. Collins, 113 S. Ct. 853, 884 (1993)(Blackmun, J., dissenting).

90. *Id.* Leonel Herrera was executed on May 12, 1993, by lethal injection. *Herrera Executed in Texas*, FACTS ON FILE WORLD NEWS DIGEST, May 13, 1993, at 350, B1. It is worth noting that Justice Blackmun's years on the Court and his experience with capital appeals have caused him to take the position that "the death penalty, as currently administered, is unconstitutional." Callins v. Collins, 114 S. Ct. 1127, 1138 (1994) (Blackmun, J., dissenting). Justice Blackmun cited *Herrera* as one of the cases demonstrating the Court's inability to constitutionally enforce the death penalty. *Id.* at 1137. In reference to *Herrera*, he stated:

> Certainly there will be individuals who are actually innocent who will be unable to make a better showing than what was made by Herrera without the benefit of an evidentiary hearing. The Court is unmoved by this dilemma, however; it prefers "finality" in death sentences to reliable determinations of a capital defendant's guilt.

What is the message from *Herrera*? There are two major interpretations. First, the decision could be narrowly interpreted and limited to the specific facts of the *Herrera* case.[91] Since Herrera's claim was so weak, this issue was not really addressed. After all, six justices agreed that no matter what the standard for obtaining relief was, Herrera could never meet it.[92] Thus one could take an optimistic viewpoint that since six justices seemed to say the Constitution prohibits execution of innocents,[93] the door is not closed to a future case allowing for review of capital defendants' innocence claims.[94] However, that does not seem to be likely in the immediate future. In granting review of a case to be heard in the fall of 1994 where the defendant is claiming new evidence of innocence, the Court refused to certify for review the issue of actual innocence as a free-standing constitutional claim.[95]

A second viewpoint, one seized by newspapers across the country[96] and by Justice Blackmun,[97] is the broad interpretation

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Id. at 1138 (footnote omitted).

91. *See* Hoffmann, *supra* note 37, at 832 (finding that the Court interpreted on primarily procedural, rather than substantive grounds); *Constitutional Law Conference*, 62 U.S.L.W. 2263, 2269-70 (U.S. Nov. 2, 1993) (quoting Yale Kamisar's analysis).

92. *See generally Herrera*, 113 S. Ct. at 856-75 (Chief Justice Rehnquist and Justices O'Connor, Kennedy, White, Scalia, and Thomas).

93. *See supra* note 71 and accompanying text (Justices O'Connor, Kennedy, White, Blackmun, Stevens and Souter).

94. Hoffmann, *supra* note 37, at 833.

95. Schlup v. Delo, 11 F.3d 738 (8th Cir. 1994), *cert. granted*, 114 S. Ct. 1368 (1994); Schlup v. Delo, 63 U.S.L.W. 3025, 3025 (U.S. July 19, 1994) (setting out the questions presented for Court review); Michael Kirkland, *Supreme Court Accepts Evidence Issue on Capital Case*, PROPRIETARY TO THE UNITED PRESS 1994, Mar. 28, 1994 (noting that the Court refused to certify the question of whether execution of an actually innocent person violates the Constitution). In refusing to answer the question of whether executing an actually innocent person is a constitutional violation, the Court instead will be addressing the evidentiary standard needed for proof of innocence in a "miscarraige of justice" claim in which evidence of actual innocence is the gateway to raise a procedurally defaulted claim. *Schlup*, 63 U.S.L.W. at 3025. This is in contrast to the free-standing claim of innocence raised in *Herrera*. In *Schlup*, the Court will be choosing between the standard announced in Sawyer v. Whitley, 112 S. Ct. 2514, 2517 (1992), of clear and convincing evidence that but for the constitutional error, no reasonable factfinder would find the defendant guilty and the standard announced in Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) of a colorable showing of innocence. *Id.* Thus, although the contexts vary, the Court's decision in *Schlup* is relevant to this Note's discussion of evidentiary standards. Indeed, the *Schlup* decision will go a long way towards predicting future action, if any, by the Court on the evidentiary standard for free-standing claims of actual innocence. For the factual background surrounding the *Schlup* case, see *infra* note 126 and accompanying text.

96. *See supra* notes 7-18 and accompanying text.

97. *See supra* note 90 and accompanying text.

that the Court has shirked its duty as protector of the Constitution. This viewpoint stresses that executing an innocent person should be the most unconstitutional action a state could perform. The Court's reference to an "extraordinarily high" standard[98] indicates that no case will likely ever merit a hearing for new evidence. Justice Blackmun believes that *Herrera* "erect[ed] nearly insurmountable barriers to a defendant's ability to get a hearing on a claim of actual innocence."[99] By deferring to clemency and refusing to structure a standard by which a hearing can be obtained, the Court demonstrated its eagerness to further limit habeas corpus at the expense of certainty. Indeed the Court's foremost aim seemed to be to increase the pace of executions.[100] The Court's refusal to stay Herrera's execution until his case had been heard is a strong indicator of the Court's utter intolerance for capital appeals.[101]

IV. APPLICATIONS OF *HERRERA*

Based on subsequent cases applying *Herrera*, the immediate effect of the *Herrera* opinion has been to facilitate executions. *Herrera* has yet to be viewed in its narrow context by lower federal courts. It has turned into the "green light to execute innocent people" that the director of the American Civil Liberties Union's capital punishment project feared it would be.[102]

In *Delo v. Blair*,[103] the Supreme Court summarily rejected a capital defendant's new evidence claim, saying that the claim was indistinguishable from Herrera's. Justices Blackmun and Stevens dissented, urging the Court not to vacate the stay of execution ordered by the Court of Appeals.[104] Based on the Court of Appeals' concurring opinion,[105] Blair's claim of innocence and

98. Herrera v. Collins, 113 S. Ct. 853, 869 (1993).

99. Callins v. Collins, 114 S. Ct. 1127, 1138 (1994) (Blackmun, J., dissenting).

100. *Cf.* J. Thomas Sullivan, *"Reforming" Federal Habeas Corpus: The Cost to Federalism; the Burden for Defense Counsel; and the Loss of Innocence*, 61 UMKC L. REV. 291, 326 (1992) (predicting that the result of *Herrera* will be facilitation of executions).

101. *Cf. id.* at 325 (noting that *Herrera* suggests the Court's willingness to subjugate the federal claim to the state's interest in execution).

102. *New Facts Won't Automatically Halt Execution*, STAR TRIB., Jan. 26, 1993, at 1A, 4A (quoting Diann Rust-Tierney, director of the American Civil Liberties Union's capital punishment project).

103. 113 S. Ct. 2922, 2923 (1993).

104. *Id.* (Blackmun & Stevens, J.J., dissenting). Justice Souter did not join in the dissent, but he also refused to vacate the stay. *Id.* at 2924.

105. Blair v. Delo, 999 F.2d 1219 (8th Cir.) (Heaney, J., concurring), *stay vacated*, 113 S. Ct. 2922 (1993). Justice Heaney systematically eliminated the errors the Supreme Court

injustice seemed more substantial than Herrera's but was nevertheless summarily rejected under *Herrera*. As a result of another state's time limit for raising claims of new evidence, yet another death row inmate with cognizable claims of innocence was executed without an evidentiary hearing to examine those claims.[106] The Supreme Court again showed no tolerance for claims of actual innocence.

This intolerance was seized by the district court in *Young v. Puckett*,[107] which held that free-standing claims of innocence are not permitted in habeas corpus and thus rejected the capital defendant's claim of innocence. Also, the Eighth Circuit Court of Appeals, in *Bolder v. Delo*,[108] followed *Herrera*'s disfavored view of affidavits and dismissed a claim of actual innocence in a capital case due to the "eleventh hour" appearance of the affidavits and the double hearsay found within them. The Eighth Circuit reiterated its impatience with innocence claims by death row inmates in *Schlup v. Delo*[109] where it rejected the innocence claims of a death row inmate who later received a commutation due to strong evidence of innocence. The court cited *Herrera* and stated that "[f]ederal habeas . . . does not provide a forum for the retrial of a convicted felon."[110] In addition to these cases, there have been

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found in Herrera's affidavits from Blair's affidavits. Blair had a stronger claim of innocence because 1) his affidavits did not contain hearsay since five affiants testified that the real killer confessed to them, therefore falling under the hearsay exception for admissions, 2) there was a satisfactory explanation for the delay which caused one witness to recant her trial testimony since she feared for her life at the hands of the confessed killer, and 3) there were no inconsistencies within Blair's affidavits. *Id.* at 1221. In addition to believing in Blair's innocence, Heaney also believed that he did not receive a fair trial primarily due to prosecutorial misconduct. *Id.* at 1220.

106. Blair was executed 90 minutes after the Supreme Court lifted the Court of Appeals' stay. *No More Hearings for Walter Blair*, ST. LOUIS POST-DISPATCH, July 23, 1993, at 6B.

107. 822 F. Supp. 352, 355 (N.D. Miss. 1993).

108. 985 F.2d 941, 943 (8th Cir.), *cert. denied*, 113 S. Ct. 1070 (1993). The court noted Justice O'Connor's statement that eleventh hour affidavits "'are to be treated with a fair degree of skepticism.'" *Id.* (quoting Herrera v. Collins, 113 S. Ct. 853, 872 (1993) (O'Connor, J., concurring)). The new evidence alleged in the affidavits was that the victim died as a result of medical malpractice and not the stab wound inflicted by the capital defendant. *Id.* at 942.

109. 11 F.3d 738 (8th Cir. 1993), *cert. granted*, 114 S. Ct. 1368 (1994). *See infra* note 126 and accompanying text for details of Schlup's evidence of innocence and the commutation he received.

110. *Schlup*, 11 F.3d at 741. As in *Bolder*, the Eight Circuit also focused on the "inconsistencies and weaknesses" in Schlup's affidavits. *Id.* at 744. Note that this case will be reviewed by the Supreme Court in the fall of 1994 but not on the issue of actual

several other opinions utilizing the *Herrera* precedent to deny new evidence of actual innocence claims.[111]

Thus far, *Herrera*'s progeny, with few exceptions,[112] have reflected a wholesale affirmation of Chief Justice Rehnquist's majority opinion holding that a claim of innocence based on new evidence is not a constitutional issue. The *Herrera* decision is a major contributing ingredient to the current "rush to execution" mindset affecting the country as exemplified by the judiciary's eagerness to hurry the process of justice.[113] This mindset has produced an increase in executions in recent years and an indication that the trend will continue in greater numbers.[114] In *Delo v.*

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innocence as a free-standing claim. *See supra* note 95 and accompanying text.

111. *See* Murray v. Delo, No. 91-2542EM, 1994 U.S. App. LEXIS 24121, at *18-19 (8th Cir. Sept. 6, 1994) (dismissing new evidence couched in affidavits based on *Herrera*); Jacobs v. Scott, No. 93-2792, 1994 U.S. App. LEXIS 23922, at *15-17 (5th Cir. Sept. 1, 1994) (choosing not to engage in the arguendo of *Herrera* and to instead follow the rule that actual innocence claims based on new evidence are not constitutional claims); Bryant v. Scott, 28 F.3d 1141, 1420 n.14 (5th Cir. 1994) (rejecting Bryant's claim that the district court erred in finding that his claim of actual innocence provided no basis for relief); Ricker v. Leapley, 25 F.3d 1406, 1410 (8th Cir. 1994) (quoting *Herrera* for proposition that new evidence of actual innocence claims is not cognizable in habeas corpus); United States *ex. rel.* Pearson v. Ahitow, No. 93-CV-3303, 1994 U.S. Dist. LEXIS 11154, at *3 (N.D. Ill. Aug. 3, 1994) (rejecting new evidence claim as constitutionally irrelevant); Bowman v. Armontrout, No. 90-0969-CV-W-8, 1994 U.S. Dist. LEXIS 11214, at *4 (W.D. Mo. July 14, 1994) (holding that new evidence cannot be presented which relates to guilt or innocence); Payne v. Thompson, 853 F. Supp. 932, 937 (E.D. Va. 1994) (dismissing new evidence of innocence since actual innocence is not a constitutional claim); United States v. DeCarlo, 848 F. Supp. 354, 357 (E.D.N.Y. 1994) (holding that under *Herrera* the conviction of an innocent person is an unconstitutional injustice only when a legal error accompanies it).

112. *See* Milone v. Camp, 22 F.3d 693, 699 (7th Cir. 1994) (interpreting *Herrera* to hold unconstitutional the execution of a "'legally and factually innocent person'"); Enoch v. Gramley, No. 93-1003, 1994 U.S. Dist. LEXIS 12250, at *28 (C.D. Ill. Aug. 22, 1994) (citing *Herrera* for the proposition that a habeas petitioner can obtain relief for new evidence of actual innocence when proof of probable innocence is made).

113. *See* John B. Morris, Jr., Note, *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 YALE L.J. 371, 377 (1985) (noting that recent Supreme Court opinions display the justices' impatience with the habeas corpus process).

114. *See* Naftali Bendavid, *What Ever Happened to Habeas Reform?*, LEGAL TIMES, May 16, 1994, at 1, 17 (detailing the increase in executions by 24 from 1991 to 1993 and stating that more states are expected to join the ranks of the 37 states with capital punishment); Welsh S. White, *Capital Punishment's Future*, 91 MICH. L. REV. 1429, 1439-40 (1993) (presenting statistics that from 1987-1992 executions averaged 18 per year nationwide, but the pace increased to 31 executions in 1992. Moreover, White argues that the current political climate will hasten this trend to at least 50 executions per year by the mid-1990s); Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990's*, 20 FLA. ST. U. L. REV. 7, 7 (1992) (predicting, based on the trend of the Supreme Court, that the coming decade will see an increase in executions).

Blair, justice would have been better served by allowing Blair to present his new evidence in court. Instead, Blair was summarily denied that opportunity and executed ninety minutes later amid a cloud of doubt.[115] Why the rush?

V. INNOCENTS ARE EXECUTED

The fear that innocents may be executed is not unrealistic. Factually innocent defendants have been executed in the United States, and the risk still exists. Even well-known proponents of capital punishment concede that innocents are executed.[116] The most comprehensive proof of this comes from the Bedau and Radelet study.[117] This research surveyed capital punishment from 1900 and unearthed 416 "potentially capital cases" in which defendants convicted of capital crimes have been shown innocent.[118] At least twenty-three were ultimately executed.[119]

A widespread public misconception exists that innocents are not executed or at least that the danger is a relic of history.[120]

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115. *See supra* note 106.

116. *See* Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice*, 23 LOY. L.A. L. REV. 59, 114 (1989) (saying that there is no serious doubt that capital punishment results in innocents being executed). Ernest van den Haag, a leading proponent of the death penalty, sees the executions of innocents as a justifiable cost of the death penalty since "[m]ost human activities . . . cause the death of some innocent bystanders." ERNEST VAN DEN HAAG & JOHN P. CONRAD, THE DEATH PENALTY: A DEBATE 226 (1983). Van den Haag views the moral advantages of the death penalty as outweighing its moral disadvantages. *Id.* Also Justice Blackmun, though not a capital punishment proponent, has recently stated that he believes innocent men are being executed in the United States. Callins v. Collins, 114 S. Ct. 1127, 1138 n.8 (1994) (Blackmun, J., dissenting).

117. MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE (1992) [hereinafter IN SPITE OF INNOCENCE]; Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) [hereinafter Bedau & Radelet, *Miscarriages of Justice*]. *But see* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 121 (1988) (presenting the argument that the Bedau-Radelet study is "severely flawed" and only confirms that the risk of executing the innocent is too minuscule a factor to be considered in the death penalty debate). Bedau and Radelet subsequently responded to Markman and Cassell's criticism leveled at their study. Hugo Adam Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988) [hereinafter Bedau & Radelet, *The Myth of Infallibility*].

118. IN SPITE OF INNOCENCE, *supra* note 117, at 17, 272.

119. Bedau & Radelet, *Miscarriages of Justice*, *supra* note 117, at 36. Several others were saved with only moments to spare. *Id.* at 71.

120. Robert R. Bryan, *The Execution of the Innocent*, 18 N.Y.U. REV. L. & SOC. CHANGE 831, 831-32 (1990-1991). *See also* Paul G. Cassell, *In Defense of the Death Penalty*, LEGAL TIMES, May 3, 1993, at 33 (recounting his testimony before Congress that no innocent person had been executed in the past 50 years).

Such a belief should be questioned in light of the recent epidemic of innocents released from death row.[121] The staff of the Civil Rights Subcommittee of the House Judiciary Committee has found forty-eight cases of innocent men released from death row in the past twenty years alone.[122] In 1987, 1988, and 1989, at least twelve men on death row were released as innocent.[123]

Recently, there have been several haunting tales of men within days and even hours of execution who were released due to their innocence. In 1992, Walter McMillian was released from an Alabama penitentary after serving six years for a murder he did not commit. McMillian's fifth state appeal was finally successful in proving that he had been convicted based on false testimony and racial prejudice.[124] Kirk Bloodsworth was freed in 1993, after eight years on Maryland's death row, due to a new DNA testing procedure which established his innocence.[125] Lloyd Schlup came within eight hours of execution in 1993 before his sentence was commuted by the governor of Missouri due to substantial questions of Schlup's guilt.[126]

In addition to these avoidances of the death penalty, there are several capital defendants currently asserting colorable innocence claims. In the celebrated case of Gary Graham, a Texas death row inmate is claiming his innocence while making dramatic challenges to Texas law and the *Herrera* precedent.[127] Graham was convict-

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121. *See* Marcia Coyle, *Innocence vs. Executions*, NAT'L L.J., Dec. 27, 1993, at 1, 33 (noting the increasing number of inmates being released from death row as innocents).

122. William E. Clayton, Jr., *Dangers Seen in Death Row Appeals Rules*, HOUSTON CHRON., Oct. 22, 1993, at 18A.

123. Tabak & Lane, *supra* note 116, at 102.

124. Christopher Colford, *Cruel, But Not Unusual, Mistakes*, THE PLAIN DEALER, Mar. 7, 1993, at 3-C. Note that if McMillian had been sentenced to life imprisonment, he probably would have died in jail since he only received special legal assistance from the Alabama Capital Representation Project because of his death sentence. Coyle, *supra* note 121, at 33.

125. *Innocent, but Sentenced to Die*, WASH. POST, July 3, 1993, at A22.

126. *The Ultimate Crank Call*, TIME, Nov. 29, 1993, at 20, 20. After a two day trial, Schlup was sentenced to die for killing a prison guard, but a videotape gives him an alibi, and five eyewitnesses who did not testify at trial attest that Schlup was not the assailant. Schlup v. Delo, 11 F.3d 738, 744 (8th Cir. 1993) (Heaney, Sr. J., dissenting), *cert. granted*, 114 S. Ct. 1368 (1994). A prison guard also asserted Schlup's innocence. James Willwerth, *Invitation to an Execution*, TIME, Nov. 22, 1993, at 46, 46. However, Schlup's habeas appeals based on new evidence were unsuccessful as a result of *Herrera*. *See Schlup*, 11 F.3d at 741 (noting that federal habeas corpus does not permit the retrial of a convicted felon). Despite the commutation, Schlup will try to prove his innocence to the Supreme Court during its October 1994 term. *See supra* note 95 and accompanying text.

127. Kathy Fair, *Many States Have Limits on Evidence; Texas Is Not Alone on Its 30-*

ed of murder without any physical evidence primarily due to the testimony of one witness who was forty feet away.[128] Eleven witnesses have since asserted Graham's innocence but have been barred from testifying because of the thirty-day time limit in Texas of which Herrera was also a victim.[129] On three separate occasions Graham has come within days, and even hours, of death.[130] A Texas civil court ordered that Graham be granted a clemency hearing based on assertions in *Herrera* that clemency is a "fail-safe."[131] Another Texas death row inmate, Robert Drew, asserted his claim of innocence in conjunction with Gary Graham in the Texas civil court.[132] Drew's assertion of innocence stemmed from his accomplice recanting testimony that Drew performed the murder.[133] The civil court order granting both men's clemency hearings was appealed to the Texas Criminal Court of Appeals, which unexpectedly overruled Texas's thirty-day limitation on new evidence claims (something the Supreme Court refused to do in *Herrera*). In place of the thirty-day rule, the court announced a standard for presenting new evidence of innocence which places a high burden of proof on the defendant.[134] That decision is now on appeal to the Texas Supreme Court. However, Robert Drew has since been executed, despite his claims of innocence.[135]

Two other colorable innocence claims are being made in California and Virginia. In California, Willie Darnell Johnson has received a stay of execution in order for his claim of innocence to

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Day Rule, HOUSTON CHRON., Oct. 17, 1993, at A1.

128. *Foes of Execution Contest a Texas Case*, N.Y. TIMES, June 2, 1993, at A16.

129. *Id.*

130. *See* Susan Warren and Glen Golightly, *Graham Wins 3rd Reprieve from Death; Clemency Hearing Is at Issue*, HOUSTON CHRON., Aug. 14, 1993, at 1 (reporting Graham's third reprieve in four months).

131. State *ex rel.* Holmes v. 3d Court of Appeals of Texas, 860 S.W.2d 873, 878 (Tex. Ct. App. 1993) (*en banc*); Marcia Coyle, *Inmate Granted Unique Hearing*, NAT'L L. J., Aug. 16, 1993, at 3, 42.

132. Rad Sallee, *Justices Refuse Case of 'Smiling' Death Warrant*, HOUSTON CHRON., Mar. 1, 1994, at 16A. Drew's petition for Supreme Court review was denied. Drew v. Collins, *cert. denied*, 114 S. Ct. 1207 (1994). Drew attempted to raise an Eighth Amendment claim since the judge who signed the order setting his execution date put a "happy face" by his signature. Sallee, *supra*, at 16A.

133. Sallee, *supra* note 132, at 16A.

134. State *ex rel.* Holmes, No. 71,764, 1994 WL 135476, at *8 (Tex. Crim. App. Apr. 20, 1994); Gary Taylor, *Texas Death Row Inmate Wins, But Faces Tough Test*, NAT'L L. J., May 16, 1994, at A9.

135. *Texas Executes Vermont Man in Slaying During Hitchhiking*, N.Y. TIMES, Aug. 2, 1994 at A19.

be evaluated.[136] Earl Washington, Jr., a capital defendant in Virginia, is avowing his innocence through a new DNA test which, based on the facts of the state's case, makes it impossible for Washington to have committed both the rape and murder for which he was convicted.[137] Washington has received a conditional pardon of life imprisionment from the Virginia governor due to his innocence claims.[138] However, as a result of this conditional pardon, Washington will not be able to prove his innocence in court.[139] These are just a few of the cases which demonstrate that, overall, the number of innocence claims is rising dramatically.[140]

These cases of innocence and asserted innocence are poignant in light of the belief that the risk of executing innocent men has disappeared.[141] That these innocent men came so close to execution indicates the tightrope on which the American justice system is walking. Instead of indicating that the system works, these cases

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136. Harriet Chiang, *New Evidence May Spare Man on Death Row*, S.F. CHRON., July 17, 1993, at A16.

137. Coyle, *supra* note 121, at 33. In order to deflect this new evidence, the state would have to now change its version of the facts of the case and allege that the victim had intercourse with someone other than her husband or Washington, despite the statements of the victim to the contrary before her death. *See id.* Moreover, Washington is mentally retarded and confessed to the rape and murder after two days of interrogation in which he gave a confession with details that were totally inconsistent with the crime. *Id. See also* William Raspberry, *Scientific Evidence Supersedes Politics to Grant a Pardon*, CHI. TRIB., Jan. 10, 1994, 1, at 15.

138. Peter Baker, *Death Row Inmate Gets Clemency; Agreement Ends Day of Suspense*, WASH. POST, Jan. 15, 1994, at A1.

139. *See id.* at A12 (noting that Washington was only given two hours by Governor Wilder to choose between 1) taking the pardon (which subjected him to life in prison) and thereby giving up any federal habeas petition based on innocence, or 2) refusing the pardon and taking the risk that his execution would be upheld).

140. *See* Coyle, *supra* note 121, at 33 (stating that there are three principal reasons for this increase: the number of death row inmates is increasing, death penalty resource centers are channelling more resources into factual investigations, and scientific techniques such as DNA testing have opened up new avenues of proving innocence). *See also* Mark Ballard, *Innocence Claims Hinge on* Herrera; *Texas Case May Limit Death Row's Best Defense*, TEXAS LAW., Jan. 18, 1993, at 1, 25 (reporting that an informal survey of six states with the death penalty reveals that nearly 50 inmates have claimed innocence in recent habeas petitions). *Cf.* Peter J. Neufeld, *Have You No Sense of Decency?*, 84 J. CRIM. L. & CRIMINOLOGY 189, 201-02 (1993) (arguing against laws which limit the production of new evidence to within 60 days of trial due to the potentially exculpatory power of DNA testing). Another reason for the increase is that capital punishment opponents see innocence claims as the "Achilles' heel of the death penalty in America" and are spotlighting these cases. Coyle, *supra* note 121, at 33.

141. *See* Bryan, *supra* note 120, at 831-32 (noting the misconception among Americans that innocent people are no longer executed in the United States).

indicate the system is fallible. While no one can conclusively point to an innocent who has been executed in recent years, there are certainly strong cases to make.[142] The large number of released innocents strengthens the likelihood that some innocents have fallen through the cracks. Bedau estimated in 1992 that one percent of the 2600 people on death row were innocent.[143]

The reality that the United States has executed innocent men in the past and is likely executing innocent men in the present gives credence to the cries made after *Herrera* of "state murder"[144] and "[m]urder by the highest court in the land."[145] It is this reality which makes Senate Bill 1441's provisions for federal habeas corpus appeals based on claims of new evidence of innocence anything but an academic question. The standards for new evidence in Senate Bill 1441 will have a direct impact on human lives and the credibility of the American justice system and thus must adequately ensure that justice will be served.

VI. EXAMINATION OF THE NEW EVIDENCE PROVISION IN SENATE BILL 1441

Congress has responded to the protests following the *Herrera* decision[146] with a provision in the Habeas Corpus Reform Act which gives constitutional review to claims of innocence based on newly discovered evidence.[147] The Habeas Corpus Reform Act, or the "Biden Bill," originally was one of the three major prongs of President Bill Clinton's crime package.[148] The habeas provisions,

142. A strong case has already been made for Walter Blair. *See supra* note 105 and accompanying text. There is also the case of Roger Keith Coleman who was executed in Virginia despite his claims of actual innocence. Coleman's claims were broadcast through an intense media campaign which included a cover story in TIME. *See* Jill Smolowe, *Must This Man Die?*, TIME, May 18, 1992, at 40; *Guilty or Innocent, He's Dead*, ST. PETERSBURG TIMES, May 21, 1992, at 1A.

143. Stuart Taylor, Jr., *When Quick Justice Is No Justice at All*, LEGAL TIMES, Nov. 2, 1992, at 25, 25.

144. Harrington, *supra* note 7, at A25.

145. Hentoff, *supra* note 8, at A31.

146. Texas has also responded by eliminating its 30 day period for new evidence in exchange for a standard for presenting new evidence which is very similar to Senate Bill 1441 but even more difficult to meet. *See infra* note 159 and accompanying text.

147. S. 1441, § 6. This provision provides for review of two types of innocence claims: that the petitioner is innocent of the underlying crime itself, and that the petitioner is "death-innocent" or undeserving of capital punishment due to some error in the capital sentencing phase. *Id.*

148. The other two provisions were the Brady Bill, a five-day waiting period for handgun purchases, and a $3.5 billion dollar scheme to put more policemen on the streets.

however, were carved out of the Senate crime bill[149] at the last minute due to opposition from liberals and conservatives who threatened the passage of the overall crime package.[150] The House also rejected the habeas reform proposals due to fears that the reforms would prevent executions.[151] Thus, the habeas corpus process will remain unchanged until reform is addressed by a later Congress.[152] The Habeas Corpus Reform Act was intended to be a compromise that appeased both liberals and conservatives.[153] However, while prosecutors generally favored the bill's tough punitive measures, defense attorneys disliked the bill's rigorous standards.[154] Thus the habeas bill, if ever passed, will be the product of considerable controversy.[155]

There are two primary features of Senate Bill 1441. First, it places an 180-day statute of limitations on habeas corpus appeals which would run from the last day of the post-conviction appellate proceedings.[156] A claim of new evidence is an exception to the 180-day limit.[157] Second, in exchange for the six-month limit on habeas appeals, the bill establishes minimum standards for defense

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Stephen Chapman, *On Crime Congress Labors to Conceal Its Irrelevance*, CHI. TRIB., Oct. 24, 1993, at C18; Naftali Bendavid, *Minority Opposition Slowing Crime Legislation Juggernaut*, THE RECORDER, Oct. 18, 1993, at 1, 15.

149. S. 1607, 103rd Cong., 1st Sess. (1993).

150. *Today's News Update*, N.Y. L.J., Nov. 22, 1993, at A1. Habeas corpus reform was offered as an amendment to the Senate Crime Bill but was tabled by a vote of 65 to 34. 139 CONG. REC. S15807, 15809-15 (1993). The amendment came in the form of Senate Bill 1657, which has the same new evidence standards as Senate Bill 1441, but varies somewhat from a few of Senate Bill 1441's provisions.

151. William J. Eaton, *House Votes $13.5 Billion for State Prison Systems*, L.A. TIMES, Apr. 20, 1994, at A21.

152. Michael Wines, *House Votes Tough Measures as It Starts Push on Crime Bill*, N.Y. TIMES, Apr. 20, 1994, at A16.

153. Daniel Wise, *House, Senate Diverge on Altering Habeas Law*, N.Y. L.J., Nov. 9, 1993, at A1.

154. Naftali Bendavid, *Consensus Over Crime Reform Turns Fragile*, N.J. L.J., Sept. 6, 1993, at 6. Some prosecutors, however, are against the habeas reforms claiming that it will only lengthen the appeals process. This criticism is targeted at the new evidence provision. *See* Marc Sandalow, *Lungren Says Clinton Crime Bill Is Bad for Death Penalty*, S.F. CHRON., Oct. 14, 1993, at A8.

155. Although habeas corpus reform has been rejected by the 103rd Congress, reform proposals will likely reappear in the future. Even if Congress does not reform the habeas corpus system, the evaluation of the Senate Bill 1441 standard is relevant due to its close parallel with the new standard in Texas and the likelihood that other states, and maybe even the federal system, will follow Texas's lead in admitting new evidence of innocence into habeas corpus proceedings.

156. S. 1441, § 2.

157. S. 1441, § 6.

counsel in capital cases and grants more funds for legal representation.[158]

The provision that responds to *Herrera* makes an exception to the six-month statute of limitations by giving constitutional status to a claim of new evidence of innocence. It reads as follows:

> For purposes of this chapter, a claim arising from a violation of the Constitution, laws, or treaties of the United States shall include a claim by a person under sentence of death that is based on factual allegations that, if proven and viewed in light of the evidence as a whole, would be sufficient to demonstrate that no reasonable factfinder would have found the petitioner guilty of the offense or that no reasonable sentencing authority would have found an aggravating circumstance or other condition of eligibility for the sentence. Such a claim shall be dismissed if the facts supporting the claim were actually known to the petitioner during a prior stage of the litigation in which the claim was not raised. Notwithstanding any other provision of this chapter, the claim shall not be subject to § 2244(b) or the time requirements established by § 2242. In all other respects, the claim shall be subject to the rules applicable to claims under this chapter.[159]

A series of official statements endorsing the standard for obtaining review of new evidence followed introduction of the bill. Attorney General Janet Reno said the bill struck the right balance between finality and justice.[160] Deputy Associate Attorney General Harry Litman acknowledged the standard is high but stated that such a high standard is needed to prevent abuse.[161] Deputy Attorney General Phil Heymann declared that "in light of the provisions that allow for the consideration of new evidence, . . . the risk of wrongly executing someone will not be greatly increased . . . .

158. S. 1441, § 8,9.

159. S. 1441, § 6. The Texas standard for new evidence of innocence varies in that "would" is replaced with "could" to make the Texas standard an even more difficult standard to meet than Senate Bill 1441. State *ex. rel.* Holmes, No. 71,764, 1994 WL 135476, at *8 (Tex. Crim. App. Apr. 20, 1994). The "would vs. could" debate is the subject of an appeal to the Texas Supreme Court. *See* Taylor, *supra* note 134 and accompanying text.

160. *Attorney General Janet Reno Interviewed* (National Public Radio radio broadcast, Aug. 12, 1993).

161. Savage, *supra* note 20, at A12.

Anything that brings an end to review sometimes increases the chance that sometime someone will be wrongly executed."[162]

While the official statements regarding the new evidence provision were expectedly praiseworthy, several criticisms are apparent. The shortcomings of Senate Bill 1441's new evidence provision are primarily twofold. First, the standard itself is too high to make any real difference.[163] It will merely "rubber stamp" the Supreme Court's approach in *Herrera* and *Blair* of summarily rejecting claims of innocence couched in affidavits because a reasonable factfinder can always dismiss allegations in affidavits when compared with sworn testimony from trial.[164] Even prosecutors acknowledge that "no reasonable factfinder" is a difficult standard to meet,[165] as does the United States Attorney General's Office itself.[166]

The harshness of this standard can be illustrated by three hypothetical situations in which a death sentence is undeserved but still would be upheld under the "no reasonable factfinder" test.[167] First, the principle aggravating circumstance presented in the penalty phase of a defendant's capital trial is a rape that is later proved false in a habeas petition. Despite this evidence, a reasonable jury could still have sentenced the defendant to death if another less inflammatory aggravating circumstance existed.[168] Second, defendant's counsel fails to present mitigating evidence at the penalty phase which, more probably than not, would have resulted in a life sentence, but again a reasonable jury could have given the death sentence.[169] Third, jurors in a capital trial are bribed to impose the death penalty, but the evidence sustains a reasonable

162. *White House Special Briefing*, Federal News Service, Aug. 11, 1993, *available in* LEXIS, News Library, Federal News Service File.

163. Senate Bill 1441's standard, however, is probably not as high as the "extraordinarily high" showing the majority opinion in *Herrera* contemplated. *See* Herrera v. Collins, 113 S. Ct. 853, 869 (1993).

164. *See Ultimate Innocence and the Ultimate Penalty*, THE RECORDER, Apr. 14, 1993, at 8 (noting that *Herrera* seemed to require that a showing of innocence be made before any discovery is ordered and that a "probably innocent" standard would not have such an unrealistic result). This article reported on a congressional hearing in which Walter McMillian and Randall Dale Adams, another person wrongfully sentenced to death, pleaded with Congress to enact Metzenbaum's "probably innocent" standard for granting hearings for new evidence. *Id.*

165. Bendavid, *supra* note 154 and accompanying text.

166. *See* Savage, *supra* note 20, at A12; *see also supra* text accompanying note 161.

167. *In re* Clark, 855 P.2d 729, 770 (Cal. 1993) (Kennard, J., concurring).

168. *Id.*

169. *Id.*

jury's verdict of capital punishment.[170]

In these situations, the reasonableness standard of Senate Bill 1441 allows a judge to affirm the death sentence. These examples of new evidence are not entitled to a hearing under Senate Bill 1441 even though they suggest the likelihood of an improperly imposed death sentence. Only exculpatory evidence which is irreconcilable with the conviction or eligibility for the death sentence guarantees an evidentiary hearing under Senate Bill 1441's standards.[171] Justice and the heightened reliability demanded of capital punishment should lead Congress to enact a less rigorous standard for claims of new evidence of innocence in order to remedy this flaw inherent in Senate Bill 1441.

The second major flaw with the standard is that the rationale behind the provision rescuing the innocent is rendered moot by Senate Bill 1441's statute of limitations on filing habeas claims. By the time new evidence is discovered, most death row inmates may have already been executed under Senate Bill 1441's time limits on habeas. Historically, there has been a great time lag between conviction and discovery of exculpatory evidence.[172] The current lag between conviction and execution is six to nine years.[173] A delay in the system is needed to ensure certainty.[174] Some scholars even assert that the 180-day limit is unconstitutional.[175] Constitutionality aside, the 180-day limit will adversely impact upon the accuracy of judgments given the increased pace of executions which will likely result.

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170. *Id.* This hypothetical may have occurred in reality. The State of Georgia recently executed William Henry Hance despite a juror's affidavit that she did not vote for execution. *The State Killings Continue*, ST. LOUIS POST-DISPATCH, Apr. 6, 1994, at 6B.

171. *See* Sullivan, *supra* note 100, at 321 (discussing the standard advocated by Justice White in *Herrera* which is almost identical to Senate Bill 1441's standard).

172. Bedau & Radelet, *Miscarriages of Justice*, *supra* note 117, at 71 (establishing that in nearly half of the surveyed cases of innocent convictions, discovery of error took over five years); Joseph M. Giarratano, *'To the Best of Our Knowledge, We Have Never Been Wrong': Fallibility v. Finality in Capital Punishment*, 100 YALE L.J. 1005, 1010 (1990-1991).

173. *See* Bendavid, *supra* note 114, at 6 (stating that the current delay is nine and one-half years); Berger, *supra* note 31, at 1665 (stating that it takes between six and one-half years and over eight years); Stephen P. Garvey, *Death-Innocence and the Law of Habeas Corpus*, 56 ALB. L. REV. 225, 225 (1992) (stating it takes between six and seven years).

174. Morris, *supra* note 113, at 378.

175. *See* Mello & Duffy, *supra* note 37, at 460 (noting that habeas has never been restricted with a "statute of limitations" and arguing that such a limitation would be unconstitutional under the suspension clause given the importance of habeas in protecting the rights of criminal defendants).

VII. AN ALTERNATIVE TO THE NEW EVIDENCE PROVISION IN SENATE BILL 1441

While Congress's idea of reversing *Herrera* and providing a hearing for innocence claims is laudable, Senate Bill 1441 does not go far enough to protect against the execution of innocent defendants. Its standard is too low and the 180-day limit on habeas appeals will rush justice before the discovery of new evidence of innocence. This section proposes a viable alternative to Senate Bill 1441's new evidence provision that would both increase the likelihood that a capital defendant will receive a hearing for justifiable claims of new evidence and decrease the chances that such hearings will be necessary, while also preserving the interests of finality.[176] The following proposal for reducing the risk that innocents are executed consists of two parts: improving Senate Bill 1441's standard for obtaining review of new evidence of innocence and instituting a series of reforms which improves the reliability of the system that sentences too many innocent men to death.

A. An Alternative Standard

The best standard for achieving hearings for meritorious new evidence claims is the "probably innocent" standard[177] espoused in Justice Blackmun's dissent in *Herrera*[178] and embodied in a bill introduced to the Senate by former Senator Howard Metzenbaum.[179] The new evidence should be enough to establish

176. Note that the only way to eliminate the risk that innocents are executed is to abolish capital punishment since implementation of capital punishment by humans will always be a fallible exercise. *See* Callins v. Callins, 114 S. Ct. 1127, 1138 n.8 (1994) (Blackmun, J., dissenting); Robert R. Bryan, *The Execution of the Innocent: The Tragedy of the Hauptmann-Lindbergh and Bigelow Cases*, 18 N.Y.U. REV. OF L. & SOC. CHANGE 831, 870 (1990-1991); Giarratano, *supra* note 172, at 1009; IN SPITE OF INNOCENCE, *supra* note 117, at 279.

177. This standard was first formulated by Judge Henry J. Friendly in his seminal article on the role of innocence in habeas corpus. Judge Friendly advocated that federal habeas petitioners be required to show a fair probability, based on all available evidence, that the trier of fact would have entertained a reasonable doubt about petitioner's guilt. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970).

178. Herrera v. Collins, 113 S. Ct. 853, 882-83 (1993) (Blackmun, J., dissenting).

179. S. 221, 103rd Cong., 1st Sess. (1993) [hereinafter S. 221]. Metzenbaum opposes any time limit on habeas appeals and introduced this bill two days after the *Herrera* decision. 139 CONG. REC. 774, 775-76 (1993). Metzenbaum's bill amends § 1651 of Title 28, U.S.C., and reads in relevant part:

(c)(1) At any time, and notwithstanding any other provision of law, a district

that based on all the old and new evidence, the petitioner is either probably innocent of the underlying crime itself or probably undeserving of the sentence of death.[180] The new evidence could have either been exculpatory evidence available at trial but not known to the defendant, or evidence which has surfaced since trial that contradicts the evidence presented at trial or sentencing. This standard would require the evidence to be weighed, and would prevent the examples of Senate Bill 1441's loopholes by ensuring that only meritorious claims of innocence be heard.[181]

The burden of proving probable innocence should be on the petitioner since he now carries the presumption of guilt; it is not up to the government to reprove his guilt.[182] However, the facts asserted in the application for an evidentiary hearing should be seen in the light most favorable to the petitioner.[183] This slanted view of the facts, which would disappear once an evidentiary hearing is granted, prevents a court from automatically dismissing facts presented in affidavits, as was done in *Herrera* and *Blair*. Moreover, the law gives facts a more favorable interpretation in certain

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court shall issue any appropriate writ or relief on behalf of an applicant under sentence of death, imposed either in Federal or in State court, who establishes that he is probably innocent of the offense for which the death sentence was imposed.

(2) On receipt of an application filed pursuant to paragraph (1), a district court shall promptly stay the applicant's execution pending consideration of the application and, upon an unfavorable disposition, until the court's action is affirmed on direct review.

(3) The court shall dismiss the application, unless it alleges fact, supported by sworn affidavits or documentary evidence, that

(A) could not have been discovered through the exercise of due diligence in time to be presented at trial; and

(B) if proven, would establish that the applicant is probably innocent.

S. 221, *supra*. Note that Senate Bill 221 requires a "due diligence" standard for the discovery of evidence at the trial phase. *Id.* This is a more difficult standard to satisfy than Senate Bill 1441's requirement of "actual knowledge." Also Senate Bill 221 does not provide review for claims that the death sentence is undeserved.

180. *Herrera*, 113 S. Ct. at 883 (Blackmun, J., dissenting).

181. A similar standard would be Eric Freedman's "probable cause" standard which would also have the advantage of carrying a well-developed body of law. Eric M. Freedman, *Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases*, 18 N. Y. U. REV. L. & SOC. CHANGE 315, 320-21 (1990-1991). This standard grants an evidentiary hearing if "probable cause" exists to believe that the jury's verdict on defendant's guilt or sentence might change based on the new evidence. *Id.* at 320.

182. *See Herrera*, 113 S. Ct. at 883 (Blackmun, J., dissenting).

183. *Cf.* Morris, *supra* note 113, at 386 n.77 (advocating a presumption that the facts asserted by the petitioner are true).

situations, as for example in a motion for summary judgment which requires evidence be seen in the light most favorable to the non-moving party.[184] The irrevocability of the death sentence heightens the need for certainty; therefore, the petitioner deserves a fair reading of his new facts. Some may object out of concern for the need for finality in judgments; but, once new facts of innocence surface, any judgment needs reexamining to assure its validity. These same considerations support a rule that once the petitioner has made a showing of probable innocence and received an evidentiary hearing, he should only be required to prove his innocence by a preponderance of the evidence and not beyond a reasonable doubt.[185]

Another feature of the standard for obtaining a hearing for new evidence should be the "actual knowledge" standard which is already incorporated in Senate Bill 1441. The petitioner must prove that there was no actual knowledge[186] of this new evidence at the time of trial. This feature prevents the abuse of the new evidence claim as a strategy to delay the execution process. It is preferable to the "due diligence" standard advocated by Senator Metzenbaum's bill. A "due diligence" standard is too high considering the petitioner is claiming innocence in a capital appeal.[187]

Some may object to the extension of this proposal to claims of new evidence that the death sentence was undeserved. Such an extension is necessary, however, to prevent miscarriages of justice.[188] Senate Bill 1441 wisely allows new evidence of ineligibility for the death sentence.[189] While evidence tending to prove ineligibility for the death sentence is not as delineated as evidence of innocence of the actual crime, justice demands a chance to present

184. *See* 6 JAMES WILLIAM MOORE, ET AL., FEDERAL PRACTICE ¶ 56.02[1] (2d ed. 1993) (discussing Rule 56 of the *Federal Rules of Civil Procedure*).

185. *See* Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 387 (1993) (discussing the standard for obtaining relief for bare-innocence claims and advocating the preponderance of evidence standard out of fairness to the petitioner).

186. This actual knowledge requirement should also include those presumably rare instances of "willful blindness" in which evidence is ignored in hopes that it can be raised in habeas proceedings if a conviction is obtained.

187. Ledewitz, *supra* note 1, at 446 (stating that mechanisms, such as due dilligence requirements, whereby the states try to achieve finality "should be trumped by the claims of the innocent prisoner" whenever a showing of innocence is made, just as procedural default and successive petitions are trumped by innocence).

188. *Id.* at 447.

189. Senator Metzenbaum's bill, Senate Bill 221, does not provide for this. *See supra* note 179 and accompanying text.

evidence of ineligibility so persons who do not legally qualify for the death sentence are not executed.[190] Examples of death ineligibility would include evidence negating an aggravating factor of the crime or evidence of a compelling new mitigating factor.[191]

Implementation of this standard for obtaining evidentiary hearings for both the underlying offense and the sentence of death should not be unduly disruptive or burdensome to the federal courts. First, the number of death row inmates who would be able to make such claims is not great.[192] Moreover, the Supreme Court's contention in *Herrera* that such an avenue of relief would be one of the most disruptive blows to the federal court system[193] ignores the fact that the present delay in habeas litigation is due not to substantive Eighth Amendment claims, such as factual innocence, but to claims deriving from the Court's maze of procedural limitations on habeas corpus.[194] Currently, assertions of innocence are couched in complicated procedural arguments.[195] Assessing a factual claim is both less complicated than claims under the current complex habeas law and less time-consuming since the standard of review is higher.[196]

Second, if the Supreme Court does not want to burden the federal courts with such claims, it could constitutionally mandate that state courts follow the example of Texas and re-examine their laws to provide an avenue for new evidence claims on the grounds

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190. Ledewitz, *supra* note 1, at 447.

191. *See id.* Ledewitz gives the examples of new evidence where the capital defendant was not the triggerman and mitigating evidence that a member of the capital defendant's family was supplied illegal drugs by the victim and died as a result.

192. *Id.* Recall that the total percentage of civil cases in federal court which are habeas petitions is only 5%. Lay, *supra* note 33, at 1043 n.162. Furthermore, this proposal only concerns capital cases with new evidence claims. *See supra* note 179 and accompanying text.

193. Herrera v. Collins, 113 S. Ct. 853, 861 (1993).

194. *See* Hoffmann, *supra* note 37, at 834 (arguing that the root of the problem with habeas litigation is the complexity of the Supreme Court's Eighth Amendment procedural rules); Lay, *supra* note 33, at 1018-19 (stating that the only way to expedite habeas cases is to radically change the procedural rules of habeas corpus law); Steiker, *supra* note 185, at 387-88 (asserting that allowing claims of bare-innocence would simplify and reduce habeas litigation because current habeas doctrine encourages petitioners to manufacture claims of actual innocence).

195. *See* Freedman, *supra* note 181, at 321 (giving the examples of ineffective assistance of counsel claims, Brady violation claims, and sentencing error claims).

196. One author has argued that the Supreme Court's emphasis on innocence in its habeas jurisprudence dictates that the Court should allow for actual innocence claims when states do not provide for meaningful review of such claims. *See* Steiker, *supra* note 185, at 370-71.

that it is unconstitutional to execute an innocent man.[197] Also, rather than conducting an evidentiary hearing at the district court level, should one be granted, the district court could remand for the state courts to review the new evidence.[198]

Third, the standard of review for a denial of a petition for new evidence should be a high standard similar to reviewing a denial of a motion for judgment as a matter of law in order to prevent an endless stream of appeals.[199] The district court is most capable of assessing new evidence claims given its experience in the fact finding role. Collectively, these three elements should ease fears of perpetual appeals and abuse of claims of innocence based on new evidence. However, when the choice is between speed in executions or justice, justice should prevail as a matter of principle.

B. A Preventive Proposal

The second aspect of this proposal is a preventive, rather than remedial, solution to the problem. By improving the reliability of the system which convicts innocents, the need for hearings for new evidence of innocence will be greatly reduced. The proposed reforms are *for capital cases only* and would therefore not greatly impact the criminal justice system. These reforms also counteract the effect of the proposed 180-day limit on habeas appeals should it ever be enacted.

Initially, the causes for erroneous convictions need to be outlined. Bedau and Radelet detailed many of the causes for erroneous convictions and found that three of the leading origins of error were prosecutorial misconduct in suppressing exculpatory evidence, police misconduct in coercing false confessions, and witness error through either mistaken identity or perjured testimony.[200] Reforms thus need to be channeled towards addressing these problems.

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197. *See* Sullivan, *supra* note 100, at 319 (discussing Justice O'Connor's concurrence in *Herrera* asserting that the Court might have held that Texas must provide a vehicle for litigation of newly discovered evidence claims).

198. Constitutionally requiring states to provide for such hearings would be preferable to the plan suggested by Freedman, *supra* note 181, at 321, that popular opinion, once aware of potential injustices, would mandate that states alter any procedural bars to such evidentiary hearings.

199. *See id.* at 323 (arguing for such a standard of review).

200. Bedau & Radelet, *Miscarriages of Justice*, *supra* note 117, at 57.

1. Combating Prosecutorial Misconduct

Two fundamental reforms can be adopted to combat prosecutorial misconduct.[201] First, stronger deterrent measures are needed to keep prosecutors from withholding evidence or presenting false evidence.[202] Under the *Brady* doctrine,[203] prosecutors must disclose exculpatory evidence to the defense and attempt to rectify false evidence.[204] While complying with the *Brady* doctrine is a constitutional requirement, the only real deterrence prosecutors face for *Brady*-type misconduct is the chance that the convicted defendant will receive a new trial.[205] There are a host of provisions which *could* be imposed on prosecutors for violating the ethical codes which prohibit *Brady*-type behavior,[206] but research shows that these sanctions are few and far between.[207] The rarity of

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201. Bedau and Radelet's evidence of prosecutorial misconduct as a leading cause of wrongful death sentences is further supported by recent examples. *See* Bedau & Radelet, *Miscarriages of Justice*, *supra* note 117; *supra* text accompanying note 200. Walter McMillian's release from death row after his fifth appeal was largely due to a tape, suppressed by the prosecutor but uncovered by McMillian's attorney, in which a witness complained of being coerced into framing McMillian. Cris Carmody, *The Brady Rule: Is It Working?*, NAT'L L. J., May 17, 1993, at 1, 30. Kenneth Griffin's death sentence was also vacated due to the prosecutor withholding investigative records. *Id.* The Carmody article also quotes Prof. Bennett L. Gershman of Pace University School of Law as saying "I think it's fair to say in many if not most of the major cases that have gotten publicity for a wrongful conviction, it's revealed that the prosecutor suppressed exculpatory evidence." *Id.*

202. This reform would be advantageous for the integrity of the entire criminal justice system and need not be limited to capital cases.

203. The *Brady* doctrine gets its name from the landmark decision in Brady v. Maryland, 373 U.S. 83 (1963), in which the Supreme Court held that a defendant facing the death penalty, who maintained he was not the triggerman, had his due process rights violated because the prosecutor suppressed evidence of a confession to the shooting by the defendant's partner. The Court held 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." *Id.* at 87. However, the Court did not reverse the conviction since the suppressed evidence was admissible only on the issue of punishment. *Id.* at 90-91.

204. *Cf.* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 696-97 (1987) (examining the rules which attempt, but fail, to enforce the *Brady* doctrine).

205. *Id.* at 731-32.

206. For instance, contempt citations, criminal prosecution, removal from office, and disbarment are some of the strongest means of punishing prosecutors for *Brady* violations. *Id.* at 703; *see also*, JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS 32-43 (1983) (listing possible dispositions and sanctions for attorney misconduct). Punishments can be as minor as an admonition or probation. *Id.* at 38-39.

207. Rosen, *supra* note 204, at 703, 716-31 (reporting on survey of all available print

sanctions negates any real deterrent value. Given the large number of *Brady* violations,[208] imposition of stronger sanctions on prosecutors is needed to deter such behavior. Deterrence can be achieved by greater reporting of *Brady* violators by defense attorneys[209] or by altering the disciplinary procedures so investigation of *Brady* misconduct does not require formal complaints.[210] Furthermore, bar disciplinary boards and judges should put some teeth into the *Brady* rule by imposing sanctions when needed.[211]

The second reform to curb prosecutorial misconduct is to mandate open file policies for prosecutors in capital cases. Historically, the criminal justice system has been saddled with restrictive discovery processes.[212] Currently, there are a growing number of advocates for liberalization of discovery rules.[213] In response to the arguments for liberalized discovery and as a means of complying with the *Brady* doctrine, six states now require open prosecutorial files in capital cases.[214] The American Bar Association's Criminal

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material and questionnaires submitted to all bar disciplinary agencies revealing that, in the 25 years after *Brady*, discipline for *Brady* violators was considered in only nine cases).

208. *See id.* at 697-703 (presenting a recent catalog of reported state and federal cases involving *Brady* violations); *see also* Charles Aron, Comment, *Prosecutorial Misconduct: A National Survey*, 21 DEPAUL L. REV. 422 (1971) (cataloging prosecutorial misconduct cases).

209. *See* Carmody, *supra* note 201, at 30 (referring to defense attorneys who admit they should be more aggressive in reporting *Brady* violations).

210. *See* Rosen, *supra* note 204, at 735-36 (noting that reliance on defense attorneys to report *Brady* violations is misplaced and bar disciplinary bodies should review cases involving *Brady* violations).

211. One district court judge attempted to do so by ordering the government to pay the litigation costs of the defendant as a result of *Brady* violations; however, this sanction was reversed on appeal. *See* U.S. v. Woodley, 9 F.3d 774, 782 (9th Cir. 1993).

212. *See* Rosen, *supra* note 204, at 695 n.4 (contrasting the pro-disclosure civil discovery rules with the minimal discovery available to criminal defendants).

213. In the civil system, discovery rules have been greatly enlarged to the point of mandatory disclosure. *See* John C. Koski, *Mandatory Disclosure*, A.B.A. J., Feb. 1994, at 85, 85 (stating that under the amendments to Federal Rule 26, litigants seeking information need only wait for it). In the criminal system, academics are increasingly calling for liberalization of the criminal discovery process. *See* Cary Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 CATH. U. L. REV. 641, 645 (1989) (arguing for broader pre-trial discovery in criminal cases as a means of stream-lining the costs and time involved in the criminal justice system); Linda S. Eads, *Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery*, 67 N.C. L. REV. 577, 621 (1989) (proposing an amendment to the *Federal Rules of Criminal Procedure* which would provide for discovery of all nonscientific and scientific experts); Paul C. Giannelli, *Criminal Discovery, Scientific Evidence and DNA*, 44 VAND. L. REV. 791, 799-800 (1991) (explaining the appeal of liberalized defense discovery of scientific evidence).

214. Carmody, *supra* note 201, at 30. The states are Maryland, Florida, Colorado, Ore-

Justice System is also waging a campaign to establish such policies nationwide.[215] Open file policies[216] would eliminate the problem of prosecutors not complying with the *Brady* doctrine, would give defendants a greater chance to obtain justice, and would add only a small amount of time and expense to the system.[217]

2. Combating Police Misconduct

As revealed by Bedau and Radelet's study and empirical research since that time, false confessions obtained through police coercion remain a major problem.[218] Many believe that the *Miranda* rule[219] has failed to deter police coercion.[220] To pre-

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gon, New Hampshire, and Alabama. *Id.*

215. *Id.*

216. Open file policies do not include a prosecutor's work product. *Id.*

217. *But see* Steven A. Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1462-64 (1987) (arguing that such open file policies will encourage prosecutors not to pursue any evidence which may help the defendant). Reiss suggests one alternative to open file policies is to compel judges to review all prosecutorial files in deciding which information falls under the *Brady* doctrine and which does not. *Id.* at 1464-65. Reiss dismisses this alternative because of the immense burden it would place on the system. *Id.*

218. *See* Corey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1155-79 (1984) (surveying psychological and sociological literature to conclude that false confessions, whether physically or psychologically coerced, are prevalent enough to justify additional legal safeguards).

219. *See* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) (holding that procedural protective devices are necessary when a person is in police custody to ensure that person is free from police coercion and aware of his free choice and that failure to use such protective devices will result in the inadmissibility of statements obtained from the person in custody).

220. *See* Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self Incrimination*, 63 N.Y.U. L. REV. 955, 956-59 (1988) (cataloging criticisms of the *Miranda* rule for its ineffectiveness in deterring police coercion). *Cf.* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 269 (1988) (arguing in the context of the exclusionary rule that deterrence of police coercion is the pervasive rationale of the courts).

Note also that the usefulness of the *Miranda* rule and the deterrence of police coercion have been severely restricted by Arizona v. Fulminante, 499 U.S. 279 (1991), in which the Supreme Court held that the rule of harmless error on appeal applies to the erroneous admission of coerced confessions. *Id.* at 308. *But see* Charles J. Ogletree, Jr., Comment, Arizona v. Fulminante: *The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 154 (1991) (calling the application of the harmless error rule "wrong"). *Cf.* Rosenberg & Rosenberg, *supra*, at 963 (forecasting that the current onslaught against the *Miranda* rule could lead "full circle on the confession issue, and we will be forced to resolve once again how best to assure that police interrogation does not become the foundation for an underground inquisitorial system").

vent false confessions from leading to erroneous death sentences, a wise reform would prohibit the death penalty when a capital defendant has confessed. Some commentators have advocated a more restrictive rule of banning all confessions from court and applying that to all cases—not just capital cases.[221] Forbidding the death penalty once a defendant has confessed would reduce the number of erroneous death sentences, force the prosecution to prove its case, and deter police coercion. Moreover, studies show that such a rule would rarely result in guilty persons going free.[222]

3. Combating Witness Error

According to the Bedau and Radelet study, witness error through mistaken identity and perjury is the greatest cause of erroneous convictions.[223] Even the Supreme Court has acknowledged the risks of eyewitness testimony: "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[224] To prevent the overinfluence of witness error in erroneous convictions, one of two reforms can be implemented.

First, independent corroboration could be required in order for the testimony of one eyewitness to be admitted into evidence in a capital trial.[225] Ancient Talmudic law required the testimony of

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221. *See* Richard H. Kuh, *Interrogation of Criminal Defendants—Some Views on* Miranda v. Arizona, 35 FORDHAM L. REV. 233, 235 (1966) (reasoning that a more in-depth reflection on the Fifth Amendment would lead the Supreme Court to prohibit confessions in the adversary system). *Cf.* Ayling, *supra* note 218, at 1199-200, 1203-04 (reviewing the benefits of banning confessions but concluding that outlawing confessions on reliability grounds alone is not justified; however, such an alternative may be justified on broader Fifth Amendment grounds). Jewish law also generally forbids confessions as evidence of guilt. Rosenberg & Rosenberg, *supra* note 220, at 974.

222. *See* Ayling, *supra* note 218, at 1198-99 (observing that in most cases, confessions are not necessary in order for the prosecution to prove its case because prosecutors have alternative investigation means available and suspects usually confess only in light of overwhelming evidence against them). Ayling also mentions other, less drastic, potential reforms such as requiring an attorney to be present during all police questioning, requiring video or audio taping of interrogation and confessions, and requiring judges rather than juries to assess the corroboration requirements under a higher standard. *Id.* at 1198, 1202-03.

223. Bedau & Radelet, *Miscarriages of Justice*, *supra* note 117, at 57. Recent studies also indicate that more than half of all wrongful convictions in the U.S. are caused by witness error. MARTIN YANT, PRESUMED GUILTY 98-99 (1991).

224. United States v. Wade, 388 U.S. 218, 228 (1967).

225. *See* ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 188 (1979) (exploring such an option for all criminal cases, but concluding that such a rule would remove decisions from juries, would cause someone to decide what constitutes corroborating evidence, and

two witnesses.[226] Such a rule, however, is disadvantageous since not all eyewitness testimony is unreliable.

A less arbitrary reform would permit expert witnesses to testify in capital cases on the inherent unreliability of eyewitness identification.[227] This would educate the jury on the "vagaries of eyewitness identification" and could reverse the tendency of juries to overvalue eyewitness evidence.[228] Capital cases should have a presumption in favor of admitting expert testimony on the unreliability of eyewitness identification in order to reduce the large number of wrongful convictions based on witness error.[229]

4. Combating Error in General

Bedau and Radelet found several other causes of wrongful convictions.[230] These causes, as well as the previously mentioned causes, are producing a criminal justice system which makes too many mistakes. In order to preserve the integrity of the system and

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would pose problems where only one eyewitness, however reliable, existed); PATRICK M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 182-193 (1965) (proposing a "qualitative" rule of corroboration).

226. Bedau & Radelet, *Miscarriages of Justice*, *supra* note 117, at 87.

227. Courts have already indicated a willingness to allow such expert testimony as long as certain criteria are met. *See, e.g.*, United States v. Amaral, 488 F.2d 1148, 1152-53 (9th Cir. 1973) (setting forth four criteria to determine the admissibility of expert testimony on eyewitness evidence); State v. Chapple, 660 P.2d 1208, 1223-24 (Ariz. 1983) (*en banc*) (holding exclusion of expert testimony on the unreliability of eyewitness identification an abuse of the trial court's discretion); People v. McDonald, 690 P.2d 709, 726-27 (Cal. 1984) (*en banc*) (finding prejudicial error in trial court's exclusion of expert testimony on eyewitness identifications).

228. *See* Christopher M. Walters, Comment, *Admission of Expert Testimony on Eyewitness Identification*, 73 CALIF. L. REV. 1402, 1404 n.12 (1985) (detailing the empirical research indicating that jurors tend to overbelieve eyewitness testimony).

229. *See* Cindy J. O'Hagan, Note, *When Seeing Is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741, 771 (1993) (arguing for such a presumption in all criminal cases). Another author suggested fashioning a constitutional due process right to expert testimony on the unreliability of eyewitness identification. *See* Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 315 (1990-1991). *Cf.* Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 223 (1989-1990) (proposing a rule governing the admissibility of expert evidence on witness credibility which generally prohibits admission of such evidence but allows the expert testimony when it is offerred by the accused and the court determines its probative value is of sufficient weight and centrality to the case).

230. Bedau & Radelet, *Miscarriages of Justice*, *supra* note 117, at 57. Although not as frequent, the other causes of error are: misleading circumstantial evidence, incompetent defense counsel, judicial refusal to admit exculpatory evidence, little consideration of alibi evidence, erroneous judgment on cause of death, false guilty plea of defendant, and community outrage demanding a conviction. *Id.*

to protect the innocent, two additional reforms are suggested.

First, it is well documented that better legal representation is needed at the trial level to ensure that mistakes are not made, as well as for capital defendants in their habeas petitions.[231] In fact, the American Bar Association Task Force on Death Penalty Habeas Corpus lists the inadequacy of counsel as the chief failure of the capital punishment system.[232] Senate Bill 1441 wisely acknowledges this problem by establishing minimum standards of attorney competence and experience in capital cases and, in turn, by providing increased funding for counsel in capital cases.[233] This type of reform is imperative given the poor legal representation faced by capital defendants and the Supreme Court's unwillingness to adequately address errors caused by attorney incompetence.[234] In light of the control attorneys have over a capital defendant's fate, guaranteeing each capital defendant competent representation at trial and appeal may be the most effective reform to ensure that innocent persons are not executed while restoring integrity to the capital punishment system.

Second, to provide as much certainty as possible in capital convictions, the requirements for death sentences that are based on circumstantial evidence should be heightened.[235] This was former-

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231. *See generally* Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993) (expounding on the poor assistance of counsel representing indigent criminal defendants as a result of inadequate compensation); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 325 (documenting the importance of competent counsel in the penalty phase following the capital trial); *American Bar Association Criminal Justice Section: Report to the House of Delegates: Recommendations*, 40 AM. U. L. REV. 9, 9-12 (1990) [hereinafter *ABA Report*] (proposing 16 recommendations for improving implementation of the death penalty, six of which focus on enhancing the quality of legal representation); Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 585-606 (1988) (singling out the State of Florida for exploration of the crisis in legal representation at the post-conviction stage of capital cases).

232. *ABA Report*, *supra* note 231, at 16.

233. *See* S. 1441, § 8-9. .

234. *See, e.g.*, Murray v. Giarratano, 492 U.S. 1, 109 (1989) (holding that there is no constitutional right to an attorney in a state post-conviction proceeding); Coleman v. Thompson, 501 U.S. 722, 757 (1991) (refusing to allow federal habeas review for capital petitioner because his attorney filed the notice of appeal three days late). *But see* McFarland v. Scott, 114 S. Ct. 2568, 2574 (1994) (holding there is a right to counsel at the preapplication phase of a habeas proceeding).

235. *See* Bedau & Radelet, *Miscarriages of Justice*, *supra* note 117, at 87-88 (exploring the possibility of barring the death penalty where the conviction was based solely on either circumstantial evidence or the defendant's confession, but ultimately concluding that such options are unlikely to find favor with legislatures, jurists, or prosecutors). Edwin

ly part of Ohio common law but was not applicable in federal habeas corpus cases.[236] The *Model Penal Code* goes even further by requiring a higher standard of proof in capital cases. Under the *Model Penal Code*, a death sentence can only be given when the evidence "foreclose[s] all doubt respecting the defendant's guilt."[237]

There are a host of other reforms which could be adopted to improve the capital sentencing process and the criminal justice system in general, but the ones mentioned in this Note are channeled toward preventing innocents from being sentenced to death. These types of reforms will reduce the burden on the federal courts from examining the increasing number of innocence claims, counteract the effect of speedier executions if the 180-day time limit is enacted, and restore integrity to a system making too many mistakes.

VIII. CONCLUSION

Given the finality of capital punishment and the metaphor it represents for the entire American system of justice, justice demands that the system get it right if the death penalty is to be administered. Ensuring that innocent persons are not executed is a fundamental obligation of justice. Anglo-American criminal law is premised on the belief that the rights of innocents should be protected at the expense of letting the guilty go free.[238] But such a

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Borchard advocates that the death sentence should not be given based solely on circumstantial evidence, but Bedau and Radelet disagree with this, saying such a rule would prevent few, if any, wrongful convictions in capital cases. *Id.* Jewish law also prohibited circumstantial evidence from establishing guilt, but this Note does not propose such a radical change. *See* Irene Merker Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the MaHaRaL of Prague*, 90 MICH. L. REV. 604, 616 (1991) (explaining Jewish law's deep concern with factual rather than legal guilt).

236. York v. Tate, 858 F.2d 322, 330 (6th Cir. 1988), *cert. denied*, 490 U.S. 1049 (1989). In State v. Kulig, 309 N.E.2d 897, 899 (Ohio 1974) the rule was stated that where "circumstantial evidence alone is relied upon to prove an element essential to a finding of guilt, it must be consistent only with the theory of guilt and irreconcilable with any reasonable theory of innocence." This point, however, was overruled in State v. Jenks, 574 N.E.2d 492, 502 (Ohio 1991).

237. MODEL PENAL CODE § 210.6(1)(f) (1962). Another wise reform concerning the standard of proof would be to require the "beyond a reasonable doubt" standard in the sentencing phase of capital trials. *See* Linda E. Carter, *A Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness*, 52 OHIO ST. L.J. 195, 215-21 (1991) (arguing for such a reform).

238. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *358 ("[I]t is better that ten guilty persons escape, than that one innocent man suffer."); *In re* Winship, 387 U.S. 358,

premise may be a relic of the past when viewed in light of *Herrera* and those who say execution of innocents is a rational cost of the death penalty.

The ultimate question is whether American society will tolerate the execution of innocents to achieve comity between federal and state courts, finality in judgments, and a less congested court system. Given the protests following *Herrera*, the legislative reply of Senate Bill 1441, and the change in Texas law by the Texas Court of Criminal Appeals, there is still hope that the answer is "No." However, Senate Bill 1441 was rejected by Congress, and the change in Texas law is being appealed. The federal courts, through habeas corpus, should be responsible for protecting innocents by providing for review of petitions for hearings to evaluate new evidence of innocence. Senate Bill 1441's provisions and the new standard under Texas law are not good enough. A petitioner claiming innocence based on new evidence should be able to secure an evidentiary hearing if he can prove that he is probably innocent. In addition, extra safeguards should be adopted to reduce the risk of executing innocents by improving the reliability of the system which sentences too many innocent men to death. Maybe then the American criminal justice system will no longer be open to charges of "state murder."[239]

TARA L. SWAFFORD

372 (1970) (Harlan, J., concurring) ("I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man that to let a guilty man go free.").

239. *See* Harrington, *supra* note 7, at A25 (using the term to describe the type of actions the Court's decision in *Herrera* would sanction).