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Habeas Corpus--Limited Review for Actual Innocence

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HABEAS CORPUS—LIMITED REVIEW FOR ACTUAL INNOCENCE

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

I. INTRODUCTION

In *Herrera v. Collins*,[1] the United States Supreme Court held that absent an accompanying constitutional violation, a claim of actual innocence by a death penalty petitioner is not grounds for federal habeas corpus relief. Although Chief Justice Rehnquist, writing for the majority, refused to authorize review of Herrera's claim, he disposed of the case by assuming, *arguendo*, that the Constitution would prohibit the execution of a petitioner who made a truly persuasive showing of actual innocence. The Court offered neither a constitutional rationale for its hypothetical treatment nor a standard by which evidence of actual innocence would be measured.

This Note examines the history of federal habeas corpus review and argues that the Court logically extended precedent in a manner consistent with its current position on federal habeas corpus: habeas relief is to be granted only in cases of egregious procedural error in order to encourage the finality of state court decisions. This Note further argues that the Court's hypothetical argument is in line with recent decisions that make available narrow exceptions for substantive review in truly extraordinary circumstances. Finally, this Note argues that a truly compelling showing of actual innocence would require the Court to adopt a substantive interpretation of habeas relief in order to justify its review of the claim.

II. BACKGROUND

A. FEDERAL HABEAS CORPUS JURISPRUDENCE

The "Great Writ" of habeas corpus, "the most celebrated writ in the English Law,"[2] offers protection against "illegal restraint or confinement."[3] Habeas corpus relief is based in the principle "that in a civilized society, government must always be accountable to the

[1] 113 S. Ct. 853 (1993).
[2] 3 WILLIAM BLACKSTONE, COMMENTARIES *129.
[3] Fay v. Noia, 372 U.S. 391, 400 (1962).

judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."[4] Habeas corpus protection originated at common law[5] and is guaranteed by the Constitution, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in the Cases of Rebellion or Invasion the public Safety may require it."[6] In addition, Congress created a habeas remedy for federal prisoners held "in custody, under or by colour of the authority of the United States" in its first grant of jurisdiction to the federal courts in 1789.[7]

Initially, habeas protection existed only for cases in which the legal process leading to imprisonment[8] or the jurisdiction of the sentencing tribunal[9] were challenged. In 1867, Congress extended federal habeas corpus protection to prisoners held in state custody.[10] The Court noted that the congressional act "brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of [de]privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction."[11]

Despite the stated expansion, habeas protection continued to be applied only to cases in which the defendant alleged that the sentencing court lacked personal or subject matter jurisdiction.[12] The Court extended the reach of federal habeas review during the later part of the nineteenth century, however, by changing the circumstances under which the lack of state court jurisdiction could be found.[13] Even after this shift, federal habeas courts sat not as fact finders but as guarantors of fundamental constitutional rights. Justice Holmes noted that "what we have to deal with [on habeas re-

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4 *Id.* at 402.

5 *Id.* at 400.

6 U.S. CONST. art. I, § 9, cl. 2.

7 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82 (1789).

8 McCleskey v. Zant, 111 S. Ct. 1454, 1461 (1991) (citing *Ex parte* Wells, 59 U.S. (18 How.) 307 (1856)).

9 *Id.* (citing *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 201-03 (1830)).

10 Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (1867) (codified as 28 U.S.C. §§ 2241-55 (1988)).

11 *Ex parte* McCardle, 73 U.S. 318, 325-26 (1867).

12 *See* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE § 33.01(b), at 831 (2d ed. 1986).

13 *See, e.g.*, Henry M. Hart, Jr., *The Supreme Court 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 103-04 (1959) (explaining the "long process of expansion of the concept of lack of jurisdiction"); *Ex parte* Lange, 85 U.S. 163, 176-78 (1873) (lack of jurisdiction found for violation of prohibition against double jeopardy); *Ex parte* Siebold, 100 U.S. 371, 376-77 (1879) (lack of jurisdiction found when statute upon which prosecution was based was determined unconstitutional).

view] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved."[14] In *Hyde v. Shine*,[15] the Court further articulated its position on evidentiary review when it held that "[i]n the Federal courts, . . . it is well settled that upon *habeas corpus* the court will not weigh the evidence, although if there is an entire lack of evidence to support the accusation the court may order his discharge."[16]

In 1915, the Court dramatically increased the scope of habeas corpus in *Frank v. Mangum*,[17] in which the Court held that habeas relief is available whenever the state, "supplying no corrective process, . . . deprives the accused of his life or liberty without due process of law."[18] The Warren Court continued this shift toward increased availability of habeas corpus in the next phase of habeas litigation after World War II.[19] Among the issues decided by the Warren Court were which claims could be heard upon habeas corpus. In *Fay v. Noia*,[20] the Warren Court set the standard that a claim not raised in state court could be raised before a habeas court as long as the petitioner had not deliberately bypassed state procedural rules. The Court created this "deliberate bypass" rule because "a forfeiture of remedies does not legitimize the unconstitutional conduct by which [a] conviction was procured."[21]

In keeping with its expansive interpretation, the Warren Court also authorized federal courts to engage in fact-finding independent of the state court upon habeas review. *Townsend v. Sain*[22] involved a challenge to a murder conviction based on a confession obtained after the police had injected the defendant with "truth serum."[23] The Court held that federal courts are required to hold factual hearings when facts are in dispute or when the defendant did not receive a full and fair hearing in state court.[24] Specifically, the Court held that a federal court must grant an evidentiary hearing to a habeas applicant when:

(1) the merits of the factual dispute were not resolved in the state hear-

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14 Moore v. Dempsey, 261 U.S. 86, 87-88 (1923).
15 199 U.S. 62 (1904).
16 *Id.* at 84.
17 237 U.S. 309 (1915).
18 *Id.* at 335.
19 *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.2 at 684-85 (1989) (discussing the causes for changes in constitutional interpretation that led to a new habeas jurisprudence).
20 372 U.S. 391 (1963), *abrogated by* Coleman v. Thompson, 111 S. Ct. 2546 (1991).
21 *Id.* at 428.
22 372 U.S. 293 (1963).
23 *Id.* at 303.
24 *Id.* at 313.

> ing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) *there is a substantial allegation of newly discovered evidence*, (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[25]

The Court suggested that deference should be paid to a state court's fact-finding; new evidentiary hearings should be held only if there is reason to doubt that the habeas applicant had a fair hearing that resulted in reliable findings.[26] For the first time, however, federal courts were required "to engage in independent fact-finding under specific circumstances."[27]

The *Townsend* Court elaborated upon its position relating to newly discovered evidence. The Court explained that federal courts must grant an evidentiary hearing when newly discovered evidence related to the constitutionality of a petitioner's detention is alleged.

> Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus. Also, the district judge is under no obligation to grant a hearing upon a frivolous or incredible allegation of newly discovered evidence.[28]

Since *Townsend*, however, the Court has substantially narrowed the ability of death row inmates to obtain habeas review. The Burger Court adopted a standard very different than the "deliberate bypass" criteria articulated in *Fay*. In *Wainwright v. Sykes*,[29] the Burger Court held that a habeas petitioner must show "cause" for not having proceeded in state court and "prejudice" by not being allowed a federal court hearing before a claim that was not presented in state court will be heard.[30] In *Murray v. Carrier*,[31] the Court recognized an exception to the "cause and prejudice" standard for "extraordinary case[s], where a constitutional violation has probably resulted in the conviction of one who is actually innocent . . . ."[32]

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25 *Id.* (emphasis added).
26 *Id.* at 318.
27 CHEMERINSKY, *supra* note 19, § 15.5 at 719.
28 *Townsend*, 372 U.S. at 317.
29 433 U.S. 72 (1977).
30 *Id.* at 90-91.
31 477 U.S. 478 (1986).
32 *Id.* at 496.

B. THE ACTUAL INNOCENCE EXCEPTION

The "actual innocence" exception, also referred to as the "fundamental miscarriage of justice" exception, stems from the language of the federal habeas statute,[33] which, prior to amendment in 1966, allowed a judge to deny successive claims[34] without a hearing as long as the judge was "satisfied that the *ends of justice will not be served by such inquiry.*"[35] Although that language was omitted in the statute's amended version, the Court retained but substantially narrowed the actual innocence exception in *Kuhlmann v. Wilson*,[36] its first of three habeas decisions in the 1986 term. The plurality in *Kuhlmann* found that "[t]he ends of justice require federal courts to entertain [successive] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."[37] Justice Brennan objected to this limitation in his dissenting opinion. He argued that

> [d]espite the plurality's intimations, we simply have never held that federal habeas review of properly presented, nondefaulted constitutional claims is limited either to constitutional protections that advance the accuracy of the fact-finding process at trial or is available solely to prisoners who can make out a colorable showing of factual innocence.[38]

Despite this objection, in *Murray v. Carrier*,[39] decided shortly after *Kuhlmann*, the Supreme Court held that the actual innocence exception to the cause and prejudice requirement applied to procedurally defaulted claims as well.[40] The *Carrier* Court found that defense counsel's inadvertent failure to raise a claim in a notice of appeal did not allow it to be heard on habeas review unless the error amounted to ineffective assistance of counsel.[41] Under the relevant state law, the state supreme court would hear only those issues raised in the petition for appeal.[42] Accordingly, the state

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33 28 U.S.C. § 2244(b) (1988).

34 A successive claim is one that raises grounds identical to one heard and decided on its merits in a previous petition. Kuhlmann v. Wilson, 477 U.S. 436, 444 n.6 (1986).

35 28 U.S.C. § 2244 (1988) as quoted before its amendment in Sanders v. United States, 373 U.S. 1, 11 n.5 (1963) (emphasis added).

36 477 U.S. 436 (1986).

37 *Id.* at 454 (internal quotation marks omitted). The Court uses "factual innocence" and "actual innocence" interchangeably.

38 *Id.* at 466 (Brennan, J., dissenting).

39 477 U.S. 478 (1986).

40 *Id.* at 496-97. A procedurally defaulted claim is one in which the petitioner failed to comply with state procedural rules in bringing the claim. Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992).

41 *Carrier*, 477 U.S. at 496-97.

42 *Id.* at 482.

supreme court had refused to address the issue.[43]

The United States Supreme Court, applying the *Sykes* standard, found that there was not sufficient cause to permit the defendant to raise the issue in the federal habeas proceeding. However, Justice O'Connor, writing for the majority, found an exception to the cause requirement. The *Carrier* Court explained that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."[44] Carrier's petition was remanded with orders to dismiss unless the appellate court found facts that established the petitioner's actual innocence.[45]

In *Smith v. Murray*,[46] its third habeas decision of the 1986 term, the Court applied the actual innocence exception to the sentencing phase of a capital case.[47] In *Smith*, the defendant challenged the admission of a psychiatrist's testimony regarding the defendant's discussion of his conduct in other instances.[48] The state courts refused to hear the issue on appeal because the defendant did not assert this claim in the initial proceeding, as required by state law.[49] The defendant then sought habeas relief. The United States Supreme Court found that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default."[50]

The *Smith* Court expressly rejected the argument that more liberal habeas review should be available in capital cases.[51] The Court, however, explained that the failure to demonstrate cause would not preclude habeas review if the defendant could show that he is likely actually innocent.[52] The Court acknowledged that its concern with actual innocence "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense."[53] Nevertheless, the Court's standard required the prisoner to demonstrate a "substantial claim that [counsel's] alleged [proce-

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43 *Id.*

44 *Id.* at 496.

45 *Id.* at 497.

46 477 U.S. 527 (1986).

47 *Id.* at 537.

48 *Id.* at 531. The defendant, accused of raping and brutally killing a woman, told the court-appointed psychiatrist "that he had once torn the clothes off a girl on a school bus before deciding not to carry out his original plan to rape her." *Id.* at 530.

49 *Id.* at 533.

50 *Id.* at 535.

51 *Id.* at 538.

52 *Id.* at 537.

53 *Id.*

dural] error undermined the accuracy of the guilt or sentencing determination."[54] The Court found that the petitioner did not meet his burden to show actual innocence of the death penalty because the "alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones."[55]

The Court both clarified and further narrowed the "actual innocence" exception, which allows the granting of federal habeas corpus relief without a demonstration of cause and prejudice, in *Sawyer v. Whitley*.[56] In *Sawyer*, the Court finally articulated a definition of "actual innocence" for death penalty cases. In an opinion by Chief Justice Rehnquist, the Court stated that a habeas petitioner can show actual innocence only by presenting "clear and convincing evidence that but for constitutional error, no reasonable juror would have found him eligible for the death penalty under the applicable state law."[57] In a successive petition, the defendant in *Sawyer* argued that evidence impeaching the testimony of one witness for the prosecution as well as statements made by the witness' four-year old son were unconstitutionally withheld from the jury during the sentencing phase of his trial.[58] Under applicable state law, imposing the death penalty required a finding "beyond a reasonable doubt that at least one aggravating circumstance exists and . . . consideration of any mitigating circumstances."[59] The Court refused to admit the alleged evidence of mitigating circumstances, explaining that the evidence offered "fail[ed] to show that the petitioner is actually innocent of the death penalty to which he has been

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54 *Id.* at 539. The actual innocence exception was considered in over 100 cases in the five years following *Smith v. Murray*. No death penalty determination was found to meet the standard. Johnson v. Singletary, 938 F.2d 1166, 1200 (11th Cir. 1991), *cert. denied*, 113 S. Ct. 361 (1992).

55 *Smith*, 477 U.S. at 538.

56 112 S. Ct. 2514 (1992).

57 *Id.* at 2517. In his concurring opinion, Justice Stevens noted the decidedly heavy burden that this standard places on those seeking to challenge capital sentences. Justice Stevens remarked:

> While a defendant raising defaulted claims in a non-capital case must show that constitutional error 'probably resulted' in a miscarriage of justice, a capital defendant must present 'clear and convincing evidence' that no reasonable juror would find him eligible for the death penalty. It is heartlessly perverse to impose a more stringent standard of proof to avoid a miscarriage of justice in a capital case than in a noncapital case.

Id. at 2533 (Stevens, J., concurring).

58 *Id.* at 2524.

59 *Id.* at 2520 n.9. Petitioner was convicted of first degree murder for brutally attacking a woman and then setting her body on fire. Upon sentencing, the valid aggravating circumstances found by the jury were "that the murder was committed in the course of an aggravated arson and that the murder was especially cruel, atrocious, and heinous." *Id.* at 2523.

sentenced."[60]

Until *Herrera v. Collins*,[61] the Supreme Court had never considered a habeas petition unaccompanied by an underlying procedural error in violation of the Constitution. Unlike the above cited cases, Herrera did not challenge the state court's finding of guilt based on the evidence presented at trial. Instead, in his habeas appeal, Herrera argued that new evidence, not available at trial, proved him innocent despite the state court's finding.[62] The Court's decision in *Jackson v. Virginia*[63] "comes as close to authorizing evidentiary review of a state court conviction on federal habeas as any of [the Court's] cases."[64] The *Jackson* Court held that if the procedural prerequisites for challenging a conviction have been satisfied, a petitioner is entitled to habeas relief only if review of the evidence from trial reveals that no rational trier of fact could have found guilt beyond a reasonable doubt.[65] The *Jackson* Court made clear that this standard is not a subjective one. The Court must ask "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[66] The Court reasoned that applying such an objective criterion would impinge "upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law."[67]

In *Herrera*, the Court considered whether habeas review is required by the Eighth and Fourteenth Amendments when a death row convict proffers newly discovered evidence alleging actual innocence.[68]

III. FACTS

Before midnight on September 29, 1981, a passerby discovered the body of David Rucker, a Texas Department of Public Safety of-

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60 *Id.* at 2524.

61 113 S. Ct. 853 (1993).

62 *Id.* at 859.

63 443 U.S. 307 (1979).

64 *Herrera*, 113 S. Ct. at 861.

65 *Jackson*, 443 U.S. at 324.

66 *Id.* at 319.

67 *Id.*

68 The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

The Fourteenth Amendment provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

ficer, on a desolate stretch of highway near Los Fresnos, Texas.[69] Officer Rucker's body was found beside his patrol car with a bullet in his head.[70]

Minutes thereafter, Los Fresnos Police Officer Enrique Carrisalez observed a car speeding along the same route, away from the location where the body had been discovered.[71] Carrisalez chased the speeding vehicle,[72] accompanied in his patrol car by Enrique Hernandez.[73] The vehicle pulled over.[74] Officer Carrisalez stopped behind it and walked toward the speeder's car, flashlight in hand.[75] The driver opened his car door, spoke to Carrisalez, and then fired at the officer.[76] Nine days later, after extensive surgery, Officer Carrisalez died from his wound.[77]

Hernandez watched the shooting from inside the patrol car and immediately took cover.[78] When Hernandez next peered over the dashboard, he saw a wounded Carrisalez fire four shots as the car sped away.[79] Hernandez then radioed in a description of the shooter and his vehicle.[80] While in pursuit, Officer Carrisalez had called in the license plate number of the car he followed as "WBZ 143"; the number was later corrected to "XBZ 143."[81] Local police recognized the descriptions as those of Leonel Herrera and a car he often drove.[82] After obtaining and executing an arrest warrant, the officers located the vehicle.[83] The car, registered to Herrera's live-in girlfriend, had license plate number "XBZ 143."[84] She allowed the police to search the car.[85] The officers found personal papers

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69 Herrera v. Collins, 113 S. Ct. 853, 857 (1993).

70 *Id.*

71 *Id.*; Herrera v. Texas, 682 S.W.2d 313, 317 (Tex. Crim. App. 1984), *cert. denied*, 471 U.S. 1131 (1985).

72 113 S. Ct. at 857.

73 Although Hernandez was a civilian, he frequently accompanied officers on night patrol. Hernandez had military training in aircraft identification, and, in the eight years in which he had ridden with police officers, had witnessed several arrests. Respondent's Brief at 7, Herrera v. Collins, 113 S. Ct. 853 (1993) (No. 91-7328).

74 *Herrera*, 113 S. Ct. at 857.

75 *Id.*

76 *Id.*

77 *Id.*

78 Herrera v. Collins, 904 F.2d 944, 946 (5th Cir.), *cert. denied*, 498 U.S. 925 (1990).

79 *Id.*

80 *Id.*

81 Herrera v. Texas, 682 S.W.2d 313, 316 (Tex. Crim. App. 1984), *cert. denied*, 471 U.S. 1131 (1985). The record is unclear as to whether the mistake was made by Carrisalez when he called in the number or by the dispatcher who noted it. *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

belonging to Herrera, as well as some spent shotgun shells.[86] In addition, the left side of the car, the driver's seat, and floorboard were blood-stained.[87] Forensic tests subsequently showed that the blood stains were type A, the same as that of Officer David Rucker.[88] Herrera had type O blood.[89]

Following a massive manhunt,[90] Leonel Torres Herrera was arrested near Los Fresnos on October 6, 1981, and charged with the capital murder of both Officers Rucker and Carrisalez.[91] Upon arrest, Herrera was taken to the Edinburg Police Department.[92] Several hours later, bleeding, unconscious, and paralyzed, Herrera was taken to a hospital emergency room in a hearse.[93] Exactly what happened between Herrera's arrest and his departure for the hospital is subject to some debate. Known is that an officer attempted to interrogate Herrera, who refused.[94] He told the police to read a certain letter explaining the occurrence if they wanted to know what happened,[95] and then requested counsel.[96] Subsequently, with no lawyer present, Assistant District Attorney Joe Hendley attempted to interrogate Herrera.[97] He asked Herrera why he had killed Officer Rucker.[98] Herrera struck Hendley and continued to hit him until "restrained" by several other officers.[99] Later, the police found six envelopes among Herrera's belongings on which a letter was written by Herrera; it essentially admitted and explained both police killings.[100]

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86 *Id.*

87 *Id.* at 316-17.

88 *Id.* at 317.

89 Herrera v. Collins, 113 S. Ct. 853, 857 (1993).

90 *See* Petitioner's Brief at 7, *Herrera* (No. 91-7328).

91 *Herrera*, 113 S. Ct. at 857.

92 Petitioner's Brief at 8, *Herrera*, (No. 91-7328).

93 *Id.*

94 Herrera v. Texas, 682 S.W.2d 313, 317 (Tex. Crim. App. 1984), *cert. denied*, 471 U.S. 1131 (1985).

95 *Id.*

96 *Id.* at 320. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

97 *Herrera*, 682 S.W.2d at 320.

98 *Id.*

99 *Id.* Herrera's version is that Hendley tortured him by holding a lit cigarette lighter under his nose. Petitiioner's Brief at 9, Herrera v. Collins, 113 S. Ct. 853 (1993) (No. 91-7328). In addition, the *Brownsville Ledger* reported the allegation by Herrera's wife that he was pistol whipped and beaten while being questioned. Petitioner's Brief at 11, Herrera v. Collins, 113 S. Ct. 853 (1993) (No. 91-7328).

100 *Herrera*, 682 S.W.2d at 317. The letter read:

> To whom it may concern: I am terribly sorry for those I have brought grief to their lives. Who knows why? We cannot change the future's problems with problems

At trial, Hernandez identified Herrera as the person who shot Carrisalez.[101] He also positively identified Herrera's girlfriend's car.[102] Hernandez testified that there was only one person in the assailant's vehicle on the night of the murder.[103] A declaration made by Officer Carrisalez while he was in the hospital, in which he identified Herrera as his attacker, was also admitted.[104] Further evidence showed that Herrera's social security card was found near Rucker's patrol car the night of his murder.[105] Herrera had keys to his girlfriend's car in his pocket at the time of his arrest, and blood splatters on his pants matched Officer Rucker's blood type.[106] Herrera was convicted of the capital murder of Officer Carrisalez and sentenced to death in January 1982.[107] In July of that year, Herrera pleaded guilty to the murder of Officer David Rucker.[108]

IV. PROCEDURAL HISTORY

Herrera appealed his conviction and sentence, arguing, among

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from the past. What I did was for a cause and purpose. One law runs others, and in the world we live in, that's the way it is.

I am not a tormented person . . . . I believe in the law. What would it be without this [sic] men that risk their lives for others, and that's what they should be doing—protecting life, property, and the pursuit of happiness. Sometimes, the law gets too involved with other things that profit them. The most laws that they make for people to break them, in other words, to encourage crime.

What happened to Rucker was for a certain reason. I knew him as Mike Tatum. He was in my business, and he violated some of its laws and suffered the penalty, like the one you have for me when the time comes.

My personal life, which has been a conspiracy since my high school days, has nothing to do with what has happened. The other officer that became part of our lives, me and Rucker's (Tatum), that night had not to do in this [sic]. He was out to do what he had to do, protect, but that's life. There's a lot of us that wear different faces in lives every day, and that is what causes problems for all. [Unintelligible word].

You have wrote all you want of my life, but think of yours, also. [Signed, Leonel Herrera].

I have tapes and pictures to prove what I have said. I will prove my side if you accept to listen. You [unintelligible word] freedom of speech, even a criminal has that right. I will present myself if this is read word for word over the media, I will turn myself in; if not, don't have millions of men out there working just on me while others—robbers, rapists, or burglars—are taking advantage of the law's time. Excuse my spelling and writing. It's hard at times like this.

Herrera v. Collins, 113 S. Ct. 853, 857-58 n.1 (1993).

101 *Herrera*, 113 S. Ct. at 857.

102 *Id.*

103 *Id.*

104 *Id.* Officer Carrisalez was on a respirator and in critical condition when he was shown a single photograph of Herrera and was asked, "Is this the man who shot you?" Upon seeing the picture Carrisalez became extremely agitated and excited. He remained agitated and had to be sedated. *Herrera*, 682 S.W.2d at 319-20.

105 *Herrera*, 113 S. Ct. at 857.

106 *Id.*

107 *Id.*

108 *Id.*

other things, that Hernandez' and Carrisalez' identifications were unreliable[109] and improperly admitted.[110] The Texas Court of Criminal Appeals overruled all grounds of error and affirmed his conviction.[111] The United States Supreme Court denied certiorari.[112] The state court then ordered that Herrera be executed by lethal injection on August 16, 1985.[113] On July 2, 1985, Herrera applied for state habeas corpus relief, which was denied.[114] Herrera then petitioned the United States District Court for the Southern District of Texas for federal habeas corpus relief and a stay of execution, again challenging the identifications of him made at trial.[115] The federal district court granted the stay on August 12, 1985, but later granted the state's motion for summary judgment and denied Herrera federal habeas relief.[116] On appeal, the Fifth Circuit affirmed the district court's conclusion that the pre-trial identifications of Herrera by Hernandez and Carrisalez were not impermissibly suggestive[117] so as to deny Herrera due process.[118] The court denied the habeas petition, and the U.S. Supreme Court refused certiorari.[119]

Herrera next filed a second habeas petition in state court on December 12, 1990, raising, among others, a claim of "actual innocence" on newly discovered evidence.[120] Herrera presented the affidavits of Hector Villarreal, an attorney who had represented Herrera's brother, Raul Herrera, Sr., and of Juan Franco Palacious, one of Raul Sr.'s former cellmates.[121] Both claimed that Raul Sr., who died in 1984, told them that he—and not Leonel Herrera—had killed Officers Rucker and Carrisalez.[122] The Texas district court

109 *Herrera*, 682 S.W.2d at 317.

110 *Id.* at 313. Herrera appealed on eight grounds of error. In four counts he claimed that both pre-trial and in-court identifications of him violated his constitutional rights; he objected to the admission of Carrisalez' dying declaration; he objected to the admission of threatening statements made by him that he alleged were the result of an interrogation in violation of Miranda v. Arizona, 384 U.S. 436 (1966); and he objected to testimony regarding an assault that occurred during his arraignment on an un-related charge for which he was later acquitted. *Herrera*, 682 S.W.2d at 316.

111 *Id.* at 322.

112 Herrera v. Texas, 471 U.S. 1131 (1985).

113 Herrera v. Collins, 904 F.2d 944, 945 (5th Cir. 1990), *cert. denied*, 498 U.S. 925 (1990).

114 Herrera v. Collins, 113 S. Ct. 853, 858 (1993).

115 *Herrera*, 904 F.2d at 945.

116 *Id.*

117 *See supra* note 104.

118 *Id.*

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

120 *Id.*

121 *Id.*

122 *Id.*

denied the petition on the ground that "no evidence at trial remotely suggest[ed] that anyone other than [petitioner] committed the offense."[123] The Texas Court of Criminal Appeals denied relief based on the trial court's conclusions, and vacated the stay of execution on May 29, 1991.[124] The Supreme Court denied certiorari.[125]

In February 1992, Herrera filed a second habeas petition in federal court, raising five claims for relief[126] including the allegation that his execution would violate the Eighth and Fourteenth Amendments because he was innocent of the murders of Rucker and Carrisalez.[127] With this writ, Herrera presented the additional affidavits of Raul Herrera, Jr., Raul Sr.'s son, and Jose Ybarra, a schoolmate of both Herrera brothers. Raul Jr.'s affidavit, dated January 29, 1992, averred that he was in the car and witnessed his father shoot Officers Rucker and Carrisalez.[128] According to Raul Jr., Leonel Herrera was not present.[129] Raul Jr. was nine years old at the time of the murders.[130] Ybarra, in an affidavit dated January 9, 1991, attested that Raul Sr. told him in 1983 that he had shot the two police officers.[131] Herrera alleged that local police officers acted in violation

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123 *Id.* (alteration in original).

124 *Ex parte* Herrera, 819 S.W.2d 528 (Tex. Crim. App. 1991) (en banc), *cert. denied*, 112 S. Ct. 1074 (1992).

125 Herrera v. Texas, 112 S. Ct. 1074 (1992).

126 Herrera raised the following claims in the instant habeas petition:

1.) The State's failure to reveal exculpatory evidence resulted in the conviction and sentence of an innocent person, in violation of the Sixth, Eighth, and Fourteenth Amendments. Petitioner is innocent, another person has confessed to the crime, and the Petitioner's execution would violate the Eighth and Fourteenth Amendments.

2.) Petitioner was tried and sentenced to death for the murder of two police officers by a jury whose members included a police officer in an office that investigated the case, in violation of the Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

3.) During trial, recesses, and juror deliberation, juror-police officer Bressler was armed, and at least one juror noticed; in addition, and contrary to his sworn statements during voir dire, this officer knew one of the victims. These facts reveal that Petitioner's conviction and death sentence occurred in violation of his Sixth, Eighth, and Fourteenth Amendment rights.

4.) Petitioner's sentencers were precluded from considering evidence which counseled in favor of a sentence less than death, in violation of Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

5.) The trial judge wrongfully refused to allow Petitioner to speak at all during Petitioner's trial and capital sentencing proceeding, thereby violating Petitioner's federal Constitutional rights.

Herrera v. Collins, 954 F.2d 1029, 1031 n.1 (5th Cir. 1992), *aff'd*, 113 S. Ct. 853 (1993).

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

128 *Id.* The testimony of Enrique Hernandez at trial, however, established that there was only one person in the assailant's vehicle the night of the shooting. *See supra* note 103 and accompanying text.

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

130 *Id.*

131 *Id.*

of *Brady v. Maryland*[132] when they withheld this evidence, of which they were fully aware.[133]

The district court denied all relief on claims 2-5[134] claiming abuse of the habeas writ.[135] The court initially denied Herrera's *Brady* claim, which was incorporated into his first claim, stating that Herrera failed to present "any evidence of withholding exculpatory material by the prosecution."[136] On reconsideration, however, the district court concluded that sufficient facts were presented to require a hearing. Thus, "[i]n order to ensure that Petitioner can assert his constitutional claims and out of a sense of fairness and due process," the district court granted Herrera's request for a stay of execution to enable him to present his claim of actual innocence in state court.[137]

Collins, director of the Texas Department of Criminal Justice, appealed from the district court's stay of execution and moved the Fifth Circuit for an order vacating the stay.[138] The Fifth Circuit upheld the district court's initial conclusion that Herrera neither alleged nor proffered facts that the prosecution withheld any favorable evidence from him.[139] The court of appeals held that absent an accompanying constitutional violation, Herrera's claim of actual innocence was not cognizable under *Townsend.*[140] *Townsend* held that "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."[141] The Fifth Circuit thus granted Collins' motion to vacate the stay of execution entered by the district court.[142]

The United States Supreme Court granted certiorari to address whether it violates due process or constitutes cruel and unusual

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132 373 U.S. 83 (1963). *Brady* requires a prosecutor to disclose exculpatory evidence in his possession. The Court held that "the suppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . . ." *Id.* at 87.

133 *Herrera*, 113 S. Ct. at 858-59.

134 *See supra* note 126.

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

136 *Id.*

137 *Id.*

138 Herrera v. Collins, 954 F.2d. 1029, 1031 (5th Cir. 1992), *aff'd*, 113 S. Ct. 835 (1993).

139 *Id.*

140 *Id.* at 1034.

141 Townsend v. Sain, 372 U.S. 293, 317 (1963). In *Townsend*, the Court held that a federal habeas court must grant an evidentiary hearing in an allegation of newly discovered evidence only when the evidence "bear[s] upon the constitutionality of the applicant's detention." *Id.*

142 *Herrera*, 954 F.2d at 1034.

punishment for a State to execute a person who, after conviction of murder, alleges that newly discovered evidence proves his innocence.[143]

V. THE SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

Chief Justice Rehnquist, writing for the majority,[144] affirmed the Fifth Circuit's decision by relying on the rule that absent an accompanying constitutional violation, a claim of actual innocence is not a ground for federal habeas corpus relief.[145] The Court thus reaffirmed the principle that "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."[146]

Herrera asserted that the Eighth and Fourteenth Amendments "prohibit the execution of a person who is innocent of the crime for which he was convicted."[147] The Court countered, however, that "innocence" and "guilt" are not arbitrary appellations but are instead determined by judicial proceedings.[148] Thus, according to the majority, Herrera's claims had to be evaluated in light of the procedural history of his case, which spanned almost a decade.[149] The Court outlined the abundant constitutional provisions that ensure against the conviction an innocent person, including the rights to a presumption of innocence, to confront adverse witnesses, to compulsory process, to effective assistance of counsel, to a jury trial, and to a "fair trial in a fair tribunal."[150] The Court recognized the prosecution's burden to prove guilt beyond a reasonable doubt and the requirement that the prosecution disclose exculpatory evidence as additional safeguards.[151] Chief Justice Rehnquist also noted that

143 Herrera v. Collins, 113 S. Ct. 853, 859 (1993).

144 Chief Justice Rehnquist delivered the opinion of the Court. Justice O'Connor concurred and filed an opinion in which Justice Kennedy joined. Justice Scalia concurred and filed and opinion in which Justice Thomas joined. Justice White filed an opinion concurring in judgement.

145 *Herrera*, 113 S. Ct. at 860.

146 *Id.*

147 *Id.* at 859.

148 *Id.*

149 *Id.*

150 *Id.* at 859-60 (citing *In re* Winship, 397 U.S. 358 (1970) (presumption of innocence); Coy v. Iowa, 487 U.S. 1012 (1988) (confrontation of adverse witness); Taylor v. Illinois, 484 U.S. 400 (1988) (compulsory process); Strickland v. Washington, 466 U.S. 668 (1984) (effective assistance of counsel); Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial); *In re* Murchison, 349 U.S. 133, 136 (1955) ("fair trial in a fair tribunal")).

151 *Id.* (citing *In re* Winship, 397 U.S. 358 (1970) (reasonable doubt); Brady v. Maryland, 373 U.S. 83 (1963) (exculpatory evidence).

capital cases demand special procedures, such as the requirement that the jury be given the option of convicting the defendant of a lesser offense, because of the nature of the penalty at stake.[152] Chief Justice Rehnquist explained that these constitutional provisions exist to make it difficult for the State to overturn a criminal defendant's presumption of innocence.[153] According to the Court, these provisions grant each defendant the procedural safeguards required by due process of law.[154] However, since the presumption of innocence lasts only until a defendant's conviction, "in the eyes of the law, [Herrera did] not come before the Court as one who is 'innocent,' but on the contrary as one who has been convicted by due process of law of two brutal murders."[155]

Herrera, though, did not challenge the state court's finding of guilt beyond a reasonable doubt based on the evidence presented at trial.[156] Instead, he argued that new evidence, not available at trial, proved his innocence.[157] Chief Justice Rehnquist noted that habeas courts historically could not correct errors of fact,[158] and proceeded to review more recent authority.[159] Of all the Supreme Court's cases, Chief Justice Rehnquist noted that *Jackson v. Virginia*[160] came as close as any to authorizing evidentiary review on federal habeas appeal.[161] However, the Chief Justice rejected the contention that *Jackson* authorized an evidentiary review of the state court conviction in Herrera's case.[162] While *Jackson* held that a federal habeas court may review a claim "that the evidence adduced at a state trial was not sufficient to convict a criminal beyond a reasonable doubt,"[163]

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152 *Id.* at 860 (citing Beck v. Alabama, 447 U.S. 625 (1980)).

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* at 858.

158 *See, e.g., Ex parte* Terry, 128 U.S. 289, 305 (1888) and cases cited *supra* notes 14-16 and accompanying text.

159 *Herrera*, 113 S. Ct. at 861 (citing Barefoot v. Estelle, 463 U.S. 880, 887 (1983) ("Federal courts are not forums in which to relitigate state trials."); Wainwright v. Sykes, 433 U.S. 72, 90 (1983) (verdicts in state criminal trials are "a decisive and portentous event")).

160 443 U.S. 307 (1979).

161 *Herrera*, 113 S. Ct. at 861.

162 *Id.* Chief Justice Rehnquist explained that Herrera's claim that newly discovered evidence proved him innocent was not cognizable in Texas courts either. *Id.* at 860. Texas law requires a defendant to file a motion within 30 days after imposition or suspension of sentence to obtain a new trial based on newly discovered evidence. TEX. R. APP. PROC. 31 (a)(1). Since Herrera's claim of actual innocence was made nearly ten years after his conviction, he presented no cause of action to the Texas courts. *Herrera*, 113 S. Ct. at 860.

163 *Herrera*, 113 S. Ct. at 861.

Chief Justice Rehnquist emphasized that this does not allow a reviewing court to draw its own conclusion from the evidence.[164] Instead, the role of the habeas court is to determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[165] In addition, Chief Justice Rehnquist distinguished *Jackson* from *Herrera* in that the former authorized review of record evidence: "*Jackson* does not extend to nonrecord evidence, including newly discovered evidence."[166]

The majority based its decision refusing federal habeas review to actual innocence claims in part on the need for finality in capital decisions. The Court reasoned that to allow new evidence to be heard would also require the habeas court to re-hear the testimony presented at trial.[167] Additional discovery would often have to be allowed. The Court found that such a re-hearing would damage the integrity of the trial court process as well as incur considerable expense.[168] In addition, there would be no guarantee that the resulting verdict would be any more correct than that of the original trial.[169] "[T]he passage of time only diminishes the reliability of criminal adjudications,"[170] and the Court did not want to place the district court "in the . . . difficult position of having to weigh the probative value of 'hot' and 'cold' evidence on the petitioner's guilt or innocence."[171]

Chief Justice Rehnquist also found a procedural bar to hearing Herrera's actual innocence claim. Looking to its recent habeas jurisprudence, the Court found that the "fundamental miscarriage of justice exception is available only where the prisoner *supplements* his constitutional claim with a colorable showing of factual innocence."[172] The Court refused to expand the narrow exception to allow actual innocence itself to be a constitutional claim. Instead, the Court held that actual innocence is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."[173] Herrera's claim of actual innocence did not include the procedural error required to bring a

164 *Id.*
165 *Id.* (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)).
166 *Id.*
167 *Id.*
168 *Id.* at 861.
169 *Id.* at 862.
170 *Id. See, e.g.*, McCleskey v. Zant, 111 S. Ct. 1454, 1468 (1991); United States v. Smith, 331 U.S. 469, 476 (1947).
171 *Herrera*, 113 S. Ct. at 862.
172 *Id.* (citing Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986)) (emphasis added by *Herrera* Court).
173 *Id.*

constitutional claim.[174]

The Court rejected Herrera's assertion that his actual innocence claim deserved special consideration because he was on death row. The Court reiterated its refusal "to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus."[175] While the Eighth Amendment requires that the death penalty be imposed only through a process that reliably prevents wrongful execution,[176] the Court reasoned that a new trial nearly a decade after the original was unlikely to add to the reliability of the outcome.[177]

The Court likewise found no rationale to grant Herrera's suggestion that it vacate his death sentence without overturning his conviction. Although *Ford v. Wainwright*[178] held that the Eighth Amendment requires certain procedural protections in sanity determinations to prevent the execution of the insane, the Chief Justice distinguished between Ford's challenge to the *constitutionality* of his conviction and Herrera's challenge of the *validity* of his own.[179] Chief Justice Rehnquist noted that questions of punishment, not guilt, are "properly examined within the purview of the Eighth Amendment."[180] As the Eighth Amendment prohibits the execution of the insane, a determination of sanity prior to execution is timely.[181] A determination of guilt or innocence many years after the trial, however, imperils "the high regard for truth that befits a decision affecting the life or death of a human being."[182]

The Court also rejected Herrera's alternative claim that the Due Process Clause of the Fourteenth Amendment entitled him to either a new trial or a vacation of his death sentence.[183] Citing the Court's historical willingness to grant substantial deference to the states in

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174 *Id.*

175 *Id.* at 863 (quoting Murray v. Giarratano, 492 U.S. 1, 9 (1989) (plurality opinion), *cert. denied*, 498 U.S. 827 (1990)).

176 *See, e.g.*, McKoy v. North Carolina, 494 U.S. 433 (1990); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

177 *Herrera*, 113 S. Ct. at 863.

178 477 U.S. 399 (1986). In *Ford*, the petitioner was convicted of murder and sentenced to death. While there was no question as to his mental competency at either the time of his offense, his trial or his sentencing, subsequent behavior raised doubts about his sanity. The U.S. Supreme Court required the state to provide an additional hearing to determine his competency. The Court held that the petitioner could not be executed if he were incapable of understanding the punishment he was going to suffer and the rationale for the punishment. *Id.* at 422-23.

179 *Herrera*, 113 S. Ct. at 863.

180 *Id.*

181 *Id.*

182 *Id.* (quoting *Ford*, 477 U.S. at 411).

183 *Id.* at 864.

matters of criminal procedure, Chief Justice Rehnquist explained that the Court has found criminal process lacking only where it offends a fundamental principle of justice.[184] The Court looked to historical practice to determine "whether a procedural rule can be characterized as fundamental."[185] Chief Justice Rehnquist showed that while granting new trials based on newly discovered evidence has common law roots, limitations on their timeliness have an equally long history.[186] Reviewing the two-year time limit for filing new trial motions in federal court,[187] and the states' time limits, which range from within sixty days of judgment to over three years after conviction,[188] the Court found no fundamental offense in Texas' thirty-day limit for new trial motions based on newly discovered evidence.[189]

The Chief Justice noted that Herrera is not without a forum to raise his actual innocence claim. Clemency, according to the Court, "is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."[190] All thirty-six states that permit capital punishment have constitutional or statutory clemency provisions.[191] Under Texas law, the individual sentenced to death, his or her representative, or the Governor may request clemency consideration by the Board of Pardons and Paroles.[192] With the recommendation of a majority of the Board, the Governor may grant clemency.[193] Specific guidelines exist for pardons based on innocence as well.[194] Clemency, according to the Court, "has provided

184 *Id.* (citing Medina v. California, 112 S. Ct. 2572, 2577 (1992)).

185 *Id.* (quoting *Medina*, 112 S. Ct. at 2577).

186 *Id.* at 864-65. The common law originally allowed the granting of a new trial "only during the term of court in which the final judgment was entered." *Id.* That rule was later changed several times by statute to 60 days after final judgement, to any time before execution, and to the current two year limit. *Id.* at 865.

187 FED. R. CRIM. P. 33.

188 At the time *Herrera* was decided, seventeen states required that a new trial motion based on newly discovered evidence be brought within 60 days of judgment; one state adhered to the common law rule, which allows a new trial to be granted only during the term of court in which the final judgment was entered; 18 jurisdictions had time limits ranging from one to three years, and 15 states allowed motions to be brought more than three years after conviction. *Herrera*, 113 S. Ct. at 865-66.

189 *Id.*

190 *Id.* at 866.

191 *Id.* at 867.

192 TEX. CONST., art. IV, § 11; TEX. CODE CRIM. PROC. ANN., Art 48.01 (West 1979).

193 *Id.*

194 The applicable statute reads:

> On the grounds of innocence of the offense for which convicted the board will only consider applications for recommendation to the governor for full pardon upon receipt of: (1) a written unanimous recommendation of the current trial officials of the court of conviction; and/or (2) a certified order or judgment of a court having

the 'fail safe' in our criminal justice system."[195] The Court noted that Herrera had not yet applied for a pardon on the grounds of innocence or otherwise.[196]

The majority opinion concluded with the argument that in a capital case, a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional.[197] Such a case would warrant federal habeas relief if no state avenue were open to process the claim.[198] The Court hypothesized that the threshold showing would have to be extraordinarily high because of the tremendous burden that re-trying cases based on stale evidence would place on the states, and because of the great need for finality in capital cases.[199]

Without articulating what the standard for review in such a case might be, the Court stated that the showing made by Herrera fell far short of the threshold.[200] The Court explained that new trial motions based on affidavits alone are generally disfavored, as there is no opportunity either to cross-examine the affiants or to assess their credibility.[201] Further, the Court reasoned, Herrera's affidavits were particularly suspect since they were based mainly on hearsay, contained inconsistencies, were provided at the "11th hour" without an explanation for the delay, blamed a dead man, and gave no rationale for why Herrera pleaded guilty to the murder of Officer Rucker.[202] The Court noted that had the evidence been provided at trial, it could have been weighed by the jury in making its factual determination.[203] "But coming 10 years after petitioner's trial, this showing of innocence falls far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist."[204]

B. JUSTICE O'CONNOR'S CONCURRING OPINION

Justice O'Connor concurred in the judgment as well as with Chief Justice Rehnquist's hypothetical argument that executing the

jurisdiction accompanied by certified copy of the findings of fact (if any); and (3) affidavits of witnesses upon which the finding of innocence is based.
TEX. ADMIN. CODE tit. 37, § 143.2 (1992).

195 *Herrera*, 113 S. Ct. at 868.
196 *Id.* at 869.
197 *Id.*
198 *Id.*
199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.*
203 *Id.* at 870.
204 *Id.*

legally and factually innocent would be unconstitutional.[205] She found in the instant matter, however, that Herrera was "not innocent, in any sense of the word."[206] As Herrera was convicted by a jury of his peers, he did not come before the Court as an innocent man mistakenly sentenced to death.[207] She argued that Herrera was "instead a legally guilty [man] who, refusing to accept the jury's verdict, demands a hearing in which to have his culpability determined once again."[208] Justice O'Connor reiterated the Court's opinion that federal courts should not intervene to prevent an execution once a prisoner has been convicted following a constitutionally adequate trial.[209] The sole remedy available in such cases is clemency.[210]

Justice O'Connor's concurrence focused on the insubstantial nature of the evidence offerred by Herrera and the troubling manner in which it was presented. Affidavits, she explained, are not uncommon in capital cases and are not regarded as reliable: "when a prisoner's life is at stake, he often can find someone new to vouch for him."[211] Justice O'Connor reasoned that Herrera's affidavits were no exception, for they were produced eight years after his conviction, and without any reasonable excuse for the delay.[212] Worse, they blamed Raul Sr., a dead man who could "neither contest the allegations nor suffer punishment because of them."[213] Justice O'Connor argued that none of the new evidence presented remotely explained the most damaging evidence produced against Herrera at trial—the signed letter in which he confessed and offered to turn himself in.[214] Since there was no question of Herrera's guilt in Justice O'Connor's mind, she reasoned that the Court had no need to decide "whether federal courts may entertain convincing claims of actual innocence. That difficult question remains open. If the Constitution's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, it may never require resolution at all."[215]

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205 *Id.* (O'Connor, J., concurring). Justice Kennedy joined Justice O'Connor.
206 *Id.* (O'Connor, J., concurring).
207 *Id.* (O'Connor, J., concurring).
208 *Id.* (O'Connor, J., concurring).
209 *Id.* at 871 (O'Connor, J., concurring).
210 *Id.* (O'Connor, J., concurring).
211 *Id.* at 872 (O'Connor, J., concurring).
212 *Id.* (O'Connor, J., concurring).
213 *Id.* (O'Connor, J., concurring).
214 *Id.* at 873 (O'Connor, J., concurring).
215 *Id.* at 874 (O'Connor, J., concurring).

C. JUSTICE SCALIA'S CONCURRING OPINION

Justice Scalia joined the majority opinion in its entirety, but disagreed with Justice Rehnquist's assumption, made only for the sake of argument, that a constitutional right to a new trial would exist if there were compelling new evidence of innocence.[216] Justice Scalia noted that the question for which the Court granted certiorari—whether the execution of a person convicted in a full and fair trial, who later alleges that new evidence proves his actual innocence, violates due process or constitutes cruel and unusual punishment—was never answered by the Court.[217] Justice Scalia answered the certiorari question with an unequivocal "no." According to Justice Scalia, "[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 a conviction."[218]

Justice Scalia explained that the Court made its hypothetical argument only to rationalize the harsh outcome that constitutional analysis of the question requires.[219] Justice Scalia implored the lower courts not to engage in hypothetical analysis similar to the majority's in the instant matter. Instead, lower courts, when faced with actual innocence claims, should follow the Court's *Townsend* holding that newly discovered evidence relevant to a state prisoner's guilt or innocence, unaccompanied by an underlying constitutional violation, is not a basis for federal habeas corpus relief.[220]

D. JUSTICE WHITE'S CONCURRING OPINION

Justice White joined the majority's judgment and agreed with Chief Justice Rehnquist's assumption that a "persuasive showing of 'actual innocence' " would render the execution of a convict unconstitutional.[221] Justice White further articulated a standard by which newly discovered evidence could be measured to determine whether the petitioner would be entitled to relief: a petitioner would be required to show at the very least that "based on [the] proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt be-

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216 *Id.* at 874 (Scalia, J., concurring). Justice Thomas joined Justice Scalia.

217 *Id.* (Scalia, J., concurring).

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

219 *Id.* at 875 (Scalia, J., concurring).

220 *Id.* (Scalia, J., concurring) (citing Townsend v. Sain, 372 U.S. 293, 317 (1963)).

221 *Id.* (White, J., concurring).

yond a reasonable doubt.' "[222]

E. JUSTICE BLACKMUN'S DISSENTING OPINION

In his dissenting opinion, Justice Blackmun[223] explained that the district court, not the Supreme Court, should decide whether Herrera is entitled to a hearing and to relief on the merits of his claim.[224] According to Justice Blackmun, the Eighth Amendment's prohibition against cruel and unusual punishment reflects society's evolving standard of decency, and the execution of an innocent person is at "odds with contemporary standards . . . ."[225] He argued that nothing could be more "shocking to the conscience" than to execute a person who is actually innocent.[226] Justice Blackmun found that execution of the innocent is equally offensive to the Due Process Clause of the Fourteenth Amendment.[227] He argued that the majority misinterpreted Herrera's claim as one of procedural due process, when in fact he was raising a substantive due process challenge.[228] According to Justice Blackmun, substantive due process, like the cruel and unusual punishment prohibition, precludes the government from engaging in conduct that shocks the conscience.[229] To Justice Blackmun, the lethal injection of an innocent man falls within that category of behavior.[230]

Having found that the Constitution prohibits the execution of the actually innocent, Justice Blackmun argued that "[t]he possibility of executive clemency is not sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments."[231] "A pardon is an act of grace. . . . The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal."[232]

Justice Blackmun then outlined the procedure that should be followed by a state prisoner to make an actual innocence claim. He explained that the state court is the proper forum for hearing a

222 *Id.* (White, J., concurring) (quoting Jackson v. Virginia, 443 U.S. 307, 324 (1979) (second alteration in original)).

223 Justice Blackmun was joined in Parts I-IV by Justices Stevens and Souter.

224 *Id.* at 876 (Blackmun, J., dissenting).

225 *Id.* (Blackmun, J., dissenting) (quoting Spaziano v. Florida, 468 U.S. 447, 465 (1984)).

226 *Id.* (Blackmun, J., dissenting) (citing Rochin v. California, 342 U.S. 165, 172 (1952)).

227 *Id.* at 878 (Blackmun, J., dissenting).

228 *Id.* (Blackmun, J., dissenting).

229 *Id.* at 879 (Blackmun, J., dissenting) (citing *Rochin*, 342 U.S. at 172).

230 *Id.* at 876 (Blackmun, J., dissenting).

231 *Id.* at 881 (Blackmun, J., dissenting).

232 *Id.* (Blackmun, J., dissenting) (citations omitted).

claim of actual innocence.[233] A prisoner would be required to exhaust all state judicial procedures before taking his or her claim of actual innocence to federal court.[234] Provided the petitioner had exhausted his state remedies, the district court could summarily dismiss the petition if it appeared on its face that the petitioner was not entitled to relief.[235] Justice Blackmun argued that if the petition raised factual questions, as did Herrera's, the district court would be required to provide a full and fair hearing.[236]

Justice Blackmun further argued that the petitioner must show that he or she probably is innocent to be granted relief on an actual innocence claim based on new evidence.[237] As the passage of time could make it difficult to re-try a defendant, "an otherwise constitutionally valid conviction or sentence should not be set aside lightly."[238] Placing the burden on the prisoner would create a presumption that the conviction is valid. No further presumptions would be needed regarding the general reliability of newly discovered evidence.[239] Thus, the probable innocence standard would protect the integrity of the resulting decision.[240]

According to Justice Blackmun, "the court charged with deciding such a claim should make a case-by-case determination about the reliability of the newly discovered evidence under the circumstances."[241] A prisoner raising an actual innocence claim would not be entitled to discovery as a matter of right.[242] Instead, the district court would retain discretion to order discovery when it would aid the court in making "a reliable determination with respect to the prisoner's claim."[243] Applying this standard to the facts of *Herrera*, Justice Blackmun would have reversed the decision of the Court of Appeals and remanded the case to the district court "to consider whether the petitioner had shown, in light of all the evidence, that he was probably actually innocent."[244]

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233 *Id.* (Blackmun, J., dissenting).

234 *Id.* (Blackmun, J., dissenting).

235 *Id.* (Blackmun, J., dissenting).

236 *Id.* at 881-82 (Blackmun, J., dissenting) (citing Townsend v. Sain, 372 U.S. 293, 313 (1962)).

237 *Id.* at 882 (Blackmun, J., dissenting).

238 *Id.* (Blackmun, J., dissenting).

239 *Id.* at 883 (Blackmun, J., dissenting).

240 *Id.* (Blackmun, J., dissenting).

241 *Id.* (Blackmun, J., dissenting).

242 *Id.* (Blackmun, J., dissenting) (citing Harris v. Nelson, 394 U.S. 286, 295 (1969).

243 *Id.* (Blackmun, J., dissenting) (citing *Harris*, 394 U.S. at 299-300).

244 *Id.* at 883-84 (Blackmun, J., dissenting).

VI. ANALYSIS

A. DENIAL OF HABEAS REVIEW FOLLOWS PRECEDENT

Chief Justice Rehnquist began his majority opinion with the statement that "the central purpose of any system of criminal justice is to convict the guilty and free the innocent. . . . In any system of criminal justice, [however,] 'innocence' or 'guilt' must be determined in some sort of a judicial proceeding."[245] His conclusion in *Herrera v. Collins* flows directly from this central tenet that judicial procedures exist to enable fact finders to accurately determine the truth, and is supported by the Court's past procedural limitations on federal habeas review.[246]

With *Wainwright v. Sykes,* the Court initiated a line of cases that created formidable hurdles for state habeas petitioners to have their claims reviewed by federal courts. In addition to the *Sykes* "cause and prejudice" requirement, these hurdles include the restricted review of Fourth Amendment search and seizure claims;[247] impediments to hearing successive,[248] abusive,[249] and defaulted petitions;[250] strict adherence to the exhaustion requirement[251] and to state procedural rules;[252] and a bar on applying new constitutional principles retroactively.[253] A narrow exception to these pro-

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245 *Id.* at 859 (citations omitted).

246 *See, e.g.*, Sawyer v. Whitley, 112 S. Ct. 2514, 2529 (1992) (Blackmun, J., concurring) ("Only last term I had occasion to lament the Court's continuing 'crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims. . . .' ").

247 Stone v. Powell, 428 U.S. 465, 494 (1976). In *Stone,* the Court held that federal habeas relief is not available for a claim that evidence was admitted at trial in violation of the Fourth Amendment protection against search and seizure unless the state court denied an opportunity for a full and adequate hearing on the Fourth Amendment claim. *Id.*

248 *See supra* notes 34-37 and accompanying text.

249 An abusive claim is a new claim, not previously raised at state trial; bringing such a claim upon habeas review is considered an abuse of the writ. *See, e.g.*, McCleskey v. Zant, 111 S. Ct. 1454, 1468 (1991).

250 *See supra* notes 40-41 and accompanying text.

251 A federal court may not grant a habeas petition "unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b) (1988). The Court has more strictly enforced the exhaustion requirement by holding that petitions containing both exhausted and unexhausted claims should be dismissed. Rose v. Lundy, 455 U.S. 509, 510 (1982).

252 In Coleman v. Thompson, 111 S. Ct. 2546, 2552-53 (1991), the Court denied review of a capital habeas petitioner's case because his lawyer had filed the state habeas petition three days late. *Id.* at 2552-53, 2565.

253 The Court's retroactivity doctrine holds that even preserved and convincing claims of constitutional error cannot be heard in habeas if they depend upon constitutional precedent that did not exist when a petitioner's case cleared the direct review

cedural restrictions applies if a petitioner can make a colorable showing of actual innocence.

In *Herrera,* Chief Justice Rehnquist made a sound and logical argument that led to his conclusion that the actual innocence exception does not apply: the Constitution provides no federal habeas relief for a post-conviction claim of actual innocence not grounded in a procedural constitutional violation.[254] He persuasively demonstrated that federal habeas case law has not historically treated actual innocence claims as independent constitutional violations, as Herrera argued. Instead, the Court's review of cases shows that a prisoner may use an actual innocence claim only as a basis for having his or her otherwise barred constitutional claim considered on its merits.[255] As the error in *Herrera* was in the outcome of the state trial—the trial court's finding of guilt—and no violation of constitutional procedure was claimed, there is nothing unconstitutional about either Herrera's incarceration or death sentence. "[T]he error lies only in the result, and guilt or innocence is not a constitutional question."[256]

Several themes emerge from the Court's recent death penalty decisions that predict both the outcome of *Herrera* and an increasing number of executions in death penalty cases generally.[257] First, by strictly interpreting the old barriers to habeas review and erecting additional hurdles, the Court has dramatically decreased the role of federal courts in reviewing capital cases.[258] Second, the Court has tried to clarify its capital punishment jurisprudence to enable state compliance and decrease the need for federal supervision.[259] To do so, the Court has stated its constitutional death penalty concerns in "formalistic terms that set predictable, attainable, and easily policed standards of behavior."[260] Although legal clarity is desired by the Court, a third trend is in the Court's willingness to defer clear standards whenever their attainment would require either the state to compromise a legitimate interest or the Court to grant upon an accused more protection than that necessary to secure a constitutional

process. Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion). For a thorough review of the Court's retroactivity rules, see Lori Bienstock, Note, *Federal Habeas Corpus: The New Standard of Retroactivity*, 57 BROOK. L. REV. 865 (1991).

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

255 *Id.*

256 Judge Stephen Reinhardt, *The Supreme Court, The Death Penalty, and The* Harris *Case*, 102 YALE L.J. 205, 216 (1992).

257 Louis D. Bilionis, *Legitimating Death*, 91 MICH. L. REV. 1643, 1650 (1993).

258 *Id.* at 1650-52. *See also supra* notes 247-53 and accompanying text.

259 Bilionis, *supra* note 257, at 1652.

260 *Id.*

right.[261] The resulting standards are thus broad enough to enable a state to enforce its interests yet fact-dependent enough to minimize the risk of federal reversal.[262]

Within this framework, although *Herrera* was the Court's first opportunity to determine whether habeas review applies to a case in which no constitutional violation was claimed, the Court's result is an entirely logical extension of past precedent and is consistent with its current position on federal habeas: "liberal availability of the federal habeas corpus remedy must yield to considerations of comity, federalism, and finality in judgements."[263] Thus, the *Herrera* decision indicates that "[a] sleeker death penalty jurisprudence, built more for speed and efficiency than for normative safety, is coming on line. . . . [E]xecutions are on the rise."[264]

B. THE HYPOTHETICAL ARGUMENT

To those who value a more substantive interpretation of habeas review,[265] the *Herrera* decision is disheartening. However, there is some hope in the language of the decision that such an interpretation is not altogether gone. "[T]he Court has [long] struggled to resolve the tension between a narrow focus on death-penalty procedures and the (substantive) view that federal judges have a responsibility to prevent state-imposed death sentences from being carried out when such sentences are undeserved."[266] The Court's *Herrera* decision reflects just this tension. Having previously stated that the role of the habeas court is "to ensure that individuals are not impris-

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261 *Id.* at 1654.

262 *Id.* at 1655.

263 Mary Ann Snow, Comment, Lundy, Isaac *and* Frady: *A Trilogy of Habeas Corpus Restraint*, 32 CATH. U. L. REV. 169, 185 (1982). *See also* Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015, 1018 (1993) ("The majority of the Justices has sacrificed constitutional fairness to reinforce its present concern over the finality of the state judgment.").

264 Bilionis, *supra* note 257, at 1659.

265 Those in favor of more liberal habeas review argue that federal habeas jurisdiction is concerned only with the constitutionality of confinement, not the procedure with which the claim was brought.

> The jurisdictional prerequisite [to habeas corpus] is not the judgment of a state court but detention *simpliciter*. . . . Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can only act on the body of the petitioner.

Fay v. Noia, 372 U.S. 391, 430-31 (1963), *abrogated by* Coleman v. Thompson, 111 S. Ct. 2546 (1991). *See also* Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Corpus Claims in Capital Cases*, 23 LOY. L.A. L. REV. 193, 205-07 (1989).

266 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, 818 (1993).

oned in violation of the Constitution—not to correct errors of fact,"[267] Chief Justice Rehnquist concluded, albeit in dicta, that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and [would] warrant federal habeas relief . . . ."[268] Thus, *Herrera* requires habeas courts to consider the merits of each criminal case when contemplating awarding habeas relief. By requiring the substantive analysis of each case, "the Court may be able to . . . empower the federal courts to perform (at least in a limited fashion) the important substantive function of separating those state death-row inmates who truly deserve the death penalty . . . from those who do not."[269]

Chief Justice Rehnquist's assumption, made for the sake of argument toward the close of his opinion, is at odds with his logical conclusion that no habeas relief would be available to claims of innocence unaccompanied by an underlying constitutional violation. However, it is consistent with the Court's recent desire to leave open a path for substantive habeas review. As the Rehnquist Court has created increasingly stringent procedural barriers to federal habeas relief, it has also provided narrow exceptions for truly extraordinary claims. The Court's current interpretation of actual innocence is just such an exception. In *Smith v. Murray*,[270] the Court recognized that a fundamental miscarriage of justice occurs whenever there is a substantial claim that a procedural error undermined the accuracy of the sentencing decision.[271] Since *Smith*, however, the Court has determined that the broad actual innocence exception defined in that case would turn the "extraordinary case," in which a fundamental miscarriage of justice is proven, "into an all too ordinary one."[272] The actual innocence standard defined in *Sawyer v. Whitley* is intended to provide a narrow outlet to ensure that the exception does not become the rule. Likewise, Chief Justice Rehnquist's hypothetical in *Herrera* leaves a way out for the truly exceptional case that cannot be reached by the existing, narrowly-defined, procedural actual innocence exception.

Justices' Rehnquist, O'Connor, Kennedy, White, Scalia, and Thomas all agreed to the dismissal of Herrera's claim without authorizing review. The new evidence offered by Herrera in his

267 Herrera v. Collins, 113 S. Ct. 853, 860 (1993).
268 *Id.* at 869.
269 Hoffmann, *supra* note 266, at 820.
270 477 U.S. 527 (1986).
271 *Id.* at 538-39.
272 Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989).

habeas petition, consisting mainly of affidavits that blamed a dead man,[273] did bring out some significant questions of fact that were never resolved.[274] However, as both Chief Justice Rehnquist and Justice O'Connor noted in the majority opinion and her concurrence respectively, none of the evidence provided an explanation for either Herrera's letter of confession or the eight-year delay in bringing the new evidence to the attention of the Court.[275] Notably, even the dissenting Justices made no finding that Herrera's evidence was compelling proof of innocence. Instead, the dissent argued that the Court should agree with the district court that "petitioner's evidence was [not] so insubstantial that it could be dismissed without any hearing at all."[276]

In making the hypothetical argument, the Chief Justice caused a split within the majority. Justices O'Connor, Kennedy, and White ground their conclusions in the Chief Justice's hypothetical argument.[277] Although they rejected Herrera's showing, they asserted that a constitutional right to habeas review exists where a truly compelling showing is made.[278] Justices Scalia and Thomas, however, would hold that there is never a constitutional right to have newly discovered evidence of actual innocence heard.[279] While the majority continues to vocally reject a substantive reading of the constitutional provisions, the other Justices firmly reject the strict procedural interpretation of habeas relief offered by Justices Scalia and Thomas. Thus, the hypothetical argument paves the way for a truly extraordinary case to be heard on its merits.

C. THE ANSWER TO THE CERTIORARI QUESTION

As Herrera's claim was found to contain no "truly persuasive" showing of actual innocence by six of the Justices, regardless of what standard might be required to define such a showing, the constitutional question presented on certiorari was never reached. The Chief Justice offers no constitutional justification for his affirmative, albeit hypothetical, answer to the certiorari question of whether

273 *See supra* notes 200-02 and accompanying text.

274 The affidavit of Hector Villareal, Raul Herrera, Sr.'s lawyer, attested that Herrera and his brother were involved in a drug-trafficking scheme that included the Hidalgo County Sheriff. The affidavit further claimed that Raul Sr. was killed in an effort to silence him by an agent of the sheriff who was present when Raul Sr. murdered Officers Rucker and Carrisalez. Herrera v. Collins, 113 S. Ct. 853, 858 n.2 (1993).

275 *See supra* notes 200-02, 211-14 and accompanying text.

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

277 *See supra* notes 205, 221 and accompanying text.

278 *See supra* notes 205, 221 and accompanying text.

279 *See supra* notes 216-18 and accompanying text.

habeas review might be awarded to a claim of actual innocence brought following a procedurally adequate trial. He cannot do so because, as Justice Scalia in his concurring opinion correctly argues, taking the reasoning of the Court to its logical end allows for no such constitutional justification.[280]

Justices Blackmun, Souter, and Stevens also conclude that the Constitution provides an avenue for the federal habeas review of actual innocence claims based on post-conviction evidence. Unlike Justices Rehnquist, O'Connor, Kennedy, and White, however, these dissenting Justices base their conclusion on constitutional principles. The dissent argues that a substantive interpretation of the Eighth Amendment's prohibition against cruel and unusual punishment, as well as substantive due process accorded by the Fourteenth Amendment, provide the necessary constitutional authority to grant federal habeas review of actual innocence claims based on newly discovered evidence that do not allege additional procedural violations.[281] Thus, in total, seven Justices find a constitutional right to federal habeas relief.[282] Only three[283] justify that right. Should a case come before the Court with more compelling evidence pointing toward a claim of actual innocence, it is likely that the majority opinion will more closely follow the *Herrera* dissent.

Should such a case reach the Court, the adoption of either Justice White's or Justice Blackmun's standard would produce a similar result. Justice White's standard to enable a petitioner to receive habeas review requires a "persuasive showing of 'actual innocence.' "[284] Justice Blackmun's standard requires only that the petition raise a factual question.[285] Under the White standard, the threshold showing for granting habeas review is quite high. So is the standard by which the evidence would be measured. According to Justice White, the petitioner would not be granted relief unless a review of both the newly discovered evidence and the trial record showed that "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt."[286]

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280 *Herrera*, 113 S. Ct. at 874-75 (Scalia, J., concurring) ("There is no basis in text, tradition, or even in contemporary practice . . . for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.").

281 *See supra* notes 225-30 and accompanying text.

282 Chief Justice Rehnquist, and Justices O'Connor, Kennedy, White, Blackmun, Souter, and Stevens.

283 Justices Blackmun, Souter, and Stevens.

284 *See supra* note 222 and accompanying text.

285 *See supra* note 236 and accompanying text.

286 Herrera v. Collins, 113 S. Ct. 853, 875 (1993) (White, J., concurring) (quoting Jackson v. Virginia, 443 U.S. 307, 324 (1979) (alteration in original)).

The Blackmun standard, on the other hand, would compel habeas review of any case that raised a factual question so long as all state judicial procedures had been exhausted. Justice Blackmun's standard for habeas relief, however, is equally burdensome for the petitioner; the petitioner must show that he "probably is innocent."[287] Like the standard articulated by Justice White, Justice Blackmun's standard creates a presumption that the underlying conviction is valid. Since authorizing new discovery would be left to the discretion of the district court under the Blackmun standard, as under that articulated by Justice White, the petitioner would often be required to show his probable innocence based only on the newly discovered evidence and the trial record. Given the narrow interpretation of the actual innocence exception in habeas cases to date,[288] it is unlikely that under either standard any but the most compelling showing of actual innocence would result in the prisoner's release upon habeas review.

In the meantime, clemency, the "fail-safe" procedure to prevent execution of the actually innocent, may take on a more fundamental role in insuring the accuracy of the outcome of judicial proceedings.[289] Indeed, the limitations on federal habeas review have spurred a re-examination of capital clemency.[290] It has been argued that "the revitalization of clemency is not merely a matter of choice. . . . [M]eaningful clemency review is a governor's constitutional obligation."[291] As the Court continues to narrow the means by which a state prisoner may obtain federal habeas review, clemency may indeed be the only means by which a prisoner who makes a substantial showing of actual innocence may gain relief.

VII. CONCLUSION

In *Herrera*, the Rehnquist Court continued its current practice of aggressively narrowing access to federal courts for criminal defendants in death penalty cases.[292] Given the Rehnquist Court's

287 *Id.* at 882 (Blackmun, J., dissenting); *see also supra* note 237 and accompanying text.

288 *See supra* note 54.

289 Following the Court's *Herrera* decision, a Texas court for the first time ordered the State Board of Pardons and Paroles to hear a death row inmate's evidence of actual innocence. Marcia Coyle, *Inmate Granted Unique Hearing*, NAT'L. L.J., Aug. 16, 1993, at 3.

290 *See, e.g.*, Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 225 (1990-91); Margery Malkin Koosed, *Some Perspectives on the Possible Impact of Diminished Federal Review of Ohio Death Sentences*, 19 CAP. U. L. REV. 695 (1990); Paul Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389 (1989).

291 Bilionis, *supra* note 257, at 1698.

292 *See* Erwin Chemerinsky, *Is the Rehnquist Court Really That Conservative?: An Analysis of the 1991-92 Term*, 26 CREIGHTON L. REV. 987, 999 (1993).

philosophy that procedural protections alone may prevent wrongful executions, and its concern that any greater protection undermines the judicial process and only results in delays,[293] the Court predictably ruled that there is no right to federal habeas review of an actual innocence claim not grounded in an underlying constitutional violation. The Court did create a narrow exeception for substantive review, however, by acknowledging that if a truly compelling showing of actual innocence is made, the Constitution would prohibit the execution of an innocent person.

This Note asserts that the Court's exception to its reasoned conclusion that no constitutional right to habeas review of this case exists is consistent with the Court's recent history of leaving open narrow access for substantive review of truly exceptional cases. Whether this actual innocence exception to its general prohibition against habeas review will in fact provide protection for wrongly incarcerated death row inmates, however, remains to be determined. In the immediate future, it is hoped that other remedies, such as more careful decisions by state courts and more meaningful clemency policies by state governors, will make up for the stringent limits on federal habeas review imposed by the Rehnquist Court.

JENNIFER BREUER

293 *See id.* at 1000.