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People v. Cole: Is the Incarceration of an "Actually Innocent" Person Constitutional?

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PEOPLE V. COLE[1]: IS THE INCARCERATION OF AN "ACTUALLY INNOCENT" PERSON CONSTITUTIONAL?

Aileen R. Kavanagh[2]

Valance Cole was convicted of manslaughter in the first degree and related charges and was sentenced to twelve and one-half years to twenty-five years in prison with concurrent lesser terms of imprisonment on the related charges.[3] The defendant moved to vacate the judgment on the basis of newly discovered evidence.[4] The court granted a hearing to determine the "probability" that the new evidence would alter the result of defendant's conviction if a new trial was granted, and also to discuss the *Brady* claim implicit in defendant's alleged new evidence.[5] The court ultimately held, via first impression, that the New York State Constitution prohibits the incarceration of a person who is actually innocent, and permitted the hearing of evidence with respect to defendant's free-standing claim of "actual innocence" inherent in his motion.[6]

A fatal shooting occurred on a Brooklyn Street in August 1985.[7] The evidence accumulated at the time of the investigation consisted of oral statements by various witnesses identifying the defendant as the shooter, a statement by another witness, Mr. Fleming, who identified by photograph an individual who was incarcerated at the time of the fatal incident, and additional witnesses who identified persons that the investigation later ruled

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[1] N.Y.L.J., Sept. 20, 2002, at 20, col. 4 (N.Y. Sup. Ct.).

[2] J.D. Candidate 2004, Touro College Jacob D. Fuchsberg Law Center. This paper received an Honorable Mention for second place in the Annual Lawrence Robert Gould New York State Constitutional Law writing competition.

[3] *Cole*, *supra* note 1.

[4] *Cole*, *supra* note 1.

[5] *Cole*, *supra* note 1.

[6] *Cole*, *supra* note 1 (stating, "[t]his presents a novel issue of whether the New York State Constitution recognizes a free-standing claim of innocence as grounds to vacate a judgment of conviction.")

[7] *Cole*, *supra* note 1.

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out.[8] Approximately six months later, Jeffrey Campbell, while incarcerated on an unrelated matter, identified the defendant as the shooter, and another eyewitness identified the defendant by photograph and a subsequent lineup.[9] Sometime thereafter, Mr. Fleming and the defendant testified at a grand jury presentation.[10] In February 1986, the defendant was charged with murder in the second degree and related charges.[11] The defendant was arraigned in March 1986, and pled not guilty.[12]

In the same month the defendant was arraigned, Jeffrey Campbell and another eyewitness testified for the prosecution and both identified the defendant as the shooter.[13] One of the defendant's witnesses testified that he knew the defendant, and the defendant was not the shooter.[14] Furthermore, an alibi witness placed the defendant elsewhere at the time of the shooting.[15] However, Mr. Fleming and the defendant did not testify at the trial.[16]

In March 1987, the defendant was convicted of manslaughter in the first degree and was sentenced to twelve and one-half years to twenty-five years, and other lesser terms to run concurrently.[17] Approximately seven years later, the defendant filed a vacatur motion because Mr. Campbell recanted his testimony.[18] The motion was denied because Mr. Campbell's audio-taped recantation was never submitted to the court by sworn transcript, and as a result, the court held the papers were legally insufficient. Mr. Campbell passed away shortly thereafter.[19]

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[8] *Cole, supra* note 1.
[9] *Cole, supra* note 1.
[10] *Cole, supra* note 1.
[11] *Cole, supra* note 1.
[12] *Cole, supra* note 1.
[13] *Cole, supra* note 1.
[14] *Cole, supra* note 1.
[15] *Cole, supra* note 1.
[16] *Cole, supra* note 1.
[17] *Cole, supra* note 1.
[18] *Cole, supra* note 1.
[19] *Cole, supra* note 1.

The defendant then submitted various documents alleging newly discovered evidence.[20] The evidence consisted of a transcript of Mr. Campbell's recantation, affidavits of Mr. Fleming, and three eyewitnesses claiming the defendant was not the shooter. The new evidence also included the affidavits of alibi witnesses, who were never called upon at trial, the affidavits of two eyewitnesses who testified at trial, and an affidavit of defendant's investigator claiming that the prosecution's eyewitness recanted.[21] The prosecution presented an affidavit that their eyewitness did not recant.[22]

The court noted that Mr. Campbell (whose transcript of recantation defendant attempts to introduce) testified at trial that he received threats from the defendant's brother and others. However, the court also noted that the trial minutes indicated that Mr. Fleming, who testified for the prosecution at the grand jury presentation, was paid for his testimony.[23]

The court discussed that its power to grant a new trial on the ground of newly discovered evidence rests on the unlimited discretion of the court to determine that all the requirements for newly discovered evidence claims are met, in accordance with the statute.[24] In order to satisfy the statute, the proffered evidence

[20] *Cole, supra* note 1.
[21] *Cole, supra* note 1.
[22] *Cole, supra* note 1.
[23] *Cole, supra* note 1.
[24] *Cole, supra* note 1 (citing People v. Salemi, 309 N.Y. 208, 215, 128 N.E.2d 377, 381, (1955); People v. Pugh, 236 A.D.2d 810, 811, 653 N.Y.S.2d 994, 996 (4th Dep't 1997); People v. Latella, 112 A.D.2d 321, 322, 491 N.Y.S.2d 771, 772 (2d Dep't 1985); People v. Balan, 107 A.D.2d 811, 813, 484 A.D.2d 648, 649 (2d Dep't 1985); People v. Baxley, 84 N.Y.2d 208, 212, 639 N.E.2d 746, 749, 616 N.Y.S.2d 7, 10 (1994); People v. Crimmins, 38 N.Y.2d 407, 415, 343 N.E.2d 719, 725, 381 N.Y.S.2d 1, 20 (1975); *see also* N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2002)). Section 440.10(1)(g) provides in pertinent part:

> At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
> (g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial

must meet all six criteria:[25] it must be of such nature that it would probably change the result if a new trial were held; it must have been discovered after trial; it must have been undiscoverable prior to or during trial, notwithstanding defendant's exercise of due diligence; it must be material to the issue; it must not be merely cumulative; and, it must not merely impeach or contradict evidence given at trial.[26]

Accordingly, the court reasoned that the transcript of Mr. Campbell's recantation, the affidavit of Mr. Fleming claiming the defendant was not the shooter, and the affidavits of the defendant's two eyewitnesses who testified at trial, are *not* newly discovered evidence.[27] However, the court allowed this evidence to be considered in the determination of whether the proffered evidence would have "probably" altered the result, in conjunction with the testimony of the three eyewitnesses who also claimed defendant was not the shooter.[28] Although the affidavits are inconsistent and created serious issues of credibility, the court ordered a hearing to determine whether through due diligence, the witnesses could have been discovered earlier, if they were

> even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based on such ground must be made with due diligence after the discovery of such alleged new evidence . . . .

[25] *Cole, supra* note 1. Note, however, that as discussed, *infra*, the court did not require all six criteria to be met herein due to the unconstitutionality of an actual innocence claim, and will allow all of the defendant's newly discovered evidence to be submitted at the hearing.

[26] *Cole, supra* note 1 (citing *Salemi*, 309 N.Y. at 216, 128 N.E.2d at 383) (defining "it" as the newly discovered evidence which must be evidence admissible at trial); *see also* People v. Boyette, 201 A.D.2d 490, 491, 607 N.Y.S.2d 402, 404 (2nd Dep't 1994); People v. Dabbs, 154 Misc. 2d 671, 674, 587 N.Y.S.2d 90, 92 (Sup. Ct. Westchester County 1991); People v. Fields, 66 N.Y.2d 876, 877, 489 N.E.2d 728, 729, 498 N.Y.S.2d 759, 760 (1985).

[27] *Cole, supra* note 1.

[28] *Cole, supra* note 1.

credible, and whether the proposed newly discovered evidence, in its entirety, would "probably" have altered the result.[29]

Additionally, the court pointed out that even though defendant did not make a *Brady*[30] claim, several of the new witnesses allegedly provided the police with statements that the defendant did not commit the crime, and nothing in the record demonstrated defendant received such statements from the prosecution.[31] Accordingly, even though the defendant did not make a *Brady* claim, the court found the affidavits "raise[d] the issue,"[32] and therefore ordered the hearing to include the *Brady* claim.[33] In accordance with *Brady*, the burden is upon the State to disclose exculpatory evidence if, in the absence of the undisclosed evidence, it is reasonably possible to affect the guilt or innocence of the defendant.[34] If the defendant can show that he did not know and could not have known that the exculpatory evidence existed, and that it was never disclosed, such failure by the prosecution constitutes a due process violation.[35] As such, the *Cole* court declared that it would hear evidence on the issue of a *Brady* claim at the hearing.

Next, the *Cole* court recognized that without explicitly arguing the point, the defendant made a freestanding claim of actual innocence in his motion to vacate his judgment.[36] As the court pointed out, even in the absence of a claim of an underlying constitutional violation at the trial stage, "[t]his presents a novel

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[29] *Cole, supra* note 1.

[30] *See* Brady v. Maryland, 373 U.S. 83, 88 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

[31] *Cole, supra* note 1.

[32] *Cole, supra* note 1.

[33] *Cole, supra* note 1.

[34] *Cole, supra* note 1 (citing *Brady*, 373 U.S. at 88; People v. Vilardi, 76 N.Y.2d 67, 73, 555 N.E.2d 915, 917, 556 N.Y.S.2d 518, 520 (1990).

[35] *Cole, supra* note 1 (citing *Brady*, 373 U.S. at 88; *Vilardi*, 76 N.Y.2d at 73, 555 N.E.2d at 917, 556 N.Y.S.2d at 520; United States v. Agurs, 427 U.S. 97, 112 (1976)).

[36] *Cole, supra* note 1.

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issue of whether the New York State Constitution[37] recognizes a free-standing claim of innocence as grounds to vacate a judgment of conviction."[38]

The court began its analysis of this issue by first discussing the federal precedent with respect to the constitutionality of claims of actual innocence under the United States Constitution.[39] The United States Supreme Court has been reluctant to hold that the Federal Constitution provides a remedy for state prisoners raising a free-standing claim of actual innocence on federal habeas corpus review,[40] and further, following *Herrera*[41] and *Schulp*,[42] as long as the state provides for the pardon of an actually innocent defendant, the United States Constitution does not prohibit leaving an actually innocent person in jail.[43] Conversely, the *Cole* court held that even though New York State provides for the pardon of an actually innocent defendant, the New York State Constitution prohibits the incarceration of a person who is actually innocent.[44]

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[37] N.Y. CONST. art. I, § 6 provides in pertinent part: ". . . No person shall be deprived of life, liberty or property without due process of law."

[38] *Cole, supra* note 1.

[39] U.S. CONST. amend. V states, *inter alia*: "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law . . ."; U.S. CONST. amend. VIII provides in pertinent part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."; U.S. CONST. amend. XIV declares: "No . . . State [shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[40] *Cole, supra* note 1 (citing Herrera v. Collins, 506 U.S. 390, 399-400 (1993)).

[41] 506 U.S. 390 (1993).

[42] 513 U.S. 298 (1995).

[43] *Cole, supra* note 1 (citing Royal v. Taylor, 188 F.3d 239, 243 (4th Cir. (1999); Sellers v. Ward, 135 F.3d 1333, 1338-89 (10th Cir. 1998); Lucas v. Johnson, 132 F.3d 1069, 1075-77 (5th Cir. 1998); Meadows v. Delo, 99 F.3d 280, 288 (8th Cir. 1996); Milone v. Camp, 22 F.3d 693, 705-06 (7th Cir. 1994)).

[44] *Cole, supra* note 1. The court analyzes how other jurisdictions deal with the issue of actual innocence and notes that most states hold that a claim of actual innocence, in and of itself, is not sufficient to vacate a conviction while

In *Herrera v. Collins*,[45] the United States Court of Appeals for the Fifth Circuit affirmed the denial of an inmate's habeas corpus petition arguing that he was actually innocent of the crime of murder.[46] Upon grant of *certiorari*, the United States Supreme Court affirmed the denial, holding that the defendant's claim of actual innocence based on newly discovered evidence was not a ground for federal habeas corpus relief absent an independent constitutional violation.[47] The defendant was afforded a fair trial and was found guilty of capital murder beyond a reasonable doubt.[48] The Court reasoned that the State's refusal to hear the defendant's newly discovered evidence eight years after his conviction "did not transgress any principle of fundamental fairness."[49]

Leonel Torres Herrera was convicted of the capital murder of a police officer in September 1991 and sentenced to death in January 1982.[50] In July of that same year, Herrera pleaded guilty to, but did not receive the death sentence for, the murder of another officer who was shot and killed that same evening.[51] The defendant unsuccessfully appealed his conviction and was subsequently denied his first petition for habeas corpus relief.[52] Herrera then filed a second habeas corpus petition, ten years after his conviction, claiming that he was actually innocent.[53] He presented newly discovered evidence that consisted of affidavits of his nephew and of a mutual schoolmate of the Herrera brothers, alleging that it was Herrera's now deceased brother who shot the two officers. Herrera also made a

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only a minority of states hold the incarceration of an actually innocent defendant unconstitutional; *see* nn. 97, 98 *infra*.

[45] 506 U.S. 390 (1993).

[46] *Id.* at 393.

[47] *Id.* at 393, 400.

[48] *Id.* at 399-400.

[49] *Id.* at 411.

[50] *Herrera*, 506 U.S. at 393.

[51] *Id.*

[52] *Id.*

[53] *Id.*

Brady claim, alleging the police were aware of this evidence and withheld it.[54]

The defendant claimed that because he was innocent, his execution would violate the Eighth[55] and Fourteenth[56] Amendments to the United States Constitution.[57] Although the Supreme Court of the United States never explicitly ruled on this issue, the Court indicated that Herrera's claim failed to fall within the Court's Eighth Amendment jurisprudence,[58] and that the refusal of Texas to consider newly discovered evidence eight years later, did not violate procedural due process.[59]

The majority in *Herrera* reiterated that a claim of actual innocence is not itself a constitutional claim, but instead a gateway that a defendant must pass through to have the merits of an otherwise barred constitutional claim considered on collateral review.[60] This has been dubbed what is known as the "fundamental miscarriage of justice exception," which is grounded in the equitable discretion of habeas courts.[61] The Court reasoned, however, that Herrera was not entitled to habeas relief because he was not claiming a procedural error, but that new evidence demonstrated that he should not have been convicted.[62] This does not entitle him to the exception because it is available, "only where the prisoner *supplements* his constitutional claim with a colorable showing of actual

[54] *Id.* at 397.

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

[56] U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: "No . . . State [shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[57] *Herrera*, 506 U.S. at 398.

[58] *Id.*

[59] *Id.* at 411.

[60] *Id.* at 404.

[61] *Id.* (citing Sawyer v. Whitley, 505 U.S. 333 (1992); McCleskey v. Zant, 499 U.S. 467, 491 (1991)).

[62] *Herrera*, 506 U.S. at 404.

innocence."[63] Stating further, "[w]e have never held that [the fundamental miscarriage of justice exception] extends to a freestanding claim of actual innocence."[64]

But the Court also assumed, "for the sake of argument a truly persuasive demonstration of 'actual innocence' proffered after trial would render the execution of a defendant unconstitutional . . . if there were no state avenue open to process such a claim."[65] Accordingly, the majority concluded that since Herrera could file for clemency under Texas' Clemency Law, the Court disposed of Herrera's free-standing claim of actual innocence, finding that it fell far short of the "extraordinarily high" threshold showing that would be required for such an assumed right.[66]

Justice Blackmun's dissenting opinion denounced the majority's position and stated that a condemned prisoner had a constitutional right to proffer new evidence which would prove his innocence,[67] and the concurring opinions agreed with that aspect of the dissent's argument.[68] However, Justice Scalia stated there is no basis for a constitutional right which allows for judicial consideration of evidence of actual innocence after a conviction.[69] Three years after *Herrera*'s unfortunate decision, it remained, "[u]nder the federal system, [that] a claim of innocence by a State prisoner is not, in and of itself, sufficient ground for granting of habeas corpus relief, but permits the federal courts to overlook procedural grounds barring other Federal Constitutional claims."[70]

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[63] *Id.* (citing Kuhlmann v. Wilson, 477 U.S. 436, 453 (1986)).

[64] *Id.* at 404-05.

[65] *Id.* at 417.

[66] *Id.* at 417-19.

[67] *Herrera*, 506 U.S. at 430-35 (Blackmun, J., dissenting).

[68] *Id.* at 875. Justice O'Connor declared, "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution." *Id.* at 870 (O'Connor, J., concurring); Justice White similarly assumed that the demonstration of " 'actual innocence' made after the trial would render unconstitutional the execution of petitioner in this case." *Id.* (White, J., concurring).

[69] *Id.* at 874-75 (Scalia, J., concurring).

[70] *Cole, supra note* 1 (citing Schulp v. Delo, 513 U.S. 298 (1995)).

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In another United States Supreme Court case, *Schulp v. Delo*,[71] the United States Court of Appeals for the Eighth Circuit affirmed the denial of petitioner inmate's second request for federal habeas corpus relief.[72] Upon *certiorari*, the United States Supreme Court vacated the judgment of the appellate court and held that the court below applied the wrong standard in evaluating the defendant's claim of actual innocence.[73] The Court reasoned that the district court should have focused on the likely behavior of the trier of fact, and should have assessed the probative force of the defendant's new evidence in connection with the evidence of guilt adduced at trial.[74] The case was remanded to the circuit court with instructions to remand to the district court for further proceedings.[75]

Lloyd Schulp was a prisoner convicted of stabbing a fellow inmate to death.[76] At Schulp's trial in December 1985, the prosecution's evidence consisted solely of the eyewitness testimony of two corrections officers, without any physical evidence connecting Schulp to the killing.[77] Schulp pleaded not guilty and his defense introduced a videotape from a camera in the prison's dining room that showed he could not have been at the scene of the crime at the time that the murder took place, and that seconds after the stabbing, another inmate ran into the dining room dripping with blood.[78] Nevertheless, the jury returned a verdict of guilty and sentenced him to death.[79]

After Schulp unsuccessfully appealed, exhausted his state collateral remedies, and was denied a federal writ of habeas corpus on his first petition, he then filed a second federal habeas petition challenging his conviction and sentence.[80] Similar to

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[71] 513 U.S. 298 (1995).
[72] *Id.* at 301.
[73] *Id.* at 324.
[74] *Id.* at 331-32.
[75] *Id.* at 332.
[76] *Schulp*, 513 U.S. at 301-02.
[77] *Id.* at 302.
[78] *Id.* at 303.
[79] *Id.* at 305.
[80] *Id.* at 306.

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Herrera, Schulp sought to introduce numerous affidavits attesting to his actual innocence of the murder, and also argued that his execution would violate the Eighth and Fourteenth Amendments to the United States Constitution.[81] In addition, however, Schulp also raised the issue of ineffective counsel for failing to interview alibi witnesses, and to discover the State's failure to disclose exculpatory evidence.[82]

The Supreme Court distinguished Schulp's claim of innocence from Herrera's, stating that whereas Herrera had claimed that his assertion of innocence, in and of itself, constituted a substantive ground for habeas relief, Schulp's constitutional claims were not based on his innocence, but rather on procedural claims of ineffectiveness of counsel and withholding of evidence by the prosecution.[83] His claim of innocence, therefore, was only used as a vehicle to get through the "gateway" which would allow review of his other constitutional claims.[84]

In *Schulp*, the Supreme Court considered the question of what burden of proof should be imposed upon a petitioner alleging a miscarriage of justice exception, including a claim of actual innocence.[85] The Supreme Court analyzed the miscarriage of justice exception as applied to a petitioner who claimed he was "actually innocent of the death penalty" and abandoned the holding that such a habeas petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty."[86] Rather, the Court held that when the claimed

[81] *Schulp*, 513 U.S. at 307.

[82] *Id.* at 307.

[83] *Id.* at 314.

[84] *Id.* at 314-15 (citing *Herrera*, 506 U.S. at 404 (1993)).

[85] *Id.* at 322. (citing Murray v. Carrier, 477 U.S. 478, 485 (1986) "[p]etitioner must show that the constitutional error 'probably' resulted in the conviction of one who was actually innocent; Kuhlman v. Wilson, 477 U.S. 436, 454 n.17 (1986) ("establishing by a 'fair probability,' [that] 'the trier of facts would have entertained a reasonable doubt of his guilt.' ")

[86] *Schulp*, 513 U.S. at 323 (quoting Sawyer v. Whitley, 505 U.S. 333, 336 (1992)).

injustice is that constitutional error has resulted in the conviction of one who is actually innocent, the proper standard is that petitioner must show that it was more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.[87] In order to make such a showing, the burden is placed on the petitioner to support his alleged constitutional violations with reliable new evidence that was not presented at trial, including evidence that may be exculpatory scientific, critical physical evidence, or new eyewitness affidavits.[88] The court of appeals and the district court utilized an improper standard, and accordingly, Schulp was granted further proceedings on remand.[89]

It remains, however, that where the court cannot find that it is more likely than not that no reasonable juror would have convicted a defendant in light of the new evidence presented, and where the State provides a clemency process, there is no relief for a claim of actual innocence under the United States Constitution.[90]

It would be appropriate to note however, that since *Herrera* and *Schulp* were decided, Congress adopted the Federal Death Penalty Act of 1994,[91] which states that a defendant who has been found guilty of the proscribed crime shall be sentenced to death if, after consideration of the factors set forth in the statute, it is determined that imposition of a death sentence is

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[87] *Id.* at 324 (justifying "the fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case," and concluding, "that [the] Carrier [standard], rather than [the] Sawyer [standard], properly strikes that balance when the claimed injustice is that constitutional error has resulted in the conviction of one who is actually innocent of the crime.").

[88] *Id.* at 324.

[89] *Id.* at 332.

[90] *Cole, supra note* 1 (citing *Royal*, 188 F.3d at 243; *Sellers*, 135 F.3d at 1338-[3]9; *Lucas*, 132 F.3d at 1075-77; *Meadows*, 99 F.3d at 288; *Milone*, 22 F.3d at 705-06).

[91] Pub. L. No. 103-322, Title VI, §§ 60001-60026, 108 Stat. 1959 (Sept. 13, 1994) (codified at 18 U.S.C. §§ 3591-3598 (2000)). Also dubbed, "The Death Penalty Statutes."

justified.[92] In July 2002, the Federal Death Penalty Act was held unconstitutional by the United States District Court for the Southern District of New York in *United States v. Quinones*,[93] and subsequently reversed on appeal by the United States Court of Appeals for the Second Circuit.[94] In the former opinion, the United States District Court reasoned that:

> [T]he best available evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed and that, on the other hand, convincing proof of their innocence often does not emerge until long after their convictions. It is therefore fully foreseeable that in enforcing the death penalty a meaningful number of innocent people will be executed who otherwise would eventually be able to prove their innocence. It follows that implementation of the Federal Death Penalty Act not only deprives innocent people of a significant opportunity to prove their innocence, and thereby violates procedural due process, but also creates an undue risk of executing innocent people, and thereby violates substantive due process.[95]

The court of appeals reversed the lower court's decision refusing to overturn the holding of *Herrera*.[96] The court rejected the district court's reasoning that "evolving standards" mandate consideration of a defendant's liberty interest under the Due Process Clause of the Fifth Amendment,[97] and maintains, via

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[92] 18 U.S.C. § 3591.

[93] 205 F. Supp. 2d 256 (S.D.N.Y.).

[94] United States v. Quinones, 313 F.3d 49 (2d Cir. 2002).

[95] *Quinones*, 205 F. Supp. 2d at 257.

[96] *Quinones*, 313 F.3d at 52 (reiterating, "there is no fundamental right to a continued opportunity for exoneration throughout the course of one's natural life.").

[97] U.S. Const. amend. V.

precedent[98] and legislative intent,[99] that the "continued opportunity to exonerate oneself throughout the natural course of one's life is not a right 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[100]

Given that the court of appeals expressly denied holding that the death penalty is unconstitutional regardless of new, "evolving" evidence, it remains that a claim of actual innocence is still not grounds for relief for an incarcerated individual not sentenced to death under the United States Constitution. As stated in *People v. Cole*, because New York State provides for the pardon of an actually innocent defendant,[101] the incarceration

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[98] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 238 (1997); Rodriguez de Quijas v. Shearson Am. Express, Inc., 490 U.S. 477 (1989) (reiterating the obligation of the Court of Appeals to follow controlling case law); Gregg v. Georgia, 428 U.S. 153, 207 (1976) (holding that capital punishment does not constitute a *per se* violation of the Eighth Amendment).

[99] *Quinones*, 313 F.3d at 64-65 (noting the deliberative legislative action by Congress in enacting the FDPA).

[100] *Id.* at 62 (quoting Rochin v. California, 342 U.S. 165 (1952). *See also* U.S. v. Matthews, No. 00-CR-269, 2002 U.S. Dist. LEXIS 25664 (N.D.N.Y. Dec. 31, 2002) (denying defendant's motion to declare the "Death Penalty Statutes" unconstitutional); U.S. v. Fell, 217 F. Supp. 2d 469, 491 (D. Vt. 2002) (refusing to address the constitutionality of the Federal Death Penalty Act even though the issue of deprivation of due process raised by the defendant, "may have legal merit.").

[101] *Cole, supra* note 1 (citing N.Y. EXEC. LAW § 19 (McKinney 2002), which states:

> Upon motion duly made therefore, the judgment of conviction must be set aside and the indictment, information or complaint dismissed by the court in which the defendant was convicted, in a case where the defendant shall receive a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which he was convicted and further stating that such finding of innocence is based upon evidence discovered after the judgment of conviction was rendered and after the time within which to make a motion for a new trial on newly discovered evidence had expired. Such setting aside of a judgment of conviction and dismissal of an indictment, information or complaint against a defendant shall place the defendant in the same position as if the indictment, information or complaint had been dismissed at the conclusion of the trial by the court

of an actual innocent person in New York would not violate the Federal Constitution.[102]

Similarly, many states have followed the *Herrera-Schulp* dichotomy that a free-standing claim of actual innocence, in and of itself, is not sufficient to provide for relief after conviction; however, a showing of actual innocence will overcome procedural bars to claims other than actual innocence.[103] Conversely, a few states have held that the incarceration of an actually innocent person is either unconstitutional or is, in and of itself, sufficient newly discovered evidence permitting the court to vacate a judgment of conviction.[104]

The *Cole* court, however, did not find any New York case answering the question of whether New York State's Constitution prohibits the incarceration of an actually innocent person.[105] Alternatively, the *Cole* court agreed with the reasoning and holding stated by the Supreme Court of Illinois in *People v. Washington*,[106] and subsequently held that the New York State Constitution also prohibits the incarceration of a person who is actually innocent.[107]

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because of the failure to establish the defendant's guilty beyond a reasonable doubt); *see also* People v. Chichester, 162 Misc. 2d 658, 659 (County Ct., Suffolk County 1994)).

[102] *Cole, supra* note 1.

[103] *Cole, supra* note 1 (citing State v. Byrd, 710 N.E.2d 1043, 1053-54 (Ohio Ct. App. 2001); State v. Ratliff, 71 S.W.3d 291, 296-98 (Tenn. Crim. App. 2001); State v. Placzkiewicz, 36 P.3d 934, 936 (Mont. 2001); State v. Norsworthy, 71 S.W.3d 610 (Mont. 2002); Pellegrini v. State, 34 P.3d 519, 537 (Nev. 2001); Heffermam v. State, 2002 WL 1303388 (Ark.)).

[104] *Cole, supra* note 1 (citing People v. Washington, 665 N.E.2d 1330 (Ill. 1996); Miller v. Commissioner of Correction, 700 A.2d 1108 (Conn. 1997); *In re* Clark, 855 P.2d 729 (Cal. 1993); *Ex parte* Elizondo, 947 S.W.2d 202 (Tex. Crim. App. 1997)).

[105] *Cole, supra* note 1. The court did find a case whereby the civil trial court "seems to have assumed that it is illegal to incarcerate an actually innocent person." *Id.* (holding that defendant's petition to permit DNA testing of evidence was granted reasoning that, "to deny petitioner the opportunity to prove his innocence with such [DNA] evidence simply to ensure the finality of convictions is untenable.").

[106] 665 N.E.2d 1330 (Ill. 1996).

[107] *Cole, supra* note 1.

In *Washington*, the defendant was convicted of murder, and at trial, the State's evidence consisted of two eyewitnesses who were in a parked car near the scene of the murder.[108] The two witnesses testified that they had been approached by Washington and then watched as he approached and shot the victim after the victim had just left his home.[109] Washington presented the testimony of a store employee, an acquaintance, and his mother, who all testified that he was at a grocery store when the murder occurred.[110] Nevertheless, the jury convicted Washington, and he was sentenced to twenty-five years imprisonment. The Illinois Appellate Court affirmed Washington's conviction.[111]

Washington collaterally attacked his conviction by filing a petition under Illinois' Post-Conviction Hearing Act.[112] He alleged, *inter alia*, ineffective trial counsel for failure to properly investigate evidence that someone else committed the murder.[113] Washington's claim was supported by an affidavit of Jacqueline Martin.[114] The trial judge held an *in camera* hearing, and the substance of Martin's testimony constituted newly discovered evidence, which became the basis for the claim on appeal.[115]

Martin testified that she accompanied her boyfriend and another individual, who were seeking to avenge an earlier beating of her boyfriend's brother, on the date of the incident.[116] Martin remained in a parked car in an alley whereby shortly after her boyfriend and the other individual left the car, she heard two

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[108] *Washington*, 665 N.E.2d at 1331.

[109] *Id.*

[110] *Id.*

[111] *See* People v. Washington, 472 N.E.2d 1244 (Ill. App. Ct. 1984).

[112] 725 Ill. Comp. Stat. 5/122 1. Illinois' PCHA provides that "[a]ny person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or the State of Illinois or both may institute a proceeding under this Article." *Id.*

[113] *Washington*, 665 N.E.2d at 1331.

[114] *Id.*

[115] *Id.*

[116] *Id.*

gunshots.[117] When her boyfriend returned to the car, Martin heard him say, "[i]t was the wrong guy."[118] After being threatened to death if she did not remain silent, Martin fled to Mississippi, where she remained for eight years.[119]

Based on Martin's testimony, the trial court permitted Washington to amend his petition to include an additional claim based on newly discovered evidence.[120] The trial court then denied Washington's original grounds for relief, but granted a new trial based on Washington's newly discovered evidence.[121] The trial court stated that if Martin had testified at the first trial and had the jury believed her, it would have "had some significant impact" on the jury.[122] The appellate court affirmed the trial court's grant of relief based on the claim of newly discovered evidence without addressing Washington's original claims.[123] The Supreme Court of Illinois granted the State's petition for leave to appeal.[124]

Because this newly discovered evidence did not implicate any State action, nor was Washington denied "ad judicatory" due process, the issue the Illinois Supreme Court decided was whether, under Illinois State Constitution, a convicted person

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[117] *Id.*

[118] *Washington*, 665 N.E.2d at 1331.

[119] *Id.* at 1332.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *See* People v. Washington, 628 N.E.2d 558, 561-62 (Ill. App. Ct. 1993).

[124] *Washington*, 665 N.E.2d at 1332. Washington filed a cross-appeal contesting the trial court's denial of his first nine claims. *Id.* The State moved to strike the cross-appeal under the fugitive dismissal doctrine, *see* 725 Ill. Comp. Stat. 5/115 4.1, because Washington failed to appear at a bond revocation hearing for an unrelated offense that took place after his release from prison. *Id. See also* People v. Partee, 530 N.E.2d 460, 464-65 (Ill. 1988) (concluding that an appellate court is not required to hear a fugitive defendant's appeal in all instances and retains discretionary power to refuse to hear the appeal unless and until the fugitive returns to the jurisdiction). The Supreme Court granted the State's motion and dismissed Washington's cross-appeal. *Washington*, 665 N.E.2d at 1332.

should be afforded additional process when newly discovered evidence shows a defendant is actually innocent.[125]

Following Justice Blackmun's dissent in *Herrera*, the *Washington* Court held that to ignore a claim of actual innocence would be "fundamentally unfair" as a matter of procedural due process.[126] Substantively, the *Washington* Court, citing the dissent in *Herrera*, agreed that, "imprisonment of the innocent would also be so conscience shocking as to trigger operation of substantive due process."[127] The *Washington* Court also dictated that, unlike the apparent conflict that the *Herrera* majority faced in assuming, "for the sake of argument,"[128] that a truly persuasive demonstration of actual innocence would make a conviction unconstitutional, the Court had "no difficulty seeing why substantive due process as a matter of Illinois Constitutional law offers the grounds for such a conclusion."[129]

In that accord, the Illinois Supreme Court said, and the Supreme Court of the State of New York agreed:

> We believe that no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence. *See generally* Herrera, 506 U.S. at 417; *see also Herrera*, 506 U.S. at 419 (O'Connor, J., concurring, joined by Kennedy, J.) (acknowledging as a 'fundamental legal principle that executing the innocent is inconsistent with the Constitution'). Given the limited avenues that our legislature has so far seen fit to provide for raising free-standing claims of innocence, that idea-but for the possibility of executive clemency-would go ignored in cases like this one. We therefore hold as

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[125] *Washington*, 665 N.E.2d at 1336.

[126] *Id.* (citing People v. McCauley, 645 N.E.2d 923 (Ill. 1994); and *Herrera*, 506 U.S. at 435, 436-37 n.5, (Blackmun, J., dissenting, joined by Stevens and Souter, JJ.); Medina v. California, 505 U.S. 437 (1992)).

[127] *Id.* at 1336 (citing *Herrera*, 506 U.S. at 436-7 (Blackmun, J., dissenting, joined by Stevens and Souter, JJ.)).

[128] *See Herrera*, 506 U.S. at 392.

[129] *Washington*, 665 N.E.2d at 1336 (citing *Herrera*, 506 U.S. at 417).

> a matter of Illinois constitutional jurisprudence that a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process. That holding aligns Illinois with other jurisdictions likewise recognizing, primarily as a matter of state habeas corpus jurisprudence, a basis to raise such claims under the rubric of due process.[130]

Accordingly, the *Cole* court held that "the New York State Constitution also prohibits the incarceration of a person who is actually innocent."[131] As such, the court allowed Cole to submit any evidence of innocence, including those that otherwise would not have met the statutory requirements as newly discovered evidence.[132]

The question that remains, however, is what degree of proof is required for a showing of actual innocence. As the court indicated in *Cole*, "there is no general agreement among the courts as to the proper standard of proof. There is also no agreement among the concurring or dissenting United States Supreme Court Justices in Herrera."[133] The court intends to answer this question upon the conclusion of a hearing by allowing both sides the opportunity to argue the degree of proof required. The hearing commenced on December 9, 2002, at the Supreme Courthouse in Kings County, New York, and has been

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[130] *Cole, supra* note 1 (quoting *Washington*, 665 N.E.2d at 1337). The dissent in *Washington* by Justice Miller, joined by Justice Bilandic, invoking People v Tisler, 469 N.E.2d 147 (Ill. 1984), would apply *Herrera* because the Illinois and federal provisions are identical and because there "is nothing in the debates of the 1970 state constitutional convention that suggests that the drafters intended the Illinois provision to mean something different from its federal counterpart." *Washington*, 665 N.E.2d at 1342.

[131] *Cole, supra* note 1.

[132] *Cole, supra* note 1. This allowance is distinguishable from *Washington*, whereby the court added after its holding that such new evidence must be new, material and not cumulative, and of such conclusive character that it would probably change the result in a new trial. *See Washington*, 665 N.E.2d at 1337.

[133] *Cole, supra* note 1.

concluded. However, as of the date of this writing,[134] Justice Leventhal has not yet rendered his decision setting forth the results of the hearing.

In conclusion, the United States Constitution does not prohibit incarcerating an innocent person in a non-capital case so long as the state provides for a pardon based upon innocence.[135] Following *Herrera*, a claim of actual innocence based on newly discovered evidence, in and of itself, is not violative of the Eighth and Fourteenth Amendments. Although it has been assumed, *arguendo*, that the execution of an individual who had made a persuasive claim of actual innocence would violate the Constitution and therefore warrant federal habeas relief if no state pardon proceedings were available, the United States Supreme Court has refused to hold that such a claim exists in every case.[136] Further, as a result of *Schulp*, where an individual asserts an actual innocence claim as a procedural gateway to assert an otherwise defaulted claim, the petitioner must show that it was more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt, in light of the newly discovered evidence.[137] After *People v. Cole*, however, New York State law, agreeing with Illinois jurisprudence in *People v. Washington*, now declares that the New York State Constitution prohibits the incarceration of a person who is actually innocent. Yet to be decided is the degree of proof required for a showing of actual innocence.[138] As it currently stands, as a matter of New York State law, a defendant presenting a claim of actual innocence is free to submit any evidence of innocence, including such newly discovered evidence that would be otherwise barred by the statutory requirements.[139]

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[134] Today's date being March 20, 2003.

[135] *Cole, supra* note 1.

[136] *Herrera*, 506 U.S. at 417.

[137] *Cole, supra* note 1.

[138] As of March 20, 2003, Justice Leventhal has not yet rendered his decision on this issue.

[139] *Cole, supra* note 1.