EIGHTH & FOURTEENTH AMENDMENTS — DEATH PENALTY — A CLAIM OF NEWLY DISCOVERED EVIDENCE OF "ACTUAL INNOCENCE" DOES NOT ENTITLE DEATH PENALTY CLAIMANT TO FEDERAL *HABEAS CORPUS* RELIEF — *Herrera v. Collins*, 113 S. Ct. 853 (1993).

Stephanie O. Joy

I. INTRODUCTION

The federal Writ of *Habeas Corpus*,[1] as guaranteed by the United States Constitution,[2] is an independent proceeding utilized to determine whether a prisoner is being unconstitutionally deprived of his or her freedom.[3] Thus, if a prisoner is being held in violation of the Eighth[4] or Fourteenth Amendments[5] of the United States Constitution, the prisoner is generally entitled to federal *habeas* relief.[6]

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[1]*Habeas corpus*, coined "the most celebrated writ in the English law," is intended to assure "deliverance from illegal confinement." BLACK'S LAW DICTIONARY 709-10 (6th ed. 1990). As such, it is not a suitable proceeding for appeal-like review of discretionary decisions or factual findings of a lower court. *Id.* (citing Sheriff, Clark County v. Hatch, 691 P.2d 449, 450 (Nev. 1984) (holding that because district courts made no finding of illegal detention, writs of *habeas corpus* were improper)).

[2]U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). *See generally* Zecharaiah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143 (1952) (maintaining the supreme importance of *habeas corpus* to human constitutional rights).

[3]BLACK'S LAW DICTIONARY 709 (6th ed. 1990).

[4]The Eighth Amendment states, in pertinent part, that "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishment inflicted.*" U.S. CONST. amend. VIII (emphasis added).

[5]The Fourteenth Amendment's Due Process Clause dictates that "nor shall any state deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. XIV.

[6]For a wide variety of commentary pertaining to federal *habeas corpus*, its history and its future, see generally Yale L. Rosenberg, *Constricting Federal Habeas Corpus: From Great Writ to Exceptional Remedy*, 12 HASTINGS CONST. L.Q. 597 (1985); Barry Friedman, *Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990); Laura Gaston Dooley, *Equal Protection and the Procedural Bar Doctrine in*

Recently, in *Herrera v. Collins*,[7] the Supreme Court of the United States addressed the controversial question of whether a death sentenced prisoner's claim of actual innocence is entitled to *habeas* relief pursuant to the Eighth Amendment's Cruel and Unusual Punishment Clause or the Fourteenth Amendment's Due Process Clause.[8] The Court ultimately resolved that a claim of actual innocence was not a constitutional claim, implicating neither the Eighth nor Fourteenth Amendment and that, consequently, such a claim did not entitle a petitioner to federal relief.[9]

Federal Habeas Corpus, 59 FORDHAM L. REV. 737 (1991); Thomas H. Boyd, *Erosion of Federal Protection of the Constitutional Rights of State Prisoners:* Offet v. Solem, 12 HAMLINE L. REV. 19 (1988); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985); Maria L. Marcus, *Federal Habeas Corpus after State Court Default: Definition of Cause and Prejudice*, 53 FORDHAM L. REV. 663 (1985); John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679 (1990); Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1 (1991); Henry B. Robertson, *Needle in the Haystack: Towards a New State Postconviction Remedy*, 41 DEPAUL L. REV. 333 (1992); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. L. REV. 100 (1985); Hon. Patrick E. Higginbotham, *Reflections on Reform of § 2254 Habeas Petitions*, 18 HOFSTRA L. REV. 1005 (1990); George Wesley Sherrell, *Successive Chances for Life:* Kuhlmann v. Wilson, *Federal Habeas Corpus, and the Capital Petitioner*, 64 N.Y.U. L. REV. 455 (1989); Paul J. Komives et al., *Survey of Recent Sixth Circuit Court of Appeals Cases Regarding Criminal Procedure*, 1987 DET. COLL. L. REV. 374 (1987); Charles S. Doskow, *Termination of Parental Rights: Habeas Corpus May Not Be Invoked*, 7 J. JUV. L. 7 (1983); Ira P. Robbins, *Whither (or Wither) Habeas Corpus?: Observations on the Supreme Court's 1985 Term*, 111 F.R.D. 265 (1986).

[7]113 S. Ct. 853 (1993).

[8]*Id.* at 859.

[9]*Id.* at 862 ("[T]his body of our *habeas* jurisprudence makes clear that a claim of 'actual innocence' is not itself a constitutional claim . . ."); *id.* at 863 (reasoning that the Eighth Amendment is not implicated because Herrera challenged the validity of his conviction and Herrera's claim concerned his guilt, not his punishment); *id.* at 866 (stating that the Fourteenth Amendment due process guarantee was not violated because "we cannot say that Texas's refusal to entertain petitioner's . . . evidence . . . transgresses a principle of fundamental fairness 'rooted in the traditions and conscience of our people'").

II. STATEMENT OF THE CASE

A. FACTS

On September 29, 1981,[10] the body of police officer David Rucker of the Texas Department of Safety ("Rucker") was found on a highway in the Rio Grande Valley[11] with fatal gunshot wounds to the head.[12] At approximately the same time that Rucker's body was found, Enrique Hernandez ("Hernandez") and Los Fresnos police officer Enrique Carrisalez ("Carrisalez") observed a speeding vehicle traveling along the same highway as, and away from, the location of Rucker's body.[13] Carrisalez pursued the speeding vehicle, which subsequently pulled over to the side of the highway.[14] Carrisalez pulled up behind the vehicle and approached the automobile with flashlight in hand.[15] The driver of the speeding vehicle then opened his door, exchanged a few words with Carrisalez, and fired at least one bullet into Carrisalez's chest, mortally wounding the officer.[16]

B. PROCEDURAL HISTORY

A few days after the shooting, Leonel Torres Herrera ("Herrera") was arrested and charged with the capital murders of both Carrisalez and Rucker.[17] In January of 1982, a jury found Herrera guilty of the capital

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[10]Brief for Petitioner at 6, Herrera v. Collins, 954 F.2d 1029 (5th Cir. 1992) (No. 91-7328), *aff'd*, 113 S. Ct. 853 (1993).

[11]*Herrera*, 113 S. Ct. at 857. The location of the body was approximately six miles to the east of Los Fresnos and a few miles north of Brownsville, Texas. *Id.*

[12]*Id.*

[13]*Id.*

[14]*Id.*

[15]*Id.*

[16]*Id.* Police Officer Carrisalez died nine days later. *Id.*

[17]*Id.* Herrera asserted that the atmosphere surrounding the murders of the two police officers was highly prejudicial to his trial. Brief for Petitioner at 6-14, *Herrera* (No. 91-7328). In particular, Herrera noted certain facts including: (1) two police officers were killed; (2) the funerals were highly public; (3) a highly publicized and impressive manhunt was instituted to capture Herrera; (4) the "arrest [was] akin to a military operation"; (5) a police interrogation resulted in placing Herrera in a coma; (6) a substantial and inflamed

murder of Officer Carrisalez and sentenced the defendant to death.[18] Six months later, Herrera pled guilty to the related capital murder of Officer Rucker.[19]

During Herrera's trial for the capital murder of Carrisalez, positive identifications were made against Herrera by Hernandez and an earlier identification by Carrisalez was admitted.[20] Additionally, evidence

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community as well as law enforcement presence existed at the trial; (7) flags were at half-mast; (8) the convicting jury was comprised of colleagues and friends of the murdered officers; (9) tremendous press coverage surrounded the event; and (10) evidence pointed to a guilty party other than Herrera. *Id.* Herrera claimed that "these circumstances surrounding the original trial explain how such a trial could have produced a gross miscarriage of justice and demonstrate . . . just how important it is that the Constitution provides a remedy for the miscarriage when state law does not." *Id.*

Conceding that many of these circumstances were natural occurrences arising generally from capital murders, Herrera maintained that law enforcement activity aggravated such prejudicial elements and prevented the disclosure of police participation in the extensive drug trade that contributed to the deaths of the officers Rucker and Carrisalez. *Id.* For example, the police description of Herrera as "public enemy number one," the police institution of the largest manhunt in the history of the area, the beating of Herrera "into a coma[,] and [the leaving of Herrera] handcuffed in the floor of his cell to die" were all inflammatory and overly prejudicial events that created obstacles to a fair trial. *Id.* Herrera also indicated that the police "might have wished to target and silence a scapegoat." *Id.*

[18]Herrera v. Collins, 113 S. Ct. 853, 857 (1993).

[19]*Id.*

[20]*Id.* Hernandez identified Herrera as the person who had shot Carrisalez. *Id.* Herrera claimed, however, that such identification was unreliable. Brief for Petitioner at 22-23, *Herrera* (No. 91-7328). Herrera maintained that Hernandez was shown six photographs, one of which was Herrera. *Id.* Hernandez did not identify just which photograph depicted Herrera, but selected three of the six, indicating that it could have been one of the three but that he was not sure which one. *Id.* Two days later, Hernandez was shown a single photograph of Herrera, which he then identified as depicting the murderer. *Id.* Herrera emphasized that this photo was a mug shot with "Edinburg Police Department" printed upon it, and that it prejudicially suggested that the person in the photo was already in custody. *Id.* Subsequently, Hernandez identified Herrera in a line-up in which Herrera was the only suspect without a mustache. *Id.* Herrera emphasized the unreliability resulting from the peculiarities of this identification process, contending that the single most important factor leading to wrongful convictions in the United States is mistaken eyewitness identification. *Id.* (citations omitted).

Carrisalez, while in the hospital days before he died, made a similar declaration which was also admitted at trial, identifying Herrera as the gunman. *Herrera,* 113 S. Ct. at 857. Herrera challenged the reliability of this dying declaration, contending that: only the aforementioned mug shot was shown to Carrisalez; Carrisalez merely nodded and spoke no words; Carrisalez was on a respirator; Carrisalez had undergone extensive surgery; and Carrisalez had been narcotized earlier with morphine and valium. Brief for Petitioner at 22-

connected the speeding vehicle from which the gunman shot Carrisalez to Herrera.[21] This evidence included Herrera's Social Security card, which was found at the scene of the murder of Officer Rucker.[22] Moreover, blood splatters found on the vehicle involved in the murders and on Herrera's pants and wallet, were the same type as Rucker's blood — significantly, the blood samples were not Herrera's blood type.[23] One of the strongest pieces of evidence was a letter, handwritten by Herrera, which clearly implied that Herrera had killed Rucker.[24] On the basis of the foregoing evidence,

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23, *Herrera* (No. 91-7328) (citation omitted).

[21]*Herrera*, 113 S. Ct. at 857. The speeding vehicle was registered to Herrera's live-in girlfriend, as discovered through a license plate check. *Id.* Herrera was known to operate the vehicle and, at the time of his arrest, a set of keys to the identified vehicle was found in Herrera's pants pocket. *Id.* In addition, Hernandez identified the vehicle as that from which the gunman emerged upon firing the bullet into Carrisalez's chest. *Id.* Herrera, however, explained that his brother, Raul Sr., had a set of keys to this car and often drove it. Brief for Petitioner at 24 n.37, *Herrera* (No. 91-7328).

[22]*Herrera*, 113 S. Ct. at 857. However, Herrera explained that he always left his Social Security card in the car and when his brother, Raul Sr., took the car, Herrera's social security card remained in the car; thus, argued Herrera, the location of the Social Security card did not evince the presence of Herrera at the scene of the murder. Brief for Petitioner at 24 n.37, *Herrera* (No. 91-7328).

[23]Herrera v. Collins, 113 S. Ct. 853, 857 (1993). Herrera, however, emphasized the insignificance of this evidence in that the blood type, being type A, was not only the blood type of Rucker, but also that of 42% of the entire population. Brief for Petitioner at 22 n.34, *Herrera* (No. 91-7328) (citation omitted). Strands of Rucker's hair were also found in the vehicle. *Herrera*, 113 S. Ct. at 857.

[24]*Herrera*, 113 S. Ct. at 857-58 n.1. The letter stated in part:

> I am terribly sorry for those I have brought grief to their lives . . . . What I did was for a cause and purpose . . . .
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> 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 . . . .
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> What happened to Rucker was for a certain reason . . . . He was in my business, and he violated some of its laws and suffered the penalty . . . .
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> The other officer that became part of our lives, me and Rucker's, . . . that night had not to do in this [sic]. He was out to do what he had to do, protect, but that's life . . . .
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> . . . .
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> I have tapes and pictures to prove what I have said . . . . I will present myself if

Herrera was convicted of the murder of Officer Carrisalez.[25]

On appeal, the Texas Court of Criminal Appeals affirmed Herrera's conviction.[26] Herrera then twice unsuccessfully attempted to obtain relief by writ of certiorari to the Supreme Court of the United States, as well as by both a state and federal *habeas corpus* writ.[27]

Herrera then returned to state court and filed a second state *habeas* petition, this time making a claim of "actual innocence," which was based

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> I have tapes and pictures to prove what I have said . . . . I will present myself if this is read word for word over the media, I will turn myself in . . . .

Id. Herrera emphasized, however, that although this letter discussed the deaths of the officers, it was not a confession. Brief for Petitioner at 24 n.35, *Herrera* (No. 91-7328). Rather, Herrera reasoned that the letter was "compatible with innocence when one realizes that the speaker was mentally unbalanced . . . ." *Id.*

[25]*Herrera*, 113 S. Ct. at 857.

[26]*Id.* at 858 (citing Herrera v. State, 682 S.W.2d 313 (1984)). On appeal, Herrera argued that the identifications of both Hernandez and Carrisalez were unreliable and improperly admitted. *Id.* *See also supra* note 20. The Court of Criminal Appeals of Texas held that the trial court which convicted Herrera properly allowed in-court identification of Herrera by the witness, Hernandez, who had previously identified the defendant from a single photo. *Herrera*, 682 S.W.2d at 317; *see supra* note 20. The court found the pretrial identification procedure not unduly suggestive when Carrisalez was shown only one photo of Herrera and identified Herrera from such photo. *Herrera*, 682 S.W.2d at 319. Accordingly, Carrisalez's identification of Herrera from a photo under the dying declaration was permitted as an exception to the hearsay rule. *Id.* at 319-20.

The court further held that Herrera's statement made in the hospital, in which he threatened to kill the police upon his discharge, was properly admitted in the sentencing phase on the issue of the future dangerousness of Herrera. *Id.* at 320-21. Moreover, testimony from a journalist who claimed to have been assaulted by Herrera was also held by the court to be properly admitted during the sentencing phase. *Id.* at 321. Finally, the court upheld the trial court's decision to permit testimony concerning an illegal sawed-off shotgun that Herrera had used during the commission of the crimes. *Id.* at 321-22. The court of appeals reasoned that even if admitting the weapon was improper, its admission was harmless error beyond a reasonable doubt. *Id.*

[27]*Herrera*, 113 S. Ct. at 858. The Supreme Court denied Herrera's first request for certiorari. *Id.* (citing Herrera v. Collins, 471 U.S. 1131 (1985)). Herrera then applied for state *habeas corpus* relief, and this application was similarly denied. *Id.* (citing *Ex parte* Herrera, No. 12,848-02 (Tex. Crim. App., Aug. 2, 1985)). Next, Herrera filed his first federal *habeas corpus* petition to challenge anew the identifications that had been made by Hernandez and Carrisalez and offered against him at trial. *Id.* This petition was denied, *id.* (citing Herrera v. Collins, 904 F.2d 944 (5th Cir. (1990)), as was the subsequent writ of certiorari to the Supreme Court of the United States. *Id.* (citing Herrera v. Collins, 498 U.S. 925 (1990)).

on newly discovered evidence consisting of two affidavits.[28] Both affidavits asserted that Herrera's brother, Raul Sr., had murdered both Rucker and Carrisalez.[29] The State court again denied the petitioner's application for *habeas* relief.[30] This decision was affirmed by the Texas Court of Criminal Appeals,[31] and certiorari was again denied by the Supreme Court of the United States.[32]

In February of 1992, Herrera lodged his second *habeas* petition in federal court.[33] Proffering additional affidavits, Herrera again claimed that he was "actually innocent" of both murders and that, therefore, his execution would violate both the Eighth and Fourteenth Amendments.[34] Although the

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[28]*Id.* One of the supporting affidavits was of Hector Villarreal ("Villarreal"), the attorney for Raul Herrera, Sr. ("Raul Sr."), Herrera's brother. *Id.* The other affidavit supporting Herrera's claim of actual innocence was of Juan Franco Palacious ("Palacious"), a former cellmate of Raul Sr. *Id.*

[29]*Id.* Villarreal stated that Raul Sr. had told him that he, Raul Sr., had shot Rucker during an argument concerning their mutual involvement in an illegal drug trade. Brief for Petitioner at 25, *Herrera* (No. 91-7328) (citation omitted). Villareal further contended that Raul Sr. had shot Carrisalez while he, Raul Sr., was stopped during flight from the scene of Rucker's murder. *Id.* Additionally, Villarreal stated that Raul Sr. confided that he had failed to admit to the murders prior to Herrera's conviction because he believed Herrera would be acquitted. *Id.*

Raul Sr. had previously been murdered in 1984. Herrera v. Collins, 113 S. Ct. 853, 858 (1993). Villarreal's affidavit stated that Raul Sr. confided that, while sentenced to death for an unrelated attempted murder conviction, he began to blackmail the Sheriff of Hildago County, Brigido Marmolejo, who was involved in the same drug trafficking business. *Id.* (citation omitted). Herrera maintained that after the commencement of the blackmail scheme, Raul Sr. was shot in the back of the head and killed by Jose Lopez. *Id.* Herrera explained that Jose Lopez, who also worked with the Sheriff in the drug trade and who was present with Raul Sr. when Raul Sr. killed the officers, received probation for the homicide of Raul Sr. *Id.*

[30]*Herrera*, 113 S. Ct. at 858 (citing *Ex parte* Herrera, No. 81-CR-672-C, slip op., at 35 (D. Tex., Jan. 14, 1991) (finding that there was no trial evidence that even "remotely suggest[ed] that anyone other than [Herrera had] committed the offense")).

[31]*Id.* (citing *Ex parte* Herrera, 819 S.W.2d 528 (1991)).

[32]*Id.* (citing Herrera v. Texas, 112 S. Ct. 1074 (1992)).

[33]*Id.* *See supra* note 27 (discussing Herrera's challenges under his first federal *habeas* petition).

[34]Herrera v. Collins, 113 S. Ct. 853, 858 (1993). See *infra* note 207 for a discussion of the particularities involved in Herrera's Eighth and Fourteenth Amendment claims.

In addition to submitting the aforementioned affidavits of Villarreal and Palacious, *see*

majority of Herrera's claims made in pursuit of federal *habeas* relief were dismissed by the federal district court as an abuse of the writ of *habeas corpus*,[35] the court granted Herrera's request for a stay of execution.[36]

On appeal by the State, the Fifth Circuit Court of Appeals vacated the federal district court's stay of execution[37] and determined that Herrera's actual innocence claim was "disingenuous."[38] The court of appeals further held that absent an accompanying constitutional violation, Herrera's claim of actual innocence was not cognizable because newly discovered evidence of innocence was simply not a basis for federal *habeas* relief.[39] The Supreme

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supra notes 28-29 and accompanying text, Herrera also proffered two additional affidavits supporting his contention that Raul Sr. had murdered the two officers. *Herrera*, 113 S. Ct. at 858. One affidavit was from the son of Raul Sr. and the other, from a previous classmate of the Herrera brothers. *Id.* The son of Raul Sr. ("Raul Jr."), who was nine years old at the time of the murders, contended in his affidavit that he had witnessed his father shoot both police officers. *Id.* Raul Jr. also stated that Herrera had not been present at the shootings. *Id.* The other newly submitted affidavit was of Jose Ybarra, Jr. ("Ybarra"), an old schoolmate of both Herrera and his now deceased brother, Raul Sr. *Id.* Ybarra asserted that in 1983, Raul Sr. had confided to him that he, Raul Sr., had shot both Rucker and Carrisalez. *Id.*

Herrera further maintained in his petition that the State officials were aware of this information and had deliberately withheld it in violation of Brady v. Maryland, 373 U.S. 83 (1963) (establishing that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). *Herrera*, 113 S. Ct. at 858-59.

[35]See *infra* note 70, explaining abusive writs.

[36]*Herrera*, 113 S. Ct. at 859 (citation omitted). The district court ordered the stay "out of a sense of fairness," so that Herrera could have a chance to present his actual innocence claim, together with the two subsequent affidavits, *see supra* note 34, in Texas state court. *Herrera*, 113 S. Ct. at 859. The court also granted an evidentiary hearing on Herrera's *Brady* claim after first dismissing it due to lack of evidence of any withholding of exculpatory evidence on the part of the prosecution. *Id.*

[37]The Fifth Circuit agreed with the district court's initial conclusion that there was no basis for a *Brady* claim. *Id.* (citing Herrera v. Collins, 954 F.2d 1029, 1032 (5th Cir. 1992)).

[38]*Id.* (citing Herrera v. Collins, 954 F.2d 1029, 1032 (5th Cir. 1992)).

[39]*Id.* The circuit court based its holding on Townsend v. Sain, 372 U.S. 293, 317 (1963) ("[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."). *See infra* notes 54-59 and accompanying text.

Court of the United States then granted Herrera's writ of certiorari[40] to address whether a claim of actual innocence by a fairly convicted and capitally sentenced prisoner constitutes an Eighth and Fourteenth Amendment claim, thus entitling the prisoner to federal *habeas corpus* relief.[41]

III. LEGAL HISTORY

A. THE EVOLUTION OF THE WRIT OF *HABEAS CORPUS*

Historically, the federal writ of *habeas corpus* only permitted a federal prisoner to attack a federal conviction.[42] In 1867, Congress passed a

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[40]Herrera v. Collins, 112 S. Ct. 1074 (1992).

[41]Herrera v. Collins, 113 S. Ct. 853, 859 (1993) (citing Herrera v. Collins, 112 S. Ct. 1074 (1992)). The question intended to be addressed by the Court was viewed in differing ways by the various Justices. Justice O'Connor, joined by Justice Kennedy, framed the issue to be "not whether a State can execute the innocent" but, "whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, 10 years after conviction, notwithstanding his failure to demonstrate that constitutional error infected his trial." *Id.* at 870 (O'Connor, J., concurring); *see infra* note 295 and accompanying text. Justice Scalia, joined by Justice Thomas, asserted that certiorari was granted "on the question whether it violates due process or constitutes cruel and unusual punishment for a State to execute a person who, having been convicted of murder after a full and fair trial, later alleges that newly discovered evidence showed him to be 'actually innocent.'" *Herrera*, 113 S. Ct. at 874 (Scalia, J. concurring); *see infra* note 316 and accompanying text. Conversely, in a brief opinion concurring in the judgment only, Justice White implied that the question revolved around whether "a persuasive showing of 'actual innocence' made after trial . . . would render unconstitutional the execution of the petitioner . . ." *Herrera*, 113 S. Ct. at 875 (White, J., concurring in the judgment); *see infra* note 321 and accompanying text. Justice Blackmun, dissenting, joined by Justices Stevens and Souter, stated that "[w]e really are being asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence." *Herrera*, 113 S. Ct. at 876 (Blackmun, J., dissenting); *see infra* note 333 and accompanying text.

[42]Sherrell, *supra* note 6, at 459. The 1st Congress passed the Judiciary Act of 1789, Ch. 20, § 14, 1 Stat. 73, 82 (1789), which empowered federal courts to issue *habeas* writs to prisoners in federal custody pursuant to the "principles and usages" of common law. Sherrell, *supra* note 6, at 458 (citing Ch. 20, § 14, 1 Stat. at 82). In the nineteenth century, a prisoner convicted in federal court could obtain federal *habeas corpus* relief only if the conviction or accompanying sentence was void for lack of either personal or subject matter jurisdiction. Sherrell, *supra* note 6, at 459; Stone v. Powell, 428 U.S. 465, 475 (1976) (holding that the courts should not grant relief on ground that the exclusionary rule applicable to Fourth Amendment violations was breached). *See, e.g.*, *Ex parte* Coy, 127 U.S. 731 (1988) (maintaining that the Court "ha[d] no power to examine the proceedings on a writ . . . [because] an imprisonment under a judgment cannot be unlawful, unless . . . [a] nullity; and

statute[43] extending the federal writ to all persons imprisoned in violation of federal law, whether they were in federal or state custody.[44] Until the 1930's, however, state convicts could only obtain federal *habeas* relief in limited circumstances — only when the statute dictating the offense or the

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it is not a nullity if the court has general jurisdiction"); *Ex Parte* Carll, 106 U.S. 521 (1883) (maintaining that the Court had "no general power to review the judgments of the inferior courts . . . by the use of the writ . . . [because its] jurisdiction is limited to the single question of the power of the court to commit the prisoner"). *See also* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 466 (1963) (examining the circumstances under which *habeas corpus* jurisdiction of the federal courts should be used to redetermine federal questions in state criminal proceedings). In fact, during this era, federal convicts generally lacked the right to appellate review of the proceedings against them. *Stone*, 428 U.S. at 475 n.7 (stating that in practical effect there was no appellate review in federal criminal cases until 1889); United States v. Sanges, 144 U.S. 310 (1892) (explaining that in the past, it was "settled that criminal cases could not be brought from a [United States] circuit court . . . to the Supreme Court . . . by writ"). *See* Note, *Developments in the Law-Federal Habeas Corpus Review*, 83 HARV. L. REV. 1038, 1046-47 (1970) [hereinafter *Developments*].

Eventually, however, the constitutionality of a statute was permitted review under *habeas corpus* because it was said to effectively deprive the lower court of its jurisdiction. *Id.* at 1046 (citing United States v. Seibold, 100 U.S. 371 (1879)). This very narrow form of *habeas* relief eventually gave way to expansion in 1942, when the Supreme Court held that a federal conviction could be attacked via federal *habeas corpus* on constitutional grounds in addition to jurisdictional grounds. Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (holding that the writ of *habeas corpus* extended to constitutional claims dependant upon facts outside the record, including the situation where a federal prisoner claimed a coerced guilty plea).

[43]Act of Feb. 5, 1867, ch. 28, § 1, 14 stat. 385.

[44]*Stone*, 428 U.S. at 475. *See generally* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 189-94 (1980); *Developments*, *supra* note 42, at 1048. Following the Civil War, the Habeas Corpus Act of 1867 was enacted to extend the *habeas corpus* remedy to state prisoners. *Id.* This enactment coincided with the Fourteenth Amendment's extension of the Bill of Rights's applicability to the states. *See* Kaufman v. United States, 394 U.S. 217, 225 (1969) (opining that principles underlying Fourteenth Amendment and the Habeas Corpus Act of 1867 require that federal courts have the 'last say' regarding questions of federal law).

The Habeas Corpus Act of 1867 stated in part:

> [T]he several courts of the United States, and the several justices and judges of such courts, . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . .

Act of Feb. 5, 1867, ch. 28, § 1, 14 stat. 385.

punishment was unconstitutional,[45] or when the court issuing the conviction or sentence lacked jurisdiction.[46]

Then, in a series of cases during the 1930's and 1940's, federal *habeas* jurisprudence evolved such that relief could be afforded on the ground that the state convict was denied a federal constitutional right applicable to state criminal proceedings.[47] Notwithstanding this expansion of *habeas corpus* jurisprudence, procedural barriers still impeded consideration on the merits

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[45]*See, e.g.*, Brimmer v. Rebman, 138 U.S. 78 (1891) (invalidating a Virginia statute prohibiting sale of meat at places 100 miles or more from place of slaughter unless inspected by Virginia authorities because the statute violated the Interstate Commerce Clause); Minnesota v. Barber, 136 U.S. 313 (1890) (rejecting a Minnesota statute prohibiting sale of beef within State unless inspected in State within 24 hours before slaughter because statute violated the Interstate Commerce and Privileges and Immunities Clauses); *In re* Medley, 134 U.S. 160 (1890) (invalidating a state statute imposing solitary confinement effectuated after the defendant was convicted and sentenced because statute violated the Ex Post Facto Clause); *Ex Parte* Royall, 117 U.S. 241 (1886) (invalidating a Virginia statute where the statute violated the Ex Post Facto Clause of the Constitution).

[46]*Developments*, *supra* note 42, at 1049-50. *See, e.g.*, *Ex Parte* Van Moore, 221 F. 954 (S.D. 1915). *Van Moore* involved a Native American petitioner who pled guilty to murder in South Dakota state court and was sentenced to imprisonment. *Id.* at 956. The petitioner filed a writ of *habeas corpus* on the ground that the alleged murder offense occurred within the reservation of the Sioux Nation, which was under the exclusive jurisdiction of the courts of the United States. *Id.* at 948. Thus, argued the petitioner, the trial, conviction, and sentence within the South Dakota state court were illegal because the state court was without jurisdiction. *Id. See also Ex Parte* Bridges, 4 Fed. Cas. 98 (N.D. Ga.), *aff'd*, 4 Fed. Cas. 98 (C.C.N.D. Ga. 1875) (No. 1,862) (holding sufficient ground where petitioner was convicted and imprisoned in state court for perjuring himself during a federal judicial investigation because perjury constituted a federal offense, which was under the exclusive jurisdiction of the federal courts).

[47]*Developments*, *supra* note 42, at 1055-56 (citing *Ex parte* Hawk, 321 U.S. 114 (1944)). *See, e.g.*, Brown v. Allen, 344 U.S. 443 (1953) (expressly holding that federal constitutional questions raised by state petitioners are cognizable on *habeas corpus*); House v. Mayo, 324 U.S. 42, 47-48 (1945) (permitting review of claims of denial of counsel and coerced guilty plea); *Hawk*, 321 U.S. at 114 (upholding claim where petitioner alleged in application for *habeas corpus* that the State court "forced him into trial for a capital offense . . . with such expedition as to deprive him of the effective assistance of counsel guaranteed by the due process clause of the Fourteenth Amendment"); Mooney v. Holohan, 294 U.S. 103 (1935) (upholding *habeas* writ upon Fourteenth Amendment grounds where prosecution knowingly used perjured testimony to obtain conviction, suppressed exculpatory evidence, and the State failed to provide any corrective judicial process by which such a conviction could be set aside); Moore v. Dempsey, 261 U.S. 86 (1923) (upholding *habeas* writs alleging petitioners' due process rights were violated when the petitioners were hurried through trial to conviction under pressure of a mob such that trial was a trial in form only).

of a petition for federal relief.[48]

1. *Habeas* Expansion Under Chief Justice Warren

Throughout the 1960's, the Supreme Court under the leadership of Chief Justice Warren (the "Warren Court"), significantly enlarged the availability of federal *habeas corpus* relief for persons convicted in state court.[49] Several cases increased the number of federal rights applicable to defendants tried in state courts.[50] In addition, both the nature and the scope of federal rights were generally expanded.[51] Furthermore, numerous procedural

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[48]*See, e.g.*, Parker v. Ellis, 362 U.S. 574, 575 (1960) (holding that case was moot and court was without jurisdiction to review claim on the merits where petitioner was released from prison after having served his sentence with time off for good behavior before his case could be heard by the Court); Daniels v. Allen, 344 U.S. 443 (1953) (holding that in *habeas corpus* cases, denial of certiorari by the Court should not be interpreted as a judicial opinion on the merits on the case); Darr v. Burford, 339 U.S. 200 (1950) (holding district court properly refused to grant writ because of failure to exhaust all state remedies); White v. Ragen, 324 U.S. 760 (1945) (explaining that where state court determined that *habeas corpus* not available under state practice or due to other adequate non-federal ground, federal court lacked jurisdiction to review the state court decision); *Hawk*, 321 U.S. 114 (1944) (holding that petitioner was not entitled to *habeas* relief where he failed to show exhaustion of all state remedies).

[49]Donald E. Wilkes, *A New Role of an Ancient Writ: Postconviction Habeas Corpus Relief in Georgia (Part II)*, 9 GA. L. REV. 13, 32-35 (1974) (considering the extent to which *habeas corpus* had been available in Georgia since the Habeas Corpus Act of 1967).

[50]*See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (holding that double jeopardy occurred where defendant acquitted of larceny at first trial but convicted of burglary was retried on larceny count after burglary conviction was set aside); Malloy v. Hogan, 378 U.S. 1 (1964) (holding the Fourteenth Amendment incorporates upon the states the Fifth Amendment's exception from compulsory self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (ruling that: (1) the Sixth Amendment right to counsel is obligatory on states by Fourteenth Amendment; and (2) indigent criminal defendant entitled to have counsel appointed for him); Mapp v. Ohio, 367 U.S. 643 (1961) (holding that evidence obtained by unconstitutional search was inadmissible and vitiated the defendant's conviction).

[51]*See, e.g.*, Stovall v. Denno, 388 U.S. 293 (1967) (recognizing viability of claim that unnecessarily suggestive witness confrontation conducive to irreparable mistaken identification denies due process); Miranda v. Arizona, 384 U.S. 436 (1966) (upholding defendant's right to silence in presence of police); Sheppard v. Maxwell, 384 U.S. 333 (1966) (holding that failure of State to protect defendant from prejudicial publicity which permeated community and failure to control disruption in courtroom deprived defendant of right to a fair trial); Escobedo v. Illinois, 378 U.S. 478 (1964) (ruling that when investigation of defendant is no longer a general inquiry into an unsolved crime but has begun to focus upon a particular suspect, defendant had right to Sixth Amendment assistance of counsel); Gideon v.

postconviction relief were substantially diminished.[52]

The Warren Court also more explicitly defined the power of federal *habeas* courts to direct an evidentiary hearing to investigate the facts.[53] One of the first cases to further define *habeas* rights was *Townsend v. Sain*,[54] which addressed the right of a petitioner convicted of murder and sentenced to death to have a plenary hearing in federal court.[55]

The Court in *Townsend* held that "[w]here the facts are in dispute, the federal court in *habeas corpus* must hold an evidentiary hearing if the *habeas* applicant did not receive a full and fair evidentiary hearing in state court, either at the time of the trial or in a collateral proceeding. . . ."[56] Chief Justice Warren articulated that the *habeas* court must grant a hearing "unless the state-court trier of fact has after a full hearing reliably found the relevant facts."[57] Delineating the parameters of mandatory hearings, the Court

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Wainwright, 372 U.S. 335 (1963) (stating that indigent criminal defendant entitled to appointment of counsel).

[52]*See, e.g.*, Carafas v. LaVallee, 391 U.S. 234 (1968) (holding, in opposition to Parker v. Ellis, 362 U.S. 574 (1960), that petitioner's cause was not moot and federal jurisdiction on *habeas corpus* application not terminated upon expiration of petitioner's sentence); Walker v. Wainwright, 390 U.S. 335 (1968) (holding that petitioner could seek relief even though granting of petition would not result in immediate release from prison); Fay v. Noia, 372 U.S. 391 (1963) (holding that: (1) a state prisoner need not seek certiorari review in the Supreme Court before petitioning for federal *habeas* relief; (2) petitioner's violation of state court rules need not preclude *habeas* consideration of a federal claim unless petitioner intentionally avoided state remedies; and (3) a "manifest federal policy exists that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review").

[53]*See, e.g.*, Townsend v. Sain, 372 U.S. 293 (1963).

[54]*Id.*

[55]*Id.* During the *Townsend* trial, the petitioner unsuccessfully objected to the introduction of a confession on the ground that the confession was not voluntary in that it was the result of the administration of a "truth serum." *Id.* at 295-96. The petitioner claimed that his Fourteenth Amendment rights were violated when a confession, obtained while he was under the influence of truth serum type drugs administered by a police physician, was admitted into evidence. *Id.* at 304-05. The state court had failed to file an opinion, conclusions of law, or findings of fact regarding the issue of the confession. *Id.* at 320.

[56]*Id.* at 312.

[57]*Id.* at 312-13. The Court then attempted to better define this standard, enumerating the following circumstances under which an evidentiary hearing must be granted:

noted that a hearing must be granted if the *habeas* application alleges newly discovered evidence which could not reasonably have been presented to the state finder of fact.[58] The Court emphasized, however, that this new evidence must pertain to the constitutionality of the applicant's detention — pertinence to the petitioner's quilt or innocence is insufficient.[59]

> If (1) the merits of the factual dispute were not resolved in the state hearing; (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 are 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.

Id. at 313. *Compare* 28 U.S.C. § 2254, *infra* notes 86-99 and accompanying text.

[58]*Townsend*, 372 U.S. at 317.

[59]*Id.* In the petitioner's situation, the Court concluded that the application did in fact assert a constitutional violation. *Id.* at 307-08, 309 (relying on Reck v. Pate, 367 U.S. 433, 440 (1961) (holding that confession constitutionally inadmissible if an individual's "will was overborne"); Blackburn v. Alabama, 361 U.S. 199, 208 (1960) (confession inadmissible if not "the product of a rational intellect and free will")).

Next, the Court in *Townsend* addressed whether the district court was required to hold an evidentiary hearing to determine the facts "which are a necessary predicate to a decision of the ultimate constitutional question." *Id.* at 309. The Court acknowledged that the petitioner received an evidentiary hearing at his original trial where the voluntariness of his confession was determined. *Id.* at 319. Twice at the federal district court level, however, *habeas corpus* relief was denied the petitioner without a hearing. *Id.*

The Court then determined that the court of appeals erroneously limited its inquiry to "the *undisputed* portion of the record." *Id.* at 320. The Court further found that the Court of Appeals erroneously refused the petitioner a hearing, because the state judge issued neither an opinion, conclusions of law, or findings of fact. *Id.* The Chief Justice surmised that "[i]n short, there [were] no indicia which would indicate whether the trial judge applied the proper standard of federal law in ruling upon the admissibility of the confession." *Id.* Additionally, the Court noted, the state judge failed to charge the jury with the constitutional principles dictating the admissibility of the confession. *Id.* The Court concluded that the factual findings of the state trier of fact could not be reconstructed, and therefore, an evidentiary hearing was compelled. *Id.* at 321.

The Court also noted that the "truth serum" qualities of the substance injected into the petitioner before he confessed, which could have "trigger[ed] statements in a legal sense involuntary," *id.*, was "inexplicably omitted from the medical experts' testimony." *Id.* at 322 ("[D]isclosure of the identity of [the drug] as a 'truth serum' was indispensable to a fair, rounded, development of the material facts . . . and [could not] realistically be regarded as [the petitioner's] inexcusable default.") (citing Fay v. Noia, 372 U.S. 391, 438 (1963)).

2. Chief Justice Burger's Restrictions

Under the leadership of Chief Justice Burger, the Supreme Court of the United States, in contrast to the Warren Court, narrowed the scope of *habeas corpus*.[60] For example, in *Stone v. Powell*,[61] the Court held that where a State had provided the petitioner a full and fair hearing of a Fourth Amendment claim, a federal court should not grant *habeas* relief on the ground that evidence obtained in an unconstitutional search or seizure was admitted at the trial.[62] Moreover, in *Strickland v. Washington*,[63] the Burger Court articulated the minimum standard for establishing that counsel

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[60]Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939, 943, 958 (1991). Patchel asserted that the court has "returned the development of constitutional restrictions on criminal processes to the States" in a manner that has troubling implications for constitutional adjudications in the future. *Id.* at 958. Furthermore, Patchel postulated that the Burger Court eliminated constitutional claims from *habeas* review because of procedural defects in the method in which the claims were raised. *Id.*

[61]428 U.S. 465 (1976). In *Stone*, the defendant was convicted of murder. *Id.* at 469. Ten hours after the killing took place, the defendant was arrested under a vagrancy ordinance. *Id.* In a search incident to the arrest, the police recovered the revolver involved in the murder and related evidence was admitted at the defendant's trial. *Id.* at 469-70. The defendant asserted that the arrest was illegal because the vagrancy ordinance was unconstitutionally vague. *Id.* at 470. Therefore, the petitioner argued, the evidence pertaining to the discovered revolver obtained during the search was essentially the fruit of the poisonous tree and should have been excluded from the trial. *Id.*

[62]*Id.* at 494-95. In *Stone*, the Court determined that the state court had already afforded the petitioner the opportunity to litigate the Fourth Amendment assertion and therefore should not be granted relief. *Id.* The Court reasoned that the Fourth Amendment exclusionary rule and its deterrence purposes would not be impaired by admission of the evidence since the police had good faith and probable cause. *Id.*

See also Smith v. Murray, 477 U.S. 527 (1986) (holding that a deliberate tactical decision by defense counsel not to pursue a constitutional claim was not an error of such magnitude as to render counsel's performance constitutionally ineffective); Kuhlmann v. Wilson, 477 U.S. 436 (1986) (defining the circumstance under which federal courts should entertain prisoner's *habeas* petition that raised claims rejected on prior petition for same relief); Holbrook v. Flynn, 475 U.S. 560 (1986) (positing that when courtroom arrangement consisting of additional trooper presence is challenged as prejudicial, question becomes whether the risk of prejudice is unacceptably high as to pose a threat to defendant's right to a fair trial, not whether it may have been feasible for the State to have employed a less conspicuous arrangement); Nix v. Whiteside, 475 U.S. 157 (1986) (holding right to counsel not violated by attorney who refused to cooperate in admitting perjured testimony).

[63]466 U.S. 668 (1984).

unconstitutionally ineffective.[64] Finally, in *Wainwright v. Sykes*,[65] the Court provided that a "procedural default" could bar federal *habeas* relief if a defendant did not assert a constitutional issue in state court according to the relevant state procedural law, and such failure resulted in the state court's barring consideration of the claim.[66]

3. Further Narrowing Under the Leadership of Chief Justice Rehnquist

The Rehnquist Court has further limited the ability of the federal courts to review *habeas* petitions and grant relief.[67] Very recently, in *Sawyer v.*

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[64]*Id.* at 700. *Strickland* held that the prisoner must show "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. The prisoner must also show that the resulting prejudice from such inadequate representation "so undermined the proper functioning of the adversarial process that" it is reasonably probable that "but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 686, 694.

[65]433 U.S. 72 (1977). In *Sykes*, at the defendant's trial, inculpatory statements made by the defendant to the police were admitted without challenge. *Id.* at 74-75. The defendant failed to challenge the admitted evidence on appeal, although he unsuccessfully attempted to do so in a motion to vacate the conviction and on state *habeas corpus*. *Id.* at 75.

[66]*Id.* at 88-91. To avoid such a procedural bar, the Court in *Sykes* held that the defendant must show "cause" for not having objected to the state procedural waiver and that he incurred "actual prejudice" as a result of the procedural default. *Id.* at 87 (citing Francis v. Henderson, 425 U.S. 536 (1976)).

[67]For example, during the 1980's, the Court determined that new constitutional rulings would be retroactively applicable to cases still on direct appeal, i.e., to convictions that were not yet final. *See* Griffith v. Kentucky, 479 U.S. 314 (1987) (holding that: (1) new rule for conduct of criminal prosecutions is to be applied retroactively to state and federal cases pending on direct review or not yet final; and (2) the decision that defendant establish *prima facie* case of racial discrimination whenever state makes peremptory challenge to strike members of defendant's race from jury would be applied retroactively); Shea v. Louisiana, 470 U.S. 51 (1985) (ruling that the decision in Edwards v. Arizona, 451 U.S. 477 (1980), applied to cases pending on direct appeal at time that *Edwards* was decided); United States v. Johnson, 457 U.S. 537 (1982) (holding that Supreme Court decisions construing Fourth Amendment are generally applicable retroactively to convictions not yet final at time decision was rendered). In 1989, however, in Teague v. Lane, 489 U.S. 288, 307, 310 (1989) (plurality opinion), the Court held that generally no "new" constitutional rules would apply to cases that had become final before the new rule was announced. The Court did, however, permit two exceptions to be triggered if the new rule either (1) "place[d] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or (2) "require[d] the observance of those procedures . . . implicit in the concept of ordered liberty." *Id.* at 307.

Whitley,[68] the Court articulated the standard necessary for determining whether a petitioner bringing a successive,[69] abusive,[70] or procedurally defaulted[71] claim had shown the necessary actual innocence such that the merits of his *habeas* petition could be reviewed by a court notwithstanding the defective claims.[72] In so doing, Chief Justice Rehnquist held that for a *habeas* court to reach the merits of a faulty[73] claim, the petitioner must demonstrate by "clear and convincing evidence" that but for the constitutional error, no reasonable juror would have found the petitioner legally eligible for the death penalty.[74]

Utilizing the criteria mandated by *Wainwright v. Sykes*,[75] the Court in *Sawyer* recognized that a court may not review the merits of successive,

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[68]112 S. Ct. 2514 (1992).

[69]Successive claims are those that raise identical grounds to those previously heard and rejected on the merits. Kuhlmann v. Wilson, 477 U.S. 436, 445 n.6 (1986) (determining that where colorable showing of innocence exists, ends of justice require courts to review successive claim) (citing Sanders v. United States, 373 U.S. 1, 15-17 (1963)).

[70]Abusive claims are those that are new, never having been raised previously when they could have been and should have been. McCleskey v. Zant, 111 S. Ct. 1454, 1467-68 (1991) (holding that defendant's failure to demonstrate cause for failing to raise constitutional claim bars review of second federal petition).

[71]Procedurally defaulted claims are those where the petitioner, when raising such claims, fails to follow the applicable state procedures required to raise such claims. Murray v. Carrier, 477 U.S. 478, 485 (1986) (holding that while a claim concerning the reliability of the guilt determination would not excuse failure to pass the cause and prejudice test, a showing of actual innocence may excuse such a failure).

[72]*Sawyer*, 112 S. Ct. at 2517.

[73]*See supra* notes 69-71.

[74]Sawyer v. Whitley, 112 S. Ct. 2514, 2517 (1992). In *Sawyer*, the petitioner was convicted of first-degree murder and subsequently sentenced pursuant to Louisiana's death penalty statute. *Id.* at 2523. The petitioner in his second federal *habeas* petition advanced two claims. *Id.* In the first claim, an abuse of the writ, the petitioner alleged that exculpatory evidence showed that his role in the murder was mitigated and that such evidence was not produced by the police in violation of Brady v. Maryland, 373 U.S. 83 (1963) (holding that prosecutorial suppression of evidence violates due process). *Sawyer*, 112 S. Ct. at 2523. The second claim was successive and asserted that defense counsel's failure to introduce at the sentencing phase, petitioner's medical records from a mental health institution he stayed at as a teenager, constituted ineffective assistance of counsel in violation of the Constitution. *Id.*

[75]433 U.S. 72 (1977). See *supra* notes 65-66 and accompanying text for a brief discussion of *Sykes*.

abusive, or procedurally defaulted claims unless the petitioner demonstrated either: (1) cause for the default and a resulting prejudice,[76] or (2) that the failure to review the constitutional, albeit faulty, challenges would constitute a "miscarriage of justice" because the petitioner was actually innocent.[77] The majority agreed with the court below,[78] determining that the "actual innocence" requirement was not so strict as to necessitate proof of innocence of the crime.[79] The Court further agreed, however, that the requirement was not so lenient to be met by a mere showing that a portion of *supplementary mitigating evidence* to be used at the jury's discretion was withheld as a result of a claimed constitutional mistake.[80] Rather, the Court held the appropriate standard was clear and convincing evidence of innocence of those elements which delineate a defendant as legally eligible for the death penalty.[81]

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[76]*Sawyer*, 112 S. Ct. at 2518 (citing *Wainwright*, 433 U.S. 72).

[77]*Id.* (citing Kuhlmann v. Wilson, 477 U.S. 436 (1976) (establishing a standard of a colorable showing of actual innocence for determining when successive claims may be reviewed on *habeas corpus*)). The applicability of the "miscarriage of justice exception," also known as the "actual innocence exception," to procedurally defaulted claims was established in Murray v. Carrier, 477 U.S. 478, 496 (1986) (stating that showing of actual innocence may excuse failure to pass the cause and prejudice test). The Court subsequently held, however, that the exception did not to apply to claims within the sentencing phase because such claims do not effect the "actual" innocence of the petitioner. Smith v. Murray, 477 U.S. 527 (1986) (holding that tactical decisions of defense counsel to not press constitutional claim on appeal did not amount to ineffective assistance of counsel). Actual innocence may signify not only innocence of the essential elements of the crime, such as when the wrong person has been convicted, but alternatively, "innocence" of the penalty as well. *Sawyer*, 112 S. Ct. at 2519-21.

[78]Sawyer v. Whitley, 945 F.2d 812 (5th Cir. 1991).

[79]Sawyer v. Whitley, 112 S. Ct. 2514, 2523 (1992).

[80]*Id.*

[81]*Id.* Thus, a defendant need not prove that he or she is innocent of the crime, but nor would it suffice to show a constitutional flaw that did not affect his or her eligibility for the death penalty. *Id.* at 2523-24.

In *Sawyer*, the Court found that the petitioner failed the "actual innocence" standard and failed to show a miscarriage of justice because evidence concerning the petitioner's unproduced past medical records did not affect either any finding of his guilt or innocence, or any aggravating factors during the defendant's death penalty sentencing. *Id.* The Court found that the petitioner would still have received the death penalty without this constitutional error and without the suppression of the defendant's past mental health records. *Id.*

The Court also found that the petitioner's second constitutional claim, alleging the *Brady*

Thus, as evinced by the aforementioned judicial expansions and restrictions of the scope of the federal writ of *habeas corpus*, the theory behind the writ and its purposes has received varying interpretations throughout history and continues to experience reformation and restructuring today.[82] Within *habeas corpus* jurisprudence, however, remains the principle that the purpose of the writ is not to determine a prisoner's guilt or innocence but, rather, to determine whether a prisoner is being improperly deprived of constitutional liberty.[83] Consequently, factual determinations made by the trial court may not be reviewed for *habeas* purposes.[84] Instead, a constitutional claim, such as the lacking of the Fourteenth Amendment's due process, a violation on the Eighth Amendment's proscription against cruel and unusual punishment, an infringement of the

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violation, was accompanied by evidence that also failed to show that the petitioner was undeserving of the death penalty. *Id.* at 2524. Part of this evidence, the Court held, which was brought to impeach the credibility of the prosecution's witness, failed to provide a clear and convincing showing that no juror could have believed the prosecution's witness. *Id.* The other part of the petitioner's evidence, consisting of the statement of a four-year old boy, was also deemed to be inadequate to negate a rational finding of the petitioner's guilt regarding the aggravated circumstance that ultimately made the petitioner eligible for the death penalty. *Id.*

[82]*See generally* Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993).

[83]Sawyer v. Smith, 497 U.S. 227, *reh'g denied*, 497 U.S. 1051 (1990) (deciding that the purpose of federal *habeas corpus* is to ensure that state convictions comply with federal law in existence at time conviction became final, and not to provide mechanism for continuing reexamination of final judgments based upon later emerging legal doctrine). This purpose of *habeas corpus* was further explained by Judge Higginbotham of the United States Circuit Court of Appeals for the Fifth Circuit:

> [S]omeone who believes that the § 2254 habeas writ simply reflects our society's concern that innocent people not be incarcerated, is met with a glaring difficulty . . . § 2254, for the most part, does not aid an innocent prisoner who is simply the victim of a jury's equally innocent, but nonetheless damning, mistake. Simply put, the modern habeas writ only offers appellate relief.

Higginbotham, *supra* note 6, at 1011-12 (citation omitted). Similarly, Judge Friendly noted that the writ of *habeas corpus* does not require nor generally provide for an avenue for a claim of actual innocence. *Id.* (citing Hon. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970) (proposing that convictions, with a few exceptions, should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence)).

[84]Townsend v. Sain, 372 U.S. 293, 311 (1962) (positing that the history of the writ "refutes a construction of the federal *habeas corpus* powers that would assimilate their task to that of courts of appellate review").

Fifth Amendment's privilege against self-incrimination, or an encroachment of the Sixth Amendment's right to counsel must be asserted to challenge a criminal conviction via the current federal *habeas corpus* statute.[85]

4. The Current Federal *Habeas Corpus* Statute

The current federal *habeas corpus* statute dictates the remedies available in federal court to prisoners held in state custody.[86] This statute declares that a federal court shall review a petition for *habeas* relief only on the ground that the state has custody of the petitioner in violation of federal or constitutional law.[87] The petition must indicate that the petitioner has depleted all state court remedies, no applicable state remedies exist, or that

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[85]*See* 28 U.S.C. § 2254 (1988 & Supp. 1993) (holding the federal *habeas corpus* statute is applicable to prisoners in state custody in violation of federal or constitutional law).

[86]*Id.* The Rules Governing Section 2254 Cases dictate the process through which a state prisoner applies for a federal writ of *habeas corpus*. 28 U.S.C. app. § 2254 (1982).

For a meaningful discussion of "custody" as required of the petitioner, see Jones v. Cunningham, 371 U.S. 236, 241-43 (1963) (stating that the constraints identified with parole constitute "custody" for *habeas* purposes because conditions routinely placed on parolees, and the possibility that they can be "rearrested at any time" if parole authorities believe they have violated parole conditions, are enough to keep parolees in the "custody" of the parole board). *Cf.* Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (holding that parole revocation hearings need not honor all the procedural defenses that are integral to due process in criminal trials). *See also* Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 300-02 (1984) (finding "custody" where the petitioner had been permitted to remain at large pending trial de novo); Hensley v. Mun. Court, San Jose-Milpitas Judicial Dist., 411 U.S. 345, 348-53 (1973) (holding that for *habeas* purposes, petitioners free on bail after trial are still in "custody"); Peyton v. Rowe, 391 U.S. 54, 64, 67 (1968) (stating a petitioner is in the "custody" of a future, challenged sentence planned to be served after the completion of a current, unchallenged term). *Cf.* Stallings v. Splain, 253 U.S. 339 (1920) (stating that for *habeas* purposes, preconviction bail is not "custody").

[87]28 U.S.C. § 2254(a). Paragraph (a) states:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court *only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.*

Id. (emphasis added). *See generally* CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §§ 4261, 4471 (1981) (pertaining to *habeas corpus* practice and reviewability of particular constitutional questions in *habeas corpus* proceedings, respectively).

existing state remedies are insufficient to protect the petitioner's rights.[88]

Furthermore, the statute establishes that within a *habeas* proceeding, a presumption of correctness attaches to factual findings of the state court supported by a written record.[89] This presumption of correctness attaches to each factual determination unless the court determines that one of several possible factors exist: (1) the particular factual issue was never actually

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[88]28 U.S.C. § 2254(b). Paragraph (b) states:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted 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). Paragraph (c) then details what constitutes the necessary exhaustion of state court remedies:

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, *if he has the right under the law of the State to raise, by any available procedure, the question presented.*

28 U.S.C. § 2254(c) (emphasis added). For more information pertaining to the prerequisite of exhaustion of state remedies to *habeas corpus* relief, see WRIGHT ET AL., *supra* note 87, at § 3573. *See also* Rose v. Lundy, 455 U.S. 509 (1982) (stating that doctrine that a state prisoner must exhaust state remedies prior to seeking federal *habeas corpus* relief was fashioned to conserve the state court's capacity in administration of federal law and to prevent disruption of state judicial proceedings). Wilwording v. Swenson, 404 U.S. 249 (1971) (recounting that the exhaustion requirement is simply an accommodation of the federal system devised to give states an initial occasion to review alleged violations of their prisoners's federal rights).

[89]28 U.S.C. § 2254(d). Paragraph (d) states, in pertinent part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, *a determination after a hearing on the merits of a factual issue*, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, *shall be presumed to be correct*, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit . . . [at least one of the following eight factors] . . . .

Id. (emphasis added).

determined by the State court;[90] (2) the State's factfinding procedures did not afford the petitioner a "full and fair hearing;"[91] (3) the State court was without jurisdiction;[92] (4) the State unconstitutionally deprived the petitioner of the right to counsel[93] or otherwise denied due process;[94] or (5) the record does not support the State's factual determination.[95] When the presumption of correctness inherent in the state court findings of fact is not rebutted by the presence of any aforementioned statutory factors, the petitioner retains the burden of proving that the state's particular factual finding was incorrect.[96]

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[90]Subsection (d)(1) states that the presumption is rebutted if it appears that "the merits of the factual dispute were not resolved in the State court hearing." *Id.* § 2254(d)(1).

[91]*Id.* § 2254(d)(2), (3), (6). Thus, if the reviewing court determines that "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing," 28 U.S.C. § 2254(d)(2), "that the material facts were not adequately developed at the State court hearing," *id.* § 2254(d)(3), or that "the applicant did not receive a full, fair, and adequate hearing in the State court proceeding," *id.* § 2254(d)(6), then the presumption of correctness will fail.

[92]*Id.* § 2254(d)(4). Subsection (4) states that the presumption will be rebutted if "the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding." *Id.*

[93]*Id.* § 2254(d)(5) (stipulating that the presumption is rebutted if it appears that "the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding").

[94]*Id.* § 2254(d)(7) (providing that the presumption is rebutted if it appears that "the applicant was otherwise denied due process of law in the State court proceeding").

[95]*Id.* § 2254(d)(8). Subsection (8) states that the presumption of correctness is rebutted if:

> [T]hat part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and *the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.*

Id. (emphasis added).

[96]*Id.* § 2254(d). After the enumeration of the eight statutory exceptions to the presumption, paragraph (d) continues:

> [A]nd in an evidentiary hearing in the proceeding in the Federal court, when due

Significantly, the statute clearly provides that a constitutional challenge to the prisoner's deprivation of liberty is a prerequisite to *habeas* review.[97] Thus, the federal *habeas* court must make the initial determination that the claim asserted in the *habeas* petition, assuming the facts stated in the petition to be true,[98] is a legitimate constitutional claim to review the petition on its merits.[99]

> proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the *burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.*

Id. (emphasis added). The *habeas corpus* statute concludes by requiring the production of the portion of the record relevant to the determination of the adequacy of the evidence if the petitioner challenges the adequacy, and providing an alternative avenue for those incapable of producing such record. *Id.* § 2254(e). Paragraph (e) states:

> *If the applicant challenges the sufficiency of the evidence* adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, *shall produce that part of the record pertinent to a determination of the sufficiency of the evidence* to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

Id. (emphasis added). Paragraph (f) provides for the admissibility of the State court record in federal court proceeding:

> (f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

Id. § 2254(f).

[97]*See supra* note 87.

[98]*See* Townsend v. Sain, 372 U.S. 293, 312 (1962).

[99]Therefore, in Herrera v. Collins, 113 S. Ct. 853 (1993), the capital defendant's "actual innocence" claim would have to be deemed by the reviewing court to be a constitutional challenge to the state's deprivation of the prisoner's liberty. In *Herrera*, the petitioner

B. THE PARAMETERS OF A CRUEL AND UNUSUAL PUNISHMENT CLAIM

The origins of the Eighth Amendment[100] can be traced to the English Bill of Rights.[101] Consequently, the Cruel and Unusual Punishment Clause is generally deemed to afford at least the same protections as those granted in England at the time of the Amendment's adoption.[102] While the Eighth Amendment prohibits only the federal government from imposing certain categories of punishments for federal crimes, the Due Process Clause of the Fourteenth Amendment[103] prevents the states from exacting such cruel and unusual punishments for state crimes.[104]

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asserted that such a claim was constitutional in nature, pursuant to the Eighth Amendment's Cruel and Unusual Punishment Clause and the Fourteenth Amendment's Due Process requirement, thus entitling the petitioner to *habeas* review. *See infra* note 207 and accompanying text.

[100]U.S. CONST. amend. VIII. *See supra* note 4.

[101]Solem v. Helm, 463 U.S. 277, 286 n.10 (1983). The Amendment was based directly on the Virginia Declaration of Rights (1776), Art. I, § 9, authored by George Mason. *Id.* Mason adopted, word for word, the language of the English Bill of Rights. *Id.* As such, it has been largely postulated that the Declaration of Rights guaranteed at least the liberties and privileges afforded by the English Bill of Rights. *Id. See generally* A. NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION (1924) (positing that the Declaration of Rights restated the English principles); A. HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968).

[102]*Solem*, 463 U.S. at 286 n.10 (citing NEVINS, *supra* note 101, at 146).

[103]*See supra* note 5. For additional discussion of due process, see *infra* notes 141-204 and accompanying text.

[104]WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 177 (West 1986) (citing Robinson v. California, 370 U.S. 660 (1962); Sutherland, *Due Process and Cruel Punishment*, 64 HARV. L. REV. 271 (1950)).

For more commentary on the Eighth Amendment, see generally Nicholas John Spinelli, Note, *Eighth Amendment Jurisprudence — From Cruelly Restrictive to Unusually Broad Protections Against Punishment* — Hudson v. McMillian, 112 S. Ct. 995 (1992), 3 SETON HALL CONST. L.J. 607 (1993); David Cox, McKinney v. Anderson: *Cruel and Unusual Smoke — Eighth Amendment Limitations on Conditions of Confinement in Prisons*, 18 J. CONTEMP. L. 131 (1992); Amanda Rubin, *Before and after* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207 (1992); Pamela Rosenblatt, *The Dilemma of Overcrowding in the Nations Prisons: What Are Constitutional Conditions and What Can Be Done?*, 8 J. HUM. RTS. 489 (1991); Karen D. Bayley, State v. Davis: *A Proportionality Challenge to Maryland's Recidivist Statute*, 48 MD. L. REV. 520 (1989); Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); Thomas E. Baker & Fletcher N. Baldwin, Jr.,

In terms of substantively restricting the reach of criminal sanctions, three major facets to the Eighth Amendment maintain significance.[105] First, the Eighth Amendment restrains the method which may be used to inflict punishment by deeming certain modes of punishment to be *per se* unconstitutional.[106] The Amendment also prohibits sanctions that are unconstitutionally disproportionate to the crimes for which they are sentenced, notwithstanding the fact that such sanctions may be constitutionally permitted for other crimes.[107] Additionally, the Amendment protects against defining certain conduct or statuses as criminal.[108]

1. *Per Se* Unconstitutional Punishments

At a minimum, the Eighth Amendment bans, as *per se* unconstitutional, those types of punishment that were considered cruel and unusual at the time of the initial adoption of the Amendment.[109] However, as American society and its values and mores change, so does the scope of the Eighth Amendment guarantee, for it "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."[110]

The death penalty, upheld by the Court in *Gregg v. Georgia*,[111]

Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent," 27 ARIZ. L. REV. 25 (1985); Beth D. Liss, *The Eighth Amendment: Judicial Self-Restraint and Legislative Power*, 65 MARQ. L. REV. 434 (1982); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

[105]LAFAVE, *supra* note 104, at 177 (citing Note, 79 HARV. L. REV. 635 (1966)).

[106]*Id.* at 177-79.

[107]*Id.* at 177, 179-82.

[108]*Id.* at 177, 182-85.

[109]*Id.* at 177. Included in this group of originally conceived cruel punishments are the punishments of crucifixion, burning at the stake, and "breaking on the wheel," *id.* (citing *In re* Kemmler, 136 U.S. 436 (1880)), as well as the "rack and thumbscrew," *id.* (citing Chambers v. Florida, 309 U.S. 227 (1940)), and even drastic cases of solitary confinement, *id.* (citing *In re* Medley, 134 U.S. 160 (1890)).

[110]*Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[111]428 U.S. 153 (1976).

maintains a variety of methods by which it may constitutionally be imposed.[112] In determining the permissibility of the death penalty, the Court in *Gregg* observed three significant factors.[113] The Court first noted that for crimes of murder, the death penalty has long been accepted in the United States as well as in England.[114] Additionally, the Court recognized that a "large portion of American society continues to regard it as an appropriate and necessary criminal sanction."[115] Finally, the majority opined that the death penalty serves two vital purposes, deterrence and retribution.[116] Thus, the Court held, as long as capital punishment is not imposed in an "arbitrary and capricious manner," the penalty may survive Eighth Amendment analysis.[117]

Recounting the constitutional proscription against capricious impositions of the death penalty, the Supreme Court in *Lockett v. Ohio*[118] determined that the Eighth Amendment requires that mitigating factors be available for consideration, as a basis for a sanction less than death, when sentencing a capital defendant.[119] The Court found that the Eighth Amendment is violated whenever a state mandates the death penalty for certain types of murder and disregards individual mitigating circumstances of the particular

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[112]LAFAVE, *supra* note 105, at 178. In *In re Kemmler*, the Court held that death by electrocution is a constitutionally permissible means of exacting a death sentence. *In re* Kemmler 136 U.S. 436 (1880). The Supreme Court also established that death by shooting was permissible. Wilkerson v. Utah, 99 U.S. 130 (1879). Similarly, deaths by hanging, Dutton v. State, 91 A. 417 (Md. 1914), and lethal gas, Gray v. Lucas, 710 F.2d 1048 (5th Cir. 1983), have survived Eighth Amendment scrutiny.

[113]LAFAVE, *supra* note 104, at 168 (citing *Gregg*, 428 U.S. at 153).

[114]*Gregg*, 428 U.S. at 176.

[115]*Id.* at 179.

[116]*Id.* at 183.

[117]*Id.* at 189 (citing Furman v. Georgia, 408 U.S. 238 (1972) (holding arbitrary and capricious impositions of the death penalty to be unconstitutional)).

[118]438 U.S. 586 (1978). In *Lockett*, the defendant was convicted of aggravated murder, *id.* at 589, and sentenced according to an Ohio statute which permitted consideration of only three particular mitigating factors when determining whether to impose the death penalty. *Id.* at 608. The Court held that the "limited range of mitigating circumstances which may be considered by the sentencer . . . is incompatible with the Eighth and Fourteenth Amendments." *Id.*

[119]*Id.*

defendant.[120] Finally, the Court established that capital punishment requires fairness and consistency, and that "a consistency produced by ignoring individual differences is a false consistency."[121]

2. Unconstitutionally Disproportionate Punishments

The second aspect of the scope of the Eighth Amendment's substantive prohibitions is the bar against excessive punishments out of proportion to the gravity of the crime committed.[122] In *Weems v. United States*,[123] the defendant was sentenced to fifteen years of *cadena temporal*[124] for falsifying an official record.[125] The majority, after comparing the defendant's punishment to those imposed by other American jurisdictions for similar crimes, held that the punishment was unconstitutionally excessive relative to the offense committed.[126]

This proportionality issue was addressed in relation to the death penalty by the Supreme Court in *Gregg*.[127] The Court, in determining that the death penalty was not disproportionate to the crime of murder, reasoned that

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[120]Roberts v. Louisiana, 431 U.S. 633 (1977) (holding sentencing statute unconstitutional because it mandated the death penalty for first degree murder of a police officer).

[121]Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). Compare this consistency requirement with the due process restriction against arbitrary and capricious impositions, *infra* note 149 and accompanying text.

[122]LAFAVE, *supra* note 104, at 179 (citing Weems v. United States, 217 U.S. 349 (1910)).

[123]217 U.S. 349 (1910).

[124]*Id.* at 358. *Cadena temporal* included extremely hard labor while shackled and chained, the loss of parental rights and the right to dispose of property inter vivos, as well as ongoing surveillance for life. *Id.* at 364; LAFAVE, *supra* note 104, at 179.

[125]*Weems*, 217 U.S. at 357-48.

[126]*Id.* at 382. However, while a punishment may be found to be disproportionate to the crime for which it is imposed and, thus, in violation of the Eighth Amendment, it is apparent that courts afford considerable deference to legislative decisions concerning the appropriate severity of a sanction authorized for particular categories of offenses. LAFAVE, *supra* note 104, at 179; *see generally* Note, 36 N.Y.U. L. REV. 846, 852 (1961). "[O]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare." Solem v. Helm, 463 U.S. 277, 289-90 (1983) (quoting Rummel v. Estelle, 445 U.S. 263, 272 (1980)).

[127]428 U.S. 153 (1976). See *supra* note 111-17 and accompanying text for a discussion *Gregg*.

"when life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime."[128]

The applicability of the proportionality principle to felony prison sentences was later established in *Solem v. Helm*.[129] In *Solem*, the defendant had six prior minor and nonviolent felony convictions and was convicted of "uttering a 'no account' check" for one hundred dollars.[130] Despite that the crime was ordinarily punishable by a maximum of five years in prison,[131] the defendant received a life sentence without parole under the State's recidivist statute.[132] The Court, per Justice Powell, held that the petitioner's sentence was significantly disproportionate to the crime committed and, therefore, prohibited by the Eighth Amendment.[133] In so holding, the Court entertained proportionality analysis, comparing the defendant's offenses and resulting sentence with the more serious crimes and resulting sentences of other offenders.[134] The majority subsequently determined that the defendant was treated far more harshly for far more minor criminal conduct.[135] Finally, the Court articulated objective criteria

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[128]*Gregg*, 428 U.S. at 187. The nature and severity of the crime of murder as opposed to lesser crimes, appeared to be the basis for considering the death penalty as consistent, proportionally, with certain murders.

However, the death penalty has been held to be unconstitutionally disproportionate to certain offenses other than murder. In *Coker v. Georgia*, the Court held that the death penalty was excessive punishment for the crime of raping an adult woman. Coker v. Georgia, 433 U.S. 584 (1977). Additionally, the Court held that the death penalty was disproportionate to the crime of aiding and abetting a felony in the course of which murder is committed by others and the defendant does not himself kill, attempt to kill, or intend a killing. Enmund v. Florida, 458 U.S. 782 (1982).

[129]463 U.S. 277 (1983).

[130]*Id.* at 281.

[131]*Id.* at 286 n.6.

[132]*Id.* at 282-83.

[133]*Id.* at 303.

[134]*Id.* at 295-300.

[135]*Id.*

to be utilized in proportionality analysis.[136]

3. Unconstitutional Status Crimes

The third aspect of the Eighth Amendment's ban on cruel and unusual punishment involves a prohibition of penal sanctions altogether in certain circumstances.[137] In essence, the Clause limits what the legislature may do in terms of defining conduct as "criminal."[138] For example, in *Robinson v. California*,[139] the Supreme Court held it unconstitutional to criminalize a person for being addicted to narcotics, essentially holding statutes creating "status" crimes to be unconstitutional.[140]

C. THE GUARANTEE OF DUE PROCESS

> *Whatever disagreement there may be as to the scope of the phrase "due process of law" there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.*[141]

1. Procedural Due Process

The Fourteenth Amendment's Due Process Clause[142] involves two different types of constitutional due process guarantees against State action

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[136]*Id.* at 290-92. In *Solem*, the majority enumerated such guidelines as including consideration of: "the gravity of the offense and the harshness of the penalty[;] . . . the sentences imposed on other criminals in the same jurisdiction; and . . . the sentences imposed for commission of the same crime in other jurisdictions." *Id.*

[137]LAFAVE, *supra* note 104, at 182.

[138]*Id.*

[139]370 U.S. 660 (1962).

[140]*Id.* at 677 (stating that the Court would "forget the teachings of the Eighth Amendment if [the majority] allowed sickness to be made a crime and permitted sick people to be punished for being sick").

[141]Frank v. Mangum, 237 U.S. 309, 347 (1915).

[142]*See supra* note 5.

— procedural and substantive.[143] Procedural due process essentially requires fairness of the decision-making process applied by the convicting State to a defendant.[144] The protections afforded by procedural due process are limited to state actions that impair a person's life, liberty, or property.[145] Thus, the underlying law which is the basis for the procedures employed need not be fair according to the guarantee of procedural due process; in fact, fairness of the underlying law is not a valid ground upon which one may assert a violation of the procedural due process guarantee.[146]

A claim revolving around Fourteenth Amendment due process requires that a person's "life, liberty, or property" is to be impaired by the state.[147] When such personal interests are at stake, procedural due process requires that the state heed enacted laws and not deviate from such legal procedures to any extent that would be unfair to the person against whom the law is to

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[143]JOHN F. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 338 (4th ed. 1991). *See generally* David Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968). The procedural aspect of due process guarantees that "each person shall be accorded a certain 'process' if they are to be deprived . . . ." NOWAK, *supra*, at 487. In contrast, substantive due process restricts the manner in which the state may limit individual freedom, protecting fundamental rights and preventing arbitrary impingement of such rights by the state. *Id.*

[144]NOWAK, *supra* note 143, at 338-39. Individuals have a right to an equitable procedure to ascertain the foundation supporting and the legality of, the particular action taken against them. *Id.* at 487. Judicial review of the procedural due process afforded by the State may involve the fairness of a legislatively authorized procedure generally, or may only review the fairness afforded in a particular case. *Id.* at 338-39.

[145]*Id.*

[146]*Id.* at 339. For instance, if a law imposed the death penalty for the crime of double parking, and a person was fairly convicted and sentenced for committing such crime, the procedural due process afforded the individual would not be assailable. *Id.* Of course, the law may otherwise fail under the alternative due process guarantee, that of substantive due process. *Id.*

[147]*Id.* at 487. What personal interests constitute "life, liberty, or property" within the meaning of the Fourteenth Amendment is constantly changing. *See generally* Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044 (1984); Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146 (1983); Rodney A. Smolla, *The Re-emergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982); William Van Alstyne, *Cracks in "The New Property": Adjudicating Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

be applied.[148]

2. Substantive Due Process

Substantive due process, on the other hand, guarantees that the underlying substance of the law is not an "irrational and arbitrary abuse" of the state's power.[149] Substantive review is the judicial determination of the harmony of the substantive law or state action with the Constitution.[150] Fairness of the process by which the state applies the law to particular individuals is not relevant.[151] The theory behind the Courts's review of the substance of legislation under the Due Process Clause, rather than under the more specific constitutional enumerations,[152] is that particular types of legislative activities exceed *any* appropriate scope of governmental exercise and are irreconcilable with the democratic system.[153]

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[148]NOWAK, *supra* note 143, at 488.

[149]*Id.* at 339. Thus, in the illustrative example noted previously, *see supra* note 146, while the double parking law may fulfill procedural due process requirements, it may be successfully attacked on substantive grounds in that such a law, imposing the death penalty on a mere crime of double parking, is an arbitrary, irrational, and disproportionate abuse of the State's power to protect against traffic dangers. NOWAK, *supra* note 143, at 339.

[150]NOWAK, *supra* note 143, at 339.

[151]*Id.* Such fairness would presumably be protected by the procedural guarantee.

Except for procedural due process review, all forms of review by the courts are substantive. *Id.* For instance, in the aforementioned illustration, *see supra* notes 146, 149, if a person was convicted under the law prohibiting double parking and was subsequently sentenced to death, the person could challenge the law substantively under the substantive due process guarantee of the Fourteenth Amendment. *See* NOWAK, *supra* note 143, at 339. Additionally, the person could argue that the law violated the Eighth Amendment's Cruel and Unusual Punishment Clause. *See id.* The Eighth Amendment challenge would be grounded in proportionality, as the death penalty imposed would be unconstitutionally disproportionate to the crime committed. *See id.* The judicial review involved in this Eighth Amendment challenge would thus be substantive rather than procedural. *Id.*

[152]Specific constitutional guarantees include the Eight Amendment's Cruel and Unusual Punishment Clause. *See* U.S. CONST. amend. VIII.

[153]NOWAK, *supra* note 143, at 340. "[A]ny life, liberty, or property limited by such a law is taken without due process because the Constitution never granted the government the ability to pass such a law" in the first place. *Id.*

Substantive review under particular Constitutional provisions or amendments is not criticized to the extent that substantive review under the Fourteenth Amendment's Due Process Clause is. *Id.* at 339. The difference appears to lie in the fact that the Constitution, through

3. The Due Process Standard Within the Criminal Arena

Early on, the Court utilized a nonspecific due process test where an interest was protected if it was deemed so fundamental that liberty and justice demanded such protection.[154] The process due was considered to be one that "hears before it condemns; which proceeds upon inquiry, and renders judgment only after a trial."[155] The phrase "due process," as guaranteed by the Fourteenth Amendment, is not precisely defined but a variety of Supreme Court decisions have illustrated situations when due process within the criminal context has been denied and have set forth the general standard for determining such constitutional violations.

Writing for the majority, Justice Cardozo in *Snyder v. Commonwealth of Massachusetts*,[156] declared that a state has the power, consistent with due process, to regulate the procedures of its courts according to the state's own image of fairness "*unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as*

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its provisions and amendments, gives express manifestation that certain actions are beyond the government's power. *See generally id.* Under the Due Process Clause, however, because the specifics of what constitutes an overreaching of the government is not defined, the Courts's ability to resolve the constitutionality of governmental laws or actions is prone to more criticism. *Id.*

[154]Hurtado v. California, 110 U.S. 516, 535 (1884) (holding that due process does not require indictment by a grand jury in a state prosecution for murder).

[155]Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 581 (1819) (stating that college charter involves contract within the meaning of the Contract Clause, Article 1, § 10).

In Mathews v. Eldridge, 424 U.S. 319 (1976), the Court established the current test within the civil arena for determining whether due process has been violated. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The first question within the two prong analytical framework articulated in *Mathews* was whether there was a threshold interest that due process protected. *Id.* If such an interest was found to exist, the second question addressed what specific process was due the interest-holder in order to comport with the Fourteenth Amendment. *Id.* In determining the process due, three factors were considered, *id.*; *see generally* Michael Millemann, *Capital Post-Conviction Petitioners' Right to Counsel Integrating Access to Court Doctrine and Due Process Principles*, 48 MD. L. REV. 455 (1989), including: (1) the particular private interest that was to be affected; (2) the risk of an erroneous deprivation of the interest together with the value of instituting additional procedures to protect against such risk; and (3) the governmental interests involved in conjunction with the cost of instituting additional procedures to avoid error. *Mathews*, 424 U.S. at 335.

[156]291 U.S. 97 (1934).

fundamental."[157] The Court established this oft-quoted due process standard when addressing the question of whether a jury's view of a murder scene, in the absence of a defendant who previously requested that he be present, was a denial of due process.[158]

Justice Cardozo articulated that a state criminal procedure does not transgress the Due Process Clause simply because another procedure appears more equitable or sagacious or more likely to protect a defendant.[159] In denying that the defendant's nonpresense at the view violated due process, the Justice refuted the existence of a Fourteenth Amendment guarantee of the defendant's "presence when [the defendant's] presence would be useless, or the benefit but a shadow."[160] The Court postulated that a due process right of the defendant's presence exists only to the extent that such presence is necessary to a constitutionally fair and just hearing that would otherwise be frustrated by the defendant's absence.[161]

The Court further resolved that even if the State's prevailing practice was to permit the defendant to accompany the jury to the view upon request,

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[157]*Id.* at 105 (emphasis added) (citing Frank v. Mangum, 237 U.S. 309, 326 (1915); Twining v. New Jersey, 211 U.S. 78, 106, 111, 112 (1906); Rogers v. Peck, 199 U.S. 425, 434 (1905); Maxwell v. Dow, 176 U.S. 581, 604 (1900); Hurtado v. California, 110 U.S. 516 (1884)).

[158]*Snyder*, 291 U.S. at 104-05. In *Snyder*, the defendant was tried for murder. *Id.* at 103. At the trial, the court granted the State's motion that the jury be directed to view the scene of the crime. *Id.* The court rejected a similar motion by the defendant, preventing the defendant's presence at the view but permitting the defendant's counsel to attend the jury site trip. *Id.*

[159]*Id.* at 105.

[160]*Id.* at 106-07 (citing Valdez v. United States, 244 U.S. 432, 445 (1917); Howard v. Kentucky, 200 U.S. 164, 175 (1906)).

[161]*Id.* at 107-08. Justice Cardozo asserted that:

> The Fourteenth Amendment has not said in so many words that [the defendant] must be present every second or minute or even every hour of the trial. If words so inflexible are to be taken as implied, it is only because they are put there by a court, and not because they are there already, in advance of the decision. *Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute, concept. It is fairness with reference to particular conditions or particular results.*

Id. at 116 (emphasis added).

such a practice may be abrogated without denying the defendant due process.[162] Justice Cardozo reasoned that the laws of a state are the "authentic forms through which the sense of justice of the people of that [State] expresses itself," and thus, because sentiments may disagree as to the policy or fairness of the laws, such laws should not be overridden on the grounds that they deny the necessities of a trial.[163]

Thirteen years later, the Supreme Court in *Louisiana ex rel. Francis v. Resweber*,[164] deemed due process to be denied when "civilized standards" are violated.[165] *Resweber* concerned a death sentenced prisoner facing death by electrocution.[166] At the scheduled electrocution, the executioner threw the switch but because of mechanical difficulty, the prisoner did not die.[167] A new death warrant was issued and a new date for execution was established.[168] The Court granted certiorari to decide whether the newly scheduled execution violated the Due Process Clause of the Fourteenth Amendment.[169]

The Court in *Resweber* first distinguished impermissible double jeopardy from the situation in a previous case, *Palko v. Connecticut*.[170] In *Palko*, the Court decided that the retrial of a defendant's case because of legal error does not constitute the type of hardship proscribed by the Fourteenth

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[162]*Id.* at 117.

[163]*Id.* at 122.

[164]329 U.S. 459 (1947).

[165]*Id.* at 468 (Frankfurter, J., concurring).

[166]*Id.* at 460.

[167]*Id.*

[168]*Id.* at 460-61. The Supreme Court of Louisiana denied the prisoner's request for relief based on a claim of a denial of due process guaranteed by the Fourteenth Amendment. *Id.* at 461.

[169]*Id.* The Court answered the question of "whether the proposed enforcement [second execution] of the criminal law of the state [death by execution] was offensive to any constitutional requirements to which reference ha[d] been made." *Id.* at 462. The defendant argued that an execution under such circumstances would violate both the Double Jeopardy Clause of the Fifth Amendment and the Cruel and Unusual Punishment provision of the Eighth Amendment and, consequently, deny the defendant due process. *Id.*

[170]302 U.S. 319 (1937).

Amendment.[171] The majority then compared the second execution in *Resweber* with the permissible retrial situation in *Palko*, "see[ing] no difference from a constitutional point of view between a new trial for error of law . . . that results in a death sentence instead of imprisonment for life, and an execution that follows a failure of equipment."[172] In deciding that the second electrocution would not constitute cruel and unusual punishment, the Court noted that the permissible death by electrocution, if hindered due to an unforeseeable accident, would not acquire an added element of cruelty when subsequently administered.[173]

Justice Frankfurter concurred, addressing the broad guarantee of the Due Process Clause rather than the Clause's application of the specific enumerations of the Bill of Rights to the States, as utilized in the Court's opinion.[174] The concurring Justice reasoned that:

> Insofar as due process under the Fourteenth Amendment requires the States to observe any of the immunities "that are valid as against the federal government by force of the specific pledges of particular amendments" it does so because they "have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."[175]

In short, Justice Frankfurter explained, the due process guarantee does not

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[171]Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462-63 (1947) (citing *Palko*, 302 U.S. at 328).

[172]*Id.* at 463 ("When an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the state's subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the Fourteenth Amendment.").

[173]*Id.* at 464. In *Resweber*, the majority noted the lack of intent to inflict unnecessary pain on the defendant as well as no unnecessary pain involved in the newly scheduled execution. *Id.* Here the majority posited that "[t]he situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block" — but such an accident by fire would not give the defendant the constitutional right to escape his death sentence. *Id.*

[174]*Id.* at 468 (Frankfurter, J., concurring) ("[Due Process] . . . expresses a demand for civilized standards which are not defined by the specifically enumerated guarantees of the Bill of Rights." (emphasis added)).

[175]*Id.* at 468-69 (Frankfurter, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 324-25 (1937)).

revoke the freedom of the states to implement their own concepts of fairness in the regulation of criminal justice unless in so doing they offend a fundamental principle of justice.[176]

Five years later, in *Rochin v. California*,[177] the Supreme Court per Justice Frankfurter, held that a State act which "shocks the conscience" is violative of due process.[178] In *Rochin*, the police obtained information that the defendant was selling narcotics and acting upon such information, entered an open door to the house and forced open the door to the defendant's bedroom.[179] Upon seeing the defendant swallow some capsules, the police unsuccessfully attempted to forcibly extract such capsules from the defendant's mouth.[180] The police then transported the defendant to the hospital, where a physician, upon police order, pumped the defendant's stomach against his will to induce vomiting.[181] The contents of the stomach included two capsules containing morphine, which were subsequently admitted as evidence against the defendant.[182]

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[176]*Id.* at 469 (Frankfurter, J., concurring) (quoting Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105 (1934)). The Justice elaborated that a State may be found to deny due process by treating a person in a manner that "violates standards of decency more or less universally accepted though *not when it treats him by a mode about which opinion is fairly divided.*" *Id.* at 469-79 (Frankfurter, J., concurring) (emphasis added).

In other cases, the Court has addressed the question of whether alternative modes of execution are constitutional. *See, e.g., In re* Kemmler, 136 U.S. 436, 447 (1890) (holding that electrocution is permissible mode of execution); Wilkerson v. Utah, 99 U.S. 130, 134-35 (1879) (holding that public shooting is permissible mode of execution). *See also* McGautha v. California, 402 U.S. 183 (1971) (holding death sentence permissible where jury imposed penalty without governing standard); Witherspoon v. Illinois, 391 U.S. 510 (1968) (holding that death sentence can not be exacted where State chose recommending jury by excluding those that voiced general objections to the death penalty).

[177]342 U.S. 165 (1952).

[178]*Id.* at 172.

[179]*Id.* at 166.

[180]*Id.*

[181]*Id.*

[182]*Id.* The defendant, Rochin, was convicted by a California superior court and sentenced to sixty days imprisonment. *Id.* On subsequent appeals, the district court of appeals affirmed the conviction, *id.* (citing People v. Rochin, 225 P.2d 1 (Cal. App 1950)), and the California Supreme Court denied the defendant's petition for a hearing. *Id.* (citing People v. Rochin, 225 P.2d 913 (Cal. 1951)). Two California justices dissented from the denial, opining that:

Although ultimately holding that such a method of obtaining evidence violated the Due Process Clause,[183] the Court noted that the due process guarantee should "not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice."[184] The Court balanced this regard for the States's criminal procedures with the Court's duty to uphold the Due Process Clause and its ban on "offend[ing] those canons of decency and fairness which express the notions of justice . . . even toward those charged with the most heinous offenses."[185]

Determining that the stomach pumping method utilized by the California authorities to obtain evidence violated the defendant's due process rights,

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> A conviction which rests upon evidence of incriminating objects obtained from the body of the accused by physical abuse is as invalid as a conviction which rests upon a verbal confession extracted from him by such abuse . . . . Had the evidence forced from defendant's lips consisted of an oral confession that he illegally possessed a drug . . . he would have the protection of the rule of law which excludes coerced confessions from evidence. But because the evidence forced from his lips consisted of real objects the People of this state are permitted to base a conviction upon it. [We] find no valid ground of distinction between a verbal confession extracted by physical abuse and a confession wrested from defendant's body by physical abuse.

Id. (quoting *Rochin*, 225 P.2d at 917-18).

The Supreme Court granted certiorari, *id.* (citation omitted), to address the uncertainty of the "limitations which the Due Process Clause of the Fourteenth Amendment impose[d] on the conduct of criminal proceedings by the States." *Id.* at 168.

[183]*Id.* at 174.

[184]*Id.* at 168. "[W]e must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes." *Id.* (quoting Malinski v. People of State of New York, 324 U.S. 401, 412, 418 (1945)).

[185]*Id.* at 168 (quoting *Malinski*, 324 U.S. at 416-17). The Court in *Rochin* described due process as "a summarized constitutional guarantee of respect for those personal immunities which . . ." are fundamental. *Id.* *See* Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105 (1934); Palko v. State of Connecticut, 302 U.S. 319, 325 (1937).

Recognizing the ambiguity and obscurity inherent in the guarantee, the Court nonetheless espoused that attainment by the Court of due process determinations was not whimsical. *Id.* at 172. ("[T]he mode of [Due Process] ascertainment is not self-willed . . . . [it] requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, *id.* (citation omitted), on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.").

Justice Frankfurter emphasized the drastic nature of the procedure employed.[186] The Court posited that such treatment "d[id] more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically."[187] Rather, the Justice maintained that the "forcible extraction of [the defendant's] stomach's contents . . . offend[s] even hardened sensibilities."[188]

More recently, in *Patterson v. New York*,[189] the Court, per Justice White, reaffirmed the standard applicable to court determinations that a state law within the criminal arena violates the Fourteenth Amendment.[190] In so doing, the Court upheld a New York law requiring that in a prosecution for second-degree murder, the crime for which the defendant is convicted may not be reduced to manslaughter unless the defendant proves by a preponderance of the evidence the affirmative defense of extreme emotional

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[186]*Id.*

[187]*Id.*

[188]*Id.* In *Rochin*, the Court held this state action to be too similar to the "rack and the screw" in its nature and constitutionality. *Id.*

[189]432 U.S. 197 (1977). In *Patterson*, the defendant, estranged from his wife, went to his father-in-law's house with a rifle, watched his wife through a window "in a state of semiundress" with a male friend, entered that house, and shot the male friend twice in the head. *Id.* at 198. The defendant was subsequently charged with second-degree murder. *Id.* Pursuant to New York law, the two elements comprising this crime were: (1) "inten[ding] to cause the death of another person"; and (2) "caus[ing] the death of such person or of a third person." *Id.* (quoting N.Y. PENAL LAW § 125.25 (McKinney 1975)). No "malice aforethought" was required under the statute, *id.*, but if a defendant "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse," *id.* (quoting N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1975)), the defendant could raise such a circumstance as an affirmative defense, in which case the defendant's actions might fall under the lesser charge of manslaughter. *Id.* at 198-99.

The defendant appealed his conviction of murder, relying on Mullaney v. Wilbur, 421 U.S. 684 (1975), and claimed that the New York statute violated due process by shifting the burden of persuasion concerning his extreme emotional disturbance from the prosecutor to the defendant. *Patterson*, 432 U.S. at 201. The Supreme Court affirmed the New York court's decision, distinguishing *Mullaney* on the ground that the *Mullaney* statute improperly shifted the burden of persuasion concerning an essential fact to the charged offense. *Id.* In contrast, the Court noted that the New York statute in *Patterson* involved no such shifting, since the affirmative defense in the New York statute bore no direct relationship to any element of the murder. *Id.*

[190]*Patterson*, 432 U.S. at 201-02.

disturbance.[191] First, the Justice recognized that the State maintains the authority to regulate the procedures under which its criminal laws are carried out,[192] and that such regulations are not prohibited by the procedural due process guarantee unless a particular procedure "offends some principle of [fundamental] justice."[193] The majority then concluded that the defendant's conviction under New York law did not violate the defendant's due process rights,[194] and that the Due Process Clause did not mandate that New York either abandon all of its affirmative defenses or shoulder the burden of refuting them.[195] Justice White explained that due process does not command that every imaginable procedure be taken, regardless of the sacrifice, to eradicate all potentiality of condemnation of an innocent defendant.[196] Rather, the Justice articulated that "[t]raditionlly, due process has required that only the most basic procedural safeguards be observed;

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[191]*Id.* at 201.

[192]*Id.* Justice White posited that administration of the criminal justice system is more properly within the powers of the states. *Id.* ("It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and [the Court] should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.") (citing Irvine v. California, 347 U.S. 128, 134 (1954)).

[193]*Id.* at 201-02 (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)); *see also* Leland v. Oregon, 343 U.S. 790, 798 (1952); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

Many cases have articulated the principle of judicial deference to state criminal procedures. *See, e.g.*, Rogers v. Peck, 199 U.S. 425, 434 (1905) ("The reluctance with which this court will sanction Federal interference with a state in the administration of its domestic law for the prosecution of crime has been frequently stated in the deliverances of the court upon the subject . . . . [O]nly where fundamental rights, specially secured by the Federal Constitution, are invaded, that such interference is warranted."); Maxwell v. Dow, 176 U.S. 581, 595 (1900) ("Due process of law is process due according to the law of the land . . . . regulated by the law of the state . . . . [and] [o]ur power over that law is only to determine whether it is in conflict with the supreme law of the land — that is to say, with the Constitution and laws of the United States made in pursuance thereof — or with any treaty made under the authority of the United States.").

[194]Patterson v. New York, 432 U.S. 197, 205 (1977).

[195]*Id.* at 207-08. While the Court noted that "it is far worse to convict an innocent man than to let a guilty man go free," *id.* (quoting *In re* Winship, 397 U.S. 358, 372 (1969) (Harlan, J., concurring)), and that society has voluntarily chosen to bear a significant responsibility in order to safeguard the guiltless, the Court in *Patterson* asserted that "the risk [society] must bear is not without limits." *Id.* at 208.

[196]*Id.*

more subtle balancing of society's interests against those of the accused have been left to the legislative branch."[197]

All of the aforementioned cases reiterated the *Snyder* standard for determining whether due process had been denied a criminal defendant. Throughout the years, a vast array of particular due process requirements have been established to help ensure that innocent people are not convicted of crimes.[198] While the Supreme Court has held that the death penalty may be imposed without violating the Fourteenth Amendment's guarantee of due process,[199] the Court has also established that due process demands extra precautions be taken when a person's life is at stake. For instance, a death penalty statute may permit execution only for the most serious crimes.[200] Additionally, mandatory death penalty statutes generally violate the Due Process Clause.[201] In capital cases, the Court has ruled that juries are to be given the option of convicting the defendant of a lesser offense[202] and must be allowed to consider all of the defendant's mitigating character evidence.[203] Once a fair trial, conviction, and death sentence have

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[197]*Id.* at 210. The Court illustrated this qualification of due process with the example that "[p]unishment of those found guilty by a jury . . . is not forbidden merely because there is a remote possibility in some instances that an innocent person might go to jail." *Id.*

[198]*See, e.g.*, Coy v. Iowa, 487 U.S. 1012 (1988) (holding that due process requires that defendant has the right to confront witnesses against him); Taylor v. Illinois, 484 U.S. 400 (1988) (finding that defendant has due process right to present witnesses in his own defense); Strickland v. Washington, 466 U.S. 668 (1984) (ruling that due process is violated if defendant is denied the effective assistance of counsel); *In re* Winship, 397 U.S. 358 (1970) (requiring that state prove defendant's guilt beyond a reasonable doubt); United States v. Wade, 388 U.S. 218 (1967) (maintaining that defendant has right to counsel at post-indictment lineup); Brady v. Maryland, 373 U.S. 83 (1963) (holding that state has affirmative duty to disclose exculpatory evidence); *In re* Murchison, 349 U.S. 133 (1955) (articulating that defendant is entitled to a fair trial before impartial tribunal).

[199]NOWAK, *supra* note 143, at 492; Gregg v. Georgia, 428 U.S. 153 (1976).

[200]*See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (holding that the death penalty is disproportionate to crime of raping an adult woman).

[201]*See, e.g.*, Roberts v. Louisiana, 431 U.S. 633 (1977) (holding imposition of mandatory death penalty without consideration of individualized mitigating factors unconstitutional).

[202]Beck v. Alabama, 447 U.S. 625 (1980).

[203]Eddings v. Oklahoma, 455 U.S. 104 (1982) (holding unconstitutional the State court's refusal as a matter of law to consider as a mitigating factor the petitioner's unhappy childhood and emotional disturbance); Lockett v. Ohio, 438 U.S. 586 (1978) (holding Ohio death penalty statute violated Eighth and Fourteenth Amendments where it did not permit individual

occurred, however, due process does not require a heightened standard of review on *habeas corpus*.[204]

IV. THE SUPREME COURT'S ANALYSIS IN *HERRERA V. COLLINS*

A. THE MAJORITY OPINION, PER CHIEF JUSTICE REHNQUIST

Writing for the majority,[205] Chief Justice Rehnquist began the Court's analysis by addressing Herrera's constitutional assertions.[206] The Chief Justice interpreted Herrera's claim to be that the execution of a person who is innocent of the crime for which he (or she) was convicted violates both the Eighth and Fourteenth Amendments of the United States Constitution.[207]

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consideration of mitigating factors).

[204]Murray v. Giarratano, 492 U.S. 1 (1989) (ruling that state need not appoint counsel for indigent death row inmate seeking postconviction relief).

[205]Herrera v. Collins, 113 S. Ct. 853, 859 (1993). Chief Justice Rehnquist was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. *Id.*

[206]*Id.*

[207]*Id.* Chief Justice Rehnquist noted that Herrera claimed that such an execution was both cruel and unusual punishment and violative of the Due Process Clause. *Id.* Herrera asserted that "[b]ecause executing an innocent person would be repugnant to any civilized person and would serve no societal purpose, to do so would entail 'the gratuitous infliction of suffering' . . . and would violate the Eighth and Fourteenth Amendments." Brief for Petitioner at 37-38, *Herrera*, (No. 91-7328) (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1975) (opinion of Stewart, Powell, and Stevens, JJ.)).

The two questions presented in Herrera's brief to the Supreme Court on writ of certiorari included:

> I. Whether the Eighth and Fourteenth Amendments permit a state to execute an individual who is innocent of the crime for which he or she was convicted and sentenced to death?
> II. What post-conviction procedures are necessary to protect against the execution of an innocent person?

Brief for Petitioner at 1, *Herrera* (No. 91-7328). But see the concurring opinion of Justice O'Connor, positing that the question presented to the Court was not whether the execution of an innocent person is unconstitutional, but whether "a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew . . ." *Herrera*, 113 S. Ct. at 870 (O'Connor, J., concurring). *See also infra* text accompanying notes 295-96.

Herrera asserted two due process violations in addition to an Eighth Amendment

The Court initially recognized the "elemental appeal" of Herrera's proposal, comparing it to the idea that the Constitution proscribes the imprisonment of one innocent of the crime for which he has been convicted and incarcerated.[208] In so recognizing, the Chief Justice focused on the heart of the criminal justice system and its goal of maintaining the freedom of the innocent while convicting the guilty.[209]

The Chief Justice then underscored that in the present situation, the newly discovered evidence of "actual innocence" urged by Herrera in

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violation. Brief for Petitioner at 35-36, *Herrera* (No. 91-7328). The defendant first argued that he had a substantive due process right not to be executed because he was in fact innocent. *Id.* Second, he contended that procedural due process requires that states afford a defendant a full system of useful remedies. *Id.* at 36. If the state failed to so afford, claimed Herrera, a federal court had the duty to intercede. *Id.* at 38 (citing Harris v. Reed, 489 U.S. 255, 268 (1989) (O'Connor, J., concurring)).

[208]*Herrera*, 113 S. Ct. at 859.

[209]*Id.* (citing United States v. Nobles, 422 U.S. 225, 230 (1975) (supporting the federal courts compulsory processes to require the submission of evidence in the interest of the integrity of the truthfinding process) (quoting Berger v. United States, 295 U.S. 78, 88 (1935))). In *Nobles*, the defendant, who was subsequently convicted in a federal criminal trial for the robbery of a bank, attempted to have an investigator testify in order to impeach the prosecution's key witnesses. United States v. Nobles, 422 U.S. 225, 227-29 (1975). Although the defense did not plan on submitting the written report of the investigator, the District Court required that the report be submitted nonetheless. *Id.* at 229.

Reversing the court of appeals, the Supreme Court agreed with the district court's holding that the Fifth Amendment privilege against compulsory self-incrimination was personal to the defendant and did not extend to third-party witnesses, such as an investigator. *Id.* at 233-34. Justice Powell, supporting the availability of the federal judiciary's compulsory processes to require the presentation of evidence in court, reiterated that the dual aim of our system is "'that guilt shall not escape or innocence suffer.'" *Id.* at 230 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). Justice Powell further noted that the compulsory processes of the federal court were necessary to further these goals. *Id.* Accordingly, the Justice opined that:

> [T]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts . . . [I]t is imperative . . . that compulsory process be available for the production of evidence needed by the prosecution or by the defense.

Id. at 230-31 (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)).

support of his claim, was not produced at his initial trial.[210] The majority emphasized that the allegedly exculpatory affidavits comprising the new evidence did not arise until 1990, 1991, and 1992.[211] The Court agreed that a judicial proceeding was undoubtedly necessary to determine criminal guilt or innocence.[212] The majority noted, however, that in Herrera's case, such a judicial proceeding had occurred throughout the course of the former decade.[213] Consequently, the majority expounded that Herrera's claim must be considered together with the judicial proceedings that had attached to his case over the years.[214]

The Court utilized such parameters to consider Herrera's claim of actual innocence in conjunction with the due process that had already been afforded Herrera.[215] The majority first contemplated the various constitutional rights and guarantees afforded every criminal defendant as a means of assuring that the goals of the criminal justice system would not be circumvented.[216] Among the safety provisions enumerated by the Court was the presumption of innocence that remains until and unless the person's guilt is proven "beyond a reasonable doubt."[217]

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[210]*Herrera*, 113 S. Ct. at 859.

[211]*Id.* The affidavits of Villarreal and Palacious were dated 1990. *Id.* at 859 n.2. The affidavit of Ybarra was dated 1991 and the affidavit of Raul Jr. was dated in 1992. *Id.* at 859 n.3.

[212]*Id.* at 859.

[213]*Id.*

[214]*Id.*

[215]*Id.*

[216]*Id.* Such constitutional guarantees ensure that one of the "dual aims" of the criminal justice system shall not be circumvented, in particular, the goal of freeing the innocent, as opposed to the alternate goal of convicting the guilty. *See supra* text accompanying note 209. These provisions, required by due process, ensure that an innocent person will not be convicted. Herrera v. Collins, 113 S. Ct. 853, 859 (1993).

Justice Blackmun, however, joined by Justices Stevens and Souter, criticized the majority for its lengthy discussion of such constitutional protections positing that such an enumeration was irrelevant to the issue because such protections sometimes fail. *Id.* at 876 (Blackmun, J., dissenting). *See infra* note 332 and accompanying text.

[217]*Herrera*, 113 S. Ct. at 859 (citing *In re* Winship, 397 U.S. 358 (1970)). In *Winship*, the Court considered whether a juvenile was a "delinquent" as a result of his alleged misconduct. *In re* Winship, 397 U.S. 350 (1972). Particularly, in *Winship*, the Court addressed the narrow question of whether proof beyond a reasonable doubt was a requirement

Then, noting the added seriousness and finality of a capital case above and beyond that of other criminal cases, Chief Justice Rehnquist discussed the additional constitutional protections afforded capital defendants, but not afforded other criminal defendants.[218] Despite these added constitutional protections which increase the State's difficulty in establishing the requisite guilt, the Court posited that "every conceivable step" need not be taken to eliminate all risk of convicting an innocent person.[219] The majority justified this point by noting that a defendant loses the constitutional presumption of innocence once he is fairly convicted of a crime.[220] Moreover, Chief Justice Rehnquist emphasized that Herrera did not dispute that he was, in fact, fairly convicted of the murder of Carrisalez.[221] Accordingly, the Chief Justice insisted that because Herrera agreed that his conviction met all constitutional requirements, Herrera no longer maintained

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of due process necessary during the adjudication of an act that, if committed by an adult, would constitute a crime. *Id.* at 359. Arriving at its ultimate holding on juvenile delinquency, the Court in *Winship* explicitly held the reasonable doubt standard to be a constitutional requirement in that "the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he was held." *Id.* at 364. The Court then focused on the juvenile delinquency issue, holding that "where a twelve year old child is charged with an act of stealing which renders him liable to confinement for as long as 6 years, then as a matter of due process . . . the case against him must be proved beyond a reasonable doubt." *Id.* at 368 (citation omitted). Additional constitutional guarantees were noted by the Court in *Herrera* as being particularly important in protecting the innocent defendant: the right to confront witnesses; the right to compulsory process; the right to effective legal representation; the right to a jury trial; the requirement that the prosecution disclose exculpatory evidence; and the right to a "fair trial in a fair tribunal." *Herrera*, 113 S. Ct. at 859-60.

[218]*Herrera*, 113 S. Ct. at 860 (citing Beck v. Alabama, 447 U.S. 625 (1980) (holding that because of possible execution, the Constitution mandates that the jury in a capital case be given the option of convicting the defendant of a lesser included offense)).

[219]*Id.* (quoting Patterson v. New York, 432 U.S. 197 (1977)). See *supra* notes 189-97 and accompanying text for discussion of *Patterson*. Due process requirements, explained then-Justice Rehnquist, do not extend so far as to necessitate the "paralyz[ation of] our system for enforcement of criminal law." Herrera v. Collins, 113 S. Ct. 853, 860 (1993). In essence, the Court implied that the state's interest in finality of its criminal judgments would justify a limitation on the extent of due process requirements. *See id.* Herrera contended that the state's interest in the finality of its criminal judgments must yield when the case involves an innocent defendant. Brief for Petitioner at 37, *Herrera* (No. 91-7328).

[220]*Herrera*, 113 S. Ct. at 860 (citing Ross v. Moffitt, 417 U.S. 600 (1974) (holding that the Due Process Clause does not require that the state provide indigent with counsel on discretionary appeal to state supreme court)).

[221]*Id.*

a presumption of innocence — rather, Herrera was before the Court as a person guilty of two capital murders.[222]

After briefly describing the barriers to a new state trial erected by Texas's *habeas* laws that prevented Herrera from obtaining his requested relief in state court,[223] the Court then articulated the federal court requirements for *habeas corpus* relief.[224] Adhering to the leading case of *Townsend v. Sain*,[225] the Chief Justice stated that traditionally, actual innocence claims supported by new evidence alone, without any constitutional claims, did not entitle a person to *habeas* relief.[226] The majority reasoned that federal *habeas courts* are solely intended "to ensure that individuals are not imprisoned in violation of the constitution."[227] Chief Justice Rehnquist further stressed that *habeas corpus* is not intended to relitigate trials, which are inherently decisive proceedings.[228] The Court

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[222]*Id.* In a concurring opinion, Justice O'Connor, joined by Justice Kennedy also expressly supported this reasoning. *Id.* at 870 (O'Connor, J., concurring) (agreeing that the issue does not involve an innocent person but, rather, a guilty person)). *See infra* note 294-95 and accompanying text. Additionally, Justice Scalia, joined by Justice Thomas, asserted that the question upon which certiorari was granted did not pertain to the execution of an innocent person *per se*, but "a person who, having been convicted of murder after a full and fair trial, later alleges . . . [actual innocence]." *Herrera*, 113 S. Ct. at 874-75 (Scalia, J., concurring). *See also infra* note 316 and accompanying text.

[223]*Herrera*, 113 S. Ct. at 860. The Court explained that Herrera's claim of actual innocence, as supported by the new affidavits never presented at trial, was not cognizable by the Texas state courts due to the thirty-day limitation pertaining to newly discovered evidence. *Id.* (citing TEX. RULE APP. PROC. 31(a)(1) (1992)).

[224]*Id.*

[225]372 U.S. 293 (1963) ("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*."). See *supra* notes 54-59 and accompanying text for a discussion of *Townsend*.

[226]Herrera v. Collins, 113 S. Ct. 853, 860 (1993) (citing *Townsend*, 372 U.S. at 293).

[227]*Id.* (citing Moore v. Dempsey, 261 U.S. 86, 87-88 (1923) (holding that *habeas* court properly reviewed petition alleging that trial was infected by mob pressures and that, consequently, petitioner was denied due process); *Ex parte* Terry, 128 U.S. 289, 305 (1888) (stating that "habeas corpus does not perform the office of a writ of error or an appeal . . . facts can not be reexamined or reviewed in this collateral proceeding")).

[228]*Id.* at 861 (citing Wainwright v. Sykes, 433 U.S. 72, 90 (1977) (holding that defendant's failure to make timely objection under State's "contemporaneous objection rule" to admission of incriminating statements, absent showing of cause and prejudice, bars federal *habeas* review)).

concluded that holding otherwise would be extremely disruptive of the federal criminal justice system.[229]

The Court next attempted to delineate a standard as to when a federal *habeas* court is permitted to review a state court conviction.[230] In so doing, the majority reviewed *Jackson v. Virginia*,[231] where the Court had held that a federal *habeas* court may reevaluate a claim that the evidence presented at trial was inadequate for "any rational trier of fact" to convict the defendant beyond a reasonable doubt.[232]

However, the Court then distinguished Herrera's claim from that of the petitioner in *Jackson*.[233] Herrera, the majority proclaimed, failed to allege an independent constitutional violation while the *Jackson* petitioner succeeded in doing so.[234] Also, unlike the defendant in *Jackson*, Herrera did not request a review of evidence found solely on the record and thus, the Court rationalized, Herrera's request exceeded the degree of review of evidence authorized by *Jackson*.[235] Furthermore, the Court added that Herrera did not suggest that the trial court made an irrational determination of culpability but instead questioned asked whether the court made a correct determination of guilt or innocence, a question precluded under *Jackson*.[236]

Chief Justice Rehnquist next addressed the potential forms of relief and the standard of proof of innocence necessary to achieve the *habeas* relief, as

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[229]*Id.* The Court failed to describe how and why the relitigation of trials would be so disruptive. *See id.*

[230]*Id.*

[231]443 U.S. 307 (1979) (holding that *habeas* applicant was not entitled to relief because, with the evidence adduced at trial, a rational juror could have found petitioner guilty of first degree murder).

[232]Herrera v. Collins, 113 S. Ct. 853, 861 (1993) (citing *Jackson*, 443 U.S. at 318-19). In *Jackson*, the Court emphasized that a federal court, when reviewing the evidence presented at trial, may not make a subjective determination of guilt or innocence. *Id.* The majority commented that the question is not "'whether *it* [the Court] believes that the evidence at trial established guilt beyond a reasonable doubt,'" but whether a rational trier of fact could find such guilt. *Id.* (quoting *Jackson*, 443 U.S. at 318-19).

[233]*Id.* at 861.

[234]*Id.*

[235]*Id.*

[236]*Id.*

proposed by Herrera and the dissenting Justices.[237] The majority denigrated these approaches, arguing that they required the district court to make new individual case determinations of probable innocence.[238] Additionally, the Court criticized the dissent's requirement that the State retry a prisoner who made a showing of "probable innocence" ten years after the first trial solely because of a belief that the jury might not subsequently find the prisoner guilty beyond a reasonable doubt in light of the new evidence.[239]

Although maintaining that actual innocence claims should not be reviewed by *habeas* courts, the majority qualified this holding by observing that "our habeas jurisprudence [does not] cast[] a blind eye towards innocence."[240] Relying on *Sawyer v. Whitley*,[241] the Court considered the

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[237]*Id.* at 861-62. The Court did not, however, hold that any relief was permitted. *See id.* The Court merely expounded upon the hypothetical situation where Herrera's requested *habeas* relief was permitted upon an actual innocence claim, illustrating the possibilities. *Id.*

[238]*Id.* at 862.

[239]*Id.* The Court understood Herrera's request to be that the federal *habeas* court must rehear trial witnesses that testified ten years prior as well as the four newly discovered affiants, *see supra* notes 28-29, 34 and accompanying text, and redetermine Herrera's culpability. Herrera v. Collins, 113 S. Ct. 853, 861-62 (1993). The majority compared such relief requested by Herrera to that which the dissenting Justice Blackmun approved. *Id.* at 861. The Court interpreted the dissent as holding that Herrera would have the burden of showing "probable innocence," and if he met such a burden, he should be granted relief. *Id.* at 861-62. In effect, the Court surmised that based on the dissent's reasoning, the *habeas* court would have to make individual case determinations, weighing the new evidence against the old guilt-rendering evidence. *Id.* at 862. Consequently, the Chief Justice continued, if the district court decided that in light of the prisoner's new evidence he was "probably innocent," the prisoner would be granted relief. *Id.*

The Court noted that the dissent failed to describe the relief that should be granted if Herrera were to meet the "probable innocence" standard that the dissent would presumably impose. *Id.* However, interpreting the dissent's reasoning, the Court assumed that the district court would grant a conditional order vacating the sentence, thus requiring the State to retry Herrera a decade after his constitutionally fair first trial. *Id.* The majority criticized that such a retrial could be required merely because of a belief that a jury *might now* find Herrera not guilty at a subsequent trial. *Id.* The Court denounced this rationale because "there is not a guarantee that the guilt or innocence determination would be any more exact." *Id.* The Court reasoned that the passage of ten years since Herrera's first trial would only succeed in reducing the reliability of a subsequent trial because witnesses' memories would fade and witnesses themselves may be unavailable. *Id.* (citations omitted).

[240]*Id.*

"fundamental miscarriage of justice" exception.[242] The majority explained that under this exception, a prisoner may in certain circumstances have his constitutional claim reviewed on the merits if he can prove actual innocence.[243] The Court then clarified the boundaries of this exception by emphasizing that a claim of actual innocence is not, in and of itself, a constitutional claim.[244] As such, the Chief Justice expounded, an actual innocence claim may not be reviewed on the merits by virtue of this exception.[245] Rather, the majority opined that if a prisoner's other constitutional claim is barred, he may, by virtue of his nonconstitutional actual innocence claim, get an additional opportunity to have such a constitutional claim reviewed.[246] The Court concluded by recognizing that *Sawyer* did not extend to freestanding claims of actual innocence and thus, did not apply to Herrera's situation.[247]

The majority then rejected Herrera's argument that his case should be evaluated in a different light by virtue of his death sentence.[248] The Court acknowledged that increased reliability is necessary when imposing the death

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[241]112 S. Ct. 2514 (1992) (holding that *habeas* relief appropriately denied where petitioner failed to show by clear and convincing evidence that "but for" the constitutional error, no reasonable juror would have found petitioner eligible for the death penalty). For a discussion of *Sawyer*, see *supra* notes 68-81 and accompanying text.

[242]*Herrera*, 113 S. Ct. at 862.

[243]*Id.*

[244]*Id.*

[245]*Id.* at 862-63.

[246]*Id.*

[247]*Id.* at 863. The Court expounded that a significant distinguishing factor in Herrera's case was that Herrera did not request the dismissal of a procedural error that resulted in the barring of an alleged constitutional claim. *Id.* The majority noted that Herrera instead argued for *habeas* relief on the ground that his new evidence showed factual, rather than procedural, error in his conviction. *Id.* The Court asserted, however, that even a spirited showing of factual innocence may only be used with this exception where it augments an existing constitutional claim challenging the conviction. *Id.* (citing *Kuhlmann*, 477 U.S. 436, 454 (1986) (establishing standard of a colorable showing of actual innocence for determining when successive claims may be reviewed on *habeas* corpus)). Thus, the Court affirmed, on its own, such a showing of factual error regarding culpability did not entitle an applicant to federal *habeas* relief. *Id.*

[248]*Id.*

penalty,[249] but denied such an increased standard when reviewing federal petitions.[250]

The Court recognized that Herrera did not demand that he necessarily receive a new trial ten years after the fact — alternatively, the Court opined that Herrera merely requested that his death sentence be vacated if and when he succeeded in making a sufficient showing of actual innocence.[251] The Chief Justice attacked this reasoning as illogical because "[i]t would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution [Herrera, because of factual innocence,] could not be executed, but that he could spend the rest of his life in prison."[252]

Next, the Court rejected Herrera's reliance upon *Ford v. Wainwright*[253] because Herrera challenged the factual validity of his conviction, not the constitutionality of his death sentence in light of a subsequent insanity claim.[254] The majority reasoned that Herrera's claim could not be evaluated under Eighth Amendment jurisprudence because the claim concerned his guilt, as opposed to his punishment.[255] The Chief Justice also contrasted the two cases, positing that the sanity issue pertinent in *Ford* was appropriately evaluated close in time to the scheduled execution of the prisoner, while the question of Herrera's culpability became increasingly uncertain as the execution approached and time progressed.[256] The Court also distinguished the unconstitutionality of Florida's scheme to

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[249]*Id.* (citing McKoy v. North Carolina, 494 U.S. 433 (1990); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

[250]*Id.* (citing Murray v. Giarratano, 492 U.S. 1, 9 (1989) (holding that the state was not required to appoint counsel for death sentenced indigent seeking postconviction relief)). The Court elaborated that even if Herrera's capital case did entitle him to increased reliability within federal *habeas corpus* review, a new trial ten years after the first was unwarranted because it would probably not produce increased reliability in the result. *Id.* The majority, however, failed to articulate why the increased standard of reliability did not apply to federal *habeas corpus* review involving the death sentence. *See id.*

[251]*Id.*

[252]*Id.*

[253]477 U.S. 399 (1986) (holding that the Eighth Amendment prohibits executing convicted insane offenders).

[254]Herrera v. Collins, 113 S. Ct. 853, 863 (1993).

[255]*Id.* But see *infra* notes 327-74 and accompanying text for Justice Blackmun's dissent.

[256]*Herrera*, 113 S. Ct. at 863.

determine the sanity of a prisoner sentenced to death with the previous constitutional determination of Herrera's guilt or innocence. The Court noted that in Herrera's case, the criminal justice system already afforded a "high regard for truth that befits a decision affecting the life or death of a human being."[257]

Additionally, the Court objected to Herrera's reliance on *Johnson v. Mississippi*[258] because Herrera requested a supplementary judicial process barred by Texas law.[259] The Court deemed *Johnson* to be inapposite, in that Mississippi already had a practice of permitting evaluation of similar claims through the writ of *coram noblis* and therefore, State law did not have to be overridden to obtain such an evaluation.[260] Granting Herrera the same relief, the majority posited, would override Texas law denying an evidentiary hearing after the thirty days statutory limit had passed, a result not supported by *Johnson* and rejected by the Court.[261]

Chief Justice Rehnquist next addressed Herrera's alternative rationale for demanding a new trial or a vacation of his death sentence, that of the Fourteenth Amendment's due process guarantee.[262] The Chief Justice responded summarily by proclaiming deference to state law because of the States's "considerable expertise in matters of criminal procedure."[263] The majority insisted that the Court would only find a state's criminal process lacking if historical analysis proved a state procedural rule to be, in fact,

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[257]*Id.* (citing *Ford*, 477 U.S. at 411).

[258]486 U.S. 578 (1988). *Johnson* involved a petitioner that had been validly convicted and sentenced to death. *Id.* at 580. The petitioner's sentencing involved consideration of three aggravating circumstances, one of which was a previous violent felony conviction in New York state. *Id.* at 580-81. Following the sentencing, the New York Court of Appeals reversed the conviction for the previous violent felony that had been a basis for the petitioner's subsequent death penalty sentence. *Id.* at 582. The Supreme Court upheld the New York Court of Appeals, holding that the Eighth Amendment required review of the petitioner's death sentence because the jury had been permitted to regard evidence later determined to be materially inaccurate. *Id.* at 584.

[259]Herrera v. Collins, 113 S. Ct. 853, 863-64 (1993) (citing TEX. RULE APP. PROC. 31(a)(1) (1992)).

[260]*Herrera*, 113 S. Ct. 863-64 (citing *Johnson*, 486 U.S. at 578).

[261]*Id.* (citing *Johnson*, 486 U.S. at 578).

[262]*Id.* at 864.

[263]*Id.* (citing Medina v. California, 112 S. Ct. 2572, 2577 (1992) (holding that statute providing for presumption of competency did not violate due process)).

offensive of "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[264] The Court then detailed the history of the granting of new trials within the criminal arena beginning with the law of early England,[265] transgressing through early American common law,[266] and concluding with the States's current practices.[267] The majority established that in light of this history, Texas's criminal procedure was not lacking in due process.[268]

The Court then emphasized that there did, of course, exist an alternative route for Herrera to raise his claim of actual innocence.[269] The Chief Justice specified that while Herrera was not entitled to federal *habeas* relief due to the nonexistence of a constitutional claim, Herrera was free to file an application for executive clemency under Texas law.[270] The majority explained that clemency was the "historic remedy for preventing miscarriages of justice where judicial process has been exhausted."[271] The Court then articulated its analysis of the tradition of clemency, recounting that of Eighth century England through the United States Constitution's adoption of the English model.[272] Quoting Chief Justice Marshall, Chief Justice Rehnquist

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[264]*Id.* (quoting *Medina*, 112 S. Ct. at 2577 (quoting Patterson v. New York, 432 U.S. 197, 202 (1977))). For further discussion of the requirements of due process, see *supra* notes 141-204 and accompanying text.

[265]*Id.*

[266]*Id.* at 864-65.

[267]*Id.* at 865-66.

[268]*Id.* at 866. The majority observed that "we cannot say that Texas's refusal to entertain petitioner's newly discovered evidence eight years after his conviction transgresses a principle of fundamental fairness 'rooted in the traditions and conscience of our people.'" *Id.* (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

[269]*Id.*

[270]*Id.* (citing TEX. CONST., art. IV., § 11; TEX. CODE CRIM. PROC. ANN., art 48.01 (Vernon 1979)).

[271]*Id.*

[272]*Id.* at 867 (citing U.S. CONST. art. II, § 2, cl. 1). Article II, § 2, provides in pertinent part:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service

embraced the tradition of clemency, stating that:

> [A] pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court.[273]

The Court continued, explaining that while not mandated by the United States Constitution, all of the states that authorized capital punishment had provisions for clemency, be it through the states' constitutions or by statute.[274] Conceding that the judicial system is not infallible, "much like the human beings who administer it," the majority described executive clemency as the "fail safe" of the criminal justice system.[275] The Court reported that in one estimation, of sixty-five individuals who were wrongly convicted, forty-seven were released after successfully implementing the relief of clemency, and the other sixteen were acquitted after new trials.[276] In essence, the majority concluded that clemency often has been utilized in capital cases in which a showing of "actual innocence" has been made.[277]

> of the United States; he may require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices and *he shall have Power to grant Reprieves and Pardons for Offenses against the United States*, except in Cases of Impeachment.

U.S. CONST. art. II, § 2 cl. 1 (emphasis added).

[273]Herrera v. Collins, 113 S. Ct. 853, 867 (1993) (quoting United States v. Wilson, 32 U.S. 150, 160-61 (1833)). In addition, the Court noted that "'without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.'" *Id.* (quoting THE FEDERALIST No. 74, at 447-49 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[274]*Id.* (citations omitted).

[275]*Id.* at 868 (citing KATHLEEN D. MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 131 (1989)).

[276]*Id.* (citing E. BORCHARD, CONVICTING THE INNOCENT (1932)).

[277]*Id.* (citation omitted). The Court also acknowledged the dissent's point that one study indicates that twenty-three innocent persons have been executed in the United States. *Id.* at 868 n.15 (citing *Herrera*, 113 S. Ct. at 876 n.1 (Blackmun, J., dissenting)); *see infra* note 332 and accompanying text. The Court, however, further noted that various scholars do not agree

The Court then noted that Texas provided for clemency procedures to which Herrera could apply.[278]

Chief Justice Rehnquist then summarized the majority opinion, reaffirming its reasoning that the trial is the premier event for deciding guilt or innocence in state criminal proceedings.[279] Furthermore, the majority reiterated that federal *habeas corpus* review was limited to claims of constitutional violations that occurred during such criminal trial proceedings.[280] The Court explained that a claim of actual innocence was not constitutional in nature but, rather, the vehicle upon which a prisoner might have his constitutional claim heard on the merits.[281] Thus, the Court concluded that the remedy for actual innocence claims based on new evidence discovered after the statutory date to file a new trial motion, was executive clemency.[282]

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with the results of the study. *Herrera*, 113 S. Ct. at 868 n.15 (citation omitted).

[278]Herrera v. Collins, 113 S. Ct. 853, 868 (1993) (citing TEX. CONST., art. IV, § 11; TEX. CODE CRIM. PROC. ANN., art. 48.01 (Vernon 1979)). The Chief Justice focused on the specific clemency provisions applicable in the state of Texas and available to Herrera. *Id.* (citing TEX. CONST., art. IV, § 11; TEX. CODE CRIM. PROC. ANN., art. 48.01 (Vernon 1979)). The Court explained that in Texas, the individual prisoner, his representative, or the Governor requests that the Board of Pardons and Paroles consider the prisoner's particular situation and plea for clemency. *Id.* A majority of the Board may then recommend that the Governor grant the requested clemency. *Id.*

The Court detailed that for pardons grounded on the claim of actual innocence, the Board of Pardons and Paroles will consider recommending a full pardon upon obtaining the following:

> (1) a written unanimous recommendation of the current trial officials of the court of conviction; and/or (2) a certified order or judgment accompanied by certified copy of the findings of fact (if any); and (3) affidavits of witnesses upon which the finding of innocence is based.

Id. (quoting TEX. ADMIN. CODE, tit. 37, § 143.2 (West Supp. 1992)). The Court also pointed out that Herrera asked only for the 30 day reprieve and had not yet requested a pardon or commutation of the death sentence on the ground of innocence. *Id.*

[279]*Id.* at 869.

[280]*Id.*

[281]*Id.*

[282]*Id.* Herrera disputed the use of executive clemency as a "substitute" for *habeas corpus* relief. Brief for Petitioner at 40 n.53, *Herrera* (No. 91-7328). Relying upon West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), Herrera reasoned that the "very purpose

The Court then assumed, for the "sake of argument," that in a capital case a "truly persuasive demonstration of 'actual innocence'" would render the execution of a prisoner unconstitutional and mandate federal *habeas* relief if no other state avenue was available.[283] The Court qualified this by asserting that such a threshold showing of actual innocence would necessarily be exceptionally high in light of the very interruptive effect that consideration of such claims would have on both the state's need for finality in such cases and the hardship of having to retry cases based upon stale evidence.[284]

Chief Justice Rehnquist then concluded that in the instant case, however, Herrera's showing of actual innocence fell far short of such a threshold.[285] The Court placed suspicion upon Herrera's new evidence, expressing distrust of affidavits in general.[286] The Chief Justice also recognized various

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of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Id.* (quoting *Barnette*, 319 U.S. at 638). Herrera also utilized the Court's opinion in Ford v. Wainwright, 477 U.S. 399 (1986), to illustrated the inadequacy of clemency due to the fact that it is the Governor's subordinates that are trying to carry out the execution. *Id.* (citing *Ford*, 477 U.S. at 416 (holding that in a capital case the "vindication of a constitutional right [may not] be entrusted to the unreviewable discretion of an [executive] administrative tribunal")).

[283]Herrera v. Collins, 113 S. Ct. 853, 869 (1993). While the Court's opinion at this point was "for the sake of argument," having previously held that a claim of actual innocence is not a constitutional claim warranting *habeas corpus* review, *see supra* note 244 and accompanying text, Justice Blackmun opined that such a previous determination was mere "dictum" and that the subsequent assumption of a constitutional right for the purposes of deciding this case was the holding. *See infra* note 329 and accompanying text.

[284]*Herrera*, 113 S. Ct. at 869. According to one commentator, recent *habeas corpus* jurisprudence reveals "a continuing quest for a golden equilibrium between finality and certainty." Higginbotham, *supra* note 6, at 1.

[285]*Herrera*, 113 S. Ct. at 869.

[286]*Id.* In particular, the majority noted that affidavits, including those proffered by Herrera, are procured without the benefit of cross-examination. *Id.* (citation omitted). In addition, three of the four affidavits, other than that of Raul Jr., consisted of hearsay. See also *supra* notes 28-29, 34 and accompanying text for details concerning the affidavits. Justice Blackmun, in his dissent, attacked this portion of the Court's opinion, positing that affidavits are the usual form of new evidence, of which the credibility can not be reliably determined unless a hearing is granted. *Herrera*, 113 S. Ct. at 884 (Blackmun, J., dissenting).

inconsistencies among the affidavits themselves.[287] Moreover, the majority mentioned that the likelihood of abuse by prisoners as a "method of delaying enforcement of just sentences" would be extremely high.[288] Additionally, the Court emphasized that Herrera had failed to supply a satisfactory explanation as to why such affidavits were filed eight years after the trial.[289] The Court also questioned why, if Herrera was indeed innocent of both crimes, he pled guilty to the murder of Officer Rucker.[290]

The Court then summarized Herrera's claims and proffered affidavits by recognizing that the evidence maintained some degree of value.[291] The majority held, however, that such value was insufficient to overcome the evidence and due process that had evolved over the course of the past decade and failed to meet the minimum threshold showing of actual innocence that would, "for the sake of argument," entitle Herrera to federal *habeas* relief.[292]

B. Justice O'Connor, Concurring, Joined by Justice Kennedy

Justice O'Connor, joined by Justice Kennedy, initiated a concurring opinion by positing that the execution of an innocent person would be a "constitutionally intolerable event."[293] The Justice then emphasized, however, that Herrera was not an innocent person and, thus, his execution

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[287] *Herrera*, 113 S. Ct. at 869-70. The Court noted that while Raul Jr.'s affidavit stated that there were three people in the murderer's car, Villarreal's affidavit asserted that there were two people in that car. *Id.* Moreover, the Court continued, Hernandez testified at Herrera's trial that there was only one person in the car. *Id.* at 870.

[288] *Id.* at 869 (quoting United States v. Johnson, 327 U.S. 106 (1946) (holding that Supreme Court decision involving Fourth Amendment to be applied retroactively to all convictions not yet final at time decision was rendered)).

[289] *Id.* (citing Taylor v. Illinois, 484 U.S. 400, 414 (1988) ("'[I]t is . . . reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed'")). Justice O'Connor also considered this fact to be suspect. *Id.* at 872 (O'Connor, J., concurring).

[290] *Id.*

[291] *Id.* at 870 (O'Connor, J., concurring).

[292] *Id.*

[293] *Id.*

would not violate the Constitution.[294] Justice O'Connor explained that the issue to be addressed was whether a guilty person is entitled to federal *habeas* relief on the ground of an actual innocence claim.[295] The issue was not, the Justice argued, whether the Constitution forbids execution of an innocent person.[296]

Justice O'Connor opined without elaboration that the resolution of this issue was inappropriate. The Justice indicated, however, that the majority "persuasively demonstrate[d]" that historically the federal government resisted intervening to prevent the execution of a constitutionally convicted and sentenced person.[297] Justice O'Connor also noted without criticism that executive clemency has traditionally been the exclusive avenue to explore.[298]

Notwithstanding the aforementioned contentions, Justice O'Connor emphasized that regardless of the stance taken on this controversial issue, Herrera was not entitled to federal *habeas* relief.[299] The Justice declared that the evidence of record was so overwhelming that Herrera's newly discovered evidence did not make an ample showing of innocence.[300] Justice O'Connor found the four affidavits to be incredible and extremely

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[294] *Id.*

[295] *Id.*

[296] *Id.* Justice O'Connor then summarized and differentiated the opinion of the Court, the concurring opinion of Justice White, as well as the dissenting opinion of Justice Blackmun. *Id.* at 871 (O'Connor, J., concurring). The Justice posited that both the Court and Justice White did not expressly hold that if a person were to make a truly persuasive showing of actual innocence, his execution would be unconstitutional. *Id.* Rather, the Justice highlighted that the majority and Justice White "assume[d] for the sake of argument" that this was so. *Id.* In contrast, Justice O'Connor explained, Justice Blackmun explicitly held that such an execution would be unconstitutional, if a showing of "probable innocence" were made. *Id.*

[297] *Id.*

[298] *Id.*

[299] *Id.* Justice O'Connor then reiterated the facts pertaining to the murders of police officers Rucker and Carrisalez as well as the evidence of record that established his guilt ten years ago. *Id.* at 871-72 (O'Connor, J., concurring).

[300] *Id.*

weak in comparison to the record evidence.[301] Most importantly, the Justice noted that Herrera failed to offer a feasible excuse for the signed letter containing his confession and offer to surrender to the police.[302] The foregoing evidence led the Justice to the inescapable conclusion that Herrera was guilty.[303]

Justice O'Connor then examined the dissent's opinion, noting that Justice Blackmun did not urge Herrera's innocence.[304] Justice O'Connor, however, criticized the dissent's proposal to defer to the district court's supposed determination that Herrera's evidence was sufficiently substantial to avoid dismissal without a hearing.[305] The Justice disputed the dissent's interpretation of the district court's opinion, maintaining that the court did in fact believe a hearing would be futile.[306] The district court, Justice O'Connor contended, realized that it could not offer relief regardless of the outcome

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[301]*Id.* at 872 (O'Connor, J., concurring). Agreeing with the majority, the Justice espoused that affidavits such as Herrera's are typical in capital cases. *Id.* The Justice deemed such affidavits to be unfortunate and viewed them with skepticism, but also found them to be understandable in light of the high life-and-death stakes involved in the outcome of the federal petition in a capital case. *Id.* In particular, Justice O'Connor regarded Herrera's four affidavits with equal suspicion. *Id.* Justice O'Connor considered that the affidavits had not been produced until the "eleventh hour with no reasonable explanation for the nearly decade-long delay." *Id.* (citing Herrera v. Collins, 113 S. Ct. 853, 869 (1993)).

The Justice further noted that the affidavits also "conveniently blame[d] a dead man . . . who will neither contest . . . nor suffer punishment as a result . . . ," and contradicted each other in numerous instances. *Id.* Particularly, the Justice opined that the affidavits disagreed over the number of people in the killer's car as well as the direction in which the car was traveling when stopped by Carrisalez. *Id.* (citing *Herrera*, 113 S. Ct. at 869)). Justice O'Connor also noted that one affidavit contended that Rucker was killed at a highway rest stop while another stated that Rucker was not murdered until later when Rucker pulled over to the side of the highway. *Id.* Moreover, the Justice pointed out, the affidavits disagreed with Herrera's own admissions; the affidavits blamed the brother, Raul Sr. for both murders while Herrera pled guilty to Rucker's murder and only disputed the murder of Carrisalez. *Id.*

[302]*Id.* at 872-73 (O'Connor, J., concurring). See *supra* note 24 for details of the letter of confession signed by Herrera.

[303]*Id.* at 873 (O'Connor, J., concurring).

[304]*Id.*

[305]*Id.* (citing *Herrera*, 113 S. Ct. at 883 (Blackmun, J., dissenting)).

[306]*Id.*

because there was not an implication of a constitutional violation.[307]

Supporting the holding of the court of appeals,[308] Justice O'Connor contended that the district court erroneously stayed Herrera's execution to permit Herrera to try to obtain relief in the state courts when such state relief was unobtainable as a matter of law.[309] Alternatively, Justice O'Connor declared that even if the dissent's interpretation of the district court's holding was accurate in that further proceedings were deemed necessary in Herrera's case, such a holding was an abuse of the court's discretion.[310] Comparing the new evidence with the trial evidence, the Justice maintained that "it plainly appear[ed] from the face of the petition and [the] exhibits annexed to it that the petitioner [wa]s not entitled to relief."[311] Because Herrera did not supply sufficient grounds for *habeas* relief, the Justice posited, the State's interest in finality must prevail.[312] Justice O'Connor predicted that to hold

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[307]*Id.* The Justice also pointed to Justice Blackmun's admission that the District Court had an entirely distinct basis, that of "fairness," for granting a stay of Herrera's execution. *Id.* (citing Herrera v. Collins, 113 S. Ct. 853, 883 (1993) (Blackmun, J., dissenting)); *see supra* note 36 and accompanying text. The district court, Justice O'Connor explained, did not require that the state court hold a hearing but, rather, ordered that once the state court action was filed, the *habeas* petition was to be dismissed and the stay lifted. Herrera v. Collins, 113 S. Ct. 853, 873 (1993) (O'Connor, J., concurring).

[308]*Herrera*, 113 S. Ct. at 873 (O'Connor, J., concurring).

[309]*Id.* (citing *Herrera*, 113 S. Ct. at 860, 864-65) (acknowledging that Texas law neither recognized new evidence claims on collateral review nor considered such claim on a motion for a new trial more that thirty days after trial).

Justice O'Connor conceded that had the district court decided that the United States Constitution required the state courts to consider Herrera's claim, then the Texas courts would have been required to do so and the district court's stay would not have been inappropriate. *Id.* The Justice further explained that in order to conclude that the Constitution required Texas to entertain Herrera's claim, the district court would have had to determine that an eight-year limit on petitioner's new evidence claim was too short in terms of due process, not that Texas's thirty-day limit was too short. *Id.* The Justice pointed out, however, that the district court did not so decide and "there is little in fairness or history to support such a conclusion." *Id.*

[310]*Id.*

[311]*Id.* (citing *Herrera*, 113 S. Ct. at 883 (Blackmun, J., dissenting) (quoting 28 U.S.C. § 2254 R. 4)).

[312]*Id.* at 873-74 (O'Connor, J., concurring). The Justice articulated that Herrera's showing of innocence would have to have been thoroughly persuasive, *id.* (quoting Delo v. Stokes, 495 U.S. 320, 321 (1990) (quoting Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (holding that petitioner's constitutional rights were not denied where psychiatric testimony was

otherwise would cause the federal courts to be deluged by frivolous claims that would drown out the meritorious claims.[313] The Justice then concluded, asserting that the majority did not hold that the execution of the innocent is permissible and that Herrera did not demonstrate a persuasive showing of actual innocence.[314]

C. JUSTICE SCALIA, CONCURRING, JOINED BY JUSTICE THOMAS

Justice Scalia, joined by Justice Thomas, concurred with the majority opinion.[315] The Justice began by expressing a desire to answer the question upon which certiorari was granted by the Supreme Court: whether it is a violation of the Eighth or Fourteenth Amendment to execute a person fairly convicted and sentenced who claims to have new exculpatory evidence of actual innocence.[316] The Justice denied such a constitutional guarantee and further criticized the "calibration of [the dissenters'] consciences," arguing that the three dissenting Justices applied their personal opinions alone, disregarding "text, tradition . . . [and] contemporary practice" when they asserted that a constitutional right to additional judicial proceedings arises simply by claiming actual innocence.[317]

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admitted concerning future dangerousness))), and there must have existed no alternative state avenue through which Herrera could press his claim. *Id.* at 874 (O'Connor, J., concurring).

[313]*Id.* (citing Herrera v. Collins, 113 S. Ct. 853, 869 (1993). Justice O'Connor, quoting Justice Jackson, explained the potential danger: "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Id.* (quoting Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the result)). *But see* Walter v. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 25 (1956) ("[I]t is not a needle we are looking for in these stacks of paper, but the rights of a human being").

[314]Herrera v. Collins, 113 S. Ct. 853, 874 (1993) (O'Connor, J., concurring) (positing that "the Court . . . appropriately reserve[d] . . . the question whether the federal courts may entertain convincing claims of actual innocence").

[315]*Id.* (Scalia, J., concurring).

[316]*Id.* Justice Scalia's view of the issue to be properly determined by the Supreme Court was in line with that posited by Justice O'Connor. *See supra* notes 295-96 and accompanying text. Both Justices posited that the issue revolved around a "fairly convicted and sentenced" person, *Herrera*, 113 S. Ct. at 874 (Scalia, J., concurring), or a "legally guilty" person, *id.* at 870 (O'Connor, J., concurring), rather than an innocent person. *Id.*

[317]*Herrera*, 113 S. Ct at 874-75 (Scalia, J., concurring).

The Justice highlighted that the majority's discussion of a constitutional right arising from a claim of actual innocence was purely hypothetical, "for the sake of argument."[318] Nonetheless, the Justice expressed concern that while the high standard set by the Court "arguendo," would simplify the duties of the Supreme Court, it may create burdensome impositions upon the lower federal courts. The Justice predicted that claims of actual innocence would surely become routine and repetitive.[319] Additionally, the Justice underscored the fact that *Townsend v. Sain*[320] was not changed or overruled by the Court's holding, and therefore, newly discovered evidence relevant only to a prisoner's culpability is still not a basis for federal *habeas* relief.[321] Justice Scalia stressed that the Court merely assumed "arguendo" such a constitutional right only after explaining that such a right does not exist, and thus, continued to follow and support *Townsend*.[322]

D. JUSTICE WHITE, CONCURRING IN THE JUDGMENT

Justice White's concurring opinion followed, briefly affirming the Court's judgment and expressing the Justice's belief that the Constitution forbids executing a person who has made a persuasive showing of actual innocence.[323] The Justice also supported the standard dictated by *Jackson*

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[318]*Id.* at 875 (Scalia, J., concurring). Justice Scalia supported the majority's opinion, emphasizing the Court's use of the "assumption, arguendo" method of addressing the hypothetical existence of a constitutional right and the legality of such a decisional mechanism. *Id.* Justice Scalia further recognized the improbability that the Court would ever have to address this "embarrassing question" again; the high standard of demonstrable showing of innocence that was demanded by the Court "arguendo," would most assuredly suffice to produce an executive pardon negating any need to petition the federal courts in the first place. *Id.*

[319]*Id.*

[320]372 U.S. 293 (1963) (articulating standard for determining when an evidentiary hearing is required on a *habeas* petition). See *supra* notes 54-59 and accompanying text for a discussion of *Townsend*.

[321]Herrera v. Collins, 113 S. Ct. 853, 875 (1993) (Scalia, J., concurring).

[322]*Id.*

[323]*Id.* (White, J., concurring in the judgment).

v. Virginia,[324] that the petitioner must show that based upon both the new evidence and the record evidence, "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt."[325] Utilizing this standard, Justice White opined that Herrera fell far short of meeting such a threshold and therefore had no constitutional right of federal *habeas corpus* relief.[326]

E. Justice Blackmun, Dissenting, Joined by Justices Stevens and Souter

Justice Blackmun, joined by Justices Stevens and Souter, initiated a lengthy and strenuous dissent by expressing his abhorrence to the act of executing the innocent.[327] The Justice disagreed wholeheartedly with the Court's discussion explaining *habeas corpus* and denying that a claim of actual innocence is constitutional in nature.[328] Nonetheless, Justice Blackmun declared that the Court's analysis was mere "dictum because the Court assume[d], 'for the sake of argument in deciding this case, that . . . a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional.'"[329] The Justice espoused that the district court was the proper forum to determine whether an additional hearing was warranted and whether relief should be granted on the merits of the case.[330] Thus, the Justice contended, the decision of the

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[324]443 U.S. 307 (1979) (upholding denial of writ after finding, upon review of record in light most favorable to the prosecution, that reasonable juror could have found petitioner guilty of murder). See *supra* notes 231-32 and accompanying text for further discussion of the *Jackson* case.

[325]*Herrera*, 113 S. Ct. at 875 (White, J., concurring in the judgment) (citing *Jackson*, 443 U.S. at 324).

[326]*Id.*

[327]*Id.* at 876 (Blackmun, J., dissenting) (citing Ford v. Wainwright, 477 U.S. 399, 406 (1986) (holding that execution of an insane prisoner violates the Eighth Amendment); Rochin v. California, 342 U.S. 165, 172 (1952) (holding that due process is violated by state action, such as stomach pumping of defendant to retrieve drugs, that "shocks the conscience")).

[328]*Id.* (citing Herrera v. Collins, 113 S. Ct. 853, 859-69 (1993)).

[329]*Id.* (quoting *Herrera*, 113 S. Ct. at 869).

[330]*Id.* But see the concurring opinion of Justice O'Connor, attacking Justice Blackmun's proposal to defer to the district court's determination, *supra* notes 304-10 and accompanying text.

circuit court should be reversed and the case remanded to the district court.[331]

The dissent criticized the majority's reliance on the constitutional protections afforded criminal defendants as irrelevant to the issue in this case.[332] The Justice declared that the correct issue to be determined was whether the Constitution forbids the execution of a validly convicted and sentenced person who can prove his innocence with newly discovered evidence — the Justice answered this question in the affirmative.[333] Next, the Justice recalled the Eighth Amendment's proscription against cruel and unusual punishment and the concept that this prohibition should reflect the everchanging "standards of decency" of our society.[334] Justice Blackmun flatly maintained that the type of execution at issue in this case clearly violates current standards of decency as well as any other standard imaginable.[335]

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[331]Herrera v. Collins, 113 S. Ct. 853, 876 (1993) (Blackmun, J., dissenting).

[332]*Id.* The Justice, alleging the potential inadequacy of such guarantees, pointed to a study that indicated that despite such constitutional protections, 23 innocent people have been executed during the twentieth century. *Id.* at 876 n.1 (Blackmun, J., dissenting) (citations omitted).

[333]*Herrera*, 113 S. Ct. at 876 (Blackmun, J., dissenting).

[334]*Id.* (citing Ford v. Wainwright, 477 U.S. 399, 406 (1986) (finding execution of insane to violate the Eighth Amendment); Gregg v. Georgia, 428 U.S. 153, 171 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (finding Georgia death penalty statute to be unconstitutionally arbitrary); Trop v. Dulles, 356 U.S. 86, 101 (1958) (finding penalty of losing one's citizenship to be cruel and unusual); Weems v. United States, 217 U.S. 349, 373 (1910) (holding penalty of cadena temporal to be excessive for crime of falsifying an official record)).

[335]*Id.* (quoting Spaziano v. Florida, 468 U.S. 447, 465 (1984)). Supporting this contention, the dissent referenced the Court's holding in Coker v. Georgia, 433 U.S. 584, 593 (1977) (holding death penalty to be excessive punishment for crime of raping an adult woman), epitomizing the execution of an innocent person as the "purposeless and needless imposition of pain and suffering" that is "grossly out of proportion to the severity of the crime" and held unconstitutional by *Coker*. *Herrera*, 113 S. Ct. at 876 (Blackmun, J., dissenting) (quoting *Coker*, 433 U.S. at 592; *Gregg*, 428 U.S. at 173). The dissent further illustrated its logic by noting that the execution of a convicted rapist, *Coker*, 433 U.S. at 592, and the execution of one convicted of participating in a robbery involving the killing of another, Enmund v. Florida, 458 U.S. 782, 797 (1982), have both been held by the Supreme Court to be cruel, unusual, and excessive punishment for the crimes committed. *Herrera*, 113 S. Ct. at 876 (Blackmun, J., dissenting). As such, Justice Blackmun reasoned, it is undeniably violative of the Eighth Amendment to execute a person innocent of any crime at all. *Id.*

Justice Blackmun then criticized the Court's argument that the Eighth Amendment is inapplicable due to the issue being that of Herrera's guilt rather than his punishment.[336] The Justice maintained that Herrera's challenge of the State's right to punish him automatically implicates the Eighth Amendment, regardless of whether Herrera's argument pertains to the fact of his guilt, death penalty sentence, or continued imprisonment.[337] The Justice further opined that the fine distinction between issues of guilt and punishment should not be dispositive because "the legitimacy of punishment is inextricably intertwined with guilt."[338] Relying on *Beck v. Alabama*,[339] Justice Blackmun stated that the Eighth Amendment requires more than mere reliability in the sentencing phase and, in fact, requires reliability in the guilt determination phase as well.[340]

The Justice also touched on the issue of whether it violates the Eighth Amendment to imprison an innocent person who has nonetheless been convicted and sentenced in an otherwise constitutional manner. *Id.* at 877 n.2 (Blackmun, J., dissenting). However, the Justice declined to expressly answer this alternate issue because such an issue did not exist in the Herrera case. *Id.*

The Justice further noted that Johnson v. Mississippi, 486 U.S. 578 (1988), *see supra* note 258, and Ford v. Wainwright, 477 U.S. 399 (1986) (holding that it is unconstitutional to execute an insane prisoner), both held that the Eighth Amendment protections do not disappear upon the occurrence of a valid conviction and sentencing process; intervening circumstances may entitle a defendant to additional proceedings. *Herrera*, 113 S. Ct. at 877 (Blackmun, J., dissenting).

In *Ford*, the intervening circumstance that entitled the petitioner to an additional proceeding was the petitioner's postconviction and postsentencing insanity. *Ford*, 277 U.S. at 402-04. Because it was deemed unconstitutional to execute an insane prisoner as well as illegal under Florida law, the claim that the petitioner had become insane entitled the petitioner to an insanity hearing. *Id.* at 417-18. In *Johnson*, the intervening event that entitled the petitioner to an additional proceeding was the postconviction and postsentence reversal of a prior felony conviction that had been the basis of the petitioner's sentence. *Johnson*, 486 U.S. at 581-82.

[336]Herrera v. Collins, 113 S. Ct. 853, 877-78 (1993) (Blackmun, J., dissenting). *See supra* note 255 and accompanying text.

[337]*Herrera*, 113 S. Ct. at 877-78 (Blackmun, J., dissenting).

[338]*Id.* at 878 (Blackmun, J. dissenting).

[339]447 U.S. 625 (1980) (holding that death penalty may not be constitutionally imposed where jury was not permitted to consider verdict of guilt of a lesser included offense).

[340]*Herrera*, 113 S. Ct. at 878 (Blackmun, J., dissenting) (citing Spaziano v. Florida, 468 U.S. 447, 456 (1984)).

Justice Blackmun also disagreed with the Court's emphasis on the potential inaccuracy of a new trial ten years after the first. *Id.* The Justice asserted that the appropriate question

Next, Justice Blackmun addressed the argument pertaining to Herrera's Fourteenth Amendment claim.[341] The Justice criticized the majority as "'putting the cart before the horse'" when the Court denied Herrera's substantive due process claim because of his previous guilt determination.[342] The dissent analogized the lethal injection facing the allegedly innocent Herrera to the "rack and the screw" methods condemned in *Rochin v. California*[343] because such an execution was an "ultimate 'arbitrary imposition'" that was both irreversible and incompensable.[344] Accordingly, Justice Blackmun concluded that Herrera possessed a constitutional right to raise a substantive due process challenge to his pending execution on the grounds of actual innocence.[345] Thus, because Justice Blackmun was of the opinion that both the Eighth and Fourteenth Amendments are violated when an innocent person is executed, the Justice maintained that Herrera's claims satisfied the *Townsend v. Sain*[346] requirements, and that Herrera's actual innocence claim deserved review

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is whether the new evidence would prove the original trial to be sufficiently unreliable to enforce the death penalty sentence that resulted. *Id.* The Justice posited that the Court's contended question, that of whether the second trial would be more reliable than the first trial ten years before, was inappropriate. *Id.*

[341] *Id.*

[342] *Id.* at 878-79 n.5 (Blackmun, J., dissenting) (quoting *Herrera*, 113 S. Ct. at 864 n.6). Justice Blackmun then briefly described the constitutional protections afforded by the Due Process guarantees of the Fifth and Fourteenth Amendments. *Id.* at 879 (Blackmun, J., dissenting). See *supra* text accompanying notes 149-53 for discussion of substantive due process.

[343] 342 U.S. 165, 172 (1952) (holding that defendant's due process rights were violated when State forcibly extracted drugs from defendant's stomach). See *supra* text accompanying notes 177-88 for a discussion *Rochin*.

[344] *Herrera*, 113 S. Ct. at 879 (Blackmun, J., dissenting) (quoting Planned Parenthood of Pennsylvania v. Casey, 112 S. Ct. 2791, 2805 (1992) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds))).

[345] *Id.* Justice Blackmun also criticized the Court's procedural due process analysis under Medina v. California, 112 S. Ct. 2572 (1992), contending that the Court did not determine whether "the rule transgresses any recognized principle of 'fundamental fairness.'" *Herrera*, 113 S. Ct. at 878-79 n.5 (Blackmun, J., dissenting) (quoting *Medina*, 112 S. Ct at 2578).

[346] 372 U.S. 293 (1963). See *supra* notes 54-59 and accompanying text for a discussion of the *Townsend* requirement.

under federal *habeas corpus*.[347]

Justice Blackmun then embarked on a critique of the Chief Justice's analysis of Herrera's claims, highlighting that the majority should have utilized a balancing approach in determining whether the State's interest in the finality of its criminal judgments should be overridden by the prisoner's interest in testing the propriety of his punishment.[348] Justice Blackmun agreed with Judge Friendly that "there should be an exception to the concept of finality when a prisoner can make a colorable claim of actual innocence."[349] Justice Blackmun elaborated, positing that even an incarcerated person who has already had a "*constitutionally perfect*" trial, has an overwhelming interest in obtaining his freedom if he is innocent[350] — excluding, of course, the prisoner whose guilt is admitted or clear.[351]

The Justice further castigated the Court, describing the majority's reasoning as an effective denial of federal *habeas corpus* relief whenever feasible.[352] In essence, the Justice concluded that the majority's holding that an actual innocence claim is not a constitutional claim *per se*, yet is

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[347]Herrera v. Collins, 113 S. Ct. 853, 880 (1993) (Blackmun, J., dissenting).

[348]*Id.* (citing McCleskey v. Zant, 111 S. Ct. 1454, 1469-70 (1991) (stating that finality has special importance in context of federal attack on state conviction); Murray v. Carrier, 477 U.S. 478, 496 (1986) (holding that while a claim concerning the reliability of the guilt determination would not excuse failure to pass the cause and prejudice test, a showing of actual innocence excuses such a failure); Smith v. Murray, 477 U.S. 527, 537 (1986) (stating that the principle of finality must yield to the correction of a fundamentally unjust incarceration); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (defining the circumstance under which federal courts should entertain prisoner's *habeas* petition that raised claims rejected on prior petition for same relief and determining that where colorable showing of innocence, ends of justice require courts to review the claim)).

[349]*Id.* (citing Friendly, *supra* note 83, at 160).

[350]*Id.*

[351]*Id.* (quoting Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986)).

[352]*Id.* at 880-81 (Blackmun, J., dissenting) (citing Herrera v. Collins, 113 S. Ct. 853, 862 (1993)). Justice Blackmun argued that:

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

Id.

required to obtain review of an abusive or successive claim, creates a catch-22 type of dilemma that will act as a barrier to the prisoner facing execution who can prove his innocence.[353]

Justice Blackmun next addressed the states' duties concerning actual innocence claims in light of the Eighth and Fourteenth Amendments' binding requirements, and reproached the Court's failure to address such duties.[354] The Justice began by stating that the "possibility of executive clemency is *not* sufficient to satisfy the . . . Eighth and Fourteenth Amendments."[355] Because Justice Blackmun deemed Herrera's claimed rights to be constitutional in nature, the Justice found it significant that "the vindication of [constitutional rights] has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal."[356] Justice Blackmun posited that if the mere possibility of executive clemency was deemed sufficient, Eighth Amendment judicial review would be meaningless[357] and the United States would have a government of men, rather than a government of laws.[358]

Justice Blackmun acknowledged that constitutional claims should be heard in state court if appropriate judicial procedures are available, prior to being asserted in federal court.[359] The Justice further agreed that the state court's findings of fact should be entitled to a presumption of correctness

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[353]*Id.*

[354]*Id.* at 881 (Blackmun, J., dissenting).

[355]*Id.* (emphasis added). See *supra* notes 269-78 and accompanying text for discussion of the majority's position concerning clemency.

[356]Herrera v. Collins, 113 S. Ct. 853, 881 (1993) (Blackmun, J., dissenting) (citing Ford v. Wainwright, 477 U.S. 399, 416 (1986) (holding that executive clemency was inadequate to support the Eighth Amendment right not to be executed if one is insane)).

[357]*Id.* (citing Solem v. Helm, 463 U.S. 277, 303 (1983) (ruling that sentence of life imprisonment is excessive for crime of writing a "bad" check)).

[358]*Id.* (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)). In addition, Justice Blackmun discovered support in the Bill of Rights in that its purpose "'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'" *Id.* (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

[359]*Id.* (citing 28 U.S.C. § 2254(b), (c)).

within a subsequent federal *habeas* proceeding.[360] Justice Blackmun opined, however, that the federal petition was properly filed in the district court[361] and the district court should only have dismissed the petition if Herrera was clearly not entitled to relief.[362]

Justice Blackmun also conceded that Herrera's federal petition was abusive, Herrera having filed a previous federal petition in 1990,[363] and that, according to *McCleskey v. Zant*,[364] Herrera must show cause as to why he failed to raise the actual innocence claim in the first federal petition, as well as a resulting prejudice.[365] Alternatively, Justice Blackmun explained, Herrera could show that he fell within the actual innocence exception, a showing that would be satisfied by demonstrating that he was entitled to relief on the merits of his actual innocence claim.[366]

The Justice next described the type of showing that should be made in order to obtain relief on the merits of such an innocence claim.[367] Justice Blackmun argued that the majority failed to define its standard of a "truly persuasive" showing of actual innocence and further asserted that executions exacted under this vague standard would be unconstitutional.[368] The Justice continued, contending that the standard of the showing must be that of "probable innocence."[369] Additionally, Justice Blackmun asserted that the

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[360]*Id.* (citing 28 U.S.C. § 2254(d)).

[361]*Id.* at 881 (Blackmun, J., dissenting) (citing 28 U.S.C. § 2254).

[362]*Id.* (quoting 28 U.S.C. § 2254 R. 4). Justice Blackmun asserted that in Herrera's petition factual questions existed and because Texas did not provide Herrera an adequate evidentiary hearing, the District Court was required to do so. *Id.* (citing Townsend v. Sain, 372 U.S. 293, 313 (1963)).

[363]See *supra* note 27 for details pertaining to Herrera's first federal *habeas* petition.

[364]111 S. Ct. 1454 (1991) (holding that defendant's failure to demonstrate cause for failing to raise constitutional claim bars review of second federal petition).

[365]Herrera v. Collins, 113 S. Ct. 853, 882 (1993) (Blackmun, J., dissenting).

[366]*Id.* *See supra* note 77 and accompanying text.

[367]*Herrera*, 113 S. Ct. at 882 (Blackmun, J., dissenting).

[368]*Id.* (citing Herrera v. Collins, 113 S. Ct. 853, 869 (1993)).

[369]*Id.* The Justice did not elaborate on the intricacies of this proposed "probable innocence" standard but, presumably, it meant that the petitioner must show that it is more likely than not that he is innocent. *See id.* Justice Blackmun supported this asserted standard

reviewing court should consider all of the evidence and its reliability,[370] weighing the evidence supporting the defendant's claim of innocence with that evincing the defendant's guilt.[371]

Justice Blackmun then inspected the particularities of Herrera's situation, interpreting the district court's holding to be that Herrera's new evidence warranted further consideration.[372] The Justice stated, however, that the district court's dismissal of most of the claims and stay of Herrera's execution occurred because the court doubted its own authority to consider the new evidence but believed that Herrera's claims should be heard in state court — the dismissal did not reflect an opinion that the evidence was insubstantial.[373] Justice Blackmun advocated a reversal of the court of appeals's order and a remand to the district court to decide if Herrera made a showing of probable innocence, primarily because the district court found that the evidence was not weak enough to warrant dismissal without a hearing.[374]

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necessary for relief by acknowledging the difficulty the State may have in retrying a petitioner years later and the consequential result that an actual innocence *habeas corpus* proceeding may very well be the "final word" regarding the defendant's punishment. *Id.* In addition, the Justice conceded, because the petitioner had been validly convicted, he no longer retained the presumption of innocence and the State no longer retained the burden of proof of the defendant's guilt beyond a reasonable doubt. *Id.* at 882-83 (Blackmun, J., dissenting). As such, the dissenting Justice opined, "it is fair to place on him the burden of proving his innocence, not just raising doubt about his guilt." *Id.* at 883 (Blackmun, J., dissenting).

[370]*Id.* (citing Sawyer v. Whitley, 112 S. Ct. 2514, 2519 n.5 (1992); Kuhlmann v. Wilson, 477 U.S. 436, 455 n.17 (1986)).

[371]*Id.* Moreover, while the defendant is not entitled to discovery, the Justice assured that the district court may order discovery according to its discretion. *Id.* (citing Harris v. Nelson, 394 U.S. 286, 295, 299-300 (1969)). Justice Blackmun emphasized that his purported standard of the showing necessary to obtain relief would not effectuate the relitigation of state trials in federal courts nor require the rehearing of testimony of the original witnesses of the state trial. *Id.* The Justice, however, conceded that a *habeas* court might have to hear testimony of the new affiants. *Id.*

[372]*Id.* Justice O'Connor, however, disagreed with this interpretation of the district court's holding. *See supra* note 306-13 and accompanying text.

[373]Herrera v. Collins, 113 S. Ct. 853, 883 (1993) (Blackmun, J., dissenting).

[374]*Id.* at 883-84 (Blackmun, J., dissenting). The Justice chastised the Court for assuming the role of the District Court by ruling on Herrera's petition for *habeas corpus* relief. *Id.* at 889 (Blackmun, J., dissenting). Notwithstanding the impropriety of the Court's actions, the Justice asserted that if such a role is assumed by the Court, the rules governing district courts when considering petitions must be adhered to by the Supreme Court as well. *Id.* The Justice

V. CONCLUSION

Is it a violation of the United States Constitution to execute a criminal defendant who is "actually innocent" of the crime for which he has been sentenced to death? At first glance, one may quickly presume that it is a constitutional desecration to put to death an innocent person. It surely affronts one's sense of fairness and rightness when one hears of the rare but unfortunate situation when an executed prisoner has been subsequently exonerated, be it by newly found evidence or by exposed inequities of the due process previously granted the prisoner. However, while the execution of an innocent person is doubtlessly wrong and undesirable, such characteristics do not necessarily make it unconstitutional. State action is unconstitutional only if a provision within the Constitution so states or case law and constitutional interpretations so suggests.

In *Herrera v. Collins*,[375] the Court did not squarely address the issue of whether the Constitution forbids executing an "actually innocent" person. More accurately and appropriately, the Court addressed the issue of whether it is unconstitutional to execute a guilty person who *claims* innocence.[376]

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then claimed that the Court failed to follow the federal *habeas corpus* statute governing the district courts when the Court dismissed the petition — such a dismissal was erroneous because it did not "plainly appear[] from the face of the petition and any exhibits annexed to it that the petitioner [was] not entitled to relief." *Id.* (quoting 28 U.S.C. § 2254 R. 4). But see Justice O'Connor's opposing view, *supra* note 312 and accompanying text.

Justice Blackmun indicated that newly discovered evidence in the form of affidavits is not so insubstantial as the Court deemed it to be. *Herrera*, 113 S. Ct. at 884 (Blackmun, J., dissenting). See *supra* notes 286-90, 301 and accompanying text for further discussion of the affidavits as viewed by other members of the Court. "It makes no sense . . . to impugn the reliability of petitioner's evidence on the ground that its credibility has not been tested when the reason . . . is that petitioner's *habeas* proceeding has been truncated by the Court of Appeals and now by this Court." *Herrera*, 113 S. Ct. at 884 (Blackmun, J., dissenting).

[375]113 U.S. 853 (1993).

[376]The majority opinion did not explicitly state the issue to be determined but, rather, expressed it by circling it repeatedly through out its analysis until one could not help but pick it out of the opinion. However, concurring Justice Scalia stated it best, asserting that the question was whether it is a violation of the Eighth or Fourteenth Amendment to execute a person who was fairly convicted and sentenced yet claims to have newly discovered evidence of actual innocence. Wording it another way, Justice O'Connor essentially agreed by contending the issue to be whether a "legally guilty" person is entitled to federal *habeas corpus* relief on the grounds of an actual innocence claim. Justice White's concurring opinion was slightly different, concerning the constitutionality of executing a person who makes a *persuasive showing* of innocence, not merely a *claim* of actual innocence. Even more disparate was the supposition by Justice Blackmun in his strenuous dissent that the issue was whether it is unconstitutional to execute a validly convicted and sentenced person who *can*

The Court held that executing a validly capitally-sentenced prisoner who makes a claim of actual innocence based on new evidence is not unconstitutional. The repercussions of the nonexistence of a constitutional violation in the execution of a prisoner who claims innocence may be vast but in particular, and of great importance to Leonel Torres Herrera, is the effect that his claim of innocence does not warrant him federal *habeas corpus* relief.

The Court, in affirming the Court of Appeals and denying Herrera's request for federal *habeas* relief, relied on the principle set down in *Townsend v. Sain* and reiterated that claims of actual innocence based on newly discovered evidence do not amount to the requisite constitutional challenge necessary to afford *habeas* relief.[377] Such a conclusion is inescapable if the criminal justice system is to retain any effectiveness and meaning. Because a claim of actual innocence goes to the guilt of a prisoner rather than the punishment, the Court held that the Eighth Amendment's prohibition against cruel and unusual punishment is not implicated.[378] Justice Blackmun's dissent criticized the majority's insistence on distinguishing between the closely related issues of guilt and punishment when determining Eighth Amendment applicability. Although the Justice's argument maintains some merit, the fact remains that in all of the relevant case precedents that decide whether a particular punishment in a particular situation is cruel and unusual, the Court compares the *crime* with the punishment, without questioning the guilt or innocence of the accused. To do otherwise, would not only beg the question (sanctions applied to the legally innocent are obviously cruel) but would be damaging to our system. Doing so would prevent the punishment of legally guilty persons who claimed innocence, simply because such a punishment would be cruel *if* inflicted on an innocent person.

The Court also determined that because the increased reliability required by the Eighth Amendment when imposing a death sentence had already been afforded the prisoner during the trial and sentencing procedures, there is not a stricter standard of review required for federal *habeas corpus* involving

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prove his or her innocence. Justice Blackmun's positing of the issue comes closest to and in fact substantively equates with the issue of executing an innocent person (not just one who *claims* to be innocent). A person who *can* prove his or her innocence must be innocent or else there would be no innocence to prove. In contrast, the fact that the person claims innocence is in no way indicative of actual innocence in light of the high numbers of guilty persons who nonetheless make a claim of innocence.

[377] *Herrera*, 113 S. Ct. at 859-63.

[378] *Id.* at 863.

such capital cases.[379] The Court rationally noted that *habeas* relief would likely fail to afford increased reliability due to the probable unreliable results of a second trial several years after the first.[380]

The Court in *Herrera* also held that the Fourteenth Amendment's Due Process Clause was not implicated because Texas's criminal process, to which the Court granted great deference, was not so lacking that it offended the fundamental principles of justice inherent in this country.[381] Again, the Court followed longstanding precedent that has long protected the rights of defendants, innocent and guilty alike. The Court, looking to history, contemporary opinion, and current law throughout the nation, reached the reasonable conclusion that the *habeas* regime was not so offensive to any principle of justice fundamentally rooted in the traditions of this country.

The Court concluded by holding that although federal *habeas corpus* relief is not warranted on a mere claim of actual innocence, the traditional avenue of executive clemency remains available.[382] Although criticized by the dissent as inadequate, clemency must be sufficient at some point if finality of punishments can ever be realized.[383] Additionally, as noted in the concurring opinion of Justice O'Connor, if a petitioner could make the proposed showing ("arguendo") of innocence necessary to pass the threshold on *habeas*, he or she could surely obtain relief through clemency. Significantly, this case recognizes, despite Justice Blackmun's contentions to the contrary, that the Court's denial of a right to *habeas* relief on the nonconstitutional claim of actual innocence was not mere dictum without precedential value. Rather, the Court's assumption, "for the sake of argument," that a truly persuasive showing of innocence would render an execution unconstitutional and would be a basis for federal *habeas* relief was an alternative rationale, more palatable to the dissent, for denying this particular petitioner the requested relief.[384]

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[379] *Id.*

[380] *Id.*

[381] *Id.* at 864-66.

[382] *Id.* at 866-69.

[383] If the dissent's "probable innocence" standard were utilized and a petitioner failed to meet the threshold but still strenuously claimed his innocence (a constitutional claim according to the dissent), by the dissent's rationale carried out to its logical end, clemency would still not suffice because it was still intended to vindicate a "constitutional" right.

[384] Essentially, the Court utilized an approach similar to that of the dissent and noted that even if so utilized, the defendant could still not obtain relief, for he could not show innocence.

As expressed above, the Court's holding, however circuitously explained, is the proper conclusion. Actual innocence claims are "a-dime-a-dozen" and confidence in the guilt determinations of our criminal justice system must be maintained in light of the often endless appeals and post-conviction proceedings available to both the innocent (presumably very, very few if any) and the guilty.