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Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim

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A New Analysis of Innocence as a Constitutional Claim

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Abstract

The Supreme Court has never resolved whether innocence is a freestanding constitutional claim. Many critics have mistakenly contended that the Court held in 1993 that innocence is not a federal constitutional claim. As a result, much of the literature has failed to recognize that the door for such claims remains open, or that relevant circumstances have changed and thus the constitutional analysis has changed as well.

In the past two decades, a consensus has emerged among states recognizing the right to judicial review of compelling claims of innocence. In the wake of DNA exonerations, the states reacted uniformly in providing petitioners with mechanisms to develop and present compelling innocence claims. Modern consensus, widely shared practice, and the doctrine of fundamental fairness now demonstrate that innocence claims fall squarely within the protections of the Eighth and Fourteenth Amendments.

The states have recognized the need to change their approach to innocence claims, but federal courts have not yet done so. In light of vast discrepancies in burdens of proof and procedural restrictions imposed by states, federal courts should establish a constitutional floor to ensure that no innocent people fall through the gaps left open by state laws. The burden for proving innocence must be informed by the understanding upon which our criminal justice system was built: innocence can rarely be proven and thus must be presumed absent proof of guilt. When new evidence eviscerates the proof of guilt, innocence must be presumed anew.

This article makes four principal contributions. First, it proposes a new analysis of innocence as a freestanding constitutional claim that has not been advanced elsewhere. Second, it corrects misconceptions regarding the Court's holding in Herrera. Third, it catalogues the state laws and decisions that demonstrate the modern consensus among states that compelling claims of innocence require judicial review. Finally, it proposes a workable system of federal judicial review of innocence claims supported by model legislation.

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Table of Contents

Introduction

Can a woman who was convicted following a fair trial in state court, but who has found new evidence of her innocence, seek federal review of that evidence? Imagine a woman sitting in prison, convicted of a crime she did not commit. She was arrested months after the crime when she had no verifiable alibi. She received a procedurally fair trial, but at the time, she simply did not have evidence to prove her innocence, nor could she prove the evidence of guilt was false.

Ten years later, an investigator finds new facts demonstrating the sole evidence of guilt was completely unreliable. The state courts agree that no reasonable jury who heard all of the evidence, old and new, would convict. However, the state's post-conviction innocence laws only provide for relief when there is affirmative evidence of innocence or when DNA evidence points to a different person.[1] Thus, the state courts affirm her conviction and life sentence even though she has proven that she is "not guilty." She cannot seek review of her innocence claim in federal court. Or can she?

The only case in which the Supreme Court has analyzed whether innocence is a freestanding constitutional claim, *Herrera v. Collins*, is often misinterpreted.[2] The

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[1] For example, the current standard for proving actual innocence in California requires a petitioner to completely undermine the prosecution's case and point unerringly to innocence with evidence that no reasonable jury could reject. *In re Lawley*, 42 Cal. 4th 1231 (2008). The vast majority of convictions do not involve biological evidence, and thus there is no DNA evidence that can point to another person as the perpetrator. Absent DNA, it is nearly impossible to meet this standard, no matter how innocent one is, or even when there is not a shred of evidence of guilt that remains in light of the new evidence.

Numerous states only permit motions for new trials on the grounds of actual innocence when there is DNA evidence that supports the claim. *See ante note* 93.

[2] In *Herrera v. Collins,* 506 U.S. 390 (1993), a majority of justices assumed for the sake of deciding the case that a truly persuasive claim of actual innocence would trigger constitutional protections; however, the majority also agreed that petitioner Leonel Herrera's newly discovered evidence of innocence – evidence that his then-deceased brother had shot and killed the two police officers Herrera had been convicted of killing – was unpersuasive. Thus, without resolving whether a persuasive showing of innocence would entitle an inmate to federal habeas relief, the Court held that Herrera was not entitled to relief.

Herrera Court assumed for the sake of deciding the case that a truly persuasive claim of innocence would warrant federal habeas relief if there were no state avenue open to present the claim.[3] Despite widespread assertions to the contrary, the question of whether innocence is a freestanding constitutional claim remains open today.[4]

The Court's discussion in *Herrera*, along with its due process jurisprudence, demonstrates the importance of widely shared practice in determining what fundamental fairness requires. In 1993, when the Court decided *Herrera*, only nine states reviewed innocence claims raised at any time after conviction, while thirty-five states required that such claims be raised within sixty days to three years of conviction.[5] This is no longer the state of the law.

When faced with DNA exonerations and the undeniable evidence that innocent people are wrongfully convicted, the states uniformly recognized the need to change their approach to post-conviction claims of innocence. Currently, forty-nine states and the

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However, the case is often misinterpreted and cited for the erroneous proposition that the federal courts cannot review compelling claims of innocence, or that the Constitution permits the execution of someone who is actually innocent. *See note ante* 47.

[3] *Id.* at 417. ("We may assume for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.")

[4] Last year, in *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1931 (2013), the Supreme Court noted that it has "not resolved whether a prisoner may be entitled to [federal] habeas relief based on a freestanding claim of actual innocence."

In *House v. Bell*, 547 U.S. 518, 554 (2005), the court reiterated that in *Herrera v. Collins*, "the Court assumed without deciding that, in a capital case a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." The *House* Court declined to resolve the question because House had barely met the standard for a gateway claim of actual innocence (a showing of innocence sufficient to excuse procedural defaults and allow the federal courts to consider otherwise barred constitutional claims on their merits), and the Court had previously decided the standard for a gateway innocence claim was lower than the theoretical showing that would be required to trigger the freestanding claim the Court assumed, *arguendo*, existed.

[5] *Herrera v. Collins*, 506 U.S. at 411.

District of Columbia provide judicial review of innocence claims without conviction-related time limits. This widely shared practice demonstrates that the right to judicial review of compelling claims of innocence is fundamental and thus protected by the Due Process Clause of the Fourteenth Amendment. It is possible that this right always existed, but simply lay dormant while the prospect of an innocent person in prison was largely theoretical. Further, the modern consensus prohibiting the punishment of the innocent that has emerged since *Herrera* also demonstrates that innocence claims fall within the purview of the Eighth Amendment.

Federal judicial review is necessary and will not be excessively burdensome to the courts. Many states have unduly high burdens for proving innocence. For instance, some states require affirmative evidence of innocence, while many others require DNA evidence.[6] Only a handful of states have recognized what the Supreme Court has in a different context: that the Constitution cannot permit the incarceration of a person no reasonable trier of fact would convict.[7] Federal courts currently permit procedural default innocence claims (*Schlup* claims), which require a showing of innocence sufficient to excuse procedural defaults and allow federal courts to review the otherwise

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[6] *See note ante* 93. The Department of Justice estimates that physical evidence that could be subject to DNA testing only exists in 5-10% of criminal cases (Senate Committee on the Judiciary, Department of Justice Oversight: Funding Forensic Sciences--DNA and Beyond, 108th Cong, 1st sess., 2003, 22) and in many cases that evidence has been lost or destroyed before it could be subjected to DNA testing.

[7] The Constitution forbids imprisonment when the state did present proof of guilt beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1970). The Supreme Court has explained when an inmate claims there was insufficient evidence for a conviction, federal habeas courts must review state convictions by viewing the evidence in the light most favorable to the prosecution and determining whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. at 318-320 (original emphasis). How can the Constitution permit the continued punishment of who has new evidence that establishes no reasonably jury could now find proof beyond a reasonable doubt? Why would a conviction in which the jury did not hear all of the evidence be entitled to more weight than a conviction in which the jury did hear all of the evidence relevant to guilt and innocence?

barred independent constitutional claims on their merits.[8] There is no rational reason the federal courts could not also review freestanding innocence claims (*Herrera* claims), which require a more persuasive showing of innocence than *Schlup* claims and as such, would be less common and less burdensome than those already considered by the federal courts.[9]

Part I discusses the importance of federal review to state prisoners claiming innocence, along with existing statutory limits on federal review. It reviews the Supreme Court's seminal case on innocence, *Herrera v. Collins*, and corrects common misconceptions in legal scholarship regarding the Court's holding. Part I also covers the status of freestanding innocence claims post-*Herrera* and more recent Supreme Court guidance on the constitutional stature of innocence.

Part II proposes a new constitutional analysis of innocence claims in light of changed circumstances since 1993 when the Supreme Court decided *Herrera*. When faced with concrete evidence that innocent people are sometimes wrongfully convicted, the states reacted with near-uniformity to provide inmates with mechanisms to obtain judicial review of compelling innocence claims without time bars related to the conviction date. This widely shared and near uniform practice demonstrates that the right

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[8] *Schlup v. Delo*, 513 U.S. 298 (1995). When a petitioner's constitutional claims are procedurally barred, a petitioner may bypass the procedural bars and have the court evaluate his or her constitutional claims on their merits by establishing innocence by a preponderance of the evidence (i.e., a showing that it is more likely than not that no reasonable juror would convict in light of all of the evidence). This exception to procedural bars is appropriate because the "individual interest in avoiding injustice is most compelling in the context of actual innocence," and as such interest outweighs society's interests in finality, comity, and conservation of scarce judicial resources. *Id*. at 324.

[9] The Supreme Court has not specified the appropriate burden of proof for freestanding claims of innocence, but rather has only explained that the showing for such claims must be more persuasive than the showing required for procedural defaults. *House v. Bell*, 547 U.S. 518, 555 (2005). Clear and convincing evidence that no reasonable juror would convict – the standard rejected by the Supreme Court as being too high for procedural default or *Schlup* claims – would satisfy that requirement. *Schlup v. Delo*, 513 U.S., at 327-329

to present newly discovered evidence of innocence, even if it is discovered decades after trial, is fundamental. Thus, due process requires that federal courts review compelling claims of innocence when there is no state avenue open to process the claim.[10]

Further, these changed circumstances demonstrate an emergent modern consensus prohibiting the punishment of the innocent.[11] This modern consensus is supported by the facts that no penological purpose served by punishing the innocent, and any punishment is out of proportion to an innocent person's lack of culpability. As such, continued punishment without consideration of newly discovered evidence of innocence constitutes cruel and unusual punishment.

Part III of this article explores what it means to prove innocence in a criminal justice system designed to make determinations of guilt and presume innocence absent evidence of guilt. State mechanisms that require affirmative evidence of innocence or exculpatory DNA results have proven too narrow and resulted in the clear need for federal courts to establish a constitutional floor to protect the rights of the innocent. Further, "[t]he meaning of actual innocence as formulated by [Supreme Court procedural default precedent] does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the

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[10] The Fourteenth Amendment requires that state and federal procedures comport with fundamental fairness, and not offend principles of justice that are deeply rooted in the traditions and consciences of our people. The Supreme Court has explained that the "near-uniform" recognition of a right or application of a rule can demonstrate that a violation thereof "offends a principle of justice that is deeply rooted in the traditions and conscience of our people." *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996) (internal quotation marks and citation omitted). Similarly, the Court has explained that "widely shared practice" is one of the "concrete indicators of what fundamental fairness and rationality require." *Schad v. Arizona,* 501 U.S. 624, 640 (1991).

[11] Legislation and state practice are objective indicia of society's standards of decency and national consensus regarding whether the practice in question violates the Eighth Amendment's proscription against cruel and unusual punishment. *Graham v. Florida,* 560 U.S. 48, 61 (2010).

defendant guilty."[12] Part III demonstrates the reasons a similar, but more restrictive standard is appropriate for freestanding innocence claims. Part III also explores the legal consequences of a finding of innocence, including questions of collateral estoppel, double jeopardy, and potential effects on federal-state relations.

Part IV details a workable model for federal judicial review of compelling innocence claims. It demonstrates how the burden for proving innocence properly balances the "individual interest in avoiding injustice [which] is most compelling in the context of actual innocence," with society's interests in finality, comity, and conservation of judicial resources.[13] Further, freestanding claims of innocence would fit neatly within existing federal court practices and would not be overly burdensome. Finally, Part IV offers model federal and state legislation to assist in developing a cohesive, effective, and efficient judicial system to identify and release innocent prisoners.

This article makes four principal contributions. First, it proposes a new analysis of innocence as a freestanding constitutional claim that has not been advanced elsewhere. Second, it corrects misconceptions regarding the Court's holding in *Herrera*. Third, it catalogues the state laws and decisions that demonstrate the modern consensus among states that compelling claims of innocence require judicial review. Finally, it proposes a workable system of federal judicial review of compelling claims of innocence supported by model legislation.

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[12] *Schlup v. Delo*, 513 U.S. at 329, discussing *Murray v. Carrier*, 477 U.S. 478 (1986), and *Kulhmann v. Wilson*, 477 U.S. 436 (1986). The *Schlup* Court explained that such a showing, by a preponderance of the evidence, would allow a petitioner to pass through the gateway to have the Court consider his firmly established constitutional claims. The innocence gateway is necessary because, as the Court had previously concluded, "a prisoner retains an overriding 'interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.'" *Id*. at 321, quoting *Kuhlmann v. Wilson*, 477 U.S. at 452.

[13] *Schlup v. Delo*, 513 U.S. at 324.

I. State Innocence Under Existing Federal Law

State prisoners may only seek federal review of claims alleging violations of federal constitutional rights. Thus, federal courts can only review innocence claims raised by state prisoners if innocence, in and of itself, is a freestanding constitutional claim. As discussed further in section I.C, the Supreme Court has "not resolved whether a prisoner may be entitled to [federal] habeas relief based on a freestanding claim of actual innocence."[14] However, that is not the end of the inquiry. Part II establishes that innocence is a freestanding federal constitutional claim. The following sections discuss the need for federal review, discuss existing impediments to such review, and analyze Supreme Court precedent on this issue.

A. The Importance of Federal Review

Federal judicial review of constitutional claims remains vital to state prisoners, including the innocent. Federal courts continue to recognize constitutional violations after state courts have denied relief on the same bases. Indeed, there are more than forty exonerees[15] listed in the National Registry of Exonerations who were granted relief by federal courts after state courts had affirmed their convictions.[16]

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[14] *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1931 (2013).

[15] The Registry defines an exoneree as "[a] person who was convicted of a crime and later officially declared innocent of that crime, or relieved of all legal consequences of the conviction because evidence of innocence that was not presented at trial required reconsideration of the case." National Registry of Exonerations, *Glossary*. Available at: http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx

[16] Ricardo Aldape Guerra, Chamar Avery, Jesus Avila, David Ayers, Gene Curtis Ballinger, Derrick Bell, Early Berryman, David Boyce, Tim Brown, Kum Yet Cheung, Jabbar Collins, Kenneth M. Conley, Cory Credell, Patrick Croy, Ricky Cullipher, Joseph D'Ambrosio, Robert Escalera, Charles Fain, Timothy Gantt, Jose Garcia, Terence Garner, Antoine Goff, Thomas Goldstein, Harold Hall, Benjamin Harris, Dale Helmig, John Jackson, Lesly Jean, Levon Junior Jones, Paul Kamienski, Daniel Larson, Rafael Madrigal, Benjamin Miller, Darrel Parker, Michael Piaskowski, Michael Porter, Thomas Sawyer, Stephen Schulz, George Selber, Michael Smith, Larry Pat Souter, George Souliotes, Gordon Steidl, Richard Sturgeon, John Tennison, and Eddie Triplett. National Registry of Exonerations, searched by federal and read summaries.

These cases demonstrate that federal courts discern constitutional violations missed by state courts, even when the constitutional violations resulted in the wrongful convictions of innocent men and women. Further, each of the exonerees listed in note 16 were forced to rely on constitutional violations independent of their innocence claims to obtain relief; not every innocent person can, or will always be able to, establish such a violation.

Federal courts should review claims of innocence for four reasons. First, as shown in Part II, innocence is a freestanding constitutional claim. Thus innocence claims are entitled to federal judicial review. Moreover, there is a workable system of review as detailed in Part IV and due process demands that such a system be employed to identify constitutional violations.

Second, state restrictions on innocence claims, from requiring affirmative evidence of innocence or DNA evidence to limiting the presentation of newly discovered evidence to thirty days after its discovery,[17] fail to provide adequate process to all those entitled to constitutional protections. Federal courts must establish a constitutional floor to catch the innocent prisoners who fall through the large gaps left open by state laws.

Third, while there may be other mechanisms for reversal when the new evidence calls into question the fairness of the trial, as it often does, those mechanisms have their

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Available at: https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1= (last visited October 2, 2013).

In some of these cases, the federal courts found the person actually innocent under the *Schlup* gateway standard in order to hear their constitutional claims. But of course none were found innocent under *Herrera* or as a basis for reversal.

[17] *See note ante* 93.

own quirks and are not always available to every innocent person.[18] For instance, consider a declaration from an expert recanting his trial testimony. The declaration explains that the expert relied on a scientific technique that is no longer valid and as a result, his opinion is no longer reliable. The expert testimony was the only evidence of guilt. The recantation could thus potentially support a false testimony claim. However, in 2012, the California Supreme Court held that, "one does not establish false evidence merely by presenting evidence that an expert witness has recanted the opinion testimony given at trial. Likewise, when new expert opinion testimony is offered that criticizes or casts doubt on opinion testimony given at trial, one has not necessarily established that the opinion at trial was *false.*"[19] Similarly, the Supreme Court has only recognized that the Constitution requires reversal when the prosecution knew or should have known that the testimony was false; it has not extended this rule to situations in which the prosecution had no reason to know the testimony was false.[20]

Fourth, when other routes to reversal are pursued, the person is often left without a finding of innocence and vulnerable to claims that he or she was released "on a technicality."[21] Moreover, the lack of such a finding can affect the wrongfully convicted

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[18] For instance, in California, the standard for habeas relief is much lower in the context of ineffective assistance of counsel, prosecutorial misconduct, and false testimony. However, consider scientific evidence that has changed since trial. That cannot support a claim of ineffective counsel or prosecutorial misconduct because it was not available at the time of trial. However, it might support a false testimony claim because the testimony, even if believed at the time, has been proven false. However, new evidence that expert testimony presented at trial – testimony that established guilt – is no longer valid may not support a false testimony claim in California. In.

[19] *In re Richards*, 55 Cal. 4th 948, 963 (2012) (emphasis in original).

[20] *Cash v. Maxwell*, 132 S.Ct. 611, 615 (2012); *Napue v. People of State of Illinois*, 360 U.S. 264 (1959).

[21] Of course, constitutional protections are not technicalities. Further, to obtain relief, generally an inmate must show both a constitutional violation and a reasonable probability that absent that violation, the result would have been different – in other words, that he or she probably would have been acquitted.

person's ability to obtain compensation and to have arrest records sealed, along with employability, reputation, and other collateral consequences that result from convictions for serious crimes, even when those convictions have been reversed for constitutional violations and charges are subsequently dismissed.

Federal courts can provide relief to inmates when they have been denied procedural constitutional protections designed to protect the innocent from wrongful conviction.[22] Indeed, the majority argued in *Herrera* that the many constitutional rights afforded to criminal defendants ensure "against the risk of conviction of an innocent person."[23] Similarly, Justice O'Connor, in her concurrence in *Herrera*, explained that "[o]ur society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent."[24] However, since *Herrera* we have learned how often those "unparalleled protections" can fail.

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[22] *See e.g.*, *Copy v. Iowa*, 487 U.S. 1012, 1016-1020 (1988) (confrontation is essential to fairness because it is more difficult to lie about someone to their face, and face to face presence may "confound and undo the false accuser"); *Strickland v. Washington*, 466 U.S. 668, 711 (1984) (Marshall J., dissenting) (Justice Marshall, in dissent, argued that in requiring a showing of prejudice for ineffective assistance of counsel claims, a majority of the Supreme Court had assumed that the "only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted."); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex* 442 U.S. 1, 13 (1979) ("The function of legal process, as the concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions."); *United States v. Nixon*, 418 U.S. 683, 708 (1974) (discussing the import of compulsory process to meet the need to develop all relevant facts because, "the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts"); *In re Winship*, 397 U.S. 358, 364 (1970) (the reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error" and, "it is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned"); *Powell v. Alabama*, 287 U.S. 45, 69 (1932) ("Without [the right to counsel] though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.").

[23] *Herrera v. Collins*, 506 U.S. at 398-399.

[24] *Id*. at 420 (O'Connor J. concurring).

To believe that the Constitution provides procedural safeguards to protect the innocent from punishment, but that the same Constitution does not prohibit the punishment of the innocent if they had the benefit of a procedurally fair trial is a misguided elevation of form over substance. It offends the very notion of due process to deny judicial review of new evidence and keep an innocent person in prison simply because he or she received a "fair" trial -- when the evidence proving her innocence had not yet been discovered.

Federal review of compelling claims of innocence is both needed and required by the Constitution. The following section discusses current limitations on federal review affecting freestanding claims of innocence.

B. Legislative Limitations

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), federal courts can only grant relief to a state prisoner when the state court's denial of a claim is contrary to, or an unreasonable application of, firmly established Supreme Court law.[25] There is no Supreme Court law firmly establishing innocence as a freestanding constitutional claim. Thus, the limitations of AEDPA, enacted in 1996, coupled with the Supreme Court's failure to hold that innocence is a freestanding constitutional claim, preclude federal courts from reviewing freestanding claims of innocence.[26] As a result,

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[25] 28 USCA § 2254, subd. (d)(1) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.").

[26] *See e.g.*, *Wright v. Stegall*, 247 Fed.Appx. 709, 711 (6th Cir. 2011) (Holding that federal courts are precluded from considering petitioner's freestanding innocence claim. "Since the Supreme Court has declined to recognize a freestanding innocence claim in habeas corpus, outside the death-penalty context, this court finds that petitioner's claim is not entitled to relief under available Supreme Court precedent.").

the lower federal courts are prohibited from recognizing the existence of an innocence claim. The Tenth Circuit acknowledged this position in response to one inmate's evidence of innocence: "As much as these recantations give us pause, if *Herrera* is to be revisited, it is not for us to do so."[27]

C. The Seminal Case: *Herrera v. Collins*

The U.S. Supreme Court's holding in *Herrera* was very narrow: Herrera's showing of innocence was insufficient to entitle him to federal habeas relief.[28] To reach that conclusion, a majority of the justices assumed, for the sake of argument, that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."[29]

However, because Herrera's showing of innocence fell "far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo,* to exist," the Court held that Herrera was not entitled to relief without reaching the question of whether innocence is a constitutional claim.[30]

In 2005 and 2013, the Supreme Court reaffirmed that it did not resolve whether innocence is a freestanding constitutional claim in *Herrera* and that it has not resolved the question in any subsequent cases.[31]

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27 *Allen v. Beck*, 179 Fed.Appx. 548, 551 (10th Cir. 2006).

28 *Herrera v. Collins*, 506 U.S. at 419.

29 *Ibid.*

30 *Id*. at 419.

31 *See House v. Bell*, 547 U.S. at 554 (internal citations omitted, quoting *Herrera v. Collins*, 506 U.S. at 417), discussing that in *Herrera*, "the Court assumed without deciding that, in a capital case a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant

1. The Facts: Far from Ideal for Innocence.

Leonel Herrera was convicted of killing a police officer in 1981 and sentenced to death in 1982, after which he pled guilty to the murder of another police officer. The evidence of guilt was strong: police found Herrera's social security card beside the body of Officer David Rucker, who was found lying by his patrol car, shot in the head. [32] Officer Enrique Carrisalez stopped a car speeding away from the scene. He radioed in the license plate, which was registered to Herrera's girlfriend and whose keys Herrera when he was arrested. [33] The driver of the car shot Officer Carrisalez in the head, but the Officer lived long enough to identify Herrera as the shooter.[34]

Police also found blood spattered across exterior and interior of Herrera's girlfriend's car, inside Herrera's wallet and on his jeans; the blood was the same enzyme profile and type as Officer Rucker's and different than Herrera's. Further, when arrested, Herrera had a letter on him, which "strongly implied that he had killed Rucker."[35]

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unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."

In *McQuiggin v. Perkins*, 133 S.Ct. at 1931, the Supreme Court noted that it has "not resolved whether a prisoner may be entitled to [federal] habeas relief based on a freestanding claim of actual innocence."

[32] *Herrera v. Collins*, 390 U.S. at 393.

[33] *Id*. at 394, 422.

[34] *Ibid*.

[35] *Herrera v. Collins*, 506 U.S. at 393-395, 422. The confession letter read, in part: "To whom it may concern: I am terribly sorry for those I have brought grief to their lives. Who knows why? We cannot change the future's problems with problems from the past. What I did was for a cause and purpose. One law runs others, and in the world we live in, that's the way it is…. What happened to [Officer] Rucker was for a certain reason. I knew him as Mike Tatum. He was in my business, and he violated some of its laws and suffered the penalty, like the one you have for me when the time comes… The other officer that became part of our lives, me and Rucker's (Tatum), that night had not to do in this [*sic*]. He was out to do what he had to do, protect, but that's life…."

Indeed, when police tried to interrogate Herrera about the killings, he told them that, "it was all in the letter" and they should read it if "they wanted to know what happened."[36]

Years after his conviction, Herrera presented evidence that his then-deceased brother was the actual killer. Herrera filed declarations from three people to whom his brother had confessed either shortly after the crime or in the years before he died, including his brother's former attorney.[37] Additionally, Herrera filed a declaration from his brother's son Raul Jr., who was nine at the time of the murders and swore that he was in the car and saw his father Raul Sr. shoot Officers Rucker and Carrisalez.[38] Based on this evidence, Herrera argued that he was innocent and therefore his pending execution would therefore violate the Fourteenth Amendment and the Eighth Amendment.

2. Fractured Court Leaves Unresolved the Ultimate Issue

After the Texas state courts denied relief,[39] the U.S. District Court granted a stay of execution,[40] which the Fifth Circuit Court of Appeals promptly reversed based upon its

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[36] *Id*. at 423, citing *Herrera v. State,* 682 S.W.2d 313, 317 (Tex.Crim.App.1984), cert. denied, 471 U.S. 1131 (1985).

[37] *Id*. at 396, 423.

[38] *Ibid.*; *see also* http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/issues/deathpenalty/wrongfulexecutions/leonel-herrera.html.

[39] Herrera filed his evidence first in the state courts, but all three levels denied relief without an evidentiary hearing. The State District Court held that, "no evidence at trial remotely suggest[ed] that anyone other than [petitioner] committed the offense." *Ex parte Herrera,* No. 81-CR-672-C (Tex. 197th Jud.Dist., Jan. 14, 1991) , ¶ 35. While this is an odd justification for finding newly discovered evidence of innocence insufficient, the evidence of Herrera's guilt at trial was overwhelming. The Texas Court of Criminal Appeals affirmed the District Court's decision, and the Texas Supreme Court denied certiorari. *Ex parte Herrera,* 819 S.W.2d 528 (1991).

[40] The U.S. District Court granted Herrera's request for a stay of execution "in order to ensure that Petitioner can assert his constitutional claims and out of a sense of fairness and due process." *Herrera v. Texas*, No. M-92-30, 38-39 (SD Tex., Feb. 17, 1992).

understanding that evidence of innocence is not a ground for federal habeas relief.[41] Herrera then turned to the United States Supreme Court, which granted certiorari.[42]

Justice Rehnquist authored the opinion of the Court, in which Justices O'Connor, Kennedy, Scalia, and Thomas joined. The majority held that Herrera's showing of innocence was insufficient to meet the hypothetical "extraordinarily high" showing that would be required to trigger a freestanding claim of innocence – a claim they only assumed existed for the sake of deciding the case.[43] Because Herrera's showing was insufficient, the Court had no reason to reach the constitutional question of whether innocence is a freestanding claim for federal habeas relief.

Justice O'Connor authored a concurrence, which Justice Kennedy joined.[44] Justice Scalia authored a separate concurrence, which Justice Thomas joined.[45] Justice

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[41] The state of Texas appealed, and the U.S. Circuit Court of Appeals of the Fifth Circuit vacated the stay. *Texas v. Herrera*, 954 F.2d 1029 (5th Cir. 1992). The Fifth Circuit explained that, absent an accompanying constitutional violation, Herrera's freestanding claim of actual innocence was not cognizable because, under *Townsend v. Sain,* 372 U.S. 293, 317 (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." *Id*. at 1034.

[42] *Herrera v. Texas*, 502 U.S. 1085 (1992).

[43] *Herrera v. Collins*, 506 U.S. at 417.

[44] Justice O'Connor, joined by Justice Kennedy, emphasized the Court did not hold that the Constitution permits the execution of an innocent person, but rather left that difficult question open. *Herrera v. Collins*, 506 U.S. at 420 (O'Connor J. concurring). Justice O'Connor also argued that the question before the Court was not whether a state can execute an innocent person, but rather, "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." *Ibid*. According to Justice O'Connor, the answer to that question would normally be no, but it was "neither necessary, nor advisable" to resolve the question because of the disturbing nature of Herrera's claim that the constitutional protections had failed him and he was going to be executed despite being innocent, and also because it is a question that "implicates not just the life of a single individual, but also the State's powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations." *Id*. at 421.

[45] Justice Scalia, joined by Justice Thomas, wrote the most surprising concurrence, arguing that the Court should have held that the constitution permits the execution a person who was fairly convicted but has new evidence that proves his or her innocence; "as the Court's discussion shows, it is perfectly clear

White also authored a concurrence, but did not join the majority's opinion.[46] Justice Blackmun, joined by Justices Stevens and Souter, dissented and explained that the Court should have held that a persuasive showing of innocence would render a pending execution unconstitutional under the Eighth and Fourteenth Amendments.[47]

While the majority's holding was narrow and left the ultimate issue unresolved, Justice Rehnquist, in lengthy discussion that has resulted in much confusion, suggested that innocence is not a freestanding constitutional claim. Justice Rehnquist noted that the Supreme Court had never held that innocence is a freestanding constitutional claim, citing to dictum from 1963 that, "the existence merely of newly discovered evidence

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what the answer is: There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." *Id*. at 427 (Scalia J., concurring).

However, Justice Scalia joined the Court's opinion "because there is no legal error in deciding a case by assuming for the sake of argument that a right exists, and because, I can understand, or at least am accustomed to, the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate." *Id*. at 428.

[46] Justice White's short concurrence simply stated that in voting to affirm, he assumed that a truly persuasive showing of actual innocence would render unconstitutional a petitioner's execution, but that to be entitled to relief, a petitioner would "at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'" *Id*. at 429 (White J., concurring), quoting *Jackson v. Virginia,* 443 U.S. 307, 324 (1979). Because Herrera's evidence fell short of even that standard, Justice White concurred in the judgment that Herrera's showing was insufficient to entitle him to federal habeas relief.

[47] Justice Blackmun dissented, joined by Justices Stevens and Souter, arguing that the Court should have held that an inmate who could prove that he or she was probably innocent is entitled to federal habeas relief, and then remanded the case for an evidentiary hearing at which Herrera could have attempted to prove his innocence. *Id*. at 430 (Blackmun J., dissenting).

The dissent would have held that both the Eighth Amendment and Fourteenth Amendment prohibit executing the innocent. "Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent." *Ibid*. The dissent explained that the Eighth Amendment reflects evolving standards of decency, and also prohibits excessive punishment. The Court had held that death was excessive for crimes as serious as rape, and if execution is an excessive punishment for someone who committed a rape, it is certainly an excessive punishment for someone who did not commit any crime. *Id*. at 431. The Fourteenth Amendment prohibits government action "shocks the conscience" and nothing, argued Justice Blackmun, could be more shocking to the conscience than the execution of a man who could prove that he is innocent. *Id*. at 435. "The execution of a person who can show that he is innocent comes perilously close to simple murder." *Id*. at 446.

relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."[48]

Further, according to Justice Rehnquist, the Eighth Amendment applies only to sentencing challenges; because Herrera had challenged his guilt and not his sentence, the Eighth Amendment arguably did not apply to his claim.[49] The dissent, however, responded that the legitimacy of the punishment is inextricably intertwined with guilt, and that in challenging the finding of guilt, Herrera also challenged the state's right to punish him.[50]

In regards to the Fourteenth Amendment and due process, Justice Rehnquist suggested that Herrera was not legally innocent, but rather had come before the Court as a man convicted by due process of two capital murders. "The question before us, then, is not whether due process prohibits the execution of an innocent person, but rather whether it entitles petitioner to judicial review of his 'actual innocence' claim," an issue "properly analyzed only in terms of procedural due process."[51]

In 1993, when the Court decided *Herrera*, only fifteen states allowed inmates to raise motions for new trials based on newly discovered evidence more than three years after conviction and of those fifteen, only nine states had no time limits.[52] At the time,

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48 *Id*. at p. 400 (emphasis removed), quoting *Townsend v. Sain, supra,* 372 U.S. at p. 317.

49 *Id*. at 406.

50 *Id*. at 433-444 (Blackmun J., dissenting).

51 *Herrera v. Collins*, 506 U.S. at 407, n 6.

52 *Id*. at p. 411, citing Cal.Penal Code Ann. § 1181(8) (West 1985) (no time limit); Colo.Rule Crim.Proc. 33 (Supp.1992) (no time limit); Ga.Code Ann. §§ 5-5-40, 5-5-41(1982) (30 days, can be extended); Idaho Code § 19-2407 (Supp.1992) (14 days, can be extended); Iowa Rule Crim.Proc. 23 (1993) (45 days, can be waived); Ky. Rule Crim.Proc. 10.06 (1983) (one year, can be waived); Mass.Rule Crim.Proc. 30 (1979) (no time limit); N.J.Rule Crim.Prac. 3:20-2 (1993) (no time limit); N.Y.Crim.Proc.Law § 440.10(1)(g) (McKinney 1983) (no time limit); N.C.Gen.Stat. § 15A-

Texas was one of seventeen states that required such motions to be made within sixty days of judgment,[53] while eighteen states had time limits ranging from one to three years.[54]

Justice Rehnquist pointed to these state practices to note that, "we cannot say that Texas' 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.'"[55] However, as discussed in Part II, *ante*, this reasoning compels a different conclusion today.

Ultimately, the majority assumed without deciding that "a truly persuasive claim of actual innocence" would render a petitioner's execution unconstitutional, but denied

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1415(b)(6) (1988) (no time limit); Ohio Rule Crim.Proc. 33(A)(6), (B) (1988) (120 days, can be waived); Ore.Rev.Stat. § 136.535 (1991) (five days, can be waived);Pa.Rule Crim.Proc. 1123(d) (1992) (no time limit); S.C.Rule Crim.Proc. 29(b) (Supp.1991) (no time limit); W.Va.Rule Crim.Proc. 33 (1992) (no time limit).

[53] *Id*. at p. 410, citing Ala.Code § 15-17-5 (1982) (30 days); Ariz.Rule Crim.Proc. 24.2(a) (1987) (60 days); Ark.Rule Crim.Proc. 36.22 (1992) (30 days); Fla.Rule Crim.Proc. 3.590 (1992) (10 days); Haw.Rule Penal Proc. 33 (1992) (10 days);Ill.Rev.Stat., ch. 38, ¶ 116-1 (1991) (30 days); Ind.Rule Crim.Proc. 16 (1992) (30 days); Mich.Ct.Rule Crim.Proc. 6.431(A)(1) (1992) (42 days);Minn.Rule Crim.Proc. 26.04(3) (1992) (15 days); Mo. Rule Crim.Proc. 29.11(b) (1992) (15-25 days); Mont.Code Ann. § 46-16-702(2) (1991) (30 days); S.D. Codified Laws § 23A-29-1 (1988) (10 days); Tenn.Rule Crim.Proc. 33(b) (1992) (30 days); Tex.Rule App.Proc. 31(a)(1) (1992)(30 days); Utah Rule Crim.Proc. 24(c) (1992) (10 days); Va.Sup.Ct. Rule 3A:15(b) (1992) (21 days); Wis.Stat. § 809.30(2)(b) (1989-1990) (20 days).

[54] *Id*., citing Alaska Rule Ct., Crim.Rule 33 (1988) (two years); Conn.Gen.Stat. §§ 52-270, 52-582 (1991) (three years); Del.Ct.Crim.Rule 33 (1987) (two years); D.C.Super.Ct.Crim.Rule 33 (1992) (two years); Kan.Stat. Ann. § 22-3501 (1988) (two years); La.Code Crim.Proc.Ann., Art. 853 (West 1984) (one year); Maine Rule Crim.Proc. 33 (1992) (two years); Md.Rule Crim.Proc. 4-331(c) (1992) (one year); Neb.Rev.Stat. § 29-2103 (1989) (three years);Nev.Rev.Stat. § 176.515(3) (1991) (two years); N.H.Rev.Stat.Ann. § 526:4 (1974) (three years); N.M.Rule Crim.Proc. 5-614(C) (1992) (two years); N.D.Rule Crim.Proc. 33(b) (1992-1993) (two years); Okla.Ct.Rule Crim.Proc., ch. 15, § 953 (1992) (one year); R.I.Super.Ct.Rule Crim.Proc. 33 (1991-1992) (two years); Vt.Rule Crim.Proc. 33 (1983) (two years); Wash.Crim.Rule 7.8(b) (1993) (one year); Wyo.Rule Crim.Proc. 33(c) (1992) (two years).

[55] *Id*. at 411.

Herrera's claim because he had not made the hypothetical showing that would be required to trigger such a claim.[56]

3. Correcting the Misconceptions

Portions of the majority's discussion, when read in isolation, have led many legal scholars, practitioners, and courts astray.[57] Commentators have attempted to establish the meaning of *Herrera* in a wide variety of incorrect ways: see for example, *The Supreme Court and the Politics of Death*, alleging that in *Herrera*, "the Court rejected the view that the Constitution forbids execution of factually innocent defendants who were convicted after a fair trial;"[58] or *Texas's New Habeas Corpus Procedure for Death-Row Inmates: Kafkaesque - - And Probably Unconstitutional*, contending that in "*Herrera v. Collins*, the Court imposed further restrictions by eliminating federal habeas relief for death-row inmates claiming actual innocence."[59]

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[56] *Id*. at 417.

[57] *See*, *e.g.*, *Jordan v. Secretary, Dept. of Corrections*, 485 F.3d 1351, 1353 (11th Cir.2007), in which petitioner's appointed counsel "conceded, on behalf of [his client], that a freestanding claim of actual innocence does not provide a basis for habeas relief," citing to dictum in the majority's opinion.

Courts have similarly misinterpreted *Herrera* to deny actual innocence claims. *See*, *e.g.*, *Rozelle v. Secretary, Dept. of Corrections*, 672 F.3d 1000, 1010 (11th Cir.2012) (asserting that the *Herrera* Court held that, "no federal habeas relief is available for freestanding, non-capital claims of actual innocence"); *Zuern v. Tate*, 336 F.3d 478, n.1 (6th Cir.2003) (citing to *Herrera* for the proposition that, "[t]he Supreme Court has held that newly discovered evidence does not constitute a freestanding ground for federal habeas relief, but rather that the newly discovered evidence can only be reviewed as it relates to an "independent constitutional violation occurring in the underlying state criminal proceeding"); *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir.2003) (asserting that in *Herrera*, "the Supreme Court held that such a claim does not state an independent, substantive constitutional claim and was not a basis for federal habeas relief. However, it left open whether a truly persuasive actual innocence claim may establish a constitutional violation sufficient to state a claim for habeas relief. The Fifth Circuit has rejected this possibility and held that claims of actual innocence are not cognizable on federal habeas review."); *Milone v. Camp*, 22 F.3d 693, 700 (7th Cir. 1994), (citing *Herrera* to assert that when petitioner is not sentenced to death, "Supreme Court precedent does not allow a federal court to issue a writ of habeas corpus only on the ground that [petitioner] is, or might be, innocent of … murder.").

[58] Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 373 (2008).

[59] James Harrington, *Texas's New Habeas Corpus Procedure for Death-Row Inmates: Kafkaesque - - And Probably Unconstitutional*, 27 ST. MARY'S L.J. 69, 78 (1995).

Numerous legal scholars have advanced the erroneous claim that the Supreme Court held in *Herrera* that innocence is *not* a freestanding constitutional claim.[60] On the contrary, as discussed above, the *Herrera* Court left open the question of whether innocence is a freestanding constitutional claim, and in 2013 the Supreme Court reaffirmed that it has "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence."[61]

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[60] David Niven, Ph.D., Essay, *Unlocking the Eighth Amendment's Power to Make Innocence A Constitutional Claim: The "Objective" Views of State Legislators,* 18 Barry L. Rev. 213, 224 (2103) ["The Court has ruled 'actual innocence' is not itself a constitutional claim," citing *Herrera v. Collins*]; Anna Naimark, International Legal Update, *Troy Davis Execution Exposes Inequity Between The Capital Punishment Cases With DNA Evidence And Those Without*, 19 No. 1 Hum. Rights T.B. 25, 25 (2011) [**"**The majority in *Herrera* ultimately found that 'a claim of "actual innocence" is not itself a constitutional claim' and may have a 'very disruptive effect' on the justice system."]**;** Trevor M. Wilson, *Innocent Owners and Actual Innocence: Raising Innocence As A Constitutional Defense to Government Punishment*, 19 S. CAL. REV. L. & SOC. JUST. 377, 398 (2010) ["The Court has similarly reverted to its strict rejection of innocence as a defense in the habeas corpus context."]; Sophia S. Chang, Note, *Protecting the Innocent: Post-Conviction DNA Exoneration*, 36 HASTINGS CONST. L.Q. 285, 303 (2009) ["in *Herrera v. Collins*, the Supreme Court decided that claims of actual innocence are not constitutional claims," and "[h]abeas corpus cannot be used by those who simply proclaim that they are factually innocent"]; Bernard A. Williams, *Guilty Until Proven Innocent: The Tragedy of Habeas Capital Appeals*, 18 J.L. & Pol. 773, 795 (2002) ["In a seminal case decided in 1993, Herrera v. Collins, the Supreme Court held that newly discovered evidence of actual innocence cannot form the basis of federal habeas review unless the evidence is also accompanied by a claim of a constitutional violation"]; Kimberly A. Orem, *Evolution of an Eighth Amendment Dichotomy: Substantive and Procedural Protections Within the Cruel and Unusual Punishment Clause in Capital Cases*, 12 CAP. DEF. J. 345, 355 (2000) ["In *Herrera v. Collins* the Court held that a claim of actual innocence is not an independent basis for federal habeas relief."]; John F. Erbes & Stephen W. Baker, *Survey of Illinois Law: Criminal Law and Procedure*, 21 S. ILL. U. L.J. 759, 772 (1997) [in *Herrera*, **"**the Court had found such a claim was not a federal constitutional issue"]; Ariane M. Schreiber, Note, *States that Kill: Discretion and the Death Penalty—A Worldwide Perspective*, 29 CORNELL INT'L L.J. 263, 299 (1996) ["In *Herrera v. Collins*, the Supreme Court held that a 'claim of actual innocence based on newly discovered evidence is not ground for habeas relief.'"]; James C. Harrington & Anne More Burnham, *Texas's New Habeas Corpus Procedure for Death-Row Inmates: Kafkaesque—And Probably Unconstitutional*, 27 ST. MARY'S L.J. 69, 78 (1995) ["The Supreme Court held in *Herrera* that a claim of actual innocence does not entitle a death-row inmate to federal relief because the trial court is the appropriate forum for determining factual innocence or guilt in criminal cases."]; Jennifer Breuer, Supreme Court Review, *Habeas Corpus—Limited Review for Actual Innocence*, 84 J. CRIM. L. & CRIMINOLOGY 943 (1994) ["Chief Justice Rehnquist, writing for the majority, affirmed the Fifth Circuit's decision by relying on the rule that absent an accompanying constitutional violation, a claim of actual innocence is not a ground for federal habeas corpus relief. The Court thus reaffirmed the principle that 'federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.'"]; Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 618-619 ["the court declared that the claim of 'actual innocence' is 'not itself a constitutional claim…'"].

[61] *McQuiggin v. Perkins*, 133 S.Ct. at 1931.

A similar erroneous claim propagated by legal scholars is that the Supreme Court held that the Constitution permits the execution of an innocent person.[62] Justice O'Connor's concurrence addressed this exact misconception and clarified that, "[n]owhere does the Court state that the Constitution permits the execution of an actually innocent person."[63]

4. *Herrera* Claims: Counting the "Votes" for Innocence

Since *Herrera*, lawyers and inmates have raised or attempted to raise freestanding innocence claims in federal courts, often referred to as *Herrera* claims. These claims typically argue that while a majority of the Court in *Herrera* assumed that innocence was a constitutional claim, and a different majority would have held that the execution of an innocent person violates the Constitution. Support for Herrera claims raised with this argument is found in the dissent written by Justice Blackmun and joined by Justices Stevens and Souter, along with the concurrences of Justice O'Connor, joined by Justice

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[62] Kathleen Callahan, Note, *In Limbo: In Re Davis and the Future of Herrera Innocence Claims in Federal Habeas Proceedings*, 53 ARIZ. L. REV. 629, 633 (2011) ["in the 1993 case *Herrera v. Collins*, the Supreme Court held that punishing a person who can establish innocence does not violate the Constitution"]; Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121, 121 (2005) ["the *Herrera* Court found that executing such a prisoner who can show he is probably innocent is constitutional…" Given this interpretation of *Herrera*, it is no wonder the author also alleged that, "*Herrera* ranks as one of those infamous Supreme Court opinions, like *Lochner* and *Plessy*, that is utterly repugnant to any basic sense of fairness."]; Michael Mello, Essays, "*In the Years When Murder Wore the Mask of Law": Diary of a Capital Appeals Lawyer*, 24 VT. L. REV. 583, fn 75 (2000) ["The Court held that executing an innocent person does not violate the Constitution. Electrocuting or hanging or gassing or shooting a totally innocent man does not violate the Constitution's guarantees of "due process of law" and "equal protection" of the law. Hanging or injecting or gassing a totally innocent women does not constitute "cruel and unusual punishment."]; Stuart G. Friedman, *Hurdling the 6.500 Barrier: A Guide to Michigan Post-Conviction Remedies*, 14 T.M. COOLEY L. REV. 65, fn 122 (1997) ["See *Herrera v. Collins*, 506 U.S. 390 (1993), where the U.S. Supreme Court found that the federal constitution does not prohibit executing an actually innocent person as long as that person received a fair trial"]; Kelli Hinson, Comment, *Post-Conviction Determination of Innocence for Death Row Inmates*, 48 SMU L. REV. 231, 233 (1994) ["The Supreme Court has previously rejected this argument [that the Eighth and Fourteenth Amendments prohibit the execution of an innocent person] and held in *Herrera v. Collins* … that the criminal justice procedures already in place adequately protect an accused's constitutional rights"].

[63] *Herrera*, 390 U.S. at 427 (O'Connor, J. concurring).

Kennedy, and Justice White for the latter proposition. Both the Ninth Circuit[64] and the California Supreme Court[65] have endorsed this view, as have legal scholars.[66] However, the following questions accompany innocence claims based on this argument.

i. The Dissent: Incarceration and Execution

The text of the *Herrera* dissent makes clear that three dissenting Justices, Justices Blackmun, Stevens, and Souter, would have held that the Constitution prohibits the execution of someone who is innocent.[67] "Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent," wrote Justice Blackmun.[68] The dissent asserted that

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[64] *Carriger v. Stewart*, 132 F. 3d 463, 476 (9th Cir. 1997) (in *Herrera*, "a majority of the Supreme Court assumed, without deciding, that execution of an innocent person would violate the Constitution. A different majority of the Justices would have explicitly so held. *Compare id.* at 417, 113 S.Ct. at 869 (majority opinion) *with id.* at 419, 113 S.Ct. at 870 (O'Connor, J., joined by Kennedy, J., concurring) *and id.* at 430-37, 113 S.Ct. at 876-79 (Blackmun, J., joined by JJ. Stevens and Souter, dissenting).").

[65] *In re Clark*, 5 Cal. 4th 750, 797 (1993) (in *Herrera*, "a majority of the justices of the United States Supreme Court have expressed a belief that the Eighth and Fourteenth Amendments preclude execution of an innocent person. Their statements imply that in a capital case a claim of actual innocence of the crime of which the petitioner stands convicted must be considered regardless of when it is raised or if constitutional error affected the verdict. *Herrera v. Collins* (1993) 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203, opns. of O'Connor, J. [joined by Kennedy, J.], White, J., and Blackmun, J. [joined by Stevens and Souter, JJ.]").

[66] *See e.g.*, Judith M. Barger, *Innocence Found: Retribution, Capital Punishment, and the Eighth Amendment*, 46 Loy. L.A. L. Rev. 1, 4 (2012) ["six justices at least hypothetically agreed that such claims could be presented by individuals who had been sentenced to death,"]; Brandon Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1670 (2008) ["Six justices agreed the Fourteenth Amendment supports a freestanding claim for actual innocence."]; James G. Clessuras, *Schlup v. Delo: Actual Innocence As Mere Gatekeeper*, 86 J. Crim. L. & Criminology 1305, 1309 (1996) ["Although Chief Justice Rehnquist would not express an opinion as to whether there is a constitutional prohibition against the execution of a person who has made a persuasive showing of actual innocence (discussing the purported prohibition only arguendo), six justices--three dissenting and three concurring--concluded that such a prohibition exists."].

[67] According to the dissent, the Court should have held that an inmate on death row who could prove that he was probably innocent would be entitled to federal habeas relief, and then remand the case for an evidentiary hearing at which Herrera could attempt to prove his innocence.

[68] *Herrera v. Collins,* 506 U.S. at 430 citing *Ford v. Wainwright,* 477 U.S. 399, 406 (1986), *Rochin v. California,* 342 U.S. 165, 172 (1952). The Dissent noted that Court had been asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, could prove his innocence with newly discovered evidence. "Despite the State of Texas'

both the Eighth Amendment and the substantive due process clause of Fourteenth Amendment prohibit the execution of an innocent person.

If the question were confined to whether the Constitution prohibits the execution of an innocent person, these three justices clearly would have so held. The *Herrera* dissent, however, did not resolve whether the Constitution also prohibits the continued incarceration of an innocent person. The dissent noted that "[i]t also may violate the Eighth Amendment to imprison someone who is actually innocent," and quoted *Robinson v. California*, 370 U.S. 660, 667 (1962) for the proposition that, "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[69] The dissent recognized, however, that as the Court had noted in the past, death is different from imprisonment in its severity and finality. Because unconstitutional incarceration was not the question before the Court, the dissent went no further than these observations.[70]

Interestingly, Justice Rehnquist and the majority noted that Herrera had not asserted an error in the imposition of the death sentence, but rather a fundamental error in the finding of guilt; thus, "[i]t would be a rather strange jurisprudence, in these

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astonishing protestation to the contrary… I do not see how the answer can be anything but 'yes.' " *Id*. at 431.

The Eighth Amendment reflects evolving standards of decency; the execution of an inmate who can prove his or her innocence is at odds "with any standard of decency that I can imagine." *Ibid*. Further, Court has held that death is excessive for certain crimes, including rape; if it is "violative of the Eighth Amendment to execute someone who is guilty of those crimes, then it plainly is violative of the Eighth Amendment to execute a person who is actually innocent." *Ibid*.

Government action that "shocks the conscience" violates substantive due process under the Fourteenth Amendment. *Id*. at 435. Justice Blackmun argued that nothing could be more shocking to the conscience than the execution of a man who could prove that he is innocent. The dissent asserted that, "[t]he execution of a person who can show that he is innocent comes perilously close to simple murder." *Id*. at 446.

69 *Id*. at 432, n. 2 (Blackmun J., dissenting).

70 *Ibid*.

circumstances, which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison."[71]

More recently, in 2009, the Supreme Court assumed without deciding that innocence is a freestanding constitutional claim in a non-capital case.[72] The 2009 majority did not discuss the fact that it was extending this assumption outside of the context of execution for the first time. This supports the *Herrera* majority's suggestion that the Constitution cannot forbid the execution of an innocent person and also permit the incarceration of an innocent person, or worse still, a sentence of life without the possibility of parole – the "passive aggressive death penalty" as described by a colleague.[73]

ii. The Nuance of Justices O'Connor

Justice O'Connor began her concurrence with the oft-cited and relatively straightforward statement that, "I cannot disagree with the fundamental principle that executing the innocent is inconsistent with the Constitution."[74]

However, Justice O'Connor then continued that regardless of the formula, "the execution of a *legally and factually* innocent person would be a constitutionally intolerable event."[75] Herein lies the rub: Justice O'Connor reiterated Justice Rehnquist's view that Herrera was legally guilty because he was convicted following a trial at which

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71 *Id*. at 405.

72 *District Attorney's Office for Third Judicial Dist. V. Osborne*, 557 U.S. 52, 71-72 (2009).

73 Professor David Ball, Santa Clara University School of Law.

74 *Herrera v. Collins*, 506 U.S. at 419 (O'Connor J., concurring).

75 *Id*., (emphasis added).

he received all the constitutional protections to which a criminal defendant is entitled.[76] By this reasoning, however, no defendant who received a procedurally fair trial is legally innocent.[77] The clause of "legal" innocence thus renders a freestanding claim of innocence a nullity; innocence is not a freestanding constitutional claim if it requires an additional independent constitutional violation.

What meaning did Justices O'Connor and Kennedy intend to be extracted from their concurrence? Justice O'Connor argued that the question before the Court was narrow and procedural as opposed to substantive. The issue, according to this concurrence, was not whether a state can execute an innocent person, but rather, "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."[78] The answer would normally be no (as implied by the wording of the question), but because of the disturbing nature of Herrera's argument, and because this question "implicates not just the life of a single individual, but also the State's powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations," Justice O'Connor argued that resolving the question was "neither necessary nor advisable."[79]

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[76] *Ibid.*

[77] Presumably, if a convicted person were provided an opportunity to present the evidence of their innocence and the court found the person actually innocent, the person would then be legally innocent. But such a system renders the innocent inmate incapable of obtaining relief as he must prove that he is legally innocent to obtain review of his actual innocence claim, but he cannot obtain the status of legal innocence until his actual innocence claim is reviewed and a court finds him to be innocent.

[78] *Id*. at 420.

[79] *Id*. at 421.

There is language within the concurrence that supports the proposition that these two Justices would have held that innocence is a constitutional claim. Justice O'Connor began with the statement that she could not disagree with the fundamental principle that executing the innocent is at odds with the Constitution. This certainly implies that if the facts supported a compelling claim of innocence, and the execution of an innocent prisoner was pending, Justices O'Connor and Kennedy would have held that actual innocence is a constitutional claim.

iii. Justice White: Proposing a Standard

Justice White assumed that a persuasive showing of innocence would trigger constitutional protections, and that a petitioner would "at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt'" to be entitled to relief.[80] Justice White concurred in the decision to deny Herrera relief because Herrera had not met that minimum showing.

The fact that Justice White proposed a standard and also did not join the majority opinion, which largely argued against a constitutional claim, suggests that he would have held that innocence is a freestanding constitutional claim.

iv. Votes for the Constitution's Permission to Execute an Innocent Person

Given Justice Rehnquist's discussion suggesting that neither the Eighth Amendment, nor the Fourteenth Amendment, were triggered by Herrera's claim of innocence, there is no basis upon which to argue that he would have held that innocence is a freestanding constitutional claim.

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[80] *Id*. at 429 (White J., concurring), quoting *Jackson v. Virginia,* 443 U.S. 307, 324 (1979).

Likewise, it is clear that Justices Scalia and Thomas would have held that innocence is not a constitutional claim. Indeed, Justice Scalia's concurrence, joined by Justice Thomas, stated that the Court should have held that the Constitution permits the execution of a person who was convicted at a fair trial, but has new evidence to prove his innocence because, "as the Court's discussion shows, it is perfectly clear what the answer is: There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."[81]

Justice Scalia scolded the dissenters for applying "nothing but their personal opinions" to find the execution of a fairly convicted, but innocent person unconstitutional.[82] "If the system that has been in place for 200 years (and remains widely approved) 'shock[s]' the dissenters' consciences, […] perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of 'conscience shocking' as a legal test."[83] Justice Scalia could not have known that the "system that has been in place for 200 years" would be completely revamped once states were faced with the reality of innocent people in prison.

v. Tallying the Votes

There is a strong argument that six of the Justices, as detailed above, would have held that innocence is a freestanding constitutional claim. Unfortunately, five of the six justices that arguably would have so held (Justices White, Blackmun, O'Connor, Stevens,

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[81] *Herrera v. Collins*, 506 U.S at 427. Justice Scalia argued that the Court should have answered the question upon which it had granted certiorari: "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 shows him to be 'actually innocent.'

[82] *Id*. at p. 428.

[83] *Ibid*.

and Souter) are no longer on the Court. Moreover, this argument has not yet succeeded in convincing the federal courts that innocence claims require federal constitutional protections.

5. A Hint of Light: Recent Guidance from the Court

The Supreme Court has offered two further pieces of guidance since *Herrera*. As discussed above, in 2009, the Supreme Court assumed without deciding that innocence is a freestanding constitutional claim in a non-capital case.[84]

More importantly, but also in 2009, in a one-paragraph opinion, the Supreme Court remanded Troy Davis's case to the U.S. District Court for the Southern District of Georgia for an evidentiary hearing on Davis's actual innocence claim.[85] The Court directed the lower court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[86] The majority opinion was silent as to its underlying rationale and provided no case citations, explanation, or discussion to support its decision.

Justices Scalia and Thomas, however, implicitly recognized that the majority's decision supports the argument that innocence is a freestanding constitutional claim and thus dissented, arguing that there is no federal constitutional innocence claim.[87] Further, the dissenters argued, even if the lower court held that innocence is a constitutional claim, it could not grant relief under AEDPA because the state court's denial of the innocence claim was not contrary to, or an unreasonable application of, firmly established Supreme

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84 *District Attorney's Office for Third Judicial Dist. V. Osborne*, 557 U.S. at 71-72.

85 *In re Davis*, 557 U.S. 952, 130 S.Ct. 1, 1 (2009).

86 *Ibid.*

87 *Id*. at 3-4 (Scalia J., dissenting).

Court law.[88] According to Justice Scalia, the Supreme Court had thus sent the district court on "a fool's errand."[89]

The U.S. District for the Southern District of Georgia found that innocence is a freestanding constitutional claim, at least in the capital context, because the Eighth Amendment prohibits the execution of an innocent person.[90] However, the District Court also found that Mr. Davis's evidence was not sufficiently persuasive to meet the high burden required to establish innocence and thus did not have to resolve the question of relief.

II. A New Constitutional Analysis of Innocence as a Freestanding Claim.

In 1993, when the Supreme Court discussed in *Herrera v. Collins* whether innocence is a freestanding constitutional claim, very few people had been exonerated by DNA evidence. Today however, 312 people have been exonerated by DNA evidence; more than a thousand have been exonerated without DNA evidence.[91]

In response to DNA exonerations, state legislatures recognized the need to change their approach to innocence claims, reflecting evolving standards of decency and modern awareness regarding the requirements of fundamental fairness. In 1993, only nine states placed no time limits on motions for new trials based on evidence of innocence, while the

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88 "A state court cannot possibly have contravened, or even unreasonably applied, 'clearly established Federal law, as determined by the Supreme Court of the United States,' by rejecting a type of claim that the Supreme Court has not once accepted as valid." *Id*. at 3, quoting 28 U.S.C. § 2254, subd. (d)(1).

89 *Id*. at 4.

90 *In re Davis*, 2010 WL 3385081, at 37-43 (2010).

91 http://www.innocenceproject.org/ (last visited February 28, 2014); http://www.law.umich.edu/special/exoneration/Pages/about.aspx (listing 1,232 exonerations) (last visited February 28, 2014).

vast majority limited the time for presenting such motions to a short period after conviction. State laws have changed drastically since then.

Currently, all fifty states and the District of Columbia have recognized the post-conviction right to develop DNA evidence relevant to innocence, and all have deemed that right worthy of statutory protection.[92] Further, forty-nine of the fifty states and the District of Columbia now allow post-conviction claims of innocence without time limits related to the conviction date; not a single one requires an independent constitutional violation, or a showing that the inmate was deprived of a fair trial, in order to obtain relief. [93]

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[92] http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited October 27, 2013)

[93] **Alabama** Rules of Ct., rules 32.1, subd (e)(5) & 32.2, subd. (c) (requiring motions based on "newly discovered material facts" that establish innocence be brought within six months of the discovery of those facts); **Alaska** Code of Criminal Procedure §12.72.020, subd. (b)(2)(D) (courts may hear claims based on newly discovered evidence that establishes innocence by clear and convincing evidence and which were presented with due diligence); **Arizona** Rev. Stat. § 13-4240, subd. (K) (notwithstanding any other provision of law that would bar a hearing as untimely, if the results of post-conviction DNA testing are favorable, the court shall order a hearing and make any further orders required); **Arkansas** Ark. Code Ann. § 16-112-201, subd. (a)(1), (2) (except when a direct appeal is available, a convicted person can commence proceedings to secure relief based on scientific evidence not available at trial that establishes actual innocence; or the scientific predicate for the claim could not have been previously discovered by due diligence and the facts underlying the claim by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense); **California** *In re Clark* 5 Cal.4th 750, 797-798 (the timeliness bars to habeas petitions based on newly discovered evidence do not apply if the petitioner is actually innocent); **Colorado** CO ST RCRP Rule 35, (c)(3)(IV), (VII)(b) (right to make application for post-conviction review based on material facts discovered with due diligence that require vacation of conviction in the interests of justice), *see also Farrar v. People* 208 P.3d 702, 706-707 (newly discovered evidence must be discovered with due diligence and must be "affirmatively probative of defendant's innocence"); **Connecticut** *Boles v. Commissioner of Correction*, 89 Conn.App. 596, 600 (2005) (actual innocence is a cognizable claim by way of a petition for a writ of habeas corpus; to prevail, a prisoner must satisfy two criteria: (1) establish clear and convincing evidence that he is actually innocent and (2) that no reasonable fact finder would find petitioner guilty); *see also Williams v. Commissioner of Correction* 41 Conn.App. 515 (1996) (in raising a claim based on newly discovered evidence, a petitioner must demonstrate that the evidence could not have been discovered earlier with due diligence); **Delaware** Del. Code Ann. tit. 11, § 4504, subd. (b) (allowing motion for new trial based on DNA evidence not available at trial that establishes actual innocence and setting standard of clear and convincing evidence that no reasonable trier of fact, considering all of the evidence, would have convicted the person, but must bring motion for DNA testing within 3 years of conviction); **D.C.** Code § 22-4135, subd. (d9)(1), (f) (allowing motion to vacate conviction or grant a new trial on the ground of actual innocence and requiring an affidavit stating the new evidence of innocence was not deliberately withheld for the purposes of strategic advantage, and permitting dismissal of claims "if the government demonstrates that it has been materially

prejudiced in its ability to respond to the motion by the delay in its filing, unless the movant shows that the motion is based on grounds which the movant could not have raised by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred"); **Florida** FL ST RCRP Rule 3.853 (allowing post-conviction motion for DNA testing anytime after judgment and sentence are final when there is a reasonable probability that the movant would have been acquitted or received a lesser sentence had the DNA evidence been admitted at trial); *see also Zolman v. State*, 820 So.2d 1059, 1062-1063 (2002) (granting motion for DNA testing 23 years after conviction upon finding that the requested DNA testing would exonerate defendant if results excluded him); **Georgia** *Perkins v. Hall*, 288 Ga. 810, 824, (2011) (reiterating actual innocence exception to procedural defaults, including timeliness); **Hawaii** Haw. Rev. Stat. § 844D-121 (allowing post-conviction motion for DNA testing "at any time"); **Idaho** I.C. § 19-4902, sbd. (b), (f) (authorizing motion for DNA testing at any time, and requiring the court to grant relief if the fingerprint or forensic DNA test results demonstrate that petitioner did not commit the crime); **Illinois** IL ST CH 725 § 5/122-1, subd. (a-5) (requiring proceedings to be instituted within "a reasonable period of time"), *but see People v. Ortiz*, 235 Ill. 2d 319, 331-332 (2009) (affirming grant of new trial based on evidence of actual innocence more than 10 years after the conviction, and reiterating that actual innocence excuses defendants from having to show cause and prejudice for procedural default); **Indiana** IN ST POSTCONV Rule PC 1 (no time limit in the statute); *Kubsch v. State*, 934 N.E.2d 1138, 1145 (Ind. 2010) (new evidence mandates a retrial when it is discovered after trial and due diligence was used to discover it in time for trial, if among other things, it would probably produce a different result at retrial); **Iowa** Code Ann. § 822.2(1)(d) (authorizes vacating conviction based on material facts not previously presented and heard); *see also Summage v. State*, 579N.W.2d 821, 822 (1998) (applicant must show that the evidence could not have been discovered earlier with due diligence); **Kansas** Kan. Stat. Ann. § 21-2512, subd (a), (f)(2), amended by 2013 Kansas Laws Ch. 96 (H.B. 2093) (provides for DNA testing "any time after conviction" for murder or rape, and authorizing vacating judgment, discharging the petitioner from custody, or granting a motion for new trial if results are favorable and of such materiality that they create a reasonable probability of a different outcome); **Kentucky** Ky. Rev. Stat. Ann. § 422.285, amended by DNA—TESTS AND TESTING, 2013 Kentucky Laws Ch. 77 (HB 41) (no time limit placed on requests for DNA testing); *Bowling v. Com.*, 163 S.W.3d 361, 372, 373 (Ky. 2005) (discussing actual innocence exception to requiring a showing of cause and prejudice for procedural default); **Louisiana** La. Code Crim. Proc. Ann. art. 926.1 (requiring motions for DNA testing be timely); LSA-C.Cr.P. Art. 851, subd. (3) (authorizing motions for new trial based on new and material evidence that probably would have changed the verdict, and that was not discovered before or during trial, notwithstanding the exercise of reasonable diligence); **Maine** Me. Rev. Stat. tit. 15, § 2138, subd. (10)(A) (placing no time limit on granting a new trial based on DNA test results that, in light of all of the evidence, prove actual innocence); **Maryland** Md. Rule 4-331, subd. (c)(2), (c)(3) ((2) authorizing motion for new trial at any time if sentenced to death and defendant can show innocence, or (3) authorizing motion for new trial at any time if based on DNA testing or other generally accepted scientific techniques, the results of which show innocence); **Massachusetts** Mass. R. Crim. P. 30, subd. (a), (b) (motion for new trial may be made at any time if it appears that justice may not have been done); **Michigan** Mich. Comp. Laws Ann. § 770.16, subd. (2), (8) (allowing any motion for DNA testing filed before January 1, 2016 and authorizing motion for new trial if DNA results exclude defendant and defendant establishes by clear and convincing evidence that only the perpetrator of the crime could be the source of the biological material); **Minnesota** Minn. Stat. Ann. § 590.01, subd. (4)(b)(2) (excusing petitioners from two-year time limit based on newly discovered evidence that could not have been ascertained by due diligence within the two-year time limit and which establishes by clear and convincing evidence that petitioner is innocent); **Mississippi** Miss. Code. Ann. § 99-39-5, subd. (2)(a)(ii) (providing exception from three-year statute of limitation on motions for relief cases in which there is biological evidence that can be subjected to DNA testing and that testing would demonstrated a reasonable probability that petitioner would not have been convicted if favorable results had been obtained at the time of the original prosecution); **Missouri** *Missouri State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546-47 (Mo. 2003) (Reiterating that courts will hear constitutional claims not raised within the time period proscribed under Missouri law when the petitioner shows actual innocence by a preponderance of the evidence); **Montana** Mont. Code Ann. § 46-21-110, subd. (1), (10) (allowing motion for DNA testing at any time during incarceration and authorizing post-conviction proceedings based on favorable test results); **Nebraska** Neb. Rev. Stat. § 29-2101 (authorizing new trial based on newly discovered exculpatory DNA evidence or any newly discovered material evidence that could not have been discovered and produced

with reasonable diligence at trial), Neb. Rev. Stat. § 29-4120 (authorizing motion for DNA testing at any time after conviction); **New Hampshire** N.H. Rev. Stat. Ann. § 651-D:2, subd. (I), (VI)(b) (authorizing motion for DNA testing at any time after conviction, and stating that the court shall enter any order that serves the interests of justice, including order vacating the judgment or granting a new trial based on favorable DNA test results); **New Jersey** N.J. Stat. Ann. § 2A:84A-32a, subd. (a), (d)(5) (authorizing motion for post-conviction testing at any time during imprisonment if it raises a reasonable probability that favorable results would results in the granting of a motion for new trial); *State v. DeMarco*, 387 N.J. 506, 516 (2006) (a petitioner is entitled to a new trial based on newly discovered evidence discovered after trial and which could not have been discovered by reasonable diligence beforehand); **New Mexico** N.M. Stat. Ann. § 31-1A-2, subd. (A), (H) (authorizing motion for DNA testing without time limit and when DNA tests are exculpatory, permitting the court to set aside the judgment, dismiss the charges, grant a new trial, or order other appropriate relief); **New York** N.Y. Crim. Proc. Law § 440.10, subd. (g), (g-1) [authorizing motion to vacate judgment based on new evidence that could not have been produced at trial with due diligence and which creates a probability that the verdict would have been more favorable, or based on forensic DNA evidence performed any time after the entry of judgment]; **North Carolina** N.C. Gen. Stat. Ann. § 15A-1415, subd. (c) (allowing, at any time after verdict, motions for relief based on new evidence that directly bears on innocence, which was unknown or unavailable to the defendant trial and could not then have been discovered with due diligence); **North Dakota** Section 29–32.1–15, N.D.C.C., [authorizing DNA testing without time limit where evidence is materially relevant to actual innocence]; **Ohio** Rev. Code Ann. § 2953.21, subd. (A)(1)(a) (authorizing petition for post-conviction relief for any person convicted of a felony who has DNA results that establish actual innocence by clear and convincing evidence); Ohio Rev. Code Ann. § 2953.23, subd. (A)(2) (excluding from time bars those with DNA results that establish actual innocence by clear and convincing evidence); **Oklahoma** Okla. Stat. Ann. tit. 22, § 1080, subd. (d) (allowing, without time limit, post-conviction relief where there exists material facts not previously presented and heard that require vacation of conviction in the interests of justice); **Oregon** ORS 138.690 (permitting motion for DNA testing at any time while the person is incarcerated, or anytime if the person was convicted of murder or a sex crime], and ORS 138.510 [placing a two-year time limit on post-conviction motions unless the court finds grounds for relief that could not reasonably have been raised earlier); **Pennsylvania** 42 Pa. Cons. Stat. Ann. § 9543, subd. (a), (b) (authorizing motion for post-conviction relief when exculpatory evidence that was not available at the time of trial because available and would have changed the outcome, except when the Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner, unless the petition is based on grounds of which the petitioner could not have discovered by the exercise of reasonable diligence before the delay became prejudicial to the Commonwealth); 42 Pa. Cons. Stat. Ann. § 9543.1, subd. , (f)(1) (authorizing post-conviction DNA testing without time limit; also authorizing motion for post-conviction relief within 60 days of receipt of favorable test results); **Rhode Island** R.I. Gen. Laws 1956, § 10-9.1-1 (providing a post-conviction remedy "available to any person who has been convicted of a crime and who thereafter alleges either that the conviction violated the applicant's constitutional rights or that the existence of newly discovered material facts requires vacation of the conviction in the interests of justice." *DeCiantis v. State,* 24 A.3d 557, 569 (R.I.2011)); **South Carolina** S.C. R. Civ. P. 60, subd. (b)(2) (allowing relief from judgment based on newly discovered evidence that could not have been discovered by due diligence prior to trial or within the normal 10-day time limit for motions for new trial); *see also State v. Needs*, 333 S.C. 134, 157-158, (S.C. 1998); **South Dakota** S.D. Codified Laws § 23-5B-1, subd. (5), (6) (allowing order for DNA testing when there is good cause for the failure to request it at trial, and the petitioner did not knowingly waive right to request DNA testing or fail to request DNA testing in a prior petition for relief); **Tennessee** Tenn. Code Ann. § 40-30-303 (allowing anyone convicted of murder, rape, sexual batter, the attempted commission or lesser included of any of these offenses, to request post-conviction DNA testing at any time); **Texas** Chapter 64 of the Code of Criminal Procedure, subd. (2) (requiring judge to order DNA testing when the evidence was either justifiably not previously subjected to DNA testing because DNA testing i) was not available, or ii) was incapable of providing probative results, or iii) did not occur "through no fault of the convicted person, for reasons that are of such a nature that the interests of justice require DNA testing," or because it was subjected to previous DNA testing by techniques now superseded by more accurate techniques); *see also Ex parte Brown*, 205 S.W.3d 538, 544-546 (2006) (reiterating that the incarceration of an innocent person violates due process, that claims of actual innocence based on newly discovered evidence are cognizable on post-conviction writs of habeas corpus, and the evidence

Only Delaware continues to limit the time for developing and presenting innocence claims to the conviction date.[94] However, there are proposals to remove the three-year time limit from Delaware's post-conviction relief statute.

This emerging modern consensus and near-uniform practice demonstrates that the Eighth Amendment prohibits the continued punishment of the innocent, and that the due

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could not have been known to the applicant with the exercise of due diligence at the time of trial or a motion for new trial); **Utah** Code Ann. § 78B-9-402, amended by 2013 Utah Laws Ch. 46 (H.B. 92) (allowing petition for factual innocence based on newly discovered evidence, when that evidence could not have been discovered by petitioner's counsel or petitioner in time to include at any prior trial or motion, or the court has found counsel ineffective for failing to exercise reasonable diligence in uncovering the evidence); **Vermont** Vt. Stat. Ann. tit. 13, § 5561 (authorizing petition for post-conviction DNA testing at any time); *see also* Vt. Stat. Ann. tit. 13, § 5569 (authorizing court to set aside judgment, order new trial, order petitioner discharged from custody, or any other relief as the court deems appropriate based on favorable DNA results); **Virginia** Code § 19.2–327.11, subd. (A)(iv), (A)(vi) (Virginia 2013 Virginia Laws Ch. 170 (H.B. 1308), 2013 Virginia Laws Ch. 170 (H.B. 1308) (authorizing writ of actual innocence based on newly discovered evidence that was previously unknown or unavailable to petitioner or his trial attorney at the time the conviction because final, or could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction by the court); *see also Turner v. Com.*, 56 Va. App. 391, 409, 694 S.E.2d 251, 260 (2010) *aff'd*, 282 Va. 227, 717 S.E.2d 111 (2011); **Washington** *In re Weber*, 175 Wash.2d 247, 259-260 (adopting *Schlup* standard (it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt) for actual innocence claims raised to overcome procedural bars such as timeliness); *see also In re Carter*, 17 Wash.2d 917, 931-934 (2011) (holding that actual innocence is equitable exception to time bars to challenging criminal convictions); **West Virginia** *State ex rel. Smith v. McBride*, 224 W.Va. 196, 206-207 (motions for new trial based on newly discovered evidence will not be granted unless it was discovered after trial, that defendant was diligent in ascertaining and securing the evidence and it could not have been secured with due diligence before the verdict); **Wisconsin** *Gen. Star Indem. Co. v. Bankr. Estate of Lake Geneva Sugar Shack, Inc. by Waldschmidt*, 215 Wis. 2d 104, 133, 572 N.W.2d 881, 894 (Ct. App. 1997) (courts may grant a new trial based on newly discovered evidence when the evidence was discovered after trial, the moving party was not negligent in seeking the evidence, and a reasonable probability of a different result at a new trial exists); **Wyoming** Wyo. Stat. Ann. § 7-12-303, subd. (b) (notwithstanding any rule barring a motion for new trial as untimely, a convicted person may use the results of DNA testing ordered pursuant to this act as grounds for filing a motion for new trial); *see also Brown v. State*, 816 P.2d 818, 820 (Wyo. 1991) (motions for new trial based on newly discovered evidence that has come to the defendant's knowledge since trial and it was not owing to a want of due diligence that it was not discovered sooner).)

Finally, even AEDPA, which further limited federal habeas review of state petitioners, includes a provision allowing state prisoners to raise claims based on newly discovered evidence within one year of when that evidence was discovered or reasonably could have been discovered with due diligence. 28 USCA § 2244, subd. (d)(1)(D).

[94] Del. Code Ann. tit. 11, § 4504, subd. (a) requires motions for DNA testing to be filed not more than three years after the conviction. Subdivision (b) provides that an inmate may bring a motion for new trial based on DNA evidence obtained under subdivision (a), which establishes by clear and convincing evidence that no reasonable trier of fact, considering all of the evidence, would have convicted the person.

Many states have due diligence requirements for discovering and presenting post-conviction evidence of innocence, while other states have no time limits or other procedural bars to actual innocence claims, but time limits are not based on conviction date in any other state than Delaware.

process clause of the Fourteenth Amendment requires judicial review of compelling claims of innocence no matter how long after conviction the evidence is discovered.

A. Fundamental Fairness Requires Judicial Review

The Due Process Clause of the Fourteenth Amendment protects against state actions that violate "fundamental fairness."[95] The Supreme Court has explained that "widely shared practice" is one of the "concrete indicators of what fundamental fairness and rationality require."[96] "The near-uniform application" of a rule of criminal procedure can show that such a rule is fundamental and that the lack thereof "offends a principle of justice that is deeply rooted in the traditions and conscience of our people."[97]

There is now widely shared practice among states of providing judicial review for compelling claims of innocence.[98] Further, there is near-uniform application of the rule that innocence claims are not barred by conviction-related time limits.[99] This widely shared practice and near-uniform application of a rule demonstrates that the right to have courts consider new evidence of innocence, no matter how long after conviction it is discovered, is fundamental. Further, the refusal to entertain newly discovered evidence of innocence offends a principle of justice deeply rooted in the consciences and traditions

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[95] *See, e.g.*, *Dowling v. United States,* 493 U.S. 342, 352 (1990), considering whether the admission of certain evidence was "so extremely unfair that" its admission violates "fundamental conceptions of justice." *See also Medina v. California*, 505 U.S. 437, 448 (1992), explaining that there is "no historical basis for concluding that [a rule] violates due process, we turn to consider whether the rule transgresses any recognized principle of 'fundamental fairness' in operation." In *U.S. v. Lovasco*, 431 U.S. 783, 790 (1977), the Court state that its task was to determine whether the complained of action violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), and which define "the community's sense of fair play and decency," *Rochin v. California*, 342 U.S. 165, 173 (1952).

[96] *Schad v. Arizona,* 501 U.S. 624, 640 (1991).

[97] *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996) (internal quotation marks and citation omitted).

[98] *See note supra* 93.

[99] *Ibid.*

of our people. As a result, the Due Process Clause of the Fourteenth Amendment requires that federal courts review compelling claims of innocence.

It is quite possible that the right to judicial review of post-conviction claims of innocence always existed, but simply lay dormant when the prospect of an innocent person in prison was largely theoretical. When scientific evidence definitely proved that innocent people are wrongfully convicted, the states reacted quickly and with near-uniformity to remove the time bars and other restrictions that once limited the availability of mechanisms for proving innocence. As one state court explained, "[h]aving recognized the prospect of an intolerable wrong, the state has provided a remedy."[100]

The majority's discussion in *Herrera v. Collins* supports the conclusion that innocence claims fall within the protections of the Fourteenth Amendment. The Supreme Court pointed to state practices in 1993, which restricted the availability of post-conviction innocence claims to a short time after conviction, to suggest in dicta in that due process was not offended by Texas's refusal to entertain Herrera's evidence of innocence eight years after Herrera was convicted.[101] This analysis now compels the conclusion that due process is offended by the failure to entertain persuasive evidence of innocence, regardless of how long after trial it is discovered.

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[100] *Missouri State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546-47 (Mo. 2003). Further, Texas's highest court recognized in 1996, just three years after it had refused to entertain Herrera's evidence of innocence, that "the incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of such a person." *Ex parte Brown*, 205 S.W.3d 538, 544 (2006) quoting, *Ex parte Elizondo,* 947 S.W.2d 202, 206 (Tex.Crim.App.1996).

[101] *Herrera v. Collins*, 506 U.S. at 410-411.

Moreover, while historical practice may be probative of the existence of a due process right, historical basis is not a necessity.[102] As the Supreme Court has explained, "to hold that such a characteristic is essential to due process of law would be to deny every quality of the law but its age, and to render it incapable of progress or improvement."[103] Rather, it is more consistent with our "historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas" of fairness.[104]

More recently, the Supreme Court reinforced the evolving nature of due process, explaining that, "[h]istory and tradition are the starting point but not in all cases the ending point" of the inquiry.[105] Indeed recent laws and traditions may be more relevant than older laws because they show "an emerging awareness that liberty gives substantial protection" to the area in question.[106]

The changes in state laws and traditions over the past two decades reflect an emerging awareness of the reality that innocent people are sometimes wrongfully convicted, and that fundamental fairness requires that the innocent have an ongoing right to judicial review of newly discovered evidence of innocence.

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[102] "Discerning no historical basis for concluding that [a rule] violates due process, we turn to consider whether the rule transgresses any recognized principle of 'fundamental fairness' in operation." *Medina v. California*, 505 U.S. 437, 448 (1992), quoting *Dowling v. United States,* 493 U.S. 342, 352 (1990)

[103] *Hurtado v. California*, 110 U.S. 516, 529 (1884).

[104] *Id*. at 530.

[105] *Lawrence v. Texas* (2003) 539 U.S. 558, 572, quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring).

[106] *Lawrence v. Texas*, 539 U.S. 558, 571-572 (2003).

Supreme Court precedent confirms that due process must be flexible so that it can protect the innocent and minimize the risk of error. "[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstance."[107] This "flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error."[108]

The right to present evidence of innocence, no matter how long after conviction it is discovered, is fundamental and thus protected by the Due Process Clause of the Fourteenth Amendment.

B. Modern Consensus and Ancient Precedent Agree

The reach of the Eighth Amendment is defined by looking beyond static historical conceptions to "the evolving standards of decency that mark the progress of a maturing society."[109] It bars punishments that are barbaric and punishments that are excessive.[110] The Court has held that "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[111] Punishing the innocent makes no

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107 *Matthews v. Eldridge*, 424 U.S. 319, 324 (1976).

108 *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 13 (1979).

109 *Trop v. Dulles,* 356 U.S. 86, 101 (1958) (plurality opinion); *see also Ford v. Wainwright,* 477 U.S. at 406; *Spaziano v. Florida,* 468 U.S. 447, 465 (1984); *Weems v. United States,* 217 U.S. 349, 373 (1910), all discussing how the Eighth Amendment is not static, but rather reflects evolving or contemporary standards of decency and fairness.

110 *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

111 *Ibid.*

measurable contribution to the acceptable goals of punishment and is grossly out of proportion to an innocent person's complete lack of culpability.

In determining whether a punishment is prohibited, federal courts rely upon factors such as public attitudes, legislative actions, and Eighth Amendment precedent. First, a court "considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the […] practice at issue."[112] As a second step, because interpretation of the Constitution remains in the hands of federal courts, the court must also independently determine whether the punishment in question constitutes cruel and unusual punishment based upon precedent and prior "understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose."[113]

The only federal court that has analyzed this question since *Herrera v. Collins*, the U.S. District for the Southern District of Georgia, concluded in 2010 that the Eighth Amendment prohibits the execution of an innocent person. The court reasoned that there was consensus among the states that a truly persuasive demonstration of innocence subsequent to trial renders execution unconstitutional as evidenced by the enactment of post-conviction DNA testing statutes in forty-seven states,[114] along with the increasing abolition of the death penalty as wrongful convictions became the focus of widespread

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[112] *Graham v. Florida,* 130 S.Ct. at 2022, *quoting Roper v. Simmons,* 543 U.S. 551, 572 (2005).

[113] *Ibid.*, quoting *Kennedy v. Louisiana,* 554 U.S. 407, 1420 (2008).

[114] *In re Davis*, 2010 WL 3385081, at 37-43 (2010). At the time the District Court decided the case, forty-seven states and the District of Columbia had enacted DNA testing statutes, "statutes designed to help innocent convicts prove that their convictions were erroneous." *Id*. at 39.

public attention, and also reasoned that executing the innocent serves no legitimate penological purpose.[115]

Further evidence of modern consensus has emerged since the district court's decision in *Davis*. "[L]egislation is the 'clearest and most reliable objective evidence of contemporary values.'"[116] The enactment of post-conviction DNA testing statutes in every single state – statutes which, by their very nature, are designed to help the wrongfully convicted prove their innocence – demonstrates contemporary consensus prohibiting the punishment of the innocent. If states were not concerned with preventing punishment of the wrongfully convicted, it would be a bizarre choice to allow validly convicted persons avenues with which to secure evidence of their innocence.[117]

Further, precedent and prior understanding of the Eighth Amendment accord with this consensus. The cruel and unusual punishment clause prohibits punishments that are out of proportion to the level of culpability.[118] Any punishment, but especially execution, is out of proportion to an innocent person's complete lack of culpability. The Supreme Court has held that death is excessive for certain crimes, including rape.[119] If it is "violative of the Eighth Amendment to execute someone who is guilty of those crimes,

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115 *Id*. at 37-43.

116 *Atkins v. Virginia,* 536 U.S. 304, 323 (2002), quoting *Penry v. Lynaugh,* 492 U.S. 302, 331 (1989).

117 Not a single DNA testing statute requires a showing of constitutional error or lack of fair trial in order to obtain post-conviction DNA testing.

118 *See e.g.*, *Enmund v. Florida,* 458 U.S. 782, 797-798 (1982) (holding that death is an excessive penalty for the robber who did not kill and did not intend to kill, and the Eighth Amendment does not permit treating a defendant the same as another defendant whose "culpability is plainly different."); *Coker v. Georgia*, 433 U.S. at 598 (holding the imposition of the death penalty "is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.").

119 *Ibid.*

then it plainly is violative of the Eighth Amendment to execute a person who is actually innocent."[120]

The Supreme Court has observed that, "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[121] Further, constitutional protections were designed to accomplish "[t]he dual aim of our criminal justice system … 'that guilt shall not escape or innocence suffer.'"[122] "Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."[123] Supreme Court precedent also demonstrates that the Eighth Amendment requires additional procedures to ensure a punishment remains constitutional in light of new facts or intervening developments.[124] Newly discovered evidence of innocence fits perfectly within this doctrine.

Finally, punishments are unconstitutional if they make no measurable contribution to acceptable goals of punishment.[125] No legitimate penological purpose is served by punishing an innocent person, while the guilty person remains free.[126] Deterrence is not

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120 *Herrera v. Collins,* 560 U.S. at 431 (Blackmun J., dissenting).

121 *Robinson v. California,* 370 U.S. 660, 667 (1962).

122 *U.S. Nixon*, 418 U.S. 683, 709 (1974), quoting *Berger v. U.S.*, 295 U.S. 78, 88 (1935)

123 *Schlup v. Delo*, 513 U.S. at 325. *See also In re Davis*, 2010 WL 3385081, at 41 (2010), in which the Court asserted that, "[i]f there is a principle more firmly embedded in the fabric of the American legal system than that which proscribes punishment of the innocent, it is unknown to this Court."

124 In *Johnson v. Mississippi,* 486 U.S. 578 (1988), the Court held that a petitioner was entitled to a new hearing regarding whether he should be sentenced to death after a felony conviction that had been a one of the aggravating circumstances was reversed. In *Ford v. Wainwright,* 477 U.S. at 41, the Court held that post-conviction developments that raised doubts about the sanity of a man sentenced to death required an additional hearing to determine whether petitioner's execution was constitutional.

125 *Coker v. Georgia*, 443 U.S. at 592.

126 In cases with DNA exonerations, the real perpetrator had often gone on to commit subsequent crimes for which they were later convicted. *See*, *e.g.*, the case of Kevin Green, who was wrongfully convicted of murder, attempted murder, and assault with a deadly weapon. Mr. Green served sixteen years

served by punishing the innocent because there is no conduct to deter. Nor can retribution be served by punishing a person for crimes they did not commit and had no intention of committing. Incarcerating and executing the innocent makes no measurable contribution to acceptable goals of punishment.

Punishing the innocent is a clear violation of the Eighth Amendment. It is contrary to modern consensus and evolving standards of decency, and it is contrary to the principles that underlie the Eighth Amendment as the Supreme Court has interpreted it for hundreds of years.

III. Innocence Presumed and Innocence Found

The use of the word "innocence" may be connected to the unduly restrictive standards of proof in some states. Had innocence claims been called "not guilty" claims, they may not have evoked the immediate sympathy and strength of innocence claims, but they would have been equally well-founded under the law, equally deserving of constitutional protections, and the burden of proof would have been much more obvious from the beginning.

While there is a difference between the meanings of the words innocence and "not guilty," our system was designed around the understanding that the fairness and justice can only be achieved if innocence is presumed absent evidence of guilt. That understanding is fundamental to our criminal justice system.

As Clinical Professor and Innocence Network President Keith Findley argues, "to demand certainty is to demand the impossible, … in the end, the best we can or should do

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before the semen from the crime matched another felon in the California DNA database. Gerald Parker, a serial killer called the "Bedroom Basher" for breaking into women's bedrooms to rape and kill them, confessed to the attack, along with five other murders he had committed after the one Green had been convicted of. http://www.innocenceproject.org/Content/Kevin_Green.php

is rely on the legal standards that define guilt and, absent proof of guilt, presume innocence." When newly discovered evidence demonstrates there is no longer proof of guilt, innocence must be presumed anew.

A. Presuming Innocence: Revisiting "Not Guilty"

The Constitution prohibits punishment for a crime when there was insufficient evidence for any reasonable trier of fact to find proof of guilt beyond a reasonable doubt.[127] Thus far, the Supreme Court has only applied this rule to claims based entirely upon the evidence presented at trial. However, there is no reason a conviction based on a trial in which the jury *did not* hear all of the evidence pointing to innocence should be entitled to *more weight* than a one in which the jury *did* hear all of the evidence.

As explained by the United States District Court for the Southern District of Georgia, there are three general reasons why a jury might reach an erroneous verdict: (1) a constitutional error led a jury to consider something inappropriate or caused patently important evidence to be withheld, (2) a jury heard a set of facts that was complete at the time of trial, but later discovered to have been incomplete based on evidence that surfaced subsequent to trial, or (3) a jury made an innocent mistake based upon the evidence before it.[128]

Put differently, the evidence heard by the jury can be described in three ways: (1) corrupted, (2) incomplete, or (3) complete.[129] The highest degree of confidence can be

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[127] Federal courts can review insufficiency of the evidence claims from state prisoners to ensure the evidence was sufficient for a reasonable jury to convict a criminal defendant as required by the Constitution. *Jackson v. Virginia,* 443 U.S. 307 (1979). The courts must view the evidence in the light most favorable to the prosecution and determining whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. at 318-320.

[128] *In re Davis*, 2010 WL 3385081, at 44.

[129] *Ibid*.

placed in a verdict when the jury heard the complete body of relevant evidence. That scenario, sufficiency of the evidence, has already given rise to a federal standard for habeas review in *Jackson v. Virginia*: "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[130]

The lowest degree of confidence is afforded to cases in which the jury heard corrupted evidence because "the procedural protections in place to protect the innocent from conviction have been breached."[131] The standard of review for such cases is also already established and requires "a reasonable probability of a different verdict," further defined as undermining the court's confidence in the outcome.[132]

The standard of review for cases with incomplete records, i.e., cases in which evidence of innocence is discovered after trial, must lie between these two. The U.S. District Court for the Southern District of Georgia concluded the standard must therefore be clear and convincing evidence that no reasonable juror would have convicted the petitioner in light of the new evidence.[133]

This standard fits well within Supreme Court precedent. The Court has only provided one concrete definition of innocence, and that is in the procedural default context. For *Schlup* or "procedural gateway" claims of innocence (claims that entitle

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130 *Jackson v. Virginia*, *supra*, 443 U.S., at 318-319.

131 *In re Davis*, 2010 WL 3385081, at 44.

132 *Ibid*. See also *Kyles v. Whitley*, 514 U.S. 419, 435 (1995), quoting *U.S. v. Bagley*, 473 U.S. 667, 677 (1985) ("A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial."); *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011), quoting *Strickland v. Washington*, 466 U.S. at 694 (To demonstrate ineffective assistance of counsel, a petitioner must show a reasonable probability that but for counsel's errors, the result would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

133 *In re Davis*, 2010 WL 3385081, at 44.

petitioners to have their otherwise procedurally-barred independent constitutional claims heard), the Supreme Court has defined innocence as a showing that "that it is more likely than not that no reasonable juror would have convicted him [or her] in light of the new evidence."[134] The Supreme Court has never torn the burden of proof for establishing innocence from its constitutional roots: innocence is presumed absence evidence of guilt.

As to a freestanding claim, the Court has only said that its decisions imply that a freestanding claim of innocence requires a higher burden of proof than a procedural gateway or *Schlup* innocence claim.[135] In other words, a freestanding or *Herrera* innocence claim requires a showing more persuasive than the showing that, "more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt."[136] Clear and convincing evidence that no reasonable juror would have convicted, the standard rejected by the Supreme Court as to high for procedural default innocence claims, would satisfy that requirement.[137]

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[134] *Id*. at 327. When a constitutional claim is procedurally defaulted, a petitioner may pass through the gateway and have the courts consider his or her firmly-established constitutional claims on the merits if the petitioner makes a showing that he or she is actually innocent. The Court cited to precedent in which it had "concluded that a prisoner retains an overriding 'interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.'" *Id*. at 321, quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986). The "individual interest in avoiding injustice is most compelling in the context of actual innocence," and such interest outweighs society's interests in finality, comity, and conservation of scarce judicial resources. *Id*. at 324.

[135] *House v. Bell*, 547 U.S. at 555. "The sequence of the Court's decisions in *Herrera* and *Schlup*—first leaving unresolved the status of freestanding claims and then establishing the gateway standard—implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*."

[136] *Id*. at 538, 555.

[137] The *Schlup* Court specifically held that for gateway innocence claims, or *Schlup* claims, the clear and convincing evidence standard was too high and that the preponderance standard was the appropriate standard for governing these claims. *Id*. at 327-329.

Moreover, the Supreme Court has explained that the reasonable doubt standard "is a prime instrument to reduc[e] the risk of convictions resting on factual error" and, "it is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[138] Now that DNA has proven that pre-trial constitutional protections sometimes fail and the innocent are wrongfully convicted, these same concerns must inform post-conviction procedures as well.

At least eight states to date have tied the standard for proving innocence to a showing that no reasonable trier of fact would have convicted in light of the new evidence.[139] However, many states require much more, which only increases the need for the federal courts to establish a constitutional floor – a floor that is both workable as detailed in Part IV, and inclusive of all those requiring constitutional protections.

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[138] *In re Winship*, 397 U.S. 358, 364.

[139] Ark. Code Ann. § 16-112-201, subd. (a)(1), (2) (a convicted person can commence proceedings to secure relief based on scientific evidence not available at trial that establishes actual innocence; or the scientific predicate for the claim could not have been previously discovered by due diligence and the facts underlying the claim by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense); Del. Code Ann. tit. 11, § 4504, subd. (b) (standard for innocence is clear and convincing evidence that no reasonable trier of fact, considering all of the evidence, would have convicted the person); FL ST RCRP Rule 3.853 (allowing motion for new trial based on DNA evidence based on a reasonable probability that the movant would have been acquitted or received a lesser sentence had the DNA evidence been admitted at trial), see also *Swafford v. Florida* (2013 Fl S. Ct.) granting a new trial based on DNA evidence because it would "probably produce on acquittal on retrial"; *Kubsch v. State*, 934 N.E.2d 1138, 1145 (Ind. 2010) (new evidence mandates a retrial when it would probably produce a different result at retrial); Kan. Stat. Ann. § 21-2512 (authorizes new trial based on post-conviction DNA results that create a reasonable probability of a different outcome); LSA-C.Cr.P. Art. 851, subd. (3) (authorizing motions for new trial based on new and material evidence that probably would have changed the verdict); N.Y. Crim. Proc. Law § 440.10, subd. (g), (g-1) (authorizing motion to vacate judgment based on new evidence which creates a probability that the verdict would have been more favorable); 42 Pa. Cons. Stat. Ann. § 9543, subd. (a), (b) (authorizing motion for post-conviction relief based on new exculpatory evidence that would have changed the outcome of trial); *Gen. Star Indem. Co. v. Bankr. Estate of Lake Geneva Sugar Shack, Inc. by Waldschmidt*, 215 Wis. 2d 104, 133, 572 N.W.2d 881, 894 (Ct. App. 1997) (courts may grant a new trial based on newly discovered evidence when a reasonable probability of a different result at a new trial exists).

1. Pitfalls of Affirmative Evidence of Innocence.

Requiring affirmative evidence of innocence is extremely problematic. Even a completely innocent person may not be able to produce affirmative evidence of innocence.

Consider someone who was convicted based on eyewitness testimony. No physical evidence ever connected him to the crime. There is no physical evidence to submit for DNA testing and no one else has confessed to the crime, but the eyewitnesses have recanted their trial testimony, submitting new evidence that they did not actually see anything. The eyewitnesses explain that the police told them they had caught the perpetrator, and so they (the witnesses) identified the man sitting at the defense table. They further explain that the truth is that they did not see the perpetrator well enough to identify him. Their trial testimony was the only evidence of guilt. Everyone finds their new statements credible, including the judge and the district attorney. Clearly, there is no longer any reliable evidence of guilt, but neither is there any affirmative evidence of innocence. Can we, or should we, continue to incarcerate such a person?

The Ninth Circuit has suggested that the "extraordinarily high" showing discussed in *Herrera* contemplates that, "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent."[140]

The Ninth Circuit's analysis of the evidence of innocence in that same case, *Carriger v. Stewart*, demonstrates the problem with requiring affirmative evidence of innocence as opposed to presuming innocence absent evidence of guilt. In denying

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[140] *Carriger v. Stewart,* 132 F. 3d at 476, citing *Herrera v. Collins*, 390 U.S. at 442-446.

Carriger's innocence claim, the Ninth Circuit reasoned that, "[a]lthough the post-conviction evidence he presents casts a vast shadow of doubt over the reliability of his conviction, nearly all of it only serves to undercut the evidence presented at trial, not affirmatively to prove Carriger's innocence. Carriger has presented no evidence, for example, demonstrating that he was elsewhere at the time of the murder, nor is there any new and reliable physical evidence, such as DNA, that would preclude any possibility of Carriger's guilt."[141]

Similarly, California has established a standard that is nearly impossible to meet absent conclusive DNA evidence: a petitioner must undermine the entire prosecution case and point unerringly to innocence with evidence no reasonable jury could reject.[142] As one California Supreme Court Justice explained in criticizing this standard,

> The requirement of the majority that the petitioner prove his innocence, either by establishing an alibi or by identifying the perpetrator of the crime, is unreasonable and unwarranted. A perfectly innocent person may be unable to prove an alibi. And it is preposterous to demand of the accused that he place his finger upon the real culprit in order to exculpate himself. Although Billings has presented an alibi, it is unnecessary for us to consider it. When the chain of proof is destroyed, he needs none.[143]

When new evidence destroys the evidence of guilt, the courts cannot ask for anything further to prove innocence, but instead must presume innocence in the absence of proof of guilt.

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141 *Id*. at 477.

142 *In re Lawley*, 42 Cal. 4th at 1239-1241.

143 *In re Billings* (1930) 210 Cal. 669, 784 (Langdon, J., dissenting). Frighteningly, both Billings and his co-defendant were originally sentenced to death and the courts affirmed their convictions, but both were eventually pardoned based on the lack of evidence of guilt. First, a Mediation Commission set up by President Woodrow Wilson found no clear evidence of Billings' co-defendant's guilt, and his death sentence was commuted. In 1918 Billings' sentence was also commuted to life imprisonment. By 1939, evidence of perjury and false testimony at the trial had become overwhelming. California Governor Culbert Olson pardoned both men.

2. Pitfalls of Requiring DNA Evidence

Numerous states currently require DNA or other scientific evidence to prove innocence.[144] However, the Department of Justice estimates that physical evidence that could be subject to DNA testing only exists in 5-10% of criminal cases.[145] In many criminal convictions, that evidence has been lost or destroyed long before it could be subjected to DNA testing.

The numbers of DNA and non-DNA exonerations demonstrate that restricting post-conviction relief to DNA fails to provide a useful mechanism of relief for the majority of innocent people in prison. While 312 people have been exonerated by DNA evidence, more than a thousand have been exonerated without DNA evidence.[146] Further, the number of DNA exonerations has been steadily shrinking in the last few years, but the number of non-DNA exonerations has grown quickly in the past few years reaching a record high of 72 non-DNA exonerations across the United States in 2013.[147] Limiting innocence claims to DNA evidence ignores the lessons we have learned from the DNA exonerations that apply to the criminal justice system at large and also knowingly employs a system that fails to identify and release the majority of the innocent people who are in prison for crimes they did not commit.

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144 *See note supra* 93.

145 Senate Committee on the Judiciary, Department of Justice Oversight: Funding Forensic Sciences--DNA and Beyond, 108th Cong, 1st sess., 2003, 22.

146 http://www.innocenceproject.org/ (last visited February 28, 2014); http://www.law.umich.edu/special/exoneration/Pages/about.aspx (listing 1,232 exonerations) (last visited February 28, 2014).

147 National Registry of Exonerations, *Exonerations by Year: DNA and Non-DNA*, available at http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx (last visited February 28, 2104.)

States should not restrict innocence claims to those based upon DNA or affirmative evidence of innocence, but to the extent that they do, the need for federal courts to establish a constitutional standard is only increased.

B. Finding Innocence: Relief and Retrial

In general, when a state or federal court grants habeas relief to a state prisoner, the district attorney has sixty days to appeal, or to retry or dismiss the case. Essentially, absent an appeal, the petitioner is returned to the position of post-preliminary hearing with speedy trial rights. It is only when a state or federal court grants a habeas petition based on insufficiency of the evidence that the state cannot retry the petitioner because that finding has the force of an acquittal and thus implicates the Double Jeopardy Clause.[148] In every other situation, however, retrial is permitted.

Innocence claims raise interesting questions regarding whether retrial should be permitted. Should a federal court's finding of innocence, or a finding that no reasonable juror could convict, collaterally estop a state retrial because the ultimate issue, guilt or innocence, has been fully litigated by the parties and decided by a court? One scholar recently developed an interesting argument that the Double Jeopardy Clause should bar retrial in such cases.[149] While there are of course federalism concerns with a federal

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[148] *Burks v. U.S.*, 437 U.S. 1, 1-2 (1978). "In holding the evidence insufficient to sustain guilt, an appellate court determines that the prosecution has failed to prove guilt beyond a reasonable doubt. Given the requirements for entry of a judgment of acquittal, to permit a second trial would negate the purpose of the Double Jeopardy Clause to forbid a second trial in which the prosecution would be afforded another opportunity to supply evidence that it failed to muster in the first trial."

[149] Jordan M. Barry, *Prosecuting the Exonerated: Actual Innocence and the Double Jeopardy Clause,* 64 Stan. L. Rev. 535 (2012).

court ruling that bars a state from punishing and from retrying someone for a state crime, such a system is already employed for insufficiency of the evidence claims.[150]

The reach of the Eighth Amendment raises yet another question for federal courts. If a federal court finds that a petitioner is entitled to relief under the Eighth Amendment, which speaks only to punishment, can the court can reverse the conviction or solely vacate the sentence? It is conceivable that if a court found that continued punishment of an innocent inmate constituted cruel and unusual punishment, the court could vacate the sentence, but would have to leave the conviction in place.

Although this outcome may seem unfair, or even absurd, vacation of the sentence at least restores liberty. Further, if the conviction is left in place, there is no possibility of retrial, a perhaps unexpected benefit of this approach.[151] However, even though a court had recognized the individual's innocence, the conviction would paradoxically remain legally valid, and all collateral consequences, such as limitations on employment and voting, would remain in place.

There is merit in the idea that a federal finding of actual innocence should bar state retrial, but also merit in respect for the principles of federalism and comity. This article does propose a resolution to the question of whether a federal finding of innocence should bar retrial, but rather suggests that state and federal courts and legislatures grapple with these questions as they continue to develop their approach to innocence claims.

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150 *Burks v. U.S.*, 437 U.S. at 1-2.

151 While in the majority of exonerations, the charges are dropped, that process often takes additional months of incarceration and involves torturous time-served plea offers. Further, some do go through retrials, such as John Thompson, who was acquitted after 35 minutes of deliberation. *Connick v. Thompson*, 131 S.Ct. 1350, 1375 (Ginsburg J., dissenting).

When a state court makes the finding of innocence, and federalism concerns are not an issue, the burden of proof may be the deciding factor in whether retrial is permitted. For instance, the District of Columbia has tied relief to the following burdens of proof: the court shall grant a new trial when the inmate proves that it is more likely than not that he is innocent, but when the inmate proves that he is innocent by clear and convincing evidence, the court shall vacate the conviction and dismiss the relevant count with prejudice (thus barring retrial).[152]

IV. The Path Forward: A Workable Model for Judicial Review

Any post-conviction claim raises the specter of concerns of judicial economy, floodgates, and finality. However, the enactments of DNA testing statutes and removal of conviction-related time bars from innocence claims demonstrate the modern consensus that the individual rights retained by the innocent overcome these concerns. Similarly, the Supreme Court has explained in the procedural default context that the individual liberty interests retained by the innocent overcome society's interests in finality, comity, and preservation of judicial resources.[153]

For these reasons, "the principles of comity and finality … 'must yield to the imperative of correcting a fundamentally unjust incarceration.'"[154] Moreover, the system in place for reviewing habeas petitions filed by state prisoners is one within which freestanding claims of innocence fit neatly and thus will not be a substantial drain on judicial resources.

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[152] DC ST § 22-4135, subds. (g)(2)-(3).

[153] *Schlup v. Delo*, 513 U.S. at 324-326.

[154] *Id*. at 31-32, quoting *Murray v. Carrier*, 477 U.S. at 495.

As with other habeas claims, federal courts need only entertain claims that demonstrate prima facie evidence requiring relief. In other words, a petitioner claiming innocence must present evidence that, if true, establishes by clear and convincing evidence that no reasonable juror would convict.

Existing procedures demonstrate that federal courts are well equipped and able to review such innocence claims when there is no state avenue open mechanism for relief in state courts. The federal courts already review procedural gateway innocence claims asserting that the preponderance of evidence shows no reasonable juror would convict. The courts have proven themselves able to consider and resolve such claims, and have not been overwhelmed or flooded by such claims. There is no rational reason to believe the courts cannot also review claims that meet a more restrictive burden of proof.

Further, many of these claims will be resolved in state court. As with other constitutional claims, the federal courts will simply ensure that that state courts do not miss meritorious claims. There is a workable model for judicial review of innocence claims. The following proposed federal legislation would remove current statutory impediments to such review.

A. Federal Legislation: Removing Unconstitutional Restrictions

As discussed in Part I, AEDPA currently precludes federal courts from reviewing compelling claims of innocence. However, AEDPA's preclusive effect on such claims was likely unintended and is easily fixed, as shown below. Further, two Circuit Courts and three Supreme Court Justices have suggested that AEDPA is unconstitutional to the extent that it bars review of compelling claims of innocence.

The Second Circuit has observed that "serious Eighth Amendment and due process questions would arise with respect to [§ 2244(d) of] the AEDPA" if it precluded federal review of innocence claims. [155] In another case, the Second Circuit agreed with the Third Circuit that, "[w]ere no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent ... we would be faced with a thorny constitutional issue."[156] In his *In re Troy Davis* concurrence, Justice Stevens, joined by Justices Ginsburg and Breyer, noted that AEDPA "is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence."[157]

The federal legislature should address these constitutional concerns and amend 28 USCA section 2254, subdivision (d) to explicitly exempt freestanding claims of innocence from the provision that prohibits federal courts from granting habeas relief unless the state court's denial was contrary to, or involved an unreasonable application of, firmly established Supreme Court law.

The following statute includes proposed amendments to 28 USCA section 2254, subdivision (d) in italics:

> **§ 2254. State custody; remedies in Federal courts**
> **…**
> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim, *other than a freestanding claim of actual innocence*, that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
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> > **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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155 *Treistman v. United States*, 124 F.3d 361, 378-379 (2nd Cir.1997).

156 See *Rivas v. Fischer*, 687 F.3d 514, 552 (2nd Cir.2012), agreeing with the Third Circuit's statement in *In re Dorsainvil,* 119 F.3d 245, 248 (3d Cir.1997) (internal quotation marks omitted).

157 *In re Davis*, 557 U.S. 952 (2009) (Stevens J. concurring).

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

B. Reinforcing Constitutional Protections with State Legislation

This article largely focused on innocence as a freestanding federal constitutional claim and the need for federal review of such claims. However, the need for federal review would decrease if states further revised their respective approaches to post-conviction claims of innocence.

The proposed model state legislation does the following: (1) defines proving innocence as a showing that no reasonable juror could convict and ties relief to the burden of proof; (2) explicitly provides for all kinds of newly discovered evidence as potential bases for innocence claims; (3) ensures innocence claims are not restricted by procedural bars; and (4) details a workable procedure for review and litigation of innocence claims.

§ xxx. Post-conviction innocence claims

(a) **Claim**: After a defendant is convicted and sentenced for a crime, and after the time period for a defendant to file a motion for new trial or reconsideration has passed, a defendant may file a petition for writ of habeas corpus alleging that he or she is innocent of the offense for which he or she was convicted and sentenced. Such a claim need not additionally allege an independent constitutional violation, and it need not address, refer to, or rely upon statutory remedies or procedures outside of those addressed in this section.

(b) **Basis**: A claim presented under this section must be supported by evidence, which shows that, based on the new evidence and the entire record before the jury, no rational juror would have found the defendant guilty. Such evidence includes but is not limited to: DNA results, new scientific evidence, a change in science undermining the validity of that presented at trial, a demonstration that the evidence of guilt presented at trial was false or biased or otherwise unreliable, recantations by material witnesses, third-party confessions, new alibi evidence, or any new material information from a witness to the crime.

(c) **Procedure**: Upon presentation of such a claim, the court must determine whether the inmate has alleged a prima facie basis for relief. In other words,

assuming the new evidence is true, the court must decide whether the evidence establishes that no reasonable juror would convict.

(1) When a petition does not allege a prima facie basis for relief, the court must deny the petition.

(2) When a petition presents a prima facie basis for relief, the court must issue an order to show cause directing the respondent to respond within sixty days by 1) conceding the inmate is entitled to relief, or 2) requesting an evidentiary hearing to test the validity of the evidence, or 3) presenting evidence demonstrating the court should deny relief. Thirty days after the respondent files a return to the order to show cause, the petitioner must file a traverse conceding or disputing the facts alleged in the return. The court may deem as admitted any facts not specifically disputed in the return or traverse.

(3) The court may grant or deny petitions based on the admitted facts.

(4) If relief is dependent on credibility questions or disputed facts, the court shall order an evidentiary hearing at which the petitioner must prove the facts he or she has alleged are true.

(5) The court may grant extensions of time upon request and a showing of good cause.

(d) **Burden and Relief**: The petitioner bears the burden of showing that no reasonable juror would convict. A petitioner can make this showing by one of the following burdens of proof, each of which results in the relief described therein.

(1) If the court finds that the petitioner has proven by a preponderance of the evidence that no reasonable jury would convict, the court shall reverse the conviction. The prosecution shall proceed with retrial or dismiss the case within sixty days of the reversal.

(2) If the court finds that the petitioner has proven by clear and convincing evidence that no reasonable jury would convict, the court shall reverse the conviction and order the petitioner released on his or her own recognizance. The prosecution shall retry or dismiss the charges within sixty days of the reversal.

(3) If the court finds that the petitioner has proven beyond a reasonable doubt that no reasonable jury would convict, the court shall reverse the conviction and dismiss the count(s) with prejudice.

(e) **Procedural Bars**: No procedural bars, whether statutorily or judicially created, apply to claims raised under this section.

(f) **Review**: A court's denial or grant of a petition for writ of habeas corpus is reviewed de novo. Factual findings and credibility determinations made following an evidentiary hearing are entitled to great deference and are reviewed for plain error.

Conclusion

Despite widespread confusion in the legal literature, the Supreme Court has not resolved whether innocence is a freestanding federal constitutional claim. Relevant circumstances have changed since the Court analyzed this issue in *Herrera v. Collins*. Modern consensus and widely shared practice now demonstrate that innocence claims are entitled to the constitutional protections of the Eighth and the Fourteenth Amendment.

States have recognized the need to alter their approach to innocence claims in the wake of DNA evidence and scientific proof that innocent people are sometimes wrongfully convicted. Federal courts, however, have not yet done so. Yet the idiosyncrasies in state laws, from unduly high burdens to restrictive bases for proving innocence, along with the very definition of due process, demonstrate the need for federal courts to provide a constitutional safety net to identify and release the innocent prisoners who fall through the cracks of state laws.

This article has developed, in more detail and upon different bases than any prior effort, a new constitutional analysis demonstrating that innocence is a freestanding federal constitutional claim. It also details a workable system of federal judicial review of compelling claims of innocence that fits neatly within existing federal practices and procedures. The proposed burden of proof for establishing a freestanding constitutional claim of innocence properly balances the individual liberty interests retained by the innocent with society's interests in finality and the preservation and is informed by the

principles upon which our system of criminal justice was built: when there is no longer any proof of guilt, innocence must be presumed. The simplicity of the recommended approach would open no litigation floodgates. Instead, it would close an existing gap in constitutional protection for the very people our criminal justice system was designed to protect: the innocent.