When Actual Innocence Is Irrelevant: Federal Habeas Relief for State Prisoners after *Herrera v. Collins*

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WHEN ACTUAL INNOCENCE IS IRRELEVANT:
FEDERAL HABEAS RELIEF FOR STATE PRISONERS
AFTER HERRERA v. COLLINS

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Abstract: In Herrera v. Collins, the United States Supreme Court held that federal habeas courts lack jurisdiction over claims of actual innocence based on newly discovered evidence because federal habeas courts ensure only that state prisoners are not held in violation of the United States Constitution. This Note argues that state prisoners are held in violation of the Constitution when state procedural rules constructively bar presentations of newly discovered evidence of innocence. This Note proposes that federal habeas courts should grant 1) an evidentiary hearing when a petitioner makes a substantial allegation of newly discovered evidence of innocence, and 2) relief when that evidence proves that the trier of fact probably would have had reasonable doubt as to the petitioner's guilt.

In 1982, the state of Texas sentenced Leonel Torres Herrera to death for the murders of two law enforcement officers. Nearly ten years later, new evidence that he was innocent of the murders was discovered. State and federal courts subsequently rejected his repeated requests to present that evidence, and the Supreme Court ruled that he could be executed without a hearing to consider that evidence. In 1993, the state of Texas executed Herrera. He went to his death declaring, "I am innocent, innocent, innocent... Something very wrong is taking place tonight."

The state of Texas insists that it executed a convicted capital murderer. Others say that the state of Texas murdered an innocent man. Most agree that Herrera v. Collins posed a fundamental question about federal habeas jurisdiction. This Note addresses that question: Do federal habeas courts have jurisdiction over claims of actual innocence based on newly discovered evidence asserted by state prisoners who have been sentenced to die?

I. FEDERAL HABEAS RELIEF FOR STATE PRISONERS

Federal courts have jurisdiction to grant habeas relief to federal and state prisoners held in violation of the Constitution. Federal habeas courts always have authority to review properly presented constitutional claims and, in certain circumstances, may review questions of fact underlying those claims. In Herrera, the Court distinguished claims of actual innocence from claims of constitutional violations. The Court held that federal habeas courts lack authority to review claims of actual innocence not linked to some allegation of constitutional error in the underlying proceedings. As a result, Herrera was executed without ever presenting the new evidence of his innocence in state or federal court.

A. Federal Habeas Jurisdiction

Federal courts have jurisdiction to grant habeas relief to both federal and state prisoners. The Judiciary Act of 1789 granted jurisdiction to the Supreme Court and the lower federal courts to issue writs of habeas corpus to federal prisoners. The Act of February 5, 1867, extended the jurisdiction of federal courts to issue writs of habeas corpus to state prisoners restrained in violation of federal law. The modem version of the habeas statute, 28 U.S.C. § 2254, provides that federal courts may issue writs of habeas corpus to state prisoners held “in custody in violation of the Constitution or laws or treaties of the United States.”

B. Constitutional Claims

State prisoners must be held in custody in violation of the Constitution or laws or treaties of the United States to obtain federal habeas relief. Three constitutional claims arise under the Due Process Clause of the

5. Habeas corpus is a remedy for unlawful detention, especially that which results from a criminal conviction. Habeas proceedings are not part of the original criminal trials or direct appeals. Instead, habeas proceedings are separate civil suits that permit collateral review of the conviction. Erwin Chemerinsky, Federal Jurisdiction § 15.1 (1989).
6. Examples of constitutional claims that are not properly presented include those that: 1) rely on new constitutional rules of criminal procedure under Teague v. Lane, 489 U.S. 288 (1989); 2) were not raised in the proper state appellate or collateral proceeding under Wainwright v. Sykes, 433 U.S. 72 (1977); and 3) allege that the conviction is based on evidence obtained in violation of the Fourth Amendment under Stone v. Powell, 428 U.S. 465 (1976).
7. Ch. 20, § 14, 1 Stat. 81 (1789).
Fourteenth Amendment when state rules constructively bar\textsuperscript{10} state prisoners from presenting newly discovered evidence of innocence in direct or collateral proceedings. The Due Process Clause provides both procedural and substantive protections against deprivations of life, liberty, or property.\textsuperscript{11} The Due Process Clause also incorporates the Eighth Amendment which proscribes cruel and unusual punishment.\textsuperscript{12}

Procedural due process requires that the government fairly implement deprivations of life, liberty, or property.\textsuperscript{13} A state procedural rule comports with due process unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."\textsuperscript{14} Courts consider both historic and contemporary practice to determine whether a state rule of criminal procedure is fundamental.\textsuperscript{15}

Substantive due process prohibits government conduct which "shocks the conscience"\textsuperscript{16} or interferes with rights "implicit in the concept of ordered liberty."\textsuperscript{17} Government conduct which deprives a person of fundamental rights must be necessary to promote a compelling government interest.\textsuperscript{18} Government conduct which does not restrict such rights must bear only a rational relationship to a legitimate end of government.\textsuperscript{19}

The Cruel and Unusual Punishment Clause requires that punishments comport with civilized standards.\textsuperscript{20} The Court determines these

\textsuperscript{10} The term "constructive bar" characterizes procedural rules that prohibit a petitioner from presenting newly discovered evidence of innocence in a judicial forum at a time that is remote from trial or sentencing, and from obtaining direct or collateral relief.


\textsuperscript{13} Salerno, 481 U.S. at 746.


\textsuperscript{15} Herrera v. Collins, 113 S. Ct. 853, 864–65 (1993); see Medina, 112 S. Ct. at 2577.


\textsuperscript{18} 2 Ronald D. Rotunda et al., Treatise on Constitutional Law: Substance and Procedure § 14.6 (1986).

\textsuperscript{19} \textit{Id.}

standards based on "the evolving standards of decency that mark the
progress of a maturing society." Both excessive and unnecessary
punishments fall outside the scope of these standards of decency.\textsuperscript{21} The Cruel and Unusual Punishment Clause also mandates heightened
reliability in capital cases to protect adequately against the imposition of
such punishments.\textsuperscript{23} The Court recognizes this requirement because the
death penalty differs from all other punishments.\textsuperscript{24} The difference is not
one of degree, but one of kind.\textsuperscript{25} No other penalty is as final or
irremediable.\textsuperscript{26} No other penalty is as severe.\textsuperscript{27} The imposition of the
death penalty marks the denial of a person's humanity.\textsuperscript{28}

C. Findings of Fact

Federal habeas courts may review a state court's findings of fact even
though the state court has previously ruled on the same constitutional
claim. Federal habeas courts decide whether to review a state court's
findings of fact by evaluating the adequacy of the state court hearing on
the constitutional claim. Under the standard enunciated in Townsend v.
Sain,\textsuperscript{29} federal habeas courts generally defer to a state court's findings of
fact. When the petitioner makes a substantial allegation of newly
discovered evidence, however, the federal habeas court will find that the
state court hearing was inadequate and will grant an evidentiary
hearing.\textsuperscript{30}

1. Historic Power to Review Findings of Fact

The extension of federal habeas relief to state prisoners held in
violation of the Constitution prompted a continuing debate about federal

\begin{footnotesize}
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\item \textsuperscript{21} Trop, 356 U.S. at 100–01.
\item \textsuperscript{22} Furman, 408 U.S. at 279 (Brennan, J., concurring); \textit{id}. at 332–33 (Marshall, J., concurring).
\item \textsuperscript{23} Woodson, 428 U.S. at 304–05.
\item \textsuperscript{24} The unique nature of the death penalty has been widely recognized. See Gardner v. Florida,
(1976); \textit{id}. at 231–41 (Marshall, J., dissenting); Furman, 408 U.S. at 286–91 (Brennan, J.,
concurring); \textit{id}. at 306–10 (Stewart, J., concurring); \textit{id}. at 314–71 (Marshall, J., concurring).
\item \textsuperscript{25} Furman, 408 U.S. at 306 (Stewart, J., concurring).
\item \textsuperscript{26} Gardner, 430 U.S. at 357.
\item \textsuperscript{27} \textit{Id}.
\item \textsuperscript{28} Furman, 408 U.S. at 290 (Brennan, J., concurring).
\item \textsuperscript{29} Townsend v. Sain, 372 U.S. 293 (1963), \textit{overruled on other grounds by} Keeney v. Tamayo-
\item \textsuperscript{30} \textit{Id}. at 313.
\end{enumerate}
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habeas court power to make findings of fact on constitutional claims already litigated in state court. Critics of federal habeas relief argue that federal courts should trust state courts to protect adequately constitutional rights. Advocates of federal habeas relief respond that federal courts must be available to protect constitutional rights. They fear that state courts might restrict constitutional rights by failing to make accurate findings of fact.

Initially, federal habeas courts had no power to review state court findings of fact on constitutional claims because these courts had no power to grant habeas relief unless a state court lacked jurisdiction over the original criminal proceeding. The Court gradually expanded the circumstances in which a state court lacked jurisdiction. Eventually, the Court concluded that a state court lacked jurisdiction if it failed to provide adequate corrective process to ensure that federal claims were fully and fairly litigated. If a state court failed to provide such process, federal habeas courts could reexamine the state court findings of fact.

2. Brown v. Allen

The Court dramatically expanded the authority of federal habeas courts to review state court findings of fact in Brown v. Allen. The Court determined that a federal court may decline to hold a hearing if a habeas petitioner received an adequate hearing on federal claims in state court and the findings of fact were correct. A majority agreed, however, that a federal court must hold a new evidentiary hearing when there were "unusual circumstances," when there was a "vital flaw" in the state fact-finding proceedings, or when the state court record was incomplete or otherwise inadequate to enable the federal court to evaluate the result reached.

31. Chemerinsky, supra note 5, § 15.5 n.55 (citing Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963)).
32. Id.
33. Id.
34. Id. § 15.2.
35. Id.
37. Frank, 237 U.S. at 335.
39. Id. at 463, 503, 506.
3. Townsend v. Sain

The Court clarified the power of federal habeas courts to decide questions of fact in *Townsend v. Sain*. The Court determined that a federal court has the power to hear evidence and to find facts when a habeas petitioner alleges facts which, if proven, constitute a deprivation of constitutional rights, and entitle the petitioner to relief. The Court also concluded that a federal court must grant this evidentiary hearing in six circumstances. These circumstances superseded the “exceptional circumstances” and “vital flaw” tests of *Brown v. Allen*.

One of the six circumstances that requires an evidentiary hearing is when a habeas petitioner makes “a substantial allegation of newly discovered evidence.” The Court characterized such evidence as that which could not reasonably have been presented to the state trial court. The Court stressed that the newly discovered evidence must be relevant to the constitutionality of the petitioner’s detention. In dictum, the Court suggested that newly discovered evidence relevant only to the petitioner’s guilt or innocence would not compel an evidentiary hearing. The Court implied that newly discovered evidence, relevant to the petitioner’s guilt, could not be relevant to the constitutionality of the petitioner’s detention. In other words, only newly discovered evidence of constitutional error in underlying proceedings could be relevant to the constitutionality of the petitioner’s detention and would compel an evidentiary hearing.

4. 28 U.S.C. § 2254(d)

Federal habeas courts presume that state court findings of fact are correct unless a petitioner establishes that one or more of the

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41. Id. at 312.
42. Id. at 313. Some scholars suggest that 28 U.S.C. §2254(d) codifies the six circumstances of Townsend v. Sain. See, e.g., Chemerinsky, supra note 5, § 15.5.3.
43. See supra text accompanying note 39.
44. Townsend, 372 U.S. at 313.
45. Id. at 317.
46. Id.
47. Id.
circumstances listed in 28 U.S.C. § 2254(d) exists. Two of those circumstances apply when a petitioner presents newly discovered evidence of innocence in federal habeas proceedings. First, federal habeas courts do not presume that state court factual findings are correct when material facts are not adequately developed at the state proceeding. Second, federal habeas courts do not presume that the factual determinations are correct when the petitioner does not receive a full, fair, and adequate hearing in the state proceeding.

D. Claims of Actual Innocence

Federal habeas courts have increasingly examined the petitioner’s actual guilt or innocence, as well as the merits of the petitioner’s constitutional claim. Initially, the Court limited federal habeas jurisdiction by concluding that Fourth Amendment claims are unrelated to the petitioner’s actual guilt or innocence. Recently, the Court relied on the petitioner’s actual guilt or innocence to construct a gateway that permits federal habeas courts to exercise jurisdiction over otherwise-barred claims.

1. The Increasing Relevance of Innocence

Much of modern habeas jurisprudence comports with Judge Henry J. Friendly’s view of innocence. Friendly challenged the assumption that habeas relief should be available for all constitutional claims. Instead, he argued that habeas relief should be available only when the petitioner supplements a constitutional claim with a colorable claim of innocence. Friendly believed that this rule would enable federal habeas courts to focus on meritorious petitions, and quickly eliminate others.

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51. See infra notes 58–63 and accompanying text.
53. See infra notes 64–78 and accompanying text.
55. Id. at 156.
56. Id. at 142.
57. Id. at 150.
2. Stone v. Powell

The Court initially stressed the importance of actual innocence in habeas proceedings in Stone v. Powell. The petitioner sought federal habeas relief, contending that he was held in custody in violation of the Constitution because the evidence underlying his conviction had been discovered in an illegal search of his home. The Court held that the petitioner’s constitutional claim did not state a cognizable ground for habeas relief because the petitioner had a full and fair opportunity to litigate this claim in state court. The Court emphasized that claims of unconstitutional searches or seizures are typically unrelated to a petitioner’s actual innocence. Justice Powell reasoned that Fourth Amendment claims deal with physical evidence that is especially reliable proof of guilt. He recognized that application of the exclusionary rule diverts the trial’s focus and the participants’ attention from the ultimate question of the defendant’s guilt or innocence.

3. Actual Innocence: A Gateway to Federal Habeas Relief

The Court recently addressed the importance of innocence in habeas proceedings in three other contexts: procedurally defaulted claims, abusive writs, and successive writs. In these contexts, the Court concluded that federal habeas courts have jurisdiction only when constitutional violations result in the conviction of an actually innocent person.

59. Id. at 472–73. The Due Process Clause of the Fourteenth Amendment incorporates the Fourth Amendment which prohibits unreasonable searches and seizures. The exclusionary rule prohibits the admission at trial of unconstitutionally obtained evidence. Id. at 482–83.
60. Id. at 494.
61. Id. at 489–90. Cf. Withrow v. Williams, 113 S. Ct. 1745, 1753 (1993) (finding that the Fifth Amendment privilege against self-incrimination protected by the Miranda rule is not “necessarily divorced from the correct ascertainment of guilt”); Jackson v. Virginia, 443 U.S. 307, 323 (1979) (finding that claims of insufficient evidence are central to the question of guilt or innocence).
63. Id. at 489–90.

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First, the Court found that federal courts have jurisdiction over procedurally defaulted claims only if the petitioner shows cause and prejudice for failing to raise the constitutional claim in the appropriate appellate or collateral proceeding. The Court created an important exception to the requirement of cause and prejudice, however, to permit federal courts to correct unjust incarcerations. Under this exception, when a federal court finds no cause for a procedural default, but concludes that a constitutional violation has probably resulted in the conviction of an actually innocent person, the court may grant habeas relief.

Second, the Court decided that the same cause and prejudice standard used to excuse procedural defaults should also govern the determination of inexcusable neglect in the abuse of the writ context. Both the doctrine of procedural default and the doctrine of abuse of the writ focused on whether a petitioner had a legitimate excuse for failing to raise a claim at the appropriate time. The Court also said that federal habeas courts may excuse a petitioner for failing to raise the claim if that petitioner shows that a fundamental miscarriage of justice would otherwise result. The conviction of an innocent person would be a fundamental miscarriage of justice.

Finally, the Court concluded that the “ends of justice” required federal courts to entertain a successive habeas petition only if a petitioner

67. Procedurally defaulted claims are those that the petitioner failed to raise in the appropriate appellate or collateral proceeding. Wainwright, 433 U.S. at 81–82.
68. The Supreme Court has not explicitly defined “cause” or “prejudice.” The Court has stated that cause may be satisfied when a procedural default “is not attributable to an intentional decision by counsel made in pursuit of [the defendant’s] interests.” Reed v. Ross, 468 U.S. 1, 9 (1984). The Court has said that the petitioner may establish “prejudice” by showing that the constitutional violation “worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” United States v. Frady, 456 U.S. 152, 170 (1982).
70. Smith, 477 U.S. at 537; Murray, 477 U.S. at 495–96.
71. Smith, 477 U.S. at 537; Murray, 477 U.S. at 495–96.
72. McCleskey v. Zant, 111 S. Ct. 1454, 1468 (1991). Under the abuse of the writ doctrine, relief may be denied when claims are presented for the first time in a second or subsequent habeas petition. Id. at 1457.
73. Id. at 1468.
74. Id. at 1470.
75. Id.
76. A successive habeas petition raises a constitutional claim that was considered and rejected on the merits in a previous habeas petition. Kuhlmann v. Wilson, 477 U.S. 436, 438, 444 (1986).
supplemented a constitutional claim with a showing of innocence.\textsuperscript{77} The Court's holding reflected a balancing of the petitioner's interest in challenging the constitutionality of custody with the state's interest in the orderly administration of the criminal justice system.\textsuperscript{78}

These decisions reflect a general trend in federal habeas jurisprudence requiring petitioners to assert colorable claims of innocence in addition to constitutional claims to obtain federal habeas relief. The decision in \textit{Herrera} sidestepped this trend and ignored the risk that an innocent man would be executed.

\textbf{E. Herrera v. Collins}

The procedural history of \textit{Herrera} spans more than a decade.\textsuperscript{79} In 1982, a Texas state court convicted Leonel Torres Herrera of the capital murder of a local police officer and sentenced him to death.\textsuperscript{80} He subsequently pleaded guilty to the murder of a state public safety officer.\textsuperscript{81} Herrera unsuccessfully appealed his conviction.\textsuperscript{82} State\textsuperscript{83} and federal\textsuperscript{84} courts also denied his petitions for habeas relief. Herrera then filed a second petition for state habeas relief, claiming that newly discovered evidence proved that he was innocent. Although he supported his claim with affidavits, the state rejected his petition.\textsuperscript{85}

In 1992, Herrera filed his second petition for federal habeas relief, claiming that he was actually innocent of the murders. Again, he

\textsuperscript{77} Id. at 454 (plurality opinion).
\textsuperscript{78} Id. at 452 (plurality opinion).
\textsuperscript{79} Protracted litigation is common in death penalty cases. The least complicated case may be presented to the Supreme Court a minimum of three times. After the state court of last resort affirms a conviction, the defendant files the first petition for certiorari to the Supreme Court. Following state postconviction proceedings, which may include a petition for certiorari to the Supreme Court, the defendant files the first federal habeas corpus petition in federal district court. The defendant appeals the denial of this petition to the court of appeals, and petitions for certiorari to the Supreme Court. Ira P. Robbins, \textit{Toward a More Just and Effective System of Review in State Death Penalty Cases} 43 & n.15 (1990) (containing the American Bar Association's recommendations on death penalty habeas corpus).
\textsuperscript{80} Herrera v. Collins, 113 S. Ct. 853, 857 (1993).
\textsuperscript{81} Id.
\textsuperscript{82} Herrera v. State, 682 S.W.2d 313 (Tex. 1984), cert. denied, 471 U.S. 1131 (1985).
\textsuperscript{84} Herrera v. Collins, 904 F.2d 944 (5th Cir.), cert. denied, 498 U.S. 925 (1990).
\textsuperscript{85} \textit{Ex parte} Herrera, 819 S.W.2d 528 (Tex. 1991), cert. denied, 112 S. Ct. 1074 (1992).
supported this claim with affidavits. He argued that the Constitution prohibits the execution of an actually innocent person. The district court granted Herrera’s request for a stay of execution so that he could present his claim of actual innocence in state court. The court of appeals vacated the stay of execution, holding that a claim of actual innocence is not cognizable in habeas corpus under Townsend v. Sain. The Supreme Court granted certiorari and affirmed.

The Court determined that the intricate boundaries of federal court jurisdiction over habeas petitions filed by state prisoners barred Herrera’s claim of actual innocence. Chief Justice Rehnquist described Herrera’s argument, that the execution of an actually innocent person is unconstitutional, as having an “elemental appeal.” Although the Court determined that federal courts lack jurisdiction because claims of actual innocence do not raise constitutional claims, the Court also suggested that a truly persuasive demonstration of actual innocence may make an execution unconstitutional and warrant federal habeas relief.

1. Constitutional Violations and Factual Errors

Rehnquist rejected Herrera’s claim that actual innocence entitled him to relief in a federal habeas proceeding. He relied heavily on the Court’s dictum in Townsend v. Sain regarding newly discovered evidence relevant to guilt. He distinguished claims of actual innocence from claims of constitutional violations occurring in underlying state criminal proceedings. Rehnquist said that claims of actual innocence

86. His affidavits included statements by: Hector Villareal, an attorney who represented Herrera’s older brother, Raul Sr.; Franco Palacious, a former cellmate of Raul Sr.; Jose Ybarra, Jr., a schoolmate of Raul Sr.; and Raul Herrera, Jr., Raul Sr.’s son. Villareal, Palacious, and Ybarra stated that Raul Sr. confessed to the murders. Raul Jr. stated that, as a nine-year-old, he had witnessed his father shoot both law enforcement officers. Raul Sr.’s death in 1984 complicated further investigation of these allegations. Herrera, 113 S. Ct. at 858.
91. Id. at 859.
92. Id. at 869.
93. Id.
94. Id. at 857.
95. Id. at 860.
96. Id.
present questions of factual error, and federal habeas courts do not correct factual errors. Instead, federal habeas courts ensure that state prisoners are not held in custody in violation of the Constitution. He concluded that federal habeas courts lack jurisdiction when petitioners assert only claims of actual innocence.

Rehnquist distinguished recent habeas decisions requiring a state prisoner to assert both a colorable claim of actual innocence and a constitutional claim. Those decisions dealt with habeas petitions raising procedurally defaulted, successive, or abusive constitutional claims. Habeas jurisprudence generally bars federal courts from considering such claims unless supplemented by a claim of actual innocence. A claim of actual innocence serves as a gateway and allows a habeas court to consider an otherwise barred constitutional claim on the merits. Rehnquist found that Herrera's claim did not serve as a gateway, however, because Herrera did not allege an independent constitutional violation.

2. Truly Persuasive Demonstrations of Actual Innocence

Although the Court rejected Herrera's petition for habeas relief, a majority resisted foreclosing federal habeas jurisdiction over all petitions claiming actual innocence. With the exception of Justices Scalia and Thomas, the members of the Court either assumed arguendo or concluded that a persuasive showing of actual innocence would make an execution unconstitutional. These justices disagreed, however, on the showing necessary to obtain federal habeas relief.

Rehnquist assumed for the sake of argument that in a capital case a truly persuasive demonstration of actual innocence would warrant federal

97. Id.
98. Id.
99. Id.
100. Id.
101. See supra notes 64–78 and accompanying text.
102. See supra notes 64–78 and accompanying text.
103. Herrera, 113 S. Ct. at 862.
104. Although both Rehnquist and White assumed for the sake of argument that a truly persuasive demonstration of actual innocence would make an execution unconstitutional, neither provided any reasoning for this assumption. See id. at 869; id. at 875 (White, J., concurring).
he habeas relief.\textsuperscript{105} He did not describe such a demonstration, suggesting only that the showing would be extraordinarily high.\textsuperscript{106}

Justice O'Connor, joined by Justice Kennedy, declared that the execution of a legally and factually innocent person would be unconstitutional.\textsuperscript{107} She declined, however, to specifically resolve the issue of the showing necessary for federal habeas relief.\textsuperscript{108} Instead, she simply found that Herrera could not obtain such relief under any standard. She characterized the evidence of Herrera's guilt as overwhelming and his newly discovered evidence as "bereft of credibility."\textsuperscript{109}

Like Rehnquist, Justice White assumed that a persuasive showing of actual innocence would make an execution unconstitutional.\textsuperscript{110} Without explanation, he adopted the standard enunciated in \textit{Jackson v. Virginia}.\textsuperscript{111} To obtain relief under this standard, a habeas petitioner must show that no rational trier of fact could find proof of guilt beyond a reasonable doubt based on the newly discovered evidence and the entire record before the jury that originally convicted the petitioner.\textsuperscript{112}

In dissent, Justice Blackmun, joined by Justices Stevens and Souter, concluded that a truly persuasive demonstration of actual innocence would make an execution unconstitutional.\textsuperscript{113} He argued that a petitioner may obtain relief by showing probable innocence,\textsuperscript{114} rather than by

\textsuperscript{105.} \textit{Id.} at 869.
\textsuperscript{106.} \textit{Id.}
\textsuperscript{107.} \textit{Id.} at 870 (O'Connor, J., concurring).
\textsuperscript{108.} \textit{Id.} at 871.
\textsuperscript{109.} \textit{Id.} at 871-73 (noting that, before he died, the state public safety officer identified Herrera, and that, when arrested, Herrera possessed a letter acknowledging responsibility for the murders).
\textsuperscript{110.} \textit{Id.} at 875 (White, J., concurring).
\textsuperscript{111.} 443 U.S. 307 (1979).
\textsuperscript{112.} \textit{Herrera}, 113 S. Ct. at 875 (White, J., concurring). In \textit{Jackson v. Virginia}, the petitioner sought habeas relief, claiming that the evidence in support of his conviction was insufficient for a rational trier of fact to find guilt beyond reasonable doubt. 443 U.S. at 321.
\textsuperscript{113.} \textit{Herrera}, 113 S. Ct. at 882 (Blackmun, J., dissenting).
\textsuperscript{114.} \textit{Id.} Blackmun required a showing of probable innocence in light of all the evidence. \textit{Id.} at 883.

Blackmun disagreed with White on the proper evidentiary showing necessary to obtain habeas relief. He distinguished \textit{Jackson v. Virginia}, 443 U.S. 307 (1979), noting that Jackson did not claim that he was innocent, but that the government failed to meet its constitutional burden of proving guilt beyond a reasonable doubt. \textit{Herrera}, 113 S. Ct. at 883. He also distinguished \textit{Sawyer v. Whitley}, 112 S. Ct. 2514 (1992), which requires that a petitioner show by clear and convincing evidence that, but for constitutional error, no reasonable jury would have found that the petitioner was death
showing that the trier of fact probably would have had reasonable doubt as to guilt. He believed that the showing for habeas relief should be higher than the showing needed to overcome a procedural bar to federal habeas jurisdiction.

Only Justice Scalia, joined by Justice Thomas, expressly disputed the assumption that a persuasive demonstration of actual innocence would warrant habeas relief. Scalia reasoned that the Constitution, historic tradition, and contemporary practice do not support such an assumption. He concluded that the petitioner had no constitutional right to demand judicial review of newly discovered evidence of innocence.

II. CONSTITUTIONAL VIOLATIONS

Neither the Court nor the dissent recognized all of the constitutional violations alleged by the petitioner. Although the Court correctly noted that Herrera’s claim of actual innocence raised a procedural due process question, the Court failed to address possible substantive due process and cruel and unusual punishment issues. The dissent characterized Herrera’s claim of actual innocence as raising a substantive due process challenge and cruel and unusual punishment issues, but failed to address the question of procedural due process violations. As this Note explains, claims of actual innocence raise procedural due process, substantive due process, and cruel and unusual punishment issues.

115. Herrera, 113 S. Ct. at 882 n.6. Sawyer claimed that he was not death eligible, not that he was innocent. Id.
116. Herrera, 113 S. Ct. at 882. In Kuhlman v. Wilson, the Court required the petitioner to show that the trier of fact probably would have had reasonable doubt as to the petitioner’s guilt to overcome a procedural bar against successive writs. 477 U.S. 436, 454 n.17 (1986). See McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991) (requiring that a constitutional violation probably caused the conviction of an innocent person); Murray v. Carrier, 477 U.S. 478, 496 (1986) (same).
117. Id. at 882.
118. Id. at 874 (Scalia, J., concurring).
119. Id. at 864 n.6.
120. Id. at 876–78.
121. In fact, Herrera raised both procedural and substantive due process claims. Brief for Petitioner at 41 n.54, Herrera v. Collins, 113 S. Ct. 853 (No. 91-7328) (1993) (reminding the Court that the petitioner asserts violations of both procedural and substantive due process).
A. Procedural Due Process

The Court erroneously concluded that Texas’s refusal to hear Herrera’s newly discovered evidence did not violate procedural due process. By defining the relief sought as a new trial, the Court evaluated the constitutionality of the Texas rule that limited the time in which to move for a new trial based on newly discovered evidence of innocence. The Court considered only whether this rule offended a fundamental principle of justice. By reviewing historic and contemporary time limits on new trial motions, the Court easily concluded that such limits do not offend fundamental principles of justice.

The Court should have defined the relief sought as a hearing in which to present newly discovered evidence of innocence. The evaluation should have focused on the constitutionality of the combination of Texas rules which constructively barred Herrera from presenting newly discovered evidence of his innocence in a judicial forum and from obtaining direct or collateral relief. By reviewing the historic and contemporary availability of hearings in which to present newly discovered evidence of innocence, the Court would have concluded that a combination of rules which constructively bars both direct and collateral review violates procedural due process.

Historic practice in the nineteenth and twentieth centuries shows that federal and state courts increasingly granted post-conviction relief on grounds of newly discovered evidence of innocence. In the nineteenth century, courts preferred that a convicted person present newly discovered evidence of innocence by direct remedies such as motions for new trials. Courts rejected efforts to present such evidence in postconviction proceedings. In the twentieth century, however, a growing number of federal and state courts granted collateral relief based on newly discovered evidence of innocence. Typically, these courts granted either coram nobis or habeas relief.

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122. Herrera, 113 S. Ct. at 866.
123. The Texas procedural rules required Herrera to move for a new trial within thirty days of the imposition or suspension of his sentence. Tex. R. App. P. 31(a)(1); see Herrera, 113 S. Ct. at 860.
125. Id.
126. Id.
Contemporary practice shows that a majority of states authorize either direct or collateral remedies, or both, on grounds of newly discovered evidence of innocence. As noted by the Herrera Court, nine states have no time limits and six others have waivable time limits on new trial motions based on newly discovered evidence.² Eight states permit collateral proceedings based on newly discovered evidence.² Twenty-eight states provide direct or collateral relief, or both, on grounds of newly discovered evidence of innocence.³

B. Substantive Due Process

The Court failed to recognize that Texas’s refusal to hear Herrera’s newly discovered evidence significantly increased the risk that the state would execute an actually innocent person, and violated substantive due process. Most members of the Court suggested, and O’Connor expressly

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². Herrera v. Collins, 113 S. Ct. 853, 866 (1993); see id. at 866 n.11 (listing Cal. Penal Code Ann. § 1181(8) (West 1985) (no time limit); Colo. R. Crim. P. 33 (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 R. Crim. P. 23 (45 days, can be waived); Mass. R. Crim. P. 30 (no time limit); N.J. R. Crim. P. 3:20-2 (no time limit); N.Y. Crim. Proc. Law § 440.10(c)(g) (McKinney 1983) (no time limit); N.C. Gen. Stat. § 15A-1415(b)(6) (1988) (no time limit); Ohio R. Crim. P. 33(A)(6), (B) (120 days, can be waived); Or. Rev. Stat. § 136.535 (1991) (five days, can be waived); Pa. R. Crim. P. 1123(d) (no time limit); S.C. R. Crim. P. 29(b) (no time limit); W. Va. R. Crim. P. 33 (no time limit)).


See supra notes 128-29 and accompanying text.
stated, that executing an innocent person would be unconstitutional.\footnote{131} Yet the Court distinguished the execution of an actually innocent, but legally guilty, person from that of an actually and legally innocent person.\footnote{132} The Court relied on this spurious distinction and concluded that the execution of Herrera would be constitutional because he was legally guilty of capital murder.\footnote{133}

Substantive due process prohibits the execution of an innocent person because such an execution “shocks the conscience” and interferes with rights “implicit in the concept of ordered liberty.”\footnote{134} When the government imposes a punishment that is dramatically disproportionate to the crime, the government’s conduct offends society’s sense of justice and undermines society’s trust in the criminal justice system. The execution of an innocent person amounts to the most egregious brutality possible.

Substantive due process prohibits the execution of an actually innocent person even if that person is legally guilty. In the death penalty context, the distinction between an actually and legally innocent person is spurious. The execution of an actually innocent person “shocks the conscience” and interferes with rights “implicit in the concept of ordered liberty” even though the person is legally guilty. Such an execution similarly offends society’s sense of justice and undermines society’s trust in the criminal justice system.

This distinction is especially problematic when newly discovered evidence may prove that the legally guilty person is actually innocent. Newly discovered evidence of innocence significantly increases the possibility that an actually innocent person will be executed and that substantive due process rights will be violated. As Blackmun pointed out in his dissent in \textit{Herrera}, “[t]he execution of a person who can show that he is innocent comes perilously close to simple murder.”\footnote{135}

\begin{footnotesize}
\begin{itemize}
\item 131. \textit{Herrera}, 113 S. Ct. at 869; \textit{id.} at 870 (O’Connor, J., concurring); \textit{id.} at 875 (White, J., concurring); \textit{id.} at 876 (Blackmun, J., dissenting).
\item 132. \textit{Id.} at 860.
\item 133. \textit{Id.}
\item 135. \textit{Herrera}, 113 S. Ct. at 884 (Blackmun, J., dissenting).
\end{itemize}
\end{footnotesize}
The Court also failed to recognize that Texas’s refusal to hear Herrera’s newly discovered evidence violated the Cruel and Unusual Punishment Clause for two reasons. First, the combination of rules created the possibility that Texas would execute an actually innocent person. Second, these rules undermined the reliability of Herrera’s capital murder conviction.

The most basic constitutional limits on punishments must prohibit the execution of an innocent person. The Cruel and Unusual Punishment Clause prohibits the infliction of excessive or unnecessary punishment. The execution of an innocent person constitutes a wholly unnecessary punishment. Such an execution serves no legitimate penal, rehabilitative, or retributive purpose. An innocent person need not be punished or reformed, and society needs no retribution. As Blackmun recognized in his dissent in *Herrera*, “the legitimacy of punishment is inextricably intertwined with guilt.”

The Court has traditionally sought to prevent the conviction and execution of an innocent person. To prevent such convictions, the Court has held that the constitutional prohibition of cruel and unusual punishment mandates heightened reliability in guilt and sentencing determinations in capital cases. Rules tending to undermine the reliability of either determination violate the Cruel and Unusual Punishment Clause. The Texas rules that constructively barred Herrera from presenting newly discovered evidence of his innocence undermined the reliability of his conviction and sentencing, and violated his constitutionally guaranteed freedom from cruel and unusual punishment.

III. A PROPOSAL FOR FEDERAL HABEAS RELIEF FOR CLAIMS OF ACTUAL INNOCENCE BASED ON NEWLY DISCOVERED EVIDENCE

Federal habeas relief should be available to a petitioner who raises claims of actual innocence based on newly discovered evidence to

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136. *See supra* notes 20–28 and accompanying text.
137. Rehnquist would argue that the execution of an actually innocent, but legally guilty, person may be necessary to avoid “the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases.” *Herrera*, 113 S. Ct. at 869.
138. *Id.* at 878 (Blackmun, J., dissenting).
139. *Id.* at 859.
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protect that petitioner’s constitutional rights. When such evidence is material to the petitioner’s actual innocence, federal habeas courts should grant an evidentiary hearing. When such evidence proves that the trier of fact probably would have had reasonable doubt as to the petitioner’s guilt, federal habeas courts should grant relief.

A. Exhaustion of State Remedies

A petitioner must exhaust available state judicial remedies before seeking federal habeas relief. Exhaustion of state judicial remedies is required as a matter of comity to give state courts the opportunity to initially entertain all federal and state claims. Only when a petitioner has exhausted all available state judicial remedies which would permit the petitioner to present newly discovered evidence of innocence should that petitioner be permitted to seek federal habeas relief.

B. Inadequate State Remedies

Federal courts must exercise habeas jurisdiction when state remedies are constitutionally inadequate. Federal habeas proceedings are appropriate when state rules of criminal procedure prevent a petitioner from presenting claims of actual innocence based on newly discovered evidence. Such proceedings are also appropriate when a state constructively bars a petitioner from presenting newly discovered evidence of innocence and, instead, relies on executive clemency to prevent the execution of an actually innocent person.

State rules of criminal procedure that constructively bar a state prisoner from presenting a claim of actual innocence based on newly discovered evidence are constitutionally inadequate. Such rules violate procedural and substantive due process guarantees, and the Cruel and Unusual Punishment Clause.

State executive clemency proceedings that provide the only opportunity to present claims of actual innocence based on newly discovered evidence are also constitutionally inadequate. Such

141. 28 U.S.C. § 2254(c).
142. Executive clemency refers to the power of the President or a governor to pardon a crime or to commute a criminal sentence. *Black's Law Dictionary* 569 (6th ed. 1990).
143. *See supra* notes 122–30 and accompanying text.
144. *See supra* notes 131–35 and accompanying text.
145. *See supra* notes 136–40 and accompanying text.
proceedings are subject to human error, political mood swings, and careless review. As a result, executive clemency is a more theoretical than real means of preventing a miscarriage of justice.\textsuperscript{146}

First, human error makes executive clemency an unreliable means of protecting constitutional rights. The \textit{Herrera} Court explicitly recognized that executive clemency is fallible.\textsuperscript{147} Recent studies showing that clemency has not always been granted to persons believed to be innocent support this conclusion.\textsuperscript{148} Second, political mood swings may unduly influence clemency decisions. Governors may decline to exercise clemency powers to avoid losing bids for reelection.\textsuperscript{149} Governors have also declined to exercise clemency powers to sway legislative decision-making\textsuperscript{150} and even to fulfill campaign promises.\textsuperscript{151} Finally, officials frequently forgo careful examinations of clemency petitions and simply presume the accuracy of the judicial proceedings.\textsuperscript{152} In the absence of extraordinary defects in the underlying criminal proceedings or egregious violations of constitutional rights, these officials will reject requests for executive clemency.

C. Evidentiary Hearings for Substantial Allegations of Newly Discovered Evidence of Innocence

Federal courts should reject the dictum, but follow the holding, of \textit{Townsend v. Sain}. Federal courts should recognize that factual errors leading to the conviction or execution of an actually innocent person result in unconstitutional detention. To protect the petitioner’s constitutional rights, federal courts should grant an evidentiary hearing on claims of actual innocence only when the petitioner makes a


\textsuperscript{150} Id. at 608 (describing former California Governor Edmund Brown’s decision denying clemency for Richard Lindsey after learning that a legislator who favored Lindsey’s execution would withhold support from an important farm labor bill if Brown granted clemency).

\textsuperscript{151} Id. at 609 (describing former Louisiana Governor Edwin Edwards’s refusal to commute Wilber Rideau’s sentence to fulfill a campaign promise to one of Rideau’s victims).

substantial allegation of newly discovered evidence of innocence. Although a state court has already convicted that petitioner, the federal court should not presume that the state court findings of guilt are correct when claims of actual innocence are supported by newly discovered evidence.

In *Townsend v. Sain*, the Court erroneously implied that newly discovered evidence relevant to the petitioner’s guilt cannot be relevant to the constitutionality of the petitioner’s detention.\(^\text{153}\) The Court inadequately explored the relationship between factual error and unconstitutional detention. The Court failed to recognize that convictions and sentences resulting from factual errors are constitutionally indistinguishable from those resulting from procedural errors in the underlying criminal trial.

The Court appropriately held, however, that an evidentiary hearing should be granted when a petitioner makes a substantial allegation of newly discovered evidence.\(^\text{154}\) The standard of newly discovered evidence for granting a new trial should be used to define the standard for granting an evidentiary hearing. To be substantial, the evidence must be material to the issue of the petitioner’s innocence or guilt, and not merely cumulative or impeaching. To be newly discovered, the evidence must be that which could not have been presented at trial. The evidence must be discovered after trial, and the failure to learn of such evidence at the time of trial must not be due to the petitioner’s lack of diligence.\(^\text{155}\)

This standard reflects modern practice in a majority of states,\(^\text{156}\) and represents a pragmatic approach to the problem of newly discovered evidence. States that permit a defendant to move for a new trial based on newly discovered evidence at any time or within a waivable time limit generally apply this standard.\(^\text{157}\) States that allow post-conviction relief based on newly discovered evidence also apply this standard.\(^\text{158}\)

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153. See *supra* notes 46–47 and accompanying text.
154. See *supra* notes 44–45 and accompanying text.

The standard differs only in that the petitioner need not show, as is required of a defendant moving for a new trial, that the evidence would probably result in a different outcome. This difference is appropriate because an evidentiary hearing places a much lighter burden on the state and the federal courts than a new trial.

156. See *supra* notes 128–29 and accompanying text.
This standard also guards against frivolous habeas petitions alleging actual innocence based on newly discovered evidence. In practice, this standard frequently bars further proceedings based on newly discovered evidence. State courts frequently deny motions for new trials because the "so-called" newly discovered evidence was in fact available to the defendant at the time of trial. Likewise, federal habeas courts will deny requests for evidentiary hearings when claims of actual innocence are not based on newly discovered evidence.

Furthermore, this standard appropriately balances the habeas petitioner's and the state's interests. The habeas petitioner who faces the death penalty has an especially compelling interest in saving his own life. The state has a strong interest in finality, but also in ensuring that only those persons who are guilty of the most serious crimes are executed. By granting an evidentiary hearing when the petitioner makes a substantial allegation of newly discovered evidence of innocence, federal habeas courts respond appropriately to both the petitioner's and state's interests. The evidentiary hearing is the least intrusive, but constitutionally adequate, proceeding in which the petitioner can present and the state can rebut the newly discovered evidence.

Under 28 U.S.C. § 2254, federal courts should not presume that state court findings of guilt are correct when claims of actual innocence are supported by newly discovered evidence. Newly discovered evidence tending to establish a petitioner's innocence strongly suggests that material facts have not been fully developed at the state proceeding. Such evidence also suggests that the petitioner may not have received an adequate hearing in the underlying state criminal trial. As a result, federal courts should grant a hearing to determine whether the newly discovered evidence persuasively demonstrates the petitioner's innocence.

160. Similarly, a petitioner who is innocent has a "powerful and legitimate interest" in being released from custody. Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986).
161. Id.
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**D. Federal Habeas Relief When the Trier of Fact Probably Would Have Had Reasonable Doubt as to Guilt**

Federal courts should grant habeas relief when the petitioner proves that the trier of fact probably would have had reasonable doubt as to the petitioner’s guilt. This standard adequately protects both the petitioner’s constitutional rights and the state’s interests. Higher standards perpetuate a constitutionally intolerable risk—the risk of executing an actually innocent person.

1. **Against a Higher Standard**

Federal courts should reject a higher standard for determining a petitioner’s right to habeas relief to reduce the risk of executing an actually innocent person. For example, the probable innocence standard advocated by Justice Blackmun\(^1\) should be rejected because it imposes an unreasonable burden on a habeas petitioner. Under this standard, a petitioner must show probable innocence to obtain habeas relief on a claim of actual innocence based on newly discovered evidence. In other words, when newly discovered evidence of innocence is presented in a habeas proceeding, the court must find that the trier of fact could not have found that the petitioner was guilty by even a preponderance of the evidence. If this newly discovered evidence had been presented at trial, however, the trier of fact may have concluded that the petitioner was guilty by a preponderance of the evidence, but not beyond a reasonable doubt. Increasing the burden from negating proof beyond a reasonable doubt at trial to establishing proof of probable innocence in a habeas proceeding unacceptably increases the risk of executing an actually innocent person and violating that person’s constitutional rights.

2. **For the Reasonable Doubt Standard**

Instead, federal courts should grant habeas relief if a petitioner shows that the trier of fact probably would have had reasonable doubt as to the petitioner’s guilt. This standard ensures that only those persons who are guilty of capital crimes beyond a reasonable doubt are executed. Typically, federal habeas courts use this standard to determine whether a petitioner raises a colorable claim of innocence sufficient to overcome a procedural bar and to present a claim of constitutional error in the

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underlying proceeding. This standard is equally appropriate, however, when newly discovered evidence undermines the petitioner’s conviction or death sentence.

This standard will, no doubt, alarm prosecutors and attorneys general. They will argue that this standard will unreasonably prejudice the state’s ability to retry the petitioner. They will point out that by the time a petitioner initiates a habeas proceeding, key witnesses may be unavailable, critical evidence may be stale, and prosecutors and attorneys general may be forced to rely on written transcripts of the original trial. As a result, they will contend that the state faces a nearly impossible task in retrying a successful habeas petitioner. Modern technology, however, can alleviate these problems. For example, videotaping capital murder trials allows both the prosecution and the defense to preserve the testimony of key witnesses and the presentation of critical evidence.

E. Conditional or Absolute Discharge

Federal courts should grant habeas relief in the form of conditional or absolute discharge depending on the strength of the petitioner’s proof of innocence. For example, if newly discovered evidence of innocence proves that the trier of fact probably would have had reasonable doubt as to the petitioner’s guilt, federal courts should grant relief in the form of a conditional discharge. If newly discovered evidence proves that a petitioner is at least probably innocent, and perhaps even innocent beyond a reasonable doubt, federal courts should grant relief in the form of an absolute discharge. In such cases, absolute relief is appropriate because the state should have no interest in retrying the petitioner.

IV. ACTUAL INNOCENCE AFTER HERRERA

Until Congress authorizes federal habeas courts to exercise jurisdiction over claims of actual innocence based on newly discovered evidence, or the Court revisits Herrera and recognizes that

165. Conditional discharge means that the petitioner is discharged at the end of a fixed time period unless the state elects to retry the petitioner. Wilkes, supra note 124, § 8-34.

166. Absolute discharge means the petitioner is unconditionally discharged and is immune from further proceedings for the original offense of conviction. Id. § 8-33.

167. Members of the 103rd Congress introduced three bills authorizing federal habeas courts to exercise jurisdiction over claims of actual innocence based on newly discovered evidence. See H.R. 302
constitutional claims are intertwined with claims of actual innocence based on newly discovered evidence, federal habeas courts will not exercise jurisdiction over most claims of actual innocence asserted by state prisoners. The two exceptions to *Herrera*’s broad rejection of claims of actual innocence are: 1) claims of actual innocence accompanied by claims of independent constitutional violations occurring in the underlying state criminal proceeding; and 2) claims accompanied by “truly persuasive demonstrations of ‘actual innocence.’”

Federal habeas courts will strictly require state prisoners to assert claims of independent constitutional violations in the underlying state criminal proceeding. Petitions based only on claims of actual innocence will be rejected. The courts will emphasize that such claims allege factual error rather than constitutional error, and are not grounds for habeas relief.

Federal habeas courts will struggle to apply the “truly persuasive demonstrations of actual innocence” standard. This undefined exception purports to establish an exceptionally high threshold which federal habeas courts will be reluctant to refine. Instead, courts will simply conclude that the petitioner’s evidence falls short of such a demonstration. As a result, this exception for truly persuasive demonstrations of actual innocence may prove meaningless in practice.

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169. *See, e.g.*, Von Staich v. Borg, 988 F.2d 122 (9th Cir. 1993) (text in Westlaw) (concluding that the petitioner’s evidence falls far short of a truly persuasive demonstration of actual innocence).