

Washington Law Review

Volume 85
Number 1 *A Tribute to the Honorable Betty
Binns Fletcher*

2-1-2010

Finality, Habeas, Innocence, and the Death Penalty: Can Justice Be Done?

Ellyde Roko

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Criminal Procedure Commons](#)

Recommended Citation

Ellyde Roko, *Finality, Habeas, Innocence, and the Death Penalty: Can Justice Be Done?*, 85 Wash. L. Rev. 107 (2010).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol85/iss1/8>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

FINALITY, HABEAS, INNOCENCE, AND THE DEATH PENALTY: CAN JUSTICE BE DONE?

Ellyde Roko*

Abstract: In 1995, Judge Betty Binns Fletcher posed a question: In the context of the death penalty, can justice be done? She did not answer the question at the time. However, an examination of the procedural hurdles now facing condemned inmates seeking review of claims of constitutional violations suggests the answer is no. Too often courts, including the Supreme Court, have favored finality over fairness, elevating strict adherence to procedural rules over the responsibility to make sure justice is done. Nowhere is the problem clearer than in the arena of actual innocence, where the failure to consider a condemned inmate's claim on the merits could lead to the execution of an innocent person.

This Article argues that the Supreme Court's 2009 response to a petition for an original writ of habeas corpus in *In re Davis*¹ shows that courts have gone too far. Rather than merely weeding out frivolous claims or showing deference to reasoned state court decisions, federal courts have allowed arcane procedural rules to prevent even meritorious claims from being heard. The Supreme Court's rare intervention should encourage courts to interpret procedural rules less stringently in an effort to make sure justice is done.

INTRODUCTION	108
I. PROCEDURAL RESTRICTIONS INCREASINGLY HAVE PREVENTED COURTS FROM REVIEWING HABEAS PETITIONS ON THE MERITS	112
II. THE SUPREME COURT ELEVATED PROCEDURE OVER JUSTICE IN <i>THOMPSON V. CALDERON</i>	115
A. The Ninth Circuit Acted to Prevent a Miscarriage of Justice	115
1. Substantive Considerations: Thompson's Claims for Relief	116
2. Procedural Considerations: AEDPA Requires Recall of the Mandate	119
B. The Supreme Court Reversed the En Banc Court on Procedural Grounds Without Considering the Merits	120
C. The Supreme Court's Decision Led to an Unjust Result....	122

* Law clerk to Judge Betty Binns Fletcher, 2009–2010 court term; J.D., Fordham University School of Law, 2008. This Article grew out of a speech given at the Washington Law Review and the University of Washington School of Law symposium: *A Tribute to the Honorable Judge Betty Binns Fletcher*. The author is incredibly grateful to Alison J. Nathan. Thanks also to James J. Bilborrow and Katherine C. Hughes. This Article reflects the views of the author only.

¹ 558 U.S. ___, 130 S. Ct. 1 (2009) (mem.).

III. <i>DAVIS</i> COULD ALLOW COURTS TO FOCUS ON THE MERITS IN CERTAIN FACTUAL SITUATIONS	124
A. The Eleventh Circuit in <i>Davis</i> Applied AEDPA in a Potentially Unconstitutional Way.....	125
B. <i>Davis</i> Could Shift the Focus from Process Back to Substance.....	127
CONCLUSION	129

INTRODUCTION

In the August 2009 case of *In re Davis*,² the Supreme Court of the United States took the unusual step of directing a district court in Georgia to conduct an evidentiary hearing on the possible innocence of a death row inmate.³ After seeking relief from the Georgia Supreme Court⁴ and the U.S. Court of Appeals for the Eleventh Circuit⁵ without success, the inmate petitioned the Supreme Court for an original writ of habeas corpus.⁶ The Court had not granted such a writ in nearly fifty years.⁷ Surprisingly, the Court directed the district court to hold an evidentiary hearing on the claim.⁸ As Justice John Paul Stevens wrote in a concurring opinion, “The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing.”⁹

The procedural rarity of the case, however, quickly fell under the shadow of Justice Antonin Scalia’s proclamation in a dissent. “This Court,” Justice Scalia wrote,

has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is “actually” innocent. Quite the contrary, we have repeatedly left that question

2. 558 U.S. ___, 130 S. Ct. 1 (2009) (mem.).

3. *Id.* at 1.

4. *Davis v. State*, 660 S.E.2d 354 (Ga. 2008).

5. *In re Davis*, 565 F.3d 810 (11th Cir. 2009).

6. *Davis*, 130 S. Ct. at 1. The Supreme Court outlined its guidelines for granting an original writ of habeas corpus in *Felker v. Turpin* in 1996, requiring “exceptional circumstances warranting the exercise of the Court’s discretionary powers” and a showing that “adequate relief cannot be obtained in any other form or from any other court.” 518 U.S. 681, 665 (1996) (citing SUP. CT. R. 20.4(a)). The procedures included the guidance that “[t]hese writs are rarely granted.” *Id.*

7. *Davis*, 130 S. Ct. at 2 (Scalia, J., dissenting) (“Today this Court takes the extraordinary step—one not taken in nearly 50 years—of instructing a district court to adjudicate a state prisoner’s petition for an original writ of habeas corpus.”).

8. *Id.* at 1 (majority opinion).

9. *Id.* (Stevens, J., concurring).

unresolved, while expressing considerable doubt that any claim based on alleged “actual innocence” is constitutionally cognizable.¹⁰

The Supreme Court’s dramatic action in *Davis* highlights the failures of the existing system of appellate and habeas review. *Davis*, unable to achieve relief through the usual state and federal channels, had to rely on an unlikely action of the Supreme Court to avoid a potentially unconstitutional execution. Given the rarity of such relief, the specter of executing condemned inmates innocent of death penalty crimes looms. Indeed, innocent defendants have been sentenced to death¹¹ and evidence suggests some of them have been executed.¹² The *Davis* case highlights a question that most often falls on the shoulders of lower court judges: In the context of the death penalty, can justice be done?

Judge Fletcher posed this question in 1995 while giving the Madison Lecture at New York University School of Law.¹³ In her lecture, Judge Fletcher highlighted the responsibility of federal district and appellate judges in ensuring justice for defendants sentenced to death: “While some may view the courts as obstructions when appeals drag on for years, the federal courts are surely not doing their duty if they fail to protect the constitutional rights of capital defendants and if they tolerate execution of innocent people.”¹⁴

Judge Fletcher and her fellow judges on the U.S. Court of Appeals for the Ninth Circuit shouldered that responsibility under intense public scrutiny in 1992. That year, the pending execution of Robert Alton

10. *Id.* at 3 (Scalia, J., dissenting).

11. See, e.g., STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 303–05 (2002); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 31 (1987) (conducting a study of “cases in which the defendant was erroneously convicted of a capital crime and sentenced to death”); Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307, 1330–42 (2004) (describing former Illinois governor George Ryan’s actions in pardoning four condemned inmates and commuting the sentences of the 167 remaining on death row).

12. See, e.g., BANNER, *supra* note 11, at 303–05; David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009, at 54–55 (noting that “[t]he fear that an innocent person might be executed has long haunted jurors and lawyers and judges” and that “[i]n recent years . . . questions have mounted over whether the system is fail-safe”).

13. See Betty B. Fletcher, *The Death Penalty in America: Can Justice Be Done?*, 70 N.Y.U. L. REV. 811 (1995) (text of the speech). The James Madison Lecture Series started in 1960 and is “designed to enhance the appreciation of civil liberty and strengthen the sense of national purpose.” NYU Law James Madison Lectures, <http://www.law.nyu.edu/academics/fellowships/haysprogram/LitigationandLectures/JamesMadisonLectures/index.htm> (last visited Nov. 29, 2009). Justice Hugo L. Black gave the first Madison Lecture. *Id.*

14. Fletcher, *supra* note 13, at 818.

Harris in California placed Judge Fletcher and her colleagues on the Ninth Circuit squarely in the middle of the death penalty controversy.¹⁵ As described in newspaper accounts, “[f]or more than six hours, behind-the-scenes maneuvering by the group of defiant liberal judges delayed Harris’s execution as they sought to give every conceivable issue in his case a fair hearing.”¹⁶ The decision of whether Harris would face execution that night pitted “a faction of liberal judges scattered across the Western states”¹⁷ against the Supreme Court on two different issues. First, the Ninth Circuit’s order in the *Harris* case addressed whether Harris received a sufficient hearing on new evidence that his brother had shot one of the victims Harris was convicted of murdering.¹⁸ Second, three inmates facing execution, including Harris, had filed a lawsuit in federal court alleging that lethal gas, California’s method of execution, constituted cruel and unusual punishment.¹⁹ A panel of Ninth Circuit judges elected to stay Harris’s execution for ten days, “a move spearheaded by liberal Circuit Judge Betty Binns Fletcher of Seattle.”²⁰ Unlike in *Davis*’s case, the Supreme Court did not grant Harris relief. Rather, the Supreme Court made the unusual move of issuing an order in the wee hours of the morning that “[n]o further stays of Robert Alton Harris’ execution shall be entered by the federal courts except upon order of this Court.”²¹ Within thirty-six minutes, Mr. Harris was dead.²² He was executed before any court could hear his claims.

15. See Richard C. Paddock & Henry Weinstein, *Harris Execution Led Nation’s Top Judges to Hours of Conflict—Supreme Court Takes a Tough Stand at Top*, SEATTLE TIMES, Apr. 22, 1992, at A1. For in-depth analyses of the *Harris* case, see Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255 (1992); Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225 (1992); Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the Harris Case*, 102 YALE L.J. 205 (1992).

16. Paddock & Weinstein, *supra* note 15, at A1; see generally Reinhardt, *supra* note 15.

17. Paddock & Weinstein, *supra* note 15, at A1.

18. See Reinhardt, *supra* note 15, at 209–10; see also *Harris v. Vasquez*, 949 F.2d 1497, 1503–04 (9th Cir. 1990) (discussing the involvement of both Harris and his brother); Paddock & Weinstein, *supra* note 15, at A1.

19. See *Fierro v. Gomez*, 790 F. Supp. 966 (N.D. Cal. 1992) (alleging cruel and unusual punishment after a horrifying scene at a Arizona lethal gas execution); see also Reinhardt, *supra* note 15, at 207, 218–19. The Ninth Circuit eventually found execution by lethal gas unconstitutional. *Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir. 1996).

20. Paddock & Weinstein, *supra* note 15, at A3. Numerous judges played a large part in the behind-the-scenes maneuvering. See generally Reinhardt, *supra* note 15 (describing the events surrounding the *Harris* case).

21. *Vasquez v. Harris*, 503 U.S. 1000, 1000 (1992) (mem.); see also Reinhardt, *supra* note 15, at 213 (describing the stays issued in the *Harris* case).

22. See Paddock & Weinstein, *supra* note 15, at A3.

The move “spearheaded”²³ by Judge Fletcher reflects her philosophy on the role of federal judges in death penalty cases. As Judge Fletcher noted in her Madison Lecture, condemned inmates trying to enforce their rights and judges trying to protect those rights face incredible hurdles.²⁴ Judges must vigorously guard the rights of the defendants accused and convicted of the most brutal crimes while navigating an increasingly restrictive procedural framework.²⁵ The procedural mechanisms surrounding death penalty appeals and habeas petitions have created such obstacles to justice that the Supreme Court in *Davis* reverted to ordering a hearing on an original writ even though the Court had not granted such a writ in nearly fifty years. The *Davis* decision demonstrates that the answer to Judge Fletcher’s question, “can justice be done?” might in fact be “no.” Absent the unlikely event of Supreme Court intervention, no court would have held an evidentiary hearing on Davis’s actual innocence claim. In general, judges must take extraordinary measures to justify review on the merits, and painstakingly examine the claims of the defendants that society has deemed the “worst of the worst” to guarantee their convictions and death sentences are fair. The *Davis* case, however, has the potential to turn the focus back to the merits of such claims, particularly in the area of actual innocence.

This Article proceeds in three Parts. Part I briefly examines the increasingly restrictive scope of habeas review, focusing on the procedural hurdles courts and inmates must overcome to reach adjudication on the merits. Part II analyzes the case of *Thompson v. Calderon*,²⁶ in which Judge Fletcher and her fellow Ninth Circuit judges made remarkable efforts to ensure that procedural barriers did not result in the execution of a possibly innocent man. Finally, Part III reviews the Supreme Court’s action in *Davis* and its possible implications, and concludes that the law that has developed around habeas corpus review has made justice difficult to achieve, but that the Supreme Court’s decision could encourage lower federal courts to reach the merits of actual innocence claims.

23. *Id.*

24. Fletcher, *supra* note 13, at 818–20.

25. *Id.* at 821.

26. 120 F.3d 1045 (9th Cir. 1997), *rev’d*, 523 U.S. 538 (1998).

I. PROCEDURAL RESTRICTIONS INCREASINGLY HAVE PREVENTED COURTS FROM REVIEWING HABEAS PETITIONS ON THE MERITS

As Judge Fletcher explained in her 1995 Madison Lecture, in the context of the death penalty, “we have prolonged review processes that more often than not deflect attention from the real issues of fair trial and possible innocence to arcane examinations of technical bars.”²⁷ Judges must navigate a confusing rubric of death penalty procedure, a maze that increasingly has narrowed defendants’ abilities to challenge potential constitutional violations.²⁸ Generally, post-conviction review happens through habeas corpus, the availability of which has been restricted over the past few decades.²⁹ Numerous scholars and judges have criticized the injustice that results from procedural constraints.³⁰ These procedural cards, which are stacked against the condemned inmate, have made “performing habeas review within these restrictions . . . an awesome task.”³¹

One need not look far for evidence of these hurdles. In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) established strict guidelines for habeas review.³² AEDPA permits a federal court to grant a writ of habeas corpus only if a state court decision is “contrary to, or involved an unreasonable application of, clearly established

27. Fletcher, *supra* note 13, at 826.

28. See LARRY W. YACKLE, FEDERAL COURTS 497 (2d ed. 2003) (placing the success rate for habeas petitions at about four percent and attributing that figure to “prisoners’ inability to marshal their claims and thread their way through the maze of procedural obstacles that lie in their path on the way to an adjudication on the merits”).

29. See *infra* notes 32–42 and accompanying text; see also Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2355 (2007).

Many in Congress have apparently concluded that, even when a prisoner can prove that he or she is probably innocent, Americans are content to have the federal courts ignore the prisoner’s constitutional claims and allow the prisoner to be punished—even executed—if the prisoner’s attorneys did not obey all of the applicable procedural rules and if the prisoner’s exculpatory evidence is not quite clear and convincing.

Id.

30. See, e.g., John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259 (2006) (examining AEDPA and arguing that the Supreme Court “significantly curtailed the writ of habeas corpus” in the years preceding AEDPA); Barry Friedman, *Failed Enterprise: The Supreme Court’s Habeas Reform*, 83 CAL. L. REV. 485 (1995) (concluding that the Supreme Court’s efforts at habeas reform had failed); Lee Kovarsky, *AEDPA’s Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443 (2007) (arguing that AEDPA should not be read as disfavoring habeas relief); Pettys, *supra* note 29.

31. Fletcher, *supra* note 13, at 821.

32. Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2244, 2253–2255, 2261–2266 (2000)).

Federal law, as determined by the Supreme Court of the United States” or “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.”³³ AEDPA also imposes a one-year statute of limitations on habeas petitions³⁴ and further limits prisoners’ ability to file more than one such petition.³⁵

Even before the passage of AEDPA, however, the Supreme Court for decades had been restricting habeas corpus relief.³⁶ The Warren Court had allowed for the expansion of habeas corpus, making it “the federal machinery for bringing new constitutional values to bear in concrete cases.”³⁷ But the Rehnquist Court had a different approach, “sometimes squarely overrul[ing] Warren Court precedents and sometimes forg[ing] its own novel doctrines to circumscribe the writ.”³⁸ Over the years, the Rehnquist Court invoked the concept of “finality” with increasing frequency to justify procedures prohibiting review.³⁹ As a result, “[f]inality, federalism, and to a lesser extent the preservation of judicial resources, all have come to top fairness as the mainstay of habeas.”⁴⁰ By

33. 28 U.S.C. § 2254(d).

34. *Id.*; see also Kovarsky, *supra* note 30, at 453.

35. See 28 U.S.C. § 2244(b).

36. See YACKLE, *supra* note 28, at 495–96; see also *In re Davis*, 565 F.3d 810, 831 (11th Cir. 2009) (“There is no question that, even pre-AEDPA, the procedural obstacles to filing a second or successive habeas petition were considerable.” (citing *Schlup v. Delo*, 513 U.S. 298, 317–19 (1995))); see generally Mark V. Tushnet & Larry W. Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997) (arguing that many of the key provisions of AEDPA merely codified changes the Supreme Court already had made).

37. YACKLE, *supra* note 28, at 494 (describing how habeas corpus under the Warren Court provided review by “independent Article III courts willing and able to check the coercive power of government”).

38. *Id.* at 495. See also Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. “Process,”* 74 N.Y.U. L. REV. 313, 314 (1999) (“The Rehnquist Court will be remembered for its stark reversal of the Warren-Brennan Court’s expansion of individual rights and protections and for elevating procedural rules over substantive values and limiting rights generally, especially those of racial minorities.”). These changes also can be attributed to the Court’s adoption of theories advanced by two prominent scholars regarding the need for a narrower scope of habeas corpus review. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451–52 (1963) (“The procedural arrangements we create for the adjudication of criminal guilt have an important bearing on the effectiveness of the substantive commands of the criminal law. I suggest that finality may be a crucial element of this effectiveness. Surely it is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating that law will swiftly and certainly become subject to punishment, just punishment.”); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

39. Pettys, *supra* note 29, at 2335–39.

40. Friedman, *supra* note 30, at 491.

the time Congress passed AEDPA in 1996, “a Supreme Court impatient for congressional action had already done much of the work itself in a series of opinions overruling precedent in order to make it harder for condemned prisoners to have their constitutional claims heard by a federal court.”⁴¹ In that same year, the Rehnquist Court determined that AEDPA did not deprive the Supreme Court of its jurisdiction to entertain original habeas corpus petitions, but that AEDPA did impose new conditions on the Court’s ability to grant relief.⁴²

As a result, today lower court federal judges spend the majority of their time in habeas cases trying to determine whether the court can hear the inmate’s claim.⁴³ This onerous task has earned the disdain of numerous judges. For example, in *Coleman v. Thompson*⁴⁴ in 1991, the Supreme Court denied relief on procedural grounds to a death row inmate whose lawyers had filed a state appeal one day late.⁴⁵ This holding prompted a dissent by Justice Harry Blackmun, joined by Justices Thurgood Marshall and John Paul Stevens. The Justices rebuked the Court for continuing its “crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims” and “creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights.”⁴⁶ Before the *Davis* case reached the Supreme Court, a dissent from an Eleventh Circuit judge hearing the case emphasized these procedural obstacles, writing that the case “highlights the difficulties in navigating AEDPA’s thicket of procedural brambles.”⁴⁷ And AEDPA’s limitations led Judge Stephen Reinhardt of the Ninth Circuit to describe the legislation as “a mockery of the careful boundaries between Congress and the courts that our Constitution’s Framers believed so essential to the prevention of tyranny.”⁴⁸

41. BANNER, *supra* note 11, at 293.

42. *Felker v. Turpin*, 518 U.S. 651, 658 (1996).

43. *See, e.g.*, Reinhardt, *supra* note 38, at 318–19 (estimating that judges “spend up to ninety percent of [their] time in capital cases and other habeas proceedings trying to determine whether a defendant’s rights have unwittingly been forfeited and trying to apply the Supreme Court’s arcane and almost impenetrable procedural rules”).

44. 501 U.S. 722 (1991).

45. *See id.* at 757.

46. *Id.* at 758–59 (Blackmun, J., dissenting).

47. *In re Davis*, 565 F.3d 810, 827 (11th Cir. 2009) (Barkett, J., dissenting).

48. *Crater v. Galaza*, 508 F.3d 1261, 1270 (9th Cir. 2007) (Reinhardt, J., dissenting from the denial of rehearing en banc). In his dissent, Judge Reinhardt wrote he would hold section 104 of AEDPA unconstitutional and a violation of the separation of powers doctrine. Judge Reinhardt reasoned that section 2254(d)(1) intrudes on the judicial power that Article III vests in the courts

It is in this environment that judges must seek justice.

II. THE SUPREME COURT ELEVATED PROCEDURE OVER JUSTICE IN *THOMPSON v. CALDERON*

On a daily basis, federal court judges must balance proper procedure with substantive fairness. The story of Thomas Martin Thompson, a California inmate sentenced to death, “illustrates sharply the values, interests, and concerns weighed in death penalty habeas cases On the one hand, federal courts consider the state’s interest in finality and comity; on the other hand, they consider the interest of the defendant and the public in preserving constitutional values.”⁴⁹ In Thompson’s case, a majority of the Ninth Circuit judges sitting en banc vacated his death sentence because of constitutional violations at trial.⁵⁰ Then, the Supreme Court reversed—on procedural grounds—and California executed Thompson.⁵¹

A. *The Ninth Circuit Acted to Prevent a Miscarriage of Justice*

Two days before Thompson’s scheduled execution in August 1997, the Ninth Circuit went to extraordinary lengths to vacate his death sentence.⁵² Earlier in the year, the district court had granted Thompson’s habeas corpus petition in part, finding that Thompson’s trial counsel had been constitutionally deficient.⁵³ But a panel of the Ninth Circuit reversed the district court, holding that counsel’s performance had not resulted in prejudice.⁵⁴ A judge requested that the entire circuit receive notification of a refusal to amend the opinion or rehear the case, generally viewed as a precursor to a call for en banc review.⁵⁵ But no judge called for an en banc review and the deadline for doing so

“by prohibiting the federal courts from applying the ordinary principles of *stare decisis* in deciding habeas cases involving prisoners held in state custody” and “by requiring federal courts to give effect to incorrect state rulings that, in the federal courts’ independent judgment” violate the Constitution. *Id.* at 1261–62.

49. Reinhardt, *supra* note 38, at 346.

50. *Thompson v. Calderon*, 120 F.3d 1045, 1045–46 (9th Cir. 1997), *rev’d*, 523 U.S. 538 (1998).

51. Cal. Dep’t. Corr. and Rehab., Capital Punishment, http://www.cdcr.ca.gov/Reports_Research/thomasThompson.html (last visited Oct. 16, 2009).

52. *See Thompson*, 120 F.3d at 1048–51 (describing the process).

53. *Id.* at 1047.

54. *Id.* The panel’s amended decision is reported in *Thompson v. Calderon*, 109 F.3d 1358 (1997).

55. *See Reinhardt*, *supra* note 38, at 328–29.

passed.⁵⁶ The Supreme Court declined to review the case and Thompson asked the original panel to reconsider its decision.⁵⁷ When the panel refused to do so and all other proceedings had been exhausted without granting Thompson relief,⁵⁸ a majority of active judges on the Ninth Circuit recalled the mandate—the original panel decision from which no judge had called for en banc review—“convinced that the panel committed fundamental errors of law that would result in manifest injustice.”⁵⁹ The Ninth Circuit vacated the death sentence in its en banc decision.⁶⁰

1. Substantive Considerations: Thompson’s Claims for Relief

Thompson challenged the constitutionality of his conviction on two grounds: ineffective assistance of counsel and prosecutorial misconduct.⁶¹ Thompson alleged that his counsel’s performance at trial was deficient because his attorney did not rebut forensic evidence of rape and did not adequately impeach two government informants.⁶² Thompson also claimed that the prosecutor’s use of inconsistent case theories in the separate trials of Thompson and his co-defendant, David Leitch, constituted prosecutorial misconduct that violated due process.⁶³

The court, in an opinion Judge Fletcher authored, examined the performance of Thompson’s counsel at trial under the standard the Supreme Court articulated in *Strickland v. Washington*.⁶⁴ The Ninth Circuit pointed to counsel’s failure to rebut forensic evidence demonstrating that Thompson committed the rape, which provided the grounds for a death sentence.⁶⁵ The coroner had found a lack of physical evidence indicating rape occurred; an expert called during the evidentiary hearing testified in part that bruises on the victim were several weeks old and that the bodily fluids found on the victim were

56. See *Thompson*, 120 F.3d at 1047; see also Reinhardt, *supra* note 38, at 330–32.

57. See *Thompson*, 120 F.3d at 1047–48; see also Reinhardt, *supra* note 38, at 334–36.

58. See *Thompson*, 120 F.3d at 1048; see also Reinhardt, *supra* note 38, at 335–36.

59. *Thompson*, 120 F.3d at 1048.

60. *Id.* at 1048, 1060.

61. *Id.* at 1051–59.

62. *Id.* at 1052–55.

63. *Id.* at 1055–59.

64. 466 U.S. 668 (1984). *Strickland* established a two-step process for showing ineffective assistance of counsel: First, counsel’s performance was deficient, and second, “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

65. See *Thompson*, 120 F.3d at 1052–53.

more consistent with consensual intercourse.⁶⁶ Thompson's counsel did not pursue this avenue in part because it did not fit with his theory that another perpetrator had committed the rape, which conflicted with the coroner's testimony that there was no physical evidence of rape.⁶⁷ The commission of a rape in conjunction with murder provided not only the alleged motive for Thompson to commit the murder, but also the special circumstances making Thompson eligible for the death penalty.⁶⁸ Therefore, counsel's strategic error prejudiced Thompson by subjecting him to the death penalty: "We can think of no error more prejudicial than one that is the precipitating cause of an erroneous death sentence."⁶⁹

The court then examined trial counsel's failure to impeach two jailhouse informants.⁷⁰ The evidentiary hearing had revealed that law enforcement officers found Edward Fink, who testified against Thompson at trial, to be an unreliable informant.⁷¹ Fink had a long history of fabricating confessions so he could reap the benefits associated with providing the information.⁷² During trial, Thompson's counsel cross-examined Fink about prior felony convictions, his lengthy history of crime, and his abuse of drugs, but "stopped investigating Fink's background before trial because he believed he had enough material to cross-examine Fink, and . . . stopped cross-examining him because he thought the judge was getting restless and the jury had 'gotten the message.'"⁷³

Thompson's counsel also failed to impeach a second informant with readily available evidence, including the incorrect details of the alleged confession, which "parroted almost verbatim inaccurate news reports."⁷⁴ Thompson's counsel did not introduce evidence that the second informant

had served as an informant since the age of fourteen, that two police agencies . . . considered him unreliable, that [his] family considered him to be a pathological liar, and that [he] had shared

66. *Id.* at 1052.

67. *Id.* at 1052–53. The panel had found that counsel's strategic decision in this regard fell below the level of reasonableness, but did not result in prejudice. *Id.* at 1050, 1053.

68. *See id.* at 1053.

69. *Id.*

70. *Id.* at 1053–54.

71. *Id.* at 1054. Another lawyer had successfully used information about Fink's unreliability to get the case against his client dropped when Fink was a witness. *Id.*

72. *Id.*

73. *Id.* at 1053–54.

74. *Id.* at 1054.

a cell with Leitch [Thompson's co-defendant] for several weeks before coming into contact with Thompson.⁷⁵

The inadequate impeachment of the informants prejudiced Thompson, the en banc court found, in part because the prosecution relied so heavily on the informants' testimony as the dispositive evidence that Thompson had committed the rape and murder.⁷⁶ Effective impeachment would have weakened the prosecution's case substantially.⁷⁷ Therefore, the cumulative effect of counsel's errors "cast grave doubt on the reliability of the rape conviction and the rape special circumstance finding, and thus of the death sentence itself."⁷⁸

The court also addressed Thompson's claims of prosecutorial misconduct, finding that a prosecutor cannot present inconsistent evidence and theories of the same crime to convict two different defendants at separate trials.⁷⁹ In the preliminary phase of the trial, when Thompson and Leitch were being tried jointly, the prosecution presented the testimony of jailhouse informants who testified that Thompson had told them Leitch wanted the victim dead and that Thompson had had consensual sex with the victim before her murder.⁸⁰ But the prosecution did not call these informants at Thompson's trial, instead relying on two new informants who testified that Thompson said he had raped the victim.⁸¹ At Leitch's trial, the prosecutor called the original informants, who had testified as defense witnesses in Thompson's trial—and to whose testimony the prosecution had objected.⁸² After securing a guilty verdict in Thompson's trial, the prosecutor "manipulated evidence and witnesses, argued inconsistent motives, and at Leitch's trial essentially ridiculed the theory he had used to obtain a conviction and death sentence at Thompson's trial."⁸³

While the prosecutorial misconduct claim did not receive a majority of votes in the en banc court, Judge Fletcher, joined by three other judges, found that the prosecutor's actions rose to the level of prosecutorial misconduct.⁸⁴ Such conduct prejudiced Thompson because

75. *Id.*

76. *Id.* at 1055.

77. *Id.*

78. *Id.*

79. *Id.* at 1058.

80. *Id.* at 1055.

81. *Id.* at 1056.

82. *Id.*

83. *Id.* at 1057.

84. *Id.* at 1058 ("[I]t is well established that when no new significant evidence comes to light a

the prosecutor maintained in all proceedings, except Thompson's trial, that only Leitch had a motive for murder.⁸⁵

2. *Procedural Considerations: AEDPA Requires Recall of the Mandate*

Before examining the substance of Thompson's claims, the en banc court first had to demonstrate its ability to review the case. AEDPA requirements made the failure to call for en banc review crucial, and recall of the mandate necessary, as this habeas petition was Thompson's one bite at the apple.⁸⁶ Although Thompson made additional motions and introduced additional evidence after failing to receive rehearing from an en banc court, the majority opinion emphasized that it did not consider any of that information in reaching its decision.⁸⁷ It considered only Thompson's first petition and the evidence contained within it.⁸⁸ To do otherwise would have forced the court to consider Thompson's claim under AEDPA's even more restrictive framework for reviewing successive petitions.⁸⁹

The en banc court also emphasized that it did not take lightly the recall of a mandate in a death penalty case.⁹⁰ But the circumstances in the *Thompson* case were extraordinary. Judge Fletcher's opinion echoed the theme from her Madison Lecture a few years earlier that procedural restraints should not trump justice:

Our interest both in protecting the integrity of our processes and in preventing injustice are implicated in this case before us [I]n reversing the district court, the panel appears to have made fundamental errors of law that, if not corrected, would lead to a miscarriage of justice. The consequence of our failure to act would be the execution of a person as to whom a

prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime.”).

85. *Id.* at 1055, 1059.

86. Congressional history reveals that many thought of AEDPA as giving habeas petitioners “one bite at the apple.” *See, e.g., In re Davis*, 565 F.3d 810, 817–18 (11th Cir. 2009).

87. *Thompson*, 120 F.3d at 1049.

88. *Id.*

89. *Calderon v. Thompson*, 523 U.S. 538, 553–54 (1998).

90. *Thompson*, 120 F.3d at 1048 (“Recalling a mandate is an extraordinary remedy and we will exercise our authority to do so only in exceptional circumstances, such as when it is necessary in order to prevent injustice.”).

grave question exists whether he is innocent of the death-qualifying offense, the alleged rape, and whose conviction on the first-degree murder charge may be fundamentally flawed. This is a person who has never before been convicted of a crime. Under these circumstances, we have an obligation to recall the mandate in order to preserve the integrity of the judicial process.⁹¹

The Ninth Circuit did all it could to follow proper procedure, carefully justifying reaching the merits of the case.⁹² But the need to correct potential constitutional violations resulting in a death sentence proved no match for the Supreme Court's laser-like focus on procedure.

B. The Supreme Court Reversed the En Banc Court on Procedural Grounds Without Considering the Merits

Thompson's Ninth Circuit reprieve did not last. With a five-to-four majority, the Supreme Court reversed the en banc decision,⁹³ with a majority opinion that ironically highlighted many of the very same concerns that Judge Fletcher had articulated in her Madison Lecture.

The Supreme Court examined whether the Ninth Circuit had violated AEDPA or abused its discretion in recalling the mandate sua sponte.⁹⁴ The Court found no violation of AEDPA because the Ninth Circuit had addressed the claims and evidence contained only in Thompson's first habeas petition.⁹⁵ Indeed, the Ninth Circuit had tried in earnest to follow proper procedure.⁹⁶ Nevertheless, the Supreme Court held that the Ninth Circuit had abused its discretion.⁹⁷

In explaining how the Ninth Circuit's recall of the mandate constituted an abuse of discretion, the majority invoked the doctrine of finality.⁹⁸ The Supreme Court's opinion highlighted the "profound societal costs that attend the exercise of habeas jurisdiction," which warrant strict limitations on its use.⁹⁹ "These limits reflect our enduring respect for the State's interest in the finality of convictions that have

91. *Id.*

92. *Id.* at 1048–51.

93. *Calderon*, 523 U.S. at 541.

94. *Id.* at 541–42.

95. *Id.* at 554.

96. *Thompson*, 120 F.3d at 1048–51.

97. *Calderon*, 523 U.S. at 542.

98. *Id.* at 555–59.

99. *Id.* at 554–55 (quoting *Smith v. Murray*, 477 U.S. 527, 539 (1986)).

survived direct review within the state court system.”¹⁰⁰ The Supreme Court even quoted academic writings from the Warren Court era that urged a narrowing of habeas review.¹⁰¹ The Court opined that finality not only enhances the quality of work done by federal judges, but also preserves the balance between state and federal power.¹⁰² As such, when a federal court of appeals denies habeas relief, “the State is entitled to the assurance of finality.”¹⁰³ At that point, “finality acquires an added moral dimension” and “the State’s interests in actual finality outweigh the prisoner’s interest in obtaining yet another opportunity for review.”¹⁰⁴

The Court then analyzed the Ninth Circuit’s en banc decision.¹⁰⁵ Under habeas corpus jurisprudence, the recall of the mandate would be an abuse of discretion unless necessary to avoid a miscarriage of justice.¹⁰⁶ In the context of innocence, “the miscarriage of justice exception is concerned with actual as compared to legal innocence.”¹⁰⁷ In other words, it is not enough that a habeas petitioner show constitutional deficiencies at trial; the petitioner must show facts demonstrating actual innocence. To meet this standard, the petitioner must demonstrate that new evidence renders it more likely than not that no reasonable juror would have convicted the petitioner of the underlying crime.¹⁰⁸ To challenge a death sentence, the petitioner must demonstrate by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty.¹⁰⁹ Ultimately, the Supreme Court held that the Ninth Circuit abused its discretion in recalling the mandate under either standard.¹¹⁰

A dissent authored by Justice David Souter, and joined by Justices John Paul Stevens, Ruth Bader Ginsberg, and Stephen Breyer,¹¹¹ found

100. *Id.* at 555 (quotation marks omitted) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

101. *Id.*

102. *Id.* (“Finality is essential to both the retributive and the deterrent functions of criminal law.”).

103. *Id.* at 556.

104. *Id.* at 556–57.

105. *Id.* at 558.

106. *Id.*

107. *Id.* at 559 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)).

108. *Id.*

109. *Id.* at 559–60.

110. *Id.* at 566.

111. *Id.* at 566 (Souter, J., dissenting).

the procedural circumstances surrounding the recall of the mandate regrettable, but would not have found that the court abused its discretion in recalling the mandate:

[H]owever true it is that the en banc rehearing process cannot effectively function to review every three-judge panel that arguably goes astray in a particular case, surely it is nonetheless reasonable to resort to en banc correction that may be necessary to avoid a constitutional error standing between a life sentence and an execution.¹¹²

C. *The Supreme Court's Decision Led to an Unjust Result*

Judge Reinhardt reflected on the unprecedented sequence of events in *Thompson v. Calderon* in his own Madison Lecture.¹¹³ “Reversal by a higher court,” he noted, “is not proof that justice is thereby better done.”¹¹⁴ The Supreme Court’s decision exemplified the Rehnquist Court’s theory of habeas review: Procedural rules limit a court’s ability to review the merits of constitutional claims to protect the state’s interest in finality.¹¹⁵ But “[i]n *Thompson*, the Court took one further step—its most indefensible thus far—to elevate state procedural interests over concern for human life, over due process of law, and yes, over the Constitution itself.”¹¹⁶

Looking at the Supreme Court’s opinion, it is hard to see the balance between justice and finality. Whereas the Supreme Court gave “finality” a moral dimension, it did not do the same for “justice.” The Supreme Court did not consider whether *Thompson*’s constitutional rights had been violated, but rather used the occasion as an opportunity to create a new rule further restricting the avenues by which condemned inmates can obtain relief for constitutional violations: A federal appeals court cannot recall its mandate in a death penalty case unless the defendant can establish actual innocence.¹¹⁷ The result of the case, despite the best of efforts of the Ninth Circuit judges to ensure justice, was that “the worship of abstract procedural principles” resulted in the loss of “our concern for fairness and justice.”¹¹⁸ The Supreme Court elevated process

112. *Id.* at 569.

113. Reinhardt, *supra* note 38.

114. *Id.* at 314 (quoting *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring)).

115. *Id.* at 315–16.

116. *Id.* at 351–52.

117. *Calderon*, 523 U.S. at 558.

118. Reinhardt, *supra* note 38, at 319.

above all else, further limiting the ability of judges to ensure a just outcome.

After the Supreme Court vacated the decision, the en banc Ninth Circuit considered Thompson's motion pursuant to Federal Rule of Civil Procedure 60(b),¹¹⁹ in effect, a successive habeas petition.¹²⁰ The court thus analyzed Thompson's claim under the standard set forth in AEDPA.¹²¹ To bring a successive habeas petition, the petitioner must show that

the factual predicate for the claim could not have been discovered previously through the exercise of due diligence [and that] the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.¹²²

The court found that Thompson failed to meet the second prong.¹²³ The additional evidence Thompson offered, viewed in light of the evidence as a whole, would not "be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found Thompson guilty beyond a reasonable doubt of rape, which was the sole aggravating factor supporting the death penalty."¹²⁴

119. *Thompson v. Calderon*, 151 F.3d 918, 920 (9th Cir. 1998). Federal Rule of Civil Procedure 60(b) provides for relief from a final order based upon newly discovered evidence:

[O]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment.

120. In habeas cases governed by AEDPA, courts treat Rule 60(b) motions as successive petitions under 28 U.S.C. § 2244(b)(2). *Thompson*, 151 F.3d at 920–21.

121. *Thompson*, 151 F.3d at 921–22. As discussed, the procedural rules governing habeas review made the recall of the mandate necessary to prevent the court from considering the petition under the more restrictive guidelines for successive habeas petitions. *See supra* notes 80–83 and accompanying text. The Supreme Court explicitly stated that, had the court considered claims or evidence presented in Thompson's later filings, its action would have been based on a successive application, and so would be subject to 28 U.S.C. § 2244(b), one of AEDPA's limiting provisions. *Calderon*, 523 U.S. at 554.

122. *Thompson*, 151 F.3d at 924 (quoting 28 U.S.C. § 2244(b)(2)(B) (2000)).

123. *Id.* at 926.

124. *Id.* at 925.

Judge Reinhardt dissented.¹²⁵ Although he agreed with most of the majority's opinion, he would have found Thompson made the requisite prima facie showing.¹²⁶ In analyzing Thompson's claim, Judge Reinhardt referenced the prior en banc decision, in which the court held that constitutional violations permeated the trial, noting that the substance of that decision still stood because the Supreme Court had reversed on procedural grounds.¹²⁷ In such circumstances, the constitutional violations "must color the prism" through which the court considered Thompson's successive petition.¹²⁸ Despite AEDPA's significant obstacles, Judge Reinhardt emphasized, a prisoner who makes a convincing demonstration of actual innocence can, in fact, have his claim heard on the merits.¹²⁹ Judge Reinhardt warned that "the miscarriage of justice that is about to occur is the product of the federal judiciary's elevation of procedure over justice, of speed and efficiency over fairness and due process."¹³⁰

III. DAVIS COULD ALLOW COURTS TO FOCUS ON THE MERITS IN CERTAIN FACTUAL SITUATIONS

As Justice Scalia pointed out in *Davis*, the Supreme Court "has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent."¹³¹ But the Supreme Court's action in *Davis* indicates that the Supreme Court will not tolerate the execution of a condemned inmate in the face of convincing evidence tending to show actual innocence. After years of procedure trumping justice, the Supreme Court may have signaled in *Davis* that constitutional values cannot always come second, at least when it comes to actual innocence.

125. *Id.* at 931 (Reinhardt, J., dissenting).

126. *Id.*

127. *Id.*

128. *Id.* ("This court's refusal to allow Thompson to file a habeas petition will result in the execution of a man who was convicted and sentenced to death in a trial that violated fundamental principles of fairness, in which the constitutional violations were so egregious that seven former prosecutors, themselves highly experienced in death penalty cases, took the remarkable step of filing an amicus brief on his behalf with the United States Supreme Court.")

129. *Id.* at 937 ("Despite increasing restrictions on the writ of habeas corpus, the door has nonetheless been left open for someone who can make a convincing demonstration of actual innocence under 28 U.S.C. § 2244(b)(2)(B).")

130. *Id.*

131. 558 U.S. ___, 130 S. Ct. 1, 3 (2009) (mem.) (Scalia, J., dissenting).

A. *The Eleventh Circuit in Davis Applied AEDPA in a Potentially Unconstitutional Way*

Before the *Davis* case arrived at the Supreme Court, the Eleventh Circuit had addressed Davis's actual innocence claim.¹³² The evidence supporting Davis's claim of innocence included "seven of nine key trial witnesses recant[ing] their testimony."¹³³ The two remaining witnesses were the alternative suspect and a witness who, despite telling police he could not identify the shooter, later identified Davis.¹³⁴ Three witnesses declared in sworn affidavits that the alternative suspect—the one who ran to tell police of the murder in the first place—had confessed to the murder.¹³⁵

But the majority declined to grant Davis relief on his innocence claim because the evidence tending to show Davis's innocence could not be introduced at that point under AEDPA.¹³⁶ AEDPA allows a successive habeas petition only if the evidence could not have been discovered earlier;¹³⁷ Davis had introduced much of the relevant evidence in support of his earlier ineffective assistance of counsel claim.¹³⁸ While Davis argued that he could not have brought his actual innocence claim earlier because he had not yet exhausted his state remedies on that claim, the majority held that Davis should have brought the actual innocence claim in his first petition and the court would have stayed the petition while he exhausted the claim.¹³⁹ Therefore, the majority considered only the new evidence that could not previously have been discovered—one affidavit.¹⁴⁰ That affidavit, "standing alone," could not overcome the state's evidence at trial to make a "clear and convincing" showing of actual innocence.¹⁴¹

The majority's opinion in the Eleventh Circuit decision in *Davis* again highlights the ways in which restrictions on habeas corpus have eclipsed

132. 565 F.3d 810 (11th Cir. 2009).

133. *Id.* at 827 (Barkett, J., dissenting).

134. *Id.*

135. *Id.*

136. *Id.* at 822 (majority opinion).

137. *Id.* at 819 (citing 28 U.S.C. § 2244(b)(2)(B)(i) (2000)).

138. *Id.* at 819–20.

139. *Id.* at 820. The court then stated Davis had not adequately explained why he failed to bring his actual innocence claim in state court at an earlier point. *Id.* at 821. The court also noted that Davis could have brought his actual innocence claim in his first petition and tried to overcome its procedural default. *Id.*

140. *Id.* at 822.

141. *Id.* at 824.

justice. Despite evidence indicating that Davis might be innocent, the Eleventh Circuit held that AEDPA prevented it from looking at that evidence.¹⁴² Furthermore, the majority found that, under AEDPA, Davis had to show a separate constitutional violation in addition to showing clear and convincing evidence of actual innocence.¹⁴³ Judge Barkett, in dissent, reasoned that AEDPA could not apply “when to do so would offend the Constitution and the fundamental concept of justice that an innocent man should not be executed.”¹⁴⁴ On such occasions, judges must assure a just outcome despite procedural obstacles.¹⁴⁵ Admitting that judges “must deal with the thorny constitutional and statutory questions,” the dissent urged that courts not “lose sight of the underlying issue.”¹⁴⁶ “To execute Davis, in the face of a significant amount of proffered evidence that may establish his actual innocence, is unconscionable and unconstitutional.”¹⁴⁷

In denying relief, the majority explicitly noted that Davis still could petition the Supreme Court for an original writ of habeas corpus.¹⁴⁸ In doing so, the majority may have signaled the legitimacy of Davis’s claim, implicitly acknowledging that Davis’s case had the “exceptional circumstances warranting the exercise of the Court’s discretionary powers” when “adequate relief cannot be obtained in any other form or from any other court.”¹⁴⁹ Considering that the Supreme Court had not granted such a writ in fifty years, the chances of Davis achieving relief were slim. Nonetheless, the court recommended that Davis use the writ and stayed his execution for an extra thirty days so he could do so.¹⁵⁰

The unlikely ground for relief the Eleventh Circuit posited actually garnered results.¹⁵¹ Justice Stevens’s concurrence in *In re Davis*,

142. *Id.*

143. *Id.* (“The statute undeniably requires a petitioner seeking leave to file a second or successive petition to establish actual innocence by clear and convincing evidence *and* another constitutional violation.”).

144. *Id.* at 827 (Barkett, J., dissenting) (“In this case, the circumstances do not fit neatly into the narrow procedural confines delimited by AEDPA.”).

145. *Id.* at 827–28 (noting that “it is precisely this type of occasion that warrants judicial intervention”).

146. *Id.*

147. *Id.*

148. *Id.* at 826 (majority opinion). “The Supreme Court has made clear that the habeas corpus statute, even after the AEDPA amendments of 1996, continues to allow it to grant a writ of habeas corpus filed pursuant to its original jurisdiction.” *Id.* at 826–27.

149. *Felker v. Turpin*, 518 U.S. 651, 665 (1996).

150. *Davis*, 565 F.3d at 826–27.

151. *See In re Davis*, 558 U.S. ___, 130 S. Ct. 1 (2009) (mem.).

supporting the decision to order the district court to hold an evidentiary hearing, echoed Judge Barkett's dissent, which argued that an "actual innocence" claim should receive separate treatment under AEDPA.¹⁵² If courts interpret AEDPA as barring the claim of a death row inmate who can establish his innocence, then the section of AEDPA barring such a claim would be unconstitutional.¹⁵³ "Alternatively, the court may find in such a case that the statute's text is satisfied, because decisions of this Court clearly support the proposition that it 'would be an atrocious violation of our Constitution and the principles upon which it is based' to execute an innocent person."¹⁵⁴

B. Davis Could Shift the Focus from Process Back to Substance

Over the years, dozens of condemned inmates have been released from prison because they were found to be innocent.¹⁵⁵ DNA evidence exculpated some of them,¹⁵⁶ but most had "been victims of dishonest witnesses, prosecutors, or police officers, whose lies were found out only years later."¹⁵⁷ Yet when courts find that procedural hurdles prevent adjudication on the merits, the resulting opinions tend to downplay the evidence demonstrating innocence "to persuade the public that justice has been done."¹⁵⁸ The Eleventh Circuit panel in *Davis* and the en banc Ninth Circuit addressing Thompson's successive petition both appeared to do just this.¹⁵⁹ However, as Judge Fletcher noted:

We cannot allow ourselves to be lulled by the belief that the crimes for which the death penalty is imposed are uniformly heinous and that the chance of actual innocence in any given case is virtually nonexistent. Unfortunately, that belief is false.

152. *Id.* at 1–2 (Stevens, J., concurring); *Davis*, 565 F.3d at 827–31 (Barkett, J., dissenting).

153. *Davis*, 130 S. Ct. at 1 ("Even if the court finds that § 2254(d)(1) applies in full, it is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence.").

154. *Id.* at 1–2 (quoting *Davis*, 565 F.3d at 830). Yet Justice Scalia in his dissent reasoned that "[t]here is no sound basis for distinguishing an actual-innocence claim from any other claim that is alleged to have produced a wrongful conviction." *Id.* at 3 (Scalia, J., dissenting).

155. BANNER, *supra* note 11, at 303.

156. *Id.* at 303–04.

157. *Id.* at 304.

158. Pettys, *supra* note 29, at 2360.

159. "All one need do is read Judge Fletcher's en banc opinion of last August to discover that today's characterization of the evidence is plainly incorrect." *Thompson v. Calderon*, 151 F.3d 918, 933–34 (9th Cir. 1998) (Reinhardt, J., dissenting).

The danger of executing innocent people is real, and any clear-eyed assessment of the death penalty must recognize this.¹⁶⁰

Importantly, the Supreme Court's action in *Davis* makes apparent the viability of actual innocence claims in death penalty cases. Less apparent is what will happen in the wake of *Davis*. As it stands today, the exacting standard for demonstrating the level of actual innocence required to obtain even a hearing on the merits renders relief illusive.¹⁶¹ The Supreme Court's rare grant of relief in *Davis* possibly indicates that lower courts should have granted Davis an evidentiary hearing on the basis of the cumulative evidence before the case reached the Supreme Court.

Going forward, courts could interpret the *Davis* decision as an anomaly with little application outside the precise facts of the case. In fact, the decision may discourage courts from granting relief by showcasing the original writ of habeas corpus as a feasible option. However, lower courts should not view the Supreme Court's exceptional move in such a limited way. Rather, the Supreme Court's decision to direct the district court to hold an evidentiary hearing on Davis's actual innocence claim should encourage courts to apply a less strict interpretation of the requirements for making a showing of actual innocence on habeas review. Justice Stevens seemed to be advocating this approach: If courts apply AEDPA in such a way that it bars consideration of an actual innocence claim, then AEDPA is unconstitutional.¹⁶²

After the *Thompson* case, Judge Reinhardt reasoned that it was "time to step back and look at what we are doing to ourselves and to our system of justice."¹⁶³ While such an examination could not effect change during the Rehnquist era of the 1990s, Judge Reinhardt saw it as "the duty of the academy and the legal profession to make the record that will be necessary when the pendulum swings."¹⁶⁴ Cases like those of Thomas Thompson and Troy Davis, among numerous others, have made the

160. Fletcher, *supra* note 13, at 821.

161. See generally Pettys, *supra* note 29 (discussing the strict procedural rules that limit the consideration of newly discovered evidence, even if that evidence could demonstrate actual innocence).

162. See *supra* notes 145–146 and accompanying text. See also Pettys, *supra* note 29, at 2362 ("The [miscarriage-of-justice] exception could have been crafted in a manner that would ensure that, when there were reasonable suspicions that a person had been found guilty of a crime he or she did not commit, the federal courts would evaluate the merits of the prisoner's constitutional claims and either grant or deny habeas relief accordingly.").

163. Reinhardt, *supra* note 38, at 352.

164. *Id.*

record. The *Davis* decision could—and should—set the pendulum swinging back.

CONCLUSION

While Judge Fletcher asked the question “can justice be done?” in the context of the death penalty, she did not answer it. Instead, she declared, “We are a civilized nation. We are a caring people. We value human life. We prize human dignity. The decision deliberately to take a human life is an awesome responsibility.”¹⁶⁵

“Justice” in the context of the death penalty is difficult to define. Justice Brennan stated that, “law, when it merits the synonym justice, is based on reason and insight.”¹⁶⁶ Some will argue that justice is not done so long as states are executing offenders. Others will argue that the long time between conviction and execution means justice has not been done. A third group, whether or not supporting the death penalty, will charge that justice cannot be done unless condemned inmates receive full and fair hearings on their claims. Such examination must not be influenced by the grotesque nature of these crimes, by a desire for retribution, by biased juries or judges, or by procedural restrictions preventing full and fair analyses. It is this final definition of justice that the judicial system must try to achieve. It is this definition of justice that is evident in the death penalty opinions Judge Fletcher has authored over the years. And it is this definition of justice that *Davis* could give courts the latitude to achieve. While procedural hurdles erected in the name of “finality” have taken priority in the past few decades, the *Davis* case should serve as a turning point to allow judges to reach just results.

165. Fletcher, *supra* note 13, at 828.

166. William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 331 (1986).