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Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere

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In November 1993, the College of William and Mary hosted a symposium entitled *The American Criminal Justice System Approaching the Year 2000*. A number of extraordinary individuals took part in this event, including the author of the following article, Dean Vivian Berger. Simultaneous with the meeting in Williamsburg, the *William and Mary Law Review* published a Symposium Issue that included the written contributions of a number of the participants. Because of the late developments analyzed in Dean Berger's article, her thoughtful consideration of this area of the law was not part of the Symposium Issue. I am delighted that her incisive treatment of this significant area of the law now appears in this Issue of the *William and Mary Law Review*.

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HERRERA V. COLLINS: THE GATEWAY OF INNOCENCE FOR DEATH-SENTENCED PRISONERS LEADS NOWHERE

VIVIAN BERGER*

"Innocence finds not nearly as much protection as guilt."¹

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1. LA ROCHEFOUCAULD, MAXIMS (trans. by author of this Article).

I. INTRODUCTION

On February 19, 1992, Leonel Herrera came within minutes of execution.² He had been convicted and sentenced to death for the murder of a Texas police officer a decade earlier. Now, asserting a Perry Mason-like claim of innocence ("My brother did it") in a successive habeas petition, Herrera received a stay from the federal district judge only to see it vacated promptly by the Court of Appeals for the Fifth Circuit.³

The Supreme Court then refused, in a five to four vote, to grant a stay.⁴ Because this split suggested the probability of four votes for review on the merits of his contentions, rejected by the court below, Herrera's attorneys immediately petitioned for certiorari while simultaneously knocking on various courthouse doors, federal and state, in a frantic effort to keep the case and the client alive.⁵ Before sunrise, the Justices agreed to hear the matter but affirmed the previous stay denial.⁶ Their ruling risked the travesty of an inmate's constitutional claims being deemed sufficiently substantial to warrant plenary judicial consideration—yet insufficiently substantial to warrant protection from instant mooted by death!⁷ In a final round in this

2. The course of events described below is set forth in Marcia Coyle & Marianne Lavelle, *Capital Appeal Becomes a Court Tug of War*, NAT'L L.J., Mar. 2, 1992, at 5.

3. *Herrera v. Collins*, 954 F.2d 1029 (5th Cir. 1992).

4. *Herrera v. Collins*, 112 S. Ct. 1074 (1992) (Justices Blackmun, Stevens, O'Connor, and Souter voted to grant the stay of execution).

5. Eleventh-hour litigation of this nature is typical of capital proceedings. See, e.g., TASK FORCE ON DEATH PENALTY HABEAS CORPUS, AMERICAN BAR ASSOCIATION, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 46 (1990) [hereinafter TASK FORCE REPORT]; Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Report on Habeas Corpus in Capital Cases*, 45 Crim. L. Rep. (BNA) 3239, 3239-40 (Sept. 27, 1989) [hereinafter *Powell Committee Report*]; see also Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1668, 1685 (1990) (noting respective views on the subject of the *Powell Committee Report* and the *Task Force Report*).

6. *Herrera v. Collins*, 112 S. Ct. 1074 (1992).

7. Such an unseemly outcome is possible because the Court's "Rule of Four" calls for a grant of certiorari, in death cases as in others, on less than a majority vote. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 5.4, at 230 (7th ed. 1993). Until the retirement of Justice Powell, this risk did not materialize—he always provided the fifth vote for a stay, if needed, even when opposed to review himself. Coyle & Lavelle, *supra* note 2, at 29. Notably, sometimes a Justice has dissented

endgame of "chicken," the Texas Court of Criminal Appeals blinked before the high Court and canceled the scheduled execution.⁸

Media attention to *Herrera*, which had lapsed with the resolution of the grisly maneuvering over the stay, revived when the sideshow yielded at last to the main event.⁹ The Court heard oral argument by lawyers for the petitioner and for the State of Texas in the first week of the October 1992 Term.¹⁰ If anything, the prisoner posed an issue even more dramatically compelling than the circumstances of his reprieve. His first "Question[] Presented" was "[w]hether the Eighth and Fourteenth Amendments permit a state to execute an individual who is innocent of the crime for which he or she was convicted and sentenced to death."¹¹ The answer, abstractly, had to be "no."¹² Indeed, the State could not lawfully imprison such a person either¹³—in the

from a stay order only to end by supporting the defendant in the ultimate disposition on the merits. Compare, e.g., *Wainwright v. Ford*, 467 U.S. 1220, 1222 (1984) (O'Connor, J., dissenting from refusal to vacate stay) with *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) (O'Connor, J., concurring in the result in part and dissenting in part) (overturning sentence of death and remanding for hearing on incompetency claim).

8. *Herrera v. Collins*, 113 S. Ct. 853, 859 (1993). Chief Justice Rehnquist's later opinion for the Court simply recites the fact of the stay without mentioning the brouhaha preceding its entry. *Id.*

9. See, e.g., Neil A. Lewis, *Court Hears Condemned Texan's Case*, N.Y. TIMES, Oct. 8, 1992, at B22; Steve McGonigle, *Court Hears Case on Texas Man's Innocence Claim*, DALLAS MORNING POST, Oct. 8, 1992, at 4A; David G. Savage, *High Court Asked to Allow Execution Despite Evidence*, L.A. TIMES, Oct. 8, 1992, at A1.

10. See *Arguments Heard*, 52 Crim. L. Rep. (BNA) 3038 (Oct. 14, 1992) (*Herrera* argued Oct. 7, 1992).

11. Brief for Petitioner at i, *Herrera v. Collins*, 113 S. Ct. 853 (1993) (No. 91-7328).

12. Doing so would surely entail "the gratuitous infliction of suffering," in violation of the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) (Stewart, Powell, and Stevens, JJ.); see also *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (proscribing the imposition of the death penalty absent "major participation in the felony committed" and "reckless indifference to human life").

13. See generally *Schad v. Arizona*, 111 S. Ct. 2491, 2497 (1991) (stating that under the Fourteenth Amendment, "no person may be punished criminally save upon proof of some specific illegal conduct"); *Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."). Solely from a public relations standpoint, the Court hardly could disclaim interest in whether a person sentenced to death was actually innocent. Cf. *Herrera*, 113 S. Ct. at 874-75 & n.1 (Scalia, J., concurring)

event its agents knew or ought to have known the pertinent facts.¹⁴

But guilt and innocence lack meaning, in legal as opposed to moral terms, absent a setting in which fallible human actors can determine their existence.¹⁵ That setting, of course, has traditionally been the criminal trial. Since Herrera sought to impugn the outcome of that trial, he confronted the much tougher issue, contained in his second "Question[] Presented," of "[w]hat post-conviction procedures are necessary to protect against the execution of an innocent person?"¹⁶ This added query, though open-ended and never precisely addressed in his brief,¹⁷ implicitly invited the Court to respond in Herrera's favor in ways it likely would find unwelcome.

The petitioner's belated claim of innocence seemed to demand the constitutionalization of the universal, yet highly disfavored,¹⁸ statutory motion for a new trial based on newly discovered evidence or the federalization of such a motion¹⁹ via the

(noting the Court's understandable reluctance "to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man") (footnote omitted).

14. See *infra* note 418 (discussing the appropriate threshold showing to trigger constitutional right to vindicate a post-trial claim of innocence).

15. See *Herrera*, 113 S. Ct. at 859.

16. Brief for Petitioner at i, *Herrera* (No. 91-7328); cf. *Ford v. Wainwright*, 477 U.S. 399, 435 (1986) (Rehnquist, J., dissenting) ("Since no State sanctions execution of the insane, the real battle being fought in this case is over what procedures must accompany the inquiry into sanity.").

17. The petitioner simply requested a remand for some sort of hearing by the district court on his claim of innocence. Brief for Petitioner at 31, 42, 45, *Herrera* (No. 91-7328). He devoted less than a page and a half out of 45 pages to general comments about possible procedures and standards applicable to its disposition. See *id.* at 43-44; see also *Herrera*, 113 S. Ct. at 861 (noting Herrera's imprecision in describing proposed federal relief). Doubtless, he selected this course for strategic reasons—preferring to stress the obvious horror of killing an innocent over the murky practical problems inherent in trying to avoid that consequence years after verdict and judgment.

18. See *infra* text accompanying notes 86-87, 99-106.

19. The latter might be viewed as constitutionalizing by indirection: pressuring, though not actually forcing, states like Texas to revamp post-trial procedures in order to avert, or at least postpone, review by a federal habeas court. See generally 28 U.S.C. §§ 2254(b)-(c) (1988) (requiring exhaustion of remedies available in state court prior to review).

increasingly scorned²⁰ habeas remedy—or, possibly, both. As Texas barred any such challenge made more than thirty days from the date of sentence,²¹ and Herrera had waited over eight years,²² he argued that the district court must now give him a “meaningful post-trial opportunity” to prove his innocence.²³ In the circumstances, the court may have construed his argument as a call to invalidate all time limits on motions to consider new evidence²⁴ filed by prisoners sentenced to death. Alternatively, the court could have viewed it as a contention that habeas courts should play backstop to recalcitrant state systems without post-conviction procedures open to those in Herrera’s position. Finally, he may have been requesting the best of state and federal worlds: compulsory state corrective process (here, an out-of-time motion for a new trial) and federal review of disappointing results on the merits.

To be sure, at this stage Herrera was asking only to return to the district court.²⁵ He was understandably coy about the procedural ramifications of his proposed substantive rule that the execution of an innocent person violates the Constitution. The Justices, however, could hardly ignore these implications,²⁶

20. See *infra* note 177 and accompanying text and text accompanying note 185.

21. See TEX. R. APP. P. ANN. r. 31(a)(1) (West 1993) (barring a motion for a new trial after 30 days). The Texas courts construe the 30-day bar on the motion as jurisdictional. *Herrera*, 113 S. Ct. at 860 (citations omitted); see also *Ex parte May*, 717 S.W.2d 84, 88 (Tex. Crim. App. 1986) (“The existence of newly discovered evidence relevant to the guilt of the applicant is not a ground for relief in a post-conviction writ of habeas corpus.”).

22. *Herrera*, 113 S. Ct. at 856, 858.

23. Brief for Petitioner at 38, *Herrera* (No. 91-7328) (original quotation in capitals).

24. All jurisdictions provide for such motions, but just 15 permit their filing more than three years after conviction. Of these, six have waivable bars; only nine have no limitation. Approximately one third of the states impose a cutoff of 60 days. See generally *Herrera*, 113 S. Ct. at 865-66 & nn.8-11 (listing the pertinent provisions of the states and the District of Columbia). The current version of Rule 33 of the Federal Rules of Criminal Procedure contains a two-year bar on motions for a new trial based on newly discovered evidence, which the courts have construed strictly. See, e.g., *United States v. Spector*, 888 F.2d 583, 584 (8th Cir. 1989); *United States v. Cook*, 705 F.2d 350, 351 (9th Cir. 1983).

25. See *supra* text accompanying note 23 and note 17.

26. As Justice Scalia acerbically remarked during argument, “We have a right to probe the reach of the rules we establish in this court.” *Arguments Heard, supra* note 10, at 3039.

when the petitioner suggested merely that "what is required by due process will likely depend as an initial matter upon the corrective procedures provided by the state courts."²⁷ Furthermore, precedent and theory in several areas—coupled with pragmatic considerations—ensured that prescribing a post-trial process for capital inmates to challenge their guilt would have posed problems even for a Court more sympathetic to condemned petitioners than the current Court. Herrera's case, thus, facially presented the paradox of a fairly obvious right to be spared from death if ultimately known to be innocent, without any seeming (judicial) remedy²⁸ for its practical vindication. The prisoner's dilemma, to borrow a phrase, had now become the Court's as well.

Herrera v. Collins was handed down on January 25, 1993.²⁹ Predictably, the petitioner lost.³⁰ Relegating him to executive clemency, six Justices held that he was not entitled to judicial review of his claim of innocence and therefore affirmed the judgment below.³¹ In the following pages, I will first briefly describe *Herrera's* facts and procedural history prior to the grant of certiorari.³² Then, departing from convention, I postpone discussion of the several opinions in *Herrera* until I have treated the various, potentially inconsistent themes and doctrines that—from a forward-looking vantage—appeared to bear on the resolution of this very troubling case.³³ Although differing only in style from the usual, after-the-fact assessment of the Justices' work product, that method strikes me as fairer where the question is controversial.³⁴ (Justice Blackmun, indeed, suggested

27. Brief for Petitioner at 44, *Herrera* (No. 91-7328). Elliptically, he added: "If a state provides a death sentenced inmate with a meaningful, full and fair opportunity to present the claim, then perhaps a federal court's role is more limited." *Id.*

28. For a discussion of the route of executive clemency, see *infra* text accompanying notes 129-47.

29. 113 S. Ct. 853 (1993).

30. He was executed shortly thereafter, on May 12, 1993. *Man in Case on Curb-ing New Evidence Is Executed*, N.Y. TIMES, May 13, 1993, at A14.

31. *Herrera*, 113 S. Ct. at 853-70. Justices Blackmun, Stevens, and Souter dissented. *Id.* at 876-84 (Blackmun, J., dissenting).

32. See *infra* part II.

33. See *infra* part III.

34. See Susan Blaustein, *The Executioner's Wrong*, WASH. POST, Aug. 1, 1993, at C1, C4 (discussing the appeal of death row inmate Gary Graham).

that the majority's disposition came close to sanctioning "simple murder"!³⁵) If nothing else, by educating the reader beforehand, it may convey the difficulty of the Court's task more vividly than the traditional hindsight analysis.

Yet in the end, after describing what the Justices said and did,³⁶ I reject the outcome in *Herrera*. This rejection derives in part from my opposition to much of the background jurisprudence of the past decade, which has curtailed the procedural and substantive relief available to capital litigants.³⁷ My recommended result might well fall short, however, of satisfying many who sided with the petitioner.

In a nutshell, I conclude that a death-sentenced prisoner asserting innocence on the basis of new evidence should have a constitutional right to file a motion for a new trial or similar action in state court at *any* time—regardless of otherwise operative periods of limitation. With more hesitation, I also conclude that the right may not be burdened by the strict "due diligence" requirements prevalent in the pertinent law.³⁸ Within broad limits, however, the State would be free to define the substantive, procedural, and evidentiary features of this proceeding.³⁹ Concomitantly, I envision a minimal role for habeas.⁴⁰ While federal courts should continue to play a prominent part in ensuring the constitutional liberties of state defendants,⁴¹ their

35. *Herrera*, 113 S. Ct. at 884 (Blackmun, J., dissenting). The other dissenters did not join this portion of his opinion.

36. See *infra* part IV.

37. See, e.g., Vivian Berger, "Black Box Decisions" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham, 41 CASE W. RES. L. REV. 1067, 1070-82 (1991) (discussing Eighth Amendment law retrenchments); Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9 (1990) (discussing the contraction of habeas corpus). But cf. Louis D. Bilionis, *Legitimizing Death*, 91 MICH. L. REV. 1643 (1993) (viewing these trends in a more positive light). See generally *infra* parts III.C, III.D.

38. See *infra* text accompanying notes 419-22; see generally *infra* part V.

39. A state could not place unreasonable obstacles in the way of the death-sentenced prisoner. See *infra* notes 404-05.

40. See *infra* text accompanying notes 423-39.

41. That role has been diminished by *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), and its progeny, see, e.g., *Gilmore v. Taylor*, 113 S. Ct. 2112 (1993); *Graham v. Collins*, 113 S. Ct. 892 (1993), which prohibit habeas courts from announcing or applying new rules of criminal procedure except in the narrowest circumstances, see *infra* text accompanying notes 190-94, as well as by other restric-

resources and expertise are poorly expended in second-guessing the factual findings of local judges or juries on guilt.⁴²

Had the Justices chosen this tack, they could have announced (uncontroversially) the substantive rule that the Eighth Amendment bars execution of an innocent person. They then should have held that capital defendants with newly discovered evidence of innocence possess the related procedural entitlement to a belated new trial motion in an appropriate state forum. In my view, these rights ought to be vindicated almost exclusively in the state courts—with federal judges wielding the writ mainly to ensure the availability and basic fairness of the local remedy. To a large extent, if not entirely,⁴³ present habeas law supports the narrow review that I recommend in the novel setting of “*Herrera* claims.” But that circumstance carries less weight than it otherwise might, in light of the actual result in *Herrera*. Plainly, for now, federal redress for capital inmates “‘in favor of unfortunate guilt’ ”⁴⁴ must come from Congress,⁴⁵ if at all. A clean slate awaits the pen.

II. *HERRERA*: THE FACTS⁴⁶

At Leonel Herrera's murder trial in January 1982, the jurors heard that, on the night of September 29, 1981, a passerby found the dead body of police officer David Rucker on a highway north of Brownsville, Texas. Rucker had been shot in the head.⁴⁷ At approximately the same time on the same road, Offi-

tions in habeas jurisprudence since the 1970's.

42. See generally *infra* text accompanying notes 373-88.

43. See *infra* notes 433, 439.

44. THE FEDERALIST No. 74, at 380 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987).

45. Very likely, however, if Congress enacts some form of redress for *Herrera* claimants, it would incorporate the new provision into the current habeas statutes. A bill on the subject is pending now. See Habeas Corpus Reform Act of 1993, S. 1441, 103d Cong., 1st Sess. § 6 (1993); David G. Savage, *Plan Could Let Condemned Get Hearing for Fresh Facts*, L.A. TIMES, Aug. 27, 1993, at A12.

46. The following *précis* does not exhaust the factual and procedural detail of *Herrera*. Like most capital prosecutions of elderly vintage, this complex case possesses a voluminous record. The pertinent events are set forth in the Chief Justice's majority opinion, *Herrera*, 113 S. Ct. at 857-58 & n.1, and in Justice O'Connor's concurring opinion. *Id.* at 871-72.

47. *Id.* at 857.

cer Enrique Carrisalez pulled over a speeding car traveling away from the scene of the killing. After a brief exchange of words, the driver fired at Carrisalez. He died of his wounds nine days later.⁴⁸ It was Carrisalez' slaying—observed by his passenger, Enrique Hernandez—that led to the capital prosecution at issue in the present case.⁴⁹

Both Hernandez' eyewitness testimony and a dying declaration by Carrisalez identified Leonel Herrera as the killer.⁵⁰ This direct evidence was bolstered by scientific and other circumstantial proof as well as, somewhat more obliquely, a letter written by the defendant and found on him at the time of arrest. Among other things, the prosecution linked Herrera to the automobile involved in the murder: a license plate check revealed its ownership by his girlfriend, and he had its keys and was known to drive it.⁵¹ Further, splatters of blood on this car and on Herrera's jeans and wallet matched Rucker's blood type—but not Herrera's.⁵² The defendant's social security card was discovered alongside Rucker's car. Finally, the letter, although disjointed and confusing, implied knowledge of the circumstances of the deaths of the two police officers.⁵³ It suggested that Rucker had died for reasons relating to his involvement, with Herrera, in the drug trade. Carrisalez (who " 'had not to do in this [sic]' "⁵⁴) had died, presumably, only because he halted the vehicle.

Following his initial unsuccessful appeals and denials of post-conviction relief, state and federal,⁵⁵ the defendant began a second round of habeas proceedings in the Texas courts and later in federal district court, raising for the first time a claim that he

48. *Id.*

49. Also charged with the Rucker killing, Herrera pleaded guilty to murder in connection with that offense in July 1982. *Id.*

50. *Id.*

51. *Id.*

52. The car also contained some strands of hair determined to be Rucker's. *Id.*

53. The majority opinion quotes the letter in full. *See id.* at 857-58 n.1. Herrera told interrogating officers that if they wished to know what had happened, " 'it was all in the letter' and . . . they should read it." *See id.* at 872 (O'Connor, J., concurring) (quoting *Herrera v. State*, 682 S.W.2d 313, 317 (Tex. Crim. App. 1984), *cert. denied*, 471 U.S. 1131 (1985)).

54. *Id.* at 857 n.1 (citation omitted).

55. Attacks on his identifications by Hernandez and Carrisalez figured prominently in these challenges. *Id.* at 858.

was actually innocent.⁵⁶ Supplementing his paper showing as he went, he ultimately proffered four affidavits: these all pointed to the guilt of Raul Herrera, Sr., the petitioner's brother, who had himself been murdered in 1984.⁵⁷

Three of the affidavits reported post-trial admissions by Raul Sr. that he alone had shot the officers.⁵⁸ While two of the affiants had been Raul Sr.'s friends (and one a former cellmate as well), the third was a former state judge.⁵⁹ As a practicing attorney, the latter, Hector Villarreal, had represented Raul Sr. in 1984 on an unrelated criminal charge. Villarreal's statement, recounting his client's, reported that Raul Sr.—with Leonel, their father, Officer Rucker, and the local sheriff—had participated in drug trafficking.⁶⁰ After Leonel's conviction, Raul Sr. blackmailed the sheriff and, according to Villarreal, was killed by an associate who had been at the scene during the murders and wished to silence Raul Sr.⁶¹ Lastly, an affidavit by the petitioner's nephew purported to give a firsthand account of the relevant events—observed by him at the age of nine. Raul Herrera, Jr., asserted that only his father, Raul Sr., had been responsible for the deaths and that Leonel had not even been at the scene of the crime.⁶²

The district judge dismissed the bulk of the petitioner's claims on the ground of abuse of the writ.⁶³ But he ordered a stay so that Herrera could once again present his (now fully documented) claim of innocence to the state court.⁶⁴ The Court of Appeals

56. *See id.*

57. None of the affidavits was signed before December 1990. *See id.* at 858 nn.2-3.

58. *Id.* at 858.

59. *See* Brief for Petitioner at 25-26, *Herrera* (No. 91-7328); *Herrera*, 113 S. Ct. at 884 (Blackmun, J., dissenting). The opinion sets out the affidavits in some detail. *See id.* at 858 & nn.2-3.

60. *Herrera*, 113 S. Ct. at 858 n.2.

61. *Id.*

62. *See id.* at 858 & n.3.

63. *See generally infra* text accompanying note 222 and note 223 and accompanying text (discussing this doctrine).

64. His disposition envisioned dismissing the federal petition and lifting the stay upon the filing of the state proceeding, a somewhat puzzling course of action since the judge undoubtedly knew that the Texas courts do not address new-evidence claims on collateral review. *See id.* at 873 (O'Connor, J., concurring). He also knew, though, that Texas normally adheres to a rule of "habeas abstention," which bars

for the Fifth Circuit vacated the stay, affirming the dismissals and holding that the unabused contentions, including that of actual innocence, furnished no cause for federal relief.⁶⁵ A grant of certiorari followed.⁶⁶

III. THEMES AND PRECEDENTS

A. *Innocence as Icon, Guilt as Base Line*

The spectre of conviction and, even worse, execution of an innocent individual haunts our system.⁶⁷ That is fitting in a civilized society, whose criminal justice institutions have as their predominant aim to punish the guilty and free the innocent.⁶⁸ This concern, the cornerstone of the procedural edifice of pre-

adjudication of a state petition whose substance is pending in federal habeas. See *May v. Collins*, 948 F.2d 162, 169 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 907 (1992). Perhaps his expressed "sense of fairness and due process," *Herrera*, 113 S. Ct. at 873, led him to temporize, in the hope that the state court would ignore this doctrine. Cf. *Ex parte Herrera*, No. 81-CR-672-C (Tex. 197th Jud. Dist., Jan. 14, 1991) (reproduced in Joint Appendix at 10, 12, *Herrera v. Collins*, 113 S. Ct. 853 (1993) (No. 91-7328), and quoted in part at 113 S. Ct. at 858) (denying earlier claim of innocence on the merits). In addition, upon reconsideration, the district judge granted an evidentiary hearing on a *Brady* claim, see *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring prosecutorial disclosure of exculpatory information to a criminal defendant), alleging that law enforcement authorities had consciously withheld the exculpatory matter set out in the text. *Herrera*, 113 S. Ct. at 859.

65. *Herrera v. Collins*, 954 F.2d 1029, 1034 (5th Cir. 1992) ("[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.").

66. See *supra* text accompanying note 6.

67. See, e.g., *Pulley v. Harris*, 465 U.S. 37, 68 (1984) (Brennan, J., dissenting) ("The execution of someone who is completely innocent . . . [is] the ultimate horror case.") (internal quotations omitted) (quoting John Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L.F. 555, 576). Jim Mattox, a former Attorney General of Texas, wrote a letter to the editor of the *New York Times* supporting *Herrera*: "[M]y worst nightmare would have been the execution of an innocent person." Jim Mattox, *On Not Executing an Innocent Prisoner*, N.Y. TIMES, Apr. 3, 1992, at A28 (letter to the editor). For a discussion of the incidence of erroneous convictions in capital cases, see *infra* text accompanying notes 365-69.

68. See, e.g., *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1729 (1993) (O'Connor, J., dissenting) (stating that the "central goal of the criminal justice system [is] accurate determinations of guilt and innocence"); *United States v. Nobles*, 422 U.S. 225, 230 (1975) (stating that the "primary responsibility" of the criminal justice system is to develop "relevant facts on which a determination of guilt or innocence can be made").

sumptive innocence and proof beyond a reasonable doubt,⁶⁹ has most often found expression in variations on Blackstone's maxim: "[I]t is better that ten guilty persons escape than that one innocent suffer."⁷⁰ More important, the goal inspiring the aphorism has achieved concrete form in the many constitutional trial protections such as the rights to assistance of counsel, compulsory process, and confrontation of adverse witnesses that build on the basic structural bias handicapping the prosecution.

Despite the theoretical skew, practical factors (for example, greater resources) favor the State.⁷¹ That reality elevates the need to respect and, at times, enhance safeguards geared to the vindication of innocence even, or especially, after judgment, when officialdom's interest shifts from the prisoner.⁷² No system, however, can rest sensibly on the premise that findings of guilt are wrong.⁷³ In order to resolve this tension, upon conviction the law reverses the hallowed presumption⁷⁴ while not rendering it irrebuttable. Yet although numerous claims may im-

69. See generally *In re Winship*, 397 U.S. 358, 361-63 (1970) (giving those principles' long pedigree).

70. 4 WILLIAM BLACKSTONE, COMMENTARIES *352. See also *Winship*, 397 U.S. at 372 (Harlan, J., concurring); Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 459-60 (1989) (positing that presumption of innocence reflects the value society ascribes to protecting the innocent). The sentiment has also surfaced in famous nonlegal sources. See, e.g., VOLTAIRE, ZADIG ch. 6 (1747). Predictably, law and literature reflect a cynical countertradition as well. See, e.g., *Patterson v. New York*, 432 U.S. 197, 208 (1977) ("Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."); *supra* text accompanying note 1.

71. See Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1199 (1960) (arguing that modifications in criminal procedure have disadvantaged defendants by not compensating for prosecutorial advantage in discovery and other "inequalitie[s] of litigating position").

72. See, e.g., Blaustein, *supra* note 34, at C4 (noting that "thick administrative inertia" sets in when a capital conviction becomes final).

73. A classic exposition of the value of repose in criminal litigation generally appears in Justice Harlan's dissent in *Sanders v. United States*, 373 U.S. 1 (1963):

Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.

Id. at 24-25 (Harlan, J., dissenting). Plainly, these comments did not take note of the special case of the death-sentenced inmate.

74. See *Ross v. Moffitt*, 417 U.S. 600, 610 (1974).

pugn the accuracy of a verdict, some more directly⁷⁵ than others,⁷⁶ prevailing constitutional doctrine sanctions only the narrowest form of frontal challenge to the proof against the defendant. Under *Jackson v. Virginia*,⁷⁷ judicial scrutiny is limited to the question "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."⁷⁸ Due process, here, demands no more.

This minimal standard of legal sufficiency,⁷⁹ applied to a fixed paper record, avails the *Herreras* not at all. It goes to quantity, not quality, of proof (the former, barely) and, fatally, confines review to the evidence adduced before the jury. Since *Jackson* lays so heavy a thumb on the prosecutor's side of the

75. See, e.g., *McNally v. United States*, 483 U.S. 350 (1987) (conviction of a type of fraudulent scheme not barred by statute); *United States v. Bagley*, 473 U.S. 667 (1985) (state's withholding of exculpatory evidence); *Mooney v. Holohan*, 294 U.S. 103 (1935) (prosecutor's knowing use of perjured testimony).

76. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984) (deprivation of effective assistance of counsel); *Davis v. Alaska* 415 U.S. 308 (1974) (denial of impeachment of key prosecution witness for bias); *Stovall v. Denno*, 388 U.S. 293 (1967) (impermissibly suggestive pretrial identification procedure).

77. 443 U.S. 307 (1979).

78. *Id.* at 319.

79. Notably, the *Jackson* test replaced the even less demanding standard of *Thompson v. Louisville*, 362 U.S. 199 (1960). *Thompson*, in the words of the *Jackson* majority, invalidated "a conviction based upon a record *wholly devoid* of any relevant evidence of a crucial element of the offense charged." *Jackson*, 443 U.S. at 314 (emphasis added). *Jackson* thereby secured "the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty." *Id.* By the time of *Jackson*, *In re Winship*, 397 U.S. 358 (1970), already had established the constitutional necessity of the "beyond a reasonable doubt" showing. See *Jackson*, 443 U.S. at 315. *Jackson*, in turn, made clear that the rule of *Winship* governed in habeas as well as on appeal. The Court recently deflected an invitation to gut *Jackson's* protection by giving state court sufficiency findings deferential, instead of plenary, review in habeas proceedings. See *Wright v. West*, 112 S. Ct. 2482 (1992). Indeed, the Court has been enlarging *Jackson's* purview in the capital habeas setting. See *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992) (holding that if a rational fact finder could have found the defendant eligible for the death penalty under state law, he was not "actually innocent" of the penalty); *Lewis v. Jeffers*, 497 U.S. 764, 781-84 (1990) (finding that if the state court's application of aggravating circumstance to the defendant fulfills the rational fact finder test, it passes constitutional muster).

scales,⁸⁰ a defendant like Herrera must search elsewhere for useful precedent.

In theory, a prisoner who wants to attack a conviction or sentence on the basis of extra-record material has two potential, and radically different, routes to pursue: a motion for a new trial based on newly discovered evidence and a request for executive clemency. In actuality, each poses substantial problems for the defendant. While both options exist in every jurisdiction that allows capital punishment,⁸¹ they are creatures of local law (statutory and constitutional) rather than of federal constitutional right.⁸² Clemency, moreover—a nonjudicial, rarely granted form of relief—partakes less of “law” than of grace,⁸³ yet capital inmates routinely seek it.⁸⁴ I will now examine these in turn, with a view to assessing their viability for claimants in Herrera’s shoes.

80. Among other things, *Jackson*’s lower court progeny stress that assessing the credibility of witnesses and weighing the evidence are tasks for the jury. *See, e.g.*, *United States v. Greenwood*, 974 F.2d 1449, 1458 (5th Cir. 1992); *Wilcox v. Ford*, 813 F.2d 1140, 1143 (11th Cir.), *cert. denied*, 484 U.S. 925 (1987). Mere inconsistencies in the proof will not undermine a verdict of guilt. *See, e.g.*, *United States ex rel. Parker v. Fairman*, 695 F. Supp. 404, 406 (N.D. Ill. 1988). The reviewing court may reject testimony solely if it is facially incredible, “assert[ing] facts that the witness physically could not have observed or events that could not have occurred under the laws of nature.” *United States v. Osum*, 943 F.2d 1394, 1405 (5th Cir. 1991). *But cf.* Louis M. Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 445-46 (1980) (surmising that the *Jackson* rule may nullify a conviction even if the State can demonstrate guilt beyond a reasonable doubt by time of habeas corpus proceeding).

81. *See supra* note 24 (discussing provisions for a motion for a new trial based on newly discovered evidence); *see also* Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575 (1991) (discussing clemency). *See generally* *Herrera*, 113 S. Ct. at 867-68 & n.14 (enumerating 36 states’ provisions on clemency).

82. The sole exception is the President’s Article II “Power to grant Reprieves and Pardons for Offenses against the United States.” U.S. CONST. art. II, § 2, cl. 1.

83. *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160-61 (1833).

84. Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889, 896 (1981).

B. State Law: Judicial and Executive Avenues

1. New Trial Motion Based on Newly Discovered Evidence⁸⁵

If victory on a *Jackson* challenge usually amounts to "mission impossible," success on a motion for a new trial grounded on newly discovered evidence might be described as "mission improbable." Hostility to the inconvenience of reopening closed cases blends with genuine skepticism about the probity of efforts to do so. The pertinent rules, a mixture of judge-made and legislative standards, are facially demanding.⁸⁶ Furthermore, in applying the law to specific facts, courts favor the government on matters like witness credibility.⁸⁷ But nonetheless, deserving prisoner's sometimes win.⁸⁸ All things considered, new trial mo-

85. The case law on this topic is vast. Useful annotations, on which the following general discussion relies heavily, include: Tim A. Thomas, Annotation, *Standard for Granting or Denying New Trial in State Criminal Case on Basis of Recanted Testimony—Modern Cases*, 77 A.L.R.4th 1031 (1990) [hereinafter Thomas, *State Annotation*]; Tim A. Thomas, Annotation, *Recantation of Testimony of Witness as Grounds for New Trial—Federal Criminal Cases*, 94 A.L.R. FED. 60 (1989); [hereinafter Thomas, *Federal Annotation*]; Sonja A. Soehnel, Annotation, *What Standard, Regarding Necessity for Change of Trial Result, Applies in Granting New Trial Pursuant to Rule 33 of Federal Rules of Criminal Procedure for Newly Discovered Evidence of False Testimony by Prosecution Witness*, 59 A.L.R. FED. 657 (1982); John A. Glenn, Annotation, *What Constitutes "Newly Discovered Evidence" Within Meaning of Rule 33 of Federal Rules of Criminal Procedure Relating to Motions for New Trial*, 44 A.L.R. FED. 13 (1979). But apart from comments on specific decisions, academic work on the subject is sparse. It consists mainly of student work and tends to focus on recantations. See, e.g., Janice J. Repka, Comment, *Rethinking the Standard for New Trial Motions Based upon Recantations as Newly Discovered Evidence*, 134 U. PA. L. REV. 1433 (1986); Daniel Wolf, Note, *I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases*, 83 MICH. L. REV. 1925 (1985).

86. See, e.g., *Sawyer v. Whitley*, 112 S. Ct. 2514, 2519 (1992) (referring to "rigorous standards for granting such motions"); *United States v. Gordils*, 982 F.2d 64, 72 (2d Cir. 1992), cert. denied, 113 S. Ct. 1953 (1993) (stating that a "district court must exercise 'great caution' in determining" such motions and may grant them "only 'in the most extraordinary circumstances' ") (quoting *United States v. Imran*, 964 F.2d 1313, 1318 (2d Cir. 1992) (quoting *United States v. DiPaolo*, 835 F.2d 46, 49 (2d Cir. 1987), cert. denied, 113 S. Ct. 626 (1992))).

87. That conclusion derives from a survey of many decisions. See generally *supra* note 85 (citing pertinent annotations).

88. See, e.g., *Casias v. United States*, 337 F.2d 354 (10th Cir. 1964) (third party confessed to crime); *Ledet v. United States*, 297 F.2d 737 (5th Cir. 1962) (owner of car in which heroin was found recanted testimony implicating defendant, a passenger, in narcotics violation); *United States v. Flynn*, 130 F. Supp. 412 (S.D.N.Y. 1955) (recanting informant gave false testimony against allegedly subversive defendants),

tions afford a modicum of due process to inmates with *Herrera* claims, capital or otherwise, so long as their proffers are not summarily rejected on account of inflexible time limitations.⁸⁹

The so-called *Berry* standard for evaluating newly discovered evidence holds sway in many states and a number of federal circuits.⁹⁰ This test requires that the evidence have come to light after trial, not been obtainable earlier in the exercise of due diligence,⁹¹ and be more than merely cumulative or impeaching. Rather, the new facts must be so important as probably to cause a different result upon retrial.⁹² When dealing with a recantation, several jurisdictions (mainly federal) employ the alternative *Larrison* test.⁹³ In order to grant relief under *Larrison*, the court must feel "reasonably well satisfied" that a material witness' story was a lie⁹⁴ and that, without it, the

cert. denied, 348 U.S. 909 (1955).

89. See *infra* text accompanying notes 127-28.

90. It derives from the nineteenth century *Berry v. State*, 10 Ga. 511 (1851). See *id.* at 527-28 (outlining the requirements for application for a new trial). For a discussion of its requisites, see Sharon Cobb, Note, *Gary Dotson as Victim: The Legal Response to Recanting Testimony*, 35 EMORY L.J. 969, 973-75 (1986); Thomas, *State Annotation*, *supra* note 85, § 4; Thomas, *Federal Annotation*, *supra* note 85, § 3.

91. Cf. *United States v. Munchak*, 338 F. Supp. 1283 (S.D.N.Y.) (holding that the duty of diligent inquiry is not suspended during appeal, especially where counsel has been alerted to possibly significant facts), *aff'd*, 460 F.2d 1407 (2d Cir.), *cert. denied*, 409 U.S. 915 (1972). The duty of diligence also demands, in some jurisdictions, that the defendant make his motion promptly after discovering the evidence. See, e.g., N.Y. CRIM. PROC. LAW § 440.10(1)(g) (Consol. 1986).

92. Some courts and commentators speak in terms of "acquittal" instead of "different result." See, e.g., Thomas, *Federal Annotation*, *supra* note 85, § 3, at 65. The variance reflects confusion over whether the appropriate measure should be 12 jurors or a hung jury. In real life, the distinction likely makes no difference. Wolf, *supra* note 85, at 1933 n.28.

93. It is named after *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928). For a discussion of its criteria, see Case Comment, *Criminal Procedure: Minnesota Adopts the Larrison Standard for Granting a New Trial Because of Newly Discovered Evidence*: *State v. Caldwell*, 67 MINN. L. REV. 1314 (1983) [hereinafter *Caldwell Case Comment*]; Repka, *supra* note 85, at 1439-40; Thomas, *State Annotation*, *supra* note 85, § 3; Soehnel, *supra* note 85, § 4. There are also hybrid versions of both the *Berry* and *Larrison* standards. See Thomas, *Federal Annotation*, *supra* note 85, § 5. Finally, the law in some places is unsettled. See Soehnel, *supra* note 85, § 5.

94. At least one state has extended the standard to nonperjurious mistaken testimony. *Caldwell Case Comment*, *supra* note 93, at 1318 (treating *State v. Caldwell*, 322 N.W.2d 574 (Minn. 1982)).

jurors' conclusion "*might*" have been altered.⁹⁵ In addition, a variation of *Berry's* due diligence requirement demands that the movant either have been surprised by the perjury and unable to meet it or have been unaware of its falsity until later.⁹⁶

Much ink has been spilled on such questions as which standard better balances the State's interests against the defendant's⁹⁷ and whether claims of perjured testimony call for distinctive treatment at all.⁹⁸ They do not concern me here. For present purposes, taking controlling law as a given, I wish to highlight some difficulties routinely faced by those who would use it to their advantage.

First, as mentioned, courts harbor a deep suspicion of this type of motion, especially when it rests on a recantation.⁹⁹ That

95. *Larrison*, 24 F.2d at 87-88.

96. *Larrison* seems less strict than *Berry* in this regard. See *Caldwell Case Comment*, *supra* note 93, at 1319-20.

97. Critics of the *Larrison* standard contend that its leniency regarding the likelihood that the jury would have acted differently, absent the since-retracted perjury, see *supra* text accompanying note 95, leads many courts to "violate it in application" by concluding that the verdict would not have changed or failing to find that the testimony at trial was false. *United States v. Stofsky*, 527 F.2d 237, 245-46 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); *Caldwell Case Comment*, *supra* note 93, at 1318-19; Wolf, *supra* note 85, at 1930-31. For this reason, it has lost ground in recent years. See, e.g., *United States v. Krasny*, 607 F.2d 645 (9th Cir. 1979) (declining to follow *Larrison* in a case of first impression); *Stofsky*, 527 F.2d at 246 (abandoning *Larrison*).

98. Compare, e.g., Wolf, *supra* note 85, at 1945-47 (arguing that a more lenient test for false testimony cases is justified) with Ronald L. Carlson, *False or Suppressed Evidence: Why a Need for the Prosecutorial Tie?*, 1969 DUKE L.J. 1171, 1186 n.42 ("Any such distinction appears irrational.") and *Caldwell*, 322 N.W.2d at 596-97 (Peterson, J., dissenting) (viewing the distinction as artificial). It should be stressed that a prosecutor's *knowing* introduction or toleration of perjured evidence (not under discussion now) amounts to constitutional error almost always warranting reversal. See *infra* text accompanying note 236.

99. Repka, *supra* note 85, at 1434-35, 1440-47; see, e.g., *United States ex rel. Sostre v. Festa*, 513 F.2d 1313, 1318 (2d Cir.) (stating that traditionally, recantation is regarded as "with the utmost suspicion") (citations omitted), *cert. denied*, 423 U.S. 841 (1975); *People v. Shilitano*, 112 N.E. 733, 736 (N.Y. 1916) ("There is no form of proof so unreliable as recanting testimony."). For a differing opinion, see *United States v. Ramsey*, 726 F.2d 601, 606 (10th Cir. 1984) (McKay, J., concurring in part and dissenting in part). The reasons for the mistrust include fear of defense manipulation of the recanter "by duress, bribery, or misplaced sympathy," Repka, *supra* note 85, at 1442 (footnote omitted), the witness' often close association with the defendant, and the fact that recantations are sometimes withdrawn. See Cobb, *supra* note 90, at 987-91; see, e.g., *United States v. Ramsey*, 761 F.2d 603 (10th Cir. 1985)

bias shades their view of defense witness' credibility, which becomes a key issue when a former state's witness changes sides and offers a revised account of relevant events that the prisoner now tenders. While Herrera's affidavits did not contain repudiations of prior testimony, others' submissions often do.¹⁰⁰ Regardless, however, no belatedly proffered evidence can help the proponent unless the judge deems it at least potentially believable, whether or not she, in fact, believes it.¹⁰¹

Beyond needing to overcome the general attitude of incredulity, defendants who move for a new trial confront particular legal obstacles that, for many, prove insurmountable. Rigid statutes of limitation, as we have seen,¹⁰² may slam the door in the applicant's face. Further, for those not barred at the outset, *Berry's* probable-acquittal standard is hard to meet.¹⁰³ Admittedly, the mere possibility of a changed outcome would apparent-

(finding the repudiated recantation to be false), *cert. denied*, 474 U.S. 1082 (1986). The presumption against the reliability of such evidence also stems from prudential concerns for finality and judicial economy. See Warren Lupel, *Recanted Testimony: Procedural Alternatives for Relief from Wrongful Imprisonment*, 35 DEPAUL L. REV. 477, 478 (1985); Cobb, *supra* note 90, at 991-92; Repka, *supra* note 85, at 1443.

100. The recent release of an Alabama death row inmate, Walter McMillian, on grounds of innocence hinged largely on such retractions. See Peter Applebome, *Alabama Releases Man Held on Death Row for Six Years*, N.Y. TIMES, Mar. 3, 1993, at A1. McMillian, however, did not secure judicial relief on that account but rather because of a violation of his *Brady* right to disclosure of exculpatory evidence. See *McMillian v. State*, 616 So. 2d 933 (Ala. Crim. App. 1993). After the defendant won in court, the State acknowledged his lack of guilt and dismissed the charges. *Innocent Man Freed from Alabama's Death Row*, 4 ALA. CAPITAL REP. 25 (1993). See also *Innocence and Execution*, WASH. POST, Apr. 17, 1993, at A22 (noting that Randall Dale Adams, chronicled in the movie *The Thin Blue Line*, had once come within three days of execution but later was freed when the State's chief witness wholly recanted).

101. The *Larrison* test expressly calls for the court to decide whether a material witness lied. See *supra* text accompanying note 94. But *Berry* implicitly requires the court to make a threshold determination of the credibility of the new evidence in order to assess whether its introduction at a retrial would probably cause a better outcome for the defendant. See *Caldwell* Case Comment, *supra* note 93, at 1324; Cobb, *supra* note 90, at 978, 994 & n.120. In the context of recantations, some jurisdictions explicitly add to the *Berry* criteria the need for a finding of credibility. Thomas, *State Annotation*, *supra* note 85, at 1036 n.3; see, e.g., *State v. Norman*, 652 P.2d 683, 689 (Kan. 1982).

102. See *supra* note 24 and accompanying text.

103. It is not, though, as preclusive as the rule of *Jackson*. See *supra* text accompanying notes 77-80.

ly satisfy *Larrison*. But *Larrison* is a minority rule and applies just to recantations. Significantly, too, the prevailing distrust of turncoat witnesses has led courts to toughen this lenient test in practice.¹⁰⁴ Whatever the applicable standard, moreover, appellate courts will reverse denials of relief only for clear abuse of discretion.¹⁰⁵

A major problem for prisoners seeking a second trial (above all, capital inmates) stems from the "due diligence" requirement, which constitutes one of the *Berry* criteria and surfaces in attenuated form in the *Larrison* standard.¹⁰⁶ Together with the newness element, common to both, it demands that the evidence in question have been unknown and not reasonably discoverable at the time of trial.¹⁰⁷ Although powerful recent developments like PCR-DNA testing have led to redress for some defendants,¹⁰⁸ applicants typically cannot rely on scientific innova-

104. See *supra* note 97. A few *Berry* jurisdictions, on their part, have liberalized the rules in cases in which the victim or sole prosecution witness recants. See Repka, *supra* note 85, at 1452-54; Thomas, *State Annotation*, *supra* note 85, § 9; see, e.g., *State v. Rolax*, 529 P.2d 1078 (Wash. 1974) (holding that it was an abuse of discretion to deny a new trial when the defendant was convicted only on the testimony of the recanter). Further, insofar as courts make credibility determinations pursuant to both *Larrison* and *Berry*, see *supra* note 101, the *Berry* approach is better than the dominant *Larrison* approach for the defendant. The latter test, literally applied, considers the strength of the State's evidence *without* the perjury; the former envisions the jury's having *both* versions of the story before it. Soehnel, *supra* note 85, § 2. Thus, under *Larrison*, the judge evaluates the impact of the new matter merely on the government's substantive proof, Wolf, *supra* note 85, at 1932-33; under *Berry*, by contrast, she appraises its impeachment value as well. See *United States v. Stofsky*, 527 F.2d 237, 245-46 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

105. See Cobb, *supra* note 90, at 979-80; see, e.g., *United States v. Steel*, 458 F.2d 1164, 1166-67 (10th Cir. 1972).

106. See *supra* text accompanying notes 91, 96. The ensuing remarks draw heavily on Glenn, *supra* note 85.

107. See Glenn, *supra* note 85, § 2[a], at 21.

108. Two of these were Kirk Bloodsworth (imprisoned for murder and other crimes and, at one stage, sentenced to death) and Tony Snyder, convicted of rape. In neither case, though, did the defendant obtain relief through a new trial motion. After testing revealed their innocence, Bloodsworth persuaded the State's Attorney in Baltimore, Maryland to dismiss the charges against him and Snyder received executive clemency from Governor Douglas Wilder of Virginia. See Paul W. Valentine, *Jailed for Murder, Freed by DNA*, WASH. POST, June 29, 1993, at A1, A12; Jim Dwyer, *Justice from a Lab Instead of a Court*, N.Y. NEWSDAY, Apr. 26, 1993, at 2. See generally *Innocence and Execution*, *supra* note 100, at A22 (noting that proof of inno-

tions. Rather, when proffering new experts, they tend to invoke familiar techniques—for instance, fingerprint identification—that often were used before by the State, in an effort to present fresh results helpful to them.¹⁰⁹ Frequently, too, movants produce solely non-scientific matter, as did Herrera—for example, statements of purported witnesses to relevant events, who may or may not have testified earlier,¹¹⁰ or records or other documentary items.¹¹¹

Detailed treatment of the vagaries of the pertinent law is beyond the purview of this Article. Indeed, it is unnecessary, my aim being merely to make two points. One, except for genuine novelties such as DNA testing,¹¹² all of the usual kinds of evidence submitted in support of new trial motions raise serious issues in many cases of “oldness” or lack of due diligence. Two, with regard to death-sentenced prisoners, the circumstances characteristic of capital proceedings will only enlarge this stumbling block.

To exemplify my first contention, consider Herrera’s situation. Assuming the truth of his subsequent claim, he must have known of his actual innocence.¹¹³ Even if he thought it inadvis-

cence frequently arises outside the judicial system, such as when a newspaper runs an investigative series or when a filmmaker takes an interest in a case).

109. See, e.g., *State v. Caldwell*, 322 N.W.2d 574, 580-82 (Minn. 1982); see also *United States v. Keller*, 145 F. Supp. 692 (D.N.J. 1956) (handwriting expert). *Caldwell* presents a rare instance of the grant of a new trial based on the outcome of later testing. Significantly, by then the State had already conceded that the relevant print was not the defendant’s. *Caldwell* Case Comment, *supra* note 93, at 1315.

110. See generally Glenn, *supra* note 85, §§ 16-28 (collecting cases).

111. See generally *id.* §§ 33-37 (collecting cases).

112. But cf. *Coleman v. Thompson*, 798 F. Supp. 1209 (W.D. Va.) (finding that the habeas petitioner’s late-presented PCR-DNA evidence only bolstered the verdict of guilt), *aff’d*, 966 F.2d 1441 (4th Cir.), *cert. denied*, 112 S. Ct. 2983 (1992). Truly compelling proof may warrant dismissing the indictment rather than ordering a new trial. See, e.g., *supra* note 108 and accompanying text (discussing the Bloodsworth case). See generally Hon. Frederic S. Berman & Lainie R. Fastman, *Newly Discovered Evidence—A Defendant’s Chance for a New Trial*, 28 N.Y.L. SCH. L. REV. 31, 47 (1983) (discussing when dismissal is warranted).

113. See *United States v. Peters*, 776 F. Supp. 365, 367-68 (N.D. Ill. 1991) (“[The defendant’s] purpose in submitting the polygraph report is to proclaim his innocence, a truth or falsity that was uniquely in [his] possession prior to trial.”); see also *United States v. Capaldo*, 276 F. Supp. 986 (D. Conn. 1967) (stating that if the witness’ testimony was false, the defendant knew so at the time of trial and had an opportunity to meet it), *aff’d*, 402 F.2d 821 (2d Cir. 1968), *cert. denied*, 394 U.S. 989

able to take the stand,¹¹⁴ why did he not produce at least his brother and nephew as witnesses at trial?¹¹⁵ True, Raul Herrera, Sr. (presumably guilty of the crime himself) might have relied on his own privilege against compelled self-incrimination.¹¹⁶ Yet that possibility remained entirely speculative, in the absence of any effort to call him.¹¹⁷ True as well, Raul Jr. was still a child, but old enough to take the stand.¹¹⁸ Simply put, if guiltless, Herrera behaved in a manner strongly suggesting a conscious strategy "not to come forward at trial and accuse the [known] culprit."¹¹⁹ These facts predictably might have

(1969).

114. Courts have held that knowledge of the falseness of adverse testimony will not prevent the defendant from obtaining a new trial, if he had no way to counter the evidence without himself taking the stand. *See, e.g., United States v. Flynn*, 130 F. Supp. 412 (S.D.N.Y.), *cert. denied*, 348 U.S. 909 (1955). *But cf. United States v. Maestas*, 523 F.2d 316, 320 (10th Cir. 1975) (expressing skepticism regarding the defendant's claim that he could not have offered exculpatory evidence at trial, because such evidence could have come only from the complainant or from himself—thus forcing him to waive his privilege against self-incrimination). A defendant who failed to testify at trial, however, cannot later proffer his own evidence in support of a new trial motion. *See generally* Glenn, *supra* note 85, § 24 (collecting cases).

115. *See, e.g., Peters*, 776 F. Supp. at 367 (defendant could have produced at trial two codefendants—one, his brother—who alleged afterward that they had never conspired with him). As a legal matter, Raul Sr.'s hearsay statements may have been admissible as declarations against penal interest. *See generally* Munoz v. State, 435 S.W.2d 500, 501 (Tex. Crim. App. 1968) (stating the test). But because Raul Sr. ostensibly made the statements only after trial, they were unavailable in fact.

116. *But cf. Glenn, supra* note 85, § 17[a], at 52 (noting that a witness' unwillingness to testify at trial has been held not to excuse the defense's failure to call her).

117. The record, moreover, does not reveal any exploration prior to trial of Raul, Sr.'s potential testimony. Hence, there exists no indication that the brother informally invoked the privilege. Even if he had, a court might not have excused the defense's failure to call him. *See, e.g., Rodriguez v. United States*, 373 F.2d 17, 18 (5th Cir. 1967) (finding the defendant not entitled to a new trial on the basis of testimony by a witness whose existence was known to defense counsel despite fact that witness had stated he would refuse to testify on the ground of self-incrimination).

118. Children of four and five had been found competent to testify in prosecutions predating Herrera's. *See Lujan v. State*, 626 S.W.2d 854, 861 (Tex. Ct. App. 1981) (citing cases).

119. *See Berman & Fastman, supra* note 112, at 43. Notably, too, he pleaded guilty to the related Rucker murder. *Herrera v. Collins*, 113 S. Ct. 853, 869 (1993); *id.* at 872 (O'Connor, J., concurring); *see also supra* note 49.

doomed his quest for relief¹²⁰ even had he not fallen afoul of a hard-and-fast untimeliness bar.

As respects my second contention, one can generalize that the incompetence endemic to capital defense attorneys¹²¹ will haunt their clients in this post-conviction setting, as in others¹²²—here, in the guise of a likely finding of lack of diligence in producing evidence at trial.¹²³ Also prevalent in death penalty prosecutions, but not always detectable or provable, official suppression of exculpatory matter¹²⁴ often reduces the “pool” of

120. See, e.g., *People v. Padgett*, 300 N.Y.S.2d 612 (App. Div. 1969) (defendant made tactical decision not to call certain witnesses), *aff'd*, 265 N.E.2d 460 (N.Y. 1970). See generally Glenn, *supra* note 85, § 16 (collecting cases). To grant relief in such a setting would encourage defendants to sandbag at trial, withholding testimony in their favor, secure in the knowledge that they could supply the omissions later. See *Strauss v. United States*, 363 F.2d 366, 368 (5th Cir.), *cert. denied*, 385 U.S. 989 (1966). At oral argument, Justice Kennedy posed a hypothetical question involving an accused who chooses to withhold proof of his innocence in order to shield his brother, the murderer. He also inquired what would happen if the defendant elects “not to testify at trial and then after conviction says his testimony will show his innocence.” In response, defense counsel implied that the inmate should always be allowed to assert innocence as a bar to execution—leading Justice Souter to comment that, under Herrera’s proposed approach, a defendant might attack his guilt without offering any new evidence. See *Arguments Heard*, *supra* note 10, at 3039-40. Doubtless, strategic considerations loomed large for other justices too.

121. See Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 251 (1990-1991) (arguing that “conditions of capital defense work virtually guarantee ineffectiveness”); Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 801-10 (1986) (positing that problems of inexperience, overwork, and inadequate funding lead to ineffective representation).

122. See, e.g., *Murray v. Carrier*, 477 U.S. 478 (1986) (holding that unless it falls to the level of unconstitutional ineffectiveness, counsel’s ignorance or mistake does not amount to “cause” excusing state court procedural default in habeas proceedings).

123. See, e.g., *United States v. Eldred*, 588 F.2d 746, 753 (9th Cir. 1978); *United States v. Meier*, 484 F. Supp. 1129, 1131-34 (D. Utah 1980). See generally Glenn, *supra* note 85, § 9, at 37 (“[K]nowledge or diligence of defense counsel may be considered . . . in determining whether the lack of knowledge and the diligence requirements have been met . . .”). If counsel, moreover, belatedly learns of something relevant of which the defendant was aware at trial, the latter’s knowledge will doom his motion. See, e.g., *United States v. Blucher*, 730 F. Supp. 428, 431 (S.D. Fla. 1990). See generally Glenn, *supra* note 85, § 9, at 37 (discussing the determination of diligence by reference to “composite knowledge and actions” of counsel and client).

124. See Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOYOLA L.A. L. REV. 59, 68 (1989); Peter Applehome, *On the Fast Track From the Courtroom to Death Row*, N.Y. TIMES,

evidence at the outset, thereby magnifying the role of a retrial motion based on newly discovered evidence.¹²⁵ Finally, in order to achieve success in the face of these problems, death-sentenced prisoners desperately need professional help in mounting a post-conviction proceeding. Such help is, all too often, lacking.¹²⁶

Despite these difficulties, however, such an action holds some promise for meritorious *Herrera* claimants. Yet that promise can be fulfilled only by abandoning fixed time limits¹²⁷ because, es-

Mar. 7, 1993, § 4, at 2. For an especially egregious instance of this phenomenon, see *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989). There, prosecutors failed to inform the defendant, an African American (later represented by the author of this Article, among others), that the sole surviving victim and witness initially had identified the killer as white. Similarly egregious prosecutorial misconduct occurred in the criminal case underlying *Amadeo v. Zant*, 486 U.S. 214 (1988). In *Amadeo*, proof that the prosecutor had instructed jury commissioners to "stack" venires against minority and female jurors surfaced in a civil case nine months later, while the petitioner's appeal was pending.

125. Several of the recent innocence cases involved successful *Brady* claims (although these were not necessarily the direct cause of the prisoner's release). See, e.g., *supra* note 100 (discussing the Walter McMillian case); Valentine, *supra* note 108, at A12 (reporting on the Kirk Bloodsworth case).

126. See Berger, *supra* note 5, at 1671. As I write, Congress is, once again, considering legislation that would furnish lawyers to represent these inmates in their state collateral challenges. See, e.g., S. 1441, *supra* note 45, § 8. Federal law already provides counsel for indigents in habeas actions. 21 U.S.C. § 848(q)(4)(B) (1988). For a discussion of previous bills on this subject, see JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 2.3, at 26 (Supp. 1992); Berger, *supra* note 5, at 1705-07 & n.240.

127. See, e.g., *United States v. Kaplan*, 101 F. Supp. 7 (S.D.N.Y. 1951) (holding that even though the prosecution conceded that the wrong man had been convicted, Rule 33 relief was unavailable more than two years after judgment). Newspaper columnist Jim Dwyer made the following pointed comment on the plight of Tony Snyder, a convicted rapist who served seven years in prison before his release on grounds of innocence:

In Virginia, where Tony Snyder was jailed, a convict has 21 days, all of three weeks, to come up with new proof. It took genetic biologists, starting with Mendel, 150 years to develop the DNA tests that proved Snyder innocent.

Three weeks weren't quite enough for Tony Snyder.

Dwyer, *supra* note 108, at 2. As a less restrictive alternative to a statute of limitations, the State might impose an obligation to act promptly after the discovery of new evidence. See Cobb, *supra* note 90, at 971. Such an approach, if substituted for the usual due diligence requirements, would also alleviate the other major technical obstacle to victory on this type of motion. Compare the requirements of the State of New York, *supra* note 91 (demanding both initial diligence and prompt filing) with those of the federal government. Rule 9(a) of the Rules Governing Section 2254

pecially in capital cases, proof of innocence tends to surface years after final judgment, if at all.¹²⁸ Further development of this subject must await the end of this Article. Meanwhile, I move to the topic of clemency—the last hope of convicted innocents and scoundrels alike.

2. Clemency¹²⁹

Typically, the Governor exercises the power of executive clemency alone.¹³⁰ In a number of states, she shares it with an administrative board.¹³¹ In a handful, the latter (usually, gubernatorially appointed) has the prime decisionmaking role.¹³² Unlike the motion for a new trial (indeed, unlike any

Cases in the United States District Courts states that a habeas petition may be dismissed if delay in its filing prejudiced the State in its ability to respond to the petition, "unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred." 28 U.S.C. § 2254 (1988).

128. See Eric M. Freedman, *Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 315, 316 (1990-1991). Often, a prisoner on death row first obtains a qualified lawyer long after conviction and sentence. See, e.g., Blaustein, *supra* note 34, at C1 (noting that Gary Graham's new attorneys, including "veteran capital defender" Richard Burr, are attempting to prove the client's innocence). See generally Freedman, *supra*, at 316 n.7 (stating that the "insufficiency of legal resources results in a system of triage," with the best attorneys focusing their efforts on inmates closest to execution).

129. In addition to full or conditional pardons, the term "clemency" covers commutations and remissions of fines as well as reprieves. For a thorough treatment of its nature and history, extending beyond the scope of this Article, see generally Kobil, *supra* note 81. Other sources relied on in the ensuing pages include: Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255 (1990-1991); Bilionis, *supra* note 37, at 1696-701 (1993); Tabak, *supra* note 121, at 844-46; Stuart Lichten, *Executive Clemency in Capital Cases* (undated, unpublished manuscript on file with the *William and Mary Law Review*).

130. Kobil, *supra* note 81, at 605. Most of the 29 states adhering to this model have established advisory panels that make nonbinding recommendations to the chief executive. *Id.*

131. *Id.* (16 states, at present). In Texas, the Governor and the Board of Pardons and Paroles divide authority over clemency. See TEX. CONST. art. IV, § 11 (establishing Board of Pardons and Paroles); TEX. CODE CRIM. PROC. ANN. art. 48.01 (West 1979) (authorizing the Governor to grant reprieves, commutations of punishment, and pardons on the recommendation and advice of the Board of Pardons and Paroles).

132. Kobil, *supra* note 81, at 605 (five states, at present).

other judicial form of action), executive clemency is not encumbered by diligence requirements, burdens of proof, limitations periods, or similar obstacles to relief.¹³³ Only a very few jurisdictions—none of them major capital states—have issued any substantive standards to guide the critical determination.¹³⁴ Thus, not surprisingly, this resort for death-sentenced prisoners possesses the defects of its virtues: notably, a lack of guaranteed procedural safeguards¹³⁵ and, given the degree of discretion, a risk of arbitrary denial.¹³⁶

These structural flaws in the process pale considerably, however, in light of the single crucial fact that clemency has almost ceased to exist for death row inmates in recent years.¹³⁷ Its

133. See Bilonis, *supra* note 37, at 1699-700. But cf. *infra* note 135 (discussing Texas procedural guidelines for entertaining pardon requests grounded on innocence).

134. Professor Kobil lists only Colorado, Minnesota, Washington, and Missouri. See Kobil, *supra* note 81, at 605 & n.235.

135. See Note, *supra* note 84, at 891, 900-01. Some procedures may severely hamper the prisoner. In Texas, for instance, the Board of Pardons and Paroles will hear applications based on innocence only if the defendant tenders:

(1) a written unanimous recommendation of the current trial officials of the court of conviction; and/or

(2) a certified order or judgment of a court having jurisdiction accompanied by certified copy of the findings of fact (if any); and

(3) affidavits of witnesses upon which the finding of innocence is based.

TEX. ADMIN. CODE, tit. 37, §.143.2 (West Supp. 1992). These requirements, if unmet, operate as a substantive bar.

136. See generally George P. Fletcher, *Some Unwise Reflections About Discretion*, LAW & CONTEMP. PROBS., Autumn 1984, at 269, 279 (noting that one definition of "discretion" is "the power to get away with alternative decisions"). The election to grant or withhold clemency is not reviewable in the courts. Note, *supra* note 84, at 893-95.

137. See Bedau, *supra* note 129; Tabak, *supra* note 121, at 844-46. In the words of Professor Bilonis: "[T]he prevailing wisdom holds that clemency in death cases entered a nosedive at roughly the same moment that judicial regulation of capital punishment under the Eighth Amendment skyrocketed." Bilonis, *supra* note 37, at 1697 (footnote omitted). To the same effect, see also Lichten, *supra* note 129, at 5 ("as the pace of executions has quickened in recent years the number of commutations has declined"); cf. Kobil, *supra* note 81, at 602-04 (treating "atrophy" of federal clemency power). Interestingly, in the early 1980's, Texas accounted for 33 out of 38 death row commutations, with Florida making up the rest. See Clearinghouse on Georgia Prisons and Jails, List of Commutations Since 1976 (Jan. 21, 1987) (reprinted as unpaginated last page in Lichten, *supra* note 129). Yet, as a recent study points out, the 30 commutations between 1981 and 1983 were mass commutations granted in order to avoid retrials otherwise required because of two new Court deci-

current desuetude sharply diverges from practice earlier in the century; until about a decade ago, commutations were not infrequent.¹³⁸ Because uncertainty about guilt presents the strongest ground for redress,¹³⁹ the rare exceptions to the de facto abolition of clemency have tended to involve such lingering doubts.¹⁴⁰ But in the post-*Herrera* world, in which the executive branch often will furnish the sole available forum for evaluating newly discovered evidence, one cannot count on mercy to function as a reliable proxy for justice. To the contrary, without legislative correction (or a judicial change of heart), we shall probably witness the execution of an innocent person by the end of the 1990's.¹⁴¹

The reason for this conclusion is plain and needs no lengthy elaboration. Simply put, by a journalist critical of *Herrera*: "In relegating the fates of convicted state prisoners to discretionary acts of gubernatorial grace, the Supreme Court has thrown the

sions. Since 1983, Texas has granted relief only five times, and not once since 1990. Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 295-96 (1993). Syndicated columnist Molly Ivins has written about the current "nonexistent clemency procedure theoretically in the hands of the Board of Pardons and Paroles." Molly Ivins, *Spare Gary Graham*, WASH. POST, Aug. 18, 1993, at A21. According to Ivins, "[t]he 18 board members are scattered all over the state, no one is in charge of calling them together in emergencies, they have no rules on how to proceed, and the board is traditionally composed of retired law-enforcement officers who think it's not their job to second-guess the courts." *Id.*

138. See Lichten, *supra* note 129, at 1-5. See generally Note, *supra* note 84, at 895-96 (providing an overview of clemency in Anglo-American tradition).

139. For an early assertion that pardon is especially appropriate in those circumstances, see *Ex parte Wells*, 59 U.S. (18 How.) 307, 310 (1855). See also Kobil, *supra* note 81, at 612-13 (arguing that ideally clemency should serve as a useful safety valve for the wrongly convicted). But cf. Henry Weihofen, *The Effect of a Pardon*, 88 U. PA. L. REV. 177, 192 (1939) ("To pardon a man for being innocent is irony").

140. See, e.g., Bilionis, *supra* note 37, at 1700-01 & n.246 (discussing the commutations of death sentences of Herbert R. Bassette, Jr. and Joseph Giarratano in Virginia, and Anson Avery Maynard in North Carolina); Freedman, *supra* note 128, at 319 n.22 (discussing the commutation of Ronald Monroe in Louisiana); see also Tabak, *supra* note 121, at 845 (stating that now the Georgia Board of Pardons and Paroles will not consider clemency unless there is doubt concerning guilt).

141. The relevant "witnessing" would, of course, come after the fact, when positive proof of innocence emerged. See generally Mark V. Tushnet, *The Politics of Executing the Innocent: The Death Penalty in the Next Century?*, 53 U. PITT. L. REV. 261 (1991) (expounding the view that the Court's toleration of serious defects in capital proceedings will insure such a miscarriage of justice).

fundamental question of guilt or innocence straight into the lion's den of partisan politics."¹⁴² While courts (especially elected judges) hardly are immune from political pressure,¹⁴³ they operate under procedural constraints and issue written, reviewable decisions. Even the most biased must pay lip service to a professional norm of neutrality. Governors, on their part, institutionally fill the role of commanders-in-chief of the prosecution.¹⁴⁴ People do not expect dispassion from the executive but, rather, responsiveness to their will.

These days, perhaps always, the public cries for law-and-order. Scared to be dubbed "bleeding heart[s]" or "fuzzy-thinking do-gooder[s]," all but the very boldest leaders follow the path of least resistance¹⁴⁵—in this context, as in others. They just say no.¹⁴⁶ Thus, for most *Herrera* claimants, clemency is truly a "gateway to nowhere."¹⁴⁷

142. Comment, *Wrongful Death*, NEW YORKER, Aug. 16, 1993, at 4, 6; see Kobil, *supra* note 81, at 607-10; Tabak, *supra* note 121, at 845-46.

143. See Berger, *supra* note 37, at 1085-86 n.107; Tabak, *supra* note 121, at 846-47.

144. See *Ford v. Wainwright*, 477 U.S. 399, 416 (1986) (plurality opinion).

145. Kobil, *supra* note 81, at 607-09 (quoting MICHAEL DISALLE, *THE POWER OF LIFE OR DEATH* 204 (1965)). As a rule, there is no reason to believe that administrative boards or panels with power over the clemency decision possess more courage or independence than the chief executives who appoint them. See *supra* text accompanying notes 131-32.

146. Some Governors and their surrogates mouth pieties about not wanting to interfere with determinations by courts or juries. See Tabak, *supra* note 121, at 845; Ivins, *supra* note 137, at A21. That rationale, or rationalization, for executive inertia destroys the whole meaning of clemency—a deliberately extrajudicial process for taking a final, and fresh, look at the prisoner's case. Others, more honest, admit their capitulation to political pressure. See Kobil, *supra* note 81, at 608 (quoting EDMUND BROWN & DICK ADLER, *PUBLIC JUSTICE AND PRIVATE MERCY* 78-79, 84 (1989)).

147. Marcia Coyle, *Inmate Granted Unique Hearing*, NAT'L L.J., Aug. 16, 1993, at 3, 42 (quoting the author of this Article). On that account, some who seek to revitalize pardon and commutation propose to subject the process to legal, or even constitutional, constraints. See, e.g., Bilionis, *supra* note 37, at 1698-701 (arguing that meaningful clemency review is the Governor's constitutional duty); Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201 (1993) (contending that procedural due process protections should be extended to clemency process in capital cases); Kobil, *supra* note 81, at 624-33 (noting that an applicant would have a right to clemency in certain situations, including cases where there is "substantial doubt of guilt").

C. Federal Law: Death and Innocence, Innocence and Habeas

1. Is Death Different?¹⁴⁸

Well before *Furman v. Georgia*¹⁴⁹ and the *Gregg v. Georgia*¹⁵⁰ quintet¹⁵¹ ushered in the modern era of death penalty jurisprudence, the Court displayed a heightened concern for capital defendants. In several settings, the Justices either enunciated special rules¹⁵² or applied the usual rules with special bite¹⁵³ to insure procedural regularity in cases involving con-

In August 1993, a district judge in Austin, Texas ordered that the Board of Pardons and Paroles hear death row inmate Gary Graham's compelling new evidence of innocence. He rested his decision on the "due course of law" protection of the state constitution, a right analogous to federal due process. Coyle, *supra*, at 3 (quoting District Judge Pete Lowry of Travis County, Texas). The Attorney General took an appeal, which automatically vacated the lower court order. *New Twists in Case of a Texan Scheduled to Die*, N.Y. TIMES, Aug. 13, 1993, at B7. As I write, the litigation is still pending.

148. In this Section, which implicates a voluminous literature, the sources upon which I have relied include Berger, *supra* note 37; Vivian Berger, *Born-Again Death*, 87 COLUM. L. REV. 1301 (1987) (book review); Bilionis, *supra* note 37; Markus D. Dubber, *Regulating the Tender Heart When the Axe Is Ready to Strike*, 41 BUFF. L. REV. 85 (1993); and Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305. Analysis of the doctrinal developments noted here exceeds the scope of the present Article. Fuller treatments appear in the articles cited above.

149. 408 U.S. 238 (1972).

150. 428 U.S. 153 (1976).

151. *Gregg's* four companion cases were *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding Florida's death penalty statute); *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding Texas' death penalty statute); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (invalidating North Carolina's death penalty statute); and *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976) (invalidating Louisiana's death penalty statute).

152. For example, before *Gideon v. Wainwright*, 372 U.S. 335 (1963), required provision of counsel to felony defendants in every case, the Court laid down a per se rule calling for appointment of counsel for indigents in capital proceedings. *See, e.g.*, *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Bute v. Illinois*, 333 U.S. 640 (1948); *Powell v. Alabama*, 287 U.S. 45 (1932); *see generally Williams v. Georgia*, 349 U.S. 375, 391 (1955) (Frankfurter, J.) ("The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant.") (footnote omitted).

153. For example, the Court would give unusually intensive scrutiny to the facts bearing on the voluntariness of confessions admitted in capital cases. *See Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 516 (1963); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 272 (1985); *see, e.g.*, *Brown v. Mississippi*, 297 U.S. 278 (1936). *Cf. Norris v. Alabama*, 294 U.S. 87 (1935) (applying similar scrutiny where capitally sentenced defendant alleged grand jury discrimination).

demned prisoners.¹⁵⁴ That approach was scarcely startling, given the obvious harshness and irrevocability of execution; the "qualitative difference" between death and other penalties demanded "a corresponding difference in the need for reliability" in the capital sentencing process.¹⁵⁵ But only in the decade after *Furman* did the Court systematically mine the Cruel and Unusual Punishments Clause, invoking the "death is different" mantra to institute unique protections for capital trials¹⁵⁶ and to extend certain guilt-phase protections to sentencing hearings.¹⁵⁷

Recent years plainly have seen a weakening in the commitment to the difference principle. To be sure, the basic Eighth Amendment edifice built in the 1970's¹⁵⁸ remains in place,¹⁵⁹ with its requirements of (minimally) non-arbitrary sentencing,¹⁶⁰ individualization of punishment, narrowing of the

154. The Court also has revealed more of a disposition to police the "outposts . . . of . . . substantive criminal law" in this setting than in others. See *Patterson v. New York*, 432 U.S. 197, 228 (1977) (Powell, J., dissenting); see also *Martin v. Ohio*, 480 U.S. 228, 232 (1987) (noting "preeminent role" of states in defining criminal conduct); *Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("The States possess primary authority for defining and enforcing the criminal law."); Sundby, *supra* note 70, at 477 (remarking on the Court's extreme reluctance to impose controls in area of state criminal law). Thus, for instance, while the Eighth Amendment contains only a narrow proportionality principle applicable to ordinary sentencing, *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) (Kennedy, J., concurring), that principle has broader application in the review of sentences of death. See, e.g., *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that a death sentence is an excessive penalty for one who neither killed nor attempted or intended to kill) (modified in *Tison v. Arizona*, 481 U.S. 137 (1987)); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that a death sentence is an excessive penalty for the rape of an adult woman).

155. *Woodson*, 428 U.S. at 305; see Dubber, *supra* note 148, at 119-20.

156. See, e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980) (prohibiting a definition of statutory aggravating circumstance so broad that it fails to guide the sentencer's discretion); *Green v. Georgia*, 442 U.S. 95 (1979) (disallowing application of an otherwise valid hearsay rule in a way that excludes from consideration the defendant's trustworthy mitigating evidence).

157. See, e.g., *Estelle v. Smith*, 451 U.S. 454 (1981) (privilege against self-incrimination); *Bullington v. Missouri*, 451 U.S. 430 (1981) (double jeopardy).

158. See Berger, *supra* note 37, at 1070-74; Berger, *supra* note 148, at 1303.

159. See generally Bilonis, *supra* note 37, at 1659. The Justices, except for Scalia and Thomas, adhere to the central modern tenets that capital sentencing determinations "should aspire toward moral appropriateness, should be reached in a rational and orderly fashion, and should be rendered with . . . heightened procedural fairness." *Id.*

160. See Berger, *supra* note 37, at 1074-77 (stating that the Court has "virtually

death-eligible class by proof beyond a reasonable doubt of at least a single aggravating factor,¹⁶¹ virtually unlimited admissibility and mandatory consideration of the defendant's mitigating proof¹⁶² and lastly, meaningful appellate review.¹⁶³ Nowadays, though, death's practical distinction from other penalties makes less of a legal difference.¹⁶⁴ Insofar as it does matter, as commentators both on and off the Court have noted, it increasingly cuts against, not for, the capital defendant.¹⁶⁵

The overall retrenchment in this area does not, of course, amount to precedent regarding any specific contention. Knowing of the trend toward taking claims of death-sentenced prisoners less seriously, one could have generally predicted the likely demise of Herrera's—or another inmate's—claim without having

abandoned" its objective of curbing capricious sentencing).

161. Such narrowing, however, may occur at the guilt trial rather than at the penalty hearing. See *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

162. However, "[s]tates are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty,'" *Boyde v. California*, 494 U.S. 370, 377 (1990) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (plurality opinion)); accord *Johnson v. Texas*, 113 S. Ct. 2658 (1993), and aggravating proof is also admissible almost without constitutional constraint. Compare *Payne v. Tennessee*, 111 S. Ct. 2597 (1991) (prosecution may adduce victim impact evidence) with *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (prosecution may not employ "constitutionally impermissible or totally irrelevant" aggravating factors).

163. See *Parker v. Dugger*, 111 S. Ct. 731, 739 (1991).

164. See, e.g., *Dubber, supra* note 148, at 145 ("[D]eath was not different enough to protect capital defendants against anti-sympathy instructions . . . or against victim impact statements" in *Saffle v. Parks*, 494 U.S. 484 (1990), and *Payne*, respectively.); see also *Berger, supra* note 37, at 1074-83. Professor Weisberg correctly views the Court's October 1982 Term as a turning point for death row inmates. During that term, an almost unbroken string of victories gave way to a growing number of defeats. See Weisberg, *supra* note 148; see also WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 12-13 (1987) (noting that, previously, the Court had overturned the death sentence in all but one of the fully argued capital cases).

165. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 347 (1987) (Blackmun, J., dissenting) ("The Court today seems to give a new meaning to our recognition that death is different."); Weisberg, *supra* note 148, at 343-44 (discussing *Barefoot v. Estelle*, 463 U.S. 880 (1983)). Sometimes the principle is used, as it were, in reverse—to restrict non-capital defendants' rights. Thus, for example, in *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), the Court "limited the Eighth Amendment's requirement of individualized sentencing to capital cases on the basis of 'the qualitative difference between death and other penalties.'" *Dubber, supra* note 148, at 145 (quoting *Harmelin*, 111 S. Ct. at 2702).

identified a precise contraindication. Even in the 1990's, capital defendants win at times.¹⁶⁶ Closer analysis, however, reveals several factors militating against success for the present petitioner in particular.

First, Herrera's proposed rule that he must be given a "meaningful post-trial opportunity" to prove his innocence¹⁶⁷ was truly new. Defendants, not surprisingly, tend to prevail more often with somewhat more familiar arguments.¹⁶⁸ Second, he invoked broad concepts of substantive and procedural justice with ill-defined and potentially expansive applications. For example, at oral argument, despite counsel's disavowal, members of the Court evinced concern that a decision favoring Herrera would "extend to all inmates, not just inmates sentenced to death."¹⁶⁹ By contrast, especially in recent times, the defense stands a better chance of carrying the day on a narrower claim.¹⁷⁰ Third, although the Court announced many safeguards for penalty hearings that find no counterpart in regular sentencing¹⁷¹—to insure the utmost reliability in life-or-death determi-

166. See, e.g., Vivian Berger, *Ax Poised Over Habeas*, NAT'L L.J., Aug. 31, 1992, at S10 (describing the fairly good record of capital litigants in the Court's October 1991 Term). Notably, the victories clustered in the direct, as opposed to habeas, docket. See *id.*

167. See *supra* text accompanying note 23.

168. See, e.g., *Dawson v. Delaware*, 112 S. Ct. 1093 (1992) (holding that irrelevant penalty hearing proof of a defendant's membership in white racist prison gang violated the First Amendment); *McKoy v. North Carolina*, 494 U.S. 433 (1990) (holding in favor of a defendant compelled by its earlier decision in *Mills v. Maryland*, 486 U.S. 367 (1988), barring requirement that the jury be unanimous in finding a specific mitigating circumstance, as a prerequisite to its weighing by an individual juror).

169. Marcia Coyle, *Debate on Death Appeals Starts Court Year*, NAT'L L.J., Oct. 19, 1992, at 5; *Arguments Heard*, *supra* note 10, at 3040; see *supra* text accompanying notes 13-14, and note 26 and accompanying text; cf. *Dubber*, *supra* note 148, at 144 ("While death's unique quality once permitted the Court to grant capital defendants constitutional protections not available to other defendants, it has been transformed into a method for restricting the constitutional rights of capital and non-capital defendants alike.") (footnote omitted).

170. See, e.g., *Trevino v. Texas*, 112 S. Ct. 1547 (1992) (finding that a defendant whose trial preceded *Batson v. Kentucky*, 476 U.S. 79 (1986), sufficiently preserved an objection that the State violated equal protection in its use of peremptory strikes in his case); *Lankford v. Idaho*, 111 S. Ct. 1723 (1991) (holding that a penalty hearing did not comport with due process where the defense lacked adequate notice that the judge might sentence the defendant to death).

171. See *supra* text accompanying notes 158-62.

nations—even in the heyday of post-*Furman* doctrinal development, it did almost nothing distinctive to enhance procedures during the guilt phase.¹⁷² That background furnished no ground to anticipate a hospitable reception for a death-sentenced prisoner's assertion of a post-trial right to establish innocence.

Plainly, accurate verdicts of guilt are a *sine qua non* of accurate sentences—they comprise the principal bulwark against erroneous executions. Because most capital defendants enjoy no greater protection than any other defendants from the risk of wrongful conviction,¹⁷³ one cannot assess their vulnerability in this respect without generally evaluating the truth-determining process at trial. While such an exhaustive examination falls outside my present compass, I note my view that a real-world system could give, consistent with government interests in vindicating the criminal law, more assurance of safeguarding innocents than does ours.¹⁷⁴ Be that as it may, nothing in the juris-

172. The major exception that comes to mind, *Beck v. Alabama*, 447 U.S. 625 (1980), held that a jury in a capital case must be permitted to consider a lesser included offense supported by the record. The Court had never found a defendant entitled, as a matter of due process, to such a charge in a non-death setting. *Id.* at 637. *Beck* was limited a decade later to situations where the absence of a lesser offense instruction would leave the jury with no option but to convict of a capital crime or else set the defendant free. *Schad v. Arizona*, 111 S. Ct. 2491, 2505 (1991). In addition, certain jury selection rules meant to ensure the retention of jurors who can follow the judge's instructions also may help capital defendants during the guilt phase of the proceeding. *See, e.g., Morgan v. Illinois*, 112 S. Ct. 2222 (1992) (holding the defense entitled to challenge for cause any prospective juror who would always vote for death if the defendant was convicted of a capital offense); *Turner v. Murray*, 476 U.S. 28 (1986) (allowing a defendant accused of interracial capital crime to conduct voir dire on the issue of possible racial bias). The most significant jury selection rule, however—"death qualification" pursuant to *Witherspoon v. Illinois*, 391 U.S. 510 (1968)—may harm such defendants by eliminating venirepersons less likely to return convictions. *See Lockhart v. McCree*, 476 U.S. 162, 168-73 (1986) (discussing the numerous social science studies which conclude that "death qualification" produces "conviction-prone" juries).

173. Indeed, they may fare worse than ordinary defendants in certain ways. *See, e.g., supra* text accompanying notes 121-25 (discussing the prevalent incompetence of counsel and the suppression of evidence in capital trials); *cf. Darden v. Wainwright*, 477 U.S. 168 (1985) (tolerating extreme misconduct in the State's summation at the end of the guilt phase). *But cf. supra* note 172 (noting that in certain guilt trials, some precedent gives heightened protection).

174. Professor Stacy has mounted a persuasive case that the Burger and Rehnquist Courts, while touting accuracy "*Über alles*," have sought solely to reduce the total number of errors rather than, as has traditionally been the goal, the incidence of

prudence of difference beyond its value as a catchphrase should have provided much hope to Herrera.

2. *Is Innocence Paramount?*¹⁷⁵

Sensibly, what did encourage the petitioner was the increasing focus on innocence as a foundational reference point of modern habeas corpus doctrine.¹⁷⁶ In a context of drastic retrenchment beginning in the 1970's,¹⁷⁷ the majority Justices have placed the value of shielding the guiltless at the core of the shrinking writ.¹⁷⁸ Although "what constitutes innocence" may

mistaken convictions. See Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369 (1991). To similar effect, see Note, Winship on Rough Waters: *The Erosion of the Reasonable Doubt Standard*, 106 HARV. L. REV. 1093 (1993).

175. The habeas literature is, if possible, even vaster than the capital punishment scholarship. With regard to this section, useful sources, old and new, include the following: Bator, *supra* note 153; Berger, *supra* note 5; Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Dubber, *supra* note 148, at 92-98; Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Bruce Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 18 N.Y.U. REV. L. & SOC. CHANGE 415 (1990-1991); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992) [hereinafter Liebman, *Apocalypse*]; LIEBMAN, *supra* note 126 (1988 & Supp. 1992); James S. Liebman, *More Than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990-1991) [hereinafter Liebman, *"Slightly Retro"*]; Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128 (1986); Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939 (1991); Weisberg, *supra* note 148; and Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993).

176. See Brief for Petitioner at 36-38, *Herrera* (No. 91-7328).

177. For explorations of these trends in greater depth than is feasible here, see generally the sources cited *supra* note 175. Among other things, the Court has constructed a virtually airtight system of forfeitures that serves to deny habeas review to defendants who have made procedural missteps either in state court or in previous federal proceedings. See *infra* text accompanying notes 205-25. It also has fashioned a novel and sweeping law of prospectivity of new rulings favoring defendants, see *supra* note 41 and *infra* text accompanying notes 198-201, refused to apply the strict constitutional harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967), in habeas actions, *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), and (again departing from the difference principle), declined to afford heightened review to claims of death-sentenced habeas petitioners. See, e.g., *Herrera v. Collins*, 113 S. Ct. 853, 863 (1993) (quoting *Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (plurality opinion)). Indeed, in *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Court actually endorsed more cursory treatment for capital claimants.

178. See, e.g., *Smith v. Murray*, 477 U.S. 527, 543-44 (1986) (Stevens, J., dissent-

sometimes prove a difficult question,¹⁷⁹ the Court, as I explain below, has settled mainly on a layperson's notion of this phenomenon. Herrera's latter-day effort to shunt the blame to his brother surely fell within that heading.¹⁸⁰ Thus, paradoxically, he envisioned using the Court's restrictive precedents to broaden the path to relief for himself.

The significance of the concept of innocence in habeas law has been growing for approximately twenty years. Championed heavily by several influential jurists, both on and off the Court (most prominently, Judge Friendly,¹⁸¹ late of the Second Cir-

ing) (majority sets aside the "question whether constitutional rights have been preserved and considers only the petitioner's innocence or guilt"); see also *Teague v. Lane*, 489 U.S. 288, 313 (1989) (plurality opinion) (citing cases). Justice Stevens was contrasting the majority's approach in *Smith* with the usual view of the writ's function, expressed succinctly by Justice Holmes: "[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved." *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923). Even Justice Powell, who became one of the chief proponents of an innocence-centered writ, see *infra* text accompanying note 182, initially conceded, "I am aware that history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt." *Schneekloth v. Bustamonte*, 412 U.S. 218, 257 (1973) (Powell, J., concurring).

179. See Sundby, *supra* note 70, at 458. For example, innocence in a legal sense may coexist with factual guilt, as when wholly reliable evidence, seized in violation of the Fourth Amendment, must be suppressed and, in its absence, the record will not support conviction. (This would hold true by definition for possessory crimes.) See Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 93 n.440 (1986). Rulings that the defendant's conduct did not fall within the proscription of the law under which he was charged, see, e.g., *McNally v. United States*, 483 U.S. 350 (1987), or that the prosecution was brought under an unconstitutional statute, see, e.g., *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), may present complex issues of characterization that blur the line between factual innocence and legal innocence, especially when the activity in question violates some other law. See *id.* at 2541 & n.1 (cross burning on another's property). So, too, in a different vein, do cases involving mental states such as insanity, in which a verdict of not guilty tends, in practice, to mask a blend of laypersons', lawyers', and medical concepts. In addition, a court concerned with innocence may focus on the status of the particular defendant as a guilty or innocent person, on the type of claim she raises, or on a combination of both. See 1 LEIBMAN, *supra* note 126, § 2.2, at 20 n.83 (1988); *infra* text accompanying notes 188-90. Finally, for a discussion of "innocence of death" in the capital sentencing context, see *infra* note 213.

180. See *Sawyer v. Whitley*, 112 S. Ct. 2514, 2519-20 (1992) (discussing "[a] prototypical example of 'actual innocence'"—i.e., where a person other than the convicted defendant confesses to the crime).

181. Together with Professor Bator, see *supra* note 153, Judge Friendly provided

cuit, and Justice Powell¹⁸²), the theme of "[un]deserved confinement"¹⁸³ or moral worthiness¹⁸⁴ as a touchstone for the remedy has played out, with variations, in four main doctrinal settings. These involve limitations on the scope of federal review of certain kinds of subject matter, of repetitive applications, and of contentions procedurally defaulted in the state courts or relying on new rules announced since the judgment became final. In all these areas, a majority of Justices have inveighed against the systemic costs of habeas, especially its incursions upon finality, comity, and federalism.¹⁸⁵ Increasingly, only the possibility of overturning inaccurate judgments has been deemed a sufficient benefit to justify the perceived "expense."

I do not intend to replough this much-tilled ground in any depth in the following pages.¹⁸⁶ For present needs, it suffices to

the philosophical groundwork for the "New Habeas." Patchel, *supra* note 175, at 943. In his widely quoted article, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, he proposed that, "with a few important exceptions," collateral relief for both state and federal prisoners should lie only when the petitioner "supplements his constitutional plea with a colorable claim of innocence." Friendly, *supra* note 175, at 142; see also *id.* at 160, 167. Another preeminent law review piece of the 1970's that explored the potential for habeas of a jurisprudence of innocence was *Dialectical Federalism: Habeas Corpus and the Court*, *supra* note 175, written by Professors Cover and Aleinikoff. Unlike the earlier Friendly work, it appeared to imply expansion, not contraction, of the writ's reach. "At its outer limit, the suggested principle may create a federal constitutional right to a correct verdict." *Id.* at 1099; see also *id.* at 1087, 1095-100. Predictably, given the Court's ideological complexion, this article has not shaped the discourse outside academia.

182. See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 250-75 (1973) (Powell, J., concurring). Justice Black also contributed to this trend. See, e.g., *Kaufman v. United States*, 394 U.S. 217, 231 (Black, J., dissenting).

183. See *Schneekloth*, 412 U.S. at 257 (Powell, J., concurring).

184. Cf. *Brown v. Allen*, 344 U.S. 443, 498-99 (1953) (Frankfurter, J.) ("For surely it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they involve limitations on State power and may be invoked by the *morally unworthy*." (emphasis added)).

185. See, e.g., *McCleskey v. Zant*, 111 S. Ct. 1454, 1468-69 (1991); *Teague v. Lane*, 489 U.S. 288, 309-10 (1989) (plurality opinion); *Engle v. Isaac*, 456 U.S. 107, 126-28 & nn.31-32 (1982) (quoting, inter alia, Friendly, *supra* note 175, at 145, 146; Bator, *supra* note 153, at 452); *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976).

186. Professor Bator's approach to narrowing collateral relief, contained in a path-breaking law review article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, *supra* note 153, is, however, worthy of mention. Even more mooted than Judge Friendly's, see generally Liebman, *Apocalypse*, *supra* note 175, at 2041, it has competed with his for dominance as a theoretical basis for restricting habeas corpus. Unlike the latter, which sees the writ's central function as correcting

identify what Herrera's team would have observed in the legal landscape of the 1990's¹⁸⁷ of conceivable aid to them.

Essentially, the jurisprudence of innocence has evolved along two lines, distinct but related, in this context. One is "categorically focused" on constitutional violations that, irrespective of their effect on the individual defendant, tend to subvert reliable determinations of guilt in the general run of cases.¹⁸⁸ The other looks to the status of the specific defendant: whether, regardless of the type of error urged, she might be innocent.¹⁸⁹ A tougher variant of the latter blends it partly with the former, restricting relief to instances in which the alleged breach may have resulted in the conviction of *this* petitioner, despite her innocence.¹⁹⁰

The first approach initially emerged in a number of opinions suggesting that post-conviction review should not encompass complaints of unlawful search and seizure, whose vindication obstructs the truthfinding function of trials.¹⁹¹ That view pre-

erroneous results, Professor Bator's article regards habeas as an insurer of satisfactory process for deciding federal questions in cases in which the state courts have not afforded adequate review at some point in the proceedings. "It is, after all, the essence of the responsibility of the states under the due process clause to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case" Bator, *supra* note 153, at 456. Absent such a failure of process or a lack of jurisdiction in the trial court, Bator would deny a federal forum. *See id.* at 455-62. Although Judge Friendly's article acknowledges his heavy debt to the Bator piece, their implications are very different and often at odds. But as Professor Patchel has shown, both have influenced recent case law (at times, conjoining in a single decision, *see, e.g.,* Stone v. Powell, 428 U.S. 465 (1976); *infra* note 192 and accompanying text) because of their mutual ability to further the agenda of cutting back on habeas. *See* Patchel, *supra* note 175, at 953-58 & n.85, 961; *id.* (passim); *see also* Friendly, *supra* note 175, at 146 n.15. For a summary listing of several models of habeas review, *see* Woolhandler, *supra* note 175, at 576-80.

187. *See supra* note 57 and accompanying text.

188. *See* 1 LIEBMAN, *supra* note 126, § 2.2, at 20 n.83 (1988).

189. *See id.* For instance, under this approach, a defendant might offer evidence of innocence along with a claim of a breach of her constitutional right to a speedy trial, which has little or nothing to do with guilt or innocence.

190. *See id.* For example, a defendant might urge that admission of an unconstitutionally suggestive pretrial identification procedure at her trial caused an erroneous verdict of guilt. Here, as opposed to the previous example, *see supra* note 189, the nature of the error (guilt related) and the status of the defendant (innocent) are connected.

191. *See* Lefkowitz v. Newsome, 420 U.S. 283, 302 (1975) (Powell, J., dissenting); Schneckloth v. Bustamonte, 412 U.S. 218, 250-75 (1973) (Powell, J., concurring); Kaufman v. United States, 394 U.S. 217, 231 (1969) (Black, J., dissenting).

vailed in 1976 in *Stone v. Powell*.¹⁹² Justice Powell, writing for the Court, emphasized that exempting this class of claims from habeas created no danger of denying a safeguard against compelling an innocent man to lose his liberty.¹⁹³ Assailed by scholars,¹⁹⁴ *Stone* has not, however, proved the harbinger of a piecemeal evisceration of habeas, as feared by dissenting Justice Brennan,¹⁹⁵ nor even of a prudential limitation of the writ to petitioners with innocence-connected claims.¹⁹⁶ Instead, the Court has repeatedly rebuffed attempts to extend it beyond the Fourth Amendment domain.¹⁹⁷

192. 428 U.S. 465 (1976). In an amalgam of innocence and process considerations, the Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial." *Id.* at 482.

193. *Id.* at 491 n.31. "Rather, a convicted defendant who pressed a search and seizure claim on collateral attack was 'usually asking society to redetermine an issue that ha[d] no bearing on the basic justice of his incarceration.'" *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion) (quoting *Stone*, 428 U.S. at 492 n.31).

194. See, e.g., Patchel, *supra* note 175, at 959-65; Ira P. Robbins & James E. Sanders, *Judicial Integrity, the Appearance of Justice, and the Great Writ of Habeas Corpus: How to Kill Two Thirds (or More) with One Stone*, 15 AM. CRIM. L. REV. 63 (1977); Yale L. Rosenberg, *Constricting Federal Habeas Corpus: From Great Writ to Exceptional Remedy*, 12 HASTINGS CONST. L.Q. 597, 598-610 (1985). But cf. Cover & Aleinikoff, *supra* note 175, at 1086-100 (considering the implications of *Stone* in more positive terms).

195. See *Stone*, 428 U.S. at 516 (Brennan, J., dissenting).

196. See *id.*; cf. Robbins & Sanders, *supra* note 194, at 85 (predicting that the position "that federal habeas corpus relief should be available only to those who present a colorable claim of innocence may be only a *Stone*'s throw away") (footnote omitted). Before *Stone*, Professor Mishkin had recommended limiting habeas relief to claims that affect the "guilt determining process." See Paul J. Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 79-86, 102 (1965).

197. See *Withrow v. Williams*, 113 S. Ct. 1745 (1993) (declining to "*Stone*" violations of *Miranda*); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (refusing to bar habeas for claim of ineffective assistance of counsel, grounded in failure to challenge search and seizure on Fourth Amendment grounds); *Jackson v. Virginia*, 443 U.S. 307 (1979) (holding that *Stone* does not bar claims of constitutionally deficient evidence); *Rose v. Mitchell*, 443 U.S. 545 (1979) (allowing the issue of racial discrimination in selection of grand jury foreman to be raised in habeas). Although the issue in *Jackson*, for instance, did bear directly on "the basic question of guilt or innocence," see *Withrow*, 113 S. Ct. at 1750 (quoting *Jackson*, 443 U.S. at 323), in *Rose*, it surely did not. The accused had been convicted at trial by a properly chosen

More recently, the Court included a categorical innocence exception¹⁹⁸ to its general bar, announced in the landmark *Teague v. Lane*,¹⁹⁹ on announcing or applying new rules of criminal procedure in habeas corpus.²⁰⁰ This narrow proviso allowed for retroactivity of certain "watershed rules;" specifically, "those new procedures without which the likelihood of an accurate conviction is seriously diminished."²⁰¹ While *Stone's* ultimately failed blueprint implied whittling away at habeas, *Teague's* highly successful strategy has cut the remedy down with an ax.²⁰² Yet, from the petitioner's perspective, both theo-

petit jury. Cf. *Withrow*, 113 S. Ct. at 1753 (holding that *Miranda* serves to guard against use of unreliable statements at trial). *Stone*, therefore, may rest more on hostility to the exclusionary rule than to habeas corpus as such. See also *Stone*, 428 U.S. at 481 (purporting to rest the Court's holding on "the nature and purpose of the Fourth Amendment exclusionary rule"). Yet insofar as the former's unpopularity stems from its suppression of typically reliable, often indispensable, evidence of guilt, see, e.g., *United States v. Leon*, 468 U.S. 897, 907-08 (1984); *Stone*, 428 U.S. at 489-90, it furnished a logical jumping-off point for an innocence-centered writ. Cf. *Berger*, *supra* note 179, at 99 (stating that the Court has linked a "disfavored right"—effective assistance of defense counsel—with the "unloved remedy" of habeas corpus, "and not enhanced the status of either").

198. See *supra* text accompanying note 188.

199. 489 U.S. 288 (1989) (plurality opinion).

200. *Teague* has spawned a mini-library of critical work within the overall habeas literature. See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); Steven M. Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357 (1990-1991); Liebman, *"Slightly Retro," supra* note 175.

201. *Teague*, 489 U.S. at 311, 313; see *Butler v. McKellar*, 494 U.S. 407, 416 (1990); *Saffle v. Parks*, 494 U.S. 484, 495 (1990). The Court made plain its expectation that few "such components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313. It gave as examples chestnuts like the right not to be tried in an atmosphere dominated by mob violence, the right not to have perjured testimony knowingly introduced by the State, and the right to exclude one's brutally coerced confession from trial. *Id.* at 314. Notably, in none of the half-dozen cases in which the Justices could have applied the exemption in question did they do so. See, e.g., *Gilmore v. Taylor*, 113 S. Ct. 2112, 2119 (1993); *Butler*, 494 U.S. at 416; *Parks*, 494 U.S. at 495. Another, even narrower proviso permitted retroactive application of a new rule that "places a class of private conduct beyond the power of the State to proscribe." *Parks*, 494 U.S. at 494; see *Teague*, 489 U.S. at 311. *Penry v. Lynaugh*, 492 U.S. 302 (1989), in which a majority endorsed the plurality's position in *Teague* in a capital case (which *Teague* was not), held that this exemption included prohibitions on " 'a certain category of punishment for a class of defendants because of their status or offense.' " See *Parks*, 494 U.S. at 494-95 (quoting *Penry*, 492 U.S. at 329-30).

202. See generally *Bilonis*, *supra* note 37, at 1652 (stating that *Teague's* "capacity

retically looked to preserve and, conceivably, even enhance the protection of innocence,²⁰³ regarded by the current Court as the bedrock value of habeas.

Two other lines of precedent, however (merged now, in relevant respects²⁰⁴), offered a still more promising prospect. These involved the treatment of state procedural defaults and of repetitive requests for the writ, based on either contentions previously heard and rejected or on contentions not raised before.²⁰⁵ In each of these areas, the Court has been fashioning an obstacle course for habeas applicants, replacing the generous law of the 1960's with draconian door-closing doctrines. The Court has ended in each, however, by making the possible factual innocence of the defendant an "open sesame," thereby adopting the second (noncategorical) approach outlined above.²⁰⁶

Briefly stated, in the 1970's the generous reign of *Fay v. Noia*,²⁰⁷ pursuant to which a forfeiture of state court remedies did not forestall federal relief unless a petitioner "deliberately bypassed the orderly procedure of the state courts,"²⁰⁸ yielded to the strict regime of *Wainwright v. Sykes*.²⁰⁹ Under *Sykes*,

for drastically reducing the role of the federal courts in death cases needs no elaboration"); Patchel, *supra* note 175, at 982 ("The retroactivity doctrine limits both the practical efficacy of rights and the avenues available for their vindication . . .").

203. Incredibly, in the actual case, the State urged that Herrera's proposed new rule would not fall under the accuracy exception. See Brief for Respondent at 42-44, *Herrera v. Collins*, 113 S. Ct. 853 (1993) (No. 91-7328). Because "[r]etroactivity is properly treated as a threshold question," *Teague*, 489 U.S. at 300, the Court's failure to mention the argument in the opinion on the merits intimates a rejection of it. Cf. *Evans v. Muncy*, 916 F.2d 163, 165-66 (4th Cir.) (calling the petitioner's claim that "the Constitution requires a state to reestablish the validity of an error-free sentence because a prisoner desires to present character evidence based on his post-sentencing conduct" a new rule having "nothing to do with the accuracy of his conviction"), *cert. denied*, 498 U.S. 927 (1990).

204. See *infra* text accompanying note 225.

205. The petition before the Court in *Herrera* belonged in the latter category. See *Herrera*, 113 S. Ct. at 858.

206. See *supra* text accompanying notes 189-90.

207. 372 U.S. 391 (1963).

208. *Id.* at 438. Even then, the district judge had discretion to overlook the bypass. See *id.*

209. 433 U.S. 72 (1977). For a description of the intervening decisions, see Jack A. Guttenberg, *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617, 623-45 (1984); Ralph S. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L.

authored by then-Justice Rehnquist, a defaulting defendant could obtain a hearing only if he was able to demonstrate " 'cause' " and " 'prejudice,' " a standard the Court did not define, other than to suggest its narrowness.²¹⁰ Although *Sykes* and its early progeny insisted that victims of a fundamental miscarriage of justice would meet this test,²¹¹ in 1986 in *Murray v. Carrier*,²¹² the Court acknowledged the need for a slender escape hatch in an "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent" yet cannot demonstrate cause.²¹³

REV. 473, 500-09 (1978). Like the rule of *Teague*, see *supra* text accompanying notes 198-202, the modern law of procedural default has produced a voluminous critical literature. The works upon which I have relied in the following discussion include: Berger, *supra* note 5, at 1691-92 & n.169 (citing sources); Berger, *supra* note 179, at 18-25; Patchel, *supra* note 175, at 965-77; Ruthann Robson & Michael Mello, *Ariadne's Provisions: A "Clue of Thread" to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty*, 76 CAL. L. REV. 87 (1988); and Yale L. Rosenberg, *Jettisoning Fay v. Noia: Procedural Defaults by Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341 (1978).

210. *Sykes*, 433 U.S. at 87 (referring to the "rule of [Francis v. Henderson, 425 U.S. 536 (1976)], barring federal habeas review absent a showing of 'cause' and 'prejudice' "). "Prejudice" remained a vague concept. See *United States v. Frady*, 456 U.S. 152, 170 (1982) (errors must work to defendant's "actual and substantial disadvantage"). It probably refers to the effect on the outcome of the trial, similar to harmless error analysis with a reversed burden of proof. See Berger, *supra* note 179, at 21-22; Bruce S. Ledewitz, *Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence*, 24 CRIM. L. BULL. 379, 389 (1988). "Cause" came to imply " 'some objective factor external to the defense [which] impeded counsel's efforts' to raise the claim in state court." See *McCleskey v. Zant*, 111 S. Ct. 1454, 1470 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Such factors included interference by officials, unavailability of the claim's factual or legal basis, and ineffective assistance of counsel. *Id.*

211. See, e.g., *Engle v. Isaac*, 456 U.S. 107, 135 (1982); *Sykes*, 433 U.S. at 91.

212. 477 U.S. 478 (1986).

213. See *id.* at 496. This formulation embodies the "blended" approach to innocence, focusing "on both the *claims* that can be raised and the *persons* who can raise them." 1 LIEBMAN, *supra* note 126, § 2.2, at 20 n.83 (1988); see also *supra* text accompanying note 190. In *Smith v. Murray*, 477 U.S. 527 (1986), handed down together with *Carrier* and *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), the Court began to develop a notion of "innocence of death," conceding, however, that " 'actual,' as distinct from 'legal,' innocence," see *supra* note 179, "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." *Kuhlmann*, 477 U.S. at 537. Ultimately, *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992), held: "Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself . . . that there was no aggravating circumstance or that some other condition of eligibility had

That same day, the Court decided *Kuhlmann v. Wilson*.²¹⁴ *Kuhlmann* involved not a defaulted but rather a repetitive claim—one that had been resolved before by the federal courts.²¹⁵ Invoking Judge Friendly and referring, as usual, to the high costs of collateral review,²¹⁶ Justice Powell, writing for a plurality of four, concluded that the “‘ends of justice’”²¹⁷ require consideration of such applications “only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.”²¹⁸ Stressing the factual, not legal, focus of that standard,²¹⁹ the plurality significantly implied that he could produce *new* evidence to show his innocence.²²⁰

not been met.” *Id.* at 2522 (footnote omitted). That showing, notably, had to be made by “clear and convincing evidence.” *Id.* at 2517. In so holding, the Justices rejected both the Solicitor General’s submission—limiting the concept solely to innocence of the crime—and Sawyer’s own, which would have expanded upon the Court’s definition to include situations where erroneous exclusion of mitigating evidence led to the sentencer’s being “presented with ‘a factually inaccurate sentencing profile’” of the petitioner.” *Id.* at 2521 (citations omitted).

214. 477 U.S. 436 (1986).

215. As is often true, the defendant pressed for a second hearing because of an intervening decision in his favor. *See id.* at 442. The petitioner sought to rely on *United States v. Henry*, 447 U.S. 264 (1980), in support of his allegation of an interrogation violative of the Sixth Amendment. *Id.*; *see also* LIEBMAN, *supra* note 126, § 26.4, at 390 n.57 (Supp. 1992) (citing numerous cases). For a general discussion of successive petitions, *see id.* § 26.3 (new-claim successive petitions) and *id.* § 26.4 (same-claim successive petitions); LARRY W. YACKLE, POSTCONVICTION REMEDIES §§ 150-56 (1981 & Supp. 1993). For a brief summary of governing doctrine prior to the changes effected by *McCleskey v. Zant*, 111 S. Ct. 1454 (1991), and *Sawyer*, *see infra* note 217 and accompanying text and note 220; Berger, *supra* note 5, at 1682-83. For competing versions of the relevant history—in particular, the interplay between Congress and the Court—compare *McCleskey*, 111 S. Ct. at 1454-68 with *id.* at 1477-82 (Marshall, J., dissenting).

216. *Kuhlmann*, 477 U.S. at 452-54 (plurality opinion); *see supra* text accompanying note 185.

217. This vague (but clearly more generous) test, drawn from *Sanders v. United States*, 373 U.S. 1 (1963), then controlled when habeas courts should hear same-claim successive petitions. *See* Berger, *supra* note 5, at 1682.

218. *Kuhlmann*, 477 U.S. at 454. This formulation, on its face, embodies the pure “status” approach to innocence: targeting the claimant’s standing as an innocent or guilty person rather than the nature of his claim. *See supra* text accompanying note 189.

219. *See Kuhlmann*, 477 U.S. at 454 (“The prisoner must make his evidentiary showing even though . . . the evidence of guilt may have been unlawfully admitted . . .”).

220. In that regard, the plurality relied directly on Judge Friendly’s views,

Justice Powell never garnered a fifth vote for the position he urged in *Kuhlmann*. But in 1991, a few years after he left the bench, a majority of the Court adopted the essence of his proposed approach. *McCleskey v. Zant*,²²¹ which (unlike *Kuhlmann*) dealt with a new-claim successive petition challenged as an abuse of the writ, altered the rules for entertaining such applications by substituting the cause-and-prejudice or innocence test drawn from the area of procedural default²²² for the generally more forgiving criteria used earlier in this setting.²²³ Without discussion, the Court rapidly extended its sway to same-claim successors in *Sawyer v. Whitley*.²²⁴ As of

[T]he prisoner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt."

Id. at 455 n.17 (footnote omitted) (emphasis added) (quoting Friendly, *supra* note 175, at 160). Under prevailing same-claim successor law, petitioners were given a second shot when "[n]ewly discovered evidence render[ed] meritorious a claim rejected for lack of proof in the prior proceeding, particularly if the state impeded the discovery of the evidence." See LIEBMAN, *supra* note 126, § 26.4, at 391 (Supp. 1992) (footnote omitted).

221. 111 S. Ct. 1454 (1991).

222. *Id.* at 1470; *supra* notes 209-13 and accompanying text.

223. See LIEBMAN, *supra* note 126, § 26.2, at 361-62 n.38 (Supp. 1992). The *Kuhlmann* plurality described these criteria as follows: "[W]here a prisoner files a petition raising grounds that were available but not relied upon in a prior petition, or engages in other conduct that 'disentitle[s] him to the relief he seeks,' the federal court may dismiss the subsequent petition on the ground that the prisoner has abused the writ." *Kuhlmann*, 477 U.S. at 444 n.6 (quoting *Sanders v. United States*, 373 U.S. at 1, 17-19 (1963)). More specifically, the inquiry was "whether the petitioner 'deliberately withheld the newly asserted ground or otherwise abused the writ' because [her] 'only purpose [was] to vex, harass, or delay.'" Berger, *supra* note 5, at 1682 (quoting 28 U.S.C. § 2244(b) (1988) and *Sanders*, 373 U.S. at 18). See generally LIEBMAN, *supra* note 126, § 26.3c (Supp. 1992) (listing a number of situations in which claimants would likely satisfy both *McCleskey* and previous law). Among other things, adjudication of new claims was allowed if "[n]either the petitioner nor counsel was, or with reasonable diligence could have become, aware of the facts giving rise to the new claim." *Id.* § 26.3, at 378 (footnote omitted).

224. 112 S. Ct. 2514, 2518 (1992). Sawyer's second habeas petition contained both successive and abusive claims. *Id.* at 2517. Justice Kennedy, the author of *Sawyer* and *McCleskey*, wrote as though the "doctrinal advance" had already occurred—describing the *Kuhlmann* plurality opinion as the holding of the Court. See *id.* at 2518-19; *McCleskey*, 111 S. Ct. at 1471; LIEBMAN, *supra* note 126, § 26.4, at

the present time, therefore, a unified field theory of forfeiture governs in habeas corpus proceedings.²²⁵

Ironically, the cloud banks massing over state defendants who wished to obtain federal review appeared to hold a silver lining for Herrera. Contraction of the writ's perimeter toward a central core of innocence amounted to expansion of the nucleus—at least, in terms of relative significance. Herrera, moreover, represented the pith of the core. As a defendant sentenced to death for a crime he declared he had nothing to do with, he seemed just the kind of person targeted for the miscarriage of justice “detour around the successive petition, abuse of the writ, and procedural default roadblocks.”²²⁶

Yet even a stubborn optimist would have paused before predicting that the Court would fully embrace the logic of its “‘exaltation of accuracy.’”²²⁷ Rhetoric extolling the role of habeas as

392 (Supp. 1992). See generally *id.* § 26.4, at 393 n.68 (noting that “considerable overlap” exists between new and traditional tests). A month before *Sawyer*, the hegemony of the cause-and-prejudice or innocence standard had already broadened to include the case of failure to develop a material fact in state court proceedings, a distinct type of procedural default previously controlled by a lenient deliberate bypass test. See *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992) (holding that a judge may deny a federal hearing in such a case), *overruling Townsend v. Sain*, 372 U.S. 293 (1963).

225. The recent opinions tend to quote in the same breath the relevant language from *Carrier* and *Kuhlmann*. See *supra* notes 212-18 and accompanying text; see, e.g., *Herrera v. Collins*, 113 S. Ct. 853, 882 (1993) (Blackmun, J., dissenting); *Sawyer*, 112 S. Ct. at 2519 & nn.5-6; *McCleskey*, 111 S. Ct. at 1470-71. I suspect, though, that the Court, if faced squarely with the issue, would require the nexus between the claim and the claimant implied by the word “resulted” in *Carrier*, which does not appear in *Kuhlmann*. Compare *supra* text accompanying notes 212-13 with *supra* text accompanying notes 217-18. Generally, however, there seems to be no difference between the two tests regarding the burden or standard of proof or the connotations of “actual” and “factual,” used interchangeably to modify either “innocent” or “innocence.” See, e.g., *Harris v. Reed*, 489 U.S. 255, 271 (1989) (O’Connor, J., concurring) (citing *Carrier*, 489 U.S. at 495-96, where the Court used the phrase “actually innocent,” while the Justice herself employed the term “factually innocent”). They both reflect the predominant current emphasis on an individualized rather than a categorical approach to the notion of innocence. See generally *Dugger v. Adams*, 489 U.S. 401, 412 n.6 (1989) (asserting that, in the context of challenge to capital sentence, a categorical approach to miscarriage of justice would convert an “‘extraordinary case’” “into an all too ordinary one”) (citation omitted).

226. *Dubber*, *supra* note 148, at 103 n.81.

227. See *Sawyer*, 112 S. Ct. at 2527 (Blackmun J., concurring in judgment) (quoting *Smith v. Murray*, 477 U.S. 527, 545 (1986) (Stevens, J., dissenting)).

a "safety valve" for innocence²²⁸ and similar verbiage had been employed mainly to reach the result of finality.²²⁹ The Justices themselves have never found a petitioner innocent of either his crime²³⁰ or his sentence,²³¹ so as to excuse a forfeiture. Further, perusal of lower court cases over a period of several years reveals only a handful of instances in which the defendant prevailed in an effort to surmount threshold barriers to review through a show of probable innocence.²³² One might account

228. See *Harris*, 489 U.S. at 271 (O'Connor, J., concurring).

229. See Patchel, *supra* note 175, at 958-59.

230. See *McCleskey v. Zant*, 111 S. Ct. 1454, 1474-75 (1991) (agreeing with the district court's conclusion that there was "absolutely no doubt" about guilt of defendant); cf. *Coleman v. Thompson*, 111 S. Ct. 2546, 2568 (1991) (noting that the defendant did not urge in the Court that habeas review was needed to prevent a miscarriage of justice); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (remanding for a determination whether the defendant, in fact, suffered a miscarriage of justice).

231. See *Sawyer*, 112 S. Ct. at 2523-25 (finding that the defendant failed to show that, absent the alleged error, no reasonable juror could have found him eligible for the death penalty); *Dugger v. Adams*, 489 U.S. 401, 412 n.6 (1989) (holding that fact that trial judge "found an equal number of aggravating and mitigating circumstances is not sufficient to show that an alleged error in instructing the jury on sentencing resulted in a fundamental miscarriage of justice"); *Smith v. Murray*, 477 U.S. 427, 537-39 (1986) (rejecting a suggestion of fundamental unfairness where there was no substantial claim that the alleged error undermined the sentencing determination).

232. See, e.g., *Jones v. Arkansas*, 929 F.2d 375 (8th Cir. 1991) (holding that the defendant was actually innocent of life sentence not authorized by statute); *Hamilton v. Jones*, 789 F. Supp. 299 (E.D. Mo. 1992) (holding that probability of factual innocence existed, where prosecutor discriminated in the exercise of peremptory strikes, thereby casting the fairness of the proceeding in doubt); *United States v. Varley*, No. 91 CR 467, 1992 WL 159389 (N.D. Ill. July 1, 1992) (holding defendant entitled to a hearing on a claim under *Jacobson v. United States*, 112 S. Ct. 1535 (1992), because entrapment, if it occurred, would amount to a complete miscarriage of justice); *Harris v. United States*, 793 F. Supp. 754 (M.D. Tenn. 1992) (holding defendant not guilty of being a felon in possession of a firearm because his right to bear arms had been restored); *Simpson v. Camper*, 743 F. Supp. 1342 (W.D. Mo. 1990) (nullifying an *Alford* plea to manslaughter by a 14-year-old, where she denied she had killed her mother, and her father was the likely culprit), *vacated as moot*, 974 F.2d 1030 (8th Cir. 1992); *Reid v. Warden*, 708 F. Supp. 730 (W.D.N.C. 1989) (holding that use of an unconstitutional burden-shifting presumption probably led to conviction of an innocent, where evidence was purely circumstantial); cf. *Rode v. Lockhart*, 675 F. Supp. 491, 493 (E.D. Ark. 1987) (holding, in a confused opinion, that counsel's inadequate assistance probably caused the conviction of a defendant "actually innocent" of first-degree murder, as opposed to a lesser charge).

My informal survey covered 1987 through the first nine months of 1992. Although I kept no exact tally, failures of claims of likely innocence clearly outnumbered successes by a large multiple. See *Pruett v. Thompson*, 771 F. Supp. 1428,

for these statistics by speculating that almost none of the applicants was, in fact, guiltless.²³³ But equally likely, those courts well understood the majority Justices' plain intent to impose an extremely strong presumption against petitioners in this situation.²³⁴

Worse, however, for the petitioner than the stinginess of the *Carrier-Kuhlmann* doctrine, in both theory and application, the Court had issued explicit (if fairly elderly) dicta rejecting the availability of habeas for "freestanding claims of actual innocence"²³⁵ not linked to a separate constitutional infringement such as, for example, the prosecution's knowing use of perjured testimony²³⁶ or suppression of exculpatory evidence.²³⁷ In 1963, in *Townsend v. Sain*,²³⁸ which listed various circumstances mandating federal evidentiary hearings on petitioners' allegations, the Court included instances of newly discovered evidence "which could not reasonably have been presented to the state trier of facts."²³⁹ In the same breath, then Chief Justice Warren opined: "Of course, such evidence must bear upon the constitutionality of the applicant's detention; *the existence merely*

1443 (E.D. Va. 1991) ("The actual innocence exception is at this point only theoretical."), *aff'd*, 996 F.2d 1560 (4th Cir. 1993). Notably, several of the victories involved legal as much as factual innocence—differing therein from Herrera's contention. *See, e.g., Jones*, 929 F.2d at 375 (finding that the defendant was sentenced under a statute not in force when the crime was committed). Not unrelatedly, virtually all were decided on the original record. *But see Simpson*, 743 F. Supp. at 1343 (district court conducted an evidentiary hearing). And a few plainly stretched the idea of miscarriage of justice beyond what the Court had intended. *See, e.g., Hamilton*, 789 F. Supp. at 301 (finding probability of actual innocence because racial discrimination in selection of jurors casts doubt upon the integrity of the judicial process). Someone in the petitioner's shoes, therefore, should have drawn small comfort from these results. 233. *But cf. infra* notes 365-69 and accompanying text (noting that innocent defendants have been sentenced to death).

234. That intent inheres in the use of the word "extraordinary." *See Harris v. Reed*, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring); *supra* note 213 and accompanying text.

235. *See Herrera v. Collins*, 113 S. Ct. 853, 863 (1993).

236. *See Napue v. Illinois*, 360 U.S. 264 (1959).

237. *See United States v. Bagley*, 473 U.S. 667 (1985); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963). Applicants who assert their innocence on the basis of new evidence are likely to raise related arguments under *Brady*, as did Herrera. *See supra* note 64.

238. 372 U.S. 293 (1963).

239. *Id.* at 317.

of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."²⁴⁰

Members of the Court (for the most part, predictable liberals) occasionally voiced a dissenting view,²⁴¹ as did academics.²⁴²

240. *Id.* (emphasis added). Indirectly, the Court was saying that such a contention would not amount to a claim of "custody in violation of the Constitution or laws . . . of the United States." See 28 U.S.C. § 2254(a) (1988); compare *Hysler v. Florida*, 315 U.S. 411, 413 (1942) (mere recantation of testimony does not invoke due process clause).

241. See *Dobbert v. Wainwright*, 468 U.S. 1231, 1234-35, 1238 (1984) (Brennan, J., joined by Marshall, J., dissenting from denial of stay and certiorari) (in the face of sworn recantation by sole witness, dissenting Justices would grant stay of execution pending determination of claim that rules barring post-trial reconsideration of guilt should be subject to Eighth Amendment scrutiny); see also *Evans v. Muncy*, 498 U.S. 927, 931 (1990) (Marshall, J., dissenting from denial of stay) (dissenting Justice would grant stay of execution to "accommodate post-sentencing evidence casting doubt on a jury's finding of future dangerousness"). In *Durley v. Mayo*, 351 U.S. 277 (1956), a pre-Townsend procedural dismissal in a case where the State had denied a post-conviction challenge, the four dissenting Justices wrote:

It is well settled that to obtain a conviction by the use of testimony known by the prosecution to be perjured offends due process While the petition did not allege that the prosecution knew that petitioner's codefendants were lying when they implicated petitioner, the State now knows that the testimony of the only witnesses against petitioner was false. No competent evidence remains to support the conviction. Deprivation of a hearing under these circumstances amounts in my opinion to a denial of due process of law.

Id. at 290-91 (Douglas, J., joined by Warren, Black and Clark, JJ., dissenting) (citations omitted).

242. For an early expression of this sort, see Carlson, *supra* note 98, and (oddly) Professor Bator, *supra* note 153, at 509. Another 1960's-era commentator overconfidently predicted that the Court would have little trouble in "declar[ing] that any conviction obtained as a result of perjured testimony unknowingly utilized by the prosecution in a state or federal trial does violence to the right of due process." Daniel E. Murray, *Convictions Obtained by Perjured Testimony: A Comparative View*, 27 OHIO ST. L.J. 102, 107 (1966). Offering a more cautious assessment, Judge Wright (then on the U.S. Court of Appeals for the District of Columbia Circuit) and Abraham D. Sofaer noted: "It is arguably a violation of due process if the state refuses to vacate a conviction entirely based upon evidence later shown to be untrue, though not necessarily suppressed or withheld. In effect, there is no probative evidence left supporting such convictions." J. Skelly Wright & Abraham D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 958 n.223 (1966). At the time these authors wrote, the "no evidence" test prevailed. See *supra* note 79. Following *Jackson v. Virginia*, 443 U.S. 307 (1979), they might have expanded their formulation to take account of cases where later events revealed a lack of sufficient true evidence to meet the reasonable doubt standard. See *supra* text accompanying notes 77-78. Finally, for more recent scholarship taking an approach different from Townsend, see Barry Friedman, *A Tale of*

Indeed, Judge Friendly himself recommended opening post-conviction forums, state and federal, to colorable claims of factual innocence.²⁴³ Additionally, a few courts of appeals had held that, under certain conditions,²⁴⁴ allegations of new, favorable evidence stated a basis for collateral attack.²⁴⁵ Generally, though, the circuits have followed the above-quoted passage,²⁴⁶

Two Habeas, 73 MINN. L. REV. 247, 322-24 (1988), and, with respect to death-sentenced prisoners, see Ledewitz, *supra* note 175, at 444-49, and Freedman, *supra* note 128, at 315, 319 n.22.

243. See Friendly, *supra* note 175, at 159 & n.87, 160, 167. He appeared, however, to be recommending legislative change, not reinterpretation of the Constitution, to cover claims such as Herrera's. See *id.* at 160; see generally Freedman, *supra* note 128 (proposing two different statutes); Ledewitz, *supra* note 175, at 448-49 (supporting extension of the habeas statute to such claims).

244. See *Jones v. Kentucky*, 97 F.2d 335 (6th Cir. 1938) (holding that the State must afford corrective process to a death-sentenced prisoner, where the attorney general believes the defendant was convicted on perjured testimony and the Governor conceives himself bound by a pledge to deny clemency); cf. *Grace v. Butterworth*, 586 F.2d 878, 880 (1st Cir. 1978) (assuming arguendo that "compelling claim for relief might be presented when newly available evidence conclusively shows that a vital mistake had been made"). *Jones* was later confined to its facts in *Burks v. Egeler*, 512 F.2d 221, 227-29 (6th Cir.), *cert. denied*, 423 U.S. 937 (1975); see *Sanders v. Sullivan*, 863 F.2d 218, 224 (2d Cir. 1988) (rejecting the criticism of *Jones* by *Burks*).

245. See, e.g., *Lewis v. Erickson*, 946 F.2d 1361, 1362 (8th Cir. 1991) ("We grant habeas relief based on newly discovered evidence if the evidence 'would probably produce an acquittal on retrial.'") (citations omitted); *Sanders*, 863 F.2d at 222, 225-26 (holding that the State's failure to vacate conviction after credible recantation denies due process if, "but for the perjured testimony, the defendant would most likely not have been convicted"). *Sanders* contains a thoughtful discussion of the court's reasons for departing from the *Townsend* dicta. Among other things, the opinion made clear that "a state's failure to act to cure a conviction" can amount to "sufficient state action" to call into play due process protections. *Id.* at 224. But it also stressed "that the perjured testimony which will trigger a due process violation must be of an extraordinary nature." *Id.* at 226 (emphasis added); cf. *infra* text accompanying note 317 (discussing the Court's similar attitude toward cases of purported innocence).

246. See *supra* text accompanying note 240; see, e.g., *Boyd v. Puckett*, 905 F.2d 895, 896-97 (5th Cir.), *cert. denied*, 498 U.S. 988 (1990); *Smith v. Wainwright*, 741 F.2d 1248, 1257 (11th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985); *United States ex rel. Burnett v. Illinois*, 619 F.2d 668, 674 (7th Cir.), *cert. denied*, 449 U.S. 880 (1980); *Burks v. Egeler*, 512 F.2d at 227-30; *Marcella v. United States*, 344 F.2d 876, 880 (9th Cir. 1965); see also *Evans v. Muncy*, 916 F.2d 163, 165-66 (4th Cir.) (holding that newly discovered evidence that a death-sentenced defendant may have been innocent of single established aggravating factor provides no basis for habeas relief), *cert. denied*, 498 U.S. 927 (1990); cf. *Ex parte Binder*, 660 S.W.2d 103 (Tex. Crim. App. 1983) (adhering to the *Townsend* approach).

which the Justices never retracted. Although one could in some respects distinguish Herrera's case from Townsend's, as his counsel attempted to do,²⁴⁷ the defense team plainly would confront an uphill course in their effort to establish that "[a] death sentence that is dead wrong is no less so simply because its deficiency is not uncovered until the eleventh hour."²⁴⁸

*D. Federal and State Law Blended: The Constitution and State Post-Conviction Remedies*²⁴⁹

It seemed, thus, that putative innocence might furnish a key to the federal courthouse under the *Carrier-Kuhlmann* doctrine.²⁵⁰ But entry would not avail Herrera if *Townsend* immediately slammed the door shut in his face. That problem leads to the inquiry whether the gateway of habeas corpus could lead elsewhere—in particular, back to the state courts—to the benefit of a petitioner such as Herrera. I explore the topic in greater detail in Part V of this Article.²⁵¹ For now, I give the relevant background.

In the mid-1960's, in *Case v. Nebraska*, the Court granted certiorari²⁵² to decide if "the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation

247. For example, while *Townsend* was also a capital proceeding, the defendant there challenged his conviction—not his "unjust execution." Townsend's state, Illinois, also provided an opportunity for him to assert innocence after judgment, which the defendant did not do. Townsend's case, moreover, preceded the many modern decisions affording heightened scrutiny to the death-determining process. See Brief for Petitioner at 39-40 n.52, *Herrera* (No. 91-7328).

248. *Evans v. Muncy*, 498 U.S. 927, 931 (1990) (Marshall, J., dissenting from denial of stay).

249. Useful readings on this topic include: PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 589-90, 1559-60 (3d ed. 1988 & Supp. 1992) [hereinafter HART & WECHSLER]; 1 LIEBMAN, *supra* note 126, § 7.1b (1988 & Supp. 1992); Terrance Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187; Wright & Sofaer, *supra* note 242; Note, *Effect of the Federal Constitution in Requiring State Post-Conviction Remedies*, 53 COLUM. L. REV. 1143 (1953); and Comment, *State Court Withdrawal from Habeas Corpus*, 114 U. PA. L. REV. 1081 (1966).

250. The petitioner needed such a key since he had filed a second application for habeas corpus. See *supra* text accompanying notes 56, 221-23.

251. See *infra* part V.

252. *Case v. Nebraska*, 379 U.S. 958 (1965).

of federal constitutional guarantees.”²⁵³ The issue arose in the context of a guilty plea to a burglary charge. The defendant sought to challenge the judgment, alleging denial of assistance of counsel, by initiating a habeas proceeding in a local court. While recognizing the plea’s infirmity, if the allegation was true, the Nebraska Supreme Court affirmed the lower court’s dismissal of the action on the basis that the remedy did not lie where the trial court had jurisdiction and imposed a sentence within its power.²⁵⁴ Nor, apparently, did he have any other collateral route to pursue to obtain redress.²⁵⁵ Thus, he was presenting the question whether the Constitution confers a right to post-conviction review.

The Justices left this significant issue unresolved, remanding the case for reconsideration in light of a supervening statute that, on its face, provided a hearing for Case’s complaint.²⁵⁶ A decade later, then-Justice Rehnquist wrote in a plurality opinion in *United States v. MacCollom*²⁵⁷ that due process “does not establish any right . . . to collaterally attack a final judgment of conviction.”²⁵⁸ As Chief Justice, he repeated this dictum twice in the 1980’s: once, in *Pennsylvania v. Finley*²⁵⁹ (a non-capital prosecution) for a majority of the Court, and again in *Murray v. Giarratano*²⁶⁰ (a civil rights action brought by death-sentenced prisoners) for himself and Justices White, O’Connor and Scalia. In *Giarratano*, these four also opined that the Eighth Amendment did not compel a different result.²⁶¹

253. *Case v. Nebraska*, 381 U.S. 336, 337 (1965).

254. *Id.* at 336-37.

255. *Id.* at 341 & n.3 (Brennan, J., concurring).

256. *Id.* at 337. Without expressing a view on the merits of the claim, both Justices Clark and Brennan, in separate concurrences, applauded the law’s enactment. *Id.* at 339-40 (Clark, J., concurring); *id.* at 345-47 (Brennan, J., concurring); see also Maurice Kelman, *Federal Habeas Corpus as a Source of New Constitutional Requirements for State Criminal Procedure*, 28 OHIO ST. L.J. 46, 63 (1967) (noting that the two Justices praised the Nebraska statute).

257. 426 U.S. 317 (1976).

258. *Id.* at 323 (plurality opinion) (citation and footnote omitted).

259. 481 U.S. 551, 556-57 (1987) “States have no obligation to provide this avenue of relief.” *Id.* at 556 (citing *MacCollom*).

260. 492 U.S. 1, 10-11 (1989) (plurality opinion) (quoting *Finley*).

261. *Id.* The Suspension Clause of the Constitution mandates that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Re-

Yet the above-mentioned decisions had little to do with Herrera's predicament. *MacCollom* rejected a federal defendant's challenge, on equal protection grounds, to the failure to furnish him a free trial transcript for use in connection with a planned motion to vacate his sentence.²⁶² Notably, the prisoner could have gotten what he desired had he appealed from his conviction two years earlier or had he later met the conditions of a not unreasonable statute.²⁶³ *Finley* involved a comprehensive state post-conviction scheme that even assigned counsel for indigents.²⁶⁴ In this setting, the Justices held that Pennsylvania could permit such counsel to withdraw from a matter he and the trial court deemed frivolous without following the constitutionally mandated process for withdrawal on direct appeal as of right.²⁶⁵ *Giarratano*, finally, held only that neither due process nor the Eighth Amendment required Virginia to appoint lawyers for death row inmates seeking state collateral relief.²⁶⁶

In *MacCollom*, *Finley*, and *Giarratano*, the applicant, thus, had a forum in which to mount his attack; it simply lacked some perquisite that would have helped him in the proceeding. But Case, as we have seen, had none—at least at the point he raised the challenge.²⁶⁷ Herrera, too, had no place to go at a relevant

bellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. Although the language might be read to afford a post-conviction remedy for state prisoners, see Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509 & n.329 (1987), the clause is more plausibly understood as constraining only the federal government. See Fallon & Meltzer, *supra* note 200, at 1779 n.244; Friendly, *supra* note 175, at 172; Comment, *supra* note 249, at 1087-88 (citing cases).

262. *MacCollom*, 426 U.S. at 324-25.

263. He had to persuade the trial judge to certify that his application was " 'not frivolous' " and that the transcript was " 'needed to decide the issue presented.' " *Id.* at 325 (quoting 28 U.S.C. § 753(f)).

264. *Finley*, 481 U.S. at 553-54.

265. *Id.* at 554-59. *Anders v. California*, 386 U.S. 738 (1967), laid down a complicated set of rules controlling the latter situation. The *Giarratano* plurality later described *Finley* as resting on readings of both the Due Process Clause and "the equal protection guarantee of 'meaningful access.' " *Giarratano*, 492 U.S. at 7.

266. See generally *Giarratano*, 492 U.S. at 10-11. Justice Kennedy, who provided the fifth vote for the majority, narrowly concurred "[o]n the facts and the record of this case," stating that no inmate "has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief." *Id.* at 14-15. (Kennedy, J., concurring in the judgment).

267. It is unclear why he did not appeal his conviction. Nebraska's response to the

time. Like Nebraska, Texas did not extend state habeas to the kind of claim in question.²⁶⁸ Although Texas, unlike Nebraska, provided some post-conviction court with competence over Herrera's complaint,²⁶⁹ his new evidence did not surface during the unrealistically brief thirty-day limitations period; hence, in fact, he had no recourse.²⁷⁰

Further, with current and foreseeable changes in the Court's personnel,²⁷¹ one should pause before elevating recent dictum to the status of definitive holding. That is particularly true when, in the most pertinent context (for present purposes) in which it appears, the capital case of *Giarratano*, only a plurality signed the opinion. In addition, in positing that the Constitution accords no right to collateral review—even for defendants sentenced to death—the Chief Justice did little but parrot the operative words of *MacCollom* and *Finley* and, citing a number of decisions from the 1980's, propound the view that "death's difference" applies solely at the trial level.²⁷²

petition conceded that the state courts had never passed upon his claim. *Case v. Nebraska*, 381 U.S. 336, 341 n.3 (1965) (Brennan, J., concurring). Theoretically, he could have done so—he pled guilty a month after *Gideon v. Wainwright*, 372 U.S. 335 (1963), guaranteed appointed counsel to indigent state felony defendants. *Case*, 381 U.S. at 340. Practically speaking, one may surmise that he failed to appeal just because he lacked the assistance of an attorney. He alleged that he "was 'fast talked' and forcibly coerced into waiving his rights to have advice and counsel . . . and to plead not-guilty." *Id.* at 340 n.1 (quoting petition for habeas corpus). See generally *Douglas v. California*, 372 U.S. 353 (1963) (holding that the Fourteenth Amendment guarantees assigned counsel to indigent defendants on first appeal as of right).

268. See *supra* note 21.

269. Unlike *Case*, see *supra* note 267, Herrera could not, even theoretically, have raised his claim on direct appeal since appellate courts are bound by the record.

270. Most petitioners, especially those under sentence of death, will be unable to uncover such evidence within a month. See *supra* text accompanying note 128.

271. As I write, Justice Ginsburg has taken the oath of office to replace retiring Justice White. See Joan Biskupic, *Ginsburg Sworn in as 107th Justice and 2nd Woman on Supreme Court*, WASH. POST, Aug. 11, 1993, at A6.

272. *Murray v. Giarratano*, 492 U.S. 1, 7-10 (1989) (plurality opinion). But cf. *supra* text accompanying note 163 (arguing that the Eighth Amendment guarantees "meaningful appellate review" in capital cases); *Giarratano*, 492 U.S. at 23-24 (Stevens, J., dissenting) (arguing that there is significant evidence that direct review in capital cases does not sufficiently protect against miscarriages of justice to warrant a presumption of finality).

Indeed, the grant of certiorari in *Case* itself indicates the substantiality of the question whether the states must furnish "a postconviction remedy that offers an 'adequate corrective process for the hearing . . . of [claims of violation of] federal constitutional guarantees' "²⁷³ and, if so, just what amounts to "an 'adequate' process" in this setting.²⁷⁴ It is clear, moreover, that

273. 1 LIEBMAN, *supra* note 126, § 7.1b, at 70-71 & n.48 (1988) (footnote omitted); see generally *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring) ("[T]he scope of the State's obligation to provide collateral review is shrouded in . . . much uncertainty . . .") (citing *Case v. Nebraska*, 381 U.S. 336 (1965)); cf. *Bator*, *supra* note 153, at 489-93 (noting that some early cases like *Mooney v. Holahan*, 294 U.S. 103 (1935), intimated that the State may be obliged to afford such corrective process); Friendly, *supra* note 175, at 172 (positing that "in some cases," a state's "complete denial of post-conviction remedies . . . would violate the due process clause"). Because the states have greatly enhanced their post-conviction remedial schemes since the 1960's, the Court has had little opportunity to face anew the type of question presented in *Case*. See Kenneth J. Hodson et al., *Postconviction Remedies*, in 4 AMERICAN BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE § 22-1.1, at 22-8 (2d ed. 1978) (noting that a great majority of states have adopted modern post-conviction procedures). To my knowledge, Arkansas is the only state to abolish a provision establishing broad-based grounds for relief on collateral attack, thereby remitting would-be petitioners to state habeas, a "remedy" as limited as that in *Case*. See *Whitmore v. State*, 771 S.W.2d 266, 267 & n.1 (Ark. 1989) (abolishing ARK. R. CRIM. P. 37, with the intent of narrowing post-conviction relief). But the Arkansas Supreme Court, which had taken this drastic action out of pique at supposed abuses and delays, *id.* at 267-69, reversed its course the following year. It reinstated the rule in question, with modifications (modeled on recent ones in Missouri) designed chiefly to shorten the post-conviction process. See ARK. R. CRIM. P. 37.1 publisher's notes (Michie 1993). See generally John M. Morris, *Post-Conviction Practice Under the "New 27.26,"* 43 MO. B.J. 435 (1987) (discussing Missouri's remedial cutbacks).

274. 1 LIEBMAN, *supra* note 126, § 7.1b, at 71 (1988). With respect to the duty, not of state but of federal courts, even the narrowest historical and normative vision of habeas views it as an appropriate remedy for failures of process in state court proceedings. See *supra* note 186 (treating Professor Bator's thesis); see also *Wright v. West*, 112 S. Ct. 2482, 2486-87 (1992) (plurality opinion) (relying on the Bator approach); Friendly, *supra* note 175 (incorporating part of the "process" theory into his approach). Nowadays, the absence or ineffectiveness of state collateral review procedures constitutes a "recognized exception" to various rules burdening federal habeas petitioners: the requirement of exhaustion of state remedies, 28 U.S.C. § 2254(b) & (d) (1988); the barrier of state procedural default, see *supra* text accompanying notes 209-13; the door-closing doctrine of *Stone v. Powell*, 428 U.S. 465 (1976), see *supra* text accompanying note 191 and note 192 and accompanying text; and the presumption of correctness of state court factual findings. See 28 U.S.C. § 2254(d) (1988); *infra* note 353 and accompanying text, and text accompanying notes 437-38. See generally 1 LIEBMAN, *supra* note 126, § 7.1b, at 68-69 (1988). Discussion of these complex and multifaceted subjects falls beyond the scope of this piece. But it is worth noting, finally, that irrespective of the State's duty, if any, to furnish a post-convic-

a *Herrera*-type complaint—which, by its nature, does not arise until after trial and cannot be heard on direct appeal—poses the most compelling argument for such a duty.²⁷⁵ In 1986, a divided Court, ruling in favor of a capital defendant in *Ford v. Wainwright*,²⁷⁶ gave some credence to this approach. A majority agreed that the prisoner had a substantive Eighth Amendment right to avoid execution if he was insane and that Florida, whose own laws also accorded this right,²⁷⁷ had instituted deficient means for its protection.²⁷⁸ They disagreed about what, as a minimum, the Constitution required by way of procedural safeguards.²⁷⁹ Suggestively, Justice Marshall wrote for himself and three other members of the Court: “[I]f the Constitution renders the fact or timing of [the inmate’s] execution contingent upon establishment of a further fact”—here, present sanity—“then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being.”²⁸⁰ He excoriated, above all, the State’s placement of the decision wholly in the executive branch: “The commander of the State’s corps of prosecutors cannot be said to have the neutrality that is necessary for reliability in the factfinding proceed-

tion forum for attacks on the constitutionality of a judgment, “once [a state] chooses to do so, the due process clause . . . may require that the means it provides be full and fair.” *Id.* § 7.1b, at 71-72 (footnote omitted) (citing cases).

275. See 1 LIEBMAN, *supra* note 126, § 7.1b, at 72-73 (1988); Sandalow, *supra* note 249, at 211.

276. 477 U.S. 399 (1986) (plurality opinion).

277. *Id.* at 403; see *infra* note 278.

278. See *Ford*, 477 U.S. at 411-16 (plurality opinion); *id.* at 423-25 (Powell, J., concurring in part and concurring in the judgment). Justice O’Connor concurred solely on the ground that the State had “created a protected liberty interest in avoiding execution while incompetent” and then failed to provide the minimal procedural safeguards mandated by the Fourteenth Amendment. *Id.* at 427 (O’Connor, J., concurring in the result in part and dissenting in part).

279. Compare *id.* at 411-18 (Marshall, J.) (plurality opinion) with *id.* at 424-27 (Powell, J., concurring in part and concurring in the judgment) and *id.* at 429-30 (O’Connor, J., concurring in the result in part and concurring in the judgment).

280. *Id.* at 411. But as the Chief Justice later noted, five Justices rejected the view (expressed in the plurality’s next sentence) that determining “a prisoner’s sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding.” *Id.* at 411-12; see *Murray v. Giarratano*, 492 U.S. 1, 9-10 (1989) (plurality opinion) (quoting *Ford*, 477 U.S. at 411-12).

ing."²⁸¹ Similarly, Herrera could urge, as he ultimately did,²⁸² that if an execution's validity depends on the prisoner's actual guilt, the State must furnish a mode of ascertaining that fact (or reascertaining it,²⁸³ on a suitably serious challenge subsequent to its proof at trial) consistent with the need for trustworthiness in a life-or-death determination.²⁸⁴

Yet, to be sure, Florida afforded *some* process²⁸⁵—although one suspiciously resembling a clemency procedure,²⁸⁶ which Herrera naturally rejected as inadequate.²⁸⁷ Ford, therefore, was not asking the Court to open a forum the State had shut entirely.²⁸⁸ And, whereas Ford merely impugned his present

281. *Ford*, 477 U.S. at 416; cf. *id.* at 427 (Powell, J., concurring in part and concurring in the judgment) (believing that the State should provide, at least, an "impartial officer or board").

282. See Brief for Petitioner at 41, *Herrera v. Collins*, 113 S. Ct. 853 (1993) (No. 91-7328).

283. *Ford* proceedings may also involve revisiting facts that have been determined—in whole or in part—prior to or at the trial, in determining fitness to proceed or lack of criminal responsibility based on mental disease or defect. For typical standards governing those respective inquiries (albeit in a non-death penalty state), see N.Y. CRIM. PROC. LAW art. 730 (Consol. 1986) and N.Y. PENAL LAW § 40.15 (Consol. 1984). See generally *Ford*, 477 U.S. at 421-22 (Powell, J., concurring in part and concurring in the judgment) (remarking that no state requires less than "that those who are executed know the fact of their impending execution and the reason for it").

284. See *supra* text accompanying notes 155, 280.

285. See generally *Johnson v. Mississippi*, 486 U.S. 578 (1988) (holding that Mississippi Supreme Court erred in affirming a death sentence based in part on since-vacated felony conviction in New York, and that failure to raise this claim on direct appeal did not amount to procedural bar—given that the court had entertained similar claims by writ of error *coram nobis*). Compare *Herrera v. Collins*, 113 S. Ct. 853, 863-64 (1993) (distinguishing *Johnson*'s situation from that of *Herrera* on the basis of available state process) with *id.* at 877 n.3 (Blackmun, J., dissenting) (arguing that *Johnson* considered the State's past practice only on the question of whether an independent and adequate state ground existed, not on the question of whether an Eighth Amendment violation had occurred).

286. *Ford*, 477 U.S. at 403-04 (plurality opinion); *supra* text accompanying note 281.

287. See Brief for Petitioner at 41 n.53, *Herrera* (No. 91-7328) (faulting clemency as resting in the hands of the Governor's subordinates).

288. From a different perspective, however, the absence of process at the only relevant time cut in favor of *Herrera*. Compare *supra* note 269 (commenting that *Herrera*'s position may have been even worse than *Case*'s in this regard) with Comment, *supra* note 249, at 1088 (noting that in Professor Amsterdam's view, *Case* suffered a "total deprivation of . . . process").

sanity, Herrera sought to relitigate the ultimate issue at trial. The Court could hardly welcome such a broad challenge in any setting.²⁸⁹ Thus, the defense team, poised for the final effort to save the client's life, had their work cut out for them.

IV. HERRERA: THE OPINIONS²⁹⁰

A. *The Majority of Six: Too Little, Too Late*

1. *The Opinion for the Court*

The Chief Justice, writing for himself and four other Justices, conceded the "elemental appeal" of the argument that the Constitution forbids execution (or indeed, imprisonment) of a person who is innocent of the crime for which he stands convicted.²⁹¹ Yet, he remarked, although our judicial system provides numerous safeguards to the accused, the presumption of innocence disappears upon rendition of a guilty verdict: "Thus, in the eyes of the law, petitioner does not come before the Court as one who is 'innocent,' but on the contrary as one who has been convicted by due process of law of two brutal murders."²⁹²

The opinion then quotes *Townsend v. Sain*²⁹³ on the noncognizability in habeas of bare allegations of actual innocence, based on newly discovered evidence, and *Moore v. Dempsey*²⁹⁴ to the effect that federal courts sit to redress violations of constitutional rights, not to correct errors of fact.²⁹⁵ While

289. See *supra* text accompanying notes 169-70.

290. See *Herrera v. Collins*, 113 S. Ct. 853 (1993). The Chief Justice wrote the Court's majority opinion, joined by Justices O'Connor, Scalia, Kennedy and Thomas. See *id.* Justice O'Connor, with Justice Kennedy, filed a concurrence. *Id.* at 870 (O'Connor, J., concurring). Justice Scalia, joined by Justice Thomas, did likewise, *id.* at 874 (Scalia, J., concurring), and Justice White concurred in the judgment, *id.* at 875 (White, J., concurring in the judgment). Justice Blackmun wrote a dissent, in most of which Justices Stevens and Souter joined. *Id.* at 876 (Blackmun, J., dissenting).

291. *Id.* at 859.

292. *Id.* at 860. Chief Justice Rehnquist proceeded to fault the dissent for "assum[ing]" the petitioner's innocence in its analysis. *Id.* at 864 n.6.

293. 372 U.S. 293, 317 (1963). See *supra* text accompanying note 240.

294. 261 U.S. 86, 87-88 (1923) (Holmes, J.). See *supra* note 178.

295. *Herrera*, 113 S. Ct. at 860. Of course, when a petitioner does assert a traditional claim of right, the conservative majority often insists that she cast doubt upon

affirming the relevance of innocence,²⁹⁶ it swiftly cabined previous precedents in the *Carrier-Kuhlmann* line²⁹⁷ to the procedural forfeiture context: "[T]his body of our habeas jurisprudence makes clear that a claim of 'actual innocence' is not itself a constitutional claim, but instead a *gateway* through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."²⁹⁸ Further, in contrast to the sufficiency-of-evidence review called for by *Jackson v. Virginia*,²⁹⁹ the type of scrutiny urged by Herrera would be very disruptive of federalism, according to the Chief Justice, because it would focus on the accuracy—not the rationality—of the determination of guilt and demand expansion of the original record: "Acceptance of this view would presumably require the habeas court to hear testimony from the witnesses who testified at trial as well as those who made the statements in the affidavits which petitioner has presented"³⁰⁰

The majority also voiced concern about the nature of appropriate relief: "Would it be commutation of petitioner's death sentence, new trial, or unconditional release from imprisonment?"³⁰¹ On the assumption that it would consist of an order conditionally freeing the inmate unless the authorities chose to retry him,³⁰² the Chief Justice expressed skepticism that the

her guilt. See *infra* text accompanying note 350.

296. "This is not to say that our habeas jurisprudence casts a blind eye towards innocence." *Herrera*, 113 S. Ct. at 862.

297. See *Murray v. Carrier*, 477 U.S. 478 (1986); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (plurality opinion); see generally *supra* text accompanying notes 204-25 (discussing the place of actual innocence in habeas corpus proceedings).

298. *Herrera*, 113 S. Ct. at 862-63 (emphasis added).

299. 443 U.S. 307 (1979). See *supra* text accompanying notes 77-80.

300. *Herrera*, 113 S. Ct. at 861. The Chief Justice also worried that the district court would confront the difficult task of "weigh[ing] the probative value of 'hot' and 'cold' evidence on petitioner's guilt or innocence." *Id.* at 862.

301. *Id.* at 862.

302. *Id.* If the new evidence left no room for doubt of innocence, release ought to be unconditional. Cf. *supra* note 112 (noting that in the setting of a motion for a new trial, truly compelling proof may warrant dismissing the indictment). During oral argument, Herrera's counsel declined to request an ultimate remedy beyond immunity from execution, see *Herrera*, 113 S. Ct. at 863, despite pressure from several Justices to explain why, if innocent, he should not be freed from prison. (The excerpt from the petitioner's argument in the Criminal Law Reporter conveys these exchanges only obliquely. See *Arguments Heard*, *supra* note 10, at 3039-40. I am

guilt or innocence finding "would be any more exact" on this round.³⁰³ To the contrary, because time's passage erodes memory and leads to the disappearance of witnesses, adjudications become less accurate.³⁰⁴

For this reason, he gave short shrift to Herrera's "death is different" argument. Although the Eighth Amendment requires enhanced reliability of the process for imposing death, he considered it "far from clear" that a belated second trial would yield a more dependable result.³⁰⁵ *Ford v. Wainwright*,³⁰⁶ was, moreover, distinguishable. "[U]nlike the question of guilt or innocence, . . . the issue of sanity is properly considered in proximity to the execution."³⁰⁷ Here, the former had already been determined " 'with the high regard for truth' " befitting a life or death decision.³⁰⁸

Due process, the Court continued, provides no alternative route for Herrera. Neither history nor current practice supports the view that his show of innocence entitles him to relief from his conviction or sentence.³⁰⁹ In particular, common law precedent confined motions for a new trial to the term of court in which a final judgment was entered.³¹⁰ Rule 33 of the Federal Rules of Criminal Procedure, which governs such motions based on newly discovered evidence, now contains a strictly enforced two-year limit³¹¹—applicable in capital as well as regular proceedings.³¹² State practice varies widely.³¹³ In these circum-

also relying, therefore, on my own contemporaneous notes.) In the Court's opinion, the Chief Justice later noted the illogicality of holding that someone like the petitioner "could not be executed, but that he could spend the rest of his life in prison." *Herrera*, 113 S. Ct. at 863.

303. *Herrera*, 113 S. Ct. at 862.

304. *Id.*

305. *Id.* at 863.

306. 477 U.S. 399 (1986). See *supra* text accompanying notes 276-81, 285-86.

307. *Herrera*, 113 S. Ct. at 863.

308. *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion)); see *id.* at 866 n.13. The Court added that Ford's claim, which went to punishment rather than guilt, fell more properly than Herrera's within the scope of the Eighth Amendment. See *id.* at 863.

309. *Id.* at 864-66.

310. *Id.* at 864-65.

311. See *id.* at 865; *supra* note 24.

312. See *Herrera*, 113 S. Ct. at 865. One of the rule's previous versions permitted such motions by death-sentenced prisoners " 'at any time' " before execution. *Id.*

stances, Chief Justice Rehnquist stated, "we cannot say that Texas' refusal to entertain petitioner's newly discovered evidence eight years after his conviction transgresses . . . fundamental fairness."³¹⁴ Yet according to the Court, Herrera, like others in his position in every death-sentence jurisdiction, did have one remaining outlet:³¹⁵ "History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency."³¹⁶

In a tantalizing conclusion, the majority left open a theoretical path for future Herreras:

We may assume, for the sake of argument in deciding this case, that in a capital case a *truly persuasive demonstration* of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But . . . the threshold showing for such an assumed right would necessarily be *extraordinarily high*.³¹⁷

Measured against this daunting standard, adopted because of the need for finality and the fear of petitioner abuse,³¹⁸ Herrera clearly came up short. Among other things, his affida-

(citation omitted). An even earlier variation imposed an across-the-board bar of 60 days. *Id.* Before that, the federal courts adhered to the practice at common law. See *id.* at 864-65; *supra* text accompanying note 310.

313. See *Herrera*, 113 S. Ct. at 865-66; *supra* note 24.

314. *Herrera*, 113 S. Ct. at 866.

315. See *supra* text accompanying note 81.

316. *Herrera*, 113 S. Ct. at 869. The Court described it as the "fail safe" in our criminal justice system. *Id.* at 868 (citation omitted). Chief Justice Rehnquist did not discuss whether, without that possibility, the Court would have taken a different approach. *Cf. id.* at 867 (noting that states are not required "to enact a clemency mechanism"). He did opine that clemency had been granted "frequently" to death-sentenced prisoners who had demonstrated "actual innocence." *Id.* at 868 (citation omitted). But *cf. infra* text accompanying notes 364-69 (painting a less rosy picture of the clemency process).

317. *Herrera*, 113 S. Ct. at 869 (emphasis added). Presumably (although the opinion is less than clear on this point), clemency alone would not suffice. *Cf. id.* at 881 (Blackmun, J., dissenting) ("[T]he majority does not say that the vindication of petitioner's constitutional rights may be left to executive clemency.").

318. See *id.*, 113 S. Ct. at 869. The majority stated: "Although we are not presented with a new trial motion *per se*, we believe the likelihood of abuse is as great—or greater—here." *Id.*

vits were faulted as hearsay, "eleventh hour," and inconsistent; while not "without probative value," they could not be viewed apart from the strong evidence of guilt at trial.³¹⁹ Hence, said the Court, they could not "trigger the sort of constitutional claim" hypothesized for extreme cases.³²⁰

2. *The Concurring Opinions*³²¹

Writing for herself and Justice Kennedy, Justice O'Connor emphasized in her separate opinion that, while "the execution of a legally and factually innocent person would be . . . constitutionally intolerable," Herrera was, in no sense, innocent.³²² Instead, having been duly convicted, he now sought to establish the right "to yet another judicial proceeding in which to adjudicate his guilt anew."³²³ The Justice saw no need to resolve the "sensitive" and "troubling" question he raised because, "[n]o matter what the Court might say about claims of actual innocence," he could not obtain relief.³²⁴ She then parsed the original record as well as the proffered new material to show that Herrera had surely murdered Officers Rucker and Carrisalez. With respect to the proof at trial, she especially stressed the contents of the letter found on Herrera's person at the time of his arrest; she construed it as a virtual confession.³²⁵ With regard to the affidavits (again described as "eleventh hour," inconsistent and paling beside the State's evidence³²⁶) she

319. *Id.* at 869-70. Justice O'Connor's concurring opinion goes into the facts in greater detail. *See id.* at 871-73 (O'Connor, J., concurring).

320. *Id.* at 870.

321. These are treated more summarily than the opinion for the Court.

322. *Herrera*, 113 S. Ct. at 870 (O'Connor, J., concurring).

323. *Id.*

324. *Id.* at 871. She concluded her opinion: "If the Constitution's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, it may never require resolution at all." *Id.* at 874. I strongly predict otherwise.

325. *See id.* at 872-73. For a description of the letter, see *supra* text accompanying notes 53-54 and note 53.

326. *Herrera*, 113 S. Ct. at 872, 874 (O'Connor, J., concurring); *see supra* text accompanying note 319. She noted, as had the Chief Justice writing for the majority, that the petitioner had given "no reasonable explanation for the nearly decade-long delay." *Herrera*, 113 S. Ct. at 872 (O'Connor, J., concurring); *cf. id.* at 869 (majority opinion) ("[n]o satisfactory explanation has been given"). The petitioner indirectly suggested a justification in his depiction of a corrupt local society, in which the

faulted them, above all, for "conveniently blam[ing] a dead man—someone who will neither contest the allegations nor suffer punishment as a result of them."³²⁷ Finally, she criticized the district court for ordering a stay since Herrera "could not have obtained relief—or even a hearing—through the state courts."³²⁸

The two other concurring opinions, both brief, were authored by Justices Scalia and White. The former, joined by Justice Thomas, would have expressly held that neither the Eighth nor Fourteenth Amendments affords "a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."³²⁹ The latter, like Chief Justice Rehnquist, assumed that even an untimely "persuasive showing of 'actual innocence' " would render invalid the execution of the proponent.³³⁰ In order to merit relief, however, the Justice stated, a prisoner must meet the high standard of *Jackson v. Virginia*:³³¹ he must, at least, demonstrate—based on both the proffered new material and the record before the jury—that " 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.' " ³³²

police endeavored to conceal their own involvement in the drug trade along the Mexican border. See Brief for Petitioner at 3, 5, 25-26, *Herrera* (No. 91-7328); see also *Herrera*, 113 S. Ct. at 859 n.4 (detailing the affidavit filed after the court of appeals vacated Herrera's stay, in which Raul Jr. alleged that law enforcement officials, including the sheriff, had told him "not to say what happened on the night of the shootings and threatened his family").

327. *Herrera*, 113 S. Ct. at 872 (O'Connor, J., concurring).

328. *Id.* at 873. Believing that the judge had not envisioned holding further federal proceedings, the Justice remarked that, if he had, he surely would have abused his discretion since the petitioner "failed to make a persuasive showing of actual innocence." *Id.* at 873-74.

329. *Id.* at 874-75 (Scalia, J., concurring). He wished to spare the lower federal courts the burden of dealing with *Herrera* claims which, "it can confidently be predicted, will become routine and even repetitive." *Id.* at 875. He also regarded it as "improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon." *Id.*

330. *Id.* at 875 (White, J., concurring in the judgment).

331. 443 U.S. 307 (1979).

332. *Herrera*, 113 S. Ct. at 875 (White, J., concurring in the judgment) (quoting *Jackson*, 443 U.S. at 324).

B. *The Dissenting Three: Better Late than Never*

Writing for himself in addition to Justices Stevens and Souter, Justice Blackmun would have held that both the Eighth³³³ and Fourteenth³³⁴ Amendments "forbid[] the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence."³³⁵ Relegating *Townsend's* contrary statement³³⁶ to "distant dictum,"³³⁷ he also would have defined a "truly persuasive demonstration of 'actual innocence' made after trial"³³⁸—the majority's assumed standard for a constitutionally cognizable claim³³⁹—as a showing by the prisoner that she "is probably actually innocent."³⁴⁰ Some of his points are noted below.

First, he stressed, the protection of the Eighth Amendment does not end at the time of judgment.³⁴¹ *Ford v. Wainwright*,³⁴² for instance, recognized that subsequent developments may entitle a capital defendant to further proceedings: "[T]he legitimacy of punishment is inextricably intertwined with guilt."³⁴³ He disagreed with the Chief Justice³⁴⁴ that, unlike sanity, guilt or innocence should not be considered after trial, since new evidence impugning the conviction may surface belatedly.³⁴⁵ The question, moreover, "is not whether a second trial

333. See *id.* at 876-78 (Blackmun, J., dissenting). "I think it is crystal clear that the execution of an innocent person is 'at odds with contemporary standards of fairness and decency.'" *Id.* at 876 (quoting *Spaziano v. Florida*, 468 U.S. 447, 465 (1984)).

334. See *id.* at 878-79 (allowing the execution of an innocent person violates substantive due process because it amounts to the ultimate arbitrary imposition).

335. *Id.* at 876.

336. *Townsend v. Sain*, 372 U.S. 293, 317 (1963).

337. *Herrera*, 113 S. Ct. at 880 (Blackmun, J., dissenting); see *supra* text accompanying note 240.

338. *Herrera*, 113 S. Ct. at 869 (Rehnquist, C.J.).

339. See *supra* text accompanying note 317.

340. See *Herrera*, 113 S. Ct. at 883 (Blackmun, J., dissenting).

341. *Id.* at 877.

342. 477 U.S. 399 (1986).

343. *Herrera*, 113 S. Ct. at 878 (Blackmun, J., dissenting); see *Spaziano v. Florida*, 468 U.S. 447, 456 (1984); *Beck v. Alabama*, 447 U.S. 625 (1980). See generally *supra* note 172 and accompanying text (discussing guilt-phase protections in capital cases).

344. See *supra* text accompanying note 307.

345. *Herrera*, 113 S. Ct. at 877 n.4 (Blackmun, J., dissenting).

would be more reliable than the first but whether, in light of new evidence, the result of the first trial is sufficiently reliable for the State to carry out a death sentence."³⁴⁶ Second, he deemed the Court's opinion especially "perverse" in light of the thrust of recent habeas jurisprudence.³⁴⁷ The *Carrier-Kuhlmann* line of precedent, which shifted the focus of federal review from legal rights to factual innocence, could not be cabined to abusive, successive, or defaulted claims.³⁴⁸ Rejecting the majority's "gateway" approach,³⁴⁹ he insisted that the reasoning of these decisions plainly encompassed substantive claims of innocence as well. The opposite conclusion was, in addition, result oriented and disingenuous:

[H]aving held that a prisoner who is incarcerated in violation of the Constitution must show he is actually innocent to obtain relief, the majority would now hold that a prisoner who is actually innocent must show a constitutional violation to obtain relief. The only principle that would appear to reconcile these two positions is the principle that habeas relief should be denied whenever possible.³⁵⁰

Third, enlarging on the subject of remedy, the Justice stated that allegations such as Herrera's "can and should be heard in state court."³⁵¹ If the State provided a forum, the defendant

346. *Id.* at 878. With respect to the Fourteenth Amendment, he engaged the majority in a fairly opaque discussion about whether the latter had misinterpreted Herrera's claim "as raising a procedural rather than a substantive due process challenge." *Id.* Compare *id.* at 878-79 & n.5 (arguing for substantive due process analysis) with *id.* at 864 n.6 (Rehnquist, C.J.) (arguing that the dissent's analysis rests on the faulty assumption that the petitioner is innocent). Because it is tangential to my analysis, I will not develop it further.

347. *Id.* at 880 (Blackmun, J., dissenting).

348. *Id.*

349. See *supra* text accompanying note 298. Concomitantly, he repudiated the chance of clemency as wholly inadequate to safeguard constitutional rights: "The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal." *Herrera*, 113 S. Ct. at 881 (Blackmun, J., dissenting); see also *id.* at 876 n.1 (showing that innocent people may be executed despite existence of clemency process).

350. *Id.* at 880-81.

351. *Id.* at 881.

would have to exhaust its procedures³⁵² before resorting to federal court—where findings of fact would be entitled to the usual presumption of correctness.³⁵³ But if the State failed to do so and the petition raised questions of fact, as in this case, the habeas judge was obliged to hold an evidentiary hearing.³⁵⁴ To prevail on the merits, the inmate would need to demonstrate probable actual innocence.³⁵⁵ The dissenters deemed this standard tougher than the *Carrier-Kuhlmann* test³⁵⁶: in their view, it laid upon the petitioner the burden of proving his innocence—not just showing “there probably would be a reasonable doubt” about his guilt.³⁵⁷

352. See 28 U.S.C. § 2254(b)-(c) (1988).

353. *Herrera*, 113 S. Ct. at 881 (Blackmun, J., dissenting); see 28 U.S.C. § 2254(d) (1988) (providing that in most circumstances, “the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous”); Wright & Sofaer, *supra* note 242, at 984-95; see also *infra* text accompanying notes 437-38 (discussing deference to state fact finding). See generally 1 LIEBMAN, *supra* note 126, § 28.2 (1988 & Supp. 1992) (supplying an overview of the pertinent doctrine).

354. *Herrera*, 113 S. Ct. at 881-82 (Blackmun, J., dissenting) (citing *Townsend v. Sain*, 372 U.S. 293, 313 (1963)).

355. See *supra* text accompanying notes 338-40.

356. See *supra* text accompanying notes 208-25. For this reason, an applicant, like *Herrera* himself, on his second round of habeas proceedings could not be barred for abuse of the writ by *McCleskey v. Zant*, 111 S. Ct. 1454 (1991), which applied the *Carrier-Kuhlmann* standard to new-claim successive petitions. See *supra* text accompanying notes 221-23; see also *Herrera*, 113 S. Ct. at 882 (Blackmun, J., dissenting).

357. *Herrera*, 113 S. Ct. at 882 (Blackmun, J., dissenting). The *Kuhlmann* formulation, which incorporates Judge Friendly’s language on “reasonable doubt,” see *supra* text accompanying notes 214-20 and note 220, more clearly supports this interpretation than the alternate *Carrier* formulation, see *supra* text accompanying note 213, which facially resembles Justice Blackmun’s ostensibly more demanding test. Indeed, only the year before, the Justice himself had joined an opinion in *Sawyer v. Whitely*, 112 S. Ct. 2514, 2531-32 (1992) (Stevens, J., concurring in the judgment), construing *Carrier* to call for the strict “more likely than not test”—essentially identical to his suggested *Herrera* standard—widely employed to assess motions for a new trial based on newly discovered evidence. See *id.* at 2531. As I noted earlier, however, see *supra* note 225, *Carrier* and *Kuhlmann* are generally treated as alike in their purport. In *Herrera*, the Justice explained, this higher standard was warranted by the evaporation of the original presumption of innocence after a valid conviction and sentence and the frequently long delay in uncovering new evidence which, because of the hardship in retrying a successful petitioner, might render the post-trial hearing “the final word on whether the defendant may be punished.” *Herrera*, 113 S. Ct. at 882 (Blackmun, J., dissenting); see also 1 LIEBMAN, *supra* note 126, § 22.1b, at 309 (1988) (noting that ordinarily, the habeas petitioner bears the civil burden of proof

Finally, with respect to Herrera, Justice Blackmun wanted to remand to the district court so that it might decide in the first place whether or not to order a hearing.³⁵⁸ Criticizing the majority's critique of Herrera's hearsay affidavits, the Justice again faulted their haste to deny relief: "It makes no sense . . . to impugn the reliability of petitioner's evidence on the ground that its credibility has not been tested when the reason its credibility has not been tested is that petitioner's habeas proceeding has been truncated by the Court of Appeals and now by this Court."³⁵⁹ In a bitter peroration not joined by the other dissenters, Justice Blackmun voiced his continuing reservations about the validity of capital punishment under the Court's hands-off regime.³⁶⁰

V. A GATEWAY TO SOMEWHERE

A. "Let's Go to the Videotape"

At oral argument, Justice Kennedy inquired of counsel for the State whether it would violate the Eighth Amendment to exe-

by a preponderance of the evidence); *cf. Herrera*, 113 S. Ct. at 878 (Blackmun, J., dissenting) ("[I]t is far from clear that a State will seek to retry the rare prisoner who prevails on a claim of actual innocence . . ."). At the same time, he rejected *Sawyer's* very tough criterion for innocence of the death penalty in the procedural forfeiture context—a defense " 'show[ing] by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the [defendant] eligible for the death penalty.' " *Id.* at 882 n.6 (quoting *Sawyer*, 112 S. Ct. at 2515). The Court developed it "for prisoners who are concededly guilty of capital crimes." *Id.* But *cf. Cornell v. Nix*, 976 F.2d 376, 381 (8th Cir. 1992) (en banc) (extending heightened *Sawyer* standard to habeas challenges to convictions), *cert. denied*, 113 S. Ct. 1820 (1993).

358. *Herrera*, 113 S. Ct. at 876 (Blackmun, J., dissenting). The district court could summarily dismiss the action only if (unlike here) " 'it plainly appear[ed] from the face of the petition and any exhibits annexed to it that the petitioner [was] not entitled to relief.' " *See id.* at 881-82, 884 (quoting 28 U.S.C. § 2254 Rule 4 (from the Rules Governing Section 2254 Cases in the U.S. District Courts)); *Blackledge v. Allison*, 431 U.S. 63, 74 n.4 (1977). The dissent believed that the Villarreal affidavit alone, *see supra* text accompanying notes 59-61, raised questions that could not "be resolved simply by examining the affidavits and the petition." *Herrera*, 113 S. Ct. at 884 (Blackmun, J., dissenting). In general, he stated, "the court charged with deciding such a claim should make a case-by-case determination about the reliability of the newly discovered evidence under the circumstances." *Id.* at 883.

359. *Herrera*, 113 S. Ct. at 884 (Blackmun, J., dissenting).

360. *See id.*; *supra* text accompanying note 35.

cute a death-sentenced prisoner who produced a videotape showing someone else committing the murder. Amazingly, she replied: "No."³⁶¹ The majority, ultimately, took it on faith that such convincing evidence of innocence would inevitably yield a pardon.³⁶² Like the dissenters,³⁶³ I am less sanguine. To develop the Justice's hypothetical, a film may raise serious questions of authenticity calling for resolution in a forum suited to determining disputed facts: a courthouse, not a Governor's mansion. Furthermore, the executive branch has, at times, denied clemency even in cases of strong doubts about a death-sentenced prisoner's guilt.³⁶⁴

One's readiness to trust the inmate's fate to the vagaries of extrajudicial grace may depend, in part, on one's perception of the incidence of wrongful capital convictions and of their timely remediation. Among other things, the Chief Justice and Justice Blackmun conducted a minor footnote skirmish over the merits of a recent study finding that twenty-three innocent people had been put to death in this century in the United States.³⁶⁵ But whether or not its precise conclusion withstands scrutiny,³⁶⁶ capital litigators can attest to the accuracy of the authors' assertion that, however low the chances of convicting the innocent,

361. *Arguments Heard*, *supra* note 10, at 3040.

362. *See, e.g.*, *supra* note 329 (giving Justice Scalia's opinion to this effect).

363. *See supra* note 349.

364. *See, e.g.*, *supra* note 244 (discussing *Jones v. Kentucky*, 97 F.2d 335 (6th Cir. 1938)); *see also* *Herrera*, 113 S. Ct. at 876 n.1 (Blackmun, J., dissenting).

365. *Compare* *Herrera*, 113 S. Ct. at 868 n.15 (Rehnquist, C.J.) (remarking that "scholars have taken issue with [the study]") *with id.* at 876 n.1 (Blackmun, J., dissenting) (calling the work "impressive"). The subject of the Justices' sparring is a lengthy article by Professors Bedau and Radelet. *See* Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

366. Two attorneys, then employed by the Justice Department, attacked the Bedau-Radelet piece shortly after its publication. *See* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988). The authors defended their methodology and findings in a brief rebuttal. *See* Hugo A. Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988). Subsequently, they published a book expanding on their earlier work. *See* MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE (1992). As they note in the original article, the pertinent empirical research is sparse. *See* Bedau & Radelet, *supra* note 365, at 23-26; *see also id.* at 25 & nn.20 & 22 (listing some previous studies).

"the odds of innocent prisoners—once convicted—being able to marshal the resources essential to proving their innocence are lower still."³⁶⁷ We cannot know how many mistakes are literally buried.³⁶⁸ The fact that we read with increasing frequency of death row inmates released from prison surely does not warrant complacency when hairbreadth reprieves are all too common.³⁶⁹

In the last analysis, judgments concerning the risk of erroneous executions relate to values more than (largely unknowable) numbers. In noting the differences among the opinions in *Herrera*, one should not slight significant areas of agreement. Five Justices wrote explicitly that the Constitution forbids putting a guiltless person to death; unsurprisingly, no one expressed the opposite view.³⁷⁰ Significantly, too, while only three would have held that on an appropriate demonstration of innocence a death-sentenced prisoner possesses the right to judicial relief, all but two were willing to assume it.³⁷¹ Although I think the majority erred in placing too heavy a thumb on the scale on the side of finality—influenced, perhaps, by what they regarded as bad facts³⁷²—and in tacitly underrating the likelihood of a miscarriage of justice, I believe that only Justices

367. RADELET ET AL., *supra* note 366, at 271-72. See generally *supra* text accompanying notes 121-28 (detailing the particular problems of death-sentenced prisoners).

368. See RADELET ET AL., *supra* note 366, at 272; see generally Freedman, *supra* note 128, at 315 (warning that the "danger of wrongful execution is chillingly real").

369. See, e.g., RADELET ET AL., *supra* note 366, at 275-76 & n.* (listing more than two dozen cases of eleventh-hour salvation); Tabak & Lane, *supra* note 124, at 102-03 (Joseph Green Brown came within 15 hours of death); *id.* at 107 (Ronald Monroe received a stay three days before his execution date); *supra* note 100 (Randall Dale Adams won a reprieve within three days of his execution).

370. See *supra* text accompanying note 322 (Justices O'Connor and Kennedy); *supra* text accompanying notes 333-34 (Justices Blackmun, Stevens and Souter); cf. *supra* text accompanying notes 291-92 (Chief Justice Rehnquist, with Justices O'Connor, Scalia, Kennedy, and Thomas) (opinion for the Court, admitting the "elemental appeal" of this proposition).

371. Compare *Herrera*, 113 S. Ct. at 871 (O'Connor, J, concurring) (discussing this aspect of the Rehnquist, White, and Blackmun opinions) with *supra* text accompanying note 329 (noting the contrary sentiment voiced in the Scalia and Thomas opinion).

372. The victim's status as a policeman, combined with *Herrera's* drug trafficking, may have cast a subliminal pall over the petitioner's legal claim. Possibly, a more appealing defendant might have elicited better dicta for future litigants if not a victory for himself.

Scalia and Thomas approached the matter cavalierly. I also regard the generic issue posed by *Herrera* as genuinely troubling. Setting aside my opposition to capital punishment, I concede that seeking to overturn a judgment valid when rendered implicates weighty government interests. For these reasons, I cannot muster Justice Blackmun's sense of outrage.

Yet the State, as well as the inmate, ought to have the strongest concern for vindicating well-founded claims of innocence. Responsible officials, ethically, cannot wish the problem of innocence away, especially where human life is at stake. Beyond that, enforcing local substantive law through reliable verdicts of guilt constitutes the *raison d'être* of any criminal justice system. The latter insight suggests the wisdom—in this area, above all others—of a state court resolution of a complaint such as *Herrera's*.

In the following pages, I indicate in general terms a possible constitutional strategy toward that end. Not fleshed out in great detail (in part, because the action agenda has shifted from the Court to Congress and local legislatures), the rest of this Article amounts to more of a sketch than a portrait. Whether or not the proposed approach would have profited this petitioner or, through dicta, litigants to come, it might at least have allowed a fairly hard case to avoid making bad law.

*B. Furnishing a Federal Key to the Statehouse Door*³⁷³

1. The Rationale

Perhaps because of the imprecision of the petitioner's requested relief,³⁷⁴ the Court's opinion focused mainly on the ramifications for habeas of a victory for *Herrera*. "Federal courts are not forums in which to relitigate state trials,"³⁷⁵ Chief Justice Rehnquist announced. In his estimation, few rulings would dis-

373. In this Section, my analysis draws heavily on Wright & Sofaer, *supra* note 242, *passim*.

374. See *supra* text accompanying notes 25-27.

375. *Herrera*, 113 S. Ct. at 861 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)).

rupt the federal system more than "habeas review of free-standing claims of actual innocence."³⁷⁶

Given the majority's recent attitude toward the writ,³⁷⁷ one might readily discount those statements as merely reflexive hostility to habeas. In many cases, as I myself have commented elsewhere, linkage of an asserted right with the disliked federal remedy has tended to doom or dilute the former.³⁷⁸ But irrespective of possible bias, the Chief Justice's words ring true to a certain extent. For a number of reasons, allocating *Herrera* claims to state post-conviction courts is a far superior solution to processing them in the district courts. Further, although the habeas doctrine of exhaustion of state remedies reflects an understandable preference for intra-systemic correction of error,³⁷⁹ wherever possible, the arguments favoring such a course have special weight in the present setting.

First and foremost, it bears repeating, fact finding on guilt and innocence comprises "the central focus and purpose" of local criminal prosecutions.³⁸⁰ Thus, in Professor Liebman's words, "[t]here hardly can be a greater slight to the presumption of competence of state courts . . . than to empower the federal courts to reconsider the validity of the guilt determinations that state courts routinely make."³⁸¹ Federal courts have only limited expertise in the definition of state offenses and the application of ancillary doctrines (such as rules requiring corroboration³⁸²), making evaluation of this type of evidence relatively harder for the federal judiciary.³⁸³ Further, even though dis-

376. *Id.*

377. See *supra* text accompanying note 185 and note 177 and accompanying text.

378. See generally Berger, *supra* note 179, at 98-99 (arguing that dislike of habeas "may be exerting a general downward pull on the law").

379. See 28 U.S.C. § 2254(b) (1988). In the words of Justice White, "ensuring that full factual development of a claim takes place in state court channels the resolution of the claim to the most appropriate forum. The state court is the appropriate forum for resolution of factual issues in the first instance . . ." *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1719 (1992).

380. See LIEBMAN, *supra* note 126, § 26.4, at 389 (Supp. 1992).

381. 1 LIEBMAN, *supra* note 126, § 2.2c, at 17 n.61 (1988); cf. Patchel, *supra* note 175, at 1024-25 n.497 (discussing operation of the innocence standard in the forfeiture context).

382. See, e.g., N.Y. CRIM. PROC. LAW §§ 60.22, 60.50 (Consol. 1986).

383. See Rosenberg, *supra* note 194, at 608. Unlike *Herrera*, not every post-convic-

strict judges will likely possess some familiarity with the laws of their own jurisdictions,³⁸⁴ their time is better spent deciding more broadly significant questions involving constitutional rights.³⁸⁵ Allegations of innocence, however key to the individual death row inmate, lack any national importance.³⁸⁶ Finally, prisoners raising contentions that do not impugn their guilt arguably have the most need for protection from Article III courts,³⁸⁷ with their greater insulation from the intense political pressures so endemic to capital cases.³⁸⁸

How, then, might the Court have relegated *Herrera* contentions to a state judicial forum? After all, through its thirty-day limitations period, Texas literally had given the petitioner short shrift. Notably, many other jurisdictions would have done likewise.³⁸⁹ Imposing a duty upon the State to hear his complaint would have meant not that a month's cutoff "was too short . . . but that applying an 8-year limit to [him] would be."³⁹⁰ In the real world, as I have pointed out already, any rigid time bar to

tion challenge based on newly discovered evidence will pose a simple "who done it" scenario. *See generally supra* note 179 and accompanying text (discussing the complexities of the notion of "innocence").

384. They already must review *Jackson* claims. *See supra* text accompanying notes 77-78.

385. *See Kuhlmann v. Wilson*, 477 U.S. 436, 471 n.7 (1986) (Brennan, J., dissenting). As previously mentioned, *see supra* note 353, prior state court findings of fact bearing on constitutional claims receive only deferential review. *See also* Liebman, *Apocalypse*, *supra* note 175, at 2094 (remarking that factual issues have, from the beginning of habeas review, "been singled out as singularly unworthy of habeas corpus relitigation"); 1 LIEBMAN, *supra* note 126, § 2.2c, at 13 (1988) (noting that "habeas corpus is not a writ of error designed to cure factually erroneous convictions") (footnote omitted); *cf. Wright v. West*, 112 S. Ct. 2482, 2494-97 (1992) (O'Connor, J., concurring in the judgment) (stating that habeas review is plenary as to questions of law and mixed questions of law and fact).

386. *See* Liebman, *Apocalypse*, *supra* note 175, at 2056; Patchel, *supra* note 175, at 1030 n.512.

387. *See* 1 LIEBMAN, *supra* note 126, § 2.2c, at 14-15 (1988); Patchel, *supra* note 175, at 1030 n.512 (citing RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 186-87 (1985)).

388. *See* Berger, *supra* note 37, at 1085-86 n.107; *see also supra* text accompanying notes 142-46 (discussing such pressures in the clemency setting). That being said, I stress that one should not underestimate the general hostility toward capital defendants—at trial and after judgment—which threatens their rights in any forum.

389. *See generally supra* note 24 (summarizing the relevant time limits).

390. *See Herrera v. Collins*, 113 S. Ct. 853, 873 (1993) (O'Connor, J., concurring).

motions for a new trial based on newly discovered evidence will probably prevent the bulk of potential death row movants from having their claims heard by a state court.³⁹¹ Only blanket invalidation of such barriers would, therefore, accomplish the goal of having these matters adjudicated locally. I now proceed to develop the constitutional argument in support of that result.

2. *The Legal Route and Its Ramifications*³⁹²

At this point, I can affirm without much fear of refutation that the Eighth Amendment forbids executing a guiltless person.³⁹³ The abstract substantive right to avoid execution if innocent means nothing in concrete terms, however, unless there exists a correlative right to establish innocence before a court at a requisite level of probability—and to do so *after* judgment. Simply put, absent the latter, the former would pose a classic instance of a right without a remedy. To avert that outcome, I would hold that the Eighth Amendment obligates states to entertain motions for a new trial based on newly discovered evidence, by death-sentenced prisoners asserting innocence, without regard to generally applicable time limitations.³⁹⁴ Admit-

391. See *supra* text accompanying notes 127-28. In addition, I know of no constitutional basis for drawing the line at a set number of months or years.

392. Like Justice Blackmun, I reserve for a later day questions, substantive and procedural, surrounding analogous claims by defendants who have been sentenced to life imprisonment or to lengthy terms of years. See *Herrera*, 113 S. Ct. at 877 n.2 (Blackmun, J., dissenting). Such an attitude need not, as some have implied, connote callousness toward those inmates. See *Bass v. Estelle*, 696 F.2d 1154, 1157 n.2 (5th Cir. 1983). The fashioning of new constitutional doctrine often, quite properly, occurs incrementally. Without apology, I *do*, moreover, think death is different—in the original sense intended. See *Herrera*, 113 S. Ct. at 877 n.2 (Blackmun, J., dissenting) (citations omitted); compare *supra* text accompanying notes 152-57 with *supra* text accompanying notes 164-65. Unlike Justice Blackmun, however, I will not make a separate Fourteenth Amendment argument in support of my position. It adds nothing, in the case of a death-sentenced prisoner, to an Eighth Amendment analysis. And insofar as the Court looks to history or even current practice in deciding what process is due a criminal defendant, the *Herrera* claimant has to lose. See *supra* text accompanying notes 309-14; cf. *Mathews v. Eldridge*, 424 U.S. 319 (1976) (enunciating a more generous balancing test for application in certain civil contexts).

393. *Teague* notwithstanding, I believe that the Court could have proclaimed this right in a habeas setting. Either it is not a new rule or it falls within the rarely applied exception for conduct beyond the State's power to proscribe or punish. See generally *supra* text accompanying notes 198-203 and note 201.

394. Again, I believe that this new rule should constitute an exception to *Teague*

tedly, as we have seen,³⁹⁵ recent dicta from the Court cast a pall over the notion of any constitutional entitlement to adequate post-conviction process. Yet exempting *Herrera* claims from the negative implications of cases like *Finley* and *Giarratano* would hardly reflect the "extreme position"³⁹⁶ that every constitutional right compels a remedy for violations. For one thing, when a state acts (or threatens to act) coercively to infringe such rights, it may generally have a duty to grant relief notwithstanding otherwise operative limits on its remedial processes.³⁹⁷ Further, given the highly disturbing nature of these particular claims³⁹⁸ and the fact that they cannot be redressed at trial or on appeal (or often, until long afterward), the argument in favor of mandating state corrective procedures seems very strong in the circumstances.³⁹⁹ The Eighth Amendment's core concern for reliability survives the verdict, as Justice Blackmun emphasized,⁴⁰⁰ and as even the Chief Justice grudgingly conceded by leaving open the possibility that "a truly persuasive" showing of actual innocence after judgment would

since it lays down a "procedure[] without which the likelihood of an accurate conviction is seriously diminished." *Teague v. Lane*, 489 U.S. 288, 313 (1989) (plurality opinion). See *supra* text accompanying note 201; see also *Sanders v. Sullivan*, 900 F.2d 601, 606 (2d Cir. 1990) (stating that when the "state's constitutional violation is the preservation of a conviction despite a credible recantation of material testimony," either *Teague* does not apply or the quoted exception does).

395. See *supra* text accompanying notes 257-61.

396. See Woolhandler, *supra* note 175, at 635-36.

397. See, e.g., *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990) (holding that where a state required the payment of an unconstitutional tax before review of the tax's validity, due process obliged it to furnish a meaningful opportunity for a refund); *Ward v. Love County*, 253 U.S. 17 (1920) (holding that a county that levied taxes on Indians in violation of the Indians' constitutional rights and obtained the money by coercive means, could not permissibly deny a refund on the ground of lack of authority to pay it). Such relief may be prospective, see *General Oil v. Crain*, 209 U.S. 211 (1908), and, in this context, obviously must be.

398. See *Herrera v. Collins*, 113 S. Ct. 853, 871 (1993) (O'Connor, J., concurring).

399. See generally Freedman, *supra* note 128:

[W]hatever the prospect of its current acceptance by the courts, a strong legal argument exists that the execution of a prisoner violates the eighth amendment's requirements of a comprehensive, reliable, individualized sentencing determination where newly-acquired evidence, never considered by the sentencing jury, creates a reasonable doubt as to guilt.

Id. at 319 n.22 (citation omitted).

400. See *supra* text accompanying notes 341-46.

render an execution invalid.⁴⁰¹ Insistence that a judge close her eyes to an exculpatory videotape or stop her ears to a third party's convincing confession mocks the Court's professed commitment to "super-accuracy" in capital punishment.⁴⁰²

Happily, the universal availability of motions for a new trial based on newly discovered evidence⁴⁰³ pretermits the vexing

401. See *supra* text accompanying note 317.

402. See generally Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980) (discussing the Supreme Court's position that the Eighth Amendment requires procedural safeguards in capital cases which result in a kind of "super due process"). One branch of Eighth Amendment jurisprudence looks to whether a challenged practice comports with "evolving standards of decency that mark the progress of a maturing society." See *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). A majority of the Court believes that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures"; it also considers, where applicable, the "actions of sentencing juries." *Id.* at 331. Three current members of the Court (the Chief Justice, and Justices Kennedy and Scalia) deem those sources of data exclusive, while three others (Justices O'Connor, Stevens, and Blackmun) hold that the Court also has a duty to conduct its own independent proportionality analysis. Compare *Stanford v. Kentucky*, 492 U.S. 361, 369-70 & n.1, 377-79 (1989) (Scalia, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.) with *id.* at 381-82 (O'Connor, J., concurring in part and concurring in the judgment) and *id.* at 382-83 (Brennan, J., concurring, joined by Marshall, Blackmun, and Stevens, JJ.). At least Justices Blackmun and Stevens will, moreover, survey a wider range of evidence, including public opinion polls, the views of organizations with relevant expertise, "and the choices of governments elsewhere in the world." *Id.* at 384. Plainly, if a headcount of statutes governing motions for new trials, including time bars, were to determine the Eighth Amendment status of *Herrera* claims, my approach could not prevail. See *supra* note 24 and text accompanying note 389; see, e.g., *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (stating that where only a few jurisdictions reject the possibility of death for felony murder, absent an intent to kill, the Constitution does not mandate the minority's position). The outcome of a broader-based examination would be less certain.

These considerations, however, should not detract from my argument. The Court has applied the "evolving standards of decency" doctrine almost exclusively to claims of substantive immunity from death. See, e.g., *Stanford*, 492 U.S. 361 (16- or 17-year-old murderers); *Penry*, 492 U.S. 302 (retarded persons); *Enmund v. Florida*, 458 U.S. 782 (1982) (felony murderers who did not themselves kill or attempt or intend to kill). I know of only a single instance in which this line of precedent was used (without discussion) to assess an asserted procedural right, jury sentencing in capital cases. Significantly, the Court held against the defendant despite the strong state consensus favoring the practice. See *Spaziano v. Florida*, 468 U.S. 447 (1984). Finally, in *Herrera* itself, the majority rejected the petitioner's contentions without such analysis, while "counting heads" as part of their due process inquiry. See *supra* text accompanying notes 311-13.

403. See *supra* text accompanying note 81. As previously noted, Arkansas tempo-

question whether a state can be required to create a forum for the enforcement of federal rights.⁴⁰⁴ Indeed, with regard to the posited constitutional entitlement to a belated state hearing on such a motion, it basically merges with the question whether that "remedial right" exists.⁴⁰⁵ If it does not, the substantive Eighth Amendment right would (as Chief Justice Rehnquist assumed) entail vindication in habeas proceedings.⁴⁰⁶ I believe, as I signaled earlier, that this alternative is inferior to a constitutional rule that the states must furnish a *Herrera* procedure.⁴⁰⁷ Because my reasoning in support of a locally focused

rarily repealed its general post-conviction statute. *See supra* note 273. But it did not repeal its law authorizing new trial motions based on newly discovered evidence. *See* ARK. CODE ANN. § 16-89-130(c)(6) (Michie 1987).

404. *See* *Howlett v. Rose*, 496 U.S. 356, 378 & n.1 (1990). While Texas' bar has been construed as "jurisdictional," *see supra* note 21, that designation is not dispositive. In *Howlett*, which involved a § 1983 action against a school board filed in a Florida circuit court, Justice Stevens wrote for a unanimous bench:

The fact that a rule is denominated jurisdictional does not provide a court an excuse to avoid the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word "jurisdiction."

Id. at 381-83. No reason exists to surmise that the Texas rule stems from the sorts of considerations mentioned in the quoted passage. *Cf. id.* at 383 (stating that if the State's label were dispositive, the State could overrule the decision in *Felder v. Casey*, 487 U.S. 131 (1988), *see infra* note 405).

Further, so long as a state system generally entertains motions for a new trial based on newly discovered evidence, it could not refuse to do so in cases where the defendant's right arises under federal law, *see Howlett*, 496 U.S. at 356; *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230, 233-34 (1934) (Federal Employers' Liability Act), because, for example, the courts or legislature deemed applications by death row inmates more likely to be frivolous. *See Howlett*, 496 U.S. at 379-80; *cf. supra* note 318 and accompanying text (discussing Chief Justice Rehnquist's view of probability of abuse).

405. If it does, a state could not invoke its time bar as an "adequate state ground" to preclude federal review of a dismissed *Herrera* claim. A procedural rule that, on its face or as applied, violates the Constitution is naturally inadequate for this purpose, *see* HART & WECHSLER, *supra* note 249, at 604-06, as is even one that, although not unconstitutional, evades or unduly interferes with federal rights. *See id.* at 608; *see also* *Williams v. Georgia*, 349 U.S. 375, 399 (1955) (Clark, J., dissenting); *cf. Felder v. Casey*, 487 U.S. 131 (1988) (holding that when a § 1983 action is filed in state court, state notice-of-claim law—in part, a statute of limitations—is preempted because it conflicts with remedial aims of federal law).

406. *See supra* text accompanying note 317.

407. *See supra* text accompanying notes 380-88, 394. Significantly, the respondent

solution to the *Herrera* problem relies heavily on considerations of comity and federalism, I should in candor acknowledge that forcing the states to adjudicate claims of innocence by death row inmates might be seen as a greater intrusion than simply according a federal hearing when they do not.⁴⁰⁸ First and foremost, any compulsion, by definition, infringes on the state's autonomy.⁴⁰⁹ Then, too, in the latter case, the prisoner only obtains her freedom in the event she wins on the merits; in the former, denial of state corrective process that the Court has deemed imperative results in her release from custody.⁴¹⁰ For that reason (if not out of deference alone), a state very likely would comply with a federal mandate to entertain this type of

in *Herrera* agreed. As a fallback position, the warden contended that the Court should announce a constitutional entitlement to a state post-conviction procedure—"such as an untimely motion for a new trial"—in preference to requiring a "federal habeas court to directly adjudicate guilt or innocence." See Respondent's Brief at 40, *Herrera v. Collins*, 113 S. Ct. 853 (1993) (No. 91-7328). For a useful summary of factors bearing on the choice between a federal "hearing to correct unacceptable fact-finding caused by deficient adjudications of federal rights or a constitutional rule invalidating the deficiency," see Wright & Sofaer, *supra* note 242, at 919. The reader should bear in mind that the ensuing discussion, which focuses largely on state interests, compares only those two options—not the third option, effectively adopted by the Court, of providing no redress at all.

408. See, e.g., Bator, *supra* note 153, at 492 (asserting that once a habeas court decides that the state corrective process is inadequate, determining the federal claim itself constitutes a "less abrasive" course); Sandalow, *supra* note 249, at 215 (arguing that the Court cannot reduce friction resulting from the federal intervention by making states furnish post-conviction procedures for hearing inmates' federal claims); cf. Comment, *supra* note 249, at 1091 ("[T]he Supreme Court should decide that availability of federal habeas corpus renders unnecessary insistence that a state court expand the scope of its collateral relief.") (footnote omitted).

409. Wright & Sofaer, *supra* note 242, at 900-01.

410. *Id.* at 908; see also Sandalow, *supra* note 249, at 210. But the discharge order might be conditional—avoidable, that is, if the State then furnished a proper remedy. See, e.g., *Pate v. Robinson*, 383 U.S. 375 (1966) (granting an order of release subject to retrial, where the state court erroneously had failed to conduct an inquiry into the defendant's competency); *Rogers v. Richmond*, 365 U.S. 534 (1961) (granting an order of release subject to retrial, where state court had applied an incorrect constitutional standard in determining a confession's voluntariness). Although a habeas court may order appropriately limited corrective action, see Wright & Sofaer, *supra* note 242, at 904-05 & n.36, I agree with the Chief Justice that merely lifting the sentence of death does not suffice, in logic or fairness, as relief for an innocent capital defendant. See *supra* note 302; cf. *Jackson v. Denno*, 378 U.S. 368, 395-96 (1964) (granting an order of release subject to the state court's after-the-fact hearing on the confession's voluntariness).

motion⁴¹¹ and, therefore, would have to assume some burden of marginal workload.⁴¹²

While reasonable people may disagree, I remain firm in the view that my proposal maximizes respect for the states. In letting their judges "off the hook," the Court avoids the friction stemming from the "coercion of state tribunals only by opening the gate to even more irritating situations."⁴¹³ As previously noted, empowering federal courts to dispose of the central question of guilt or innocence would constitute a major slight to the state judiciary.⁴¹⁴ The fact that a state can choose to authorize local courts to pass on prisoners' *Herrera* claims and, thus, prevent this slur on its judges as well as loss of control over a core criminal justice function does not necessarily mean that imposing a duty to do so thwarts state interests. To the contrary, I think it fair to conclude that the long-run balance of interests—state, federal, and death row inmates—inclines toward the course which I recommend.⁴¹⁵

That judgment rests heavily on the latitude I would extend to particular states to shape the contours of their remedy,⁴¹⁶ so

411. See Wright & Sofaer, *supra* note 242, at 901, 908. At least as regards the Court's own mandate, one can anticipate states' obedience, see Sandalow, *supra* note 249, at 234, although "[t]he possibility that a state court would ignore the Court's directions upon remand is not imaginary." Comment, *supra* note 249, at 1091 n.55 (citing *Hawk v. Olson*, 326 U.S. 271 (1945), *on remand*, 22 N.W.2d 136 (Neb. 1946)).

412. That burden is hard to assess; I do not consider it onerous. To be sure, three states (California, Florida, and Texas) currently have over 300 persons on death row. Yet most jurisdictions have far fewer; several, indeed, have under 10. See NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW U.S.A. 487-517 (Summer 1993). Notwithstanding the litigious habits of capital defendants, in many places only a handful will probably file *Herrera* claims in a given year.

413. Note, *supra* note 249, at 1150.

414. See *supra* text accompanying note 381; cf. Kelman, *supra* note 256, at 68 (imposing a duty on state judges to hear constitutional claims by prisoners would be a "vote of confidence" in the state judiciary). Notably, habeas courts have been loathe to order state courts to conduct hearings on federal claims. See, e.g., *Hull v. Freeman*, 932 F.2d 159, 170 n.9 (3d Cir. 1991) (stating that "if an evidentiary hearing is necessary in a federal habeas case . . . , it should be held in federal district court, rather than state court"). See generally 1 LIEBMAN, *supra* note 126, § 7.1b, at 69 n.44 (1988) (citing cases). There are, however, occasional exceptions to the rule. See, e.g., *United States ex rel. McQueen v. Wangelin*, 527 F.2d 579, 581-82 (8th Cir. 1975) (holding that the district court's remand to state court of habeas action was an exercise of discretion within the district court's power).

415. See *supra* text accompanying notes 379-88.

416. Cf. Wright & Sofaer, *supra* note 242, at 918 (arguing that state autonomy is

long as it remains open to death-sentenced prisoners without regard to passage of time. For example, a state could properly entrust to the judge (or, alternatively, to a new jury) the task of deciding whether a material witness lied⁴¹⁷ and define the precise showing needed to prevail on the merits of the claim, as by fixing the level of confidence to be instilled in the finder of fact.⁴¹⁸ The sole further constraint which I currently consider vital is abrogation of strict "due diligence" requirements as applied to *Herrera* movants.⁴¹⁹ Because of my preference for rather broad local autonomy in the area,⁴²⁰ I would impose it with

"not seriously limited" by *Pate v. Robinson*, 383 U.S. 375 (1966), because the Court did "not require any specific type of procedure").

417. See *supra* note 101.

418. But its discretion would not be boundless. A state may not place undue burdens on federal rights. See *supra* note 405. I do not think that the movant could be compelled to prove her innocence beyond a reasonable doubt, to give one instance of a forbiddingly high standard. By the same token, I would reject the related test of whether any rational fact finder could pronounce the defendant guilty of the offense on the sum of the evidence, old and new. Justice White's *Herrera* concurrence urged this approach, see *supra* text accompanying notes 331-32, which is also embodied in the relevant provision of the pending crime bill. See S. 1441, *supra* note 45, § 6. Justice Blackmun's suggested standard of probable actual innocence, see *supra* text accompanying notes 338-40, however, appears sensible. I am not now prepared to say if a higher standard should pass muster in this context; it would likelier be justified if applied to a claim of sentencing innocence. Cf. *supra* note 213 (describing *Sawyer's* combined rationality and clear and convincing evidence test); S. 1441, *supra* note 45, § 6 (looking to whether any rational fact finder "would have found an aggravating circumstance or other condition of eligibility").

In general, I would note that I have qualms about extending the putative *Herrera* right to allegations of innocence of death. At least insofar as these may involve complex or value-laden questions, they do not readily lend themselves to the format of a new trial motion founded on newly discovered evidence. See, e.g., *Evans v. Muncy*, 916 F.2d 163, 165-66 (4th Cir.) (rejecting a prisoner's attempt to present new evidence of post-sentencing good behavior, which purportedly cast doubt on his future dangerousness), *cert. denied*, 498 U.S. 927 (1990). But cf. *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992) (allowing the defendant to attack collaterally a death sentence as disproportionate, based on an equally guilty cohort's later-imposed life sentence). Their inclusion also would increase greatly the burdensomeness of the process, see *Ledewitz*, *supra* note 175, at 446-47, thereby potentially biasing judges even against those defendants asserting innocence of the crime.

419. But cf. *Friendly*, *supra* note 175, at 159 n.87 (endorsing due diligence requirements for collateral attacks on guilt).

420. Cf. *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) (Powell, J., concurring in part and concurring in the judgment) (stating that beyond a few basic requirements, "the States should have substantial leeway" to devise procedures for pre-execution assessment of sanity).

some reluctance. Yet the special problems of capital defendants—above all, ineffective assistance of counsel at trial and lack of counsel in collateral proceedings⁴²¹—make clear that to sanction this otherwise reasonable limit would, in the real world, scuttle the right. So unless the prisoner deliberately withheld⁴²² evidence of innocence from the trial court, I would not permit the State to bar her post-conviction challenge. Finally, whatever the procedure chosen, it should comport with basic justice.

It remains, still, to sketch the projected role of habeas in a regime of constitutionally mandated state *Herrera* processes. That role should be very restricted. If, as expected, the State entertains the inmate's motion,⁴²³ a compelling showing on her behalf ought to put an end to the matter with an order for a new trial or, in some cases, immediate release.⁴²⁴ Yet losing defendants, irrespective of the strength of their allegations, will doubtless seek a second shot at obtaining relief. Nonetheless, under *Townsend v. Sain*⁴²⁵ (which governs the right to a federal evidentiary hearing⁴²⁶) and the "intertwined" section

421. See *supra* text accompanying notes 121-23, 126.

422. This subjective bad faith standard is drawn from the superseded tests for procedural default and abuse of the writ. See *supra* text accompanying notes 207-08 and note 223; Freedman, *supra* note 128, at 322 & n.37. *Herrera* had implicitly argued that no type of defense misconduct in litigation should later preclude a death row inmate from collaterally attacking guilt. See *supra* note 120. Even apart from the practical issues regarding lawyering in capital cases, see *supra* text accompanying notes 121-23, objective standards strike me as inappropriate to apply to a possibly innocent defendant confronting execution. Here, in particular, the penalty for negligence should not be death. See Ledewitz, *supra* note 175, at 446; see also *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1721 (1988) (holding that, despite absence of cause, a habeas petitioner's failure to develop material facts in state court proceedings will be excused if he can show that a "fundamental miscarriage of justice would result" from lack of a federal hearing).

423. See *supra* text accompanying note 411.

424. See *supra* note 112.

425. 372 U.S. 293 (1963).

426. The opinion states:

We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allega-

2254(d) of the habeas statutes⁴²⁷ (which controls the effect in habeas of written state court findings of fact), procedural fairness and regularity in the belated new trial motion should largely insulate merits decisions⁴²⁸ from further review.

Specifically, with regard to *Townsend*: when the State employs a procedure sufficient to afford a full and fair hearing⁴²⁹ on the applicant's proof and otherwise conducts the proceeding fairly,⁴³⁰ the defendant generally will be denied a federal hearing⁴³¹ unless the State's determination was "not fairly sup-

tion of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313. Even though *Townsend* expressly excluded situations in which newly discovered evidence only bore on the prisoner's guilt, *see supra* text accompanying notes 238-40, it did so because such circumstances did not raise a constitutional issue and, thus, did not give rise to grounds for habeas relief. But if one accepts my constitutionalization of *Herrera* claims, I think the decision should apply to them too: *Townsend* plainly sought to set ground rules for hearings in habeas respecting all constitutional claims.

427. 28 U.S.C. § 2254(d) (1988); *see Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1726 (1988) (O'Connor, J., dissenting).

428. *See supra* note 426 (*Townsend's* circumstance (1)).

429. *See id.* (*Townsend's* circumstance (3)).

430. *See id.* (*Townsend's* circumstance (6)). *Townsend* also calls for a hearing when "the material facts were not adequately developed at the state court hearing." *See id.* (*Townsend's* circumstance (5)). This circumstance probably deals with certain types of state obstruction already covered by other provisos. *See Keeney*, 112 S. Ct. at 1721 n.5; *id.* at 1726-27 (O'Connor, J., dissenting). But surely it speaks to defaults by the prisoner or by his attorney, if he has one. The nature of the claim—actual innocence—would likely prevent procedural forfeiture from barring federal court review. *See supra* note 356 and accompanying text. This prospect raises the question whether, on account of circumstance (5), a defendant could initiate repeated attempts to present new evidence—in both state and federal court—at least, in the absence of deliberate withholding on his first *Herrera* motion. To avoid such results, perhaps a state could permissibly demand a much higher threshold showing by a repetitive *Herrera* claimant. *Cf. Ford v. Wainwright*, 477 U.S. 399, 417 (1986) (plurality opinion) (suggesting that repeated insanity claims might be controllable in this manner). Under current habeas law, though, a federal court might still have to review such claims; if so, I would change the statute. In any event, such derelictions should be infrequent at a state hearing sought and granted on the sole ground of new evidence, although they may occur occasionally. *Cf. Keeney*, 112 S. Ct. at 1716-17 (holding that defense failed to develop critical facts at a post-conviction hearing held on validity of guilty plea).

431. It bears mention that habeas courts retain discretion to order hearings, in the absence of a mandate to do so. *Keeney*, 112 S. Ct. at 1727; *see Townsend v. Sain*,

ported by the record as a whole."⁴³² In line with my aim to make *Herrera* adjudications as much as feasible a local affair while not eviscerating the remedy, I would, if I could, exempt such claims from that proviso.⁴³³

For one thing, it authorizes at least preliminary, and sometimes plenary, substantive scrutiny of state determinations of guilt: these comprise perhaps the most intrusive form of federal review.⁴³⁴ Then, too, since proper procedures—the *Townsend* criteria's primary focus—tend to produce reliable results, dispensing with it in this type of case ought not to threaten the prisoner unduly. Here, moreover, the State possesses a greater than usual incentive to furnish a fair hearing. Insofar as *Townsend* reflects core notions of due process⁴³⁵ (or, with regard to *Herrera* motions, adequate state corrective process), violation of these procedural requisites, at least in some systemic way, should trigger not merely a federal hearing but, rather, unconditional release.⁴³⁶ That would be strong medicine, in-

372 U.S. 293, 318 (1963); 1 LIEBMAN, *supra* note 126, § 20.4 (1988). But the same concerns that counsel in favor of a right to state corrective process in this context would strongly militate against such grants except in unusual circumstances.

432. See *supra* note 426 (*Townsend*'s circumstance (2)).

433. Perhaps the Court could do so without congressional action since it recently rejected the view that Congress, "in adopting 28 U.S.C. § 2254(d) . . . assumed the continuing validity of all aspects of *Townsend*." *Keeney*, 112 S. Ct. at 1720 n.5.

434. Speaking more generally, a pair of leading habeas scholars made the following pertinent comments:

[D]istrict courts should search for discernible indicia of unreliability, rather than engage in the treacherous process of evidence evaluation. The most significant possible exception to this approach in *Townsend* is the requirement that a hearing be held when the facts found by the state court are not "fairly supported" by the record . . . [T]he requirement should therefore be read with a full appreciation of the complexities and uncertainties inherent in reviewing findings of fact, and of the need to preserve a meaningful role for the state courts.

Wright & Sofaer, *supra* note 242, at 922.

435. Cf. *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and concurring in the judgment) (arguing that at least in the context of competency assessments prior to execution, the "full and fair hearing" language of *Townsend* and 28 U.S.C. § 2254(d) embodies the same standard as procedural due process).

436. On the one hand, once the Court, in effect, has instructed the states to establish appropriate *Herrera* procedures, their failure to do so should not reward them with a "second bite at the apple." See *Hull v. Freeman*, 932 F.2d 159, 170 & n.9 (3d Cir. 1991) (holding that comity in habeas does not require that state courts get

deed, yet warranted, I think, if a state were to play fast and loose with a possibly innocent death row inmate.

Lastly, the present statutory scheme calls in general for great deference in habeas proceedings to state courts' factual findings. Section 2254(d)⁴³⁷ largely replicates *Townsend's* categories. The upshot, in Justice O'Connor's words, is that *Townsend* "work[s] hand in hand" with the statute: "Where a petitioner has a right to a hearing he must prove facts by a preponderance of the evidence, but where he has no right to a hearing he must prove facts by the higher standard of convincing evidence."⁴³⁸ In the latter situation, "it is safe to assume" that most applicants will fail to attain this higher standard.⁴³⁹

Simply put, under my proposal, if a state establishes a fair and not unduly burdensome *Herrera* process and observes it in application, it should succeed in retaining control of this extremely sensitive area. If it does not, and incurs the penalty, it has only itself to blame.

VI. CONCLUSION

With due respect to Justice Blackmun, *Herrera* involved not "simple murder"⁴⁴⁰ but complex law—in a setting of strong competing interests of federalism and basic justice. Yet the majority of the Court should have taken more seriously the risk of executing innocent people. Skeptical of the petitioner before them, they adopted a blinkered approach to a problem they had implicitly acknowledged in fashioning habeas forfeiture doctrine. The innocence-as-gateway notion⁴⁴¹ is bankrupt, legally and morally, if it leads to a blind alley. I have suggested an alternate

more than one opportunity to adjudicate federal claims). On the other hand, I regard release, as opposed to a federal hearing, as too harsh when random breaches occur within the framework of an acceptable process.

437. See 28 U.S.C. § 2254(d)(1)-(8) (1988).

438. *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1726 (1992) (O'Connor, J., dissenting).

439. *Id.* Section 2254(d)(8) embodies *Townsend's* circumstance (2). For the reasons stated earlier, see *supra* text accompanying notes 433-36 and notes 433-34, I would wish that the Court discard it, too, in this context. In the case of a statute, however, Congress must do the necessary work.

440. See *supra* text accompanying note 35.

441. See *supra* text accompanying note 298.

vision of innocence-as-gateway: one leading to a local forum, constitutionally bound to consider post-conviction challenges to guilt by death row inmates. In my opinion, that course would have struck an appropriate accommodation between the State and the individual. For now, though, the baton has passed to Congress and, ultimately, President Clinton—whose views will very likely differ from both my own and those of Chief Justice Rehnquist.