Georgia State University Law Review

Volume 27
Issue 2 *Winter 2011*

Article 16

1-1-2011

The End of Innocence? Federal Habeas Corpus Law After In re Davis

Joshua M. Lott

THE END OF INNOCENCE? FEDERAL HABEAS CORPUS LAW AFTER *IN RE DAVIS*

Joshua M. Lott*

INTRODUCTION

"This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent."[1] Justice Scalia may already be well known for a strict approach to statutory construction, but his dissenting statement in the 2009 Supreme Court decision, *In re Davis*, caused quite a buzz among national media.[2] Although callous in appearance, Justice Scalia's words provide a technically correct reading of Supreme Court precedent and federal habeas corpus law:[3] actual innocence is not a recognized claim of constitutional error that would allow federal courts to review a prisoner's habeas petition.[4]

A majority of the justices, however, were convinced that Troy Davis, the petitioner, held new evidence so substantial that it warranted the Court's rarely used "original" habeas jurisdiction.[5] In granting his petition, the Court cleared the way for the federal evidentiary hearing that Mr. Davis's lawyers and advocates had been

---

* J.D. Candidate, 2011, Georgia State University College of Law. Special thanks to Professor Anne Emanuel for her guidance and willingness to be a constant sounding board for my ideas.

1. *In re* Davis, 130 S. Ct. 1, 3 (2009) (mem.) (Scalia, J., dissenting).

2. *See, e.g.*, David Von Drehle, *Troy Davis Raises Death Penalty Questions*, TIME, Aug. 18, 2009, http://www.time.com/time/nation/article/0,8599,1917118,00.html; Josh Patashnik, *The Troy Davis Case and Standards of Review*, THE NEW REPUBLIC, Aug. 18, 2009, http://www.tnr.com/blog/the-plank/the-troy-davis-case-and-standards-review; Bill Rankin, *U.S. Supreme Court Orders New Hearing for Troy Davis*, ATLANTA J.-CONST., Aug. 18, 2009, http://www.ajc.com/news/u-s-supreme-court-117260.html.

3. *See* 28 U.S.C. § 2254(d)(1) (2006) (stating that federal habeas relief is barred unless the state court decision was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court).

4. Herrera v. Collins, 506 U.S. 390, 400 (1993) ("[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.") (quoting Townsend v. Sain, 372 U.S. 293, 317 (1963))).

5. *Davis*, 130 S. Ct. at 1.

seeking for years.[6] Justice Stevens, who wrote the Court's only other opinion, stated in concurrence with the majority's order that it was right to reject a line of reasoning that would theoretically justify the execution of a truly innocent person.[7] The Court transferred Mr. Davis's case to the district court for a determination of "whether evidence that could not have been obtained at the time of trial clearly establishes [the] petitioner's innocence."[8] Until this most recent Supreme Court decision, every state and federal body that reviewed Mr. Davis's case had concluded that the evidence was not persuasive enough to justify a new trial, evidentiary hearing, or any conclusion other than the jury's.[9]

The story behind the Court's extraordinary decision begins in 1989 at a Burger King parking lot on a late August night in Savannah, Georgia.[10] Mark MacPhail, an off-duty police officer, was working security for the restaurant when he ran outside after hearing a man scream for help.[11] In the parking lot, three men surrounded Larry Young, who was bloodied and lying on the ground after a scuffle turned violent.[12] As Officer MacPhail approached, shots were fired from a .38 caliber revolver, and he fell to the ground dead.[13] When his body was found later, MacPhail's gun was still in its holster, blood had filled his mouth, and bits of teeth were scattered along an adjacent sidewalk.[14]

The tangled mess that followed is replete with murder mystery ambiguity: eyewitnesses with alleged motives to lie, questionable police identification procedures, ambiguous ballistics results from shell casings found at the scene, and an angry public traumatized by

6. *See generally* Brief for Bob Barr et al. as Amici Curiae Supporting Petitioner, *In re* Davis, 130 S. Ct. 1 (2009) (No. 08-1443) [hereinafter Brief for Bob Barr et al.]; *see also* Bob Barr, Editorial, *Death Penalty Disgrace*, N.Y. TIMES, June 1, 2009, at A21 [hereinafter Barr Death Penalty Editorial].

7. *Davis*, 130 S. Ct. at 1 (2009) (Stevens, J., concurring).

8. *Id.*

9. Brief of Petitioner at 2, *In re* Davis, 130 S. Ct. 1 (2009) (No. 08-1443) [hereinafter Brief of Petitioner].

10. *Id.* at 2.

11. *Id.*

12. *Id.*

13. *Id.*

14. Brief of Respondent at 17, *In re* Davis, 130 S. Ct. 1, (2009) (No. 08-1443) [hereinafter Brief of Respondent].

the loss of a public servant.[15] In the end, nine eyewitnesses identified Troy Davis as the gunman.[16] Despite his claim of innocence, Mr. Davis was convicted of malice murder, and on August 30, 1991, he was sentenced to death.[17] To this day, Troy Davis has maintained his innocence; in fact, he continues to assert that Redd Coles, one of the State's nine witnesses, fired the gun that ended Mark MacPhail's life.[18] After years of unsuccessful attempts, Mr. Davis's defense team convinced the Supreme Court that his new evidence of innocence coupled with the recantations from seven of the eyewitnesses demanded a reexamination of his case.[19]

Death penalty proponents and abolitionists,[20] jurists and politicians across the political spectrum,[21] and Troy Davis supporters[22] all heralded the Supreme Court's decision as an answer to their call for a more fair and flexible judiciary, but *In re Davis* actually invites serious doubt about such an assumption.[23] Although the Court appears to acknowledge that a truly persuasive claim of actual innocence in a capital case exposes a gap in current law, *Davis* fails to provide a legitimate method to fill this gap.[24] The substantive and procedural components of federal post-conviction law are aimed at ensuring limited judicial review and granting relief only when a state

15. *See generally id.*; Brief of Petitioner, *supra* note 9.

16. Brief of Petitioner, *supra* note 9, at 2.

17. Brief of Respondent, *supra* note 14, at 4 (citing Davis v. State, 426 S.E.2d 844 (1993)).

18. Brief of Petitioner, *supra* note 9, at 2.

19. *Id.* at 2–9.

20. *See, e.g.*, Amnesty International USA, Troy Davis: Finality Over Fairness, http://www.amnestyusa.org/death-penalty/troy-davis-finality-over-fairness/page.do?id=1011343 (last visited Oct. 13, 2010); Barr Death Penalty Editorial, *supra* note 6 ("I am a firm believer in the death penalty, but I am an equally firm believer in the rights and protections guaranteed by the Constitution. To execute Troy Davis without having a court hear the evidence of his innocence would be unconscionable and unconstitutional.").

21. Brief for Bob Barr et al., *supra* note 6 (listing twenty-seven different politicians, prosecutors, and members of the judiciary).

22. Amnesty International USA, *supra* note 20 (listing activists across the world who have joined in supporting Troy Davis).

23. *See* Herrera v. Collins, 506 U.S. 390, 404–05 (1993) (holding that petitioner must supplement his innocence evidence with a cognizable claim because actual innocence alone does not warrant habeas relief); *see* discussion *infra* Parts I.B.1, II.B.

24. *See Herrera*, 506 U.S. at 400–06. The Supreme Court has never decided the burden of proof required for habeas relief in a substantive claim of actual innocence. *In re* Davis, 130 S. Ct. 1, 2 (2009) (mem.) (Scalia, J., dissenting).

court judgment is unconstitutional.[25] Indeed, without some other independent constitutional violation, post-conviction claims of factual innocence alone have never qualified as a basis for habeas relief.

Under current law, Mr. Davis's request for a federal evidentiary hearing should have been denied outright. The Court's decision to bypass these statutory and constitutional requirements raises a multitude of questions in the ongoing debate over how capital punishment is administered and reviewed in the United States. With no majority opinion, however, and no guidance other than Justice Stevens's hypothesis as to how lower courts, if persuaded, might circumvent the statutory language controlling habeas relief,[26] the decision could possibly upset decades of precedent, federal law, and federalism principles.[27] In the absence of such direction, *In re Davis* may be nothing more than a hollow attempt at reconciling a very serious moral crisis—one that potentially fails the victims in whose name capital punishment is justified, or worse, result in the execution of a truly innocent petitioner. Indeed, Judge William T. Moore, Jr., of Georgia's Southern district, had the difficult task of unraveling these "innocence" ambiguities in Mr. Davis's case. After hearing all the evidence in the much-anticipated June 2010 hearing, Judge Moore concluded that while actual innocence is a valid constitutional claim, Mr. Davis had failed to "clearly" establish his innocence.[28]

---

25. 28 U.S.C. § 2254(d)(1) (2006); *see also* Sara Rodriguez & Scott J. Atlas, *Habeas Corpus: The Dilemma of Actual Innocence*, 34 LITIG. 35, 36 (Winter 2008) ("[T]he writ of habeas corpus . . . [is] used by prisoners seeking 'collateral review' after completion of direct appeal. In this context, prisoners test the constitutionality of their convictions and sentences.").

26. Justice Stevens's concurrence is limited to a discussion of how the district court might still have power to grant relief. *In re* Davis, 130 S. Ct. 1 (2009) (mem.) (Stevens, J., concurring). It does not guide lower courts on how to arrive at a decision that relief is warranted. *Id.*; *see also* discussion *infra* Part II.D.2.

27. *Herrera*, 506 U.S. at 421 ("The question is a sensitive and . . . troubling one. It implicates not just the life of a single individual, but also the State's powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations.") (O'Connor, J., concurring); *see also* discussion *infra* Parts I.B–C.

28. *In re* Davis, No. CV409-130, 2010 WL 3385081, slip op. at 109 (S.D. Ga. Aug. 24, 2010), *available at* http://www.scotusblog.com/blog/2010/08/24/innocence-claim rejected/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+scotusblog%2FpFXs+%28SCOTUSblog%29.

This Note has two primary purposes. The first is to examine the legal structure and policies behind actual innocence in the context of certain contemporary trends that have eroded public faith in the criminal justice system. The second purpose is to set forth a proposal that fills the aforementioned "innocence gap" and to justify the availability of a substantive innocence claim in a narrow class of death penalty cases.

Part I explores the relevant history of habeas corpus in the United States and how *In re Davis* is inconsistent with the Court's earlier actual innocence decisions.[29] Part II examines the *Davis* Court's reasoning as well as the legal and policy implications of the decision.[30] Specifically, Part II analyzes the interplay between (1) the increasing public awareness of weaknesses existing in the criminal justice process, (2) the potential burdens of proof required to prove actual innocence at a habeas corpus evidentiary hearing, (3) the problematic nature of recanting eyewitness testimony as evidence of innocence, and (4) the high level of deference given to state court judgments and the federal policy of judgment finality.[31] In light of this analysis, Part III proposes that the Supreme Court should recognize that the Eighth and Fourteenth Amendments to the Constitution require judicial review of certain substantive actual innocence claims in the capital punishment context.[32] Rather than relying on overly restrictive constructions of habeas corpus law, however, this proposal adopts Justice Blackmun's "probably is innocent" framework from *Herrera v. Collins*[33] as the basis for adjudicating innocence claims on the merits. This proposal serves as a limited exception to the otherwise valid statutory requirements found in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), the legislation that controls all federal habeas corpus

29. *See* discussion *infra* Part I. Part I also includes a description of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the philosophical shift behind the Burger and Rehnquist Courts' treatment of habeas review. *Id.*

30. *See infra* Part II. The discussion includes the societal effect of DNA evidence and the exposure of wrongful convictions. *Id.*

31. *See infra* Parts II.A–D.

32. *See infra* Part III.A.

33. Herrera v. Collins, 506 U.S. 390 (1993).

claims.[34] Finally, Part III recommends that states should protect their finality interests and minimize federal intervention by addressing flaws within their own criminal systems.[35]

I. INNOCENCE AND FEDERAL HABEAS CORPUS LAW

A. Understanding the Modern Writ

1. Historical Foundation

The writ of habeas corpus has a long history in English and American common law jurisprudence.[36] Although traditionally used as a means of compelling officials to bring prisoners into court,[37] the writ has expanded today into a complex set of procedural rules and is the primary method used to challenge the legality of one's imprisonment.[38]

In the American context, the writ of habeas corpus is rooted in the Suspension Clause of the Constitution, which states that the writ "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[39] The Suspension Clause serves as the basis for what the Court defines as its "original habeas jurisdiction."[40] However, a petitioner seeking issuance of the Court's original writ rarely receives it because one must show that "exceptional circumstances" exist and that "relief cannot be obtained in any other form or from any other court."[41] Pursuant to these limitations, the habeas petitioner may file the writ in any branch of

34. *See* discussion *infra* Parts I.C, III.B.

35. *See infra* Part III.C.

36. Rodriguez & Atlas, *supra* note 25, at 36.

37. *Id.* at 36 (defining "grant of the writ" as shorthand for granting relief the petitioner has requested if the restraints are found to be illegal).

38. *Id.*

39. U.S. CONST. art. I, § 9, cl. 2.

40. SUP. CT. R. 20.4(a).

41. SUP. CT. R. 20.4(a) (stating that an original writ shall be issued only in the truly exceptional case); *In re* Davis, 130 S. Ct. 1 (2009) (mem.) (acknowledging that the Court's original writ power had not been used in almost fifty years).

the federal judiciary, but the normal practice is that determinations are made in the appropriate district court.[42]

Beyond the rarely issued "original" writ, the Supreme Court lacks jurisdiction over habeas corpus claims through Article III.[43] Instead, Congress, through its own constitutional power over the appellate jurisdiction of the Court, maintains wide discretion over the rules and procedures governing habeas practice.[44] In fact, federal courts could only consider claims by federal prisoners until 1867—the year Congress expanded habeas jurisdiction to include all cases and persons restrained "in violation of the constitution."[45] However, post-conviction collateral attacks by state prisoners were not fully included in this expanded constitutional framework until the 1960s. During this era, the Warren Court greatly expanded the scope of the writ as a means of striking down unconstitutional state criminal procedures and laws.[46] While these actions provided defendants greater access to justice on a variety of newly recognized grounds, critics feared that federal courts would be overwhelmed by frivolous claims from state prisoners.[47]

2. Habeas Corpus and Verdict Accuracy

In response to what was viewed as "abuse of the writ,"[48] the Burger and Rehnquist Courts restricted the availability of habeas

42. 28 U.S.C. § 2241(a) (2000).

43. U.S. CONST. art. III.

44. The Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73.

45. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385; *see also* Felker v. Turpin, 518 U.S. 651, 659–60 n.2 (1996) (citing the few exceptions where state prisoners were allowed to obtain the writ).

46. *See* Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 591, 609–10 (2005). The Warren Court was largely guided by the idea that the criminal process should be improved with additional federal review, which resulted in the creation of new cognizable claims for habeas petitioners. *Id.*

47. *Id.* at 609. The Court expressed fear that expansion of the writ would lead to an increase in the total number of petitions, tying up judicial resources such that the habeas petitioner in true need of federal relief would not have meaningful review. *See* Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring) ("It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.").

48. The "abuse of the writ" doctrine is a judicially created doctrine that limits a prisoner's ability to bring a successive or previously litigated claim. Lyn S. Entzeroth, *Struggling for Federal Judicial*

corpus relief in several ways.[49] In a series of decisions, the Court moved away from overturning state judgments solely because of government misconduct or incompetent defense counsel.[50] Instead, the Court defined the individual right to a fair trial by focusing on the accuracy of the original verdict; thus, despite constitutional error, "unfairness" worthy of habeas relief hinged on whether the guilty verdict remained reliable.[51]

As "verdict accuracy" gained momentum, the Court also became receptive to the habeas reform ideas espoused by Judge Henry Friendly, who first introduced the idea of actual innocence.[52] To combat habeas abuses, Judge Friendly stated that "with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of actual innocence."[53] Judge Friendly's proposal essentially relegated "innocence" into a post-conviction procedural mechanism because it required petitioners to show new innocence evidence plus a constitutional violation before evidentiary

---

Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review, 60 U. MIAMI L. REV. 75, 89 (2005). The doctrine was strengthened by the Court during this era and codified in 1966 and 1976 amendments to the federal habeas statute. *See id.* at 89 n.96. The Court placed even more restrictions through abuse of the writ in the Rehnquist era. *See* McCleskey v. Zant, 499 U.S. 467, 493 (1991).

49. *See* cases cited *infra* notes 50–51.

50. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 669 (1984) (holding that convictions should remain undisturbed even where a petitioner can prove that his attorney fell below the reasonable competence standard unless there is a reasonable probability that the outcome was undermined); Stone v. Powell, 428 U.S. 465, 493–94 (1976) (stating that no rights in federal habeas are created in evidentiary and Fourth Amendment search-and-seizure issues because they are expected to be litigated in a state court at trial); Steiker & Steiker, *supra* note 46, at 613 ("The Court defined 'prejudice' . . . as 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' noting that '[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.'") (quoting *Strickland*, 466 U.S. at 694)).

51. *See* cases cited *supra* note 50; *see also* Barefoot v. Estelle, 463 U.S. 880, 887 (1983) (noting that the purpose of federal habeas is not to retry the facts of the case); Wainright v. Sykes, 433 U.S. 72, 90 (1977) (stating that a state criminal trial is the ultimate event in deciding issues of innocence and guilt); Steiker & Steiker, *supra* note 46, at 610 ("[T]he Court's preclusion of 'new' constitutional claims on federal habeas, like its tightened procedural rules, allowed only narrow exceptions, the most significant of which concerned issues related to verdict accuracy.").

52. *See generally* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

53. *Id.* at 142. For a fuller understanding of Judge Friendly's influence on the Court see Steiker & Steiker, *supra* note 46, at 609–12.

hearings could even be granted.[54] Although this actual innocence concept placed a heavier burden on state prisoners, the Court believed Judge Friendly's ideas struck the proper balance between the state's interest in judgment finality, individual rights, and abuses in the federal habeas system.[55]

3. The Procedural Default Doctrine and Actual Innocence

By embracing policies that emphasized the state trial as the ultimate determination of a defendant's guilt, the Burger and Rehnquist Courts also restricted the procedural limitations of habeas corpus law.[56] For example, the procedural default doctrine bars all constitutional claims from being heard in federal court if they have already been denied in state habeas proceedings.[57] Conversely, the doctrine also requires the petitioner to raise all constitutional claims in state court before raising them in federal court or risk having those claims barred in the federal proceeding as well.[58] Thus, procedurally defaulted claims are completely foreclosed to federal review with only a few exceptions.[59]

To overcome the bar on procedurally defaulted claims a prisoner must demonstrate "cause for the default and actual prejudice as a result of the alleged violation of federal law."[60] Within the default doctrine, however, the Court created a "fundamental miscarriage of justice" exception to the cause-and-prejudice requirement, for which actual innocence serves in its limited procedural role.[61] Essentially,

54. Steiker & Steiker, *supra* note 46, at 610.

55. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 400–03 (1993) (discussing the deference given to state court judgments); Rodriguez & Atlas, *supra* note 25, at 35 ("Federal habeas corpus procedures (and, often, state habeas procedures) closely reflect the views of Justice Jackson and Judge Friendly."); Steiker & Steiker, *supra* note 46, at 609–10.

56. *See* cases cited *supra* notes 50–51; Rodriguez & Atlas, *supra* note 25, at 36.

57. Rodriguez & Atlas, *supra* note 25, at 38.

58. *Id.* ("[T]he "exhaustion [of claims] requirement 'reflects a policy of federal-state comity.'" (citing Picard v. Connor, 404 U.S. 270, 275 (1971))).

59. Steiker & Steiker, *supra* note 46, at 610.

60. Rodriguez & Atlas, *supra* note 25, at 38 (quoting Coleman v. Thompson, 501 U.S. 722, 750 (1991)).

61. *Id.* ("The 'fundamental-miscarriage-of-justice' exception to the finality rule . . . can be satisfied only by . . . new, reliable evidence that the prisoner is actually innocent of the underlying offense [as well as constitutional error] or . . . that he is actually innocent for purposes of the punishment of death as

any prisoner seeking federal habeas review must file a claim that alleges a cognizable constitutional error, explain the cause for why it was not filed in state court, and explain the prejudice that will occur if a federal court chooses not to hear it.[62] If the prisoner cannot meet the cause-and-prejudice requirement, he must present a compelling case of actual innocence: facts not available at the time of trial to show that a fundamental miscarriage of justice will occur.[63] If actual innocence is proven, then the defaulted constitutional claims will be decided on their merits at an evidentiary hearing.[64] Thus, in creating these exceptions, the Court officially incorporated actual innocence into federal habeas corpus for the procedural purpose advocated by Judge Friendly.[65] However, the Court did not define the required burden of proof for a showing of actual innocence, nor did it resolve the question of whether actual innocence was itself an independent constitutional claim until *Herrera v. Collins*[66] and *Schlup v. Delo*.[67]

B. The Two Meanings of Actual Innocence: Substantive and Procedural

1. Actual Innocence is Not a Substantive Claim Under Herrera

In *Herrera*, the Court was asked to decide whether actual innocence was a cognizable and independent constitutional claim that would entitle a habeas petitioner to relief.[68] The petitioner, Leonel

---

the result of an error that occurred at his sentencing." (citing Schlup v. Delo, 513 U.S. 298, 324–25 (1995))).

62. *See* Steiker & Steiker, *supra* note 46, at 610 (citing Wainwright v. Sykes, 433 U.S. 72 (1977) (excuse for petitioner's failure to comply with state procedural rule must meet "cause and prejudice" standard rather than "deliberate bypass" standard of Fay v. Noia, 372 U.S. 391 (1963))); Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) (applying cause and prejudice standard to failure to develop the facts underlying claim and overruling Townsend v. Sain, 372 U.S. 293 (1963)); McCleskey v. Zant, 499 U.S. 467 (1991) (applying cause and prejudice standard to new claims not presented in previous petition); Kuhlmann v. Wilson, 477 U.S. 436 (1986) (applying cause and prejudice standard to successive claims raising grounds identical to grounds heard and decided on the merits in a previous petition)).

63. *See* Coleman v. Thompson, 501 U.S. 722, 750 (1991); Rodriguez & Atlas, *supra* note 25, at 38.

64. *See* Rodriguez & Atlas, *supra* note 25, at 39.

65. Steiker & Steiker, *supra* note 46 (citing McCleskey v. Zant, 499 U.S. 467, 494–95, (1991)); *see also* Friendly, *supra* note 52.

66. Herrera v. Collins, 506 U.S. 390 (1993).

67. Schlup v. Delo, 513 U.S. 298 (1995).

68. *Herrera*, 506 U.S. at 393.

Herrera, was sentenced to death in January 1982 after he was found guilty of murder.[69] After spending ten years navigating state and federal habeas procedures, he brought a second federal habeas petition in federal court claiming that he was "actually innocent" of the murder.[70] The petition did not allege trial error nor did it allege past constitutional violations.[71] Instead, Mr. Herrera's claim stated that his future execution would prospectively violate the Eighth Amendment's ban on cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process of law.[72] Mr. Herrera's new evidence consisted of witness affidavits indicating his deceased brother was the actual gunman.[73] Because actual innocence was not independently cognizable, the lower circuit court declined Mr. Herrera's request for an evidentiary hearing to determine the reliability of the affidavits.[74] In affirming the circuit court's decision, the Supreme Court not only dismissed the affidavits as unreliable[75] but also held that a substantive claim of actual innocence based on newly discovered post-trial evidence is not cognizable; federal habeas relief can only be granted when an independent constitutional violation occurred at the state criminal proceeding.[76] The Court reiterated that actual innocence is a procedural mechanism under the "fundamental miscarriage of justice" exception to the procedural default rule.[77]

---

69. *Id.*
70. *Id.*
71. *Id.*
72. Herrera v. Collins, 506 U.S. 390, 393 (1993).
73. *Id.* at 393.
74. *Id.*
75. *Id.* at 417–18 ("Petitioner's affidavits are particularly suspect . . . . No satisfactory explanation has been given as to why the affiants waited until the 11th hour . . . after the alleged perpetrator of the murders himself was dead—to make their statements.").
76. *Id.* at 416 ("Federal habeas review of state convictions has traditionally been limited to claims of constitutional violations occurring in the course of the underlying state criminal proceedings. Our federal habeas cases have treated claims of 'actual innocence,' not as an independent constitutional claim . . . considered on the merits . . . .").
77. *Id.* at 404 ("[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."); *see supra* Part I.A.3.

The Court was particularly wary of the "disruptive effect" that a so-called "freestanding actual innocence claim" would have on the need for finality in state court judgments.[78] The majority believed that a fact-finder with newly proffered evidence is actually in a worse position than the original fact-finder because the passage of time has a corrosive effect on evidence and witness testimony.[79] Thus, the Court stated that a new hearing could not be a more accurate and reliable determination of truth than the original.[80] Furthermore, the Court believed that society has a large degree of faith in the legitimacy of criminal trials because the Constitution offers "unparalleled protections against convicting the innocent."[81] The Court confirmed its view that federal habeas courts do not exist to re-litigate state trials but instead are intended to free persons held in violation of the constitution.[82] Nevertheless, the Court assumed *arguendo* that a "truly persuasive demonstration of 'actual innocence' [in a capital case] . . . would render the execution of a defendant unconstitutional" but did not expressly hold so because such a case must first pass an "extraordinarily high" initial showing not present in *Herrera*.[83]

2. *Burden of Proof Required for Procedural "Actual Innocence" Under* Schlup

Two years later in *Schlup v. Delo*, the Court further refined the procedural role of actual innocence in federal habeas proceedings.[84] The *Schlup* majority upheld its previous decision, finding that

78. Herrera v. Collins, 506 U.S. 390, 403–07, 414 (1993) (stating that federal habeas courts are not intended to correct errors of fact, thus substantial deference is given to the states in criminal proceedings because of their expertise in matters of criminal procedure and process).

79. *Id.* at 403–04 ("[W]hen a habeas petitioner succeeds in obtaining a new trial, the 'erosion of memory and dispersion of witnesses that occur with the passage of time' prejudice the government and diminish the chances of reliable criminal adjudication." (quoting McKlesky v. Zant, 499 U.S. 467, 491 (1991))).

80. *Id.*

81. *Id.* at 420 (O'Connor, J., concurring).

82. *Id.* at 400 ("This rule is grounded on the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.").

83. *Id.* at 417.

84. Schlup v. Delo, 513 U.S. 298 (1995).

innocence should only be considered under the fundamental miscarriage of justice exception to the procedural default doctrine.[85] S*chlup* then provided the procedural actual innocence analysis for courts to use when deciding whether barred claims should be heard. The *Schlup* test balances the innocence evidence against the reliability of the state's verdict to determine "whether it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt."[86] Thus, if the "probable" test is met, a federal habeas petitioner may have an otherwise barred constitutional claim considered on the merits.[87] However, in subsequent cases the Court has held that the *Schlup* test is a lower standard than what would be hypothetically required for the "extraordinarily high" substantive actual innocence *Herrera* claim.[88]

C. The Antiterrorism Effective Death Penalty Act of 1996

1. Congressional Restrictions on Federal Habeas Corpus

Despite the already narrow limits placed on habeas corpus procedure by the Court, Congress further restricted habeas relief by passing the Antiterrorism Effective Death Penalty Act of 1996 (AEDPA), which applies to all habeas claims in federal court.[89] Formulated in the aftermath of the 1995 Oklahoma City bombings, the Act restricts procedural time limits, a petitioner's ability to file successive claims, and the instances where state judgments can be

85. *Id.* at 326–27.

86. *Id.* at 327.

87. *See* Rodriguez & Atlas, *supra* note 25, at 38. The Court recently discussed this test in *House v. Bell*, 547 U.S. 518 (2006). House was convicted and sentenced to death for aggravated sexual assault and murder. *Id.* at 521. In his federal habeas corpus petition, he raised a claim of ineffective assistance of counsel because it was procedurally barred under state law. *Id.* at 534. Mr. House attempted to use *Schlup* to overcome his defaulted claim because he obtained new DNA evidence as well as evidence that the victim's spouse was the murderer. *Id.* at 553. The Court held that he met the "probable" standard, and his case was remanded to the district court to consider the ineffective assistance of counsel claim. *Id.* at 554–55.

88. *See House*, 547 U.S. at 536–40, 555; Herrera v. Collins, 506 U.S. 390, 403 (1993); *see also* Sawyer v. Whitley, 505 U.S. 333 (1992) (creating an actual innocence procedural default gateway of "clear and convincing" proof indicating ineligibility for the death penalty).

89. Antiterrorism Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1217–1226 (codified as amended in scattered sections of 28 U.S.C.).

overturned.[90] Significantly, it "borrowed from and exaggerated the Court's use of innocence as a gateway"[91] by reserving relief for "only [the] truly grievous constitutional wrongs."[92] In direct contrast to *Schlup*'s probable standard, § 2254(e)(2)(B) denies a petitioner access to an evidentiary hearing unless they can "establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense."[93] Section 2254(e)(1) states that determinations made by a state court "shall be presumed to be correct" and can only be rebutted with clear and convincing evidence.[94] Furthermore, the Act provides for innocence evidence only of the *underlying offense* to be considered in relief determinations, which nullified the Court's "innocence of the aggravating circumstances" death sentence ineligibility claim.[95] The AEDPA's re-calibration of habeas corpus law is reflective of the larger verdict accuracy movement of the time, a philosophy that continues to guide the Court, and one that ensures a

90. The AEDPA requires that any claim in a successive petition be barred if the factual predicate for the claim could have been discovered during the exercise of due diligence, including actual innocence procedural claims. 28 U.S.C. § 2244(b)(2)(B)(i) (2006). The Act restricted the right to file claims by requiring challenges to state convictions be filed in federal court within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A) (2006); *see* Rodriguez & Atlas, *supra* note 25, at 39 (noting that the AEDPA's demand for quick review of constitutional error enhances the accuracy of state court judgments by "'requiring resolution of constitutional questions while the record is fresh' and lends 'finality to state court judgments within a reasonable time'" (quoting Day v. McDonough, 547 U.S. 198, 205–06 (2006))). For a more complete discussion of the many ways that the AEDPA limited a petitioner's ability to file second claims and receive relief see Entzeroth, *supra* note 48.

91. Steiker & Steiker, *supra* note 46, at 611.

92. *Id.* at 610.

93. 28 U.S.C. § 2254(e)(2)(B) (2000). The Court later distinguished § 2254(e)(2) from the *Schlup* "probable innocence" standard stating that *Schlup* applies to the first procedurally defaulted habeas petition and "clear and convincing" evidence applies to successive petitions. House v. Bell, 547 U.S. 518, 539, 554 (2006).

94. 28 U.S.C. § 2254(e)(1) (2000).

95. The AEDPA purports to eliminate *Sawyer*. 28 U.S.C. § 2244(b)(2)(B)(ii) (2000); Sawyer v. Whitley, 505 U.S. 333, 336 (1992) (holding that ineligibility for the death penalty can be shown by clear and convincing innocence evidence of the aggravating circumstances); Steiker & Steiker, *supra* note 46, at 611 ("Congress, like the Court, crafted an 'innocence' exception—but limited it to claims of factual innocence of the underlying offense (rather than ineligibility for the death penalty, as the Court permitted) . . . ."). *But see* Hope v. United States, 108 F.3d 119, 120 (7th Cir. 1997) (holding that the AEDPA abrogated collateral attack of ineligibility of a death sentence only for successive habeas petitions).

maximum amount of deference to trial judgments.[96] Many critics have noted that societal values such as dignity, fairness, and equality are secondary considerations under current law.[97]

2. Interpreting the Constitutionality of the AEDPA

In *Felker v. Turpin*, the Court considered whether it had the ability to review an Eleventh Circuit decision that denied the successive petition of a Georgia death row inmate.[98] The *Felker* petitioner claimed that the AEDPA amounted to an unconstitutional suspension of the writ because § 2244 completely repealed the Supreme Court's review power.[99] The Court upheld the amended section in question finding that it only applied to successive petitions rather than the Court's original habeas power.[100] In reference to the AEDPA's control over the Court's original authority, the Court stated, "[w]hether or not we are bound by these restrictions, they certainly *inform* our consideration of original habeas petitions."[101]

While some of the Act's provisions explicitly apply to successive petitions, many of them purport to constrain *all* of the federal judiciary—including the Supreme Court's original habeas jurisdiction. For example, § 2254(d)(1), which is disputed in *Davis*, only allows federal courts to provide habeas relief for state prisoners if the state's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[102] Additionally, in *House v. Bell*, a 2006 decision,

96. Steiker & Steiker, *supra* note 46, at 612.

97. *See id.* at 612–14. Unless the petitioner is sentenced to death, there is no right to counsel in habeas corpus proceedings. Rodriguez & Atlas, *supra* note 25, at 37; *But see infra* notes 135–41 and accompanying text; Rodriguez & Atlas, *supra* note 25, at 41 ("[V]irtually every inmate convicted of a capital or noncapital crime is indigent . . . more than 90 percent of [habeas] petitioners litigate[] their cases without counsel or [are] represented by court-appointed counsel, and most are poorly educated.").

98. Felker v. Turpin, 518 U.S. 651, 660–62 (1996).

99. *Id.* at 658.

100. *Id.* at 660–61.

101. *Id.* at 663 (emphasis added).

102. 28 U.S.C. § 2254 (a)–(d)(1) (2006). Section 2254 begins with an explicit reference to "The Supreme Court," thus affirming Justice Scalia's position in *Davis* that the majority has acted outside the explicit language of the statute because the state court has not violated any clearly established federal law in denying Mr. Davis a new trial. § 2254 (a)–(d)(1); *In re* Davis, 130 S. Ct. 1, 3 (2009) (mem.) (Scalia, J., dissenting).

Schlup's "more likely than not" standard was at issue, and a divided Court found that "clear and convincing evidence" is required only in successive habeas petitions.[103] Whether and to what extent other AEDPA restrictions constrain the Court's original habeas power remains unclear.[104]

D. Applying Federal Habeas Corpus Procedures to Troy Davis

In the legal and factual sense, understanding *In re Davis* requires "navigating [the] AEDPA's thicket of procedural brambles."[105] However, it necessarily illustrates the extraordinary impact that the decision may have on federal law.[106] Mr. Davis's first federal petition raised a series of constitutional violations not included in his prior habeas petitions before the Georgia state courts.[107] These claims included: (1) that the prosecution knowingly admitted false evidence at trial,[108] (2) that the prosecution failed to disclose exculpatory evidence,[109] and (3) that his trial counsel was constitutionally ineffective.[110] Mr. Davis sought to overcome the procedural default rule by submitting the affidavits from recanting witnesses as actual innocence evidence under *Schlup*.[111] However, rather than ruling on the merits of the *Schlup* claim, the district court decided the merits of the constitutional claims instead and denied Mr. Davis's request for an evidentiary hearing.[112]

Subsequently, Mr. Davis filed an extraordinary motion for new trial in Georgia, which was denied at the trial level and then appealed

103. House v. Bell, 547 U.S. 518, 539 (2006); *see also supra* note 94 and accompanying text.

104. *In re* Davis, 130 S. Ct. 1, 1 (2009) (mem.) (citing Felker v. Turpin, 518 U.S. 651, 663 (1996)).

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

106. *See* discussion *supra* Part I.B.1. Troy Davis was granted habeas relief in the form of an evidentiary hearing, even though he raised the hypothetical freestanding actual innocence claim that the Court denied in *Herrera*. *See In re* Davis, 130 S. Ct. 1 (2009) (mem.); Herrera v. Collins, 506 U.S. 390 (1993).

107. *Davis*, 565 F.3d at 813 (11th Cir. 2009).

108. *Id. See generally* Giglio v. United States, 405 U.S. 150 (1972).

109. *Davis*, 565 F.3d at 813. *See generally* Brady v. Maryland, 373 U.S. 83 (1963).

110. *Davis*, 565 F.3d at 813. *See generally* Strickland v. Washington, 466 U.S. 668 (1984).

111. *Davis*, 565 F.3d at 813. Mr. Davis sought to use the recanting witnesses as actual innocence evidence to have his otherwise barred constitutional claims considered on their merits. *See* discussion *supra* Parts I.A.3, I.B.2.

112. *Davis*, 565 F.3d at 813.

to the Georgia Supreme Court.[113] In affirming, the court opined about the inherent unreliability of witness recantations and noted that original trial testimony "is closer in time to the crime, when memories are more trustworthy . . . lend[ing] special credibility to trial testimony."[114] The court concluded by stating that it had "endeavored to look beyond bare legal principles" in rendering its decision as to whether, in light of the new evidence, a new jury would "probably find [Mr. Davis] not guilty or give him a sentence other than death . . . . We simply cannot disregard the [original] jury's verdict in this case."[115]

Mr. Davis then filed a successive federal habeas petition with the Eleventh Circuit.[116] Because all of his constitutional claims were denied in the first federal petition, Mr. Davis raised, for the first time, the hypothetical *Herrera* actual innocence claim.[117] Rather than deciding the merits of this "freestanding actual innocence" claim, the circuit court based its decision on the narrower inquiry of whether the claim was procedurally barred by the AEDPA.[118] The court held that the claim was barred because (1) Mr. Davis satisfied neither of the two requirements in § 2244 that govern the procedural default doctrine in successive petitions, (2) the petition did not contain any cognizable constitutional claim, and (3) even if the petition met the constitutional requirement, Mr. Davis's innocence evidence could not possibly meet a "clear and convincing" evidentiary threshold.[119]

---

113. Davis v. State, 660 S.E.2d 354 (2008). The right to file the motion for new trial is found at GA. CODE ANN. § 5-5-41 (2008).

114. *Davis*, 660 S.E.2d at 358.

115. *Id.* at 362–63. The court also explicitly stated that it "favored" the original testimony over the new. *Id.*; *see also* discussion *infra* Part II.C.

116. *In re* Davis, 565 F.3d 810 (11th Cir. 2009). The AEDPA requires that a circuit court must give permission to a petitioner to file a successive claim. 28 U.S.C. § 2244(b)(3) (2006).

117. *Davis*, 565 F.3d at 816–17.

118. *Id.* at 817 ("[T]he only question we face is whether Davis can bring such a claim in a second . . . petition. Because it is undisputed that [his] current application does not rely on a new rule of constitutional law . . . [he] must satisfy the two procedural requirements embodied in § 2244(b)(2)(B) in order to bring a *Herrera* claim now.").

119. *Id.* at 819–22. Mr. Davis failed to show cause for not filing the *Herrera* substantive actual innocence claim in the first habeas petition because the court found that the innocence evidence used for *Schlup* procedural default purposes was substantially the same in both petitions. *Id.* at 822–24. Mr. Davis also failed to show that barring the *Herrera* actual innocence claim would result in a "fundamental miscarriage of justice" because the *Schlup* actual innocence factual inquiry could not be

In a final opportunity before his execution, Mr. Davis filed an original writ of habeas corpus in the United States Supreme Court.[120] Although unused in almost fifty years, the Court exercised its original power to grant Mr. Davis the requested relief of an evidentiary hearing.[121] On August 17, 2009, his case was transferred to Judge William T. Moore of the U.S. District Court for the Southern District of Georgia to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[122]

Justice Stevens's concurrence in *Davis* focused on (1) the fact that "'*no* court,' state or federal, 'has ever conducted a hearing to assess the reliability of the . . . affidavits'" from the recanting witnesses,[123] and (2) the possibility that § 2254(d)(1) may still provide relief for Mr. Davis.[124] In his dissent, however, Justice Scalia noted that the Georgia Supreme Court could not have unreasonably applied a federal law that "the [U.S.] Supreme Court has not once accepted as valid."[125]

With little to go on other than the order itself, Judge Moore noted in his August 2010 opinion the strange and uncharted position in which he was placed.[126] In the expansive 172-page opinion, Judge Moore held that executing an innocent man would indeed violate the Constitution, but he also ruled that Troy Anthony Davis "is not innocent."[127] It remains unclear to whom Davis's lawyers must address an appeal of the order, but the Supreme Court may once

---

proven by "clear and convincing evidence." *Id.* at 826; *see also supra* note 93 and accompanying text (explaining that *Schlup* requires a heightened review in successive habeas petitions).

120. *See generally* Brief of Petitioner, *supra* note 9.

121. *In re* Davis, 130 S. Ct. 1, 1 (2009) (mem.) (Stevens, J., concurring) (citing Byrnes v. Walker, 371 U.S. 937 (1962)).

122. *Id.*

123. *Id.* (quoting *In re* Davis, 565 F.3d 810, 827 (2009)).

124. *Id.*; *see supra* text accompanying note 101.

125. *Davis*, 130 S. Ct. 1, 3 (2009) (mem.) (Scalia, J., dissenting).

126. *In re* Davis, No. CV409-130, 2010 WL 3385081, slip op. at 1 n.1 (S.D. Ga. Aug. 24, 2010), *available at* http://www.scotusblog.com/blog/2010/08/24/innocence-claim rejected/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+scotusblog%2FpFXs+%28SCOTUSblog%29.

127. *Id*. at 109.

again expound on the viability of "freestanding actual innocence" claims in light of Judge Moore's opinion.[128]

II. ANALYSIS OF ACTUAL INNOCENCE AFTER *IN RE DAVIS*

A. Recognizing Substantive Actual Innocence Claims—Why Now?

The Supreme Court decision in *Davis* is historic. It is the first stand-alone innocence claim to ever pass the hypothetical "extraordinarily high" threshold assumed to exist in *Herrera v. Collins*.[129] Even more extraordinary is that *Herrera* was decided before Congress passed the AEDPA. According to the Act's text, any requested relief, including an evidentiary hearing, is barred if a state's decision is consistent with established federal law.[130] Why would the Court allow Mr. Davis this hearing? Perhaps more importantly, did it serve any legitimate purpose?[131]

Several cultural developments have eroded the public's faith in the integrity of the criminal justice system, and they challenge the belief espoused by Justice O'Connor in *Herrera*—that the Constitution's offer of "unparalleled protections against convicting the innocent" are an effective deterrent against wrongful convictions.[132] Less than ten years after *Herrera*, in a sense of irony that only time can bring, Justice O'Connor stated in a widely publicized speech that "serious questions are being raised" over the unchecked ability of states to administer the death penalty; "the system may well be allowing innocent defendants to be executed."[133] This evolving cultural

128. *In re* Davis, 565 F.3d 810, 816 (2009).

129. Herrera v. Collins, 506 U.S. 390, 417 (1993); *see supra* text accompanying note 17.

130. BRIAN R. MEANS, FEDERAL HABEAS MANUAL: A GUIDE TO FEDERAL HABEAS CORPUS LITIGATION § 3:50 (Thomson West 2008) (noting that if "federal law is not clearly established at the time of the state court adjudication, § 2254(d)(1) bars habeas relief" (citing Williams v. Taylor, 529 U.S. 362, 412 (2000))).

131. One prevailing issue is whether the Georgia Supreme Court's decision to deny Troy Davis's extraordinary motion for new trial is so similar to a legal determination of a freestanding actual innocence claim that it would bar relief. *See* MEANS, *supra* note 130, at § 10:21 ("[F]ederal courts are bound to follow the decisions of the state's highest court on state law matters. But absent controlling state precedent, federal courts must predict how the state's highest court would decide the issue." (citation omitted)).

132. *Herrera*, 506 U.S. at 420 (O'Connor, J., concurring); *see infra* text accompanying notes 142–47.

133. Op-Ed., Justice O'Connor on Executions, N.Y. TIMES, July 5, 2001, at A16.

realization carries special weight in capital cases because "[n]othing could be more shocking to the conscience . . . than to execute a person who is actually innocent."[134]

The number of incarcerated prisoners in the United States has increased from 333,000 in the early 1970s to over 2,000,000 today.[135] As the number of incarcerated has increased, the public defender systems of many states have struggled to adequately cope with the sheer volume of cases and funding required to provide adequate legal counsel.[136] These strains have led to lower pay and morale, excessive caseloads, and very high turnover rates.[137] Out of deference to trial judgments and because of restrictive post-conviction procedures, judges have even upheld death sentences where attorneys slept through trial, admitted to drunkenness in court, or were otherwise ignorant of the law governing their case.[138] However, ineffective counsel and underfunded public defender systems are not the only contributors.

Police and prosecutorial misconduct exacerbate what one commentator refers to as our system of "finality without fairness."[139] In 2003, former Illinois Governor George Ryan famously commuted the death sentences of *all* 163 Illinois death row inmates after discovering that detectives on Chicago's South Side had tortured, suffocated, and beat the confessions out of three prisoners awaiting

134. Herrera v. Collins, 506 U.S. 390, 430 (1992) (Blackmun, J., dissenting).

135. Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 340 (2006).

136. *Id.* at 342–43 (stating that the increased number of prosecutions and prisoners with long-term or death sentences has overwhelmed many public defender systems, which makes them unable to provide adequate defense representation).

137. THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL pp. 52–70 (2009), *available at* http://tcpjusticedeniedwww.constitutionproject.org/manage/file/139.pdf

138. Stevenson, *supra* note 135, at 345 nn.23–24 (citing Guy v. Cockrell, No. 01-10425, 2002 WL 32785533, at *4 (5th Cir. July 23, 2002) (trial counsel conceded using drugs throughout capital trial); Haney v. State, 603 So.2d 368, 377–78 (Ala. Crim. App. 1991) (affirming death sentence even though trial had to be suspended for a day because lawyer appointed to represent defendant was too drunk to go forward); *Ex parte* McFarland, 163 S.W.3d 743 (Tex. Crim. App. 2005) (upholding death sentence when lead attorney slept through major portions of trial); *Ex parte* Burdine, 901 S.W.2d 456, 457 (Tex. Crim. App. 1995) (Maloney, J., dissenting) (denying death row prisoner's application for post-conviction relief when lead trial attorney slept during trial)).

139. Stevenson, *supra* note 135, at 345.

execution.[140] In defending his controversial move, Governor Ryan stated that "[o]ur capital system is haunted by the demon of error: error in determining guilt and error in determining who among the guilty deserves to die."[141]

DNA evidence has emerged as a crucial exculpatory tool for vindicating the wrongfully convicted. In the last two decades, Innocence Projects have used DNA to identify and release 242 innocent prisoners,[142] which yields valuable information for researchers to understand weaknesses within the criminal system.[143] Most significantly, DNA research has highlighted systemic challenges facing state public defender systems,[144] the fragility of eyewitness identification evidence and procedure,[145] and police and prosecutorial misconduct.[146] These findings continue to serve as a major catalyst for reform in many states.[147]

---

140. Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at L1, *available at* http://www.nytimes.com/2003/01/12/national/12DEAT.html.

141. *Id.*

142. THE INNOCENCE PROJECT, FACT SHEET, http://www.innocenceproject.org/Content/351PRINT.php (last visited Sept. 5, 2010).

143. *Id.*

144. *See, e.g.*, THE CONSTITUTION PROJECT, *supra* note 137, at 51–60. In 2009, thirty-seven states faced a budget crisis and several were forced to make significant cuts in their public defender programs. *Id.* In addition to the forced closing of a major public defender center in 2008 for budget reasons, the Public Defender Standards Council in Georgia was also forced to lay off over forty employees because attorneys representing indigent capital clients could not be paid otherwise. *Id.* For a state-by-state breakdown of public defender budget woes, see *id.*

145. THE INNOCENCE PROJECT, *supra* note 142. Three quarters of all DNA exonerations in the United States involve eyewitness misidentifications. *Id.* Many of these misidentifications involve cross-racial identification, lending support to research that shows people have difficulty recognizing the faces of people outside their own race. *Id.*

146. *See* THE CONSTITUTION PROJECT, *supra* note 137, at 45. Some states have reformed their crime labs, others require mandatory videotaping of police interrogations or focus on prosecutorial misconduct, and almost all have adopted laws allowing prisoners to request post-conviction DNA testing. Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. THIRD WORLD L.J. 75, 77 (2008); THE INNOCENCE PROJECT, *supra* note 142.

147. THE INNOCENCE PROJECT, *supra* note 142. New Jersey and North Carolina have adopted eyewitness reform statutes, while Maryland, Georgia, Vermont, Wisconsin, and West Virginia have proposed statutory reform. *Id.* In 2008, the Georgia House of Representatives adopted a resolution with the express goal of implementing scientific protocol in police department eyewitness procedures to promote consistency, accuracy, and reliability in eyewitness identifications. *See* H.R. 352, 150th Gen. Assem., Reg. Sess. (Ga. 2008); John Terzano, *Study of Georgia's Wrongfully Convicted Highlights Powerful Need for Reform*, THE HUFFINGTON POST, Sept. 22, 2009, http://www.huffingtonpost.com/john-terzano/study-of-georgias-wrongfu_b_294568.html. Like many states, "contamination" of eyewitness evidence is Georgia's number one cause for wrongful convictions,

The exposure of wrongful convictions directly calls into question the policy of "finality and judicial economy"[148] that governs current habeas corpus law. If *Davis* is the potential springboard for habeas reform, however, simply allowing a state petitioner with a stand-alone innocence claim to access a federal habeas court does not address whether meaningful review is possible. The Court's statement that no court, "state or federal, 'has ever conducted a hearing to assess the reliability" of the evidence, indicates that the Justices may not have been so much concerned with *how* Mr. Davis must prove his innocence, as with ensuring that due process affords him the opportunity to try.[149] Although the *In re Davis* and *Herrera* Courts found it unnecessary to explain how a freestanding innocence claim could be decided on the merits, providing a standard of review differing from "the principle that habeas relief should be denied whenever possible" has consequences for the credibility of the writ and the life of any wrongfully convicted prisoner.[150]

B. Defining an Evidentiary Standard of Proof for Substantive Actual Innocence Claims

1. Petitioner Probably Is Innocent

In *Herrera*, the Court stated that a hypothetical substantive innocence claim would require a "truly persuasive demonstration" to

---

and research shows that eyewitnesses must be handled the same way as other forms of physical evidence. *Id.*

148. Armbrust, *supra* note 146, at 88 n.70.

149. *In re* Davis, 130 S. Ct. 1, 1 (2009) (mem.) (Stevens, J., concurring); *see* Brief of Petitioner, *supra* note 9, at 31 ("In the rare case of seven recantations, four of whom were innocent bystanders, four confessions from Redd Coles and at least one new eyewitness implicating Coles as the shooter, the Eighth and Fourteenth Amendments require that Mr. Davis have an evidentiary hearing to prove that he is innocent.").

150. Herrera v. Collins, 506 U.S. 390, 439 (1993) (Blackmun, J., dissenting). Justice Blackmun also stated in *Herrera* that it should be expected of states to adopt procedures to consider claims of actual innocence. *Id.* This raises the likelihood that the Court did not consider Mr. Davis's extraordinary motion for new trial in Georgia to be an actual innocence hearing. *See* discussion *infra* Parts II.C.2, II.D.1; *see also* MEANS, *supra* note 130, at § 11:48 (noting that federal prisoners who file a motion for new trial that argues actual innocence, rather than new evidence of a constitutional violation, is not considered as barred for the purpose of a later habeas filing).

show that a petitioner's execution would be unconstitutional.[151] The majority did not elaborate, but Justice Blackmun's dissent not only recognized substantive actual innocence as a constitutional claim, it also provided an analytical framework for habeas courts to use.[152]

Justice Blackmun stated that to receive relief on the merits, the petitioner with a substantive actual innocence claim "must show that he probably is innocent."[153] This standard differs from the *Schlup* probable standard in two important ways. First, *Schlup* is a procedural claim that provides the passageway for other barred constitutional claims to be considered on their merits at an evidentiary hearing,[154] whereas actual innocence under Blackmun's standard *is* the constitutional claim.[155] The procedural default doctrine is not applicable because a "petitioner [that shows] he is entitled to relief on the merits . . . certainly can show that he falls within the 'actual-innocence' exception" to the default rule, and would therefore also be entitled to an evidentiary hearing.[156] Second, *Schlup* is a verdict accuracy inquiry that requires the fact-finder to consider all of the evidence and determine whether it is probable that any reasonable juror would have reasonable doubt.[157] If that burden is met, then a hearing is granted to decide the merits of the other

151. *Herrera*, 506 U.S. at 417 (majority opinion); *see* discussion *supra* Part I.B.1.

152. *Herrera*, 506 U.S. at 441–44 (Blackmun, J., dissenting).

153. *Id.* at 442.

154. *See* House v. Bell, 547 U.S. 518, 536–40 (2006); Schlup v. Delo, 513 U.S. 298, 328–29 (1995); discussion *supra* Part I.B.2.

155. Herrera v. Collins, 506 U.S. 390, 442–44 (1993) (Blackmun, J., dissenting) ("I believe that if a prisoner can show that he is probably actually innocent . . . then he has made a 'truly persuasive demonstration,' and his execution would violate the Constitution.").

156. *Id.* at 441. *Herrera* was decided two years before the actual innocence test in *Schlup* was articulated. At the time of *Herrera*, the procedural test required the petitioner to show "a fair probability . . . that the trier of facts would have entertained a reasonable doubt." *Id.* at 442 (citing Kuhlmann v. Wilson, 477 U.S. 436, 455 n.17 (1986)). Both the *Schlup* test and Justice Blackmun's proposal are higher burdens than the old *Kuhlmann* "fair" test. *See Schlup*, 513 U.S. at 328–29; *Herrera*, 506 U.S. at 443. Thus, this explains why Justice Blackmun asserts that once a petitioner shows that he is entitled to relief on the substantive actual innocent claim, the procedural default rule is easily overcome. *Herrera*, 506 U.S. at 441.

157. *House*, 547 U.S. at 538 (explaining that *Schlup* is not an inquiry into whether the government presented sufficient evidence beyond a reasonable doubt, but rather one that requires the "federal court to assess how reasonable jurors would react overall [to the] newly supplemented record" (citing Schlup v. Delo, 513 U.S. 298, 328–29 (1995))); *see also* Rodriguez & Atlas, *supra* note 25, at 38 (noting that newly discovered innocence evidence under *Schlup* is used to cast doubt on the reliability of the verdict).

constitutional claims, which have their own stringent evidentiary burdens.[158] Conversely, Justice Blackmun's "probably is innocent" standard also considers the entire evidentiary record, but whether the new evidence sufficiently undermines the reliability of the verdict is not its primary concern.[159] Instead, the court is required to "weigh the evidence in favor of the prisoner against the evidence of his guilt" on a case-by-case basis.[160] "[T]he stronger the evidence of . . . guilt, the more persuasive the newly discovered evidence must be."[161] Relief is granted once the petitioner meets the burden, and such action is justified because the execution of an innocent is unconstitutional.[162]

Justice Blackmun's proposal is the only Supreme Court opinion that provides a determinative analysis for freestanding actual innocence claims.[163] It recognizes that prisoners "retain[] a powerful and legitimate interest" in relief even after a constitutionally valid trial.[164] The "probably is innocent" test is not only an explicit rejection of actual innocence as a procedural default mechanism but also an admonishment of the Court's unfairly limited view of habeas relief.[165] Additionally, the proposal balances the individual's rights with the state's legitimate interest in finality by requiring: (1) that the state not have the burden of disproving new evidence discovered long after a conviction because (2) the petitioner is presumed guilty and

158. *Schlup*, 513 U.S. at 317; *see, e.g.*, cases cited *supra* notes 50 and 108–10.

159. *Herrera*, 506 U.S. at 443 (Blackmun, J., dissenting) ("When a defendant seeks to challenge the determination of guilt after he has been validly convicted and sentenced, it is fair to place on him the burden of proving his innocence . . . . [A] court should take all evidence into account . . . .").

160. *Id.*

161. *Id.* at 444 (1993).

162. *Id.*

163. One commentator has noted that since *Herrera*, at least 173 freestanding innocence claims have been filed in federal habeas courts. *See* Nicholas Berg, *Turning a Blind Eye to Innocence: The Legacy of* Herrera v. Collins, 42 AM. CRIM. L. REV. 121, 131 (2005). However, courts have applied different standards and possibilities of relief. *Id.* at 140–44. Of the 173 cases, courts that gave no consideration to the merits denied 91 habeas petitions. *Id.* at 134. In every circuit except the Third, 33 were denied by courts that assumed *arguendo* that the claim could exist. *Id.* at 135–36. In the 54 remaining cases, courts held that the claim was cognizable, but no petitioner met the evidentiary burden. *Id.* at 136.

164. *Herrera*, 506 U.S. at 438–39 (quoting Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986)).

165. *Id.* at 439; *see also* Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims After* Herrera v. Collins, 71 TEMP. L. REV. 489, 497–98 (1998) (noting that the *Herrera* dissenters voiced difficulty reconciling the majority's focus on fact-based inquiries into a petitioner's guilt or innocence).

bears the burden to prove innocence (3) when the original trial, conviction, and sentence contain no constitutional errors.[166]

2. Clear and Convincing Proof that Evidence Establishes Petitioner's Innocence

The language of *In re Davis*, however, provides that the district court must determine whether evidence "that could not have been obtained at the time of the trial *clearly* establishes petitioner's innocence."[167]

In addition to the *Davis* language, asserting that the Court intended clear and convincing proof invites an examination of three relevant indicators. First, assuming that the words in a four-sentence decision were chosen carefully, "clearly" refers to the "clear and convincing evidence" burden found in many provisions of the AEDPA.[168] Section 2254(e)(1) provides that once a petitioner is granted an evidentiary hearing, "factual issue[s] made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by *clear and convincing evidence*."[169] Second, in the Court's recent opinion of *House v. Bell*, the majority stated in dicta that a *Herrera* claim would "require[] more *convincing* proof of innocence than *Schlup*" to undermine the reliability of the trial verdict.[170] In cases where a prisoner includes a *Schlup* claim in his first habeas petition, as the *House* petitioner did, the Court requires a "more likely than not" burden for defaulted claims to be considered.[171] Establishing a higher "clear and convincing" burden for a freestanding innocence claim, therefore, is consistent with the Court's language because the prisoner cannot

166. *Herrera*, 506 U.S. at 442-43.

167. *In re* Davis, 130 S. Ct. 1, 1 (2009) (mem.) (Stevens, J., concurring) (emphasis added).

168. *See, e.g.*, 28 U.S.C. §§ 2244, 2254 (2006); *In re* Davis, 565 F.3d 810, 826 (11th Cir. 2009) (citing the AEDPA to hold that "we cannot honestly say that Davis can establish by *clear and convincing evidence that a jury would not have found him guilty* of Officer MacPhail's murder") (emphasis added).

169. 28 U.S.C. § 2254(e)(1) (2000) (emphasis added).

170. House v. Bell, 547 U.S. 518, 555 (2006) (emphasis added).

171. *Id.*

allege any trial error.[172] Lastly, *Herrera* states that the hypothetical threshold showing would require "extraordinarily high" circumstances to trigger the petitioner's right to an evidentiary hearing.[173] If the threshold showing is high, the prisoner's evidentiary burden at the hearing would presumably be at least as high, thus also consistent with the language of *In re Davis*.[174] Indeed, "clear and convincing" proof is exactly the burden that Judge Moore found to be required by Mr. Davis to prove his innocence.

These "clearly" considerations can be displayed as (1) the extraordinary circumstances necessary for the right to an evidentiary hearing, (2) the language from *In re Davis*, (3) Section 2254 of the AEDPA, and (4) the Court's existing actual innocence analysis that focuses on verdict reliability. Combining them reveals a burden of proof very different from Justice Blackmun's proposal: the petitioner must establish that new evidence clearly and convincingly shows that no reasonable juror would have found him guilty beyond a reasonable doubt.[175]

In this model, the innocence evidence is balanced against a presumptively correct verdict rendered after a "full and fair trial"[176] to determine its likely effect on a reasonable juror.[177] Considering the prevailing judicial attitude towards Mr. Davis's innocence evidence is one that regards it as *inherently* unreliable,[178] any review of actual

172. *See* discussion *infra* Part II.D.1.

173. Herrera v. Collins, 506 U.S. 390, 417 (1993) (majority opinion).

174. *Compare id.*, *with In re* Davis, 130 S. Ct. 1, 1 (2009) (mem.) (Stevens, J., concurring) (stating that no court has reviewed Mr. Davis's claim to determine if it would satisfy a "truly persuasive" showing of actual innocence (citing *In re* Davis, 565 F.3d 810, 827 (11th Cir. 2009) (Barkett, J., dissenting))).

175. *See In re* Davis, 565 F.3d 810, 823 (11th Cir. 2009) (stating that to establish "by clear and convincing evidence that, but for the fact that the applicant was actually innocent, no reasonable fact-finder would have found the applicant guilty of the underlying offense" is not cognizable under current law) (emphasis omitted). This proposed burden is similar to what the Eleventh Circuit contemplated as the burden to grant an evidentiary hearing in successive petitions with stand-alone innocence claims. *Id.* However, the court found that the statutory language of § 2244(b)(2)(B)(ii) demanded an additional constitutional claim. *Id.*

176. *See In re* Davis, 130 S. Ct. 1, 3 (2009) (mem.) (Scalia, J., dissenting).

177. *See supra* note 157 and accompanying text.

178. *See In re* Davis, 565 F.3d 810, 825–27 (11th Cir. 2009). The Eleventh Circuit reviewed Mr. Davis's recanting witness affidavits and stated that "[f]or starters, we repeatedly have noted that 'recantations are viewed with extreme suspicion by the courts.'" *Id.* at 825 (citing United States v. Santiago, 837 F.2d 1545, 1550 (11th Cir. 1988)). The Georgia Supreme Court, which based its denial of

innocence claims under current law directly challenges the possibility that innocence can ever be "clearly" determined.[179]

C. Recanting Eyewitness Testimony

1. Why so Much Skepticism?

Given that our post-*Herrera* DNA era likely factored into the *Davis* Court's order, it is ironic that evidence viewed with "extreme suspicion" must be relied on to prove actual innocence.[180] Even in its affidavit form, Mr. Davis's new innocence evidence divided members of the U.S. Supreme Court, the Eleventh Circuit, and the Georgia Supreme Court.[181] Is there any evidentiary value to eyewitness recantations? For very legitimate reasons, courts have traditionally held skeptical views of recanted eyewitness testimony.[182] It is seen as unreliable and untrustworthy because of the notion that "a witness . . . has either lied under oath or . . . is wasting a court's time by lying after trial," which can make credibility determinations virtually impossible.[183]

Many state courts make determinations about the reliability of recanting witnesses by using the test developed in Georgia according

---

Mr. Davis's new trial on how a jury would act with the new evidence, began its discussion by noting the inherent unreliability of witness recantations. Davis v. State, 660 S.E.2d 354, 358 (2008). Justice Scalia notes in *Davis* that the same "stale" evidence is "shunt[ed] off to be examined" by the district court. *In re* Davis, 130 S. Ct. 1, 3 (2009) (mem.) (Scalia, J., dissenting).

179. Berg, *supra* note 163, at 141–43 (noting that the review of bare innocence claims since *Herrera* shows that the petitioner's burden is virtually insurmountable, and even with affirmative DNA evidence, it may not be enough).

180. *See* cases cited *supra* note 178 and accompanying text. One of the most disturbing lessons learned from DNA is that initial eyewitness identifications are fragile, subject to suggestion, and not as reliable as once thought, and yet courts continue to dismiss evidence if the eyewitness recants. *See* Armbrust, *supra* note 146, at 77–78.

181. *See* cases cited *supra* note 178 and accompanying text.

182. Armbrust, *supra* note 146, at 82 (discussing the reasons that courts have skeptical views as to untrustworthiness of the witness, other findings in the record that support guilt, fears that witness has recanted due to duress or coercion, close relationships between witness and defendant, desire for finality, and fear of court manipulation).

183. *Id.* at 83; *see also* Christopher J. Sinnott, Note, *When Defendant Becomes the Victim: A Child's Recantation as Newly Discovered Evidence*, 41 CLEV. ST. L. REV. 569, 574–75 (1993) (stating that judicial skepticism "has become so universal that it appears to have given rise to an inference that recantation evidence is not trustworthy and should be treated as such absent the movant's ability to persuade otherwise").

to *Berry v. State*.[184] The most crucial element of the *Berry* test is whether "[the evidence] is so material that it would probably produce a different verdict, if the new trial were granted."[185] However, meeting the materiality requirement is difficult because the probability of a different outcome "is mitigated by requiring that the judge be persuaded of the recantation's *truthfulness*."[186] Although the Georgia Supreme Court denied Troy Davis's extraordinary motion for new trial under the procedural requirements of this standard,[187] Chief Justice Sears dissented and warned against a categorical rejection of eyewitness recantations:

> We have noted that recantations by trial witnesses are inherently suspect, because there is almost always more reason to credit trial testimony over later recantations. However, it is unwise and unnecessary to make a categorical rule that recantations may *never* be considered in support of an extraordinary motion for new trial. The majority cites case law stating that recantations may be considered only if the recanting witness's trial testimony is shown to be the "purest fabrication." . . . [H]owever, it should not be corrupted into a categorical rule that new evidence in the form of recanted testimony can never be considered, no matter how trustworthy it might appear. If recantation testimony, either alone or supported by other evidence, shows convincingly that prior trial testimony was false, it simply defies all logic and morality to hold that it must be disregarded categorically.[188]

184. Armbrust, *supra* note 146, at 81 (citing Berry v. State, 10 Ga. 511 (1851)).
185. *Berry*, 10 Ga. at 527.
186. Armbrust, *supra* note 146, at 82 (citing *Berry*, 10 Ga. at 527) (emphasis added).
187. *See* Davis v. State, 660 S.E.2d 354, 358 (2008) (stating that the procedural requirements for a new trial include whether new evidence is "so material that it would probably produce a different verdict" (citing Timberlake v. State, 271 S.E.2d 792, 795–96 (1980))).
188. *Id.* at 363–64 (Sears, C.J., dissenting).

2. Challenging the Value Given to Eyewitness Recantation Evidence

Commentator Shawn Armbrust's research of DNA exoneration cases and post-trial eyewitness recantations reveals challenging information for Georgia and federal courts to consider.[189] Through his examination of why courts got it wrong, Armbrust discovered that witnesses, police officers, prosecutors, and judges all play a supporting role.[190] Witnesses not only lie out of guilt or to help defendants as originally perceived but also because police and prosecutors may unknowingly place them under duress or coercion to achieve their own desired case outcomes.[191] Judges are also subject to bias against recanting witnesses, which often results in credibility determinations based on witness demeanor rather than the accuracy of what is said.[192] Furthermore, reviewing courts may unfairly give deference to unreasonable lower court judgments due to the pressure of ending cases, anxiety over concerns for the victim, and worry over the efficient use of the court's limited resources.[193] Coupled with what another commentator refers to as "status quo bias," judges may unknowingly weigh the witness's new testimony against an already established belief in the validity of the prior testimony.[194] Cumulatively, these results can be devastating to the lives of wrongly convicted defendants and do little to uncover the truth.[195]

---

189. *See generally* Armbrust, *supra* note 146.

190. *Id.* at 91–97.

191. *Id.*

192. *Id.* at 97–98.

193. *Id.* at 86, 88–91.

194. Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 701–02 (2005) (defining status quo bias as the idea that fact-finders have a cognitive reluctance to deviate from a prior court decision).

195. Armbrust, *supra* note 146, at 75–77 (citing People v. Dotson, 516 N.E.2d 718, 719–22 (Ill. App. Ct. 1987)). The very first DNA exoneration in the United States resulted from a judge's disbelief in the testimony of a recanting witness. *Id.* In that case, the victim-witness accused Gary Dotson, an innocent man, of attacking and raping her in 1977. *Id.* Dotson spent twelve years in prison before the victim came forward to say that she lied out of fear that she was pregnant. *Id.* At the rehearing, the judge refused to believe the witness's new testimony, finding that her original testimony was more credible. *Id.* DNA evidence later proved that her recanting statements were true. *Id.* In another case, a judge believed a recanting witness to be unreliable because she hesitated in her new deposition, which resulted in the witness's uncle remaining in jail for murdering his mother-in-law and raping his six-year-old niece. *Id.* DNA evidence later exonerated him also. *Id.* at 97 (citing State v. Elkins, No. 21380, 2003 Ohio App.

To avoid these undesired outcomes, Armbrust proposes that state courts should reject Georgia's *Berry* test in favor of one similar to the test used by Wisconsin state courts.[196] Additionally, because many states still rely on some formulation of *Berry*, his proposal calls on reviewing courts to "not apply a deferential standard of review to summary denial of motions for new trials based on recantations."[197] Most post-conviction evidentiary hearings do not have the added "truth" benefit of DNA evidence;[198] thus, his proposal attempts to balance the legitimate skepticism towards eyewitness recantations with the modern knowledge gained from wrongful convictions.[199] It rejects *Berry*'s total reliance on "truth" in determining whether the requested relief should be granted because "absolute truth of the recantation or absolute falsity of the trial testimony" is virtually impossible in many cases; judges inevitably rely on subjective reasons for making their decisions.[200] Instead, the Wisconsin test "requires the defendant to corroborate the recantation with other newly discovered evidence."[201] The "newly discovered evidence" requirement does not actually require new physical evidence; it is met when "there is a feasible motive for the initial false statement" and "circumstantial guarantees of the trustworthiness of the recantation."[202]

Under this proposed standard, the Georgia Supreme Court's disregard for Troy Davis's eyewitness recantation evidence is very troublesome. In the hours after Officer MacPhail's death, Redd Coles—the man Mr. Davis alleges is the real gunman—approached

---

LEXIS 4037, at *12 (Ohio Ct. App. Aug. 27, 2003)).

196. *Id.* at 98–102.

197. *Id.* at 99.

198. *Id.* at 77–78 (citing Medwed, *supra* note 194, at 715–18).

199. *Id.* at 98.

200. *Id.* at 99.

201. Armbrust, *supra* note 146, at 100 (citing State v. McCallum, 561 N.W.2d 707, 711–12 (Wis. 1997)).

202. *Id.* at 101 (citing State v. Kivioja, 592 N.W.2d 220, 232 (Wis. 1999)). Armbrust notes that in *Kivioja*, the court lists non-exhaustive considerations such as "the extent to which the statement is self-incriminatory . . . and the declarant's availability to testify under oath and subject to cross examination." *Id.* However, Ambrust's research indicates that courts should also consider whether the original testimony was incentivized in some way, the extent to which the witness may have been coerced or influenced, and whether law enforcement may have somehow affected the original testimony. *Id.*

the police with an attorney and accused Troy Davis of the murder.[203] Subsequently, Troy Davis's picture was posted on the Savannah nightly news and in the daily newspaper for five days before any witness was shown photos of suspects.[204] On the same day police discovered that Coles was carrying a .38 caliber the night of the murder, he was permitted to play the role of a bystander in a shooting reenactment along with three of the State's witnesses.[205] Upon hearing the witnesses' descriptions of the killer's clothing, Coles confessed to police that he was wearing a yellow shirt on the night of the murder, but he told them he gave it to Mr. Davis to wear.[206] With the exception of Coles, the only remaining non-recanting witness told police just hours after the shooting that he would only be able to recognize the killer by his clothing.[207]

In her affidavit, one witness stated that she felt pressured by police because she was on parole, and she was only shown one photo: Mr. Davis's.[208] Another witness, who was sixteen-years-old at the time, stated in his affidavit that police threatened him with jail time if he refused to go along with Coles's description of events.[209] A jailhouse informant completely recanted his testimony by stating, "I made [Troy's] confession up from information I had heard on TV."[210] Even Larry Young, the victim Officer MacPhail ran out to save, admitted to being intoxicated on the night of the murder, which helps explain why he has had difficulty remembering what happened that night.[211] The record contains episodes of police bias, questionable identification procedures, witness duress and coercion, and new evidence never reviewed until the June 2010 evidentiary hearing.[212] Despite so much uncertainty, however, one fact *is* clear: Mr. Davis

203. Brief of Petitioner, *supra* note 9, at 3.
204. *Id.* at 4.
205. *Id.* at 4–5.
206. *Id.* at 5.
207. *Id.* at 5, 8.
208. *Id.* at 5.
209. Brief of Petitioner, *supra* note 9, at 6.
210. *Id.* at 7.
211. *Id.* at 6.
212. *See generally id.*

was tried and convicted in a constitutionally "fair" proceeding.[213] Even though the truth may not ever be discoverable, federal law demands an unyielding deference to this original verdict.[214]

D. Actual Innocence or Actual Unfairness: Searching for a Meaningful Review of Innocence

Under the current scheme of habeas corpus law, the original guilty verdict returned in Troy Davis's case gains a stronger presumption of correctness the more the opportunity for judicial review is denied. As a result, the district court must give substantial deference to the Georgia Supreme Court, which arrived at its own decision by giving substantial deference to the original trial verdict. Furthermore, the validity of the original trial is irrefutable because Mr. Davis's claims of ineffective counsel and prosecutorial misconduct were denied in his first habeas petition.[215]

1. Federalism, Finality, and the South

Supporters of restrictive federal habeas laws point to the vast majority of actually guilty criminals clogging courts with unmeritorious claims.[216] If federal courts are to maintain a review power with integrity, they argue, stricter laws ensure that only the most compelling constitutional claims have federal access.[217] Thus, individual rights are protected and states rightly maintain the responsibility for providing avenues of relief for their prisoners.[218] Scholars point out that the "issue[] of guilt and innocence is indeed one of the primary purposes of the state trial courts" and that "federal

213. Davis v. State, 426 S.E.2d 844 (1993*)*, *cert. denied*, 510 U.S. 950 (1993).

214. *See* discussion *supra* Parts I.A.2, I.C.

215. *See* discussion *supra* Part I.D. The role of executive clemency is beyond the scope of this Note. However, for an evaluation of the failures of executive clemency in actual innocence claims see Berg, *supra* note 163, at 144–48.

216. Anderson, *supra* note 165, at 498.

217. *Id.*

218. *Id.*

courts have . . . limited expertise in the definition of state offenses and . . . procedural and evidentiary law."[219]

After the Court's *Herrera* decision, some states did respond by adopting reforms to allow actual innocence claims in state court forums.[220] Recently, in November 2009, members of the New York Senate submitted an actual innocence bill for debate.[221] If passed, the law will be groundbreaking because it gives judges the ability "to overlook procedural errors in a defendant's case" based on the evidence before them.[222] While such efforts are laudable and directly speak to the types of barriers encountered by petitioners like Mr. Davis, New York has not executed a prisoner since 1976. That same year, the Supreme Court noted that "death is different in kind from any other punishment imposed under our system of criminal justice."[223]

In fact, executions today are mainly a Southern phenomenon. Since the Supreme Court lifted the moratorium on executions in 1976, 80% of all executions have taken place in the South.[224] In 2008 alone, 95% of all executions were carried out by southern states.[225] Although Texas accounts for half of the 2008 total,[226] 84% of its wrongful convictions are due to eyewitness misidentifications.[227] Despite such an alarming trend, the state legislature continues to fail

219. *Id.* at 499 (citing Vivian Berger, Herrera v. Collins*: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943, 1009 (1994)).

220. *See generally id.* (citing Connecticut, Texas, and Illinois actual innocence reforms in the wake of the *Herrera* decision).

221. S.B. 6234, 232d Gen. Assem., Reg. Sess. (N.Y. 2009).

222. John Eligon, *Hope for the Wrongfully Convicted*, N.Y. TIMES, Nov. 23, 2009, at A23.

223. Gregg v. Georgia, 428 U.S. 153, 188 (1976) (citing Furman v. Georgia, 408 U.S. 238 (1972)); DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY (2010), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf [hereinafter DPIC FACTS].

224. DPIC FACTS, *supra* note 223 (citing the number of executions in each southern state: Texas, 463; Virginia, 107; Florida, 69; North Carolina, 43; Georgia, 47; South Carolina, 42; Alabama, 48; Louisiana, 28; Arkansas, 27; Mississippi, 13; and Tennessee, 6).

225. DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2008: YEAR END REPORT (2008), http://www.deathpenaltyinfo.org/2008YearEnd.pdf [hereinafter DPIC Year End Report].

226. *Id.*

227. Desiree Evans, *Texas Justice: Where Wrongful Convictions are the Norm*, FACING SOUTH (The Institute for Southern Studies), Sept. 1, 2009, http://southernstudies.org/2009/09/texas-wrongful-convictions.html.

in its attempts to address this problem.[228] Georgia executions are nowhere near the Texas rate, but misidentifications are also the number one cause of wrongful convictions.[229] Georgia has no actual innocence laws or state-wide uniform eyewitness identification procedures. Meanwhile, police departments across the state continue to train officers under varying standards, which results in a much higher likelihood of eyewitness "contamination."[230]

Like Georgia, most states require wrongful conviction claims to be based on either constitutional violations or newly discovered evidence.[231] As shown in *Davis v. State*, however, the Georgia Supreme Court relied on the old axiom that witness recantations must evidence "the purest fabrication" to be considered reliable rather than seeking guidance from the factual contexts of the original and recanting testimony.[232] If a state uses antiquated procedural reviewing methods to make a decision about an original verdict that was itself obtained through questionable means, then a wrongful conviction claim fails to provide proper protections to prisoners. Coupled with the "hefty procedural rules"[233] of the AEDPA, the verdict *and* the state reviewing decision are presumed correct in a federal court without regard to the varying standards used by different states.[234] In his comments about the inflexibility of the AEDPA, one scholar has noted that "[t]here are huge disparities in what states do to . . . ensure fair and reliable review in state court cases . . . . Many states have effectively opted not to provide the kind of review that the AEDPA assumes when it requires federal judges to defer to state court rulings and findings."[235]

228. *See* DPIC FACTS, *supra* note 223 (showing Texas executed twenty-three people in 2009, with the next closest being Virginia with three).

229. *See supra* notes 142 and 147 and accompanying text.

230. Terzano, *supra* note 147.

231. Eligon, *supra* note 222.

232. Davis v. State, 660 S.E.2d 354, 363–64 (2008) (Sears, C.J., dissenting); *see also supra* text accompanying note 188.

233. Eligon, *supra* note 222; *see also* discussion *supra* Parts I.C, II.B.2.

234. Stevenson, *supra* note 135, at 359–60.

235. *Id.*

2. Granting Habeas Relief on an Actual Innocence Claim: Constitutional Principle, Procedural Anomaly, or Both?

Even if the district court had been persuaded by the recanting testimony and new evidence at the evidentiary hearing, it remains unclear how Mr. Davis could have received relief. The Supreme Court has never held that a stand-alone innocence claim provides the constitutional basis for alleging that a state acted in violation of "clearly established federal law."[236] According to Justice Scalia, *In re Davis* is a "fool's errand"[237] because the district court's only options were to comply with the current law and deny the requested relief, or act outside the law and risk having any determination overturned.[238]

In *Davis*, Justice Stevens provides two explanations for how a district court might consider actual innocence relief. The first is a procedural sleight of hand. He notes that Mr. Davis's case is "sufficiently 'exceptional'" to use the Court's "original habeas jurisdiction," and Justice Scalia also acknowledges that the Court "takes the extraordinary step . . . of instructing a district court to adjudicate . . . an original writ of habeas corpus."[239] Once correctly viewed as "original," a relief possibility exists based on the Court's decision in *Felker v. Turpin*, which questioned AEDPA applicability to original habeas petitions, specifically § 2254(d)(1).[240] Justice Stevens uses *Felker* to support his assertion that the district court "may conclude that § 2254(d)(1) does not apply . . . to an original habeas petition" and grant relief to a petitioner with a freestanding actual innocence claim.[241]

Justice Stevens's second relief argument, however, is based more on constitutional principle. He states that the district court may find

236. 28 U.S.C § 2254(d)(1) (2006); *see also* Herrera v. Collins, 506 U.S. 390, 416 (1993); discussion *supra* Parts II.A–B.

237. *In re* Davis, 130 S. Ct. 1, 4 (2009) (mem.) (Scalia, J., dissenting).

238. *Id.* ("Sending [the actual innocence claim] to a district court that 'might' be authorized to provide relief, but then again 'might' be reversed if it did so, is not a sensible way to proceed.").

239. *In re* Davis, 130 S. Ct. at 1–2.

240. *See supra* notes 98–104 and 123–25 and accompanying text.

241. *In re* Davis, 130 S. Ct. at 1 (Stevens, J. concurring). *But see id.* at 3 (Scalia, J., dissenting) (noting the many cases where the Court has reversed lower court decisions for failing to apply § 2254(d)(1)).

that § 2254(d)(1) is unconstitutional if it sanctions the execution of an actually innocent prisoner.[242] Although the district court agreed that such action would be unconstitutional, it is unclear whether Judge Moore's opinion struck the proper balance in light of the demanding statutory deference given to the fact-findings of the Georgia courts.

Commentators note that restricting habeas relief to questions of verdict accuracy "has proven to be one of the biggest stumbling blocks for capital defendants in their attempts to present such claims for relief."[243] Under current law, state judgments are given highly deferential treatment even though DNA exonerations have exposed "failures of trial counsel and suppression by the state of exculpatory evidence [as] two of the primary causes of the conviction and sentencing to death of innocent people."[244] In criticizing this deferential treatment, another commentator has recommended that federal courts should not automatically confer a presumption of correctness, but instead, states should earn it by explicitly listing the reasons for their decisions.[245] In *Sawyer v. Whitley*, Justice Blackmun also criticized the Court for embracing verdict accuracy at the expense of individual constitutional rights:

> [T]he Court's focus on factual innocence is inconsistent with Congress' grant of habeas corpus jurisdiction . . . . [F]ederal courts are instructed to entertain petitions from state prisoners who allege that they are held 'in custody in violation of the Constitution or laws or treaties of the United States.' . . . [T]he focus on innocence assumes, erroneously, that the only value worth protecting through federal habeas review is the accuracy and reliability of the guilt determination. But our criminal justice system . . . our Constitution, protect[s] other values in addition to

242. *Id.* at 1 (Stevens, J., concurring).

243. Steiker & Steiker, *supra* note 46, at 613.

244. *Id.*

245. Abigail L. Kite, Note, *The Fact-Finding Process Review Model: Remedying Fact-Based Constitutional Challenges on Federal Habeas Corpus Review*, 31 T. JEFFERSON L. REV. 351, 389 (2008–2009) ("Although federal law commands that the habeas court give great deference to a factual finding made by a state court, that deference should be reasonable. The habeas court should . . . consider[] the reasons that led to the state court's ultimate conclusion.").

> the reliability of the guilt or innocence determination . . . . The . . . system of justice adopted by the Founders affords a defendant certain process-based protections that do not have accuracy of truth finding as their primary goal. These protections . . . including . . . the Eighth Amendment right against the imposition of an arbitrary and capricious sentence . . . ha[s] been systematically excluded . . . [is] debased, and indeed, rendered largely irrelevant, in a system that values the accuracy of the guilt determination above individual rights.[246]

III. ACTUAL INNOCENCE PROPOSAL

A. Actual Innocence Should Be a Substantive Claim

1. Executing an Innocent Defendant Violates the Constitution

The majority in *Herrera* assumed for the sake of argument that a truly persuasive showing of actual innocence would "render the execution of a defendant unconstitutional, and warrant habeas relief."[247] In separate opinions, however, *a majority of five* of the Court's justices explicitly stated that such an action would be unconstitutional.[248] Justice O'Connor joined by Justice Kennedy stated: "[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event."[249] Justice Blackmun, joined by Justices Stevens and Souter, stated in a vehement dissent: "We really are being asked . . . whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but . . . can [later] prove his innocence . . . . I do not see how the answer can be anything but 'yes.'"[250] Despite what should seemingly be a foregone conclusion, the Supreme Court, Congress, and the individual states should unequivocally acknowledge that executing an innocent person is the most "purposeless and needless imposition of

246. Sawyer v. Whitley, 505 U.S. 333, 355–56 (1992) (Blackmun, J., concurring).
247. Herrera v. Collins, 506 U.S. 390, 417 (1993).
248. *See id.* at 419–31.
249. *Id.* at 419 (O'Connor, J., concurring).
250. *Id.* at 431 (Blackmun, J., dissenting).

pain and suffering"[251] that could be forced on an individual. To even ask the question speaks to the most basic and fundamental retributive gap imaginable; an answer in the negative impeaches the validity of the Constitution and our entire concept of morality.

However challenging an acceptance of this basic constitutional premise may be to the nature of federal-state relations, this proposal suggests that the practical effects of recognizing substantive innocence claims will not damage the integrity of this balance. To the contrary, by limiting the availability of freestanding actual innocence claims to death-sentenced petitioners, the Court would provide incentives to help strengthen the validity of the entire criminal justice system.

2. Recognizing Actual Innocence Protects the Rights of Individuals and Restores Integrity to the Criminal Justice System

The essential purpose of any criminal justice system is to convict and punish the guilty. When the system is flawed, innocents are undeservedly punished, the guilty receive no retribution from society, and criminal activity is not effectively deterred.[252] If the larger society is made aware of these flaws, however, an entire system of justice is challenged.[253]

Undoubtedly, DNA exonerations have had the greatest public impact on criminal justice in our lifetime.[254] Every wrongful conviction made public through DNA evidence, or any other means, casts doubt upon the system's fairness, but exonerations also create challenging opportunities to restore public faith in the safeguards aimed at protecting the innocent.[255] When these challenges are answered, as many jurisdictions have done, it can lead to statutory reform in areas such as eyewitness identification procedure, crime lab

251. Coker v. Georgia, 433 U.S. 584, 592 (1977).
252. Steiker & Steiker, *supra* note 46, at 596.
253. *Id.* at 588.
254. Armbrust, *supra* note 146, at 77.
255. *See* Steiker & Steiker, *supra* note 46, at 592 (discussing that the Supreme Court battled the public knowledge of the arbitrary and inequitable imposition of the death penalty in the 1960s by limiting the discretion given to states and prosecutors).

protocol, and post-conviction DNA access for defendants.[256] If the knowledge gained from DNA exonerations is ignored, however, it can eventually result in "consequences not only for society's effort to prevent crime and achieve justice, but also for the capacity of government to be successful in other areas of social policy."[257] Unfortunately, many states that impose the death penalty have failed to adequately address these issues, both legislatively and in the courtroom. On the federal level, Congress, through the AEDPA, has exacerbated this problem by maximizing the level of deference given to state court judgments in all cases.

Federal courts, through the writ of habeas corpus, have been given the duty and ability to free those held "in violation of the constitution,"[258] ensuring both due process for the accused and punishments that are not "cruel and unusual."[259] Because the Supreme Court has held that the death penalty will receive a heightened level of scrutiny and review,[260] and because the standard defining whether a punishment is cruel and unusual evolves according to society's standards of decency,[261] no potentially innocent death row prisoner should be denied a fair opportunity to present a colorable claim of actual innocence in federal court. Allowing this access fully acknowledges the reality that innocent people are convicted of crimes at a greater rate than ever thought possible, despite the protections of "full and fair trials."[262] Allowing the actual innocence petitioner to have his claim reviewed fulfills the Court's death penalty promise, it reflects the growing societal concern over wrongful convictions, and it incentivizes states to adopt reforms that will ensure greater accuracy in guilt determinations. The Court should therefore hold that a capital defendant maintains a right

256. *See* discussion *supra* Part II.A.
257. Steiker & Steiker, *supra* note 46, at 596.
258. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (1863–1867).
259. U.S. CONST. amends. VIII, XIV.
260. Stevenson, *supra* note 135, at 362 (citing Woodson v. North Carolina, 428 U.S. 280 (1976).
261. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).
262. Since 1973, 138 people have been released from death row due to evidence of their innocence. DPIC FACTS, *supra* note 223. In the last seven years there have been an average of five exonerations per year, and over one thousand defendants have been sentenced to death during the same period. *Id.*

to raise a habeas corpus claim based solely on newly discovered innocence evidence because executing an innocent person is unconstitutional.[263]

B. The Standard of Review for Actual Innocence Claims Should Be Fair to All Parties

Justice Blackmun's "probably is innocent" proposal in *Herrera v. Collins* provides the only justifiable framework for federal courts to use when considering substantive actual innocence claims on the merits.[264] Under the current actual innocence doctrine as defined in *Schlup*, a petitioner can overcome the procedural default rule and be granted an evidentiary hearing by showing that new evidence proves that a reasonable juror would have "more likely than not" found him innocent. By analogy, the petitioner with a freestanding actual innocence claim should also have to present evidence compelling enough to overcome the default rule; however, given the wealth of data that exonerations have revealed about "valid" trials, relief on the merits of a freestanding innocence claim should be granted where the petitioner can prove he "probably is innocent."

1. Placing a "Probably is Innocent" Burden on the Petitioner Properly Rejects Verdict Accuracy Determinations

It is the actual innocence of the defendant, rather than his ability to allege constitutional errors from trial, that makes his execution unconstitutional.[265] Thus, this proposal rejects substantive actual innocence determinations based upon the so-called "verdict accuracy" model.

As exemplified by Troy Davis's case, the need to recognize substantive actual innocence claims arises from the Court's very narrow definition and use of innocence. As Justice Stevens noted, it is quite possible under current law for a truly innocent petitioner to be

263. This proposal is based upon Justice Blackmun's dissent in *Herrera*. Herrera v. Collins, 506 U.S. 390, 430–46 (1992).

264. *See* discussion *supra* Part II.B.1.

265. *See In re* Davis, 565 F.3d 810, 831 (11th Cir. 2009) (Barkett, J., dissenting).

executed.[266] Although the Supreme Court intervened in Mr. Davis's case and granted the requested hearing, he is forced to concede a full and fair trial because his other constitutional claims were previously denied or barred. Combined with the AEDPA requirement that state court decisions be considered presumptively correct, weighing innocence evidence against that verdict to determine how reasonable jurors would act completely disregards whether the state judgment "[was] obtained . . . through fundamentally fair procedures" and misunderstands the nature of the constitutional claim.[267] Indeed, under the verdict accuracy approach to habeas relief, newly obtained innocence evidence merely allows petitioners to challenge the reliability of the trial process.[268] Thus, petitioners with substantive innocence claims, who cannot allege trial error, would be required to clearly and convincingly prove their innocence so that the accuracy of the verdict is sufficiently undermined. The flaw in such an inquiry is readily apparent: those adjudged as "probably innocent" would presumably have their claims denied and death sentences upheld, a result dangerously close to deliberate murder.

By its nature, a "freestanding actual innocence" claim differs substantially from the Court's current understanding and use of actual innocence. Most importantly, a freestanding claim is not solely raised to undermine the reliability of the process that led to the guilty verdict, nor is it concerned with bolstering the validity of other process based constitutional claims of trial error. Indeed, the Court dismisses the science behind wrongful convictions and unjustly forecloses avenues of habeas relief when the constitutional definition of a fair trial is inextricably linked to a determination of verdict reliability. Any legitimate treatment of substantive innocence claims must recognize, for example, that a minimally "fair" trial does not always produce presumptively accurate results, especially where new evidence proving innocence was previously unobtainable.

---

266. *See* discussion *supra* Part I.D.

267. Strickland v. Washington, 466 U.S. 668, 711 (1984) (Marshall, J., dissenting); *see also* discussion *supra* Part II.C.2.

268. House v. Bell, 547 U.S. 518, 555 (2006).

Under this proposal, the habeas court is simply required to consider whether the petitioner's new evidence proves that he probably is innocent. In so doing, "it is not necessary or appropriate [for a judge] to make further presumptions about the reliability of newly discovered evidence" because how a reasonable juror would have considered the new evidence in the original trial is irrelevant.[269] Moreover, individual review ensures proper judicial flexibility in defining whether the burden of proof is met because in each case "the stronger the evidence of . . . guilt, the more persuasive the newly discovered evidence must be"[270] to receive relief.

2. Placing the Burden on the Petitioner is Fair to the State

Punishing convicted defendants is a legitimate state and societal interest.[271] By acting as independent sovereigns, states also maintain a substantial interest in judgment finality.[272] Accordingly, the actually innocent petitioner must bear the burden to prove innocence at an evidentiary hearing out of deference to the state and respect for the jury's verdict. The original judgment and those made by state courts in later proceedings, however, should not automatically create a *rigid* presumption of correctness.[273] Instead, federal review must be thorough and meaningful, which includes an acknowledgement that the petitioner has passed the *Schlup* gateway stage. Under this "probably is innocent" proposal, habeas courts would be required to "weigh the evidence in favor of the prisoner against the evidence of his guilt" on a case-by-case basis[274] recognizing that state judgments should be afforded presumptive correctness when it is deserved.[275] If necessary, federal habeas courts should even consider when state disparities in public funding for indigent defense, eyewitness identification standards, and state post-conviction procedures factor

269. Herrera v. Collins, 506 U.S. 390, 443–44 (1993) (Blackmun, J., dissenting).
270. *Id.*
271. Anderson, *supra* note165, at 499–500.
272. *Id.*
273. *See supra* notes 238–46 and accompanying text.
274. Herrera v. Collins, 506 U.S. 390, 443 (1993) (Blackmun, J., dissenting).
275. *See supra* notes 243–45 and accompanying text.

into their review of claims.[276] A district court presented with innocence evidence in the form of recanting testimony, for example, might give a Wisconsin judgment higher deference than a Georgia judgment because of the different standards used in making reliability determinations.[277] In all cases, however, habeas courts should consider the reasons that states arrive at fact-findings to ensure a meaningful review of the innocence claim.[278]

C. The Effect of Actual Innocence Claims on the Criminal Justice System

1. Judicial Economy

Striking the proper balance between the Court's interest in judicial economy and the actually innocent petitioner's interest in federal review is achieved simply by recognizing the claim. For example, in the last two decades, death sentencing has steadily decreased in the United States from a high of 328 cases in 1994 to 111 in 2008.[279] Furthermore, the latest statistics from the year 2000 show that of the 21,086 habeas corpus petitions filed by state prisoners in federal courts, only 259 of those involved prisoners sentenced to death.[280] Currently, only 10% of prisoners with death sentences file habeas petitions claiming actual innocence.[281] Of that 10%, very few meet *Schlup*'s "probable" gateway requirement, and an even smaller number later result in findings of constitutional error sufficient to overturn a verdict.[282] Thus, the actual number of innocence evidentiary hearings would be nominal.

---

276. *See* Steiker & Steiker, *supra* note 46, at 613 (discussing that any fairness afforded to capital defendants has given way to habeas relief only when the claimed harm affects the "accuracy of [trial] outcomes"); *see also* Strickland v. Washington, 466 U.S. 668, 711 (1984) (Marshall, J., dissenting) (stating that where the petitioner can show injury, the government should bear the burden of showing that it was harmless to the verdict, not the other way around).

277. *See* discussion *supra* Part II.C.2.

278. *See generally* Kite, *supra* note 245.

279. DPIC FACTS, *supra* note 223. Death sentences have been in steady decline since 1999.

280. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (BJS), SPECIAL REPORT: PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000 (2002).

281. Rodriguez & Atlas, *supra* note 25, at 41.

282. *Id.*

AEDPA was intended to decrease the burden on federal courts and expedite state interests in finality, but the Act has actually had the opposite effect.[283] Government data shows that habeas filings increased at a higher rate than normal in the years following the Act's passage,[284] despite higher review standards and more stringent procedural bar rules. Thus, any perceived additional burden on the judiciary created by substantive actual innocence claims is unfounded. One commentator has also noted that "federal judges retain great authority to dismiss summarily insufficient pleadings, grant state motions for summary judgment, and deny and even bar . . . filings from prisoners who abuse the process."[285] Lastly, no special procedural treatment is required for this new claim because "[i]f a petitioner can show that he is entitled to relief on the merits of his actual-innocence claim . . . he certainly can show that [it] falls within the 'actual-innocence' exception" to the procedural default rule.[286]

2. States Should Take the Lead by Passing Actual Innocence Laws and Adopting Reforms Based on the Lessons of DNA

The potential federal interference in state court criminal judgments provides substantial justification for states to pass their own criminal procedure reforms and actual innocence laws. The state trial is the definitive process for guilt determinations, and federal courts have limited knowledge of state processes.[287] Therefore, "[i]f states provide their own methods for review, they can improve the prospect of attaining finality in criminal cases by maintaining control over their own criminal judgments, within their own systems of justice."[288]

283. *Id.*

284. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (BJS), SPECIAL REPORT: PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000 (2002) ("Between April 1996 and September 2000 an estimated 18,000 additional habeas corpus petitions were filed in U.S. district courts by State prison inmates as a result of the enactment of the AEDPA.").

285. Stevenson, *supra* note 135, at 362.

286. Herrera v. Collins, 506 U.S. 390, 441 (1993) (Blackmun, J., dissenting).

287. Anderson, *supra* note 165, at 499.

288. *Id.* at 519.

Because the review of capital cases involves serious legal and moral considerations, all states with active death penalty laws should again reassess whether their methods of review adequately address the interests of defendants and the State.[289] Moreover, state courts should be required "to do more"[290] when they engage in actual innocence analysis. New York's proposed actual innocence law is one example of state action that legitimates the reality of wrongful convictions. "It elevates substance over form" by dismissing unfair procedural rules in cases with compelling claims of actual innocence.[291]

Accordingly, Georgia courts should also "do more" and move away from the procedural limitations of *Berry v. State* when deciding extraordinary motions for retrial. New research challenges the traditional judicial attitudes toward eyewitness recantations,[292] and indicates that the courts' total disregard for this form of evidence "obscures the truth instead of revealing it" and "los[es] sight of justice."[293] Instead, Georgia should adopt a workable standard like that of Wisconsin state courts.[294] Recanting eyewitness evidence must be considered with regard to all of the circumstances surrounding the initial identifications and subsequent recants, so courts may gain a better understanding of its true probative value. As indicated by the *Davis* Court's willingness to grant Troy Davis an evidentiary hearing, federal interference in an unreasonable state judgment is necessary and justified when the death penalty is involved.[295] The Georgia Supreme Court's decision in *Davis v. State* does not warrant AEDPA's inflexible deference, and Chief Justice

289. *Id.*; *see* discussion *supra* Parts II.A, II.D.
290. Eligon, *supra* note 222.
291. *Id.*
292. *See generally* Armbrust, *supra* note 146.
293. Alyson M. Palmer, *Georgia Death Row Inmate Loses 11th Circuit Appeal*, FULTON CO. DAILY REP., Apr. 20, 2009 (quoting Steven Bright, President of the Southern Center for Human Rights).
294. Armbrust, *supra* note 146, at 100 (citing State v. McCallum, 561 N.W.2d 707, 711–12 (Wis. 1997)); *see also* discussion *supra* Part II.C.2.
295. *See generally In re* Davis, 130 S. Ct. 1 (2009) (mem.).

Sears's dissent provides a necessary and rational view to consider when an individual's life is at stake.[296]

CONCLUSION

This note has examined the policy of finality underlying the writ of habeas corpus and argued that more flexibility is needed to ensure that federal courts properly review substantive actual innocence claims. The current review standards imposed by the Supreme Court and Congress meant to free those held in violation of the Constitution are more stringent than ever before. And yet, the causes for wrongful convictions, which directly challenge many assumptions about the protections afforded to defendants at trial, reveal the need for substantial reform at both the state and federal level. The Court's past refusal to directly answer the innocence question may reflect legitimate federalism concerns, but there are greater liberty interests at stake for death-sentenced actual innocence petitioners. Indeed, the Court's willingness to grant Troy Davis an evidentiary hearing represents a major shift toward recognizing the unconstitutional procedural limitations of the AEDPA; however, *Herrera v. Collins* and the definition of actual innocence must be revisited before any subsequent hearing serves its purpose. The risk of executing an innocent person is too great and the legitimacy of the criminal system is too important for *In re Davis* to be nothing more than a hollow resolution to these challenges. The need for judgment finality should not come at the expense of justice.

296. Davis v. State, 660 S.E.2d 354, 363–64 (2008) (Sears, C.J., dissenting); *see supra* text accompanying note 188.