

CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE

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Class Thirteen - Part One: Innocence

As a result of DNA testing, it has been possible to demonstrate that a number of people who had been found guilty beyond a reasonable doubt and sent to prison or death rows were actually innocent. Before DNA testing, innocence was established on occasion by further investigation, new witnesses coming forward and other factors, it was virtually impossible to resolve disputes about the accuracy of convictions in closely contested cases that depended upon such things as credibility determinations and the persuasiveness of some evidence. However, DNA comparisons can conclusively rule out suspects as well as establish that certain DNA material came from a particular person. Although DNA testing is available in only about 10 percent of criminal cases, it has removed any doubt about the innocence of some people and called into question the accuracy of convictions in other cases.

The primary reasons for wrongful convictions have been identified as mistaken identifications, reliance on “junk science” and false or misleading testimony by expert witnesses, unreliable testimony by informants, false confessions, police and prosecutorial misconduct such as failure to reveal exculpatory evidence, and inadequate legal representation for the accused. *See* Barry Scheck, Peter Neufeld & Jim Dwyer, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (Doubleday 2000), and the Innocence Project’s website, www.innocenceproject.org. *See also* Scott Christianson, *INNOCENT: INSIDE WRONGFUL CONVICTION CASES* (NYU Press 2004); Stanley Cohen, *THE WRONG MEN: AMERICA’S EPIDEMIC OF WRONGFUL DEATH ROW CONVICTIONS*

(Carroll & Graf 2003).

A study published by Professors Jon Gould of American University and Richard Leo of the University of San Francisco, along with other researchers, compared cases in which defendants were found guilty and eventually exonerated to those in which defendants were not convicted in the first place. The researchers found a number of variables that separated wrongful convictions from so-called “near misses,” including the criminal history of the defendant, withheld exculpatory evidence, errors with forensic evidence, and inadequate representation. With respect to the death penalty, the researchers found that states with higher use of the death penalty were more likely to produce wrongful convictions, even in cases that did not involve capital punishment.

The authors offered a possible explanation for this effect, saying, “In a punitive legal culture, police and prosecutors may be more interested in obtaining a conviction at all costs (leading, for example, to more *Brady* violations), and community pressure may encourage overly swift resolutions to cases involving serious crimes like rape and murder.” The researchers recommended changes to the justice system to limit wrongful convictions, including better funding for indigent defense, earlier testing of forensic evidence, and subjecting forensic labs to peer review. Jon Gould & Richard Leo, *Predicting Erroneous Convictions*, 99 *IOWA L. REV.* 471 (2014).

Glenn Ford Exonerated After 30 Years on Death Row

Glenn Ford was released in March, 2014, after 30 years on death row in Louisiana for a crime he did not commit. He was the 144th person sentenced to death to be exonerated since 1973.¹

Ford, an African American, was unable to afford an attorney and was assigned an oil and gas lawyer who had never tried a case – criminal or civil – to a jury as his lead counsel and a second attorney who had been out of law school for only two years and worked at an insurance defense firm on slip-and-fall cases. Ford was tried by an all-white jury because the prosecutors used their peremptory strikes to keep blacks off the jury. Despite a very weak case against him, Ford, virtually defenseless before an all-white jury, was convicted and sentenced to death. *See* Andrew Cohen, [Freedom After 30 Years on Death Row](#), THE ATLANTIC, March 11, 2014; Cohen, [Glenn Ford's First Days of Freedom After 30 Years on Death Row](#), THE ATLANTIC, March 14, 2014; Cohen, [The Meaning of the Exoneration of Glenn Ford](#), Brennan Center, March 13, 2014.

Adam Cohen also summarizes the case and life of Delbert Tibbs, who was exonerated after being sentencing to death in Florida in Andrew Cohen, [The Uncommon Life and Natural Death of Delbert Tibbs](#), THE ATLANTIC, Dec. 3, 2013

The difficulties of reentering society after spending years in prison are described in Alan Feuerfeb, *Exonerated. Now What?*, N.Y. TIMES, Feb. 21, 2014, <http://nyti.ms/1myIr81>.

1. Death Penalty Information Center, The Innocence List, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>.

The Case of Carlos DeLuna

Other innocent people sentenced to death have not been as fortunate as Glenn Ford, if spending 30 years in prison for a crime one did not do can be called fortunate. Professor James Liebman of Columbia Law School and others have published *THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION* (Columbia University Press 2014), which describes how Carlos DeLuna was put to death for a crime committed by a man named Carlos Hernandez.

DeLuna was arrested in 1983 and charged with murdering Wanda Lopez, a single mother who was stabbed to death with a lock-blade buck knife while working at a convenience store in Corpus Christi. DeLuna later said that he saw Carlos Hernandez, a man he knew, attack Lopez. However, DeLuna ran from the area because he was on parole and was afraid he would be arrested if seen by police. Nevertheless, he was arrested 40 minutes later, hiding under a pickup truck.

Because the attack was with a knife, the killer and victim would be covered with blood as they wrested hand to hand. But DeLuna had no blood on his clothes. No DNA, fingerprints or other physical evidence connected him to the crime. The main evidence against him was a single, nighttime eyewitness identification after police brought him to the crime scene in handcuffs. Besides the suggestive nature of the identification, it was not very probative because DeLuna and Hernandez bore a strong resemblance to one another.

However, the prosecution never admitted that Hernandez even existed. DeLuna had insisted that Carlos Hernandez committed the crime from the moment he was arrested and his lawyer made that argument at trial. The prosecutor told the jury that Carlos Hernandez was a “phantom” of DeLuna’s imagination. DeLuna was convicted and sentenced to death. Six years after his arrest, he was executed.

But Hernandez was no phantom. He was well known to police as a violent felon with a history

of gas station armed robberies and assaults of women with lock-blade buck knives like the one used against Lopez and left behind at the scene. A police detective also reported hearing from informants that Hernandez admitted he had killed the store clerk. This was not disclosed to DeLuna's lawyer.

Hernandez was arrested outside a convenience store with a knife two months after Lopez's murder. He was arrested a few months before DeLuna's execution, for attacking another young Latina with a lock-blade buck knife. He pleaded guilty to that crime. A tape of police radio reports, uncovered 20 years after the crime, indicates that officers had chased another man for the 30 minutes before their attention was drawn to DeLuna. None of this information was disclosed to DeLuna's lawyers or the courts.

Hernandez died from liver disease 10 years after DeLuna was executed. He was in a Texas prison for attacking a neighbor with a knife.

The book is the result of four years of investigation by Professor Liebman and the Columbia DeLuna Project. They published an article *Los Tocayos Carlos*, 43 COLUM. HUM. RTS. L. REV. 711 (2012), and developed a website, *Los Tocayos Carlos*, <http://www3.law.columbia.edu/hrlr/ltc/>, which contains video interviews, documents, photographs and other information about the case.

Questions have been raised about the executions of other people who may have been innocent. Among the cases which remain controversial and have draw scrutiny is the one against Todd Willingham, who was sentenced to death and executed for an arson that may well have been an accidental fire. See David Grann, *Trial by Fire: Did Texas execute an innocent Man?* THE NEW YORKER, Sept. 7, 2009, www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann?printable=true;

Procedural Barriers to Issues of Innocence

When evidence of innocence is uncovered after trial and conviction, there may be significant obstacles to getting it before a court. Some states have short deadlines for filing a motion for new trial or post-conviction petition. It may be impossible to file after those deadlines. Failure of one's lawyer to comply with procedural rules at trial or any part of the post-conviction review process may also present obstacles to review of claims of innocence.

In some instances, evidence of innocence may not be discovered until after the convicted person has had full habeas corpus review. If a person has already had federal habeas corpus review of the conviction and sentence, getting into federal court a second time requires approval of a three-judge panel of the Court of Appeals before a petition may be filed in district court. We take up procedural default, which is governed by Supreme Court caselaw, first and then turn to obtaining a second habeas corpus review, which is defined by statute.

The Supreme Court has held that a claim could be heard despite a procedural default if it involved a constitutional violation that resulted in a miscarriage of justice. The Court defined miscarriage of justice as the actual innocence of the petitioner. Thus, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray v. Carrier*, 477 U.S. 478, 495 (1986). In *Kuhlmann v. Wilson*, 477 U.S. 436, 448 (1986), the Court said "the prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.'" 477 U.S. at 455, n. 17.

Herrera v. Collins

In most cases, those claiming innocence base the claim on a violation of the Constitution, such as the prosecution's failure to disclose exculpatory evidence which may not come to light until years after trial. However, Leonel Torres Herrera asserted no constitutional violation, but claimed that he was innocent of the crime that resulted in his death sentence and, therefore, his execution would violate the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's due process guarantee.

Herrera raised the claim in his second federal habeas petition asserting that newly discovered evidence demonstrated his innocence of the murders of two police officers. Herrera had been convicted ten years earlier of the capital murder of one police officer and sentenced to death and had plead guilty to the related capital murder of another officer. The evidence against him at his capital trial included two eyewitness identifications, numerous pieces of circumstantial evidence, and a handwritten letter by Herrera impliedly admitting his guilt.

Nevertheless, Herrera claimed innocence based on affidavits tending to show that his brother, who was no longer alive, had committed the murders. Herrera was unable to present his new evidence to the Texas courts because Texas law required a motion for a new trial based on newly discovered evidence to be filed within 30 days of imposition or suspension of sentence.

The Supreme Court, in an opinion by Chief Justice Rehnquist for five justices, held that Herrera did not make a sufficiently compelling showing to state a claim. *Herrera v. Collins*, 506 U.S. 390 (1993). The Court observed at the outset:

Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.

Id. at 400. The Court expressed its skepticism that requiring a new trial ten years after the first trial would produce a more reliable determination of guilt or innocence, since the passage of time diminishes the reliability of criminal adjudications.

The Court also found no due process violation in the lack of any available procedure in Texas for Herrera to present his claim of innocence. It found that its cases "have treated claims of 'actual innocence,' not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits, even though his habeas petition would otherwise be regarded as successive or abusive." *Id.* at 416-17.

"History," the Court said, "shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." *Id.* at 417. It found clemency "deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Id.* at 411-12. After discussing the history of clemency from England in the 1700's through the present, the Court concluded:

Executive clemency has provided the "fail safe" in our criminal justice system. It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.

Id. at 415.

Although Chief Justice Rehnquist expressed the view that neither the Eighth or Fourteenth Amendments prohibited execution of an innocent person, in order to get the votes of Justices O'Connor, Kennedy and White, his opinion did not decide whether a claim of innocence that was not based on a constitutional violation would ever

state a ground for federal habeas relief, but instead

assume[d], for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of “actual innocence” made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.

Id. at 417. It found that Herrera’s showing – based on affidavits and coming 10 years after his convictions – “falls far short of this threshold.”

Justice O’Connor filed a concurring opinion, joined by Justice Kennedy. She acknowledged that “throughout our history the federal courts have assumed that they should not and could not intervene to prevent an execution so long as the prisoner had been convicted after a constitutionally adequate trial [and that] [t]he prisoner’s sole remedy was a pardon or clemency.” *Id.* at 421. Nevertheless, she stated, “the execution of a legally and factually innocent person would be a constitutionally intolerable event.” *Id.* at 419. She noted, however, that, “[o]ur society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent.” *Id.* at 420. She concluded that “[t]he record overwhelmingly demonstrates that petitioner deliberately shot and killed” the officers and that Herrera’s “new evidence is bereft of credibility.” *Id.* at 421.

Justice Scalia filed a concurring opinion, joined by Justice Thomas, expressing the view that “[t]here is no basis in text, tradition, or even in contemporary practice (if that were enough), for finding in the Constitution a right to demand

judicial consideration of newly discovered evidence of innocence brought forward after conviction.” *Id.* at 427-28.

Justice White filed a concurring opinion expressing the view that to be entitled to relief, a petitioner would “at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, ‘no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.’” *Id.* at 429.

Justice Blackmun, joined by Justices Stevens and Souter, dissented, arguing that the Eighth Amendment question “was not whether a second trial would be more reliable than the first but whether, in light of new evidence, the result of the first trial is sufficiently reliable for the State to carry out a death sentence” and that the majority erred in interpreting Herrera’s Fourteenth Amendment claim as a procedural rather than a substantive due process claim. *Id.* at 434-37. Observing that the execution of an innocent person would be the ultimate arbitrary imposition of the death penalty and a due process violation, Justice Blackmun expressed the view that “to obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent.” *Id.* at 442.

The government bears the burden of proving the defendant’s guilt beyond a reasonable doubt, but once the government has done so, the burden of proving innocence must shift to the convicted defendant. The actual-innocence inquiry is therefore distinguishable from review for sufficiency of the evidence, where the question is not whether the defendant is innocent but whether the government has met its constitutional burden of proving the defendant’s guilt beyond a reasonable doubt. 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, not just raising doubt about his guilt.

Id. at 443.

Finally, in a statement joined by no other member of the Court, Justice Blackmun concluded, “[t]he execution of a person who can show that he is innocent comes perilously close to simple murder.” *Id.* at 446.

Texas executed Herrera by lethal injection on May 12, 1993.

Schlup v. Delo and House v. Bell

Lloyd Schlup, who was sentenced to death in Missouri for being one of three inmates involved in the murder of a fellow inmate in prison, sought to file a second federal habeas corpus petition arguing that because of the prosecution’s failure to disclose exculpatory evidence and the ineffective assistance of his counsel, the jury was deprived of critical evidence that would have established his innocence. Schlup had maintained his innocence and argued misidentification at trial. Because Schlup’s case was litigated before passage of the Antiterrorism and Effective Death Penalty Act, the issue of whether he could file a second habeas petition was based on the “actual innocence” standard the Court had established to excuse procedural defaults.

Schlup argued that the prosecution had not produced a transcript of an interview with a witness saying that a distress call went out shortly after the incident began. If true, Schlup could not have committed the murder because he was shown on a videotape in the dining hall for a full minute before guards in the dining hall responded to the distress call. It was not possible for Schlup to participate in the murder in another part of the prison and get to the dining hall by the time he was recorded there. The witness also identified another inmate rather than Schlup as one of the assailants. An affidavit of a lieutenant stated that Schlup had been in the presence of the lieutenant for at least two and half minutes on his way to the dining hall, that Schlup was walking at a leisurely pace, and that Schlup “was not perspiring or breathing hard, and he was not nervous.”

The District Court denied the petition without a hearing and the Court of Appeals affirmed. Both courts denied a stay of execution. The Governor of Missouri issued a stay one day before Schlup’s execution date so that clemency proceedings could be initiated. The United States Supreme Court granted certiorari and reversed, holding that Schlup’s showing was sufficient to require an evidentiary hearing. *Schlup v. Delo*, 513 U.S. 298 (1995).

The Court noted that unlike the “freestanding claim of innocence” not based on any constitutional violation that it had rejected in *Herrera v. Collins*, Schlup was arguing that he was convicted because of constitutional violations – the failure of the prosecutor to disclose exculpatory evidence and the ineffective assistance of his trial lawyer. The question was whether he could file a second or successive federal habeas corpus petition to litigate the claims. The Court held that the lower courts had applied the wrong standard of proof, requiring Schlup to prove his innocence by clear and convincing evidence. The proper standard, the Court held, was the one it had adopted in *Murray v. Carrier* – that the petitioner show that the constitutional violation “probably resulted” in conviction of an innocent person to avoid a procedural bar to the consideration of the merits of his constitutional claims. “[T]he petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” *Id.* at 327.²

Justice O’Connor issued a concurring opinion responding to dissents by Chief Justice Rehnquist, joined by Justices Kennedy and Thomas, expressing the view that the lower courts applied the proper standard, and by Justice Scalia, joined

2. The Antiterrorism and Effective Death Penalty Act adopted in 1996 changes the law in this regard and provides that a federal court is to consider a second petition based on innocence only if the petitioner “establish[es] by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C. § 2244 (b)(2)(B).

by Justice Thomas, expressing the view that under the habeas statute the district court was not required to consider the successive petition.

The Court later applied *Schlup* in the case of Paul Gregory House, allowing consideration of his defaulted claim of ineffective assistance of counsel based upon its finding that it was more likely than not that no reasonable juror would have found House guilty beyond a reasonable doubt. *House v. Bell*, 547 U.S. 518 (2006). Because the claim, although procedurally defaulted, was brought in House's first and only habeas corpus petition, the more stringent provisions of the Antiterrorism and Effective Death Penalty Act regarding successive petitions did not apply. *Id.* at 539. Although the *Schlup* standard has been replaced for successive petitions by the Anti-terrorism and Effective Death Penalty Act, it still applies to whether a procedural default is to be excused.

House was convicted of the murder of a woman and sentenced to death. His conviction and sentence were upheld on appeal. He sought state post-conviction relief twice, raising a claim of ineffective assistance of trial counsel only in the second application. The Tennessee courts held the claim procedurally defaulted. House argued that the claim should be considered by the federal courts in habeas corpus review because upon consideration of the claim, the court would find him

His showing included proof that DNA testing of semen on the victim's clothing came not from House, as a witness had testified at trial, but from her husband; that the victim's blood on House's jeans, which were used at trial to connect him with the murder, probably came from autopsy samples from the victim that were spilled while being transported to the FBI; that the murder may have been committed by the victim's husband – one witness said he confessed, two others described suspicious behavior and others described spousal abuse.

The District Court dismissed the petition. The Sixth Circuit was closely divided – the eight

judges appointed by Republican presidents held that House's showing was insufficient; seven judges appointed by Democrats found that House had met the *Schlup* standard. Judge Gilman, in a separate dissent, described the case as "a real-life murder mystery, an authentic 'who-done-it' where the wrong man may be executed." *House v. Bell*, 386 F.3d 688, 709 (6th Cir. 2004) (Gilman, J., dissenting).

After an extensive and detailed discussion of the evidence, the Supreme Court, in an opinion by Justice Kennedy reversed, concluding:

This is not a case of conclusive exoneration. Some aspects of the State's evidence * * * still support an inference of guilt. Yet the central forensic proof connecting House to the crime – the blood and the semen – has been called into question, and House has put forward substantial evidence pointing to a different suspect. Accordingly, and although the issue is close, we conclude that this is the rare case where – had the jury heard all the conflicting testimony – it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.

Id. at 553-54. While finding that House was entitled to a hearing on his claim based on this determination, the Court found that the evidence did not establish a "freestanding" claim of innocence under *Herrera* as argued by the six dissenting members of the Sixth Circuit.

Chief Justice Roberts, joined by Justices Scalia and Thomas, dissented, expressing the view that House's evidence was not sufficiently reliable to show that no reasonable juror would vote to convict him. Justice Alito did not participate in the case.

On remand, the United States District Court granted the writ in 2008. Someone who remained anonymous posted bond of \$100,000 and House, who has multiple sclerosis and cannot walk, left prison in accompanied by his mother on July 2, 2008.

A new round of DNA testing of hair found in the victim's hand showed the follicles did not come from either House or the victim's husband. On May 12, 2009, a month before the retrial was to begin, prosecutors moved the court to dismiss all charges against House, bringing the case against him to an end 24 years after his arrest.

Sawyer v. Whitley

The "actual innocence" standard is not a comfortable fit when applied to claims that but for certain errors the death penalty would not have been imposed. In *Smith v. Murray*, 477 U.S. 527 (1986), counsel failed to raise a meritorious claim on appeal and the Supreme Court held the federal courts were procedurally barred from addressing the claim on the merits. The Court held that the miscarriage of justice exception did not apply. Emphasizing that the exception applied to "actual" as compared to "legal innocence" and acknowledging that the actual innocence "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense," the Court found that the habeas petitioner had failed to show "actual innocence of the death penalty" because the "alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." *Id.*, at 538.

In *Sawyer v. Whitley*, 505 U.S. 333, 350 (1992), the Court held that in order to show "actual innocence of the death penalty" the petitioner must show "by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death." Thus, it rejected the claim of Robert Sawyer, who argued that the jury would not have imposed death if it had considered evidence about his role in the crime and the credibility of a prosecution witness which the prosecution failed to disclose, and evidence of his mental health that his lawyer had failed to present. Since the evidence would not have prevented the jury from finding Sawyer eligible for the death penalty, it did not meet the "actual innocence" exception. Justices Blackmun, Stevens and O'Connor concurred in the result, but expressed

the view that the burden of proof should be a probability instead of clear and convincing, and that actual innocence should not be defined as eligibility, but with regard to whether the capital sentence was clearly erroneous.

Standards Governing a Second Habeas Corpus Petition (Anti-terrorism and Effective Death Penalty Act) [emphasis added]

Not all claim of innocence are presented in a second federal habeas corpus action, but many are. The Anti-terrorism and Effective Death Penalty Act, adopted in 1996, established a higher standard of proof than the Supreme Court had adopted in *Schlup v. Delo*, and new procedures for a federal court's consideration of a claim of innocence presented in a second and successive petition. The following are those portions of the Act:

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless
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(A) the applicant shows that the claim relies on a new rule of constitutional

law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) *the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and*

(ii) *the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.*

(3) (A) Before a second or successive application permitted by this section is filed in the district court, *the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.*

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) *The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be*

the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

Seeking Supreme Court Review Despite the Statute

Although subsection E of the statute provides that the grant or denial of authorization to file a second or successive application shall not be subject to petition for *certiorari* review by the Supreme Court, the Court exercised its power to issue original writs to remand a case for an evidentiary hearing on innocence in *In re Troy Davis*, 130 S.Ct. 1 (2009). Davis had been denied authorization to file a second habeas petition by the Eleventh Circuit. The Supreme Court remanded the case to a district court, which held a evidentiary hearing and concluded that Davis had failed to prove than he was innocent. *In re Davis*, 2010 WL 3385081 (S.D. Ga. 2010). Georgia executed Davis by lethal injection on September 21, 2011.

KANSAS, Petitioner,
v.
Michael Lee MARSH, II.

Supreme Court of the United States
548 U.S. 163, 126 S.Ct. 2516 (2006).

The Court held in a 5-4 decision that the Kansas death penalty statute which requires the imposition of the death penalty if the sentencing jury determines that aggravating evidence and mitigating evidence are in equipoise does not violate the Constitution. In his dissent, Justice Souter expressed his concern about the number of people sentenced to death who were later found to be innocent. Justice Scalia responded in a concurrence.

Justice Scalia's concurrence appears before Justice Souter's dissent in the reporters, but the order has been reversed here because Justice Scalia responds to the dissent.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

* * *

* * * Today, a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. * * *

A few numbers from a growing literature will give a sense of the reality that must be addressed. When the Governor of Illinois imposed a moratorium on executions in 2000, 13 prisoners under death sentences had been released since 1977 after a number of them were shown to be innocent, as described in a report which used their examples to illustrate a theme common to all 13, of "relatively little solid evidence connecting the charged defendants to the crimes." State of Illinois, G. Ryan, Governor, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL

PUNISHMENT: RECOMMENDATIONS ONLY 7 (Apr.2002) (hereinafter Report). During the same period, 12 condemned convicts had been executed. Subsequently the Governor determined that 4 more death row inmates were innocent.³ Illinois had thus wrongly convicted and condemned even more capital defendants than it had executed, but it may well not have been otherwise unique; one recent study reports that between 1989 and 2003, 74 American prisoners condemned to death were exonerated, Gross,

3. The Illinois Report emphasizes the difference between exoneration of a convict because of actual innocence, and reversal of a judgment because of legal error affecting conviction or sentence but not inconsistent with guilt in fact. More importantly, it takes only a cursory reading of the Report to recognize that it describes men released who were demonstrably innocent or convicted on grossly unreliable evidence. Of one, the Report notes "two other persons were subsequently convicted in Wisconsin of" the murders. Of two others, the Report states that they were released after "DNA tests revealed that none of them were the source of the semen found in the victim. That same year, two other men confessed to the crime, pleaded guilty and were sentenced to life in prison, and a third was tried and convicted for the crime." Of yet another, the Report says that "another man subsequently confessed to the crime for which [the released man] was convicted. He entered a plea of guilty and is currently serving a prison term for that crime."

A number were subject to judgments as close to innocence as any judgments courts normally render. In the case of one of the released men, the Supreme Court of Illinois found the evidence insufficient to support his conviction. Several others obtained acquittals, and still more simply had the charges against them dropped, after receiving orders for new trials.

At least 2 of the 13 were released at the initiative of the executive. We can reasonably assume that a State under no obligation to do so would not release into the public a person against whom it had a valid conviction and sentence unless it were certain beyond all doubt that the person in custody was not the perpetrator of the crime. The reason that the State would forgo even a judicial forum in which defendants would demonstrate grounds for vacating their convictions is a matter of common sense: evidence going to innocence was conclusive.

Jacoby, Matheson, Montgomery, & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J.CRIM. L. & C. 523, 531 (2006), many of them cleared by DNA evidence.⁴ Another report states that “more than 110” death row prisoners have been released since 1973 upon findings that they were innocent of the crimes charged, and “[h]undreds of additional wrongful convictions in potentially capital cases have been documented over the past century.” Lanier & Acker, *Capital Punishment, the Moratorium Movement, and Empirical Questions*, 10 PSYCHOLOGY, PUBLIC POLICY & LAW 577, 593 (2004). Most of these wrongful convictions and sentences resulted from eyewitness misidentification, false confession, and (most frequently) perjury, and the total shows that among all prosecutions homicide cases suffer an unusually high incidence of false conviction, probably owing to the combined difficulty of investigating without help from the victim, intense pressure to get convictions in homicide cases, and

4. The authors state the criteria for their study: “As we use the term, ‘exoneration’ is an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted. The exonerations we have studied occurred in four ways: (1) In forty-two cases governors (or other appropriate executive officers) issued pardons based on evidence of the defendants’ innocence. (2) In 263 cases criminal charges were dismissed by courts after new evidence of innocence emerged, such as DNA. (3) In thirty-one cases the defendants were acquitted at a retrial on the basis of evidence that they had no role in the crimes for which they were originally convicted. (4) In four cases, states posthumously acknowledged the innocence of defendants who had already died in prison. . . .” The authors exclude from their list of exonerations “any case in which a dismissal or an acquittal appears to have been based on a decision that while the defendant was not guilty of the charges in the original conviction, he did play a role in the crime and may be guilty of some lesser crime that is based on the same conduct. For our purposes, a defendant who is acquitted of murder on retrial, but convicted of involuntary manslaughter, has not been exonerated. We have also excluded any case in which a dismissal was entered in the absence of strong evidence of factual innocence, or in which – despite such evidence – there was unexplained physical evidence of the defendant’s guilt.”

the corresponding incentive for the guilty to frame the innocent.

We are thus in a period of new empirical argument about how “death is different”: not only would these false verdicts defy correction after the fatal moment, the Illinois experience shows them to be remarkable in number, and they are probably disproportionately high in capital cases. * * *

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Justice SCALIA, concurring.

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Finally, I must say a few words (indeed, more than a few) in response to Part III of Justice SOUTER’s dissent. * * * The dissent essentially argues that capital punishment is such an undesirable institution – it results in the condemnation of such a large number of innocents – that any legal rule which eliminates its pronouncement, including the one favored by the dissenters in the present case, should be embraced.

As a general rule, I do not think it appropriate for judges to heap either praise or censure upon a legislative measure that comes before them, lest it be thought that their validation, invalidation, or interpretation of it is driven by their desire to expand or constrict what they personally approve or disapprove as a matter of policy. In the present case, for example, people might leap to the conclusion that the dissenters’ views on whether Kansas’s equipose rule is constitutional are determined by their personal disapproval of an institution that has been democratically adopted by 38 States and the United States. But of course that requires no leap; just a willingness to take the dissenters at their word. * * *

There exists in some parts of the world sanctimonious criticism of America’s death penalty, as somehow unworthy of a civilized society. (I say sanctimonious, because most of the countries to which these finger-waggers belong had the death penalty themselves until recently – and indeed, many of them would still have it if the

democratic will prevailed.⁵) It is a certainty that the opinion of a near-majority of the United States Supreme Court to the effect that our system condemns many innocent defendants to death will be trumpeted abroad as vindication of these criticisms. * * *

It should be noted at the outset that the dissent does not discuss a single case – not one – in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not have to hunt for it; the innocent’s name would be shouted from the rooftops by the abolition lobby. The dissent makes much of the new-found capacity of DNA testing to establish innocence. But in every case of an executed defendant of which I am aware, that technology has *confirmed* guilt.

This happened, for instance, only a few months ago in the case of Roger Coleman. Coleman was convicted of the gruesome rape and murder of his sister-in-law, but he persuaded many that he was actually innocent and became the poster-child for the abolitionist lobby. * * * Coleman ultimately failed a lie-detector test offered by the Governor of Virginia as a condition of a possible stay; he was executed on May 20, 1992.

In the years since then, Coleman’s case became

5. It is commonly recognized that “[m]any European countries ... abolished the death penalty in spite of public opinion rather than because of it.” Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U.L.Rev. 911, 931-932 (2006). Abolishing the death penalty has been made a condition of joining the Council of Europe, which is in turn a condition of obtaining the economic benefits of joining the European Union. The European Union advocates against the death-penalty even *in America*; there is a separate death-penalty page on the website of the Delegation of the European Commission to the U.S.A. The views of the European Union have been relied upon by Justices of this Court (including all four dissenters today) in narrowing the power of the American people to impose capital punishment. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 317, n. 21 (2002) (citing, for the views of “the world community,” the Brief for the European Union as *Amicus Curiae*).

a rallying point for abolitionists, who hoped it would offer what they consider the “Holy Grail: proof from a test tube that an innocent person had been executed.” But earlier this year, a DNA test ordered by a later Governor of Virginia proved that Coleman was guilty, even though his defense team had “proved” his innocence and had even identified “the real killer” (with whom they eventually settled a defamation suit). And Coleman’s case is not unique. * * *

Instead of identifying and discussing any particular case or cases of mistaken execution, the dissent simply cites a handful of studies that bemoan the alleged prevalence of wrongful death sentences. One study (by Lanier and Acker) is quoted by the dissent as claiming that “more than 110 death row prisoners have been released since 1973 upon findings that they were innocent of the crimes charged, and ‘hundreds of additional wrongful convictions in potentially capital cases have been documented over the past century.’” For the first point, Lanier and Acker cite the work of the Death Penalty Information Center (more about that below) and an article in a law review jointly authored by Radelet, Lofquist, and Bedau (two professors of sociology and a professor of philosophy). For the second point, they cite only a 1987 article by Bedau and Radelet. See *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21. * * *

The 1987 article’s obsolescence began at the moment of publication. The most recent executions it considered were in 1984, 1964, and 1951; the rest predate the Allied victory in World War II. (Two of the supposed innocents are Sacco and Vanzetti.) Even if the innocence claims made in this study were true, all except (perhaps) the 1984 example would cast no light upon the functioning of our current system of capital adjudication. * * *

* * * The only execution of an innocent man it alleges to have occurred after the restoration of the death penalty in 1976 – the Florida execution of James Adams in 1984 – is the easiest case to verify. As evidence of Adams’ innocence, it describes a hair that could not have been his as

being “clutched in the victim’s hand.” The hair was *not* in the victim’s hand; “[i]t was a remnant of a sweeping of the ambulance and so could have come from another source.” Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L.REV. 121, 131 (1988). The study also claims that a witness who “heard a voice inside the victim’s home at the time of the crime” testified that the “voice was a woman’s.” The witness’s actual testimony was that the voice, which said “““In the name of God, don’t do it””” (and was hence unlikely to have been the voice of anyone but the male victim), ““sounded “kind of like a woman’s voice, kind of like strangling or something”””. Bedau and Radelet failed to mention that upon arrest on the afternoon of the murder Adams was found with some \$200 in his pocket – one bill of which “was stained with type O blood. When Adams was asked about the blood on the money, he said that it came from a cut on his finger. His blood was type AB, however, while the victim’s was type O.” Among the other unmentioned, incriminating details: that the victim’s *eyeglasses* were found in Adams’ car, along with jewelry belonging to the victim, and clothing of Adams’ stained with type O blood. This is just a sample of the evidence arrayed against this “innocent.”

* * *

Remarkably avoiding any claim of erroneous executions, the dissent focuses on the large numbers of *non-executed* “exonerees” paraded by various professors. It speaks as though exoneration came about through the operation of some outside force to correct the mistakes of our legal system, rather than *as a consequence of the functioning of our legal system*. Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out.

* * *

Another of the dissent’s leading authorities on exoneration of the innocent is Gross, Jacoby,

Matheson, Montgomery, & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J.CRIM. L. & C. 523 (2006). * * * [T]hat article, like the others cited, is notable not for its rigorous investigation and analysis, but for the fervor of its belief that the American justice system is condemning the innocent “in numbers,” as the dissent puts it, “never imagined before the development of DNA tests.” Among the article’s list of 74 “exonerees,” is Jay Smith of Pennsylvania. Smith – a school principal – earned three death sentences for slaying one of his teachers and her two young children. See *Smith v. Holtz*, 210 F.3d 186, 188 (C.A.3 2000). His retrial for triple murder was barred on double jeopardy grounds because of prosecutorial misconduct during the first trial. But Smith could not leave well enough alone. He had the gall to sue, under 42 U.S.C. § 1983, for false imprisonment. The Court of Appeals for the Third Circuit affirmed the jury verdict for the defendants, observing along the way that “our confidence in Smith’s convictions is not diminished in the least. We remain firmly convinced of the integrity of those guilty verdicts.”

* * *

In its inflation of the word “exoneration,” the Gross article hardly stands alone; mischaracterization of reversible error as actual innocence is endemic in abolitionist rhetoric, and other prominent catalogues of “innocence” in the death-penalty context suffer from the same defect. Perhaps the best-known of them is the List of Those Freed From Death Row, maintained by the Death Penalty Information Center. This includes * * * some dubious candidates of its own. Delbert Tibbs is one of them. We considered his case in *Tibbs v. Florida*, 457 U.S. 31 (1982), concluding that the Double Jeopardy Clause does not bar a retrial when a conviction is “revers[ed] based on the weight, rather than the sufficiency, of the evidence.” The case involved a man and a woman hitchhiking together in Florida. A driver who picked them up sodomized and raped the woman, and killed her boyfriend. She eventually escaped and positively identified Tibbs. The Florida Supreme Court reversed the conviction on a 4-to-3

vote. The Florida courts then grappled with whether Tibbs could be retried without violating the Double Jeopardy Clause. The Florida Supreme Court determined not only that there was no double-jeopardy problem, but that the *very basis on which it had reversed the conviction was no longer valid law*, and that its action in “reweigh[ing] the evidence” in Tibbs’ case had been “clearly improper.” After we affirmed the Florida Supreme Court, however, the State felt compelled to drop the charges. The State Attorney explained this to the Florida Commission on Capital Cases: “By the time of the retrial, [the] witness/victim . . . had progressed from a marijuana smoker to a crack user and I could not put her up on the stand, so I declined to prosecute. Tibbs, in my opinion, was never an innocent man wrongfully accused. He was a lucky human being. He was guilty, he was lucky and now he is free. His 1974 conviction was not a miscarriage of justice.”

Of course, even with its distorted concept of what constitutes “exoneration,” the claims of the Gross article are fairly modest: Between 1989 and 2003, the authors identify 340 “exonerations” *nationwide* – not just for capital cases, mind you, nor even just for murder convictions, but for various felonies. * * *

* * *

The dissent’s suggestion that capital defendants are *especially* liable to suffer from the lack of 100% perfection in our criminal justice system is implausible. Capital cases are given especially close scrutiny at every level, which is why in most cases many years elapse before the sentence is executed. And of course capital cases receive special attention in the application of executive clemency. Indeed, one of the arguments made by abolitionists is that the process of finally completing all the appeals and reexaminations of capital sentences is so lengthy, and thus so expensive for the State, that the game is not worth the candle. The proof of the pudding, of course, is that as far as anyone can determine (and many are looking), *none* of cases included in the .027% error rate for American verdicts involved a capital

defendant erroneously executed.

Since 1976 there have been approximately a half million murders in the United States. In that time, 7,000 murderers have been sentenced to death; about 950 of them have been executed; and about 3,700 inmates are currently on death row. As a consequence of the sensitivity of the criminal justice system to the due-process rights of defendants sentenced to death, almost two-thirds of all death sentences are overturned. “Virtually none” of these reversals, however, are attributable to a defendant’s “actual innocence.” Most are based on legal errors that have little or nothing to do with guilt. The studies cited by the dissent demonstrate nothing more.

Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. * * *
* The American people have determined that the good to be derived from capital punishment – in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes – outweighs the risk of error. It is no proper part of the business of this Court, or of its Justices, to second-guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution.

Innocence - for Further Reading

Wrongful convictions and the primary reasons for them – such as mistaken identifications, unreliable testimony by informants, false confessions, unreliable scientific evidence, police and prosecutorial misconduct, and lack of adequate legal representation for the accused – are described in Barry Scheck, Peter Neufeld & Jim Dwyer, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (Doubleday 2000). *See also* Scott Christianson, *INNOCENT: INSIDE WRONGFUL CONVICTION CASES* (NYU Press 2004); Stanley Cohen, *THE WRONG MEN: AMERICA’S EPIDEMIC OF WRONGFUL DEATH ROW*

CONVICTIONS (Carroll & Graf 2003).

Among the books describing innocence in particular cases are two about strikingly similar cases involving the murders of young women from Ada, Oklahoma in the early 1980s. In both cases, the defendants were convicted based on little evidence except for confessions that supposedly emerged from dreams. Bill Peterson prosecuted both cases and both involved the same jail-house informant. John Grisham tells the story of Ron Williamson in his first non-fiction book, *THE INNOCENT MAN* (Random House 2006). Williamson, a former hometown baseball hero, was convicted of murder and rape in 1988 and spent 11 years on death row before he and his co-defendant were exonerated by DNA evidence in 1999. Robert Mayer recounts the story of Tommy Ward and Karl Fonte who were sentenced to death in the other case in *THE DREAMS OF ADA* (Doubleday Broadway 1987). Their death sentences were overturned, but there was no DNA evidence in their cases which might have proven their innocence. They remain convicted and in prison for the rest of their lives.

In *VICTIMS OF JUSTICE REVISITED* (Northwestern U. Press 2005), Thomas Frisbie and Randy Garrett describe the case of Rolando Cruz and Alejandro Hernandez, who were convicted in DuPage County, Illinois and sent to death row for the 1983 murder of a 10-year-old child. They were exonerated in 1995 due to DNA tests and recanted testimony.

The case was one of several innocence cases that led then-Governor George Ryan to declare a moratorium on executions in Illinois and to eventually pardon or commute the sentences of all those under death sentence in the state.

Brian Dugan, convicted of two other murders, admitted raping and murdering the child as early as 1985, but law enforcement officials rejected his admission. After the book was published, Dugan pleaded guilty to the crimes on July 28, 2009.

Three former DuPage County prosecutors and four sheriff's officers were indicted in 1996 on

charges of lying and concealing evidence to convict Cruz and Hernandez. They were acquitted, but in 2000, the DuPage County Board paid \$3.5 million to settle lawsuits brought by Cruz, Hernandez and third former defendant Stephen Buckley. Charges against Buckley were dropped in 1987.

Other recommended readings regarding the possible innocence of people sentenced to death include:

Nick Davies, *WHITE LIES: RAPE, MURDER, AND JUSTICE TEXAS STYLE* (Pantheon Books 1991) (the story of Clarence Earl Brantley, an African American sentenced to death in Texas and later exonerated, who became a suspect because of his race and whose trial was influenced by racial prejudice).

Pete Earley, *CIRCUMSTANTIAL EVIDENCE: DEATH, LIFE, AND JUSTICE IN A SOUTHERN TOWN* (Bantam Books 1995) (the story of Walter McMillan, an African American sentenced to death in Alabama and later exonerated, who became a suspect because of his race and whose trial was influenced by racial prejudice).

Margaret Edds, *AN EXPENDABLE MAN* (NYU Press, 2003) (describing the case of Earl Washington, Jr., a black, mentally retarded farm-hand, who spent nine years on death row and almost 18 years in Virginia prisons for a crime that DNA evidence proved he did not commit).

Roger Parloff, *TRIPLE JEOPARDY: A STORY OF LAW AT ITS BEST – AND WORST* (Little Brown & Co. 1996) (the story of John Knapp, who was sentenced to death in Arizona for the arson murders of his two daughters; five warrants were issued for his execution and he came within 48 hours of execution before being allowed to enter a plea of *nolo contendere* 19 years after the crime in exchange for a sentence of time served).