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Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim

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INNOCENCE PRESUMED: A NEW ANALYSIS OF INNOCENCE AS A CONSTITUTIONAL CLAIM

PAIGE KANEB*

ABSTRACT

The Supreme Court has never resolved whether innocence is a freestanding constitutional claim. Some have mistakenly contended that the Court held in 1993 that innocence is not a federal constitutional claim. As a result, much of the literature has failed to recognize that the door for such claims remains open or that relevant circumstances have changed and thus the constitutional analysis has changed as well.

In the past two decades, a consensus has emerged among states recognizing the right to judicial review of compelling claims of innocence. In the wake of DNA exonerations, the states reacted uniformly in providing petitioners with mechanisms to develop and present compelling innocence claims. Modern consensus, widely shared practice, and the doctrine of fundamental fairness now

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demonstrate that innocence claims fall squarely within the protections of the Eighth and Fourteenth Amendments.

The states have recognized the need to change their approach to innocence claims, but federal courts have not yet done so. In light of vast discrepancies in burdens of proof and procedural restrictions imposed by states, federal courts should establish a constitutional floor to ensure that no innocents fall through the gaps left open by state laws. The burden for proving innocence must be informed by the understanding upon which our criminal justice system is built: innocence can rarely be proven and thus must be presumed absent proof of guilt. When new evidence eviscerates the proof of guilt, innocence must be presumed anew.

This article makes four principal contributions. First, it proposes a new analysis of innocence as a freestanding constitutional claim that has not been advanced elsewhere. Second, it corrects misconceptions regarding the Court's holding in Herrera. Third, it catalogues the state laws and decisions that demonstrate the modern consensus among states that compelling claims of innocence require judicial review. Finally, it proposes a workable system of federal judicial review of innocence claims supported by model state and federal legislation.

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INTRODUCTION

Can a woman who was convicted following a fair trial in state court, but who has found new evidence of her innocence, seek federal review of that evidence? Imagine a woman sitting in prison, convicted of a crime she did not commit. She was arrested months after the crime when she had no verifiable alibi. She received a procedurally fair trial, but at the time, she simply did not have evidence to prove her innocence, nor could she prove the evidence of guilt was false.

Ten years later, an investigator finds new facts demonstrating the sole evidence of guilt was completely unreliable. The state courts agree that no reasonable jury who heard all of the evidence, old and new, would convict. However, the state's post-conviction innocence laws only provide for relief when there is affirmative evidence of innocence or when DNA evidence points to a different person.¹ Thus, the state courts affirm her conviction and life sentence even though she has proven that she is "not guilty." She cannot seek review of her innocence claim in federal court. Or can she?

Herrera v. Collins, the only case in which the Supreme Court has analyzed whether innocence is a freestanding constitutional claim, is often misinterpreted.² The *Herrera* Court assumed for the sake of

1. For example, the current standard for proving actual innocence in California requires a petitioner to "completely undermine" the prosecution's case and "point unerringly to innocence" with evidence that no "reasonable jury could have rejected." *In re Lawley*, 42 Cal. 4th 1231, 1239 (2008) (citations omitted) (internal quotation marks omitted). Most convictions do not involve biological evidence; thus there is no DNA evidence that can point to another person as the perpetrator. *See infra* note 9. Absent DNA, it is nearly impossible to meet this standard, no matter how innocent one is—even when there is not a shred of evidence of guilt that remains in light of the new evidence. Moreover, many states only permit motions for new trials on the grounds of actual innocence when there is DNA evidence that supports the claim. *See infra* note 140.

2. *Herrera v. Collins*, 506 U.S. 390, 417 (1993). In *Herrera*, a majority of Justices assumed for the sake of deciding the case that a "truly persuasive" claim of actual innocence would trigger constitutional protections; however, the majority also agreed that petitioner Leonel Herrera's newly discovered evidence of innocence—evidence that his then-deceased brother had shot and killed the two police officers Herrera had been convicted of killing—was unpersuasive. *Id.* at 417-19. Thus,

deciding the case that a “truly persuasive” claim of innocence would warrant federal habeas relief if there were no state avenue open to present the claim.³ Despite widespread assertions to the contrary, the question of whether innocence is a freestanding constitutional claim remains open today.⁴

The Court’s discussion in *Herrera*, along with its due process jurisprudence, demonstrates the importance of widely shared practice in determining what fundamental fairness requires. In 1993, when the Court decided *Herrera*, only nine states reviewed innocence claims raised at any time after conviction, while thirty-five states required that such claims be raised within sixty days to three years of conviction.⁵ This is no longer the state of the law.⁶

When faced with DNA exonerations and the undeniable evidence that innocent people are wrongfully convicted, the states uniformly

without resolving whether a persuasive showing of innocence would entitle an inmate to federal habeas relief, the Court held that *Herrera* was not entitled to relief. *Id.* However, the case is often misinterpreted and cited for the erroneous proposition that the federal courts cannot review compelling claims of innocence or that the Constitution permits the execution of someone who is actually innocent. *See infra* notes 86-90 and accompanying text.

3. *Id.* at 417 (“We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.”).

4. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013); *House v. Bell*, 547 U.S. 518, 554 (2006). Last year, in *McQuiggin*, the Supreme Court noted that it has “not resolved whether a prisoner may be entitled to [federal] habeas relief based on a freestanding claim of actual innocence.” *McQuiggin*, 133 S. Ct. at 1931. Similarly, in *House*, the Court reiterated that in *Herrera*, “the Court assumed without deciding 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.” *House*, 547 U.S. at 554 (quoting *Herrera*, 506 U.S. at 417) (internal quotation marks omitted). The *House* Court also “decline[d] to resolve” the question because *House* had barely met the standard for a gateway claim of actual innocence (a showing of innocence sufficient to excuse procedural defaults and allow the federal courts to consider otherwise barred constitutional claims on their merits), and the Court had previously decided the standard for a gateway innocence claim was lower than the theoretical showing that would be required to trigger the freestanding claim the Court assumed, *arguendo*, existed. *Id.* at 555.

5. *Herrera*, 506 U.S. at 410-11.

6. *See infra* note 140 and accompanying text.

recognized the need to change their approach to post-conviction claims of innocence.⁷ Currently, forty-nine states and the District of Columbia provide judicial review of innocence claims without conviction-related time limits.⁸ This widely shared practice demonstrates that the right to judicial review of compelling claims of innocence is fundamental and thus protected by the Due Process Clause of the Fourteenth Amendment. It is possible that this right always existed, but simply lay dormant while the prospect of an innocent person in prison was largely theoretical. Further, the modern consensus prohibiting the punishment of the innocent that has emerged since *Herrera* also demonstrates that innocence claims fall within the purview of the Eighth Amendment.

As shown in this article, federal judicial review of innocence claims is necessary. Many states have unduly high burdens for proving innocence. For instance, some states require affirmative evidence of innocence, while many others require DNA evidence.⁹ Only a handful of states have recognized what the Supreme Court has in a different context: that the Constitution cannot permit the conviction of a person no reasonable trier of fact would convict.¹⁰

7. See *infra* note 140 and accompanying text.

8. See *infra* note 140 and accompanying text.

9. See *infra* note 140. Yet physical evidence that could be subject to DNA testing may not exist in many criminal cases—and that evidence may have been lost or destroyed before it could be subjected to DNA testing. *Department of Justice Oversight: Funding Forensic Sciences—DNA and Beyond: Hearing Before the S. Subcomm. on Admin. Oversight & the Court of the S. Comm. on the Judiciary*, 108th Cong. 23 (2003) [hereinafter *Department of Justice Oversight*] (statement of Michael M. Baden, M.D., Director, Medicolegal Investigations Unit, New York State Police) (“But in my examination of the literature and DOJ statistics, less than 1 percent of all murders in this country involve sexual assault. They get a lot of publicity in the papers, but are small in number, fortunately. In my calculations, in less than 10 percent of murders does the perpetrator leave DNA evidence behind. Most murders are by gunshots from a distance. About 5 percent of crime labs’ workload involves DNA analysis.”).

10. *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (“The Constitution prohibits the criminal conviction of any person except upon proof of guilty beyond a reasonable doubt.”); *In re Winship*, 397 U.S. 358, 362 (1970). In *Jackson*, the Supreme Court explained that, when an inmate claims there was insufficient evidence for a conviction, federal courts must review state convictions by viewing the evidence “in the light most favorable to the prosecution” and determining whether “any rational trier of fact could have found the essential elements of the

Part I discusses the importance of federal review to state prisoners claiming innocence, along with existing statutory limits on federal review. It reviews the Supreme Court's seminal case on innocence, *Herrera v. Collins*, and corrects common misconceptions in legal scholarship regarding the Court's holding. Part I also covers the status of freestanding innocence claims post-*Herrera* and more recent Supreme Court guidance on the constitutional stature of innocence.

Part II proposes a new constitutional analysis of innocence claims in light of changed circumstances since 1993 when the Supreme Court decided *Herrera*. When faced with concrete evidence that innocent people are sometimes wrongfully convicted, the states reacted with near-uniformity to provide inmates with mechanisms to obtain judicial review of compelling innocence claims without time bars related to the conviction date.¹¹ This widely shared and near-uniform practice demonstrates that the right to present newly discovered evidence of innocence, even if it is discovered decades after trial, is fundamental. Thus, due process requires that federal courts review compelling claims of innocence when there is no state avenue open to process the claim.¹²

crime beyond a reasonable doubt.” *Jackson*, 443 U.S. at 318-19. Yet the Constitution should not permit the continued punishment of a prisoner who has new evidence that establishes no reasonable jury could now find proof beyond a reasonable doubt. After all, why should a conviction following a trial in which the jury did not hear all of the evidence be entitled to more weight than a conviction following a trial in which the jury did hear all of the evidence relevant to guilt and innocence?

11. See *infra* note 140 and accompanying text.

12. The Fourteenth Amendment requires that state and federal procedures comport with “fundamental fairness,” and not “offend[] . . . principle[s] of justice that [are] deeply rooted in the traditions and conscience of our people.” *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996) (citations omitted) (internal quotation marks omitted) (discussing U.S. CONST. amend. XIV § 1). The Supreme Court has explained that the “near-uniform” recognition of a right or application of a rule can demonstrate that a violation thereof “offends a principle of justice that is deeply rooted in the traditions and conscience of our people.” *Id.* Similarly, the Court has noted that “widely shared practice” is one of the “concrete indicators of what fundamental fairness and rationality require.” *Schad v. Arizona*, 501 U.S. 624, 640 (1991).

Further, these changed circumstances demonstrate an emergent modern consensus prohibiting the punishment of the innocent.¹³ This modern consensus is supported by the recognition that no legitimate penological purpose is served by punishing the innocent and that *any* punishment is out of proportion to an innocent person's lack of culpability.¹⁴ As such, continued punishment without consideration of newly discovered evidence of innocence constitutes cruel and unusual punishment.

Part III of this article explores what it means to prove innocence in a criminal justice system designed to make determinations of guilt. The Founders understood that innocence cannot always be proven and instead must be presumed absent evidence of guilt.¹⁵ State mechanisms that require affirmative evidence of innocence or exculpatory DNA results have proven too narrow and resulted in the clear need for federal courts to establish a constitutional floor to protect the rights of the innocent.¹⁶ Further, “[t]he meaning of actual innocence as formulated by [Supreme Court procedural default precedent] does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty.”¹⁷ Part III demonstrates

13. Legislation and state practice are “objective indicia of society’s standards” of decency and “national consensus” regarding whether the practice in question violates the Eighth Amendment’s proscription against cruel and unusual punishment. *Graham v. Florida*, 560 U.S. 48, 61 (2010) (quoting *Roper v. Simmons*, 542 U.S. 551, 572 (2005)).

14. *See infra* Part II.B.

15. *See, e.g., Roush v. State*, 413 So. 2d 15, 23 (Fla. 1982) (“The concept of due process, the presumption of innocence, the requirement that only those shown to have violated published laws may be subjected to penal sanctions—these are principles that the founders of this Republic found so important that they insisted on their being written into the basic charter as the Bill of Rights.”).

16. The National Registry of Exonerations demonstrates that less than one quarter of all exonerations involve DNA, and that while all had some new evidence of innocence, the majority had their convictions overturned on grounds other than innocence. NAT’L REG’Y OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Apr. 21, 2014).

17. *Schlup v. Delo*, 513 U.S. 298, 329 (1995) (discussing *Murray v. Carrier*, 477 U.S. 478 (1986), and *Sawyer v. Whitley*, 505 U.S. 333 (1992)). The *Schlup* Court explained that such a showing, by a preponderance of the evidence, would allow a petitioner to pass through the gateway to have the Court consider his procedurally barred yet firmly established constitutional claims. *Id.* at 316. The

the reasons a similar, but more restrictive standard is appropriate for freestanding innocence claims. Part III also explores the legal consequences of a finding of innocence, including questions of collateral estoppel, double jeopardy, and potential effects on federal-state relations.

Part IV details a workable model for federal judicial review of compelling innocence claims. It demonstrates how the burden for proving innocence properly balances the “individual interest in avoiding injustice [which] is most compelling in the context of actual innocence,” with society’s interests in “finality,” “comity,” and conservation of “judicial resources.”¹⁸ Further, freestanding claims of innocence would fit neatly within existing federal court practices and would not be overly burdensome. Finally, Part IV offers model federal and state legislation to assist in developing a cohesive, effective, and efficient judicial system to identify and release innocent prisoners.

This article makes four principal contributions. First, it proposes a new analysis of innocence as a freestanding constitutional claim that has not been advanced elsewhere. Second, it corrects misconceptions regarding the Court’s holding in *Herrera*. Third, it catalogues the state laws and decisions that demonstrate the modern consensus that compelling claims of innocence require judicial review. Finally, it proposes a workable system of federal judicial review of compelling claims of innocence supported by model legislation.

I. STATE INNOCENCE UNDER EXISTING FEDERAL LAW

State prisoners may only seek federal review of habeas corpus claims when alleging violations of federal constitutional rights or federal laws.¹⁹ Thus, federal courts can only review innocence claims

innocence gateway is necessary because, as the Court had previously concluded, “a prisoner retains an overriding ‘interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.’” *Id.* at 321 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986)).

18. *Id.* at 324.

19. *Boumediene v. Bush*, 553 U.S. 723, 774 (2008); 28 U.S.C. § 2241(a), (c)(3) (2012) (“The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States”); 28 U.S.C. § 2254(a) (2012) (“The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas

raised by state prisoners if innocence, in and of itself, is a freestanding constitutional claim. As discussed further in Part I.C, the Supreme Court has “not resolved whether a prisoner may be entitled to [federal] habeas relief based on a freestanding claim of actual innocence.”²⁰ However, that is not the end of the inquiry. Part II establishes that innocence is a freestanding federal constitutional claim. The following sections discuss the need for federal review, existing impediments to such review, and Supreme Court precedent on this issue.

A. *The Importance of Federal Review*

Federal judicial review of constitutional claims remains vital to state prisoners, including the innocent. Federal courts continue to recognize constitutional violations after state courts have denied relief on the same bases.²¹ For instance, there are more than forty exonerees²² listed in the National Registry of Exonerations who were granted relief by federal courts after state courts had affirmed their convictions.²³

corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”).

20. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013).

21. *See* sources cited *supra* note 19.

22. The Registry defines an exoneree as “[a] person who was convicted of a crime and later officially declared innocent of that crime, or relieved of all legal consequences of the conviction because evidence of innocence that was not presented at trial required reconsideration of the case.” *Glossary*, NATIONAL NAT’L REGISTRY REG’Y OF EXONERATIONS, *available at* <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited June 2, 2014).

23. Ricardo Aldape Guerra, Chamar Avery, David Ayers, Gene Curtis Ballinger, Derrick Bell, Earl Berryman, David Boyce, Timothy Brown, Kum Yet Cheung, Jabbar Collins, Kenneth M. Conley, Cory Credell, Patrick Croy, Ricky Cullipher, Joseph D’Ambrosio, Robert Escalera, Charles Fain, Timothy Gantt, Jose Garcia, Terence Garner, Antoine Goff, Thomas Lee Goldstein, Harold Hall, Benjamin Harris, Dale Helmig, John Jackson, Lesly Jean, Levon Junior Jones, Paul Kamienski, Daniel Larsen, Rafael Madrigal, Benjamin Miller, Darrel Parker, Michael Piaskowski, Michael Porter, Thomas Sawyer, Stephen Schulz, George Seiber, Michael Smith, Larry Pat Souter, Gordon Steidl, Richard Sturgeon, John Tennison, and Eddie Triplett. *Archive of Cases*, NAT’L REG’Y OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Oct.

These cases demonstrate that federal courts discern constitutional violations missed by state courts, even when the violations resulted in the wrongful convictions of innocent men and women. For example, John Tennison's conviction was eventually overturned in federal court on the basis of evidence withheld by the police and prosecution—but only after the California courts first had denied his claims.²⁴ Despite the weakness of the case against Tennison, and the overwhelming strength of the evidence that had been withheld, Tennison was only able to obtain relief in federal court.²⁵ The prosecution subsequently dismissed all charges against Tennison.²⁶ Similarly, the other exonerees listed above in footnote 23 were forced to rely on constitutional violations independent of their innocence claims to obtain relief; unfortunately, however, not every innocent person can establish such a violation.

Federal courts should review claims of innocence for four reasons. First, as shown in Part II, innocence is a freestanding constitutional claim.²⁷ Thus, innocence claims are entitled to federal judicial review in their own right. Moreover, as detailed in Part IV, there is a workable system of review; due process demands that such a system be employed to identify constitutional violations.²⁸

Second, state restrictions on innocence claims, from requiring affirmative evidence of innocence or DNA evidence to limiting the

2, 2013). In some of these cases, the federal courts found the person actually innocent under the *Schlup* gateway standard in order to hear their constitutional claims, but, of course, none were found innocent under *Herrera* or had actual innocence as the basis for reversal. *Id.*

24. *Tennison v. Henry*, No. 98-3842 CW, 2003 WL 25851307, at *1 (N.D. Cal. Aug. 26, 2003). The suppressed evidence included a confession from Ricard, a man unrelated to Tennison, the identity of and statement from a witness who had identified Ricard as the killer, the existence and disposition of \$2500 from the Secret Witness Fund request for this case, the recantation and subsequent polygraph of one of the two prosecution witnesses, and a videotaped interview of a witness who contradicted the version of the facts offered by the two prosecution witnesses. *Id.* at *1-29, 36-36-46.

25. *Id.* at *47.

26. Maurice Possley, *John Tennison*, NAT'L REG'Y OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3680> (last visited Apr. 21, 2104.)

27. *See infra* Part II.

28. *See infra* Part IV.

presentation of newly discovered evidence to thirty days after its discovery,²⁹ fail to provide adequate process to all those entitled to constitutional protections. Federal courts must establish a constitutional floor to catch the innocent prisoners who fall through the large gaps left open by state laws.

Third, while there may be other mechanisms for reversal when new evidence rightly calls into question the fairness of a trial, those mechanisms have their own quirks and are not always available to every innocent person.³⁰ For instance, consider a declaration from an expert recanting his trial testimony. The declaration explains that the expert relied on a scientific technique that is no longer valid, and as a result, his opinion is no longer reliable. If the expert testimony was the only evidence of guilt, the recantation could perhaps support a false testimony claim. However, in 2012, the California Supreme Court held that:

[O]ne does not establish false evidence merely by presenting evidence that an expert witness has recanted the opinion testimony given at trial. Likewise, when new expert opinion testimony is offered that criticizes or casts doubt on opinion testimony given at trial, one has not necessarily established that the opinion at trial was *false*.³¹

Similarly, the Supreme Court has only recognized that the Constitution requires reversal when the prosecution knew or should have known that the testimony was false; it has not extended this rule to situations in which the prosecution had no reason to know the testimony was false.³²

Fourth, when other routes to reversal are pursued, the person is often left without a finding of innocence and vulnerable to claims that he or she was released “on a technicality.”³³ Moreover, the lack of

29. See *infra* note 140.

30. For instance, in California, the standard for habeas relief is much lower for claims of ineffective assistance of counsel, prosecutorial misconduct, and false testimony. *In re Lawley*, 179 P.3d 891, 898-99 (Cal. 2008).

31. *In re Richards*, 289 P.3d 860, 870-71 (Cal. 2012).

32. *Cash v. Maxwell*, 132 S. Ct. 611, 615 (2012) (Scalia, J., dissenting); *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959).

33. See, e.g., *Man Freed From Prison After 20 Years Behind Bars*, KTVU (Mar. 28, 2011, 10:15 PM), <http://www.ktvu.com/news/news/man-freed-from->

such a finding can affect the wrongfully convicted person's ability to obtain compensation and to have arrest records sealed, along with employability, reputation, and other collateral consequences that result from convictions for serious crimes, even when those convictions have been reversed for constitutional violations and charges are subsequently dismissed.³⁴

Federal courts can provide relief to inmates when they have been denied procedural constitutional protections³⁵ designed to protect the innocent from wrongful conviction.³⁶ Indeed, the majority stated in

prison-after-20-years-behind-bars/nKWsL/. Of course, constitutional protections are not mere technicalities. Further, to obtain relief, generally an inmate must show both a constitutional violation and a "reasonable probability" that absent that violation, the result would have been "different"—in other words, that he or she probably would have been acquitted. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 694 (1984).

34. For example, when Maurice Caldwell was released after spending 20 years in prison for a crime he did not commit, the prosecutor repeatedly stressed the lack of a finding of innocence, even though Caldwell's conviction was reversed because his attorney was ineffective in that he failed to investigate the evidence of Caldwell's innocence. *See KTVU, supra* note 33; Paige Kaneb, *DA Should Admit Convicting an Innocent Man*, SFGATE (April 12, 2011, 4:00 AM), <http://www.sfgate.com/opinion/openforum/article/D-A-should-admit-convicting-an-innocent-man-2375255.php>. As a result, it has been more difficult for Caldwell to obtain compensation, because, although his criminal record shows that his conviction was overturned and the charges subsequently dismissed, the record was not sealed or the conviction otherwise removed from his record.

35. *See* sources cited *supra* note 19.

36. *See, e.g., Coy v. Iowa*, 487 U.S. 1012, 1016-20 (1988) ("[C]onfrontation [of witnesses] is essential to fairness" because "it is always more difficult to tell a lie about a person 'to his face,'" and "face-to-face presence" may "confound and undo the false accuser . . ."); *Strickland*, 466 U.S. at 711 (Marshall, J., dissenting) (arguing that in requiring a showing of prejudice for ineffective assistance of counsel claims, a majority of the Supreme Court had assumed that the "only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted"); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979) ("The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions."); *United States v. Nixon*, 418 U.S. 683, 709 (1974) (compulsory process meets the "need to develop all relevant facts" because "[t]he ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts"); *In re Winship*, 397 U.S. 358, 363-64 (1970) (reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error" and "[i]t is critical that the

Herrera that the many constitutional rights afforded to criminal defendants “ensur[e] against the risk of convicting of an innocent person.”³⁷ Similarly, Justice O’Connor, in her concurrence in *Herrera*, explained 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.”³⁸ However, since *Herrera*, we have learned how often those unparalleled protections can fail.³⁹

For the Constitution to provide procedural safeguards to protect the innocent from punishment, yet not prohibit the punishment of the innocent simply because they had the benefit of a procedurally fair trial would be a misguided elevation of form over substance. It offends the very notion of due process to deny judicial review of new evidence and keep the innocent in prison simply because—even though evidence proving innocence had not yet been discovered—they received a “fair” trial.

Federal review of compelling claims of innocence is thus both needed and required by the Constitution.⁴⁰ The following section discusses current limitations on federal review affecting freestanding claims of innocence.

B. Legislative Limitations

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), federal courts can grant habeas corpus relief to a state prisoner “only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”⁴¹ Moreover, federal courts may not grant relief for constitutional claims that were

moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned”); *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (“Without [the right to counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

37. *Herrera v. Collins*, 506 U.S. 390, 398-99 (1993).

38. *Id.* at 420 (O’Connor, J., concurring).

39. The National Registry of Exonerations lists 1,351 exonerees for whom those protections have failed, the vast majority of whom were exonerated after the Supreme Court decided *Herrera*. NAT’L REG’Y OF EXONERATIONS, *supra* note 16.

40. *See infra* Part II.

41. 28 U.S.C. § 2254(a) (2012).

denied on the merits by a state court unless the denial was “contrary to, or involved an unreasonable application of, clearly established” federal law or “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented” to the state court.⁴² Unfortunately, the Supreme Court has yet to firmly establish innocence as a freestanding constitutional claim. Thus, the narrow limitations of AEDPA, coupled with the Supreme Court’s failure to hold that innocence is a freestanding constitutional claim, preclude lower federal courts from reviewing the merits of freestanding claims of innocence.⁴³ The Tenth Circuit acknowledged this position in response to one inmate’s evidence of innocence: “As much as these recantations give us pause, if *Herrera* is to be revisited, it is not for us to do so.”⁴⁴

42. 28 U.S.C. § 2254 (d)(1)-(2) (2012) (“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”).

43. *See, e.g., Ortiz v. Yates*, No. CIV S-08-2165-JAM-TJB, 2010 WL 4628197, at *33 (E.D. Cal. Nov. 5, 2010) (“to the extent Petitioner asserts a freestanding actual innocence claim, he is not entitled to relief because . . . the United States Supreme Court has expressly left open the question of whether a freestanding actual innocence claim based on newly discovered evidence constitutes grounds for habeas relief in a non-capital case. In the absence of Supreme Court authority establishing the cognizability of a freestanding actual innocence claim on federal habeas review, the California Supreme Court’s rejection of petitioner’s freestanding actual innocence claim could not be contrary to, or involve an unreasonable application of, ‘clearly established’ Supreme Court authority.” (quoting *Carey v. Musladin*, 549 U.S. 70, 77 (2006); *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004))); *see also Wright v. Stegall*, 247 F. App’x. 709, 711 (6th Cir. 2007) (“Since the Supreme Court has declined to recognize a freestanding innocence claim in habeas corpus, outside the death-penalty context, this court finds that petitioner’s claim is not entitled to relief under available Supreme Court precedent.”).

44. *Allen v. Beck*, 179 F. App’x. 548, 551 (10th Cir. 2006).

C. The Seminal Case: Herrera v. Collins

The U.S. Supreme Court's holding in *Herrera* was very narrow: Herrera's showing of innocence was insufficient to entitle him to federal habeas relief.⁴⁵ To reach that conclusion, a majority of the Justices assumed, "for the sake of argument," that "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."⁴⁶ However, because Herrera's "showing of innocence" fell "far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist," the Court, without reaching the question of whether innocence is a valid constitutional claim, held that Herrera was not entitled to relief.⁴⁷ Notably, in both 2006 and 2013, the Supreme Court reaffirmed that it did not resolve whether innocence is a freestanding constitutional claim in *Herrera* and has not resolved the question in subsequent cases.⁴⁸

1. The Facts: Far from Ideal for Innocence

Leonel Herrera was convicted of killing a police officer in 1981 and sentenced to death in 1982; afterward, he pled guilty to the murder of another police officer.⁴⁹ The evidence of Herrera's guilt was strong: police discovered Herrera's Social Security card near the body of Officer David Rucker, who was "found lying beside his patrol car," shot in the head.⁵⁰ Shortly later, "Officer Enrique Carrisalez

45. See *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

46. *Id.*

47. *Id.* at 418-19.

48. See *House v. Bell*, 547 U.S. 518, 554-55 (2006) ("the Court [in *Herrera*] assumed without deciding 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.'" (quoting *Herrera*, 506 U.S. at 417)); *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013) (affirming that the Supreme Court has "not resolved whether a prisoner may be entitled to [federal] habeas relief based on a freestanding claim of actual innocence.").

49. *Herrera*, 506 U.S. at 394.

50. *Id.* at 422 (O'Connor, J., concurring).

stopped a car speeding away from the murder scene” and was shot in the chest by the driver.⁵¹ Before he was shot, however, Officer Carrisalez radioed in the car’s license plate, which revealed the car was registered to Herrera’s girlfriend.⁵² Moreover, Officer Carrisalez “lived long enough to identify” Herrera as the shooter.⁵³

Police also found blood “spattered” across the exterior and interior of Herrera’s girlfriend’s car, inside Herrera’s wallet, and on his jeans; the blood was the same enzyme profile and type as Officer Rucker’s and different than Herrera’s.⁵⁴ Further, Herrera had a letter on him when arrested, which “strongly implied that he had killed Rucker.”⁵⁵ Indeed, “[w]hen the police attempted to interrogate [Herrera] about the killings, he told them ‘it was all in the letter’ and suggested that, if ‘they wanted to know what happened’ they should read it.”⁵⁶

Years after his conviction, Herrera presented evidence that his by-then-deceased brother was the actual killer.⁵⁷ Herrera filed declarations from three people to whom his brother had confessed either shortly after the crime or in the years before he died, including his brother’s former attorney.⁵⁸ Additionally, Herrera filed a

51. *Id.*

52. *Id.* Herrera had a set of keys to the car on his person when he was arrested several days later. *Id.*

53. *Id.* A second witness, Enrique Hernandez, “also identified [Herrera] as the culprit.” *Id.*

54. *Id.*

55. *Id.* at 394-395 (majority opinion). The confession letter read, in part: “To whom it may concern: I am terribly sorry for those I have brought grief to their lives. Who knows why? We cannot change the future’s problems with problems from the past. What I did was for a cause and purpose. One law runs others, and in the world we live in, that’s the way it is. . . .What happened to [Officer] Rucker was for a certain reason. I knew him as Mike Tatum. He was in my business, and he violated some of its laws and suffered the penalty, like the one you have for me when the time comes. . . . The other officer that became part of our lives, me and Rucker’s (Tatum), that night had not to do in this [*sic*]. He was out to do what he had to do, protect, but that’s life.

Id. at 395 n.1 (second alteration in original).

56. *Id.* at 423 (O’Connor, J., concurring) (quoting *Herrera v. State*, 682 S.W.2d 313, 317 (Tex. Crim. App. 1984).

57. *Id.* at 396-97 (majority opinion).

58. *Id.* at 396.

declaration from his brother's son, who was nine at the time of the murders, who swore that he was in the car and saw his father shoot Officers Rucker and Carrisalez.⁵⁹ Based on this evidence, Herrera argued that, because he was innocent, his pending "execution would thus violate the Eighth and Fourteenth Amendments."⁶⁰

2. *Fractured Court Leaves Unresolved the Ultimate Issue*

After the Texas state courts denied relief,⁶¹ the federal district court granted a stay of execution,⁶² which the Court of Appeals for the Fifth Circuit promptly vacated based upon its understanding that evidence of innocence is not a ground for federal habeas relief.⁶³ The United States Supreme Court subsequently granted certiorari.⁶⁴

59. *Id.* at 397; see also *Leonel Herrera*, CTR. ON WRONGFUL CONVICTIONS, BLUHM LEGAL CLINIC, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/issues/deathpenalty/wrongfulexecutions/leonel-herrera.html> (last visited April 21, 2014).

60. *Herrera*, 506 U.S. at 396-98.

61. *Id.* at 395-96. Herrera filed his evidence of innocence first in the state courts, but was denied relief without an evidentiary hearing. *Id.* The "State District Court . . . [found] that 'no evidence at trial remotely suggest[ed] that anyone other than [petitioner] committed the offense.'" *Id.* at 396 (second and third alterations in original) (quoting *Ex parte Herrera*, No. 81-CR-672-C, ¶ 35 (Tex. 197th Jud. Dist., Jan. 14, 1991)). While this is an odd justification for finding newly discovered evidence of innocence insufficient, the evidence of Herrera's guilt at trial was, as discussed above, overwhelming. The Texas Court of Criminal Appeals affirmed the lower court's decision. *Id.* (citing *Ex parte Herrera*, 819 S.W.2d 528 (Tex. Crim. App. 1991)).

62. *Id.* at 397. The federal district court granted Herrera's request for a stay of execution "in order to ensure that Petitioner can assert his constitutional claims and out of a sense of fairness and due process." *Id.* (quoting *Herrera v. Texas*, No. M-92-30, at 38-39 (S.D. Tex. Feb. 17, 1992)).

63. *Id.* at 397-97 (citing *Herrera v. Collins*, 954 F.2d 1029, 1032 (5th Cir. 1992)). The Fifth Circuit explained that, "[a]bsent an accompanying constitutional violation," Herrera's freestanding "claim of actual innocence was not cognizable because, under *Townsend v. Sain*, 372 U.S. 293, 317 (1963), 'the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.'" *Id.* (full citation omitted) (quoting *Herrera*, 954 F.2d at 1034).

64. *Id.*

Chief Justice Rehnquist authored the opinion of the Court, in which Justices O'Connor, Kennedy, Scalia, and Thomas joined.⁶⁵ The majority held that Herrera's showing of innocence was insufficient to meet the hypothetical "extraordinarily high" "threshold showing" that would be required to trigger a freestanding claim of innocence—a claim the Court only assumed existed for the sake of deciding the case.⁶⁶ Thus, because Herrera's showing was inadequate, the Court had no reason to reach the constitutional question of whether innocence is a freestanding claim for federal habeas relief.

Justice O'Connor authored a concurring opinion, which Justice Kennedy joined.⁶⁷ Justice Scalia wrote a separate concurrence, which Justice Thomas joined.⁶⁸ Justice White also authored a separate concurrence, but did not join the majority's opinion.⁶⁹ Justice Blackmun, joined in part by Justices Stevens and Souter, dissented from the Court's opinion and explained that the Court should have held that a persuasive showing of innocence would render a pending execution unconstitutional under the Eighth and Fourteenth Amendments.⁷⁰

While the Court's holding was narrow and left the ultimate issue unresolved, Chief Justice Rehnquist, in lengthy discussion that has resulted in much confusion, suggested that innocence is not a freestanding constitutional claim.⁷¹ Chief Justice Rehnquist noted that the Supreme Court had never held that innocence is a freestanding constitutional claim, because "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."⁷²

According to Chief Justice Rehnquist, the Eighth Amendment applies only to sentencing challenges; thus, because Herrera had

65. *Id.* at 390.

66. *Id.* at 417.

67. *Id.* at 420 (O'Connor, J., concurring). *See* discussion *infra* Part I.C.4.ii.

68. *Id.* at 427-28 (Scalia, J., concurring). *See* discussion *infra* Part I.C.4.iv.

69. *Id.* at 429 (White, J., concurring). *See* discussion *infra* Part I.C.4.iii.

70. *Id.* at 430 (Blackmun, J., dissenting). *See* discussion *infra* Part I.C.4.i.

71. *Id.* at 400-17 (majority opinion).

72. *Id.* at 400 (emphasis omitted) (quoting *Townsend v. Sain*, 372 U.S. 293, 317 (1963)). Chief Justice Rehnquist went on to state that "[t]his rule is grounded in 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." *Id.*

challenged his conviction and not his sentence, the Eighth Amendment arguably did not apply to his claim.⁷³ In response however, Justice Blackmun pointed out that the “legitimacy of punishment is inextricably intertwined with guilt.”⁷⁴ Thus, “whether [Herrera] is viewed as challenging simply his death sentence or also his continued detention, he [would] still be challenging the State’s right to punish him.”⁷⁵

Regarding the Fourteenth Amendment and due process, Chief Justice Rehnquist analyzed Herrera’s claim under procedural due process standards.⁷⁶ He explained that Herrera was not legally innocent, but rather that he “c[a]me before this Court . . . as one who has been convicted by due process of law of two capital murders.”⁷⁷ “The question before us, then, is not whether due process prohibits the execution of an innocent person, but rather whether it entitles petitioner to judicial review of his ‘actual innocence’ claim,” an issue “properly analyzed only in terms of procedural due process.”⁷⁸

Reviewing “contemporary practice in the States” in analyzing Herrera’s due process challenge, Chief Justice stated that in 1993, when the Court decided *Herrera*, only fifteen states allowed inmates to raise motions for new trials based on newly discovered evidence more than three years after conviction.⁷⁹ Of those fifteen states, only nine allowed inmates to raise those motions with no time limits.⁸⁰ At the time, Texas was one of seventeen states that required such motions to be made within sixty days of judgment.⁸¹ The time limits in eighteen other states ranged from one to three years.⁸²

Chief Justice Rehnquist pointed to these state practices in concluding that “we cannot say that Texas’ refusal to entertain petitioner’s newly discovered evidence eight years after his conviction

73. *Id.* at 406-07.

74. *Id.* at 434 (Blackmun, J., dissenting).

75. *Id.* at 433-34.

76. *Id.* at 407 (majority opinion).

77. *Id.* at 407 n.6.

78. *Id.*

79. *Id.* at 411.

80. *Id.* at 411 & n.11.

81. *Id.* at 410 & n.8.

82. *Id.* at 410 & n.10.

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transgresses a principle of fundamental fairness ‘rooted in the traditions and conscience of our people.’”⁸³ However, this reasoning compels a different conclusion today.⁸⁴

Ultimately, the Court assumed for the sake of argument that “a truly persuasive demonstration of actual innocence” would “render the execution of [Herrera] unconstitutional,” but nonetheless denied Herrera’s claim because he had not met the hypothetical burden of proof required to trigger such a claim.⁸⁵

3. *Correcting the Misconceptions*

Portions of the Court’s discussion in *Herrera*, read in isolation, have led legal scholars⁸⁶, practitioners⁸⁷, and courts astray.⁸⁸

83. *Id.* at 411 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

84. *See* discussion *infra* Part II.

85. *Id.* at 417 (internal quotation marks omitted).

86. *See, e.g.*, Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 373 (2008) (alleging that the Court in *Herrera* “rejected the view that the Constitution forbids execution of factually innocent defendants who were convicted after a fair trial”); James C. Harrington & Anne More Burnham, *Texas’s New Habeas Corpus Procedure for Death-Row Inmates: Kafkaesque—And Probably Unconstitutional*, 27 ST. MARY’S L.J. 69, 78 (1995) (claiming that in “*Herrera v. Collins*, the Court imposed further restrictions by eliminating federal habeas relief for death-row inmates claiming actual innocence.”) (footnote omitted).

87. *See, e.g.*, *Jordan v. Sec’y, Dep’t of Corr.*, 485 F.3d 1351, 1353 (11th Cir. 2007) (petitioner’s appointed counsel, relying on *Herrera*, 506 U.S. at 400, “conceded, on behalf of [his client], that a freestanding claim of actual innocence [does] not provide a basis for federal habeas relief”).

88. *See, e.g.*, *Rozelle v. Sec’y, Fla. Dep’t of Corr.*, 672 F.3d 1000, 1010 (11th Cir. 2012) (asserting that the *Herrera* Court held that “no federal habeas relief is available for freestanding, non-capital claims of actual innocence”); *Zuern v. Tate*, 336 F.3d 478, 482 n.1 (6th Cir. 2003) (citing to *Herrera* for the proposition that “[t]he Supreme Court has held that newly discovered evidence does not constitute a freestanding ground for federal habeas relief, but rather that the newly discovered evidence can only be reviewed as it relates to an ‘independent constitutional violation occurring in the underlying state criminal proceeding’”); *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003) (“[T]he Supreme Court held [in *Herrera*] that such a claim does not state an independent, substantive constitutional claim and was not a basis for federal habeas relief. However, it left open whether a truly persuasive actual innocence claim may establish a constitutional violation sufficient to state a claim for habeas relief. The Fifth Circuit has rejected this possibility and held that claims of actual innocence are not cognizable on federal habeas review.” (citation omitted)); *Milone v. Camp*, 22 F.3d 693, 700 (7th Cir.

Numerous legal scholars have advanced the erroneous claim that the Supreme Court held in *Herrera* that innocence is *not* a freestanding constitutional claim.⁸⁹ On the contrary, as discussed above, the

1994), (citing *Herrera*, 506 U.S. at 400-01, in asserting that since petitioner is not sentenced to death, “Supreme Court precedent does not allow a federal court to issue a writ of habeas corpus only on the ground that [petitioner] is, or might be, innocent of . . . murder”).

89. See, e.g., David Niven, *Unlocking the Eighth Amendment’s Power to Make Innocence a Constitutional Claim: The ‘Objective’ Views of State Legislators*, 18 BARRY L. REV. 213, 224 (2103) (“The Court has ruled [in *Herrera*] actual innocence is not itself a constitutional claim . . .”) (quoting *Herrera*, 506 U.S. at 404) (internal quotation marks omitted); Anna Naimark et al., *Troy Davis Execution Exposes Inequity Between the Capital Punishment Cases with DNA Evidence and Those Without*, 19 HUM. RTS. BRIEF 25, 25 (Sept. 2011) (“The majority in *Herrera* ultimately found that ‘a claim of “actual innocence” is not itself a constitutional claim’ and may have a ‘very disruptive effect’ on the justice system.”); Trevor M. Wilson, *Innocent Owners and Actual Innocence: Raising Innocence as a Constitutional Defense to Government Punishment*, 19 S. CAL. REV. L. & SOC. JUST. 377, 398 (2010) (“The Court has similarly reverted to its strict rejection of innocence as a defense in the habeas corpus context.”); Sophia S. Chang, Note, *Protecting the Innocent: Post-Conviction DNA Exoneration*, 36 HASTINGS CONST. L.Q. 285, 303 (2009) (“[I]n *Herrera v. Collins*, the Supreme Court decided that claims of actual innocence are not constitutional claims. . . . Habeas corpus cannot be used by those who simply proclaim that they are factually innocent.”) (footnote omitted); Bernard A. Williams, *Guilty Until Proven Innocent: The Tragedy of Habeas Capital Appeals*, 18 J.L. & POL. 773, 795 (2002) (“In a seminal case decided in 1993, *Herrera v. Collins*, the Supreme Court held that newly discovered evidence of actual innocence cannot form the basis of federal habeas review unless the evidence is also accompanied by a claim of a constitutional violation.”); Kimberly A. Orem, *Evolution of an Eighth Amendment Dichotomy: Substantive and Procedural Protections Within the Cruel and Unusual Punishment Clause in Capital Cases*, 12 CAP. DEF. J. 345, 355 (2000) (“In *Herrera v. Collins* the Court held that a claim of actual innocence is not an independent basis for federal habeas relief.”); John F. Erbes & Stephen W. Baker, *Survey of Illinois Law: Criminal Law and Procedure*, 21 S. ILL. U. L.J. 759, 772 (1997) (“[T]he Court [in *Herrera*] had found such a claim [of innocence] was not a federal constitutional issue”); Ariane M. Schreiber, Note, *States that Kill: Discretion and the Death Penalty—A Worldwide Perspective*, 29 CORNELL INT’L L.J. 263, 299 (1996) (“In *Herrera v. Collins*, the Supreme Court held that a ‘claim of actual innocence based on newly discovered evidence is not ground for habeas relief.’”) (quoting *Herrera*, 506 U.S. at 390); Harrington & Burnham, *supra* note 86, at 78 (“The Supreme Court held in *Herrera* that a claim of actual innocence does not entitle a death-row inmate to federal relief because the trial court is the appropriate forum for determining factual innocence or guilt in criminal cases.”); Jennifer Breuer, *Habeas Corpus—Limited Review for Actual Innocence*, 84 J. CRIM. L. & CRIMINOLOGY 943, 957 (1994) (“Chief Justice

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Herrera Court left open the question of whether innocence is a freestanding constitutional claim; indeed, as recently as 2013, the Supreme Court reaffirmed that it has “not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence.”⁹⁰

A similarly erroneous claim propagated by some legal scholars is that the Supreme Court held in *Herrera* that the Constitution permits the execution of an innocent person.⁹¹ Justice O’Connor’s concurrence in *Herrera* addressed this exact misconception and

Rehnquist, writing for the majority, affirmed the Fifth Circuit’s decision by relying on the rule that absent an accompanying constitutional violation, a claim of actual innocence is not a ground for federal habeas corpus relief. The Court thus reaffirmed 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.’”) (footnotes omitted) (quoting *Herrera*, 506 U.S. at 400); Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 618 (“[I]n *Herrera v. Collins*, the Court declared that the claim of ‘actual innocence’ is ‘not itself a constitutional claim’”) (quoting *Herrera*, 506 U.S. at 404).

90. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013).

91. Kathleen Callahan, Note, *In Limbo: In Re Davis and the Future of Herrera Innocence Claims in Federal Habeas Proceedings*, 53 ARIZ. L. REV. 629, 633 (2011) (“[I]n the 1993 case *Herrera v. Collins*, the Supreme Court held that punishing a person who can establish innocence does not violate the Constitution.”); Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121, 121 (2005) (“[T]he *Herrera* Court found that executing such a prisoner who can show he is probably innocent is constitutional.”); Michael Mello, “*In the Years When Murder Wore the Mask of Law*”: *Diary of a Capital Appeals Lawyer (1983-1986)*, 24 VT. L. REV. 583, 601 n.75 (2000) (“The Court held [in *Herrera*] that executing an innocent person does not violate the Constitution. Electrocuting or hanging or gassing or shooting a totally innocent man does not violate the Constitution’s guarantees of ‘due process of law’ and ‘equal protection’ of the law. Hanging or injecting or gassing a totally innocent woman [sic] does not constitute ‘cruel and unusual punishment.’”); Stuart G. Friedman, *Hurdling the 6.500 Barrier: A Guide to Michigan Post-Conviction Remedies*, 14 T.M. COOLEY L. REV. 65, 86 n.122 (1997) (“[In] *Herrera v. Collins*, 506 U.S. 390 (1993), . . . the U.S. Supreme Court found that the federal [C]onstitution does not prohibit executing an actually innocent person as long as that person received a fair trial.”); Kelli Hinson, Comment, *Post-Conviction Determination of Innocence for Death Row Inmates*, 48 SMU L. REV. 231, 233 (1994) (“The Supreme Court has previously rejected this argument [that the Eighth and Fourteenth Amendments prohibit the execution of an innocent person] and held in *Herrera v. Collins* . . . that the criminal justice procedures already in place adequately protect an accused’s constitutional rights.”).

clarified that, “[n]owhere does the Court state that the Constitution permits the execution of an actually innocent person.”⁹²

4. *Herrera Claims: Counting the “Votes” for Innocence*

Since *Herrera*, lawyers and inmates have raised or attempted to raise freestanding innocence claims—often referred to as *Herrera* claims—in federal courts.⁹³ It is typically argued in favor of these claims that while a majority of the Court in *Herrera* assumed for the sake of deciding the case that innocence was a constitutional claim, a different majority would have held that the execution of an innocent person violates the Constitution.⁹⁴ Support for *Herrera* claims raised with this argument is found in Justice Blackmun’s dissenting opinion (joined in part by Justices Stevens and Souter), along with the concurring opinions of Justice O’Connor (joined by Justice Kennedy) and Justice White.⁹⁵ Both the Ninth Circuit and the California Supreme Court⁹⁶ have endorsed this view, as have a number of legal scholars.⁹⁷ However, the following questions accompany innocence claims based on this argument.

92. *Herrera*, 506 U.S. at 427 (O’Connor, J., concurring).

93. See, e.g., *Carriger v. Stewart*, 132 F.3d 463, 477-78 (9th Cir. 1997).

94. See, e.g., *id.* at 476 (“[A] majority of the Supreme Court [in *Herrera*] assumed, without deciding, that execution of an innocent person would violate the Constitution. A different majority would have explicitly so held.” (comparing *Herrera*, 506 U.S. at 417, with *id.* at 419 (O’Connor, J., joined by Kennedy, J., concurring), and *id.* at 430-37 (Blackmun, J., joined in part by Stevens & Souter, JJ., dissenting))); *In re Clark*, 855 P.2d 729, 760 (Cal. 1993) (“A majority of the [J]ustices of the United States Supreme Court have expressed a belief [in *Herrera*] that the Eighth and Fourteenth Amendments preclude execution of an innocent person. Their statements imply that in a capital case a claim of actual innocence of the crime of which the petitioner stands convicted must be considered regardless of when it is raised or if constitutional error affected the verdict.” (citing *Herrera*, 506 U.S. at 419-27, 429-46 (O’Connor, J., concurring; White, J., concurring; Blackmun, J., dissenting))).

95. See *Herrera*, 506 U.S. at 419-29 (O’Connor, J., concurring); *id.* at 429-430 (White, J., concurring); *id.* at 430-46 (Blackmun, J., dissenting).

96. See cases cited *supra* note 94.

97. See, e.g., Judith M. Barger, *Innocence Found: Retribution, Capital Punishment, and the Eighth Amendment*, 46 LOY. L.A. L. REV. 1, 5 (2012) (“[S]ix [J]ustices at least hypothetically agreed that such claims could be presented by individuals who had been sentenced to death”) (footnote omitted) (citing

i. The Dissent: Incarceration and Execution

The *Herrera* dissent makes clear that Justices Blackmun, Stevens, and Souter would have held that the Constitution prohibits the execution of someone who is innocent.⁹⁸ The dissenting Justices asserted that both the Eighth Amendment and the substantive Due Process Clause of the Fourteenth Amendment prohibit the execution of an innocent person.⁹⁹ In Justice Blackmun's words, "[n]othing

Herrera, 506 U.S. at 397-98, 417; *id.* at 428 (Scalia, J., concurring); *id.* at 435 (Blackmun, J., dissenting); James G. Clessuras, Note, *Schlup v. Delo: Actual Innocence as Mere Gatekeeper*, 86 J. CRIM. L. & CRIMINOLOGY 1305, 1309 (1996) ("Although Chief Justice Rehnquist would not express an opinion as to whether there is a constitutional prohibition against the execution of a person who has made a persuasive showing of actual innocence (discussing the purported prohibition only *arguendo*), six [J]ustices—three dissenting and three concurring—concluded that such a prohibition exists."); Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1700 (2008) ("Six Justices in *Herrera* agreed that the Fourteenth Amendment supports a freestanding claim for actual innocence.") (citing *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring); *id.* at 429 (White, J., concurring); *id.* at 435 (Blackmun, J., dissenting)).

98. See *Herrera*, 506 U.S. at 430-31 (Blackmun, J., dissenting). Justice Blackmun noted that the Court "really" had been "asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence." *Id.* at 430-31. In Justice Blackmun's view, the answer to this question is clear: "Despite the State of Texas' astonishing protestation to the contrary, I do not see how the answer can be anything but 'yes.'" *Id.* at 431 (citation omitted). Thus, according to the dissenting Justices, the Court should have held that an inmate on death row who could prove that he was probably innocent would be entitled to federal habeas relief and then remanded the case to the federal district court for an evidentiary hearing at which *Herrera* could attempt to prove his innocence. *Id.* at 430.

99. *Id.* at 430-36. Justice Blackmun explained that the Eighth Amendment "reflects evolving standards of decency" and prohibits "excessive" punishment. *Id.* at 431. The Court had previously held that death was excessive punishment even for crimes as serious as rape; in his view, if execution is an "excessive punishment for rape," it is certainly an even more excessive punishment for "someone who is actually innocent." *Id.* Thus, according to Justice Blackmun, the execution of one who can prove innocence would violate the Eighth Amendment because it is "at odds with any standard of decency that I can imagine." *Id.* Similarly, the Fourteenth Amendment prohibits government action that "shocks the conscience"; yet nothing, argued Justice Blackmun, could be "more shocking to the conscience" than to "execute a person who is actually innocent." *Id.* at 435-37 (quoting *Rochin*

could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent.”¹⁰⁰

If the question were confined to whether the Constitution prohibits the execution of an innocent person, these three Justices clearly would have so held. The *Herrera* dissent, however, did not resolve whether the Constitution also prohibits the continued incarceration of an innocent person. The dissent noted that “[i]t also may violate the Eighth Amendment to imprison someone who is actually innocent,” because “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”¹⁰¹ The dissent recognized, however, that as the Court had “noted” in the past, “death is different” from imprisonment in “both its severity and its finality.”¹⁰² Because unconstitutional incarceration was not the question before the Court, the dissent went no further than these observations.¹⁰³

Interestingly, Chief Justice Rehnquist and the majority took the position that if the Constitution forbids the execution of an innocent person, it must also forbid the imprisonment of an innocent person.¹⁰⁴ The majority noted that *Herrera* had not asserted an error in the imposition of the death sentence, but rather “that a fundamental error was made in finding him guilty . . . in the first place.”¹⁰⁵ Thus, merely to vacate *Herrera*’s death sentence would be “scarcely logical”: “[i]t would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison.”¹⁰⁶

v. California, 342 U.S. 165, 172 (1952)). Thus, the “execution of a person who can show that he is innocent comes perilously close to simple murder.” *Id.* at 446.

100. *Id.* at 430 (citations omitted) (citing *Ford v. Wainwright*, 477 U.S. 399, 406 (1986); *Rochin v. California*, 342 U.S. 165, 172 (1952)).

101. *Id.* at 432 n.2 (quoting *Robinson v. California*, 370 U.S. 660, 667 (1962)).

102. *Id.* (quoting *Beck v. Alabama*, 447 U.S. 625, 637 (1980))

103. *Id.*

104. *Id.* at 405 (majority opinion).

105. *Id.*

106. *Id.* More recently, in 2009, the Supreme Court assumed without deciding that innocence is a freestanding constitutional claim in a non-capital case. *Dist. Att’y’s Office for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 71-72 (2009). The Court in 2009 did not discuss the fact that it was extending this assumption outside

ii. The Nuance of Justice O'Connor

Justice O'Connor began her concurrence with an oft-cited and relatively straightforward statement: "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."¹⁰⁷ However, Justice O'Connor then continued that, "[r]egardless of the verbal formula, . . . the execution of a *legally and factually* innocent person would be a constitutionally intolerable event."¹⁰⁸ Herein lies the rub: Justice O'Connor reiterated Chief Justice Rehnquist's view that Herrera was legally guilty because he was convicted following a trial during which he received all the constitutional protections to which a criminal defendant is entitled.¹⁰⁹ By this reasoning, however, no defendant who received a procedurally fair trial could be legally innocent once convicted.¹¹⁰ The clause of "legal" innocence thus renders a freestanding claim of innocence a nullity; innocence is not a freestanding constitutional claim if it requires an independent constitutional violation.

What meaning did Justices O'Connor and Kennedy intend to be extracted from their concurrence? Justice O'Connor argued that the question before the Court was narrow and procedural as opposed to substantive.¹¹¹ The issue, according to her, was not whether a "State can execute the innocent" but rather "whether a fairly convicted and

of the context of execution for the first time. *Id.* This extension supports the *Herrera* Court's suggestion that the Constitution cannot forbid the execution of the innocent but permit their incarceration. Certainly, it would be difficult to argue that the Constitution forbids the execution of an innocent person, but permits a sentence of life without the possibility of parole—what a colleague has aptly described as the "passive aggressive death penalty." David Ball, Professor, Santa Clara University School of Law.

107. *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring).

108. *Id.* (emphasis added).

109. *Id.*

110. Presumably, if a convicted person were provided an opportunity to present the evidence of innocence and the court found the person actually innocent, the person would then be legally innocent. But such a system renders the innocent inmate incapable of obtaining federal habeas relief as he must prove that he is legally innocent to obtain review of his actual innocence claim by the federal courts, but he cannot obtain the status of legal innocence until his actual innocence claim is reviewed and a court finds him to be innocent.

111. *Herrera*, 506 U.S. at 420 (O'Connor, J., concurring).

therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, 10 years after conviction, notwithstanding his failure to demonstrate that constitutional error infected his trial.”¹¹² The answer, noted Justice O’Connor, would normally be no, as implied by the wording of the question.¹¹³ However, because of the “disturbing nature” of Herrera’s argument, and because this question “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,” Justice O’Connor argued that resolving the question was “neither necessary nor advisable.”¹¹⁴

Thus, there is language within the concurrence that supports the proposition that these two Justices would have held that innocence is a constitutional claim.¹¹⁵ After all, as noted above, Justice O’Connor began by stating that she could not disagree with the fundamental principle that executing the innocent is at odds with the Constitution.¹¹⁶ This comment, along with the nuances of her analysis, certainly implies that if the facts supported a compelling claim of innocence, and the execution of an innocent prisoner were pending, Justices O’Connor and Kennedy would have held that actual innocence is a freestanding constitutional claim.

iii. Justice White: Proposing a Standard

In his short opinion explaining why he concurred in the judgment, Justice White simply stated that “[i]n voting to affirm, he assume[d] that a [truly] persuasive showing of ‘actual innocence’ made after trial . . . would render unconstitutional” Herrera’s execution.¹¹⁷ “To be entitled to relief, however, [Herrera] 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

112. *Id.*

113. *Id.*

114. *Id.* at 420-21.

115. *Id.* at 419-27.

116. *Id.* at 419.

117. *Id.* at 429 (White, J., concurring).

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trier of fact could [find] proof of guilt beyond a reasonable doubt.”¹¹⁸ Justice White concurred in the decision to deny Herrera relief because Herrera’s evidence of innocence fell “far short of satisfying even” the minimum showing required by Justice White’s suggested standard.¹¹⁹ However, the fact that Justice White proposed a standard and also declined to join the majority opinion, which largely argued against innocence as a freestanding constitutional claim, suggests that he would have held that innocence is a freestanding constitutional claim were the evidence far more favorable to the petitioner.

*iv. Votes for the Constitution’s Permission to Execute
an Innocent Person*

Given Chief Justice Rehnquist’s discussion suggesting that neither the Eighth Amendment nor the Fourteenth Amendment’s protections were triggered by Herrera’s claim of innocence, there is no basis upon which to argue that Chief Justice Rehnquist would have held that innocence is a freestanding constitutional claim.

Likewise, it is clear that Justices Scalia and Thomas would have held that innocence is not a freestanding constitutional claim. Indeed, in perhaps the most surprising concurrence, Justice Scalia stated that the Court should have held that the Constitution permits the execution of a person who was fairly convicted, notwithstanding any new evidence to prove his innocence.¹²⁰ In Justice Scalia’s words, “as the Court’s discussion shows, it is perfectly clear what the answer is: There 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.”¹²¹

118. *Id.* (last alteration in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)).

119. *Id.*

120. *Id.* at 428-29 (Scalia, J., concurring).

121. *Id.* at 427-28. Justice Scalia argued that the Court should have answered the question upon which it had granted certiorari: “whether it violates due process or constitutes cruel and unusual punishment for a State to execute a person who, having been convicted of murder after a full and fair trial, later alleges that newly discovered evidence shows him to be ‘actually innocent.’” *Id.* at 427. However, despite reservations about its approach, Justice Scalia joined the Court’s opinion “because there is no legal error in deciding a case by assuming, *arguendo*, that an

Justice Scalia scolded the dissenters for applying “nothing but their personal opinions” to find the execution of a fairly convicted, but innocent person unconstitutional.¹²² “If the system that has been in place for 200 years (and remains widely approved) ‘shock[s]’ the dissenters’ consciences, perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of ‘conscience shocking’ as a legal test.”¹²³ Justice Scalia could not have known that the system that had been in place for two centuries would be completely revamped once the reality that innocent people can be convicted became undeniable.

v. Tallying the Votes

There is a strong argument that six of the Justices, as detailed above, would have held that innocence is a freestanding constitutional claim.¹²⁴ Unfortunately, five of these six Justices—Justices White, Blackmun, O’Connor, Stevens, and Souter—are no longer on the Court. Moreover, this argument has not yet successfully convinced the federal courts that innocence claims require federal constitutional protections.

vi. A Hint of Light: Recent Guidance from the Court

The Supreme Court has offered two further pieces of guidance since *Herrera*. As discussed above, the Supreme Court assumed without deciding in a 2009 decision that innocence is a freestanding constitutional claim in a non-capital case.¹²⁵ More importantly, in a one-paragraph opinion, also in 2009, the Supreme Court remanded Troy Davis’s case to the U.S. District Court for the Southern District of Georgia for an evidentiary hearing on Davis’s actual innocence

asserted constitutional right exists” and he understood “the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate.” *Id.* at 428 (footnote omitted).

122. *Id.* at 428.

123. *Id.* (alteration in original) (citation omitted).

124. See discussion *supra* Part I.C.4.i-iv.

125. *Dist. Att’y’s Office for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 71-72 (2009); see also discussion *supra* note 106 and accompanying text.

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claim.¹²⁶ The Court directed the lower court 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.”¹²⁷ The majority opinion was silent as to its underlying rationale and provided no authority, explanation, or discussion to support its decision.¹²⁸

Justices Scalia and Thomas, however, dissented, arguing that there is no federal constitutional innocence claim: thus Justices Scalia and Thomas implicitly recognized that the majority’s decision supports the argument that innocence is a freestanding constitutional claim.¹²⁹ Further, the dissenters argued that, even if the lower court held that innocence is a constitutional claim, it could not grant relief under AEDPA because the state court’s denial of the innocence claim was not “contrary to, or an unreasonable application of, ‘clearly established’” Supreme Court law.¹³⁰ According to Justice Scalia, the Supreme Court had thus sent the district court on “a fool’s errand.”¹³¹

The U.S. District Court for the Southern District of Georgia found that innocence is a freestanding constitutional claim, at least in the capital context, because the Eighth Amendment prohibits the execution of an innocent person.¹³² However, the district court also found that Mr. Davis’s evidence was not sufficiently persuasive to meet the high burden required to establish innocence and thus did not have to resolve the question of relief.¹³³

126. *In re Davis*, 557 U.S. 952, 952 (2009).

127. *Id.*

128. *Id.*

129. *Id.* at 955 (Scalia, J., dissenting).

130. *Id.* (quoting 28 U.S.C. § 2254(d)(1)) (“A state court cannot possibly have contravened, or even unreasonably applied, ‘clearly established Federal law, as determined by the Supreme Court of the United States,’ by rejecting a type of claim that the Supreme Court has not once accepted as valid.”).

131. *Id.* at 957.

132. *In re Davis*, No. CV409-130, 2010 WL 3385081, at *37-43 (S.D. Ga. Aug. 24, 2010).

133. *Id.* at *1, 61.

II. A NEW CONSTITUTIONAL ANALYSIS OF INNOCENCE AS A FREESTANDING CLAIM

In 1993, when the Supreme Court discussed whether innocence is a freestanding constitutional claim in *Herrera v. Collins*, very few people had been exonerated by DNA evidence.¹³⁴ Today, however, at least 316 people have been exonerated by DNA evidence; nearly one thousand have been exonerated without DNA evidence.¹³⁵

In response to DNA exonerations, state legislatures recognized the need to change the procedures in place for handling innocence claims in order to reflect evolving standards of decency and modern awareness regarding the requirements of fundamental fairness.¹³⁶ In 1993, only nine states placed no time limits on motions for new trials based on evidence of innocence, while the vast majority limited the time for presenting such motions to a short period after conviction.¹³⁷ State laws have changed drastically since then.¹³⁸

Currently, all fifty states and the District of Columbia recognize the post-conviction right to develop DNA evidence relevant to innocence, and all have deemed that right to be worthy of statutory protection.¹³⁹ Further, forty-nine states and the District of Columbia now allow post-conviction claims of innocence without time limits

134. See SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REG'Y OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989-2012, at 21 (June 2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (noting that the total number of DNA exonerations from 1989 to 1993 was 16, and the total number of DNA exonerations from 2008 to 2012 was 92).

135. *DNA Exoneree Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/> (last visited Apr. 21, 2014); *The Registry, Exonerations and False Convictions*, NAT'L REG'Y OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/learnmore.aspx> (last visited June 21, 2014).

136. See *infra* note 140 (discussing the state-by-state standards for handling actual innocence claims).

137. *Herrera v. Collins*, 506 U.S. 390, 410-11 (1993).

138. See *infra* note 140 (discussing the state-by-state standards for handling actual innocence claims).

139. *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited Oct. 27, 2013).

related to the conviction date; not a single one requires an independent constitutional violation, or a showing that the inmate was deprived of a fair trial, in order to obtain relief.¹⁴⁰ Only Delaware continues to

140. See ALA. R. CRIM. P. 32.1(e)(5); ALA. R. CRIM. P. 32.2(c) (requiring motions based on “newly discovered material facts” that establish innocence be brought within six months of the discovery of those facts); ALASKA STAT. §12.72.020(b) (2008) (courts may hear claims based on “newly discovered evidence” that establishes innocence by “clear and convincing evidence” and which were presented with “due diligence”); ARIZ. REV. STAT. ANN. § 13-4240(K) (2014) (“Notwithstanding any other provision of law that would bar a hearing as untimely, if the results of [post-conviction DNA] testing are favorable to the petitioner, the court shall order a hearing and make any further orders that are required”); ARK. CODE ANN. § 16-112-201(a)(1)-(2) (2005) (“Except when direct appeal is available, a [convicted person] may commence a proceeding to secure relief” if “[s]cientific evidence not available at trial establishes . . . actual innocence” or the “scientific predicate for the claim could not have been previously discovered through the exercise of due diligence and the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense.”); *In re Clark*, 855 P.2d 729, 760-61 (Cal. 1993) (en banc) (holding that procedural bars to habeas petitions based on “newly discovered evidence” do not apply if the petitioner is “actually innocent”); COLO. R. CRIM. P. 35(c)(3)(IV), (VII)(b) (providing right to make application for post-conviction relief based on “evidence that could not have been discovered previously through the exercise of due diligence”); *Farrar v. People*, 208 P.3d 702, 706-07 (Colo. 2009) (en banc) (explaining that “newly discovered evidence” must be discovered through “due diligence” and must be “affirmatively probative of the defendant’s innocence”); *Boles v. Comm’r of Corr.*, 874 A.2d 820, 823 (Conn. App. Ct. 2005) (“[A] substantial claim of actual innocence is cognizable by way of a petition for a writ of habeas corpus To prevail on a claim of actual innocence, the petitioner must satisfy two criteria”: (1) “establish by clear and convincing evidence that . . . he is actually innocent” and (2) “establish that . . . no reasonable fact finder would find the petitioner guilty” in light of all the evidence. (first alteration in original) (quoting *Player v. Comm’r of Corr.*, 808 A.2d 1140, 1142-43 (Conn. App. Ct. 2002))); *Williams v. Comm’r of Corr.*, 677 A.2d 1, 8 (Conn. App. Ct. 1996) (In raising a claim based on “newly discovered evidence, a petitioner must demonstrate . . . that the proffered evidence . . . could not have been discovered earlier by the exercise of *due diligence*.”); DEL. CODE ANN. tit. 11, § 4504(b) (2014) (allowing “motion for a new trial” based on “DNA evidence not available at trial” that “establishes . . . actual innocence” and setting standard of “clear and convincing evidence that no reasonable trier of fact, considering [all of the evidence,] would have convicted the person”); D.C. CODE § 22-4135(d)(1), (f) (2009) (allowing motion to vacate conviction or grant a new trial on the ground of actual innocence and requiring an affidavit stating that the “new evidence [of innocence] was not deliberately withheld by the movant for purposes of strategic advantage,” and permitting dismissal of claims “if the government demonstrates that

it has been materially prejudiced in its ability to respond to the motion by the delay in its filing, unless the movant shows that the motion is based on grounds which the movant could not have raised by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred”); FLA. R. CRIM. P. 3.853 (allowing motion for post-conviction DNA testing “any time” after “judgment and sentence” are “final” when there is a “reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial”); *Zollman v. State*, 820 So.2d 1059, 1060, 1062-63 (Fla. Dist. Ct. App. 2002) (granting motion for DNA testing 23 years after conviction upon finding that the requested DNA testing would exonerate defendant if results excluded him); *Perkins v. Hall*, 708 S.E.2d 335, 347-48 (Ga. 2011) (citing GA. CODE ANN. § 9-14-48(d)) (discussing actual innocence exception to procedural defaults, including timeliness); HAW. REV. STAT. § 844D-121 (2006) (allowing post-conviction motion for DNA testing “at any time”); IDAHO CODE ANN. § 19-4902(b), (f) (2012) (authorizing motion for DNA testing at “any time,” and requiring the court to grant relief if the “fingerprint or forensic DNA test results demonstrate . . . that the petitioner” did not commit the crime); *People v. Ortiz*, 919 N.E.2d 941, 948, 950 (Ill. 2009) (affirming grant of new trial based on “newly discovered evidence” of actual innocence more than 10 years after conviction, and reiterating that actual innocence excuses defendants from having to show “cause and prejudice” for procedural default); IND. R. P. POST-CONVICTION REMEDIES 1(1)(a) (proceeding for post-conviction relief may be brought at “any time”); *Kubsch v. State*, 934 N.E.2d 1138, 1145 (Ind. 2010) (“[N]ew evidence will mandate a new trial only when the defendant demonstrates [among other things] that . . . the evidence has been discovered since the trial, . . . due diligence was used to discover it in time for trial, . . . and . . . it will probably produce a different result at retrial.” (first alteration in original) (quoting *Taylor v. State*, 840 N.E. 2d 324, 329 (Ind. 2006))); IOWA CODE § 822.2(1)(d) (2006) (authorizes vacating conviction based on “evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice”); *Summage v. State*, 579 N.W.2d 821, 822 (1998) (“The applicant must show . . . [that] the evidence could not have been discovered earlier in the exercise of due diligence”); KAN. STAT. ANN. § 21-2512(a), (f)(2) (2013) (providing for DNA testing “any time after conviction” for murder or rape, and authorizing relief if “results of [post-conviction] DNA testing” are “favorable to the petitioner” and “of such materiality that a reasonable probability exists that the new evidence would result in a different outcome”) *deemed unconstitutional as applied by State v. Cheeks*, 310 P.3d 346, 356 (Kan. 2013), *and State v. Denney*, 101 P.3d 1257, 1269 (Kan. 2004); KY. REV. STAT. ANN. § 422.285 (West 2014) (requests for DNA testing may be made “at any time” by petitioners convicted of certain designated crimes); *Bowling v. Commonwealth*, 163 S.W.3d 361, 372-73 (Ky. 2005) (discussing actual innocence exception to requiring a showing of cause and prejudice for procedural default); LA. CODE CRIM. PROC. ANN. art. 851 (2014) (authorizing motions for new trial based on “[n]ew and material evidence that, notwithstanding the exercise of reasonable diligence . . . was not discovered before or during the trial, . . . and . . . would probably have changed the verdict or judgment of guilty”), *amended by Act No.*

564, 2014 La. Sess. Law Serv. Act 564 (West); LA. CODE CRIM. PROC. ANN. art. 926.1 (2011) (requiring that motions for DNA testing be “timely”); ME. REV. STAT. tit. 15, § 2138(10)(A) (2013) (placing no time limit on granting a new trial based on DNA test results that, in light of all of the evidence, prove actual innocence); MD. R. 4-331(c)(2-3) (authorizing motion for new trial at “any time” if sentenced to death and defendant can show innocence through “newly discovered evidence,” or authorizing motion for new trial at “any time” if “based on DNA . . . testing . . . or other generally accepted scientific techniques the results of which . . . show” innocence); MASS. R. CRIM. P. 30(a)-(b) (motion for new trial may be made and granted at “any time if it appears that justice may not have been done”); MICH. COMP. LAWS ANN. § 770.16(2), (8) (West 2014) (requiring motions for DNA testing be filed no later than January 1, 2016, and authorizing motion for new trial if DNA results exclude defendant and defendant establishes by “clear and convincing evidence” that “only the perpetrator of the crime . . . could be the source of the identified biological material”); MINN. STAT. § 590.01(4)(b)(2) (2005) (excusing petitioners from two-year time limit based on “newly discovered evidence . . . that could not have been ascertained by the exercise of due diligence . . . within the two-year time period . . . and [which] establishes by a clear and convincing standard that the petitioner is innocent”); MISS. CODE ANN. § 99-39-5(2)(a)(ii) (2009) (providing exception from three-year statute of limitation for motions for relief in which there is “biological evidence . . . that can be subjected to additional DNA testing . . . and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted . . . if favorable results had been obtained . . . at the time of the original prosecution”); State *ex rel.* Amrine *v.* Roper, 102 S.W.3d 541, 546-47 (Mo. 2003) (en banc) (reiterating that courts will hear constitutional claims not raised within the time period provided under Missouri law when the petitioner shows actual innocence by the “preponderance of the evidence”); MONT. CODE ANN. § 46-21-110(1), (10) (2003) (allowing motion for DNA testing at any time during incarceration and authorizing post-conviction proceedings “test results are favorable to the petitioner”); NEB. REV. STAT. § 29-2101 (2013) (authorizing new trial based on “newly discovered exculpatory DNA” evidence or any “newly discovered [material] evidence” that the petitioner “could not with reasonable diligence have discovered and produced at the trial”); NEB. REV. STAT. § 29-4120 (2001) (authorizing motion for DNA testing “at any time after conviction”); N.H. REV. STAT. ANN. § 651-D:2(I), (VI)(b) (2010) (authorizing motion for DNA testing “at any time after conviction,” and stating that, “if the results of DNA testing . . . are favorable to the petitioner,” the court “shall enter any order that serves the interests of justice, including an order vacating . . . the judgment . . . or granting a new trial”); N.J. STAT. ANN. § 2A:84A-32a(a), (d)(5) (West 2002) (authorizing motion for post-conviction testing at any time during imprisonment if it raises a “reasonable probability” that “favorable” test results would lead to the granting of a motion for new trial); State *v.* DeMarco, 904 A.2d 797, 804 (N.J. Super. Ct. App. Div. 2006) (“To be entitled to a new trial based on newly discovered evidence, a defendant must demonstrate [among other things] that the new evidence [was] discovered since the trial and [was] not discoverable by reasonable diligence beforehand” (internal quotation marks omitted) (quoting State *v.* Carter, 426 A.2d 501, 508 (N.J.

1981)); N.M. STAT. ANN. § 31-1A-2(A), (H) (West 2005) (authorizing motion for DNA testing without time limit and, when DNA tests are “exculpatory,” permitting the court to “set aside the petitioner’s judgment and sentence,” “dismiss the charges against the petitioner with prejudice,” “grant the petitioner a new trial,” or “order other appropriate relief”); N.Y. CRIM. PROC. LAW § 440.10(g)-(g-1) (McKinney 2014) (authorizing motion to vacate judgment based on new evidence that “could not have been produced” at trial “with due diligence on [the petitioner’s] part” and which “create[s] a probability that . . . the verdict would have been more favorable to the defendant” or based on “[f]orensic DNA testing of evidence performed” any time “since the entry of a judgment”); N.C. GEN. STAT. § 15A-1415(c) (2013) (allowing, “at any time after verdict,” motions for relief based on new evidence that “direct[ly] and material[ly] bear[s]” on innocence, which was “unknown or unavailable to the defendant at the time of trial” and “could not with due diligence have been discovered” earlier); N.D. CENT. CODE § 29-32.1-15 (2005) (authorizing post-conviction DNA testing without time limit where evidence is “materially relevant” to “actual innocence”); OHIO REV. CODE ANN. § 2953.21(A)(1)(a) (LexisNexis 2013) (authorizing petition for post-conviction relief for any person convicted of a felony who has DNA results that “establish, by clear and convincing evidence, actual innocence”); OHIO REV. CODE ANN. § 2953.23(A)(2) (LexisNexis 2013) (excluding from time limits petitioners with DNA test results that “establish, by clear and convincing evidence, actual innocence”); OKLA. STAT. tit. 22, § 1080(d) (2013) (allowing, without time limit, post-conviction relief where there “exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice”); OR. REV. STAT. § 138.690 (2007) (permitting motion for DNA testing at any time while the person is incarcerated or if the person was convicted of “murder or a sex crime”); OR. REV. STAT. § 138.510(3) (2007) (placing a two-year time limit on post-conviction motions “unless the court . . . finds grounds for relief asserted which could not reasonably have been raised” earlier); 42 PA. CONS. STAT. § 9543(a), (b) (1997) (authorizing motion for post-conviction relief when “exculpatory evidence” that was “unavailable[e] at the time of trial” later “become[s] available and would have changed the outcome of the trial if it had been introduced,” except when the “Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner,” unless the “petition is based on grounds of which the petitioner could not have discovered by the exercise of reasonable diligence before the delay became prejudicial to the Commonwealth”); 42 PA. CONS. STAT. Ann. § 9543.1(f)(1) (2002) (authorizing post-conviction DNA testing without time limit and petitions for post-conviction relief within 60 days of receipt of favorable test results); *DeCiantis v. State*, 24 A.3d 557, 569 (R.I. 2011) (“[T]he remedy of postconviction relief is available to any person who has been convicted of a crime and who thereafter alleges either that the conviction violated the applicant’s constitutional rights or that the existence of newly discovered material facts requires vacation of the conviction in the interest of justice.” (quoting *Page v. State*, 995 A.2d 934, 942 (R.I. 2010))); S.C. R. CRIM. PROC. 29(b) (“A motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the

evidence could have been ascertained by the exercise of reasonable diligence.”); *State v. Needs*, 508 S.E.2d 857, 869 (S.C. 1998) (“To prevail on a motion for a new trial based on after discovered evidence, a defendant must show (1) the evidence is such as will probably change the result if a new trial is granted; (2) the evidence has been discovered since the trial; (3) the evidence could not have been discovered prior to trial by the exercise of due diligence; (4) the evidence is material; and (5) the evidence is not merely cumulative or impeaching.”); S.D. CODIFIED LAWS § 23-5B-1(5)-(6) (2009) (allowing order for DNA testing when there is “good cause for the failure to request” DNA testing at trial, and the petitioner did not “[k]nowingly and voluntarily waive the right to request DNA testing” or “fail to request DNA testing in a prior petition for relief”); TENN. CODE ANN. § 40-30-303 (2001) (allowing anyone convicted of murder, rape, sexual battery, the “attempted commission” or “lesser included offense” of any of these offenses, or, with the judge’s permission, “any other offense” to request post-conviction DNA testing at “any time”); TEX. CODE CRIM. PROC. ANN. art. 64.01(b) (West 2014) (permitting motion for DNA testing when the evidence was either “not previously subjected to DNA testing” or “can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the previous test”); *Ex parte Brown*, 205 S.W.3d 538, 544-546 (Tex. Crim. App. 2006) (reiterating that the incarceration of an innocent person violates due process, that “claims of actual innocence based on newly discovered evidence are cognizable on post-conviction writs of habeas corpus,” and that such evidence is “evidence that was not known to the applicant at the time of trial [or during the time for a motion for a new trial] and could not be known to him even with the exercise of due diligence”); UTAH CODE ANN. § 78B-9-402 (West 2014) (allowing petition for factual innocence based on “newly discovered material evidence,” when that “evidence could not have been discovered by the petitioner or the petitioner’s counsel through the exercise of reasonable diligence” in time to “include the evidence in any previously filed post-trial motion or postconviction motion,” or the “court has found ineffective assistance of counsel for failing to exercise reasonable diligence in uncovering the evidence”); VT. STAT. ANN. tit. 13, §§ 5561, 5569 (2007) (authorizing petition for post-conviction DNA testing at “any time” and, if the test results are favorable to the petitioner, authorizing the court to set aside the judgment of conviction, order a new trial, order the petitioner discharged from custody, or any other relief the “court deems appropriate”); Va. Code Ann. § 19.2-327.11(A)(iv), (vi) (2013) (authorizing writ of actual innocence based on newly discovered evidence that was “previously unknown or unavailable to petitioner or his trial attorney of record at the time the conviction . . . became final,” and “could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction” by the court); *Turner v. Commonwealth*, 694 S.E.2d 251, 260 (Va. Ct. App. 2010) (discussing requirements for petition for a writ of actual innocence based on newly discovered evidence), *aff’d*, 717 S.E.2d 111 (Va. 2011); *In re Weber*, 284 P.3d 734, 740 (Wash. 2012) (en banc) (Petitioner raising actual innocence claim to overcome procedural bars such as timeliness to other constitutional claims must prove to the court that, in light of new evidence, “it is more likely than not that no reasonable juror would

limit the time for developing and presenting innocence claims based on DNA evidence to the conviction date.¹⁴¹ However, there are proposals to remove the three-year time limit from Delaware's post-conviction relief statute.¹⁴²

have found petitioner guilty beyond a reasonable doubt.” (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *In re Carter*, 263 P.3d 1241, 1248-50 (Wash. 2011) (en banc) (holding that “actual innocence doctrine” is an “equitable exception to the time bar[s] that appl[y]” to challenging criminal convictions); *State ex rel. Smith v. McBride*, 681 S.E.2d 81, 91(W. Va. 2009) (Motions for new trial based on newly discovered evidence will not be granted unless the evidence was discovered after trial, the defendant was “diligent in ascertaining and securing” the evidence, and “due diligence would not have secured it before the verdict.” (internal quotation marks omitted) (quoting *In re Renewed Investigation of State Police Crime Lab.; Serology Div.*, 633 S.E.2d 762, 763 (2006))); *Gen. Star Indem. Co. v. Bankr. Estate of Lake Geneva Sugar Shack, Inc., by Waldschmidt*, 572 N.W.2d 881, 894 (Wis. Ct. App. 1997) (Courts “may grant a new trial based on newly discovered evidence” only if “(1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; . . . and (5) it is reasonably probable that a different result would be reached at a new trial.” (quoting *State v. Terrance J.W.*, 550 N.W.2d 445, 447 (Wis. Ct. App. 1996))); WYO. STAT. ANN. § 7-12-303(b) (2008) (“Notwithstanding any law or rule of procedure that bars a motion for a new trial as untimely, a convicted person may use the results of a DNA test ordered pursuant to this act as grounds for filing a motion for new trial.”); *Brown v. State*, 816 P.2d 818, 820 (Wyo. 1991) (The standard for motions for new trial based on newly discovered evidence “requires that . . . (1) The evidence has come to defendant’s knowledge since the trial; (2) it was not owing to a want of due diligence that it was not discovered sooner; . . .”).

Finally, even AEDPA, which further limited federal habeas review of state petitions, includes a provision allowing state prisoners to raise claims based on newly discovered evidence within one year of when that evidence “could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D) (1996).

141. DEL. CODE ANN. tit. 11, § 4504(a) (2014) (requiring motions for DNA testing to be filed “not . . . more than 3 years after the judgment of conviction is final”). A “person convicted of a crime” may bring a “motion for a new trial” based on DNA evidence “if the person establishes by clear and convincing evidence that no reasonable trier of fact,” considering all of the evidence now available, “would have convicted the person.” *Id.* § 4504(b). Many states have due diligence requirements for discovering and presenting post-conviction evidence of innocence, while other states have no time limits or other procedural bars to actual innocence claims, but time limits are not based on conviction date except in Delaware. *See* sources cited *supra* note 140.

142. *E.g.*, INNOCENCE PROJECT, *supra* note 139 (DNA testing laws should “[e]xclude . . . absolute deadlines” for “access to post-conviction DNA evidence”

This evolution of state law evidences the emerging modern consensus that the Eighth Amendment prohibits the continued punishment of the innocent and the Due Process Clause of the Fourteenth Amendment requires judicial review of compelling claims of innocence, irrespective of how long after conviction new evidence is discovered.

A. *Fundamental Fairness Requires Judicial Review*

The Due Process Clause of the Fourteenth Amendment provides protection against state actions that violate “‘fundamental fairness.’”¹⁴³ The Supreme Court has explained that “‘widely shared practice’” is one of the “‘concrete indicators of what fundamental fairness and rationality require.’”¹⁴⁴ “‘The near-uniform application’” of a rule of criminal procedure can show that such a rule is so fundamental that the lack thereof “‘offends a principle of justice that is deeply rooted in the traditions and conscience of our people.’”¹⁴⁵

There is now a widely shared practice among states of providing judicial review for compelling claims of innocence.¹⁴⁶ Further, there is near-uniform application among states of the rule that innocence claims are not barred by conviction-related time limits.¹⁴⁷ Thus, this widely shared practice and near-uniform rule demonstrate that the right to have courts consider new evidence of innocence, no matter

and “[d]isallow procedural hurdles that stymie DNA testing petitions and proceedings that govern other forms of post-conviction relief . . .”).

143. See, e.g., *Dowling v. United States*, 493 U.S. 342, 352 (1990) (considering whether the admission of certain evidence is “so extremely unfair that its admission violates ‘fundamental conceptions of justice’” (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1990))); see also *Medina v. California*, 505 U.S. 437, 448 (1992) (If there is “no historical basis for concluding that [a rule] violates due process, we turn to consider whether the rule transgresses any recognized principle of ‘fundamental fairness’ in operation.” (quoting *Dowling*, 493 U.S. at 352)). In *Lovasco*, the Court stated that its task was to determine whether the complained of action “violates those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions,’ and which define ‘the community’s sense of fair play and decency.’” *Lovasco*, 431 U.S. at 790 (citations omitted).

144. *Schad v. Arizona*, 501 U.S. 624, 640 (1991).

145. *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996) (internal quotation marks omitted).

146. See *supra* note 140.

147. See *supra* note 140.

how long after conviction the evidence is discovered, is so fundamental that the refusal to entertain such evidence would “offend[] a principle of justice that is deeply rooted in the traditions and conscience of our people.”¹⁴⁸ As a result, the Due Process Clause of the Fourteenth Amendment requires that federal courts review compelling claims of innocence.

The right to judicial review of post-conviction claims of innocence arguably has always existed, lying dormant while the prospect of an innocent person in prison was deemed theoretical. When scientific evidence definitely proved that innocent people had been wrongfully convicted, the states reacted quickly and with near-uniformity to remove the time bars and other restrictions that once limited the availability of mechanisms for proving innocence.¹⁴⁹ As one state court explained, “[h]aving recognized the prospect of an intolerable wrong, the state has provided a remedy.”¹⁵⁰

The majority’s discussion in *Herrera v. Collins* also supports the conclusion that innocence claims fall within the protections of the Fourteenth Amendment. The Supreme Court in 1993 pointed to state practices, which, at the time, restricted the availability of post-conviction innocence claims to a short time after conviction, to suggest in dicta in that due process was not offended by “Texas’ refusal to entertain” Herrera’s evidence of innocence eight years after Herrera was convicted.¹⁵¹ In light of current state practices, however, the Court’s analysis now compels the different conclusion that due process is offended by the failure to entertain persuasive evidence of innocence, regardless of how long after conviction it is discovered.

Moreover, while “[h]istorical practice is probative” of the existence of a due process right, a “historical basis” for the right is not

148. *Cooper*, 517 U.S. at 362 (internal quotation marks omitted).

149. *See supra* note 140 (discussing the state-by-state standards for handling actual innocence claims).

150. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. 2003) (en banc). Further, Texas’s highest court “recognized” in 1996, just three years after it had refused to entertain Herrera’s evidence of innocence, “that ‘the incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of such a person.’” *Ex parte Brown*, 205 S.W.3d 538, 544 (Tex. Crim. App. 2006) (quoting *Ex parte Elizondo*, 947 S.W.2d 202, 206 (Tex. Crim. App. 1996)).

151. *Herrera v. Collins*, 506 U.S. 390, 410-11 (1993).

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a necessity.¹⁵² As the Supreme Court has explained, “to hold that such a characteristic is essential to due process of law would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.”¹⁵³ Rather, it is more consistent with our “historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances . . . of the forms and processes found fit to give . . . new expression and greater effect to modern ideas” of fairness.¹⁵⁴

More recently, the Supreme Court noted the evolving nature of due process, explaining that, “[h]istory and tradition are the starting point but not in all cases the ending point of the . . . inquiry.”¹⁵⁵ Indeed, recent laws and developing traditions may be more relevant than older laws because they show “an emerging awareness that liberty gives substantial protection” to the right in question.¹⁵⁶ The changes in state laws and traditions over the past two decades reflect an emerging awareness of the reality that innocent people are wrongfully convicted and that fundamental fairness requires that the innocent have an ongoing right to judicial review of newly discovered evidence of innocence.

Supreme Court precedent confirms that due process must be “flexibl[e]” to protect the innocent and “minimiz[e] the risk of error.”¹⁵⁷ Due process, “unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstance.”¹⁵⁸ The Court has explained that this “flexibility is necessary to gear the process to the particular need; the quantum and

152. *Medina v. California*, 505 U.S. 437, 448 (1992) (“Discerning no historical basis for concluding that [a rule] violates due process, we turn to consider whether the rule transgresses any recognized principle of ‘fundamental fairness’ in operation.” (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990))).

153. *Hurtado v. California*, 110 U.S. 516, 529 (1884).

154. *Id.* at 530.

155. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

156. *Id.* at 571-72.

157. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

158. *Mathews*, 424 U.S. at 324 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.”¹⁵⁹

B. Modern Consensus and Ancient Precedent Agree

The “reach” of the Eighth Amendment is “not static” but rather is “defined by looking beyond historical conceptions to ‘the evolving standards of decency that mark the progress of a maturing society.’”¹⁶⁰ The Eighth Amendment “bars punishment” that is “barbaric” or “excessive.”¹⁶¹ The Court has held that “a punishment is ‘excessive’ and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.”¹⁶² Punishing the innocent makes no measurable contribution to the acceptable goals of punishment and is grossly out of proportion to an innocent person’s complete lack of culpability.

In determining whether a punishment is prohibited, federal courts rely upon factors such as “public attitudes,” “legislative attitudes,” and Eighth Amendment precedent.¹⁶³ “First, a court considers objective indicia of society’s standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the . . . practice at issue.”¹⁶⁴ Next, “the court must independently determine whether the punishment in question” constitutes cruel and unusual punishment “based upon precedent and

159. *Greenholtz*, 442 U.S. at 13 (citing *Mathews*, 424 U.S. at 335).

160. *In re Davis*, No. CV409-130, 2010 WL 3385081, at *39 (S.D. Ga. Aug. 24, 2010) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); see also *Ford v. Wainwright*, 477 U.S. 399, 406 (1986); *Spaziano v. Florida*, 468 U.S. 447, 465 (1984); *Weems v. United States*, 217 U.S. 349, 373 (1910) (explaining that the Eighth Amendment is not static, but rather reflects evolving or contemporary standards of decency and fairness).

161. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

162. *Id.*

163. See *id.* (discussing the Eighth Amendment prohibition against cruel and unusual punishment); *Graham v. Florida*, 560 U.S. 48, 61 (2010).

164. *In re Davis*, 2010 WL 3385081, at *40 (internal quotation marks omitted) (quoting *Graham*, 560 U.S. at 61).

the court's understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose."¹⁶⁵

The only federal court that has analyzed this question since *Herrera v. Collins*, the U.S. District Court for the Southern District of Georgia, concluded in 2010 that the Eighth Amendment prohibits the execution of an innocent person.¹⁶⁶ The court reasoned that there was "consensus among the states . . . that a truly persuasive demonstration of innocence subsequent to trial renders [execution] unconstitutional": this consensus, the court stated, was evidenced by the enactment of post-conviction DNA testing statutes in forty-seven states, along with the increasing abolition of the death penalty as wrongful convictions became the focus of widespread public attention.¹⁶⁷ The court further reasoned that "executions of the 'actually' innocent do not serve any legitimate penological purpose."¹⁶⁸

Further evidence of modern consensus has emerged since the district court's decision in *In re Davis*. As the district court noted then, "legislation is the clearest and most reliable objective evidence of contemporary values."¹⁶⁹ The enactment of post-conviction DNA testing statutes in every single state—statutes which, by their very nature, are designed to help the wrongfully convicted prove their innocence—demonstrates contemporary consensus prohibiting the punishment of the innocent.¹⁷⁰ As the *In re Davis* court pointed out, "if states were not concerned with preventing punishment of the wrongfully convicted, it would be difficult to understand why they

165. *Id.* (internal quotation marks omitted) (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008)).

166. *In re Davis*, 2010 WL 3385081, at *1.

167. *Id.* at *40-41, 43. At the time the district court decided the case, "forty-seven states and the District of Columbia ha[d] enacted [DNA testing] statutes designed to help innocent convicts prove that their convictions were erroneous." *Id.* at *40.

168. *Id.* at *43.

169. *Id.* at *40 (internal quotation marks omitted) (quoting *Atkins v. Virginia*, 536 U.S. 304, 323 (2002)).

170. *See supra* note 140 (discussing state-by-state standards for handling actual innocence claims). No DNA testing statute requires a showing of constitutional error or lack of fair trial in order to obtain post-conviction DNA testing. *See sources cited supra* note 140 and accompanying text.

would allow validly convicted persons avenues with which to secure evidence of their innocence.”¹⁷¹

Further, “precedent and [prior] understanding of the Eighth Amendment accord[] with this consensus.”¹⁷² The Supreme Court has ruled that the Eighth Amendment prohibits punishments that are out of proportion to the level of culpability.¹⁷³ For instance, the Supreme Court has held that death is excessive for certain crimes, including rape.¹⁷⁴ Thus, if it is “violative of the Eighth Amendment to execute someone who is guilty of those crimes, then it plainly is violative of the Eighth Amendment to execute a person who is actually innocent.”¹⁷⁵ Any punishment, but especially execution, is out of proportion to an innocent person’s complete lack of culpability.¹⁷⁶ After all, “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”¹⁷⁷

The protections of the Constitution were designed to accomplish “the twofold aim [of criminal justice] . . . that guilt shall not escape or innocence suffer.”¹⁷⁸ “Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of

171. *In re Davis*, 2010 WL 3385081, at *40.

172. *Id.* at *43. *See also* *Schlup v. Delo*, 513 U.S. 298, 316 (1995) (holding that an actual innocence claim may provide a “gateway” for a court to review an otherwise barred *habeas* claim, but the “evidence [of innocence] must establish sufficient doubt about . . . guilt to justify the conclusion that . . . execution would be a miscarriage of justice”).

173. *See, e.g., Enmund v. Florida*, 458 U.S. 782, 797-98 (1982) (holding that death is an excessive penalty under the Eighth Amendment for a robber convicted of felony murder because he “did not kill or intend to kill and thus his culpability is plainly different from that of the [fellow] robbers who killed”); *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (holding that imposition of the death penalty “is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment”).

174. *E.g., Coker*, 433 U.S. at 598.

175. *Herrera v. Collins*, 506 U.S. 390, 431 (1993) (Blackmun, J., dissenting).

176. *In re Davis*, 2010 WL 3385081, at *40 n.22 (“[W]here the state attempts to punish an individual who has no culpability at all, the Eighth Amendment prohibits the imposition of any punishment” (citing *Robinson v. California*, 370 U.S. 660, 667 (1962))).

177. *Id.* (quoting *Robinson*, 370 U.S. at 667).

178. *United States v. Nixon*, 418 U.S. 683, 709 (1974) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

our criminal justice system.”¹⁷⁹ Supreme Court precedent also demonstrates that the Eighth Amendment requires additional procedures to ensure a punishment remains constitutional in light of new facts or intervening developments.¹⁸⁰ Newly discovered evidence of innocence fits perfectly within this doctrine.

Finally, punishments are unconstitutional if they “make[] no measurable contribution to acceptable goals of punishment.”¹⁸¹ No “legitimate penological purpose” is served by punishing an innocent person, while the guilty person remains free.¹⁸² “[D]eterrence is not served [by punishing the innocent] because there is no conduct to deter.”¹⁸³ Nor can retribution be served by punishing a person for crimes “‘he did not commit and had no intention of committing’” because doing so does not “‘measurably contribute to . . . ensuring that the criminal gets his just deserts.’”¹⁸⁴ Incarcerating and executing the innocent simply makes no measurable contribution to acceptable goals of punishment.

179. *Schlup v. Delo*, 513 U.S. 298, 325 (1995). *See also In re Davis*, 2010 WL 3385081, at *41 (“If there is a principle more firmly embedded in the fabric of the American legal system than that which proscribes punishment of the innocent, it is unknown to this Court.”).

180. *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988) (holding that petitioner was entitled to new hearing regarding whether he should be sentenced to death after a felony conviction that had been one of the aggravating circumstances was reversed); *Ford v. Wainwright*, 477 U.S. 399, 406, 418 (1986) (holding that post-conviction developments that raised doubts about the sanity of a man sentenced to death required an additional hearing to determine whether his execution was constitutional).

181. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

182. *In re Davis*, 2010 WL 3385081, at *42-43. In some cases with DNA exonerations, the real perpetrators had gone on to commit subsequent crimes for which they were later convicted. *See, e.g., Kevin Green Case Profile*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Kevin_Green.php (last visited Apr. 13, 2014). Kevin Green, who was wrongfully convicted of murder, attempted murder, and assault with a deadly weapon, served nearly sixteen years in prison before semen from the crime scene was matched to another felon in the California DNA database. *Id.* “Gerald Parker, a serial killer called the ‘Bedroom Basher’ for breaking into women’s bedrooms to rape and kill them, confessed to the attack as well as five other murders” he had committed. *Id.*

183. *In re Davis*, 2010 WL 3385081, at *42.

184. *Id.* at *43 (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

Punishing the innocent is thus a clear violation of the Eighth Amendment. It is contrary to modern consensus and evolving standards of decency, and it is contrary to the principles that underlie the Eighth Amendment as the Supreme Court has interpreted it for hundreds of years.

III. INNOCENCE PRESUMED AND INNOCENCE FOUND

The use of the word ‘innocence’ in actual innocence claims may be connected to the unduly restrictive standards of proof required of petitioners in some states.¹⁸⁵ Had these claims instead been called ‘not guilty’ claims, they might not have evoked the immediate sympathy and strength of innocence claims, but they would have been equally well-founded under the law, equally deserving of constitutional protections, and the burden of proof for petitioners would have been much clearer from the beginning.¹⁸⁶

While there is a difference between the meanings of ‘innocence’ and ‘not guilty,’ our criminal justice system is guided by the “fundamental” understanding that fairness and justice can only be achieved if innocence must be presumed unless guilt is proven beyond a reasonable doubt.¹⁸⁷ As clinical professor and Innocence Network President Keith Findley argues in discussing “clear proof of innocence,” “to demand certainty [of innocence] is to demand the impossible, . . . in the end, the best we can or should do is rely on the legal standards that define guilt and, absent proof of guilt, presume innocence.”¹⁸⁸ When newly discovered evidence demonstrates there is no longer sufficient proof of guilt, innocence must be presumed anew.

185. See discussion *infra* Part III.A-B.

186. See discussion *infra* Part III.A.

187. See Keith A. Findley, *Defining Innocence*, 74 Alb. L. Rev. 1157, 1162, 1189-90 (2011).

188. *Id.* Professor Findley goes on to state that “[a]nything less than that [presumption] invites endless controversy about subjective assessments of guilt and innocence, unwarranted insult and injury to the innocent who are forced to live under a continuing cloud of suspicion, and erosion of some of our most fundamental constitutional principles.” *Id.* at 1162 (footnote omitted).

A. *Presuming Innocence: Revisiting “Not Guilty”*

The Constitution prohibits punishment for a crime when there is insufficient “evidence for a rational trier of the facts to find guilt beyond a reasonable doubt.”¹⁸⁹ Thus far, the Supreme Court has only applied this rule to claims based entirely upon the evidence presented at trial.¹⁹⁰ However, there is no reason a conviction following a trial in which the jury *did not* hear all of the evidence pointing to innocence should be entitled to *more weight* than a one in which the jury *did* hear all of the evidence.

As explained by the United States District Court for the Southern District of Georgia, “there are three general reasons why a jury might reach an erroneous verdict”:

(1) a constitutional error led a jury to consider something inappropriate or caused patently important evidence to be withheld, (2) a jury heard a set of facts that was complete at the time of trial but later found to be incomplete based on evidence that surfaced subsequent to trial, and (3) a jury made an innocent mistake based upon the evidence before it. Said differently, the totality of the evidence heard by the jury . . . can be described three ways: (1) corrupted, (2) incomplete, or (3) complete.

The highest degree of confidence can be placed in a jury verdict when the jury heard the complete body of relevant evidence. This scenario has already given rise [in *Jackson v. Virginia*] to a federal standard of review on habeas. . . . “[A]fter viewing the evidence in the light most favorable to the prosecution, [a court asks under this

189. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979). Federal courts can review insufficiency of the evidence claims from state prisoners to ensure the evidence was sufficient for a reasonable jury to convict a criminal defendant as required by the Constitution. *Id.* at 320-21. For courts hearing such claims, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 318-20.

190. *See, e.g., id.* at 324 (“We hold that . . . the applicant is entitled to habeas corpus relief if it is found that upon the record evidence *adduced at trial* no rational trier of fact could have found proof of guilt beyond a reasonable doubt.” (emphasis added)).

standard whether] *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”¹⁹¹

In contrast, the “lowest degree of confidence” is afforded to cases in which the “jury hear[d] a corrupted body of evidence”: because “the procedural protections in place to protect the innocent from conviction have been breached, confidence in the result of the trial is generally undermined.”¹⁹² The standard of review for such cases is also already established and requires “a ‘reasonable probability’ of a different result,” further defined as evidence that “‘undermines [the court’s] confidence in the outcome of the trial.’”¹⁹³

The standard of review for cases with “incomplete” records, i.e., cases in which evidence of innocence is discovered after trial, “falls in the middle.”¹⁹⁴ The U.S. District Court for the Southern District of Georgia concluded the standard must therefore be “clear and convincing evidence that no reasonable juror would have convicted [the petitioner] in light of the new evidence.”¹⁹⁵ This standard fits well within Supreme Court precedent. The Court has only provided one concrete definition of innocence, and that is in the procedural default context.¹⁹⁶ For *Schlup* procedural “gateway” claims of innocence, the Supreme Court has defined innocence as requiring a showing “that it is more likely than not that no reasonable juror would

191. *In re Davis*, 2010 WL 3385081, at *44 (quoting *Jackson*, 443 U.S. at 318-19).

192. *Id.* at *45.

193. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985) (“A ‘reasonable probability’ of a different result is accordingly shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial.’”)); *see also In re Davis*, 2010 WL 3385081, at *45; *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (To show prejudice from ineffective assistance of counsel, a “challenger must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984))).

194. *In re Davis*, 2010 WL 3385081, at *45.

195. *Id.*

196. *Schlup v. Delo*, 513 U.S. 298, 327-29 (1995). When constitutional claims are subject to “a procedural bar” such as timeliness or successive or abusive petitions, a federal court can consider those otherwise barred constitutional claims on the merits if a petitioner makes a sufficient showing of “actual innocence.” *Id.*

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have convicted him [or her] in the light of the new evidence.”¹⁹⁷ Thus, even in cases of procedural default, the Supreme Court has not torn the burden of proof for establishing innocence from its constitutional roots: innocence is still presumed absent sufficient evidence of guilt.

With regard to a “hypothetical freestanding innocence claim,” the Court has said that its decisions relating to actual innocence imply that such freestanding claims require a higher burden of proof than a procedural gateway or *Schlup* innocence claim.¹⁹⁸ In other words, a freestanding or *Herrera* innocence claim requires a showing more persuasive than the showing required by *Schlup* that, “more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.”¹⁹⁹ “[C]lear and convincing evidence that no reasonable juror would have convicted [the petitioner] in the light of the new evidence”—the standard rejected by the Supreme Court as too high for procedural default innocence claims—would satisfy that requirement.²⁰⁰

Moreover, the Supreme Court has explained that the reasonable doubt standard “is a prime instrument for reducing the risk of convictions resting on factual error.”²⁰¹ The Supreme Court further

197. *Id.* at 327. *Schlup* claims are claims of actual innocence sufficiently strong to entitle petitioners to have their otherwise procedurally-barred independent constitutional claims heard on the merits. *Id.* The *Schlup* Court cited to precedent in which it had “concluded that a prisoner retains an overriding ‘interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.’” *Id.* at 321 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986)). Because the “individual interest in avoiding injustice is most compelling in the context of actual innocence,” such interest outweighs society’s “interests in finality, comity, and conservation of scarce judicial resources.” *Id.* at 324.

198. *House v. Bell*, 547 U.S. 518, 555 (2006) (“The sequence of the Court’s decisions in *Herrera* and *Schlup*—first leaving unresolved the status of freestanding claims and then establishing the gateway standard—implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*.”).

199. *Id.* at 538, 555.

200. *In re Davis*, 2010 WL 3385081, at *45. The *Schlup* Court specifically held that for *Schlup* innocence claims the clear and convincing evidence standard was too high and that the preponderance standard was the appropriate standard for governing these claims. *Schlup*, 513 U.S. at 327-29.

201. *In re Winship*, 397 U.S. 358, 363 (1970).

held that “it is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”²⁰² Now that DNA evidence has proven that constitutional protections sometimes fail and the innocent are wrongfully convicted, these same concerns must inform post-conviction procedures as well.

To date, at least eight states have tied the standard for proving innocence to a showing that no reasonable trier of fact would have convicted in light of the new evidence.²⁰³ However, many states

202. *Id.* at 364.

203. ARK. CODE ANN. § 16-112-201(a)(1)-(2) (West 2014) (A convicted person “may commence a proceeding to secure relief” if “[s]cientific evidence not available at trial establishes . . . actual innocence” or the “scientific predicate for the claim could not have been previously discovered through the exercise of due diligence and the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense”); DEL. CODE ANN. tit. 11, § 4504(b) (West 2014) (standard for new trial is “clear and convincing evidence that no reasonable trier of fact, considering [all of the evidence], would have convicted the person”); FLA. R. CRIM. P. 3.853 (allowing motion for post-conviction DNA testing if there is a “reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial”); KAN. STAT. ANN. § 21-2512 (2013) (authorizing relief if “results of [post-conviction] DNA testing” creates a “reasonable probability . . . that the new evidence would result in a different outcome at a trial or sentencing”), *deemed unconstitutional as applied by* State v. Cheeks, 310 P.3d 346, 356 (Kan. 2013), and State v. Denney, 101 P.3d 1257, 1269 (Kan. 2004); LA. CODE CRIM. PROC. ANN. art. 851 (2014) (authorizing motions for new trial based on “[n]ew and material evidence that . . . probably would have changed the verdict or judgment of guilty”), *amended by* Act No. 564, 2014 La. Sess. Law Serv. Act 564 (West); N.Y. CRIM. PROC. LAW § 440.10(g)-(g-1) (McKinney 2014) (authorizing motion to vacate judgment based on new evidence which creates a “reasonable probability that the verdict would have been more favorable”); 42 PA. CONS. STAT. § 9543(a), (b) (2014) (authorizing motion for post-conviction relief based on new “exculpatory evidence” that “would have changed the outcome of the trial”); Gen. Star Indem. Co. v. Bankr. Estate of Lake Geneva Sugar Shack, Inc., by Waldschmidt, 572 N.W.2d 881, 894 (Wis. Ct. App. 1997) (courts “may grant a new trial based on newly discovered evidence” when it is “reasonably probable that a different result would be reached” (quoting State v. Terrance J.W., 550 N.W.2d 496, 500 (Wis. Ct. App. 1996))); Swafford v. State, 125 So.3d 760, 778 (Fla. 2013) (granting a new trial based on DNA evidence because it would “probably produce on acquittal on retrial” (quoting Jones v. State, 709 So.2d 512, 523 (Fla. 1998))); Kubsch v. State, 934 N.E.2d 1138, 1145 (Ind. 2010) (“[N]ew evidence will mandate a new trial only

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require much more,²⁰⁴ which only increases the need for the federal courts to establish a constitutional floor—a floor that is both workable, as detailed in Part IV, and inclusive of all those requiring constitutional protections.

1. Pitfalls of Affirmative Evidence of Innocence

Requiring affirmative evidence of innocence is extremely problematic because even the completely innocent may not be able to produce such evidence. Consider, for instance, the plight of someone convicted only by eyewitness testimony.²⁰⁵ No physical evidence ever connected him to the crime. There is no physical evidence to submit for DNA testing and no one has confessed to the crime, but the eyewitnesses have recanted their trial testimony, submitting new evidence that they did not actually see anything. The eyewitnesses explain that the police told them they had caught the perpetrator, and so the witnesses identified the man sitting at the defense table. They further explain that they did not see the perpetrator well enough to identify him. Everyone finds their new statements credible, including the judge and the district attorney. Clearly, there is no longer any reliable evidence of guilt, but neither is there any affirmative evidence of innocence. Can we, or should we, continue to incarcerate such a person?

In *Carriger v. Stewart*, the Ninth Circuit suggested that the “‘extraordinarily high’” showing discussed in *Herrera* contemplates

when . . . it will probably produce a different result at retrial” (first alteration in original) (quoting *Taylor v. State*, 840 N.E.2d 324, 329-30 (Ind. 2006)).

204. See sources cited *supra* note 140.

205. See, e.g., Jack Leonard, *Murder Conviction Voided After 20 Years*, L.A. TIMES (Mar. 16, 2011), <http://articles.latimes.com/2011/mar/16/local/la-me-murder-conviction-overturned-20110316>. In 1992, Francisco Carrillo, Jr., was convicted of murder “solely on the word of six teenage” eyewitnesses. *Id.* After the witnesses later recanted, a reenactment of the crime corroborated the witnesses’ admissions that they were unable to see the shooter’s face. *Id.* After Carrillo’s conviction was overturned, the Brentford Ferreira, a prosecutor with the Los Angeles County District Attorney’s Office agreed with Judge Paul A. Bacigalupo that the charges against Carrillo should be dismissed. Jack Leonard, *Judge Dismisses Murder Charges Against Man Who Spent More than 20 Years in Prison*, L.A. TIMES (Apr. 5, 2011), <http://articles.latimes.com/2011/apr/05/local/la-me-charges-dismissed-20110405>.

“at least” that “a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent.”²⁰⁶ The Ninth Circuit’s subsequent analysis of the evidence of innocence proffered by Carriger demonstrates the problem with requiring affirmative evidence of innocence as opposed to presuming innocence absent evidence of guilt. In denying Carriger’s innocence claim, the Ninth Circuit reasoned that,

[a]lthough the postconviction evidence he presents casts a vast shadow of doubt over the reliability of his conviction, nearly all of it serves only to undercut the evidence presented at trial, not affirmatively to prove Carriger’s innocence. Carriger has presented no evidence, for example, demonstrating he was elsewhere at the time of the murder, nor is there any new and reliable physical evidence, such as DNA, that would preclude any possibility of Carriger’s guilt.²⁰⁷

Similarly, California has established a standard that is nearly impossible to meet absent conclusive DNA evidence: a petitioner “must undermine the entire prosecution case and point unerringly to innocence” with evidence no “reasonable jury could . . . reject[.]”²⁰⁸ As one California Supreme Court Justice explained in criticizing this standard,

The requirement of the majority that the petitioner prove his innocence, either by establishing an alibi or by identifying the perpetrator of the crime, is unreasonable and unwarranted. A perfectly innocent person may be unable to prove an alibi. And it is preposterous to demand of the accused that he place his finger upon the real culprit in order to exculpate himself. Although Billings has

206. Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997) (quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993)) (citing *Herrera*, 506 U.S. at 442-46 (Blackmun, J., dissenting)).

207. *Id.* at 477.

208. *In re Lawley*, 179 P.3d 891, 898-99 (Cal. 2008) (citations omitted) (quoting *In re Clark*, 855 P.2d 729, 739, 761 n.33 (1993) (internal quotation marks omitted)).

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presented an alibi, it is unnecessary for us to consider it. When the chain of proof is destroyed, he needs none.²⁰⁹

Thus, given the real danger that affirmative evidence of innocence may be lacking, the courts should not ask for anything further to prove innocence when new evidence destroys the evidence of guilt; instead, courts must presume innocence in the absence of adequate proof of guilt.

2. Pitfalls of Requiring DNA Evidence

Numerous states currently require DNA or other scientific evidence to prove innocence.²¹⁰ However, physical evidence that could be subject to DNA testing may only exist in a small number of criminal cases.²¹¹ Even when such evidence does exist, it may have been lost or destroyed long before it could be subjected to DNA testing. Moreover, the disparity between DNA and non-DNA exonerations demonstrate that restricting post-conviction relief to DNA fails to provide a useful mechanism of relief for the majority of innocent people in prison. While at least 316 people have been exonerated by DNA evidence, nearly a thousand have been exonerated without DNA evidence.²¹² Indeed, the number of DNA exonerations has been steadily shrinking in the last few years, while the number of non-DNA exonerations has grown quickly, reaching a record high of 72 non-DNA exonerations across the United States in 2013.²¹³ Thus, limiting innocence claims to DNA evidence ignores the lessons we have learned from the DNA exonerations that apply to the criminal justice system at large and also knowingly employs a system that fails to identify and release the majority of the innocent people who are in prison for crimes they did not commit.

States should not restrict innocence claims to those based upon DNA or affirmative evidence of innocence, but to the extent that they

209. *In re Billings*, 298 P. 1071, 1119 (Cal. 1930) (Langdon, J., dissenting).

210. *See supra* note 140.

211. *Department of Justice Oversight*, *supra* note 9.

212. *See sources cited supra* note 135.

213. *Exonerations by Year: DNA and Non-DNA*, NAT'L REG'Y OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx> (last visited June 24, 2014).

do, the need for federal courts to establish a constitutional standard is only increased.

B. Finding Innocence: Relief and Retrial

When a state or federal court grants habeas relief to a prisoner, the prosecutor generally will be granted time to appeal or to retry or dismiss the case.²¹⁴ It is only when a state or federal court grants a habeas petition based on insufficiency of the evidence that the prosecutor cannot retry the petitioner because that finding has the force of an acquittal and thus implicates the Double Jeopardy Clause.²¹⁵ In every other situation, however, retrial is permitted.²¹⁶

Innocence claims raise interesting questions regarding whether retrial should be permitted. Should a federal court's finding of innocence, or a finding that no reasonable juror could convict, collaterally estop a state retrial because the ultimate issue—guilt or innocence—has been fully litigated by the parties and decided by a court? One scholar recently developed an interesting argument that the Double Jeopardy Clause should bar retrial in such cases.²¹⁷ While

214. *See, e.g.*, *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (“[F]ederal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court.”); *People v. Black*, 10 Cal. Rptr. 3d 113, 117 (Ct. App. 2004) (“The district court’s selection of the 60-day time frame was pursuant to its powers to dispose of defendant’s habeas petition in a lawful and just manner.” (citing 28 U.S.C. § 2243)).

215. *Burks v. United States*, 437 U.S. 1, 11 & 16 n.10 (1978) (“The Double Jeopardy Clause [of the Fifth Amendment] forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. . . . In holding the evidence insufficient to sustain guilt, an appellate court determines that the prosecution has failed to prove guilt beyond a reasonable doubt.”).

216. *Montana v. Hall*, 481 U.S. 400, 402 (1987) (“It is a ‘venerable principl[e] of double jeopardy jurisprudence’ that ‘[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, poses no bar to further prosecution on the same charge.’” (alterations in original) (citation omitted) (quoting *United States v. Scott*, 437 U.S. 82, 90-91 (1978))); *see also* *Lockhart v. Nelson*, 488 U.S. 33, 37-39 (1988) (explaining that reversals via habeas corpus or other collateral attack, along with reversals via appeals, permit retrials in all situations other than reversals based upon the insufficiency of the evidence).

217. Jordan M. Barry, *Prosecuting the Exonerated: Actual Innocence and the Double Jeopardy Clause*, 64 STAN. L. REV. 535, 554-57, 562-65, 580-87 (2012).

there are of course federalism concerns when a federal court bars a state from retrying and punishing someone for a state crime, such a system is already employed for successful insufficiency of the evidence claims.²¹⁸

When a state court makes the finding of innocence—or federalism concerns are not an issue—the burden of proof may be the deciding factor in whether retrial is permitted. For instance, the District of Columbia has tied relief to the following burdens of proof: the court shall grant a new trial when the inmate proves that it is “more likely than not” that he is innocent, but when the inmate proves that he is innocent by “clear and convincing evidence,” the court “shall vacate the conviction and dismiss the relevant count with prejudice” (thus barring retrial).²¹⁹

The reach of the Eighth Amendment raises yet another question for federal courts. If a federal court finds that a petitioner is entitled to relief under the Eighth Amendment, which speaks only to punishment, can the court reverse the conviction or solely vacate the sentence? It is conceivable that if a court found that continued punishment of an innocent inmate constituted cruel and unusual punishment, the court could vacate the sentence, but would have to leave the conviction in place.

Although this outcome may seem unfair, or even absurd, vacation of the sentence at least restores liberty. Further, if the conviction is left in place, there is no possibility of retrial, a perhaps unexpected benefit of this approach.²²⁰ However, even though a court had recognized the individual’s innocence, the conviction would paradoxically remain legally valid, and all collateral consequences, such as limitations on employment and voting, would remain in place.²²¹

218. *See id.* at 580-84; *see also Lockhart*, 488 U.S. at 38-40.

219. D.C. CODE § 22-4135(g)(2)-(3) (2009).

220. While in many exonerations the charges are subsequently dropped, that process often takes additional months of incarceration and may involve torturous time-served plea offers. *See, e.g., Barry, supra* note 217, at 536-40. Further, some exonerees do go through retrials, such as John Thompson, who was eventually acquitted after “only 35 minutes” of deliberation. *Connick v. Thompson*, 131 S. Ct. 1350, 1375-76 (2011) (Ginsburg, J., dissenting).

221. *See, e.g., Barry, supra* note 217, at 541 n.44, 561 (discussing collateral consequences of felony convictions).

There is merit in the idea that a federal finding of actual innocence should bar state retrial, but also merit in respect for the principles of federalism and comity. This article does not propose a resolution to the question of whether a federal finding of innocence should bar retrial, but rather suggests that state and federal courts and legislatures must grapple with these questions as they continue to develop their approach to innocence claims.

VI. THE PATH FORWARD: A WORKABLE MODEL FOR JUDICIAL REVIEW

Any post-conviction claim raises the specter of concerns regarding judicial economy, floodgates, and finality. However, the enactments of DNA testing statutes and the removal of conviction-related time bars from innocence claims demonstrate the modern consensus that the individual rights retained by the innocent overcome these concerns.²²² Similarly, the Supreme Court has explained in the procedural default context that the individual liberty interests retained by the innocent overcome society's interests in "finality, comity, and conservation of scarce judicial resources."²²³

For these reasons, "the principles of comity and finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration."²²⁴ Moreover, the system already in place for reviewing habeas petitions filed by state prisoners is one within which freestanding claims of innocence fit neatly and thus will not be a substantial drain on judicial resources.

Existing procedures demonstrate that federal courts are well equipped and able to review such freestanding innocence claims when there is no mechanism available for relief in state courts. As with other habeas claims, federal courts need only entertain claims that demonstrate *prima facie* evidence requiring relief.²²⁵ In other words, a

222. See discussion *supra* Part II.

223. *Schlup v. Delo*, 513 U.S. 298, 324-26 (1995).

224. *Id.* at 320-21 (internal quotation marks omitted) (quoting *Murray v. Carrier*, 477 U.S. 478, 495 (1986)).

225. See, e.g., *Palmer v. Hendricks*, 592 F.3d 386, 393 (3d Cir. 2010) ("[C]ourts considering the appropriateness of an evidentiary hearing should determine whether the [habeas] petition presents a *prima facie* showing which, if

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petitioner raising a freestanding actual innocence claim would need to present evidence that, if true, establishes clearly and convincingly that no reasonable juror would convict.²²⁶ The federal courts already review procedural gateway innocence claims and have asserted that the preponderance of evidence must show no reasonable juror would convict.²²⁷ The courts have proven themselves able to consider and resolve such claims and have not been overwhelmed or flooded by them. There is no rational reason to believe the courts could not also review innocence claims that meet an even more restrictive burden of proof.

Further, many of these claims will be resolved in state courts. As with other constitutional claims, the federal courts will simply ensure that state courts do not miss meritorious claims. There is a workable model for judicial review of freestanding innocence claims. The following proposed federal legislation merely would remove current statutory impediments to such much-needed review.

A. *Federal Legislation: Removing Unconstitutional Restrictions*

As discussed in Part I, AEDPA currently precludes federal courts from reviewing compelling claims of innocence.²²⁸ However, AEDPA's preclusive effect on such claims was likely unintended and, as shown below, is easily fixed. Further, two Circuit Courts and three Supreme Court Justices have suggested that AEDPA is unconstitutional to the extent that it bars review of compelling claims of innocence.²²⁹

For example, the Second Circuit observed that "serious Eighth Amendment and due process questions would arise with respect to the AEDPA" if it precluded federal review of innocence claims.²³⁰ In another case, the Second Circuit agreed with the Third Circuit that

proven, would enable the petitioner to prevail on the merits of the asserted claim." (italics in original) (interpreting *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007))).

226. See discussion *supra* Part III.

227. E.g., *Schlup*, 513 U.S. at 326-27; *House v. Bell*, 547 U.S. 518, 536-37 (2006) (citing *Schlup*, 513 U.S. at 327); *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1935 (2013) (citing *Schlup*, 513 U.S. at 327).

228. See *supra* Part I.

229. See cases cited *infra* notes 230-32.

230. *Triestman v. United States*, 124 F.3d 361, 378-79 (2d Cir. 1997).

“[w]ere no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent . . . we would be faced with a thorny constitutional issue.”²³¹ In his *In re Davis* concurrence, Justice Stevens, joined by Justices Ginsburg and Breyer, noted that AEDPA “is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence.”²³²

Congress should address these constitutional concerns and amend 28 U.S.C. § 2254(d).²³³ Specifically, Congress should explicitly exempt freestanding claims of innocence from the provision that prohibits federal courts from granting habeas relief unless the state court’s denial was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.”²³⁴

The following excerpt from § 2254(d) includes proposed amendments to the statute in italics:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim, *other than a freestanding claim of actual innocence*, that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.²³⁵

If adopted, the proposed revision would do much to remove any question that AEDPA is not intended to preclude federal review of freestanding actual innocence claims.

231. *Rivas v. Fischer*, 687 F.3d 514, 552 (2d Cir. 2012) (alteration and ellipsis in original) (internal quotation marks omitted) (quoting *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir.1997)).

232. *In re Davis*, 557 U.S. 952, 952 (2009) (Stevens, J., concurring).

233. 28 U.S.C. § 2254(d) (2012).

234. *Id.* § 2254(d)(1).

235. *Id.* § 2254(d).

B. Reinforcing Constitutional Protections with State Legislation

This article largely focused on innocence as a freestanding federal constitutional claim and the need for federal review of such claims. However, the need for federal review would decrease if states further revised their respective approaches to post-conviction claims of innocence.

The model state legislation proposed below does the following: (1) defines proving innocence as a showing that no reasonable juror could convict and ties relief to the burden of proof; (2) explicitly provides for all kinds of newly discovered evidence as potential bases for innocence claims; (3) ensures innocence claims are not restricted by procedural bars; and (4) details a workable procedure for review and litigation of innocence claims.

§ xxx. Post-Conviction Innocence Claims

Claim: After a defendant is convicted and sentenced for a crime, and after the time period for a defendant to file a motion for new trial or reconsideration has passed, a defendant may file a petition for writ of habeas corpus alleging that he or she is innocent of the offense for which he or she was convicted and sentenced. Such a claim need not additionally allege an independent constitutional violation, and it need not address, refer to, or rely upon statutory remedies or procedures outside of those addressed in this section.

Basis: A claim presented under this section must be supported by evidence, which shows that, based on the new evidence and the entire record before the jury, no rational juror would have found the defendant guilty. Such evidence includes but is not limited to: DNA results; new scientific evidence; a change in science undermining the validity of that presented at trial; a demonstration that the evidence of guilt presented at trial was false or biased or otherwise unreliable; recantations by material witnesses; third-party confessions; new alibi evidence; or any new material information from a witness to the crime.

Procedure: Upon presentation of such a claim, the court must determine whether the inmate has alleged a prima facie basis for relief. In other words, assuming the new evidence is true, the court must decide whether the evidence establishes that no reasonable juror would convict.

When a petition does not allege a prima facie basis for relief, the court must deny the petition.

When a petition presents a prima facie basis for relief, the court must issue an order to show cause directing the respondent to respond within sixty days by (1) conceding the inmate is entitled to relief; (2) requesting an evidentiary hearing to test the validity of the evidence; or (3) presenting evidence demonstrating the court should deny relief. Thirty days after the respondent files a return to the order to show cause, the petitioner must file a traverse conceding or disputing the facts alleged in the return. The court may deem as admitted any facts not specifically disputed in the return or traverse.

The court may grant or deny petitions based on the admitted facts.

If relief is dependent on credibility questions or disputed facts, the court shall order an evidentiary hearing at which the petitioner must prove the facts he or she has alleged are true.

The court may grant extensions of time upon request and a showing of good cause.

Burden and Relief: The petitioner bears the burden of showing that no reasonable juror would convict. A petitioner can make this showing by one of the following burdens of proof, each of which results in the relief described therein:

If the court finds that the petitioner has proven by a preponderance of the evidence that no reasonable jury would convict, the court shall reverse the conviction. The prosecution shall proceed with retrial or dismiss the case within sixty days of the reversal.

If the court finds that the petitioner has proven by clear and convincing evidence that no reasonable jury would convict, the court shall reverse the conviction and order the petitioner released on his or her own recognizance. The prosecution shall retry or dismiss the charges within sixty days of the reversal.

If the court finds that the petitioner has proven beyond a reasonable doubt that no reasonable jury would convict, the court shall reverse the conviction and dismiss the count(s) with prejudice.

Procedural Bars: No procedural bars, whether statutorily or judicially created, apply to claims raised under this section.

Review: A court's denial or grant of a petition for writ of habeas corpus is reviewed de novo. Factual findings and credibility determinations made following an evidentiary hearing are entitled to great deference and are reviewed for plain error.

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INNOCENCE PRESUMED

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CONCLUSION

Despite widespread confusion in the legal literature, the Supreme Court has not resolved whether innocence is a freestanding federal constitutional claim. Relevant circumstances have changed since the Court analyzed this issue in *Herrera*. Modern consensus and widely shared practice now demonstrate that innocence claims are entitled to the constitutional protections of the Eighth and the Fourteenth Amendments.

States have recognized the need to alter their approach to innocence claims in the wake of DNA evidence and scientific proof that innocent people are sometimes wrongfully convicted. Federal courts and Congress, however, have not yet done so. Yet the idiosyncrasies in state laws, from unduly high burdens to restrictive bases for proving innocence, along with the very definition of due process, demonstrate the need for federal courts to provide a constitutional safety net to identify and release the innocent prisoners who fall through the cracks of state and federal laws.

This article has developed, in more detail and upon different bases than any prior effort, a new constitutional analysis demonstrating that innocence is a freestanding federal constitutional claim. It also details a workable system of federal judicial review of compelling claims of innocence that fits neatly within existing federal practices and procedures. The proposed burden of proof for establishing a freestanding constitutional claim of innocence properly balances the individual liberty interests retained by the innocent with society's interests in finality. This proposed burden further serves the goal of judicial economy and is informed by the principles upon which our system of criminal justice is built: when there is no longer any proof of guilt, innocence must be presumed. The simplicity of the recommended approach would open no litigation floodgates. Instead, it would close an existing gap in constitutional protection for the very people our criminal justice system is designed to protect: the innocent.