IN LIMBO: *IN RE DAVIS* AND THE FUTURE OF *HERRERA* INNOCENCE CLAIMS IN FEDERAL HABEAS PROCEEDINGS

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Since its 1993 decision Herrera v. Collins, *the U.S. Supreme Court has explicitly left open the question of whether freestanding claims of innocence may serve as a basis for relief in federal capital habeas proceedings. A recent memorandum opinion,* In re Davis, *indicates the Court may be preparing to answer that question in the affirmative. Recognizing the viability of* Herrera *claims, however, raises a variety of practical concerns. This Note proposes a system for reviewing freestanding innocence claims that balances these practical considerations with society's growing concern for the plight of the wrongfully convicted.*

INTRODUCTION

> *[T]o say that someone deserves to be executed is to make a godlike judgment with no assurance that it can be made with anything resembling godlike perspicacity.*
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> – *Walter Berns*[1]

Two days before Christmas in 1991, Cameron Todd Willingham stood on his front porch as flames engulfed his home.[2] His three daughters—one-year-old twins and a two-year-old—were trapped inside the house, burning along with it.[3] After investigators found evidence that caused them to suspect arson, an image of Willingham began to emerge: he was a cold-hearted, wife-beating sociopath who

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1. WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 178 (1979).
2. Davis Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009, at 41, *available at* http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann?.
3. *Id.* at 41.

set fire to his house and killed his daughters simply because they were "interfering with his beer drinking and dart throwing."[4]

A unanimous jury found Willingham guilty of the murder of his children, and on February 17, 2004, Willingham was executed by lethal injection for the crime.[5] In the time since his execution, the evidence of arson introduced at his trial has been largely disproven,[6] and a new image of Willingham has emerged: that of an imperfect but loving father who, after suffering the trauma of his daughters' deaths, went on to endure the almost unimaginable horror of being convicted and executed for a heinous crime that he did not commit.[7] Though Willingham's death was, of course, both final and irreversible, his case still seems unresolved in the public eye because the ultimate question of his innocence remains. Society does not know whether it executed a murderer or an innocent man.

Willingham's case is a well-publicized example of the potential fallibility of the criminal justice system and the elusiveness of "finality" in criminal cases. Though "the central purpose of any system of criminal justice is to convict the guilty and free the innocent,"[8] in almost no case can the guilt or innocence of a defendant be determined with complete certainty.

Various constitutional safeguards help to decrease the possibility of criminal trials resulting in erroneous guilty verdicts. Under the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, the government may not "deprive any person of life, liberty, or property, without due process of law."[9] Because criminal prosecutions involve the possibility of the most serious deprivations of life and liberty, due process entails a variety of protections

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4. *Id.* at 47–48 (quoting the district attorney who prosecuted the case, Pat Batchelor).

5. *Id.* at 62–63.

6. *Id.* at 63. Shortly before Willingham's execution, Dr. Gerald Hurst, an internationally acclaimed fire investigator, reviewed Willingham's case and found all of the arson indicators relied upon by the prosecution in Willingham's trial to be invalid. *Id.* at 57–62. He concluded that the fire was accidental. *Id.* at 61. At the time of Hurst's investigation and review, Willingham was petitioning the Texas Board of Pardons and Paroles for clemency. Hurst wrote a report detailing his findings for the Board. *Id.* at 61–62. In the report, he concluded that there was no valid evidence of arson in Willingham's case, and he warned that an innocent man was about to be executed because of the "junk science" of the original fire investigators involved in the case. *Id.* Hurst rushed the report to the Board so that it would reach them in time for their deliberations involving Willingham's case. *Id.* at 62. The Board seemingly paid little to no attention to the report. Records obtained by the Innocence Project through the Freedom of Information Act indicate the Board and the Governor's office received the report, but that nobody took note of it, responded to it, or called attention to it. *Id.* The Board unanimously denied Willingham's petition for clemency. *Id.* In the time since Willingham's execution, six arson experts have examined his case and concurred with the findings of Hurst's report. *Id.* at 63. News articles, including the *New Yorker* article described in this Note, drew the public's attention to Willingham's plight and the disregard with which the Governor and Texas Board of Pardons and Paroles treated his evidence of innocence.

7. *See id.*

8. Herrera v. Collins, 506 U.S. 390, 398 (1993).

9. U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. V.

during criminal trials. For example, due process in criminal cases requires a "fair trial in a fair tribunal."[10] Criminal defendants are entitled to a presumption of innocence and, to be convicted, must be proven guilty beyond a reasonable doubt.[11] They have the constitutional right not only to a jury trial[12] but to a fair and impartial jury chosen from a fair cross-section of the community.[13] Criminal defendants are constitutionally entitled to the assistance of counsel,[14] which means the *effective* assistance of counsel.[15] The prosecution in a criminal case has a constitutional obligation to disclose exculpatory information to the defense.[16] These are but some examples of the constitutional rights of criminal defendants.

Despite these safeguards, however, the judicial system makes mistakes. Though many have tried to estimate the number of wrongful convictions that have occurred in the United States, the true number is unknowable. DNA testing has resulted in the post-conviction exoneration of 267 people in the United States,[17] but, because DNA evidence exists in only a small percentage of cases, this figure represents only a portion of the true number of wrongful convictions. Many wrongful convictions will likely never be identified and corrected.

Innocence and guilt, as states of being, are black and white. Putting mental culpability and mitigating circumstances aside, a suspect either committed the elements of an offense, or he did not. The criminal justice system, however, cannot detect innocence and guilt directly; it can only detect and analyze *evidence* of innocence and guilt. From this evidentiary viewpoint, innocence and guilt are not black and white at all. Rather, they exist at two poles of a spectrum of certainty.

Different degrees of certainty along the length of this spectrum are marked by various standards of proof employed in criminal trials and post-conviction innocence claims. The highest degree of certainty attainable on this spectrum would be guilt to an absolute certainty. In most cases, it will not be possible to present evidence sufficient to establish guilt to an absolute certainty and, if the criminal justice system required prosecutors to make such a showing, almost no wrongful convictions would occur, but a very high level of guilty defendants would walk free after trial. The "guilty beyond a reasonable doubt" standard of proof required in criminal trials represents a compromise that attempts to protect innocent defendants while still allowing the criminal justice system enough flexibility to reliably convict the guilty.

The point of conviction marks a profound shift in the burden of production and proof. Before the conviction, the suspect was presumed innocent until proven guilty, and the prosecution bore the burden of presenting evidence

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10. *In re* Murchison, 349 U.S. 133, 136 (1955).
11. *In re* Winship, 397 U.S. 358, 364 (1970).
12. Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968).
13. Taylor v. Louisiana, 419 U.S. 522, 528 (1975).
14. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
15. Strickland v. Washington, 466 U.S. 668, 686 (1984).
16. Brady v. Maryland, 373 U.S. 83, 87 (1963).
17. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/351.php (last visited Mar. 11, 2011).

sufficient to establish guilt beyond a reasonable doubt. After the conviction, the suspect is presumed to be guilty. Whether a wrongfully convicted individual should be permitted the opportunity to present evidence in an attempt to overcome this presumption of guilt in post-conviction judicial proceedings is a matter of debate.[18] How that individual could manage to overcome the presumption is a matter of considerable uncertainty.

Post-conviction relief, in general, is available to inmates through state post-conviction proceedings, clemency proceedings, and federal habeas corpus proceedings. Currently, forty-eight states have statutes designed to provide inmates with post-conviction access to possibly exonerating DNA evidence.[19] Multiple states also provide for post-conviction access to additional fact-finding procedures such as fingerprint analysis.[20] Numerous states have enacted statutes delineating post-conviction procedures for raising actual innocence claims.[21]

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18. For arguments on both sides of this debate, see the majority, concurring, and dissenting opinions of *Herrera v. Collins*, 506 U.S. 390 (1993).

19. *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited Jan. 16, 2011); *see* ALA. CODE § 15-18-200 (2009); ARIZ. REV. STAT. ANN. § 13-4240 (2010); CAL. PENAL CODE § 1405 (West 2000 & Supp. 2010); COLO. REV. STAT. § 18-1-413 (2004); CONN. GEN. STAT. § 54-102kk (2003); DEL. CODE ANN. tit. 11, § 4504 (2007); D.C. CODE § 22-4133 (2002); FLA. STAT. § 925.11 (2006); GA. CODE ANN. § 5-5-41 (2003); HAW. REV. STAT. § 844D-123 (1993 & Supp. 2008); IND. CODE § 35-38-7-5 (2003); IOWA CODE § 81.10 (2005); KAN. STAT. ANN. § 21-2512 (1995 & Supp. 2002); KY. REV. STAT. ANN. § 422.285 (LexisNexis 2005 & Supp. 2008); LA. CODE CRIM. PROC. ANN. art. 926.1 (2008 & Supp. 2010); ME. REV. STAT. tit. 15, § 2137 (2006); MD. CODE ANN., CRIM. PROC. § 8-201 (LexisNexis 2008); MICH. COMP. LAWS § 770.16 (2009); MISS. CODE ANN. § 99-39-5 (2009); MO. REV. STAT. § 547.035 (2001); MONT. CODE ANN. § 46-21-110 (2007); NEB. REV. STAT. § 29-4120 (2008); NEV. REV. STAT. § 176.0918 (2003); N.H. REV. STAT. ANN. § 651-D:2 (2010); N.J. STAT. ANN. § 2A:84A-32a (West 1994 & Supp. 2010); N.M. STAT. ANN. § 31-1A-2 (2000 & Supp. 2010); N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2005); N.C. GEN. STAT. § 15A-269 (2009); N.D. CENT. CODE § 29-32.1-15 (2006); OHIO REV. CODE ANN. § 2953.72 (West 2010); OR. REV. STAT. § 138.690 (2007 & Supp. 2010); 42 PA. CONS. STAT. § 9543.1 (2002); R.I. GEN. LAWS § 10-9.1-12 (2002); S.C. CODE ANN. § 17-28-30 (2003 & Supp. 2008); S.D. CODIFIED LAWS § 23-5B-1 (2009); TENN. CODE ANN. § 40-30-304 (2006); TEX. CODE CRIM. PROC. ANN. art. 64.01 (West 2007 & Supp. 2009); UTAH CODE ANN. § 78B-9-301 (West 2009 & Supp. 2010); VT. STAT. ANN. tit. 13, § 5561 (1998 & Supp. 2010); VA. CODE ANN. § 19.2-327.1 (2008); WASH. REV. CODE § 10.73.170 (2005); W. VA. CODE § 15-2B-14 (2004); WIS. STAT. § 974.07 (2009); WYO. STAT. ANN. § 7-12-303 (2008).

20. *See* ARK. CODE ANN. § 16-112-202 (1987 & Supp. 2007); COLO. REV. STAT. § 18-1-410(1)(e) (2004); D.C. CODE § 22-4135 (2002); IDAHO CODE ANN. § 19-4902 (2004 & Supp. 2010); 725 ILL. COMP. STAT. 5/116-3 (2008); MINN. STAT. § 590.01 (2010); N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2005); UTAH CODE ANN. § 78B-9-402 (West 2009 & Supp. 2010).

21. *See* ALA. R. CRIM. P. 32.1(e)(5); ARIZ. R. CRIM. P. 32.1(h); ARK. CODE ANN. § 16-112-201 (1987 & Supp. 2007); 725 ILL. COMP. STAT. 5/122-1(a) (2008); MINN. STAT. § 590.01 subdiv. 1 (2010); N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinley 2005); OKLA. STAT. ANN. tit. 22, § 1089(C) (West 2006 & Supp. 2010); UTAH CODE ANN. § 78B-9-104(1)(e) (West 2009 & Supp. 2010).

Arguing innocence in federal habeas corpus proceedings is typically a more complicated process. Currently, convicted inmates seeking federal habeas corpus relief can use claims of innocence as "procedural gateway" claims allowing the petitioners to have procedurally barred constitutional claims heard on the merits in federal habeas proceedings.[22] Evidence of innocence can also be used in federal habeas proceedings to avoid certain limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[23] Because federal habeas corpus review is available only to state inmates claiming they are in custody in violation of "the Constitution or laws or treaties of the United States,"[24] the ability of federal habeas petitioners to successfully make freestanding claims of actual innocence hinges on whether punishing or executing innocent people violates the Constitution.

When this question is framed in black-and-white terms of innocence and guilt, as it is above, the answer seems self-evident. Of course the Constitution does not allow our government to punish or execute innocent people. Nevertheless, in the 1993 case *Herrera v. Collins*, the Supreme Court held that punishing a person who can establish innocence does not violate the Constitution.[25] In doing so, the Court distinguished the concept of actual innocence from legal innocence.[26] The Court stopped short, however, of extending its holding to inmates sentenced to death. For the last seventeen years, the Court has left open the question of whether executing someone who can conclusively establish his or her innocence violates the Constitution.

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22. In *Schlup v. Delo*, the Supreme Court found that a sufficient showing of innocence may serve as a "procedural gateway," allowing a prisoner to access federal habeas review of constitutional claims that otherwise would be procedurally defaulted. 513 U.S. 298, 314–16 (1995). *Schlup* innocence claims differ from *Herrera* innocence claims in that they are procedural, not substantive. *Id.* at 315–16. *See generally Herrera*, 506 U.S. 390. They do not allege that a prisoner's innocence, in and of itself, makes that prisoner's execution or imprisonment unconstitutional. *Schulp*, 513 U.S. at 315. Instead the claim of innocence is accompanied by—and used to access federal habeas review of—constitutional errors that occurred at trial. *Id.* at 314–15. *Schlup* innocence claims allege that a prisoner's showing of innocence means a miscarriage of justice would occur if the prisoner's procedurally defaulted claims of constitutional error were not awarded federal habeas review on the merits. *Id.* Because habeas review is subject to an intricate system of procedural restraints, *Schlup* claims represent an important means by which inmates with compelling cases of innocence and constitutional error can avoid having their cases dismissed based upon procedural technicalities. To establish *Schlup* innocence, a prisoner "must show that it is more likely than not that no reasonable juror would have convicted him" in light of new evidence that was not presented at trial. *Id.* at 327. Because *Herrera* innocence claims are substantive and are not accompanied by any allegations of a constitutionally infirm trial, the standard of proof that applies to *Herrera* claims necessarily must be stricter than the standard that applies to *Schlup* claims. *Id.* at 315–16. The scope of this Note is limited to *Herrera* innocence claims.

23. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

24. 28 U.S.C. § 2254(a) (2006).

25. *Herrera*, 506 U.S. at 398–405.

26. *Id.* at 398 (noting the "elemental appeal" of the idea that the Constitution prohibits executing or imprisoning the innocent but noting that "[i]n any system of criminal justice, 'innocence' or 'guilt' must be determined in some sort of judicial proceeding").

On August 17, 2009, the U.S. Supreme Court issued a memorandum opinion, *In re Davis*, that sheds both new light and new confusion onto this unsettled area of the law.[27] In response to a petition for original habeas corpus relief that raised nothing but a *Herrera* innocence claim, the Court sent the case to the district court for evidentiary development.[28] The Court did not, however, make a holding on the cognizability of *Herrera* claims.

In re Davis indicates that the Supreme Court is sensitive to the plight of the wrongfully convicted and may be considering making an affirmative holding on the question it has left open since *Herrera*. If the Court does one day hold that executing an inmate who can establish innocence violates the Constitution, then a system must be developed for reviewing post-conviction claims of substantive innocence. Federal habeas review of *Herrera* claims raises numerous practical concerns. The system of review for such claims thus should strike a balance between alleviating these concerns and protecting the wrongfully convicted.

After providing an overview of the current state of the law on habeas innocence claims, this Note will describe the *In re Davis* opinion and the district court opinion that it spawned upon remand. The Note will then analyze the pragmatic reasons why the Supreme Court is hesitant to turn innocence into a constitutional claim. The remainder of the Note will propose a system of federal habeas review that would minimize the Court's pragmatic concerns while allowing federal courts sitting in habeas to grant relief on meritorious claims of actual innocence.

I. CURRENT STATE OF THE LAW

In 1962 the U.S. Supreme Court held that *any* criminal punishment is disproportionate punishment in violation of the Eighth Amendment where the convicted party has no culpability whatsoever.[29] Years later in *Herrera v. Collins*, however, the Court found that punishing individuals who have been found guilty at a fair and constitutionally valid trial does not violate the Constitution even in cases where the individual can, after the conviction, present evidence persuasively establishing his or her innocence.[30] In making this determination, the Court noted that federal habeas review has never been considered a traditional or proper forum for raising freestanding claims of innocence.[31] The Court also expressed various concerns regarding the practical implications of constitutionalizing freestanding innocence claims.[32]

The *Herrera* Court stopped short of holding that the Constitution permits the *execution* of a convict who can persuasively establish innocence, and to this

27. *In re* Davis, 130 S. Ct. 1 (2009) (mem.).

28. *Id.*

29. Robinson v. California, 370 U.S. 660 (1962) (finding that imprisonment for ninety days was cruel and unusual punishment in violation of the Eighth Amendment where the convict being imprisoned was a drug addict but had never touched any narcotic drug or committed any other crime in the prosecuting state).

30. *Herrera*, 506 U.S. at 400–05.

31. *Id.* at 400.

32. *Id.* at 401–04.

day the question remains open.[33] The *Herrera* Court assumed, arguendo, "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."[34] The *Herrera* Court was able to avoid making any particular holding on this issue or defining a proper standard of proof for innocence claims in capital cases because the petitioner's demonstration of innocence fell far short of being "truly persuasive."[35]

The myriad of concurring and dissenting opinions in *Herrera* indicate that a majority of justices on the *Herrera* Court would have found the execution of an innocent person to be unconstitutional.[36] Still, over fifteen years after *Herrera* was decided, no majority opinion of the Court has ever made this holding.[37]

The Supreme Court has addressed the issue left open in *Herrera* only intermittently and briefly in the years following the opinion. In *Schlup v. Delo*, the Court discussed *Herrera* innocence only to contrast it with *Schlup* innocence, which a petitioner may use not as an independent means of relief but only as a gateway claim providing access to other constitutional claims that would otherwise be considered procedurally defaulted in federal habeas corpus proceedings.[38] In *House v. Bell*, the Court once again assumed the existence of a freestanding actual innocence claim in federal capital habeas proceedings but found the petitioner had failed to make a sufficient showing to require consideration of the claim.[39] In

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33. Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2321 (2009).

34. *Herrera*, 506 U.S. at 417.

35. *See id.* at 417–19. The *Herrera* petitioner sought to challenge his convictions of the murders of two police officers, arguing that newly discovered evidence—in the form of affidavits—showed that his since-deceased brother had actually committed the crimes. *Id.* at 393–96. However, reliable eyewitness testimony, substantial physical evidence, and a handwritten confession linked Herrera to the murders. *Id.* at 394–95. In his second habeas petition, Herrera presented affidavits to show that his deceased brother, and not he, had actually murdered the officers. *Id.* at 396–97. The affidavits, however, were inconsistent, tainted by ulterior motives, and based in large part on hearsay. *Id.* at 417–19.

36. Analysis of the varying *Herrera* opinions indicates that six justices would have found executing an innocent person unconstitutional. *Id.* at 419 (O'Connor, J., joined by Kennedy, J., concurring) ("[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event."); *id.* at 429 (White, J., concurring) ("[A] persuasive showing of 'actual innocence' made after trial . . . would render unconstitutional the execution of [a federal habeas petitioner]."); *id.* at 430 (Blackmun, J., joined by Stevens and Souter, JJ., dissenting) ("Nothing could be more contrary to contemporary standards of decency or more shocking to the conscience . . . than to execute a person who is actually innocent." (citations omitted)).

37. In *House v. Bell*, the Court repeated the *Herrera* assumption that executing an innocent person may be unconstitutional, but it expressly declined to resolve the "question left open in *Herrera*" of whether freestanding innocence claims are cognizable on federal habeas review. House v. Bell, 547 U.S. 518, 554–55 (2006).

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

39. *House*, 547 U.S. at 554–55.

District Attorney's Office v. Osborn, the Court reiterated that the cognizability of *Herrera* claims in federal habeas proceedings remains an open question.[40]

Considerable disagreement exists in the circuits as to the implications of *Herrera* and its progeny. The interpretations range between: (1) explicitly finding that *Herrera* disallows substantive innocence claims on federal habeas corpus review (even in capital cases);[41] (2) either explicitly or implicitly finding that *Herrera* may authorize merits review of substantive innocence claims in appropriate capital cases;[42] and (3) explicitly finding that substantive innocence claims are cognizable on federal habeas review of capital cases.[43] Lower courts have generally dealt with the uncertainty surrounding the viability of *Herrera* innocence claims by routinely finding that petitioners making such claims have failed to meet the required showing of innocence, whether that requisite showing has been defined in the circuit or not.[44] Thus, *Herrera* claims in federal habeas proceedings have so far existed as little more than false beacons of hope: claims that can be raised and argued but never, as a practical reality, won.

II. THE SAGA OF TROY ANTHONY DAVIS

In 1989, an off-duty police officer was shot and killed in a fast food parking lot in Savannah, Georgia.[45] Troy Anthony Davis, a former athletic coach

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40. Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2321 (2009).

41. The Fifth Circuit rejected the *Herrera* claim of a death row petitioner, noting that the petitioner's argument that a claim of actual innocence was cognizable in federal habeas proceedings was "undebatably" wrong. Moore v. Quarterman, 534 F.3d 454, 465 n.19 (5th Cir. 2008). The Fourth Circuit has used somewhat contradictory language in describing the cognizability of *Herrera* innocence claims, in one case noting that the *Herrera* decision held "that claims of actual innocence are not grounds for habeas relief even in a capital case," Rouse v. Lee, 339 F.3d 238, 255 (4th Cir. 2003), and in other cases treating *Herrera* claims as if they could, possibly, be cognizable in capital habeas proceedings, Wilson v. Greene, 155 F.3d 396, 404–05 (4th Cir. 1998).

42. The majority of circuits seem to have taken this approach. *See, e.g.*, Albrecht v. Horn, 485 F.3d 103, 121–22 (3d Cir. 2007); United States v. Sampson, 486 F.3d 13, 27–28 (1st Cir. 2007); House v. Bell, 311 F.3d 767, 768 (6th Cir. 2002); United States v. Quinones, 313 F.3d 49, 67 (2d Cir. 2002); *Wilson*, 155 F.3d at 404–05; Cornell v. Nix, 119 F.3d 1329, 1334 (8th Cir. 1997); Felker v. Turpin, 83 F.3d 1303, 1312 (11th Cir. 1996).

43. The Ninth Circuit, for example, has not only explicitly found *Herrera* innocence claims cognizable in capital habeas cases, but has defined a requisite showing for such claims. *See* Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997).

44. Most circuits have not defined the requisite showing for *Herrera* innocence claims; however, the Eighth and Ninth Circuits are exceptions. The Ninth Circuit has held that a petitioner asserting a freestanding claim of actual innocence "must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Carriger*, 132 F.3d at 476–77; *accord* Boyde v. Brown, 404 F.3d 1159, 1168 (9th Cir. 2005); Jackson v. Calderon, 211 F.3d 1148, 1165 (9th Cir. 2000). The Eighth Circuit has gleaned a standard for *Herrera* innocence claims from the Supreme Court's decision in *Schlup v. Delo*. *Cornell*, 119 F.3d at 1334 (quoting Schlup v. Delo, 513 U.S. 298, 316–17 (1995)) (stating that new facts must unquestionably establish the petitioner's innocence).

45. Kathy Lohr, *Execution Nears for Georgia Inmate*, NPR, Sept. 22, 2008, http://www.npr.org/templates/story/story.php?storyId=94826773; Brendan Lowe, *Will*

who had been at the scene of the crime, was eventually convicted of the police officer's murder and sentenced to death.[46] Davis's conviction rested almost exclusively on the testimony of eyewitnesses who implicated Davis as the shooter; investigators never found the murder weapon, and no physical evidence in the form of fingerprints or DNA existed in the case.[47]

After exhausting state remedies and being denied relief during two rounds of federal habeas proceedings, Davis took the bold—and drastic—step of filing an original petition for habeas corpus relief with the U.S. Supreme Court.[48] The petition raised only one claim: substantive innocence. In support of his claim of innocence, Davis introduced evidence that seven of the nine eyewitnesses called by the State at his trial had since recanted their testimony.[49] Of the two witnesses who had not, one—Red Coles—had been implicated by eyewitnesses and others as an alternative suspect.[50] The reliability of the remaining witness's in-court identification of Davis was undermined by the fact that the witness told police at the scene of the crime that he would not be able to identify the shooter.[51]

The Supreme Court granted certiorari and, in August 2009, issued a memorandum opinion instructing the District Court for the Southern District of Georgia to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[52] In a concurring opinion, Justice Stevens, joined by Justices Ginsburg and Breyer, noted that "[t]he substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing" and that Davis's case was sufficiently substantial to warrant the Court's original habeas jurisdiction.[53]

The Supreme Court's *In re Davis* memorandum opinion is perhaps most notable for what it fails to do rather than for what it does. It makes no holding as to the constitutionality of executing a person who can prove his or her innocence. It does not define a standard of review for *Herrera* claims. It does not decide whether the procedural limitations of AEDPA should apply to such claims. It does not even discuss what specific forms of relief might be available to petitioners with meritorious *Herrera* claims. The case does, however, indicate that the Court is sympathetic to the plight of a death row prisoner who can make a compelling showing of innocence and who has no alternative avenues of relief left available to him. The opinion may also indicate that the Court is on the verge of holding that

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Georgia Kill an Innocent Man?, TIME, July 13, 2007, http://www.time.com/time/nation/article/0,8599,1643384,00.html.

46. *See* Petition for Writ of Certiorari at 5, Davis v. Georgia, 130 S. Ct. 287 (2009) (No. 09-132); Lowe, *supra* note 45; Jeffry Scott & Marcus K. Garner, *Famous Join Chorus for Clemency*, ATLANTA J.-CONST., Sept. 20, 2008, at D1.

47. Lowe, *supra* note 45; Scott & Garner, *supra* note 46.

48. Petition for Writ of Certiorari, *In re* Davis, 130 S. Ct. 1 (2009) (No. 08-1443).

49. *Id.* at 6.

50. *Id.*

51. *Id.*

52. *In re* Davis, 130 S. Ct. 1, 1 (2009) (mem.).

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

federal habeas corpus relief should be available to capital petitioners who can point to "evidence that could not have been obtained at the time of trial [that] clearly establishes [the] petitioner's innocence."[54]

As noted in Justice Scalia's dissent, the strictures of AEDPA, which govern federal habeas corpus proceedings,[55] placed significant hurdles to the district court's ability to grant relief in Davis's case.[56] For example, AEDPA prevents federal courts from granting habeas corpus relief to state prisoners on claims that a state court has already adjudicated on the merits, unless the State court's adjudication, to quote the statute, either:

> (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
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> (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.[57]

"[C]learly established Federal law, as determined by the Supreme Court of the United States" has been interpreted to mean only affirmative holdings of the Supreme Court.[58] The Supreme Court has never affirmatively held that executing a person who can establish innocence is unconstitutional and, therefore, Georgia's prior rejection of Davis's claim of innocence could not have been contrary to or an unreasonable application of clearly established federal law.[59] Instead of addressing this problem, the Supreme Court passed it to the district court, with Justice Stevens in his concurring opinion listing several suggestions for how the court could resolve the issue in a manner that would permit it to grant Davis relief if he established his innocence.[60]

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54. *Id.* (mem.).

55. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in various sections of the United States Code; relevant portion codified at 28 U.S.C. § 2254 (2006)), substantially changed federal habeas corpus law. Under the banners of comity, federalism, judicial efficiency, and finality, AEDPA created a labyrinthine set of procedural hurdles that prisoners must overcome to gain federal habeas corpus review of the merits of their constitutional claims. Justin F. Marceau has argued that § 2254, as it is currently applied, violates the incorporation doctrine of the Fourteenth Amendment because it impedes the ability of federal courts to protect criminal constitutional rights and permits substantial irregularity in state enforcement of such rights. Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231 (2008).

56. *In re Davis*, 130 S. Ct. at 2–4 (Scalia, J., dissenting).

57. 28 U.S.C. § 2254(d).

58. Williams v. Taylor, 529 U.S. 362, 412 (2000).

59. *See In re Davis*, 130 S. Ct. at 2–3 (Scalia, J., dissenting).

60. In response to Justice Scalia's argument that § 2254(d)(1) would prevent the district court from granting relief even if it were persuaded by Davis's claim of innocence, Justice Stevens suggested several ways in which the district court could overcome this bar: according to Justice Stevens, the district court could find 28 U.S.C. § 2254 was either inapplicable, unconstitutional, or satisfied. *In re Davis*, 130 S. Ct. at 1 (Stevens, J.,

Shortly after remand, the district court issued an order requesting briefing on whether *Herrera* claims are cognizable on federal habeas review and what the appropriate burden of proof for such claims should be.[61] The district court noted: "The Supreme Court has never explicitly held that such a claim is cognizable under the Constitution, much less explicitly determined the appropriate burden of proof in such a case."[62] The court further noted that the Supreme Court had left it with the task of determining "whether 28 U.S.C. § 2254(d) prevents Petitioner from obtaining relief in this case" and thus ordered briefing on that issue as well.[63]

Ultimately, the District Court for the Southern District of Georgia confronted head-on nearly all of the issues with which it was presented. After conducting an evidentiary hearing, as instructed by the Supreme Court, the district court issued an exhaustive seventy-page opinion addressing the cognizability of freestanding claims of actual innocence in federal habeas corpus proceedings,[64] the proper standard of proof to apply to such claims,[65] the applicability of AEDPA deference,[66] and the merits of Davis's innocence claim.[67]

A. Innocence and the Eighth Amendment

The petitioner in *Herrera* contested the execution of "innocent" prisoners as cruel and unusual punishment in violation of the Eighth Amendment and as a due process violation under the Fourteenth Amendment.[68] The district court in *In re Davis* considered the issue of freestanding innocence claims only from an Eighth Amendment analysis, concluding that such claims are cognizable in capital federal habeas proceedings because executing someone who can establish innocence violates the Eighth Amendment.[69]

The Eighth Amendment to the U.S. Constitution prohibits the government from imposing cruel and unusual punishment.[70] This ban against cruel and unusual punishment encompasses a ban against excessive sanctions.[71] In order to comply

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concurring). The first two options seem a task better suited to the U.S. Supreme Court, so it would seem odd the Court transferred the job to the district court. The third option fails in light of the Supreme Court's jurisprudence on the definition of "clearly established Federal law." *See supra* text accompanying note 58.

61. *In re* Davis, No. CV409-130, 2009 WL 2750976, at *1 (S.D. Ga. Aug. 26, 2009).

62. *Id.*

63. *Id.*

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

65. *Id.* at *43–45 (finding that the petitioner "must show by clear and convincing evidence that no reasonable juror would have convicted him in the light of the new evidence").

66. *Id.* at *45–46 (finding AEDPA deference applicable in diminished form where district court held evidentiary hearing and state court did not).

67. *Id.* at *46–61 (rejecting claim of innocence).

68. Herrera v. Collins, 506 U.S. 390, 396 (1993).

69. *In re Davis*, 2010 WL 3385081, at *39–43.

70. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

71. Atkins v. Virginia, 536 U.S. 304, 311 (2002).

with the Eighth Amendment, the punishment for a crime should be proportionate to the offense.[72]

The Court has held that capital punishment, if properly applied, is constitutional because it serves the twin purposes of retribution and deterrence.[73] To avoid contravening the Eighth Amendment, capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[74] If capital punishment is disproportionate in reference to either the nature of the offense or to the offender, then "the justifications for imposing the death penalty are no longer applicable."[75]

The Supreme Court recently clarified in *Graham v. Florida* that its Eighth Amendment jurisprudence consists of two categories: cases that challenge the length of sentences and those that challenge the proportionality of a punishment with respect to the nature of the offense or the culpability of the offender.[76] In this latter category, the Court applies the analysis set forth in *Trop*,[77] relying upon its own judgment[78] and the "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions,"[79] to determine whether the punishment at issue[80] is disproportionately excessive.[81] Because the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,"[82] claims of excessive punishment should be evaluated according to currently prevailing societal standards[83] so that the reach of the Eighth Amendment may evolve along with these standards.[84]

72. Weems v. United States, 217 U.S. 349, 367 (1910).

73. Gregg v. Georgia, 428 U.S. 153, 183 (1976).

74. Kennedy v. Louisiana, 554 U.S. 107, 420 (2008) (quoting Roper v. Simmons, 543 U.S. 551, 568 (2005)).

75. *In re* Davis, No. CV409-130, 2010 WL 3385081, at *40 (S.D. Ga. Aug. 24, 2010).

76. Graham v. Florida, 130 S. Ct. 2011, 2021 (2010).

77. Trop v. Dulles, 356 U.S. 86 (1958).

78. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 317–21 (2002).

79. *Roper*, 543 U.S. at 563; *see also, e.g.*, *Atkins*, 536 U.S. at 313–17.

80. Claims that capital punishment violates the Eighth Amendment may focus on capital punishment as a whole, as applied to a certain category of persons, or as inflicted by the practices of a particular state. *See* John H. Blume & Mark E. Olive, *Introduction to the Eighth Amendment: An Overview of Constitutional Principles Relevant to Capital Cases*, CAP. DEF. NETWORK, http://www.capdefnet.org/hat/contents/intro_to_8th/3_intro_to_8th.htm (last visited Jan. 16, 2011).

81. *Atkins*, 536 U.S. at 311–13.

82. *Trop*, 356 U.S. at 100–01.

83. *Atkins*, 536 U.S. at 310.

84. For example, the U.S. Supreme Court decided in *Penry v. Lynaugh* that the Eighth Amendment did not categorically prohibit the execution of mentally retarded prisoners convicted of capital crimes. 492 U.S. 302, 340 (1989). Thirteen years later, in *Atkins v. Virginia*, the Court found that the national consensus had evolved during the time since its *Penry* decision and, informed by these evolved societal standards of decency, the Court held the Eighth Amendment bans the execution of mentally retarded prisoners as cruel and unusual punishment. 536 U.S. at 306–07.

Though the *Herrera* Court sidestepped the petitioner's Eighth Amendment analysis by concluding that the petitioner's claims were based on guilt and innocence rather than on excessive punishment,[85] the *In re Davis* district court ignored this unconvincing distinction and instead addressed Davis's Eighth Amendment claim directly using a traditional *Trop* analysis. The court framed the issue as a question of "the permissibility of capital punishment based upon a characteristic of the offender: a total lack of culpability, which is demonstrated through a showing of factual innocence based upon evidence discovered subsequent to a full and fair trial."[86]

Applying the first part of the *Trop* test, the *In re Davis* district court looked to objective indicia of societal consensus regarding executing those who can establish innocence.[87]

On the same day as its *Penry* decision, the Supreme Court decided in *Stanford v. Kentucky* that there was not a national consensus against the execution of juvenile offenders between the ages of fifteen and eighteen sufficient to hold the practice to be cruel and unusual punishment. 492 U.S. 361, 370–71 (1989). Less than two decades later, the Court revisited this decision and, once again finding an evolution in society's standards of decency, held the execution of juvenile offenders under the age of eighteen to constitute cruel and unusual punishment in violation of the Eighth Amendment. *Roper*, 543 U.S. at 574.

85. Herrera v. Collins, 506 U.S. 390, 405–07 (1993). When the *Herrera* Court assumed, for the sake of argument, that executing an innocent person would be unconstitutional, it did not specify whether it had in mind an Eighth Amendment cruel and unusual punishment or a Fourteenth Amendment due process violation. *Id.* at 417. Though the Fourteenth Amendment argument expressed by the petitioner and the dissent in *Herrera* has merit, there are several factors that weigh in favor of a focus upon the Eighth Amendment in analyzing the constitutional basis of *Herrera* claims. First, a strong argument can be made that executing or punishing a person who can convincingly show his innocence violates the Eighth Amendment. This argument will be addressed in the text discussing the district court's *In re Davis* opinion. Second, the focus on society's evolving standards of decency in Eighth Amendment jurisprudence permits the Supreme Court greater flexibility to revisit its *Herrera* decision in the face of *stare decisis* concerns. Finally, grounding the constitutional basis of *Herrera* claims in the Eighth Amendment makes sense in light of the manner in which the *Herrera* Court addressed the petitioner's Eighth Amendment claim. The majority in *Herrera* disregarded the petitioner's Eighth Amendment claim not by addressing it directly on the merits, but by differentiating substantive innocence claims from other claims properly meriting Eighth Amendment review. *Id.* at 405–07. To make *Herrera's* assumption regarding capital prisoners an affirmative holding—and even to reverse *Herrera's* holding on the cognizability of freestanding innocence claims made by non-capital prisoners—the Court would need only to abrogate the differentiation made in *Herrera*. Petitioners who argue that the Eighth Amendment prohibits their execution because they are innocent are, contrary to the *Herrera* majority's analysis, making a claim regarding punishment. As with any Eighth Amendment claim, the petitioners argue that they belong to a class of people for whom execution is an excessive punishment. If the Supreme Court accepts this rationale, it may then conduct a traditional Eighth Amendment analysis of *Herrera* claims without further offending *stare decisis*.

86. *In re* Davis, No. CV409-130, 2010 WL 3385081, at *40 (S.D. Ga. Aug. 24, 2010).

87. *Id.* at *40–41.

Though there is evidence that the people of the United States have always been concerned with the possibility of executing an innocent person,[88] recent DNA exonerations[89] have pulled the issue into the spotlight and shifted national consensus toward favoring the provision of legal avenues of relief to the wrongfully convicted.[90] The mounting public concern about the prevalence of wrongful convictions in our criminal justice system has inspired both legislatures and courts across the nation to find ways to reduce the possibility of convicting the innocent and to ensure that petitioners with claims of innocence have access to post-conviction relief.[91] Some states have enacted laws banning or severely limiting availability of the death penalty;[92] others have reformed law enforcement practices regarding eyewitness identifications;[93] and almost all have passed statutes

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88. For example, John Stuart Mill, in his 1868 speech supporting capital punishment, noted that the possibility of executing an innocent person was a weighty argument against capital punishment. 191 PARL. DEB., H.C. (3d ser.) (1868) 1053 (U.K.) ("[T]hat if by an error of justice an innocent person is put to death, the mistake can never be corrected; all compensation, all reparation for the wrong is impossible."). Mill was able to sweep aside this concern by concluding that the British system of criminal justice provided adequate safeguards to prevent the possibility of mistaken executions. Recent DNA exonerations, however, have brought public attention to the fact that wrongful convictions can occur, even in criminal justice systems providing myriad safeguards to defendants.

89. DNA testing has resulted in the post-conviction exoneration of 267 people in the United States. *Facts on Post-Conviction DNA Exonerations*, *supra* note 17. On average, each of those 267 individuals spent thirteen years in prison before DNA results proved their innocence. In total, they served 3471 years for crimes they did not commit. Seventeen of those exonerated had served time on death row. *Id.* Because DNA evidence is available in only a small percentage of criminal cases, these statistics reflect only a portion of the problem of wrongful convictions.

90. For example, George Ryan, then-Governor of Illinois, suspended the death penalty in that state after thirteen people on death row were exonerated. He noted that he could no longer support a death penalty system that had "come so close to the ultimate nightmare, the state's taking of innocent life." *Update: Death Penalty*, PBS ONLINE NEWSHOUR, May 10, 2001, http://www.pbs.org/newshour/bb/law/jan-june01/penalty_5-10.html.

91. *See* David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1039–41, 1045–53 (2010) (discussing North Carolina's Innocence Commission as a model that, with some adjustment, effectively reviews claims of actual innocence).

92. New Mexico recently banned the death penalty, in part because of concerns regarding wrongful convictions. *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 18, 2009, at A16. Maryland recently reformed its capital punishment statute to allow the death penalty only in first-degree murder cases substantiated by biological or DNA evidence, video, or a videotaped voluntary confession. MD. CODE ANN., CRIM. LAW § 2-202 (West 2009).

93. States such as New Jersey, Wisconsin, West Virginia, Maryland, North Carolina, and Georgia, as well as a growing number of cities, towns, and police precincts, have adopted eyewitness identification reforms. INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION 22–25 (2009), *available at* http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf.

providing prisoners with post-conviction access to DNA testing.[94] Many states have statutes that expressly provide post-conviction relief based upon freestanding, substantive claims of actual innocence.[95] The high courts of other states have interpreted the U.S. Constitution, state constitutions, and/or state post-conviction relief statutes as providing avenues of relief for petitioners with freestanding innocence claims.[96]

The district court in *In re Davis* took these modern reforms as evidence of a societal consensus against executing the innocent.[97] Specifically, the court found that, of the states utilizing the death penalty, only Oklahoma has failed to provide some sort of post-conviction mechanism for establishing innocence. When considering all states, both those that utilize the death penalty and those that do not, only three states have failed to enact reforms aimed at providing convicts a

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94. Forty-eight states have post-conviction DNA access statutes. *Reforms by State*, INNOCENCE PROJECT, http://www.innocenceproject.org/news/LawView2.php (last visited Jan. 16, 2011); *see also supra* note 19.

95. *See, e.g.*, ALA. R. CRIM. P. 32.1(e)(5); ARIZ. R. CRIM. P. 32.1(h); ARK. CODE ANN. § 16-112-201 (1987 & Supp. 2007); 725 ILL. COMP. STAT. 5/122-1(a) (2008); MINN. STAT. § 590.01 subdiv. 1 (2010); N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinley 2005); OKLA. STAT. ANN. tit. 22, § 1089(C) (West 2006 & Supp. 2010); UTAH CODE ANN. § 78B-9-104(1)(e) (West 2009 & Supp. 2010).

96. *See, e.g.*, *In re* Lawley, 179 P.3d 891, 897 (Cal. 2008) ("We have long recognized the viability of an actual innocence habeas corpus claim, at least insofar as the claim is based on newly discovered evidence or on proof false evidence was introduced at trial."); Summerville v. Warden, 641 A.2d 1356, 1359 (Conn. 1994) (holding that freestanding habeas claim of actual innocence is cognizable); Jones v. State, 591 So. 2d 911, 915–16 (Fla. 1991) (holding that newly discovered evidence merits post-conviction relief if it would probably have resulted in an acquittal if introduced at trial); People v. Washington, 665 N.E.2d 1330, 1336–37 (Ill. 1996) (holding that, under Illinois constitution, freestanding actual innocence claims based on new evidence are cognizable in post-conviction review); State *ex rel.* Amrine v. Roper, 102 S.W.3d 541, 547–48 (Mo. 2003) (finding freestanding actual innocence habeas claim cognizable and discussing standard for evaluating such claims); Montoya v. Ulibarri, 163 P.3d 476, 478 (N.M. 2007) (holding that "the New Mexico Constitution permits habeas petitioners to assert freestanding claims of actual innocence," and analyzing the standard for such claims); People v. Cole, 765 N.Y.S.2d 477, 485–86 (N.Y. Crim. Ct. 2003) (finding that conviction or punishment of innocent person violates New York constitution, and discussing standard for evaluating actual innocence claims); Dellinger v. State, 279 S.W.3d 282, 290–91 (Tenn. 2009) (noting that Tennessee's Post-Conviction Procedure Act expressly provides for freestanding actual innocence claims based on new scientific evidence); *Ex parte* Elizondo, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996) (holding that freestanding post-conviction actual innocence claims are cognizable whether conviction resulted in death sentence or incarceration).

97. When proof of motive was available and indicated a primary concern with wrongful convictions, the district court considered state efforts at abolishing or severely limiting the death penalty as examples of "over-inclusive solutions to avoid executing the innocent." Thus, the court recognized the repeal of the death penalty in New Mexico and the severe limitation on implementation of the death penalty in Maryland. The court also found that "protecting the innocent from execution was a motivating factor in some popular historical movements to abolish capital punishment in the states," including in Michigan in 1846, Rhode Island in 1852, and Maine in 1876. *In re* Davis, No. CV409-130, 2010 WL 3385081, at *40 n.31 (S.D. Ga. Aug. 24, 2010).

means of proving innocence.[98] In addition to providing for post-conviction DNA testing, states have also enacted reforms allowing for additional post-conviction fact-finding procedures, such as fingerprint analysis and additional forensic testing, aimed at rooting out wrongful convictions.[99] Assessing these statistics, the district court found that the states were exhibiting a "nearly unanimous" and "increasing" concern for protecting legally convicted individuals who may be able to establish factual innocence after their trials.[100]

The second portion of the *Trop* test requires the federal court reviewing an Eighth Amendment claim to apply controlling precedent and its own independent judgment regarding the proportionality of the punishment at issue.[101] In applying this portion of the test, the *In re Davis* district court noted that it did not know of a principle "more firmly embedded in the fabric of the American legal system than that which proscribes punishment of the innocent."[102] The court found no reason why a "patently erroneous, but fair, criminal adjudication would change" this fundamental policy against punishing the innocent.[103]

In the context of capital punishment, the second portion of the *Trop* test also requires a determination of whether infliction of the death penalty in the case at issue would fulfill capital punishment's two legitimate penological goals of retribution and deterrence.[104] The district court found that punishing or executing innocent convicts did not serve the purpose of deterrence because, in the case of innocent people, "there is no conduct to deter."[105] The court further found that retribution was not furthered by execution of the innocent because retribution—whether described as an expression of "the community's moral outrage" or an attempt to "restore balance for the wrong to the victim"—depends upon the direct personal culpability of the person punished.[106]

B. Burden of Proof for Herrera *Innocence Claims*

The correct burden of proof for *Herrera* innocence claims has been a subject of vigorous debate since the Supreme Court issued the opinion. Beyond

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98. Most of these reforms involve post-conviction access to DNA evidence. Forty-eight states have post-conviction DNA access statutes. *Reforms by State*, *supra* note 94. Only Massachusetts, Alaska, and Oklahoma have not enacted mechanisms to discover and correct wrongful convictions. *Id.*

99. *In re Davis*, 2010 WL 3385081, at *40 n.28.

100. *Id.* at *41.

101. Graham v. Florida, 130 S. Ct. 2011, 2022 (2010).

102. *In re Davis*, 2010 WL 3385081, at *41.

103. *Id.* at *42.

104. Kennedy v. Louisiana, 554 U.S. 407, 441 (2008).

105. *In re Davis*, 2010 WL 3385081, at *42. Rather than deterring crime, a system that permits punishing those prisoners who can establish their innocence may actually encourage crime by giving those with criminal inclinations hope that an innocent person will pay the price for their criminal conduct.

106. *Id.* at *43. There is also an argument that punishing or executing the innocent actually undermines retribution. While an innocent person is mistakenly punished, the true culprit goes free. Society receives only a temporary and elusive form of retribution that disappears as soon as the judicial system's mistake becomes apparent.

noting that it would have to be "extraordinarily high," the *Herrera* majority did not specify what showing would be required to obtain relief on a substantive actual innocence claim in a capital habeas case.[107] Justice White, concurring in the judgment, wrote: "To be entitled to relief . . . petitioner would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'"[108] Justice Blackmun, dissenting, argued: "[T]o obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent."[109] Finally, in its direction to the district court, the Supreme Court in *In re Davis* implied a standard of review based on determining "whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[110]

The Supreme Court has expressly endorsed three standards of proof for evaluating claims of innocence. If a petitioner has been found guilty at a fair and constitutionally valid trial by a trier of fact who has heard all of the reliable evidence, the petitioner can still challenge the sufficiency of the evidence presented at his trial by attempting to fulfill the burden of proof established in *Jackson v. Virginia*.[111] The *Jackson* standard requires the deciding court to determine 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."[112] The burden of proof applying to *Schlup* gateway claims is considerably less stringent. A petitioner may succeed on a *Schlup* gateway claim by showing that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."[113]

The *Sawyer* standard, which applies to showings of innocence in the context of an allegedly erroneous sentencing determination in a capital trial, falls between the *Jackson* and *Schlup* standards and requires that the petitioner establish "by clear and convincing evidence that but for constitutional error, no reasonable juror would have found him eligible for the death penalty."[114]

The *In re Davis* district court determined that the *Sawyer* standard should apply to freestanding habeas claims of actual innocence.[115] Specifically, the court required Davis to establish "by clear and convincing evidence that no reasonable

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107. Herrera v. Collins, 506 U.S. 390, 417 (1993).

108. *Id.* at 429 (White, J., concurring) (alteration in original).

109. *Id.* at 442 (Blackmun, J., dissenting).

110. The Ninth and Eighth Circuits have also defined standards of review for *Herrera* claims in capital habeas cases. *Compare* Carriger v. Stewart, 132 F.3d 463, 476–77 (9th Cir. 1997) (petitioner "must affirmatively prove that he is probably innocent"), *with* Cornell v. Nix, 119 F.3d 1329, 1334 (8th Cir. 1997) (quoting Schlup v. Delo, 513 U.S. 298, 316–17 (1995)) (new facts must unquestionably establish the petitioner's innocence).

111. Jackson v. Virginia, 443 U.S. 307 (1979).

112. *Id.* at 318–19.

113. *Schlup*, 513 U.S. at 327.

114. Sawyer v. Whitley, 505 U.S. 333, 348 (1992).

115. *In re* Davis, No. CV409-130, 2010 WL 3385081, at *45 (S.D. Ga. Aug. 24, 2010).

juror would have convicted him in the light of the new evidence."[116] The court reasoned that Supreme Court precedent indicated that the standard for *Herrera* claims must be "extraordinarily high" and higher than the *Schlup* standard but not as strict as the *Jackson* standard.[117] The court also reasoned that the burden of proof applying to post-conviction claims of innocence is rightfully dependent upon the confidence that society can reasonably place on the verdict of the case.[118] If the trier of fact has heard all of the evidence at a fair and constitutionally error-free trial, then a high degree of confidence should be placed on the trier of fact's verdict.[119] If the verdict stemmed from a trial infected by constitutional error, it merits only a low degree of confidence.[120] The district court interpreted *Herrera* claims to be somewhere between these two scenarios: the trier of fact heard a constitutionally fair trial, but only a portion of the relevant facts.[121]

C. Applicability of AEDPA

AEDPA creates a web of procedural hurdles intended to emphasize judicial efficiency[122] and respect for state judgments at the expense of narrowing the reach of the writ of habeas corpus.[123] The U.S. Supreme Court's concurring opinion in *In re Davis* implies that it may be willing to hold AEDPA provisions inapplicable or unconstitutional in relation to the review of actual innocence claims in capital habeas cases.[124] Justice Scalia's dissenting opinion in the case argues that 28 U.S.C. § 2254(d)(1) would prevent any federal court from granting habeas relief to Davis, even if the court found that Davis had established his innocence.[125] According to Justice Scalia, because the Georgia Supreme Court had rejected Davis's innocence claim on the merits and this rejection was not contrary to, or an unreasonable interpretation of, clearly established federal law (because the Supreme Court had never affirmatively held freestanding innocence claims to be constitutional claims), Davis's case could not pass through the restrictions imposed by § 2254(d)(1).[126]

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116. *Id.*

117. *Id.* at *44–45.

118. *Id.* at *44 ("[T]he burden should be directly related to how much confidence can be placed in a jury verdict in a given situation.").

119. *Id.*

120. *Id.* at *45.

121. *Id.*

122. There is some merit to the argument that AEDPA's procedural limitations, though intended to promote judicial efficiency, actually achieve the opposite result. AEDPA has created a maze of procedural obstacles that habeas petitioners must navigate and litigate. Litigating procedural matters often takes years in any given case. NANCY J. KING ET AL., HABEAS LITIGATION IN U.S. DISTRICT COURTS 39 (2007). Holding AEDPA inapplicable or unconstitutional as it relates to *Herrera* innocence claims may actually promote more efficient litigation of such claims.

123. Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 470 (2007) ("AEDPA's provisions express a 'general purpose' to restrict the writ.").

124. *In re* Davis, 130 S. Ct. 1, 1–2 (2009) (Stevens, J., concurring).

125. *Id.* at 2 (Scalia, J., dissenting).

126. *Id.* at 2–3.

The district court was able to sidestep Justice Scalia's argument by highlighting the fact that the Georgia Supreme Court had never held an evidentiary hearing on Davis's innocence claim.[127] By holding an evidentiary hearing, the district court had uncovered new evidence that the Georgia Supreme Court had never considered.[128] The district court reasoned that, in such a situation, it is problematic to defer to the state court's determination of the claim because the state court had not heard all of the relevant evidence.[129] The circuits are split on whether AEDPA deference should apply to state court determinations of a claim where the state court did not hold an evidentiary hearing on the claim and the federal district court did. Some circuits find AEDPA deference inapplicable under such circumstances;[130] one finds both the provisions of § 2254(d) and (e) applicable;[131] and the majority take a middle ground approach, applying a watered-down version of AEDPA deference.[132] The district court in *In re Davis* applied this middle-ground approach.[133]

D. The Merits of Davis's Innocence Claim

Though it agreed with petitioner Davis that the Eighth Amendment forbids executing prisoners who can establish their innocence, the district court ultimately ruled against Davis on the merits of his innocence claim after concluding that Davis's evidence of innocence consisted largely of "smoke and mirrors."[134] The court found Davis's evidence of witness recantations to be alternately overstated,[135] unlikely to affect the ultimate verdict in the case,[136] or involving unreliable witness statements.[137] The court also looked disfavorably upon Davis's decision to rest his case of innocence upon affidavits instead of bringing all of the available recanting witnesses to the stand at the evidentiary hearing to be subject to cross examination.[138] The court was similarly unimpressed with Davis's other evidence of innocence,[139] finding it to be alternately unreliable,[140] uncorroborated,[141] or unimportant to the issue of Davis's guilt.[142]

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127. *In re* Davis, 2010 WL 3385081, at *46.

128. *Id.*

129. *Id.*

130. *See, e.g.*, Bryan v. Mullin, 335 F.3d 1207, 1216 (10th Cir. 2003) (en banc); Nunes v. Mueller, 350 F.3d 1045, 1055 (9th Cir. 2003).

131. *See, e.g.*, Morrow v. Dretke, 367 F.3d 309, 315 (5th Cir. 2004).

132. *See, e.g.*, Teti v. Bender, 507 F.3d 50, 58 (1st Cir. 2007); Lambert v. Blackwell, 387 F.3d 210, 235 (3d Cir. 2004).

133. *In re Davis*, 2010 WL 3385081, at *46.

134. *Id.* at *59.

135. *Id.*

136. *Id.* at *60.

137. *Id.*

138. *Id.*

139. This evidence consisted of alternative eyewitness accounts, hearsay confessions by Mr. Coles, statements regarding Mr. Coles's conduct following Officer MacPhail's murder, and new evidence regarding shell casings found at the scene of Officer MacPhail's murder and a previous shooting which prosecutors had attempted to bootstrap to Mr. Davis's trial for the MacPhail murder. *Id.*

140. *Id.*

Given the fact that it ultimately found Davis's evidence of innocence unconvincing, the district court could have taken the standard approach—routinely applied by federal courts since *Herrera*—of assuming the existence of a right to assert *Herrera* claims in capital habeas proceedings, but declining to analyze the implications of such claims, or the burden of proof applying to them, after finding the petitioner's showing of innocence lacking. The court's decision to exhaustively explore the complicated issues surrounding *Herrera* claims may indicate an attempt to actively encourage the Supreme Court to finally resolve the open issue regarding the cognizability of such claims in federal habeas corpus proceedings.

III. CONCERNS REGARDING THE CONSTITUTIONALIZATION OF INNOCENCE CLAIMS

Permeating the *Herrera* opinion is a sense of general unease with the practical implications of a constitutional actual innocence claim.[143] Given the weak showing of innocence on the part of the petitioner in the case, the Court was free to focus upon its practical concerns without being forced to weigh them, in anything more than a hypothetical sense, against the life of an innocent prisoner. The Court's reaction to Troy Anthony Davis's original petition for habeas corpus relief may indicate that the Court is willing to disregard some of its practical concerns if one day faced with a truly persuasive showing of innocence by a death row prisoner with no other avenues of relief available. The *Herrera* Court's concerns with recognizing substantive innocence claims as cognizable on federal habeas review can be grouped into five general categories: concerns regarding (a) finality; (b) judicial efficiency; (c) the reliability of stale evidence; (d) comity and federalism; and (e) an onslaught of frivolous claims. Each of these categories of concern will be explicated below.

A. Finality

Though finality may be elusive and, in some cases, impossible to achieve, it is nevertheless necessary to the proper functioning of any judicial system,[144] including the American system of criminal justice.[145] As Justice Harlan noted in 1971: "No one, not criminal defendants, not the judicial system, not society as a

141. *Id.*

142. *Id.*

143. *See generally* Herrera v. Collins, 506 U.S. 390 (1993).

144. "One of the law's very objects is the finality of its judgments." McCleskey v. Zant, 499 U.S. 467, 491 (1991).

> No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen.

Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring).

145. "Without finality, the criminal law is deprived of much of its deterrent effect." Teague v. Lane, 489 U.S. 288, 309 (1989).

whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation."[146]

Federal habeas corpus review, even absent review of *Herrera* claims, "extends the ordeal of trial for both society and the accused."[147] Expanding federal habeas review to *Herrera* innocence claims would, in an even more literal sense, extend the ordeal of trial. Again quoting Justice Harlan:

> Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.[148]

The effect that review of innocence claims in federal habeas proceedings would have on the finality of state court judgments is arguably the primary concern underlying the *Herrera* opinion. In the Court's words: "Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence."[149]

B. Judicial Efficiency

Not only would federal habeas review of substantive innocence claims undermine the finality of state court verdicts, it would also be expensive. "Society's resources [are] concentrated at [trial] in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens."[150] Reviewing innocence claims in federal habeas proceedings would not only disregard the time and expense already undertaken by the deciding state in rendering its verdict, it would also require society to take on additional costs that, in some cases, could be very high. Federal habeas review already entails significant expense.[151] Habeas review of the average capital case currently takes 3.1 years and involves investigation costs, costs of legal counsel, and judiciary costs.[152] Reviewing meritorious innocence claims could require what essentially amounts to a new trial in the district court, complete with the time commitment and costs of evidentiary development and review.

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146. Mackey v. United States, 401 U.S. 667, 691 (Harlan, J., concurring in part and dissenting in part).

147. Engle v. Isaac, 456 U.S. 107, 126–27 (1982).

148. Sanders v. United States, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting).

149. Herrera v. Collins, 506 U.S. 390, 401 (1993).

150. Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

151. McCleskey v. Zant, 499 U.S. 467, 490–91 (1991).

152. Researchers in a study completed in 2007 found that the disposition time of capital habeas cases is 2.4 years, or 3.1 years when pending cases were included in the analysis. KING, *supra* note 122, at 41.

C. The Reliability of Stale Evidence

The *Herrera* Court took the petitioner to task for not defining with specificity the relief that he sought. The Court noted that a new trial, at such a late point in the case, would in no way necessarily lead to a more reliable result than the original trial. The majority argued that "the passage of time only diminishes the reliability of criminal adjudications."[153] Where no new evidence is being developed and the parties are simply re-introducing evidence already set forth in the original trial, it is easy to imagine a second trial, separated in time from the events at issue, producing a less accurate result than the original.[154]

Where new evidence has emerged, however, the gravity of this concern depends upon the nature of the evidence in question. While witness testimony is likely to lose value over time as the passage of time wreaks havoc on witnesses' memories,[155] certain evidence may actually be of greater probative value in the future.[156] For example, advances in DNA technology[157] and the science of arson[158] have allowed for more precise analysis of DNA and arson evidence, even in reference to evidence from very old cases.

D. Comity and Federalism

The Supreme Court and Congress[159] have limited the reach of the writ of habeas corpus for years in order to respect state sovereignty. While the Warren Court used the writ to strengthen criminal defendants' rights and reform criminal procedure, the Burger and Rehnquist Courts reeled in the reach of the writ through a variety of decisions creating or strengthening procedural obstacles to habeas corpus relief. For example, the Court expanded the notion of procedural default[160]

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153. *Herrera*, 506 U.S. at 403.

154. This is a problem inherent in federal habeas corpus relief itself, not simply in habeas relief for *Herrera* innocence claims. "Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." Engle v. Isaac, 456 U.S. 107, 127–28 (1982).

155. *Herrera*, 506 U.S. at 403–04 (stating that "the passage of time only diminishes the reliability of criminal adjudications" because witnesses disperse and witnesses' memories erode).

156. Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1703 (2008).

157. *Id.*

158. *See, e.g.*, Grann, *supra* note 2.

159. Most notably through the passage of AEDPA. *See supra* text accompanying note 23.

160. Originally, claims were not considered procedurally defaulted in federal habeas proceedings based upon procedural defaults "incurred by the applicant during the state court proceedings," but federal judges could, in their discretion, deny relief to a petitioner who had "deliberately bypassed the orderly procedure of the state courts and in so doing . . . forfeited his state court remedies." Fay v. Noia, 372 U.S. 391, 438 (1963). Eventually, however, the notion of procedural default was expanded to require exhaustion of state remedies as a prerequisite to federal habeas relief. Petitioners' claims that are, or would be, considered procedurally defaulted in state court proceedings will be ineligible for federal habeas relief unless the petitioner shows cause and prejudice for the state procedural waiver. Wainwright v. Sykes, 433 U.S. 72, 90–91 (1977).

and created a bar to prevent petitioners on collateral review from benefiting from new rules of constitutional law.[161] AEDPA codified much of the Supreme Court's precedent, but Congress tightened many of the Court's restrictions and added new limitations of its own.[162] Supporting this trend toward restriction of the writ is the philosophy that: "Reexamination of state convictions on federal habeas 'frustrate[s] . . . both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'"[163] In order to recognize actual innocence claims as cognizable on federal habeas review, the Supreme Court would need to move away from this philosophy, refocusing its attention on the rights of criminal defendants.

E. An Onslaught of Frivolous Claims

The final concern running throughout the *Herrera* opinion is that of opening a floodgate of frivolous habeas litigation.[164] Justice O'Connor cited this concern in explaining why actual innocence claims would necessarily be subject to a very stringent standard of review: "Unless federal proceedings and relief—if they are to be had at all—are reserved for 'extraordinarily high' and 'truly persuasive demonstration[s] of actual innocence' that cannot be presented to state authorities, the federal courts will be deluged with frivolous claims of actual innocence."[165]

Any system for addressing actual innocence claims in federal habeas corpus proceedings, in order to be a realistic possibility, must address many if not all of the aforementioned concerns. The ideal system would provide an effective legal avenue of relief to the wrongfully convicted while quickly weeding out frivolous claims and balancing the needs of finality, comity, judicial efficiency, and reliability.

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161. Teague v. Lane, 489 U.S. 288, 310 (1989).

162. AEDPA requires exhaustion of state remedies or a showing that state corrective process is absent or ineffective to protect the petitioner's rights. 28 U.S.C. § 2254(b) (2006). AEDPA also limits the ability of federal courts to grant habeas relief. Federal courts may not grant habeas relief to any claim adjudicated on the merits in a state court proceeding unless the state court adjudication resulted "in a decision that 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 in the State court proceeding." § 2254(d). State factual determinations are presumed correct in federal habeas proceedings, and petitioners must rebut the findings with clear and convincing evidence. § 2254(e)(1). AEDPA also severely limits the ability of federal courts to grant evidentiary hearings on habeas claims whose factual bases were not developed in state court proceedings. § 2254(e)(2).

163. McCleskey v. Zant, 499 U.S. 467, 491 (1991) (alteration in original) (quoting Murray v. Carrier, 477 U.S. 478, 487 (1986)) (internal quotation marks omitted).

164. Even though the U.S. Supreme Court has never affirmatively held that freestanding innocence claims are cognizable in capital habeas cases, such claims are raised in 10.8% of capital habeas cases. KING, *supra* note 122, at 29. Presumably, this percentage would increase if an affirmative holding of the Supreme Court made the possibility of relief less remote.

165. Herrera v. Collins, 506 U.S. 390, 426 (1993) (O'Connor, J., concurring) (alteration in original) (citation omitted) (internal quotation marks omitted).

IV. A SYSTEM FOR ADDRESSING *HERRERA* CLAIMS

Some death penalty critics cite the risk of executing the innocent as reason for abolishing the death penalty.[166] Death penalty advocates counter by arguing that, even if error is inevitable, the social benefits of the death penalty (in the form of retribution and deterrence) outweigh the risk of occasionally executing an innocent person.[167]

It is beyond the scope of this Note to weigh in on this debate. Instead of questioning whether capital punishment should be constitutional or not, this Note accepts as true the Supreme Court's holding in *Gregg v. Georgia* that capital punishment is constitutional because it serves the twin purposes of retribution and deterrence.[168] This Note also accepts as true the argument that the wrongfully convicted belong to a class upon which the death penalty cannot be imposed in accordance with the Eighth Amendment, as executing the innocent does not serve the goal of either retribution or deterrence.[169] Because executing the innocent would be unconstitutional, inmates with compelling post-conviction claims of actual innocence must be permitted access to legal review and relief. After all, "[t]he abstract substantive right to avoid execution if innocent means nothing in concrete terms . . . unless there exists a correlative right to establish innocence before a court at a requisite level of probability—and to do so after judgment."[170]

A. Federal Versus State Forum

Two general systems for reviewing post-conviction claims of innocence have been proposed: (1) requiring the states to make actual innocence claims cognizable in some type of state post-conviction proceedings (whether that be state habeas proceedings, state post-conviction relief proceedings, or motions for a new

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166. Eric M. Freedman, *Mend It or End It?: The Revised ABA Capital Defense Representation Guidelines as an Opportunity to Reconsider the Death Penalty*, 2 OHIO ST. J. CRIM. L. 663 (2005). Legal scholar Robert Hardaway recommends raising the standard of proof required in death penalty trials rather than abolishing the death penalty to prevent wrongful executions. Robert Hardaway, *Beyond a Conceivable Doubt: The Quest for a Fair and Constitutional Standard of Proof in Death Penalty Cases*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 221 (2008).

167. *See* Ronald J. Allen & Amy Shavell, *Further Reflections on the Guillotine*, 95 J. CRIM. LAW & CRIMINOLOGY 625, 627–34 (2005) ("Virtually all social policies and decisions quite literally determine who will live and who will die[;] . . . explicit tradeoffs are made between benefits and costs, including the costs of innocent deaths.").

168. Gregg v. Georgia, 428 U.S. 153, 183 (1976).

169. *See supra* Part II.A.

170. Vivian Berger, Herrera v. Collins*: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943, 1012 (1994).

trial);[171] or (2) permitting federal courts to review actual innocence claims in federal habeas corpus proceedings.[172]

Legal scholar Vivian Berger advocates the former approach, arguing that "the Eighth Amendment obligates states to entertain motions for a new trial based on newly discovered evidence, by death-sentenced prisoners asserting innocence, without regard to generally applicable time limitations."[173] Requiring states to entertain post-conviction claims of innocence instead of permitting the federal courts to do so, according to Berger, pays greater respect to comity and federalism, while also providing practical benefits.[174]

There is definite appeal to the argument that the states should retain control over guilt/innocence determinations in state criminal cases. However, there are several serious problems and complications with Berger's proposed approach. First, it is debatable whether forcing states to provide convicted inmates with post-conviction review of actual innocence claims pays greater homage to comity and federalism than allowing federal courts to review such claims.[175] Forcing states to provide post-conviction review of actual innocence claims requires states to bear considerable expense with no financial assistance from the federal government. By allowing federal habeas review of actual innocence claims, the federal government would take on these costs instead of forcing them upon the states. The states would then have the freedom to decide on their own whether to offer state post-conviction review of innocence claims. States that refuse to offer such review will forfeit their statutory right to AEDPA deference in subsequent federal habeas proceedings.[176] If states do offer such review, the conclusions and findings that

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171. *See, e.g.*, *id.*; Sophia S. Chang, *Protecting the Innocent: Post-Conviction DNA Exoneration*, 36 HASTINGS CONST. L.Q. 285 (2009) (suggesting standardizing state post-conviction DNA evidence statutes so that every prisoner has the opportunity to prove innocence).

172. This latter approach seems to be favored by the circuit courts and, judging by its *In re Davis* opinion, the U.S. Supreme Court.

173. Berger, *supra* note 170, at 1012.

174. In advocating for requiring state review of post-conviction innocence claims, Berger notes that federal courts have less expertise in state criminal law, have less interest in correcting wrongful state convictions, and can better spend their time deciding issues of national importance. *Id.* at 1010–11.

175. In a decision holding that state prisoners must file petitions for discretionary review with the state's highest court in order to properly exhaust state remedies, the U.S. Supreme Court explicitly noted that its holding could disserve "the comity interests underlying the exhaustion doctrine" because the "increased burden" of receiving discretionary review petitioners would "be unwelcome in some state courts because the courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court." O'Sullivan v. Boerckel, 526 U.S. 838, 847 (1999).

176. *See* 28 U.S.C. § 2254(b)(1)(B)(i) (2006) (permitting federal court to grant application for writ of habeas corpus where it appears that "there is an absence of available State corrective process"). If the state court never reviewed and decided the claim, "there are simply no results, let alone reasoning, to which [a federal court] can defer." McKenzie v. Smith, 326 F.3d 721, 727 (6th Cir. 2003). In this situation, deference under 28 U.S.C. § 2254(d) is inapplicable and the federal court reviews the claim de novo. *Id.*

they make will be entitled to AEDPA deference upon federal habeas review of the innocence claims.[177]

Furthermore, requiring states to offer post-conviction review of actual innocence claims may mean dictating the precise manner in which such review should be conducted. If post-conviction review of actual innocence claims is required by the U.S. Constitution, it follows that such review should be uniformly enacted. If allowed to devise their own methods for reviewing actual innocence claims in post-conviction proceedings, states could reach very different conclusions as to the proper standard of review and the meaning of "new evidence" in the context of post-conviction claims of innocence. The detrimental impact upon comity and federalism of a system in which states are required to provide post-conviction review of actual innocence claims is greater than it would appear at first glance: the federal government, in order to adequately safeguard the constitutional right of the innocent to avoid execution, must dictate to the states the precise manner in which to provide post-conviction review of innocence claims.

A second concern with Berger's approach stems from the fact that the U.S. Supreme Court has (1) repeatedly indicated that state post-conviction proceedings are not constitutionally mandated, and (2) refused to impose constitutional requirements upon them. For example, there is no constitutional right to the appointment of counsel in discretionary appeals; the right to counsel extends only to the first appeal as-of-right.[178] If Berger's proposed system were enacted, the effect upon the right to counsel (or lack thereof) in discretionary appeals would be unclear. An indigent inmate's right to make post-conviction claims of innocence in state court would be largely illusory if the inmate was not entitled to appointed counsel. Post-conviction claims of innocence would likely involve complex factual development for which self-represented inmates may be ill-prepared.[179]

A third, more abstract problem with Berger's proposal stems from the human tendency to filter reality in accordance with preexisting beliefs and to avoid admitting mistakes.[180] While it is true that a state has substantial interest in correcting wrongful convictions, human psychology can sometimes interfere with this process. When a state judicial system has undergone considerable expense in providing a constitutionally sound trial to a criminal defendant, has reached a determination of guilt beyond a reasonable doubt, and has relied upon this

177. *See* 28 U.S.C. § 2254(d).

178. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). Furthermore, AEDPA expressly states that the ineffectiveness or incompetence of state post-conviction counsel shall not be grounds for federal habeas relief. 28 U.S.C. § 2254(i).

179. AEDPA also expressly provides that the ineffectiveness of federal post-conviction counsel shall not be grounds for federal habeas relief. 28 U.S.C. § 2254(i). However, indigent defendants are guaranteed the assistance of counsel in federal habeas corpus proceedings.

180. For a discussion of these phenomena, see CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS (2007).

determination throughout the defendant's incarceration and appeals, it can be very difficult to look at new evidence of innocence with an unbiased, neutral eye.[181]

Finally, whatever the merits of Berger's proposed system, it does not seem to have caught on with the federal courts. *In re Davis* indicates the U.S. Supreme Court is considering a system in which federal district courts, sitting in habeas, conduct evidentiary findings and review capital defendants' claims of innocence.[182] The relevant circuit court opinions also seem to envision a system in which federal courts have the power to review such claims.[183]

Though permitting federal courts to review post-conviction actual innocence claims in capital habeas cases undoubtedly intrudes upon comity, federalism, and respect for state verdicts, such a system is likely more protective of the interests of the wrongfully convicted and at least arguably less intrusive than a system which would force states to provide such review. Furthermore, steps can be taken to minimize the detrimental impact on comity and federalism. For example, requiring a high requisite evidentiary showing and a standard of review deferential to state court findings would help to ensure that federal habeas review of *Herrera* claims does not trample states' rights. These procedural standards would also help to alleviate concerns regarding finality, judicial efficiency, and frivolous claims.[184] However, a balance must be struck. Certain requirements would make it difficult, if not practically impossible, for wrongfully convicted prisoners to obtain federal habeas relief on *Herrera* claims.

B. Application of AEDPA

Though the district court in *In re Davis* was able to rather quickly deal with AEDPA's implications on that case, AEDPA's procedural limitations may pose problems for other *Herrera* innocence cases that were inapplicable in *In re Davis*.

In particular, 28 U.S.C. § 2254(e)(2), which limits the ability of federal courts to hold evidentiary hearings on claims where the factual predicate of the claim was not developed in state court, would unreasonably curtail the ability of

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181. For example, Texas Governor Rick Perry has been accused of derailing the investigation into the execution of Cameron Todd Willingham. Valerie Ferrari, *Texas Governor Rick Perry Delays Willingham Investigation*, ASSOCIATED CONTENT, Oct. 12, 2009, http://www.associatedcontent.com/article/2271625/texas_governor_rick_perry_delays_willingham.html.

182. *In re* Davis, 130 S. Ct. 1 (2009) (mem.).

183. *See, e.g.*, Albrecht v. Horn, 485 F.3d 103, 121–22 (3d Cir. 2007); United States v. Sampson, 486 F.3d 13, 27–28 (1st Cir. 2007); House v. Bell, 311 F.3d 767, 768 (6th Cir. 2002); United States v. Quinones, 313 F.3d 49, 67 (2d Cir. 2002); Wilson v. Greene, 155 F.3d 396, 404–05 (4th Cir. 1998); Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997); Cornell v. Nix, 119 F.3d 1329, 1334 (8th Cir. 1997); Felker v. Turpin, 83 F.3d 1303, 1312 (11th Cir. 1996).

184. The *Herrera* majority made explicit reference to an "extraordinarily high" requisite showing being necessary to alleviate the detrimental effect on finality and judicial resources that review of *Herrera* claims would cause. Herrera v. Collins, 506 U.S. 390, 417 (1993).

capital prisoners to receive meaningful review of *Herrera* claims while doing little to further the interests of comity, federalism, or finality.[185]

Aside from 28 U.S.C. § 2254(e)(2), however, the U.S. Supreme Court would not need to rule AEDPA inapplicable or unconstitutional in relation to *Herrera* innocence claims in order to allow such claims to be a viable and valuable means by which the wrongfully convicted may obtain legal relief. Once the Supreme Court makes an affirmative holding regarding the cognizability of *Herrera* innocence claims, the issue created by 28 U.S.C. § 2254(d)(1) will become moot.[186] Furthermore, because of AEDPA provisions and Supreme Court jurisprudence permitting showings of innocence to excuse compliance with certain procedural limitations, petitioners asserting meritorious *Herrera* claims will likely be able to navigate the majority of AEDPA's procedural requirements.

AEDPA requires the exhaustion of state remedies, meaning states must be given "a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts."[187] Specifically, a federal habeas petitioner, in order to be eligible for relief, must establish (a) that he or she has exhausted all available state remedies; (b) that "there is an absence of available [s]tate corrective process"; or (c) that circumstances exist that render state corrective processes ineffective to protect the petitioners' rights.[188] If a petitioner has failed to raise a claim in an appropriate state court proceeding and would now be barred from doing so by a state procedural rule, the claim is considered technically exhausted but procedurally defaulted in federal court, and the petitioner will generally be ineligible for federal habeas relief on that claim.[189]

Most, if not virtually all, capital petitioners raising compelling *Herrera* claims will be able to avoid procedural default. In states offering post-conviction review of actual innocence claims, capital prisoners may exhaust actual innocence claims in state court before raising the claims in federal habeas proceedings. If the state court does not offer post-conviction review of actual innocence claims, a capital prisoner may avoid procedural default by arguing that there is an absence of state corrective process available to address his or her *Herrera* innocence claim. Finally, in states that apply time limitations to the availability of legal avenues of relief for prisoners with actual innocence claims, capital prisoners may claim that state corrective processes are ineffective to protect their rights because they close the courthouse doors to capital prisoners who discover exonerating evidence after the time limitations for making such a claim have run out.

Even if a capital prisoner has a *Herrera* innocence claim ruled procedurally defaulted, he will probably be able to overcome the procedural

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185. 28 U.S.C. § 2254(e)(2) is discussed *infra* Part IV.C.

186. The 28 U.S.C. § 2254(d)(1) issue will become moot because the cognizability of *Herrera* claims will be clearly established law, and federal courts could grant habeas relief if a state court disposition of a *Herrera* claim was contrary to or an unreasonable application of the clearly established federal law surrounding such claims.

187. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); *see also* 28 U.S.C. § 2254(b)(1).

188. 28 U.S.C. § 2254(b)(1)(A)–(B).

189. *See, e.g.*, *O'Sullivan*, 526 U.S. at 849.

default. Habeas petitioners may overcome a procedural default by establishing either: (1) cause and prejudice; or (2) a miscarriage of justice.[190]

To establish cause excusing a procedural default, a habeas petitioner must ordinarily point to some external impediment that prevented him from complying with state procedural rules and fairly presenting his claim at the appropriate time in state court proceedings.[191] In a state proceeding where a petitioner is entitled by the Sixth Amendment to the effective assistance of counsel, such as at trial, sentencing, or the first appeal as-of-right, counsel's ineffective assistance may constitute cause for failure to exhaust a state remedy at the appropriate time.[192] However, "[a]ttorney error short of ineffective assistance of counsel does not constitute cause for a procedural default" and "cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim."[193]

Many petitioners raising procedurally defaulted *Herrera* claims may have difficulty establishing cause for their defaults. The ineffective assistance of post-conviction counsel will not be considered cause for the default because counsel is not constitutionally required in state post-conviction proceedings.[194] By definition, *Herrera* innocence claims are post-conviction claims of innocence that would be raised, if anywhere in state proceedings, in state post-conviction proceedings. Therefore, it is likely that only those petitioners who can establish some external impediment beyond the ineffectiveness or errors of post-conviction counsel will be able to establish cause for the procedural default of their *Herrera* claims.

Even where cause and prejudice have not been established to excuse a procedural default, federal courts may review the underlying claim "where a constitutional violation has probably resulted in the conviction of one who is actually innocent."[195] For death row inmates seeking to avoid procedural default of their constitutional claims, the *Schlup* innocence standard governs this miscarriage of justice inquiry.[196] Because the burden of proof for *Herrera* claims must be, according to the Supreme Court, stricter than that for *Schlup* claims,[197] petitioners with legitimate *Herrera* claims should virtually always be able to have their actual innocence claims heard on the merits, even when procedurally defaulted, through use of the miscarriage of justice exception to the procedural default doctrine.

C. Definition of "New Evidence"

In re Davis indicates the U.S. Supreme Court envisions applying a narrow definition of "new evidence" to *Herrera* innocence claims.[198] The memorandum opinion's instructions to the district court indicate that the Supreme Court

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190. Coleman v. Thompson, 501 U.S. 722, 750 (1991).
191. Murray v. Carrier, 477 U.S. 478, 488 (1986).
192. *Id.* at 492.
193. *Id.*
194. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987).
195. *Murray*, 477 U.S. at 496.
196. Schlup v. Delo, 513 U.S. 298 (1995).
197. *See supra* Part II.B.
198. *In re* Davis, 130 S. Ct. 1 (2009) (mem.).

envisions defining "new evidence" in *Herrera* claims as evidence that *could not have been obtained* during the petitioner's trial. Under this standard, presumably, evidence that could have been obtained at trial but was not—due to oversight or the incompetence of defense counsel—would not be considered in support of a *Herrera* claim of innocence.[199]

The narrow definition of "new evidence" implied by the *In re Davis* memorandum opinion is in conformity with the language of the evidentiary hearing requirements of 28 U.S.C. § 2254(e)(2), which reads:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the [federal] court shall not hold an evidentiary hearing on the claim unless the applicant shows that:
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[200]

The requirements for an evidentiary hearing delineated in 28 U.S.C. § 2254(e)(2) are stringent and have severely curtailed the wide discretion with which district courts could, prior to the passage of AEDPA, decide whether to conduct evidentiary hearings. Because *Herrera* innocence claims would be heavily fact-based, the denial of an evidentiary hearing would probably be fatal to the success of a *Herrera* claim.[201] The narrow definition of "new evidence" envisioned by the Court and expressed in 28 U.S.C. § 2254(e)(2) thus substantially diminishes the possibility that the wrongfully convicted could obtain relief through *Herrera* claims. Though a narrow definition of new evidence would pay greater respect to comity and federalism, it would do little to address the Court's other prudential concerns with *Herrera* claims. At the same time, this narrow definition of new evidence does very little to address any of the Court's concerns regarding such claims.

If a narrow definition of new evidence is employed, evidence not brought out in state post-conviction proceedings due to the mistakes or incompetence of post-conviction counsel will be excluded from a federal habeas court's review. Innocent people may be sent to their deaths because they contracted with, or were

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199. It has been held that the incompetence of defense counsel does not excuse a petitioner from satisfying the requirements of 28 U.S.C. § 2254(e)(2).

200. 28 U.S.C. § 2254(e)(2)(A)–(B) (2006).

201. Because it had been ordered to conduct an evidentiary hearing, the district court upon remand of the case did not have to conduct an extensive § 2254(e)(2) analysis to determine whether the hearing would be permissible under AEDPA.

assigned by the state, ineffective post-conviction counsel. When inmates represent themselves pro se in state post-conviction proceedings, the concern is even greater that mistakes made during such proceedings will bar the inmate from relief later on, even if the inmate is indigent and assigned counsel to manage his or her subsequent federal habeas corpus petitions. Barring review of relevant exonerating evidence would thus not favor the judicial system's interest in the reliability of its adjudications. Furthermore, narrowly defining "new evidence" would do little to encourage judicial efficiency because habeas petitioners—as they have done in reaction to AEDPA's strict procedural limitations—would likely formulate creative and time-consuming arguments aimed at overcoming this hurdle. Balancing the Court's practical concerns against the interests of the wrongfully convicted leads to the conclusion that a broad definition of "new evidence" should be employed.[202]

The *In re Davis* opinion sheds no light on whether the U.S. Supreme Court envisions binding federal courts by the rules of evidence that govern trials in their review of *Herrera* innocence claims. In evaluating claims under *Schlup*, federal courts are not bound by rules of admissibility; they must analyze all relevant evidence, including evidence admitted at trial, evidence excluded at trial, and new evidence.[203] "Because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record."[204] There seems to be no reason why the same *Schlup* evidentiary standard should not apply to *Herrera* claims. Federal courts reviewing *Herrera* claims should be able to evaluate all evidence, including not only a broadly defined category of "new evidence" but evidence both admitted and excluded at trial. Furthermore, as discussed below, the court should be allowed flexibility in crafting appropriate remedies based upon consideration of factors beyond the evidence of innocence presented by the petitioner.

D. A Prima Facie Showing of Innocence

In order to best address the Supreme Court's practical concerns regarding *Herrera* innocence claims, multiple layers of review may be beneficial. At the initial layer of review, petitioners making freestanding innocence claims in capital habeas cases should have to present new evidence sufficient to show that a reasonable juror would find reasonable doubt regarding their guilty verdicts. The petitioner would be required to make this *prima facie* showing in order to have his *Herrera* claim fully reviewed and addressed by the district court. Requiring an

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202. Justice White seems to advocate a broad definition of new evidence in his concurring *Herrera* opinion. Herrera v. Collins, 506 U.S. 390, 429 (1993) (White, J., concurring) (explaining that the actual innocence claim should be made "based on proffered newly discovered evidence and the entire record before the jury that convicted him"). Legal scholar Jay Nelson advocates for a broad definition of new evidence as best balancing concerns for the rights of the wrongfully convicted with concerns for the interests of federalism and comity. Jay Nelson, *Facing Up to Wrongful Convictions: Broadly Defining New Evidence at the Actual Innocence Gateway*, 59 HASTINGS L.J. 711 (2008).

203. Schlup v. Delo, 513 U.S. 298, 327–28 (1995).

204. House v. Bell, 547 U.S. 518, 538 (2006).

initial showing of reasonable doubt regarding the verdict would permit federal district courts to quickly and efficiently weed out frivolous or fantastical claims of innocence.[205] If the petitioner fails to make this showing, the district court could, in its discretion, choose not to respond to the petitioner's *Herrera* claim and refuse to order any reply briefing on it.[206] To further conserve judicial resources and prevent clogging court dockets with frivolous innocence claims, the district court's dismissal of *Herrera* claims in this early stage could be made non-appealable.

E. Using Burdens of Proof to Craft Equitable Remedies

From the standpoint of the criminal justice system, innocence and guilt are not black and white. The diverse shades of gray that appear on the innocence–guilt spectrum suggest that a black-and-white approach to adjudicating post-conviction claims of innocence may be ill-fitting as a practical reality. The Supreme Court has already impliedly recognized this point by concluding that the burden of proof applied to habeas petitioners' claims of innocence should vary depending upon the reliability imputed to the petitioner's conviction in light of the nature of the petitioner's trial.

Though the *Herrera* opinion expressed concern regarding what form of relief would be appropriate for federal habeas petitioners asserting meritorious claims of innocence,[207] federal courts seem to have assumed that typical habeas corpus relief, in the form of a conditional order of release subject to the State's election to retry the petitioner, would apply.

Providing traditional habeas corpus relief to petitioners who can satisfy the *Sawyer* standard (or a different burden of proof if the Supreme Court establishes one for *Herrera* claims in the future) will significantly aid the plight of wrongfully convicted prisoners. However, certain cases will still fall through the cracks. For example, take the case of a capital habeas petitioner who successfully raises a *Schlup* gateway claim and thus is able to have procedurally barred constitutional claims of trial error heard on the merits. The federal habeas court hearing the claims concludes that they have definite merit but ultimately are not strong enough to warrant granting the writ of habeas corpus. In this scenario, the petitioner's trial is constitutionally sound but it is nevertheless imperfect and, due to its imperfections, undeserving of as much confidence as a trial in which no constitutional error even arguably occurred. If petitioner's request for habeas

205. Arguably, requiring any additional steps before a petitioner is eligible for federal habeas corpus relief only increases litigation and the amount of resources that must be dedicated to the case. If the U.S. Supreme Court's hypothesis regarding an onslaught of frivolous claims is accurate, however, there may be many *Herrera* claims that can very quickly be disposed of as frivolous in a preliminary review. Furthermore, separate briefings need not accompany the separate levels of review. In their petition for habeas corpus relief, petitioners should address their arguments at satisfying the burden of proof applying to the second-level review of *Herrera* claims because if the petitioner can meet this higher burden of proof he or she will, by default, also meet the lower burden of proof required to pass the preliminary level of review.

206. The proposed system would be similar to the system with which circuit courts review uncertified claims in habeas cases.

207. *Herrera*, 506 U.S. at 403.

corpus relief includes a *Herrera* claim, the reviewing court should be permitted the flexibility to factor into its analysis of the petitioner's showing of innocence the fact that the petitioner's trial suffered from defects that make its result less worthy of confidence.

The reviewing court should also be permitted to consider other factors that may affect the confidence that should be accorded to the petitioner's evidence of innocence. While restricting the petitioner to presenting evidence that could not have been discovered at trial through due diligence would too severely curtail the ability of wrongfully convicted inmates to access federal habeas relief, the reasons for the petitioner's belated presentation of the evidence are relevant when considering the weight with which the evidence should be viewed. If the petitioner intentionally failed to disclose certain evidence at trial as a means of forum-shopping and hoping for a more sympathetic federal habeas court, the evidence should be afforded little weight in a *Herrera* analysis. If, however, the petitioner failed to uncover and present the evidence at trial through no fault of his own, federal habeas courts should not use the belated presentation of the evidence against the petitioner.

After taking into account the circumstances surrounding the petitioner's belated presentation of evidence of innocence, the nature of petitioner's trial, and all evidence newly produced and presented at trial, the federal habeas court must determine whether the petitioner's showing of innocence meets the *Herrera* standard. If it does, the court should grant the writ and issue an order of conditional release contingent upon the State's election to retry the case.

Under current understanding of the Supreme Court's *Herrera* jurisprudence, a capital habeas petitioner asserting only a freestanding claim of innocence should be denied any relief whatsoever if the petitioner does not establish his or her innocence to the level of certainty required for *Herrera* claims. This is a bright-line rule that would apply no matter how close to the *Herrera* standard the petitioner comes.

In certain cases, application of this bright-line rule would not pose grave concerns. For example, in a case such as Troy Anthony Davis's, where all of the available evidence is of a sort that grows stale over time, there exists only a very small possibility that a petitioner unable to satisfy the *Herrera* standard today will be able to do so tomorrow. In cases where there is evidence that may potentially be analyzed more accurately in the future given scientific advances, however, application of this bright-line rule is troubling because it permits the execution of a person who may later be discovered to have been innocent.

Finality, though elusive, is necessary to the proper functioning of the criminal justice system and, in some cases, can be achieved to a degree that justifies imposing the harshest of constitutional punishments. In certain cases such as that of Cameron Todd Willingham,[208] however, refusal to stay an execution may actually hinder society's quest for a feeling of finality and closure. If substantial, but ultimately inconclusive, evidence of innocence exists in a death row prisoner's case, the criminal justice system should not force finality onto the case by

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208. *See supra* Introduction.

executing its subject. Some death row inmates' cases fall at a point along the guilt–innocence spectrum where society neither feels comfortable releasing nor executing the prisoner. To address this problem, federal habeas courts reviewing *Herrera* innocence claims should undertake one final stage of review after concluding the claim does not meet the requisite burden of proof for attaining traditional habeas corpus relief. The court should examine the nature of the evidence in the case and, to the best of the court's ability, determine the likelihood that significant new relevant evidence could be discovered in the future or that existing evidence could become substantially more probative. If the inmate's showing of evidence is sufficiently substantial to satisfy the *Schlup* standard, even where it presently fails to satisfy the *Herrera* standard, and, if the evidence in the case is of a sort that gives rise to a reasonable inference that the inmate's guilt or innocence could be determined, at some point in the future, to the level of certainty mandated for *Herrera* claims, then the federal habeas court should be permitted to issue an order releasing the prisoner from death row to the effect that the prisoner remains incarcerated on a life sentence but is afforded the continued opportunity to prove his innocence.

CONCLUSION

The *In re Davis* opinion indicates that the U.S. Supreme Court is sensitive to the plight of the wrongfully convicted. If the Court one day goes beyond its *Herrera* assumption and affirmatively holds that executing a capital inmate who can make a substantial showing of innocence violates the Constitution, then it would also, in order to give practical meaning to this holding, need to provide a means by which inmates could access post-conviction relief on actual innocence claims. There are numerous practical and prudential concerns surrounding the creation of such a means of redress. Litigating *Herrera* innocence claims on federal habeas review carries the potential to undermine finality, judicial efficiency, reliability of evidence, and the principles of comity and federalism. Furthermore, affirmatively holding *Herrera* innocence claims to be cognizable in federal habeas proceedings may spark an onslaught of frivolous claims of innocence.

This Note presents a system for minimizing these concerns while still providing for meaningful review of *Herrera* claims. Requiring petitioners to meet a threshold showing of innocence in order to obtain more than cursory review of their *Herrera* claims, and requiring a high burden of proof before awarding relief on such claims, would minimize many of the Supreme Court's concerns. Permitting review of all available evidence, both old and new, and exempting *Herrera* claims from the strictures of 28 U.S.C. § 2254(e)(2), would ensure full and fair review of *Herrera* claims. Allowing courts to factor into their analysis of *Herrera* claims the reasons why new evidence was presented belatedly will help prevent forum shopping and strategic withholding of evidence at trial. Finally, allowing federal habeas courts to order a release from death row without ordering a full release from custody will give courts the flexibility necessary to equitably deal with actual innocence cases and to prevent the execution of inmates who may later be proven innocent.