

28 U.S.C. § 2254(j): FREESTANDING INNOCENCE AS A GROUND  
FOR HABEAS RELIEF: TIME FOR CONGRESS TO ANSWER THE  
COURT’S EMBARRASSING QUESTION

by  
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*The Supreme Court has struggled with whether a showing of innocence should be an independent ground for habeas relief, or whether it should just be a way for a prisoner to have his other claims heard by a federal court. Currently, a sufficient showing of actual innocence serves as a gateway through some of the many procedural bars created by courts and the Anti-Terrorism and Effective Death Penalty Act. Through this gateway, a prisoner who produces sufficient evidence of innocence can have his habeas claims heard by a federal court despite his failure to follow all of the proper procedures. This Comment suggests that the Court will never definitively answer this question and that Congress should instead amend the federal habeas statutes to make freestanding innocence a ground for habeas relief.*

I.	INTRODUCTION .....	1650
II.	WITHOUT A REMEDY: A PROCEDURALLY PERFECT TRIAL MEANS NO HOPE FOR HABEAS RELIEF .....	1653
III.	ACTUAL INNOCENCE ALONE SHOULD BE A BASIS FOR HABEAS RELIEF .....	1657
	A. <i>Federal Circuit Courts Need Guidance as to Whether Actual Innocence Is a Basis for Habeas Relief</i> .....	1658
	B. <i>State Courts Are Split Over Whether Actual Innocence Should Be a Basis for Post-Conviction Relief.</i> .....	1659
	C. <i>Clemency Is Not a Sufficient “Fail Safe” for the Wrongfully Convicted.</i> .....	1661
	D. <i>Relief Should Not Have to Depend on a Procedural Violation.</i> .....	1662
IV.	THE CURRENT COURT IS UNLIKELY TO MAKE INNOCENCE ANYTHING MORE THAN A GATEWAY TO HABEAS RELIEF .....	1662
	A. <i>The Antiterrorism and Effective Death Penalty Act and Judicially Created Hurdles Largely Limit Federal Habeas Relief.</i> ..	1662
	B. <i>The Supreme Court Has Developed Innocence Gateways Through the Procedural Bars to Habeas Review.</i> .....	1664

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1650	LEWIS & CLARK LAW REVIEW	[Vol. 14:4
	C. <i>The Court Has Consistently Avoided Making Innocence Anything More Than a Gateway</i> .....	1666
V.	CONGRESSIONAL AMENDMENT OF THE HABEAS STATUTES IS THE BEST ANSWER TO THE COURT’S “EMBARRASSING QUESTION” .....	1670
	A. <i>Congress Should Make Its Own Determination That Actual Innocence Is an Appropriate Basis for Habeas Relief</i> .....	1670
	B. <i>If It Made Actual Innocence a Ground for Habeas Relief, Congress Could Also Impose Federal Procedural Requirements for Access to Evidence</i> .....	1672
	C. <i>A Freestanding Innocence Claim Would Mean Habeas Courts Would No Longer Need Their Innocence “Gateways”</i> .....	1674
VI.	CONGRESS SHOULD ANSWER THE COURT’S “EMBARRASSING QUESTION” BY AMENDING THE HABEAS STATUTES TO INCLUDE ACTUAL INNOCENCE AS AN INDEPENDENT GROUND FOR RELIEF.....	1675
	A. <i>Congress Has the Power to Make Actual Innocence a Ground for Habeas Relief</i> .....	1676
	B. <i>In Order Not to Overwhelm Federal Habeas Courts, Congress Needs to Strictly Limit What Evidence of Innocence Will Be Appropriate Grounds For Relief</i> .....	1679
VII.	CONCLUSION.....	1680

## I. INTRODUCTION

In August 2009, the United States Supreme Court transferred Troy Anthony Davis’s petition for a writ of habeas corpus to the District Court for the Southern District of Georgia for an evidentiary hearing.<sup>1</sup> Because the “substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing,” the District Court was asked 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.”<sup>2</sup> In a vehement dissent, Justice Scalia wrote, “[t]oday, without explanation and without any meaningful guidance, this Court sends the District Court for the Southern District of Georgia on a fool’s errand.”<sup>3</sup> Justice Scalia insisted “[t]his Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent.”<sup>4</sup>

<sup>1</sup> *In re Davis*, 130 S. Ct. 1, 1 (2009).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 4 (Scalia, J., dissenting).

<sup>4</sup> *Id.* at 3.

Not surprisingly, Justice Scalia's opinion set off a wave of criticism.<sup>5</sup> Indeed, most Americans would probably be shocked to think the Constitution would allow an innocent person to be executed. However, as a constitutional matter, Justice Scalia is not wrong. The Court has *never* found a constitutional right to habeas relief based solely on actual innocence.

In *Herrera v. Collins*, the Supreme Court flirted with the idea that it might be unconstitutional to execute an innocent person.<sup>6</sup> However, to the Court, such a situation was more of an intellectual exercise than anything else. There, the Court assumed "for the sake of argument . . . 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."<sup>7</sup> Considering it an unlikely hypothesis, the Court never reached a decision on whether a habeas petitioner without another independent underlying constitutional claim could obtain relief. The Court noted that "the threshold showing for such an assumed right would necessarily be extraordinarily high," and besides, whatever threshold would hypothetically be required, the "petitioner in this case falls far short."<sup>8</sup>

In contrast, Justice Scalia would have preferred the Court to have directly answered whether such relief would be available. To Justice Scalia, the Court's discussion made "perfectly clear what the answer is: There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."<sup>9</sup> Nevertheless, Justice Scalia joined the majority opinion, understanding the Court's "reluctance . . . to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate."<sup>10</sup> Justice Scalia further opined that "[w]ith any luck," the Court would be able to "avoid ever having to face this embarrassing question again."<sup>11</sup>

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<sup>5</sup> See, e.g., Lex Blough, *Troy Davis Must "Prove his Innocence" After a Wrongful Conviction*, AXIS OF LOGIC, (Aug. 17, 2009), [http://axisoflogic.com/artman/publish/Article\\_56667.shtml](http://axisoflogic.com/artman/publish/Article_56667.shtml); Alan M. Dershowitz, *Scalia's Catholic Betrayal*, THE DAILY BEAST (Aug. 18, 2009), <http://www.thedailybeast.com/blogs-and-stories/2009-08-18/scalias-catholic-betrayal/full/>; Scott Horton, *A Culture of Death*, HARPER'S MAGAZINE, Aug. 18 2009, available at <http://www.harpers.org/archive/2009/08/hbc-90005554>; Dahlia Lithwick, *Innocent Until Executed: We Have No Right to Exoneration*, NEWSWEEK, Sept. 14, 2009, at 25.

<sup>6</sup> 506 U.S. 390 (1993).

<sup>7</sup> *Id.* at 417.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 427-28 (Scalia, J., concurring).

<sup>10</sup> *Id.* at 428.

<sup>11</sup> *Id.*

In his oft-quoted article, *Is Innocence Irrelevant?*, Judge Friendly opined about the “proverbial man from Mars,” and that “[h]is astonishment would grow when we told him that the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime.”<sup>12</sup> This proverbial man from Mars (and Judge Friendly) would be equally shocked to discover that our Supreme Court still has not decided whether our Constitution allows a prisoner, who is in fact innocent of the crime, to be imprisoned, much less executed. Although the Writ of Habeas Corpus requires a judge to make certain that a man is not wrongfully deprived of his liberty and unjustly imprisoned, the United States Supreme Court has consistently hesitated to decide whether habeas relief based on actual innocence is available without an independent procedural violation.<sup>13</sup>

Although bringing a federal habeas petition will hopefully be one of a prisoner’s last resorts, every judicial avenue must remain open to remedy such a fundamental miscarriage of justice as incarcerating someone who is actually innocent. Thus, Congress should answer the Court’s “embarrassing question” and affirmatively recognize a prisoner’s right to bring a freestanding federal habeas claim grounded in actual innocence.

Part II of this Comment sets up a hypothetical scenario where a criminal defendant is convicted after a procedurally perfect trial even though he is actually innocent. This Part discusses the history of habeas corpus to show that, ultimately, it has always been a procedural remedy. Today, this hypothetical criminal defendant has little chance for relief from a federal habeas court.

Part III addresses the fact that our Constitution’s procedural protections sometimes fail. Recent DNA exonerations prove that we do sometimes convict innocent people. As of October 2010, the Innocence Project, a national organization dedicated to exonerating the wrongfully convicted through DNA testing, calculates that there have been 261 post-conviction DNA exonerations.<sup>14</sup> This Part emphasizes that even a prisoner who appears to have had a constitutionally perfect trial retains a powerful interest in obtaining release from custody if he is actually innocent of the charges. Federal habeas relief should not have to depend on some procedural error. Reliance on state court post-conviction proceedings and executive clemency is not an adequate alternative. Freestanding actual innocence claims should be cognizable in federal habeas proceedings.

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<sup>12</sup> Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 145 (1970).

<sup>13</sup> See *In re Davis*, 130 S. Ct. 1, 2 (2009); *Dist. Attorney’s Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2321 (2009); *House v. Bell*, 547 U.S. 518, 554–55 (2006); *Dretke v. Haley*, 541 U.S. 386, 388 (2004); *Herrera* 506 U.S. at 404–05.

<sup>14</sup> See THE INNOCENCE PROJECT, <http://www.innocenceproject.org/news/Fact-Sheets.php> for the number today.

Part IV acknowledges the Supreme Court's reluctance to recognize freestanding innocence as a basis for federal habeas relief. Although the Supreme Court has recognized that a petitioner's innocence is relevant as a gateway through the procedural bars of the Anti-Terrorism and Effective Death Penalty Act and the judicially created hurdles to habeas review, the current Court is unlikely to take the next step to make innocence alone grounds for relief. This Part addresses the federalism and separation of powers issues that would be implicated were the Court to establish such a claim. Although the Warren Court might have dared to do this, it would be too much judicial activism for the Court's current personality.

Part V proposes that the best answer to the Court's "embarrassing question" is for Congress to amend the habeas statutes to create a freestanding innocence claim. Today, innocence is not completely irrelevant for habeas proceedings, but under the Court's current precedent a showing of innocence simply means the petitioner will be able to have his otherwise defaulted procedural claims heard on the merits. By creating a federal right to habeas relief based on actual innocence, Congress could help untangle this complicated web of procedural gateways. To ensure that all prisoners have the same access to newly available evidence, Congress could also impose uniform federal procedures on the states.

Finally, Part VI outlines how the habeas statutes can be amended to make actual innocence an independent ground for relief. Under proposed 28 U.S.C. § 2254(j), by presenting newly available evidence that proves his innocence beyond a reasonable doubt, a petitioner would be entitled to habeas relief. Congress could obtain the power to create such a right via the Eighth Amendment or the Due Process Clause. It is time for Congress to recognize an obvious and long overdue right: that a prisoner with newly available evidence of innocence should have a judicial avenue open for relief without having to rely on a procedural violation to back it up.

## II. WITHOUT A REMEDY: A PROCEDURALLY PERFECT TRIAL MEANS NO HOPE FOR HABEAS RELIEF

Which prisoner is more likely to obtain habeas relief?: (A) The petitioner who claims that his trial counsel was ineffective for failing to put on an adequate defense, (B) the petitioner who claims that the prosecutor knowingly presented false testimony at his trial, (C) the petitioner who claims that the prosecutor withheld exculpatory evidence at his trial, or (D) the petitioner who had a fair trial but has newly available evidence that he is actually factually innocent of the charges.

Under current federal habeas law, D, the petitioner who had a fair trial but has newly available evidence of innocence is least likely to be

granted habeas relief. Under *Strickland v. Washington*,<sup>15</sup> *Giglio v. United States*,<sup>16</sup> and *Brady v. Maryland*,<sup>17</sup> A, B, and C, respectively, are all currently recognized grounds for habeas relief. A petitioner who can prove that his trial counsel was constitutionally inadequate, that the prosecutor knowingly presented false evidence, or that the prosecutor knowingly withheld exculpatory material will likely be granted habeas relief regardless of whether he is factually innocent or guilty. In contrast, a petitioner who has had a procedurally perfect trial will not be granted federal habeas relief even if he is completely innocent of the charges on which he was convicted.

The concept today that habeas corpus is a means of challenging a wrongful conviction and not a means of curing a factually erroneous conviction stems from the writ's long history. The Magna Carta decreed, "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."<sup>18</sup> Similar to today's notion of habeas corpus, eight hundred years ago the Magna Carta guaranteed that no man would be imprisoned contrary to the law of the land. Important as this principle is, the Magna Carta provides no specific legal means to enforce it. However, "gradually the writ of habeas corpus became the means by which the promise of [the] Magna Carta was fulfilled."<sup>19</sup> In England, the writ initially arose from a theory of power and was used in its earliest form during the reign of Edward I to protect the rights of the king and his courts.<sup>20</sup> It was a means by which the king could inquire into the authority of a jailor to restrain the liberty of one of his subjects.<sup>21</sup> By the seventeenth century, as the Magna Carta became better understood to mean that the king was also subject to the law, the writ of habeas corpus became "less an instrument of the King's power and more a restraint upon it," and was "the appropriate process for checking illegal imprisonment by public officials."<sup>22</sup> Parliament passed the Habeas Corpus Act of 1679, which established procedures for issuing the writ and was the model upon which the American colonies based their habeas statutes.<sup>23</sup> Although the

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<sup>15</sup> 466 U.S. 668, 687 (1984).

<sup>16</sup> 405 U.S. 150, 150–51 (1972).

<sup>17</sup> 373 U.S. 83, 86 (1963).

<sup>18</sup> MAGNA CARTA, § 39 (1215), reprinted in A. E. Dick Howard, MAGNA CARTA: TEXT AND COMMENTARY 43 (1964).

<sup>19</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2244 (2008) (citing 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 112 (1926)).

<sup>20</sup> *Id.* at 2244–45 (citing HOLDSWORTH, *supra* note 19, at 108–25).

<sup>21</sup> *Id.* at 2245.

<sup>22</sup> *Id.* (quoting Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 336 (1952)).

<sup>23</sup> *Id.* at 2245–46 (citing Collings, *supra* note 22, at 338–39).

importance of the writ was well understood, habeas relief in England was often denied or suspended during times of political unrest.<sup>24</sup>

The Framers “viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.”<sup>25</sup> Because the English common law writ was often suspended during times of unrest, in order to secure the writ, the Constitution specifically provides, “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>26</sup> Following the ratification of the Constitution, the Judiciary Act of 1789 expressly “gave federal courts the power to grant writs on behalf of federal prisoners ‘for the purpose of an inquiry into the cause of commitment.’”<sup>27</sup> This Act only made the writ available to federal, not state, prisoners, and the reviewable class of judicial actions was very limited.<sup>28</sup> The writ was used to test the jurisdiction of the convicting court and to ensure that the court did not act without authority or unlawfully.<sup>29</sup> Because habeas corpus was not meant to substitute for an appeal, the Court would not hear claims that merely challenged the sufficiency of the evidence to convict.<sup>30</sup>

In 1867, Congress made habeas corpus available to state prisoners, but it was not until the twentieth century that federal courts began to use the writ to enforce substantive constitutional rights, as opposed to merely testing the jurisdiction of the courts.<sup>31</sup> However, even after the writ was used substantively, the notion that actual innocence is not a basis for federal habeas relief remained imbedded in the Supreme Court’s jurisprudence. In 1923, Justice Holmes wrote, “what we have to deal with is not the petitioners’ innocence or guilt but solely the question whether their constitutional rights have been preserved.”<sup>32</sup> In 1963, Chief Justice Warren made clear, “the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.”<sup>33</sup> Then, in 1993, Chief Justice Rehnquist reaffirmed, “Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief

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<sup>24</sup> *Id.* at 2245.

<sup>25</sup> *Id.* at 2244.

<sup>26</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>27</sup> 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 38 (5th ed. 2005) (quoting An Act to Establish the Judicial Courts of the United States, ch. 20, § 14, 1 Stat. 73, 82 (1789)).

<sup>28</sup> *Felker v. Turpin*, 518 U.S. 651, 663 (1996).

<sup>29</sup> 1 HERTZ & LIEBMAN, *supra* note 27, at 47.

<sup>30</sup> *Id.* at 48.

<sup>31</sup> Michael C. Dorf, *Did the Supreme Court Recognize an Innocent Person’s Right Not to be Executed?* FINDLAW (Aug. 26, 2009), <http://writ.news.findlaw.com/dorf/20090826.html>.

<sup>32</sup> *Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923).

<sup>33</sup> *Townsend v. Sain*, 372 U.S. 293, 317 (1963).

absent an independent constitutional violation occurring in the underlying state criminal proceeding.”<sup>34</sup> This principle is grounded in the idea that “federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.”<sup>35</sup> Accordingly, federal courts have not hesitated to grant habeas relief when there was little question that the wronged petitioner was guilty, or to deny relief even when there was reason to believe the petitioner was innocent if there was no constitutional error found in the process by which he was convicted.<sup>36</sup>

Throughout its long history, habeas corpus relief has always been limited to correcting constitutional errors in procedure. An oral argument in a state post-conviction proceeding epitomizes the general unavailability of relief when no underlying procedural violation exists:

JUDGE STITH: “Are you suggesting, even if we find Mr. Amrine is actually innocent, he should be executed?”

ASSISTANT ATTORNEY GENERAL JUNG: “That’s correct, your honor.”

JUDGE WOLFF: “To make sure we are clear on this, if we find in a particular case that DNA evidence absolutely excludes somebody as the murderer, then we must execute them anyway if we cannot find an underlying constitutional violation at their trial?”

ASSISTANT ATTORNEY GENERAL JUNG: “Yes.”<sup>37</sup>

Indeed, Justice Scalia is correct—the Supreme Court has “*never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent.”<sup>38</sup> Thus, the luxury of having a procedurally perfect trial leaves an innocent prisoner with no remedy from a federal habeas court.

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<sup>34</sup> *Herrera v. Collins*, 506 U.S. 390, 400 (1993).

<sup>35</sup> *Id.*

<sup>36</sup> 1 HERTZ & LIEBMAN, *supra* note 27, at 88–89.

<sup>37</sup> Charles I. Lugosi, *Executing the Factually Innocent: The U.S. Constitution, Habeas Corpus, and the Death Penalty: Facing the Embarrassing Question at Last*, 1 STAN. J. C.R. & C.L. 473, 476 (2005) (quoting Adam Liptak, *Prosecutors See Limits to Doubt in Capital Cases*, N.Y. TIMES, Feb. 24, 2003, at A1). The Missouri Attorney General Jeremiah W. Nixon later explained that Mr. Jung was trying to convey the point that, “there must come a time when cases can be closed . . . Is the state required to prove every day that someone committed a crime beyond a reasonable doubt?” *Id.*

<sup>38</sup> *In re Davis*, 130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting).



### III. ACTUAL INNOCENCE ALONE SHOULD BE A BASIS FOR HABEAS RELIEF

It is a basic and longstanding principle “that it is far better that ten guilty persons escape, than that one innocent suffer.”<sup>39</sup> The Bible provides, “Then he said, ‘Oh let not the Lord be angry, and I will speak again but this once. Suppose ten are found there.’ He answered, ‘For the sake of ten I will not destroy [the ten].’”<sup>40</sup> In the Roman Digest, “The deified Trajan wrote . . . that neither ought a person to be condemned on suspicion; for it was preferable that the crime of a guilty man should go unpunished than an innocent man be condemned.”<sup>41</sup> To be sure, “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”<sup>42</sup>

Pursuant to this bedrock principle, numerous protections in the Bill of Rights, the Fourteenth Amendment, and statutory and judge-made rules of criminal procedure are specifically designed to prevent the conviction of an innocent person. A defendant’s opportunity to confront and cross-examine his accusers, the requirement that the government prove its case beyond a reasonable doubt, that a jury unanimously find guilt,<sup>43</sup> and the right to effective assistance of counsel all help reduce the odds that an innocent person will be convicted. Nevertheless, our system is not perfect, and recent DNA exonerations show that we sometimes convict innocent people. In his Supreme Court Petition for a Writ of Habeas Corpus, Mr. Herrera warned:

[O]ur system of criminal justice does not work with the efficiency of a machine—errors are made and innocent as well as guilty people are sometimes punished. . . . [T]he sad truth is that a cog in the machine often slips: memories fail; mistaken identifications are made; those who wield the power of life and death itself—the police officer, the witness, the prosecutor, the juror, and even the

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<sup>39</sup> W. BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 358 (Joseph Chitty ed.) (London) (1826).

<sup>40</sup> *Genesis 18:32* (Revised Standard).

<sup>41</sup> THE DIGEST OF JUSTINIAN, BOOK 48, TITLE 19, SECTION 5 (Alan Watson ed., Univ. Penn. Press 1985) (533 C.E.).

<sup>42</sup> *Robinson v. California*, 370 U.S. 660, 667 (1962).

<sup>43</sup> This is unfortunately not currently true in all states (Oregon and Louisiana currently allow non-unanimous jury verdicts). This is another issue I would like to write about. For current commentary, see generally Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L.Q. 141 (2006); Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J.L. REFORM 569 (2007); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261 (2000); Michael H. Glasser, Comment, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659 (1997); James Kachmar, Comment, *Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials*, 28 PAC. L.J. 273 (1996).

judge—become overzealous in their concern that criminals be brought to justice.<sup>44</sup>

In a 2001 speech, Justice O’Conner opined, “If statistics are any indication, the system may well be allowing some innocent defendants to be executed.”<sup>45</sup> Justice Scalia agrees that “[l]ike other human institutions, courts and juries are not perfect,” but believes that “[o]ne cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly.”<sup>46</sup> Even if our protections sometimes fail and our system of criminal justice requires us to accept the possibility that someone may be wrongfully convicted, every judicial avenue should remain open to a prisoner who can prove such a mistake. Indeed, “[i]n a society devoted to the rule of law, the difference between violating or not violating a criminal statute cannot be shrugged aside as a minor detail.”<sup>47</sup> Actual innocence should be a freestanding basis for habeas relief.

*A. Federal Circuit Courts Need Guidance as to Whether Actual Innocence Is a Basis for Habeas Relief*

The lower circuit courts are divided over whether freestanding innocence claims are cognizable in federal habeas proceedings. Some courts take the *Herrera* approach, assuming that freestanding innocence claims are not cognizable in federal habeas proceedings, but then turning to the facts of the case before them *arguendo* and finding that, regardless of whether such a claim is cognizable, the petitioner could not meet the required showing. The Eleventh Circuit has taken this approach and consistently found that the petitioner’s evidence “cannot support a freestanding actual innocence claim (if such a claim in fact exists).”<sup>48</sup>

Other courts have found freestanding innocence claims cognizable, but then have consistently found that the petitioner did not meet the required standard. For example, the Ninth Circuit has assumed that actual innocence claims are possible and has articulated a minimum

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<sup>44</sup> Brief for Petitioner at 34 n.47, *Herrera v. Collins*, 506 U.S. 390 (1993) (No. 91-7328) (quoting JEROME FRANK & BARBARA FRANK, NOT GUILTY 11–12 (1957)).

<sup>45</sup> *O’Conner Questions Death Penalty*, N.Y. TIMES, July 4, 2001, at A9.

<sup>46</sup> *Kansas v. Marsh*, 548 U.S. 163, 199 (2006) (Scalia, J., concurring).

<sup>47</sup> *Dretke v. Haley*, 541 U.S. 386, 400 (2004) (Kennedy, J., dissenting).

<sup>48</sup> *Mize v. Hall*, 532 F.3d 1184, 1198 (11th Cir. 2008); see also *In re Davis*, 565 F.3d 810, 824 (11th Cir. 2009) (finding that “even if we were to completely read out of the statute the phrase ‘but for constitutional error’ and assume *arguendo* that a *Herrera* claim, without more, is the kind of constitutional error contemplated by § 2244(b)(2)(B)(ii), the [evidence] is plainly insufficient to establish a prima facie showing that, but for this evidence, no reasonable factfinder would have found [the petitioner] guilty of the underlying offense”); *Cress v. Palmer*, 484 F.3d 844, 854–55 (6th Cir. 2007) (stating that “case law from this circuit supports the conclusion that [petitioner’s actual innocence claim] is, likewise, not cognizable,” but then going on to “conclude that the new evidence proffered in this case simply cannot satisfy the hypothetical *Herrera* standard”).

standard: “a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent.”<sup>49</sup> No petitioner has met this standard yet.<sup>50</sup>

The remaining courts explicitly refuse to recognize freestanding claims of actual innocence on federal habeas review.<sup>51</sup> One Fifth Circuit judge noted, “this court has uniformly rejected standalone claims of actual innocence as a constitutional ground for prohibiting imposition of the death penalty,” and opined that it may be “impossible to force the actual-innocence camel through the eye of either the *Giglio* or the *Strickland* needle, and thus [the court would] have no choice but to deny habeas relief to an actually innocent person.”<sup>52</sup> To this judge, the freestanding innocence question “is a brooding omnipresence in capital habeas jurisprudence that has been left unanswered for too long.”<sup>53</sup> To provide guidance and resolve the lower federal courts’ split over the possibility of relief, this question needs to be answered.

*B. State Courts Are Split Over Whether Actual Innocence Should Be a Basis for Post-Conviction Relief*

State courts are similarly divided over whether post-conviction relief should be granted based solely on a claim of actual innocence. Some

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<sup>49</sup> Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997).

<sup>50</sup> Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121, 136 (2005).

<sup>51</sup> See, e.g., *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009) (“The Fifth Circuit does not recognize freestanding claims of actual innocence on federal habeas review.”); *Fielder v. Varner*, 379 F.3d 113, 122 (3d Cir. 2004) (affirming dismissal of sole timely claim of innocence based on newly discovered evidence as not cognizable); *Johnson v. Bett*, 349 F.3d 1030, 1038 (7th Cir. 2003) (“For claims based on newly discovered evidence to state a ground for federal habeas relief, they must relate to a constitutional violation independent of any claim of innocence.”); *Rouse v. Lee*, 339 F.3d 238, 255 (4th Cir. 2003) (“[C]laims of actual innocence are not grounds for habeas relief even in a capital case . . . .”); *David v. Hall*, 318 F.3d 343, 347–48 (1st Cir. 2003) (“The actual innocence rubric . . . has been firmly disallowed by the Supreme Court as an independent ground of habeas relief, save (possibly) in extraordinary circumstances in a capital case.”); *Burton v. Dormire*, 295 F.3d 839, 848 (8th Cir. 2002) (“[W]e have squarely rejected the notion that a prisoner may receive a writ simply because he claims he is innocent.”); *LaFevers v. Gibson*, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001) (“[A]n assertion of actual innocence, although operating as a potential pathway for reaching otherwise defaulted constitutional claims, does not, standing alone, support the granting of the writ of habeas corpus.”).

<sup>52</sup> *In re Swearingen*, 556 F.3d at 349–50 (Wiener, J., concurring). *Giglio* and *Strickland* are two currently recognized constitutional bases for federal habeas relief. A petitioner bringing a *Strickland* claim argues that his trial counsel was ineffective for failing to put on an adequate defense at trial. See *Strickland v. Washington*, 466 U.S. 668 (1984). A petitioner bringing a *Giglio* claim maintains that the prosecutor knowingly presented false testimony at trial. See *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>53</sup> *In re Swearingen*, 556 F.3d at 350 (Wiener, J., concurring).

state courts refuse to acknowledge freestanding innocence claims and require an independent procedural constitutional violation.<sup>54</sup> Other state courts recognize innocence claims and have established their own standards for when post-conviction relief based on actual innocence should be granted.<sup>55</sup> After the oral argument in *State ex rel. Amrine v. Roper*, discussed in Part II,<sup>56</sup> the court went on to grant relief on the petitioner's freestanding innocence claim. The court found it "incumbent upon the courts of this state to provide judicial recourse to an individual who, after the time for appeals has passed, is able to produce sufficient evidence of innocence to undermine the habeas court's confidence in the underlying judgment that resulted in defendant's conviction and sentence of death."<sup>57</sup>

The states that recognize actual innocence claims have very different standards.<sup>58</sup> Some states permit relief if the petitioner presents new evidence of innocence that is material or that creates a probability of a different outcome;<sup>59</sup> some states require more than materiality and require that, with the new evidence, no juror would have found guilt beyond a reasonable doubt;<sup>60</sup> and other states do not specify a standard, but allow relief to be granted if "the interest of justice" so demands.<sup>61</sup>

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<sup>54</sup> See, e.g., *State ex rel. Smith v. McBride*, 681 S.E.2d 81, 93 n.44 (W. Va. 2009) ("In his brief, [petitioner] invokes the 'actual innocence' doctrine to argue that to deny him a new trial would violate the State and federal constitutions. This argument has no merit. In federal jurisprudence, the phrase 'actual innocence' was developed as a term of art . . . The actual innocence doctrine was developed for the purpose of permitting federal courts to review claims by a defendant that were procedurally barred . . ."); *People v. Collier*, 900 N.E.2d 396, 404 (Ill. App. Ct. 2008) (rejecting petitioner's actual innocence claim, reasoning "it has long been established that reasonable doubt of a defendant's guilt is not a proper issue for a post conviction proceeding").

<sup>55</sup> See, e.g., *Lewis v. Comm'r of Corr.*, 975 A.2d 740, 750 (Conn. App. Ct. 2009) ("First, the petitioner must establish by clear and convincing evidence that, taking into account all of the evidence—both the evidence adduced at the original criminal trial and the evidence adduced at the habeas corpus trial—he is actually innocent of the crime of which he stands convicted. Second, the petitioner must also establish that, after considering all of that evidence and the inferences drawn therefrom as the habeas court did, no reasonable fact finder would find the petitioner guilty of the crime."); *State v. Gallegos*, 206 P.3d 993, 1003 (N.M. 2009) ("We have recognized that freestanding claims of actual innocence may be raised in habeas corpus proceedings based on the discovery or availability of new evidence.").

<sup>56</sup> See *Lugosi*, *supra* note 37, at 476 (referring to *State ex. rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003)).

<sup>57</sup> *State ex. rel. Amrine*, 102 S.W.3d at 547.

<sup>58</sup> Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1671 (2008); see also *Herrera v. Collins*, 506 U.S. 390, 410–11 (1993) (noting varying state statutes of limitations).

<sup>59</sup> Garrett, *supra* note 58; see, e.g., N.Y. CRIM. PROC. LAW § 440.10(g) (McKinney 2005).

<sup>60</sup> Garrett, *supra* note 58; see, e.g., VA. CODE ANN. § 19.2-327.11(A) (vii) (2008).

<sup>61</sup> Garrett, *supra* note 58 (quoting N.J. CT. R. 3.20-1 (2010)).

Additionally, many states have strict statutes of limitations for when new evidence of innocence can be brought forward.<sup>62</sup>

Thus, a prisoner's chance for post-conviction relief based on newly available evidence depends largely on the state. A prisoner should not have to rely on a state opening its courthouse doors in order to have his innocence claim heard. There should be a uniform federal basis for relief for actual innocence claims.

*C. Clemency Is Not a Sufficient "Fail Safe" for the Wrongfully Convicted*

In *Herrera*, the Court justified denying judicial relief because Mr. Herrera was not left completely without a forum to raise his actual innocence claim—he could file a request for executive clemency.<sup>63</sup> Justice Rehnquist admitted, “[i]t is an unalterable fact that our judicial system, like the human beings who administer it, is fallible,” and considered clemency to provide “the ‘fail safe’ in our criminal justice system.”<sup>64</sup> However clemency is incapable of providing adequate review of freestanding innocence claims.

First, clemency is heavily influenced by the political process.<sup>65</sup> Second, clemency lacks procedural safeguards, and state laws governing the process vary widely.<sup>66</sup> “[U]nlike any judicial form of action, executive clemency is not subject to burdens of proof, limitations periods, or other similar constraints on relief.”<sup>67</sup> Generally, a governor may act with complete discretion and arbitrariness in granting or denying clemency, and decisions to grant clemency “are standardless in procedure, discretionary in exercise, and unreviewable in result.”<sup>68</sup> Finally, the use of clemency “is approaching the vanishing point.”<sup>69</sup> Governors rarely grant clemency for fear of appearing soft on crime. Indeed many commentators believe that a governor would commit “‘political suicide’ by granting clemency in a capital case.”<sup>70</sup> One commenter noted, “for all practical purposes clemency is no longer available from the executive branch.”<sup>71</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Herrera*, 506 U.S. at 411.

<sup>64</sup> *Id.* at 415.

<sup>65</sup> Berg, *supra* note 50, at 145; *see also* Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims After Herrera v. Collins*, 71 TEMP. L. REV. 489, 514–15 (1998).

<sup>66</sup> Berg, *supra* note 50, at 146; RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 643 (1994).

<sup>67</sup> Anderson, *supra* note 65, at 515.

<sup>68</sup> COYNE & ENTZEROTH, *supra* note 66, at 644 (quoting HUGO ADAM BEDAU, KILLING AS PUNISHMENT: REFLECTIONS ON THE DEATH PENALTY IN AMERICA 57 (2004)).

<sup>69</sup> Berg, *supra* note 50, at 146 (citing Anderson, *supra* note 65, at 514–15).

<sup>70</sup> COYNE & ENTZEROTH, *supra* note 66, at 644 (quoting BEDAU, *supra* note 68, at 68).

<sup>71</sup> Berg, *supra* note 50, at 146 (quoting Tara L. Swafford, *Responding to Herrera v. Collins: Ensuring that Innocents are Not Executed*, 45 CASE W. RES. L. REV. 603, 608–09 (1995)).

Relief for a prisoner who is actually innocent should not be left to the whims of the political process. Clemency is not a substitute for the judicial process because the “very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”<sup>72</sup> In his *Herrera* dissent, Justice Blackmun warned that: “The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal.”<sup>73</sup>

*D. Relief Should Not Have to Depend on a Procedural Violation*

There needs to be a way to avoid the harsh result if clemency is denied and the state and federal habeas courts refuse to hear newly available evidence of innocence because there is no constitutional procedural violation to back it up. Our criminal justice system makes two promises: a fundamentally fair trial *and* an accurate result. If either of these two promises is not met, courts should have an obligation to set things straight. If a prisoner has new evidence of actual innocence he should not have to rely on a procedural error. Indeed, “even a prisoner who appears to have had a *constitutionally perfect* trial ‘retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.’”<sup>74</sup>

IV. THE CURRENT COURT IS UNLIKELY TO MAKE INNOCENCE ANYTHING MORE THAN A GATEWAY TO HABEAS RELIEF

The Supreme Court has answered Judge Friendly’s question “Is Innocence Irrelevant?” and recognized that innocence is, and should be, relevant to habeas review.<sup>75</sup> Habeas courts are more willing to look at procedurally defaulted claims when they think the petitioner might actually be innocent. However, evidence of innocence is only a gateway, and the current Court is unlikely to ever take the next step to make innocence a road to habeas relief.

*A. The Antiterrorism and Effective Death Penalty Act and Judicially Created Hurdles Largely Limit Federal Habeas Relief*

In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA), passed largely in response to the Oklahoma City and World Trade Center

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<sup>72</sup> Brief for Petitioner at 37–38 n.53, *Herrera v. Collins*, 506 U.S. 390 (1993) (No. 91-7328) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

<sup>73</sup> *Herrera v. Collins*, 506 U.S. 390, 440 (1993) (Blackmun, J., dissenting).

<sup>74</sup> *Id.* at 438–39 (Blackmun, J., dissenting) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986)).

<sup>75</sup> Friendly, *supra* note 12.

bombings, amended the federal habeas statutes by erecting a number of new procedural obstacles to habeas corpus review.<sup>76</sup> The AEDPA was intended to “curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases.”<sup>77</sup> Upon signing the bill, President Clinton issued a statement declaring that the AEDPA was intended to “streamline Federal appeals for convicted criminals sentenced to the death penalty.”<sup>78</sup>

However, even before the passage of the AEDPA, the Supreme Court was already restricting the availability of habeas relief.<sup>79</sup> Hoping to serve interests of federalism and finality, the Court excluded Fourth Amendment claims from habeas review in 1976,<sup>80</sup> adopted and enforced strict rules of procedural default in 1977,<sup>81</sup> adopted a restrictive doctrine regarding retroactivity of new Supreme Court constitutional decisions in 1989,<sup>82</sup> erected barriers to the filing of a second habeas petition in 1991,<sup>83</sup> and made evidentiary hearings harder to obtain in 1992.<sup>84</sup> In 1993, the Supreme Court even reduced the burden on states to establish harmless error once a constitutional violation was found.<sup>85</sup> Rather than requiring the government to prove the error was “harmless beyond a reasonable doubt,”<sup>86</sup> the Court held that habeas relief could not be granted unless the constitutional error “had a substantial and injurious effect or influence in determining the jury’s verdict.”<sup>87</sup>

During this time, Justice Blackmun considered the majority of the Court to be on a “crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims,” which resulted in a “Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights . . . .”<sup>88</sup> Justice Stevens criticized the Court for losing “its way in a procedural

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<sup>76</sup> 1 HERTZ & LIEBMAN, *supra* note 27, at 81.

<sup>77</sup> *Id.* at 112 (quoting H.R. REP. NO.104-518, at 111 (1996) (Conf. Rep.)).

<sup>78</sup> *Id.* at 113 (quoting Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719, 720 (Apr. 24, 1996)).

<sup>79</sup> Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 7–8 (1999).

<sup>80</sup> *Stone v. Powell*, 428 U.S. 465, 482 (1976).

<sup>81</sup> *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (adopting the “cause” and “prejudice” requirement for procedural default).

<sup>82</sup> *Teague v. Lane*, 489 U.S. 288, 310 (1989).

<sup>83</sup> *McCleskey v. Zant*, 499 U.S. 467, 489 (1991).

<sup>84</sup> *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11–12 (1992).

<sup>85</sup> *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

<sup>86</sup> *Id.* at 630.

<sup>87</sup> *Id.* at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

<sup>88</sup> *Coleman v. Thompson*, 501 U.S. 722, 758–59 (1991) (Blackmun, J., dissenting).

maze of its own creation” and “grossly miscalculat[ing] the requirements of ‘law and justice’ . . . .”<sup>89</sup>

In 1996, instead of providing a path out of the maze, Congress enacted even more barriers to habeas corpus review. The AEDPA imposes a one-year statute of limitations for filing federal habeas petitions,<sup>90</sup> precludes successive petitions except in very narrow circumstances,<sup>91</sup> and requires a petitioner to first exhaust all available state court remedies.<sup>92</sup> The AEDPA also strictly limits when a federal habeas court can grant relief once a state court has heard the petitioner’s claims: A federal court may not grant relief unless the state court’s adjudication “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”<sup>93</sup>

Although the Supreme Court once extolled the writ’s capacity “to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes,”<sup>94</sup> and emphasized that “a habeas corpus proceeding must not be allowed to founder in a ‘procedural morass,’”<sup>95</sup> today a prisoner must successfully navigate through a web of procedural obstacles to even have his habeas petition heard.

*B. The Supreme Court Has Developed Innocence Gateways Through the Procedural Bars to Habeas Review*

Conscious of cases where these procedural obstacles might prevent a prisoner who is actually innocent from having his habeas petition heard on the merits, the Supreme Court has developed innocence exceptions to these barriers. Although considerate of finality and comity, “[a]t the same time, the Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy.”<sup>96</sup> Through its innocence gateways, the Supreme Court has slowly added substantive layers to the traditional procedural bases for federal habeas relief by taking a closer look at the petitioner’s guilt or innocence.

In three decisions handed down on the same day in 1986, the Court acknowledged the importance of an equitable inquiry into a habeas petitioner’s innocence. Although successive petitions (those raising the same claims as those raised and rejected in a prior petition) are generally

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<sup>89</sup> *Smith v. Murray*, 477 U.S. 527, 541 (1986) (Stevens, J., dissenting).

<sup>90</sup> 28 U.S.C. § 2244(d)(1) (2006).

<sup>91</sup> *Id.* § 2244(b).

<sup>92</sup> *Id.* § 2254(b)(1)(A).

<sup>93</sup> *Id.* § 2254(d)(1)–(2).

<sup>94</sup> *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

<sup>95</sup> *Id.* at 291–92 (quoting *Price v. Johnston*, 334 U.S. 226, 269 (1948)).

<sup>96</sup> *Schlup v. Delo*, 513 U.S. 298, 319 (1995).



precluded from review, in *Kuhlmann v. Wilson*, Justice Powell recognized that there are “limited circumstances under which the interests of the prisoner in relitigating constitutional claims held meritless on a prior petition may outweigh the countervailing interests served by according finality to the prior judgment.”<sup>97</sup> Although a prisoner can usually only bring a petition that has procedurally defaulted, where he has failed to properly present his claims in state court upon a showing of cause and prejudice, in *Murray v. Carrier*, Justice O’Connor observed that this requirement would not always provide adequate protection to “victims of a fundamental miscarriage of justice.”<sup>98</sup> Justice O’Connor expressed for that reason, “[i]n appropriate cases’ the principles of comity and finality that inform the concepts of cause and prejudice ‘must yield to the imperative of correcting a fundamentally unjust incarceration.’”<sup>99</sup> In *Smith v. Murray*, Justice O’Connor again acknowledged this same principle.<sup>100</sup>

In these three cases, to insure that the miscarriage of justice exception would remain “rare” and would only be applied in the “extraordinary case” to those who were truly deserving, the Supreme Court “explicitly tied the miscarriage of justice exception to the petitioner’s innocence.”<sup>101</sup> In *Kuhlmann*, Justice Powell concluded that a prisoner retains an overriding “interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated. That interest does not extend, however, to prisoners whose guilt is conceded or plain.”<sup>102</sup> In *Carrier*, Justice O’Connor wrote that “in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.”<sup>103</sup>

Later cases continued to rely on the actual innocence formulations set forth in *Kuhlmann*, *Carrier*, and *Smith*.<sup>104</sup> In *McCleskey v. Zant*, the Court recognized an exception for abusive petitions (those raising a new claim that could have been raised in a prior petition) in cases in which the constitutional violation “probably has caused the conviction of one innocent of the crime.”<sup>105</sup> In *Schlup v. Delo*, the Court observed that “habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare,” thus “tying the miscarriage of justice

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<sup>97</sup> 477 U.S. 436, 452 (1986).

<sup>98</sup> 447 U.S. 478, 495–96 (1986) (quoting *Engle v. Issac*, 456 U.S. 107, 135 (1982)).

<sup>99</sup> *Id.* at 495 (quoting *Engle*, 456 U.S. at 135).

<sup>100</sup> 477 U.S. 527, 537 (1986).

<sup>101</sup> *Schlup*, 513 U.S. at 321.

<sup>102</sup> *Kuhlmann*, 477 U.S. at 452.

<sup>103</sup> *Carrier*, 477 U.S. at 496.

<sup>104</sup> *Schlup*, 513 U.S. at 322.

<sup>105</sup> 499 U.S. 467, 494 (1991).

exception to innocence” helped accommodate “both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the ‘extraordinary case.’”<sup>106</sup> In *Schlup*, the Court held that in order for a petitioner who has been sentenced to death to have his procedurally barred petition heard on the merits, he “must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.”<sup>107</sup> The Court emphasized “the individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent.”<sup>108</sup>

Despite the Court’s emphasis on the “miscarriage of justice” that would result if an innocent person were executed, these exceptions merely provide that upon a showing of innocence a petitioner will be able to have his defaulted claim heard on the merits. In “the Court’s parlance, the discovery of innocence is not a destination. It is a ‘gateway.’”<sup>109</sup> These innocence “gateways” are not enough. If the underlying procedural claim in the petition is without merit or is harmless, habeas relief will be denied, regardless of the petitioner’s guilt or innocence.

C. *The Court Has Consistently Avoided Making Innocence Anything More Than a Gateway*

Although the Court has acknowledged that innocence should be relevant to habeas proceedings, it refuses to answer whether a petitioner without an underlying procedural violation could obtain relief solely on a showing of actual innocence. When the Court first addressed the question in 1993 in *Herrera*, it was more “for the sake of argument” than anything else.<sup>110</sup> In 2006, Justice Kennedy, in an opinion joined by Justices Stevens, Souter, Ginsburg, and Breyer, found that the petitioner satisfied the *Schlup* gateway standard and allowed him to proceed with his procedurally defaulted constitutional claims, but refused to answer the question left open in *Herrera*, noting “whatever burden a hypothetical freestanding innocence claim would require, [the] petitioner has not satisfied it.”<sup>111</sup> In 2009, the Court avoided the question again, acknowledging:

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<sup>106</sup> 513 U.S. at 321–22 (quoting *Carrier*, 477 U.S. at 496).

<sup>107</sup> *Id.* at 327.

<sup>108</sup> *Id.* at 324–25.

<sup>109</sup> Spero T. Lappas, *The Embarrassment of Innocence*, THE CHAMPION, Aug. 2006, at 13 (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)).

<sup>110</sup> *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

<sup>111</sup> *House*, 547 U.S. at 555. Commentators have criticized the Supreme Court in *House* for missing “the perfect opportunity to determine whether *Herrera* freestanding actual innocence claims are cognizable in federal habeas corpus proceedings.” See, e.g., Andre Mathis, *A Critical Analysis of Actual Innocence After House*

## 2010] FREESTANDING INNOCENCE AND HABEAS RELIEF 1667

Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet. . . . In this case too we can assume without deciding that such a claim exists . . . .<sup>112</sup>

Most recently in Troy Davis's case,<sup>113</sup> rather than answering whether a freestanding innocence claim exists, the Court sent the petition back to the district court to determine "whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."<sup>114</sup> Justice Scalia criticized the Court's action, arguing:

If this Court thinks it possible that capital convictions obtained in full compliance with law can never be final, but are always subject to being set aside by federal courts for the reason of "actual innocence," it should set this case on our own docket so that we can (if necessary) resolve that question. Sending it to a district court that "might" be authorized to provide relief, but then again "might" be reversed if it did so, is not a sensible way to proceed.<sup>115</sup>

Justice Scalia seems to be the only member of the Court willing to answer whether a freestanding innocence claim exists. Perhaps the other members of the Court hesitate to answer the "embarrassing question" because they are worried the answer might be no.

The Warren Court (1953–1969) might have been willing to recognize a freestanding innocence claim, but the current Court is unlikely to.<sup>116</sup> In the 1960s, the Court expanded the scope of habeas

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v. Bell: *Has the Riddle of Actual Innocence Finally Been Solved?*, 37 U. MEM. L. REV. 813, 834 (2007). One commentator inquired: "If this case is not suitable to answer the *Herrera* question, what type of case would a petitioner need to present to the Court in order to resolve this decade-long question?" *Id.* at 835. This commentator wrote, "a coin-flip would ensure the same validity as any form of legal reasoning as to the existence of [a] *Herrera* [claim]." *Id.* at 837.

<sup>112</sup> *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2321 (2009).

<sup>113</sup> See *supra* notes 1–5 and accompanying text.

<sup>114</sup> *In re Davis*, 130 S. Ct. 1, 1 (2009).

<sup>115</sup> *Id.* at 4 (Scalia, J., dissenting).

<sup>116</sup> Chief Justice Warren's opinion in *Townsend v. Sain* is often quoted for the language:

Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.

372 U.S. 293, 317 (1963). Chief Justice Rehnquist relies on this language in his opinion in *Herrera*. See *Herrera v. Collins*, 506 U.S. 390, 400 (1993). However, the Warren Court never had the opportunity to hear a case where the petitioner provided evidence of innocence without a procedural violation to accompany it and had a different understanding of the role that federal habeas courts should play than

review by shifting the balance of power from the states to the federal government and giving federal habeas courts enormous flexibility and power.<sup>117</sup> The Court made federal habeas corpus relief available to petitioners whose federal claims were dismissed by state courts on independent state procedural grounds<sup>118</sup> and expanded the interpretation of the statutory “custody” prerequisite for habeas relief to include prisoners who had been paroled.<sup>119</sup> The Court had a very flexible understanding of the writ<sup>120</sup> and was happy to broaden its scope,<sup>121</sup> reasoning that “[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.”<sup>122</sup>

However, we are no longer in the Warren Court era. The expansion of the writ in the 1960s increased the number of state prisoners filing for federal habeas relief and raised concerns about finality and federalism.<sup>123</sup> Faced with heavily congested court dockets, the Burger (1969–1986) and Rehnquist (1986–2005) Courts narrowed the scope of cognizable claims and raised procedural barriers.<sup>124</sup> In 1976, the Court warned, “in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the

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the Court has today. Unlike the limits imposed on the writ today, the Warren Court considered “the power of inquiry on federal habeas corpus” to be “plenary.” *Townsend*, 372 U.S. at 312. In *Townsend*, the Court advised, “where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.” *Id.* In contrast, today, when a federal habeas court considers evidence, both old and new, the “court’s function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.” *House*, 547 U.S. at 538 (2006).

<sup>117</sup> Brandon Segal, *Habeas Corpus, Equitable Tolling, and AEDPA’s Statute of Limitations: Why the Schlup v. Delo Gateway Standard for Claims of Actual Innocence Fails to Alleviate the Plight of Wrongfully Convicted Americans*, 31 U. HAW. L. REV. 225, 230 (2008).

<sup>118</sup> *Fay v. Noia*, 372 U.S. 391, 426 (1963) (overruled in part by *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

<sup>119</sup> *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

<sup>120</sup> *See, e.g., Harris v. Nelson*, 394 U.S. 286, 291 (1969) (“The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.”).

<sup>121</sup> *See, e.g., Peyton v. Rowe*, 391 U.S. 54, 66 (1968) (“The writ is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.” (quoting *Jones*, 371 U.S. at 243)).

<sup>122</sup> *Sanders v. United States*, 373 U.S. 1, 8 (1963).

<sup>123</sup> *See* Friendly, *supra* note 12, at 143–44.

<sup>124</sup> *See supra* Part IV.A.

exercise of its habeas corpus power.”<sup>125</sup> In 1991, the Court overruled a 1963 decision and held that an independent and adequate state ground barred federal habeas relief.<sup>126</sup> Justice O’Conner opened the majority opinion with the sentence, “This is a case about federalism.”<sup>127</sup> The Court’s decision “concern[ed] the respect that federal courts owe the States and the States’ procedural rules when reviewing the claims of state prisoners in federal habeas corpus.”<sup>128</sup> Today, federalism concerns persist in the Court’s habeas jurisprudence. In *Herrera*, the Court asserted, “[f]ederal courts are not forums in which to relitigate state trials,”<sup>129</sup> and “[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.”<sup>130</sup> In 2004, the Court stated “[o]ut of respect for finality, comity, and the orderly administration of justice, a federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice,”<sup>131</sup> and in 2006, the Court again acknowledged that this “rule is based on the comity and respect that must be accorded to state-court judgments.”<sup>132</sup>

As well as the general unwillingness to allow federal district courts to encroach too much on state courts, separation of powers concerns counsel against the Court recognizing a freestanding innocence claim. Habeas relief today has become largely statutory with federal statutes and the AEDPA governing the availability of, and procedures for, habeas relief.<sup>133</sup> Although the Constitution prohibits Congress from suspending

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<sup>125</sup> *Stone v. Powell*, 428 U.S. 465, 478 n.11 (1976) (quoting *Francis v. Henderson*, 425 U.S. 536, 539 (1976)).

<sup>126</sup> *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (overruling *Fay v. Noia*, 372 U.S. 391, 426 (1963)).

<sup>127</sup> *Id.* at 726.

<sup>128</sup> *Id.* Justice Blackmun observed in dissent: “Federalism; comity; state sovereignty; preservation of state resources; certainty: The majority methodically inventories these multifarious state interests . . . . One searches the majority’s opinion in vain, however, for any mention of petitioner Coleman’s right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death.” *Id.* at 758 (Blackmun, J., dissenting).

<sup>129</sup> *Herrera v. Collins*, 506 U.S. 390, 401 (1993) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)).

<sup>130</sup> *Id.*

<sup>131</sup> *Dretke v. Haley*, 541 U.S. 386, 388 (2004).

<sup>132</sup> *House v. Bell*, 547 U.S. 518, 536 (2006). The Court’s deference to state court proceedings largely stems from notions of parity and confidence that state courts will properly protect constitutional rights as well as their federal counterparts. Bright, *supra* note 79, at 10. Federal habeas relief was first extended to state prisoners right after the civil war, at a time of great distrust in the ability and willingness of state courts to protect federal rights. ERWIN CHEREMINSKY, *FEDERAL JURISDICTION* 890 (5th ed. 2007). During this time period, the writ of habeas corpus allowed federal courts to protect former slaves from unconstitutional confinement. *Id.* at 898. In contrast, today, there is much more trust that state courts will protect federal rights.

<sup>133</sup> *Id.* at 892.

the writ except in times of war and rebellion, the provision was probably meant to keep Congress from preventing *state* courts from releasing individuals who were wrongfully imprisoned.<sup>134</sup> The Framers likely feared that Congress might suspend the states' ability to grant the writ in the same way that Parliament had suspended it in the colonies.<sup>135</sup> Thus, the Constitution prevents Congress from obstructing a state court's ability to grant the writ, but does not create a federal constitutional right to habeas.<sup>136</sup> Federal statutes, not the Constitution, provide the authority for federal habeas corpus relief for state prisoners.<sup>137</sup>

Federalism and separation of powers concerns largely answer why the Court has been so reluctant to answer its "embarrassing question." In recent years, federal habeas courts have shown more deference to state court proceedings, and since the passage of the AEDPA Congress has played a larger role in determining when relief should be available. These developments make it extremely unlikely that the Supreme Court will provide guidance on the validity of a freestanding innocence claim, leaving lower courts to continue to guess about the existence of such a claim.

#### V. CONGRESSIONAL AMENDMENT OF THE HABEAS STATUTES IS THE BEST ANSWER TO THE COURT'S "EMBARRASSING QUESTION"

The Court's consistent hesitation to recognize freestanding claims of innocence and provide guidance to the states and lower federal courts makes it necessary for Congress to recognize such a right instead. Congressional recognition of freestanding innocence claims is better than waiting for the Court to answer its "embarrassing question." Congress could impose uniform federal requirements on the states to ensure that all prisoners have equal access to new evidence of innocence. Rather than having to rely on the current mess of innocence gateways through the maze of procedural barriers, habeas courts could find innocent petitioners truly deserving of relief.

##### A. *Congress Should Make Its Own Determination That Actual Innocence Is an Appropriate Basis for Habeas Relief*

In *District Attorney's Office for the Third Judicial District v. Osborne*, the Court was asked to "recognize a freestanding right to DNA evidence."<sup>138</sup> The Court, through Chief Justice Roberts, declined to recognize a due process right to DNA evidence and was concerned that "[e]stablishing a

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 897.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 892.

<sup>138</sup> 129 S. Ct. 2308, 2322 (2009).

freestanding right to access DNA evidence for testing would force us to act as policymakers, and our substantive-due-process rulemaking authority would not only have to cover the right of access but a myriad of other issues.”<sup>139</sup> Chief Justice Roberts phrased the “dilemma” as “how to harness DNA’s power to prove innocence without unnecessarily overthrowing the established system of criminal justice.”<sup>140</sup> Chief Justice Roberts concluded that the “task belongs primarily to the legislature,”<sup>141</sup> and “there is no reason to suppose that [the federal courts’] answers to these questions would be any better than those of state courts and legislatures, and good reason to suspect the opposite.”<sup>142</sup>

As a fallback to his due process right to DNA testing claim under 42 U.S.C. § 1983, Mr. Osborne also asserted a “federal constitutional right to be released upon proof of ‘actual innocence.’”<sup>143</sup> Chief Justice Roberts recognized that the Court had “struggled with [this question] over the years,” and again declined to answer whether such a claim exists.<sup>144</sup> Any actual innocence claim would have had to be brought in habeas, rather than as a § 1983 action, and because there was no due process problem, the Court did not need to reach the actual innocence question.<sup>145</sup> Although Chief Justice Roberts did not need to answer whether a freestanding innocence claim could be cognizable in federal habeas proceedings, his answer would have probably been the same as it was to the DNA testing question—it is something that should be left for the legislature to answer.

Indeed, “judgments about the proper scope of the writ are ‘normally for Congress to make.’”<sup>146</sup> The Court has “long recognized that ‘the power to award the writ by any of the courts of the United States, must be given by written law.’”<sup>147</sup> Although during the 1970s, 1980s, and early 1990s, the Court imposed many of its own procedural hurdles to limit the number of habeas petitions,<sup>148</sup> in 1996, the AEDPA codified most of these limits. In *Felker v. Turpin*,<sup>149</sup> the Court addressed the AEDPA’s further restrictions on the availability of relief to habeas petitioners, concluding that they “do not amount to a ‘suspension’ of the writ contrary to Article I, § 9.”<sup>150</sup> The passage of the AEDPA affirmed Congress’ authority to

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<sup>139</sup> *Id.* at 2323.

<sup>140</sup> *Id.* at 2316.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 2323.

<sup>143</sup> *Id.* at 2321.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 2321–22.

<sup>146</sup> *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)).

<sup>147</sup> *Id.* (quoting *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807)).

<sup>148</sup> *See supra* Part IV.A.

<sup>149</sup> 518 U.S. 651 (1996).

<sup>150</sup> *Id.* at 664.

make its own judgments about the appropriate scope of habeas corpus relief.

Although ultimately advocating a freestanding innocence claim, one commentator has cautioned that it is not “sensible for the Justices to make a discretionary determination of which habeas cases the district courts should hear without the restrictions of the AEDPA.”<sup>151</sup> This commentator recognized that “[g]iven the pyramidal structure of the federal court system, and the thousands of state prisoners who can and do file federal habeas petitions, such a top-down screening practice would be backwards.”<sup>152</sup> Habeas relief is largely statutory,<sup>153</sup> and whether a freestanding innocence claim exists is a question that Congress should answer.

*B. If It Made Actual Innocence a Ground for Habeas Relief, Congress Could Also Impose Federal Procedural Requirements for Access to Evidence*

As well as amending the habeas statutes to make actual innocence a ground for habeas relief, Congress could also impose federal procedural rights on access to evidence. In *Osborne*, the Court made clear that it would not “enlist the Federal Judiciary in creating a new constitutional code of rules for handling DNA,” and that access requirements should be left to the legislature.<sup>154</sup> Despite the Court’s reluctance to recognize a constitutional due process right to DNA testing, a federal right to habeas relief based on newly available evidence of innocence would make a uniform federal right to such evidence necessary.

Without federal requirements for post-conviction access to new evidence, state courts could potentially close the doors to the proposed federal right to habeas relief based on actual innocence. By erecting strict access requirements, states could preclude prisoners from ever making a sufficient showing of newly available evidence of innocence to warrant habeas relief. The state district attorney, the state police, and even state judges have to deal with day-to-day crime and the consequences if a released prisoner later does something wrong. Wanting to keep convictions final—and reluctant to acknowledge mistakes—these parties may not reveal new evidence that surfaces.<sup>155</sup> Virtually all local

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<sup>151</sup> Dorf, *supra* note 31, at 4.

<sup>152</sup> *Id.*

<sup>153</sup> *See supra* Part III.C.

<sup>154</sup> Dist. Attorney’s Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2322 (2009).

<sup>155</sup> *See* Interview by Frontline with Bennet Gershman, former prosecutor, available at <http://www.pbs.org/wgbh/pages/frontline/shows/case/interviews/gershman.html>. Mr. Gershman admits that

[o]nce the prosecutor suggests that there may have been a mistake, the prosecutor is suggesting that his office acted incorrectly . . . . Once the public begins to doubt that prosecutors convict guilty people—that there may be mistakes or errors in the system—that undermines public confidence in the



prosecutors are elected and they do not want to lose their positions.<sup>156</sup> Similarly, in all but a handful of states, state court judges must stand for election.<sup>157</sup> State court judges in most states lack the independence and security of federal judges, who have life tenure under Article III.<sup>158</sup> Many commentators believe that in criminal cases, “[a]n elected judge who upholds a constitutional right of a person accused of child molestation, murder, or some other crime may be signing his or her own political death warrant.”<sup>159</sup>

Almost all states currently allow post-conviction DNA testing, but access varies widely and federal uniformity would assure that all prisoners have the same access to new evidence of innocence if it becomes available. State DNA testing statutes have varying outcome-based limitations. Three states allow post-conviction access to testing on a showing that there is a likelihood that DNA could be probative of innocence.<sup>160</sup> The vast majority of states require a threshold showing of “materiality” before testing may be granted—the petitioner has to demonstrate that a reasonable probability exists that he would not have been convicted if exculpatory results had been obtained through DNA testing.<sup>161</sup> Several states impose an even more onerous standard—to require that it be “more probable than not” that the DNA testing would prove innocence,<sup>162</sup> and to require clear and convincing evidence or a substantial showing that testing would demonstrate innocence.<sup>163</sup>

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prosecutor. . . . When you acknowledge a mistake, you show a certain weakness, and the prosecutor does not want to appear weak, or confused, or uncertain. The prosecutor wants to project the image of toughness, certainty, and confidence.

*Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Bright, *supra* note 79, at 10.

<sup>158</sup> *Id.*; see also U.S. CONST. art. III, § 1.

<sup>159</sup> Bright, *supra* note 79, at 10; see also Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. R. 689, 726–27 (1995); Lynn Adelman, *The Great Writ Diminished*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 23 (2009); Leonard A. Bennett, Comment, *The Impossibility of Impartiality: Interest in Judicial Reflection as a Denial of Due Process for a Criminal Defendant*, 4 GEO. MASON U. C. R. L.J. 275, 275–76 (1994).

<sup>160</sup> Garrett, *supra* note 58, at 1676. These states are Kansas, Nebraska, and Wyoming. See KAN. STAT. ANN. § 21-2512 (2007); NEB. REV. STAT. § 29-4120(5) (2008); WYO. STAT. ANN. § 7-12-303 (2009).

<sup>161</sup> Garrett, *supra* note 58, at 1676. See, e.g., OR. REV. STAT. ANN. § 138.692(1)(b) (West 2010); ARIZ. REV. STAT. ANN. § 13-4240 (2009); HAW. REV. STAT. § 844D-123 (2008).

<sup>162</sup> Garrett, *supra* note 58, at 1676. These states are Colorado and Texas. See COLO. REV. STAT. § 18-1-413 (2009); TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(2)(A) (Vernon 2006).

<sup>163</sup> Garrett, *supra* note 58, at 1676. These states are New Hampshire and Virginia. See N.H. REV. STAT. ANN. § 651-D:2 (LexisNexis 2007); VA. CODE ANN. § 19.2-327.1 (2008).

In addition to these outcome-based limitations, all but three state post-conviction DNA testing statutes preclude entire categories of convicts who might otherwise be able to prove their innocence from seeking DNA testing.<sup>164</sup> States typically limit testing to the most serious crimes with the longest sentences. Some limit testing to felonies, some to violent crimes, and some restrict testing just to capital cases.<sup>165</sup> Additionally these statutes often bar access to petitioners who pleaded guilty and those whose attorney failed to request DNA testing at trial, and sometimes require that DNA testing technology has changed since the time of trial.<sup>166</sup>

Dissenting in *Osborne*, Justice Stevens argued, “[t]he fact that nearly all the States have now recognized some postconviction right to DNA evidence makes it more, not less, appropriate to recognize a limited federal right to such evidence in cases where litigants are unfairly barred from obtaining relief in state court.”<sup>167</sup> Furthermore, DNA evidence is not the only type of evidence of innocence that could become newly available and warrant habeas relief. Although most states allow post-conviction DNA testing, only six states and the District of Columbia permit motions related to non-DNA forensic testing, scientific evidence, or other new evidence of innocence.<sup>168</sup> In order to ensure uniformity and to prevent elected state officials and police from potentially obstructing a habeas petitioner’s right to newly available evidence of innocence, Congress should create federal procedural access requirements.

*C. A Freestanding Innocence Claim Would Mean Habeas Courts Would no Longer Need Their Innocence “Gateways”*

In his *In re Davis* dissent, Justice Scalia argued, “[t]here is no sound basis for distinguishing an actual-innocence claim from any other claim that is alleged to have produced a wrongful conviction.”<sup>169</sup> Despite their reluctance to recognize freestanding innocence claims as a basis for habeas relief, most other members of the Court would disagree. By developing innocence gateways through the procedural bars to habeas

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<sup>164</sup> Garrett, *supra* note 58, at 1679. Only Hawaii, North Carolina, and Wisconsin permit all categories of convicts access to DNA testing. See HAW. REV. STAT. § 844D-121 (2008); N.C. GEN. STAT. § 15A-266.4 (2009); WIS. STAT. ANN. § 974.07(2) (West 2007).

<sup>165</sup> Garrett, *supra* note 58, at 1680.

<sup>166</sup> *Id.*

<sup>167</sup> Dist. Attorney’s Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2335 (2009) (Stevens, J., dissenting).

<sup>168</sup> Garrett, *supra* note 58, at 1679. These jurisdictions are Arkansas (new scientific evidence), District of Columbia (new evidence of innocence), Idaho (includes other testing), Illinois (includes other testing), Minnesota (other scientific evidence), New York (any new evidence of innocence), and Virginia (any new scientific evidence). *Id.* at 1679 n.233.

<sup>169</sup> 130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting).

review, the Court *has* distinguished actual innocence claims from other claims.<sup>170</sup>

However, the Court's innocence gateways are not efficient. Under current habeas law, a showing of innocence that makes it "more likely than not" that the jury would not have convicted does not result in freedom. It just means the habeas petitioner can get through the *Schlup* gateway and the court can reach the merits of a defaulted procedural claim. For example, in *House v. Bell*, once the Supreme Court found "House has satisfied the gateway standard set forth in *Schlup*," he was allowed to "proceed on remand with [his] procedurally defaulted [ineffective assistance of counsel claim]."<sup>171</sup> Although the Court once claimed to have "consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements,"<sup>172</sup> the Court seems to have done exactly that. One commentator criticized the Court's reasoning as "form-over-substance thinking . . . adopted without regard to efficiency, liberty, or even common sense."<sup>173</sup>

Making actual innocence a freestanding basis for habeas relief would mean that federal habeas courts could grant relief directly upon a compelling showing of newly available evidence of innocence rather than having to remand cases so that procedurally defaulted claims can be resolved on the merits. Because actual innocence claims *are* different from other claims, the traditional procedural claims could still be subject to strict hurdles, such as the one-year statute of limitations and restriction on successive petitions, whereas innocence claims would not have to satisfy these hurdles as long as there is a sufficient showing of newly available evidence of innocence. Such an approach would be much more efficient. Courts could worry about the substance of habeas petitions rather than just their form, targeting their efforts to find petitioners truly deserving of relief.

#### VI. CONGRESS SHOULD ANSWER THE COURT'S "EMBARRASSING QUESTION" BY AMENDING THE HABEAS STATUTES TO INCLUDE ACTUAL INNOCENCE AS AN INDEPENDENT GROUND FOR RELIEF

Developments in DNA technology prove that our Constitution's procedural protections sometimes fail and we do sometimes convict innocent people. Despite these developments, the Supreme Court seems to be becoming more and more reluctant to recognize freestanding innocence claims. Although technology makes it easier for prisoners to

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<sup>170</sup> See *supra* Part IV.B.

<sup>171</sup> 547 U.S. 518, 555 (2006).

<sup>172</sup> *Hensley v. Mun. Court*, 411 U.S. 345, 350 (1973).

<sup>173</sup> Eric Seinsheimer, *Dretke v. Haley and the Still Unknown Limits of the Actual Innocence Exception*, 95 J. CRIM. L. & CRIMINOLOGY 905, 906 (2005).

prove their innocence, under current law, states can chose to restrict access to DNA evidence. Furthermore, even when a prisoner obtains DNA evidence conclusively establishing his innocence, he has to rely on state post-conviction courts or executive clemency for relief. A federal habeas court will not grant relief without an underlying procedural violation. Instead of waiting for the Court to answer its “embarrassing question,” Congress should recognize a prisoner’s right to habeas relief based on a showing of actual innocence.

A. *Congress Has the Power to Make Actual Innocence a Ground for Habeas Relief*

United States statutes currently regulate federal habeas corpus proceedings.<sup>174</sup> 28 U.S.C. § 2254 outlines when a federal court can and cannot grant habeas relief after a state court judgment. For example, under subsection (a), habeas relief can only be granted “on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States.”<sup>175</sup> A petitioner has no basis for federal habeas relief if he is just being held in violation of the *state* constitution or laws. Under subsection (b), it must appear that (1) “the applicant has exhausted the remedies available in the courts of the State,” or (2) “there is an absence of available State corrective process,” or (3) “circumstances exist that render such process ineffective to protect the rights of the applicant.”<sup>176</sup> The last subsection of the statute currently provides that the “ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief.”<sup>177</sup> Section 2254 should be amended to add subsection (j): *Newly available evidence of actual innocence may be a ground for relief.* Under this subsection, habeas relief could be granted without a procedural violation at the underlying state trial.

The Due Process Clause of the Fourteenth Amendment provides a natural foundation for Congress to create a habeas claim based on actual innocence.<sup>178</sup> The Clause provides, “nor shall any State deprive any

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<sup>174</sup> See 28 U.S.C. §§ 2241–55 (2006).

<sup>175</sup> *Id.* § 2254(a). The Supreme Court has interpreted this to mean that the petitioner was denied some fundamental due process protection, such as effective assistance of counsel at trial, and not that the petitioner is actually innocent. See *supra* notes 15–17 and accompanying text.

<sup>176</sup> 28 U.S.C. § 2254(b).

<sup>177</sup> *Id.* § 2254(i).

<sup>178</sup> After the Court’s decision in *In re Davis* (see *supra*, notes 1–5 and accompanying text), one commentator recognized that Justice Stevens proposed that “if the AEDPA limits apply to bar proof that a person sentenced to death is actually innocent, then those limits are themselves unconstitutional.” Dorf, *supra* note 31, at 5. Although Justice Stevens did not explain what constitutional provision would be violated, one possibility was the Due Process Clause of the Fourteenth Amendment. *Id.* This commentator thought “Justice Stevens (and the Court) might be suggesting

person of life, liberty, or property, without due process of law.”<sup>179</sup> Procedural due process imposes constraints on the government if it deprives an individual of a “life,” “liberty,” or “property” interest.<sup>180</sup> “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”<sup>181</sup> A prisoner needs a meaningful opportunity to have a court hear newly available evidence of innocence. Under current law, for a prisoner who was afforded a procedurally perfect trial, discovery of new evidence of innocence is meaningless; without an underlying procedural violation, a federal habeas court cannot grant relief.

In addition, the Supreme Court has interpreted the Due Process Clause as providing substantive protections. Substantive due process prevents the government from taking actions that “shock the conscience”<sup>182</sup> or violate rights “implicit in the concept of ordered liberty.”<sup>183</sup> In her concurring opinion in *Herrera*, Justice O’Connor observed that “[r]egardless of the verbal formula employed—‘contrary to contemporary standards of decency,’<sup>184</sup> ‘shocking to the conscience,’<sup>185</sup> or offensive to a ‘principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,’<sup>186</sup>—the execution of a legally and factually innocent person would be a constitutionally intolerable event.”<sup>187</sup> Justice O’Connor agreed with “the fundamental legal principle that executing the innocent is inconsistent with the Constitution,” but concurred with the majority’s decision not to grant relief, finding “an equally fundamental fact: Petitioner is not innocent, in any sense of the word.”<sup>188</sup> Under substantive due process, imprisonment of a factually innocent defendant, just like execution, should “shock the conscience” and violate rights “implicit in the concept of ordered liberty.”<sup>189</sup>

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that it violates due process to deny an evidentiary hearing to a condemned prisoner who, if given such a hearing, could demonstrate his innocence.” *Id.*

<sup>179</sup> U.S. CONST., amend. XIV, § 1.

<sup>180</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

<sup>181</sup> *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

<sup>182</sup> *Rochin v. California*, 342 U.S. 165, 172 (1952).

<sup>183</sup> *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937).

<sup>184</sup> *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O’Connor, J., concurring) (citing *Ford v. Wainwright*, 477 U.S. 399, 406 (1986)).

<sup>185</sup> *Id.* (quoting *Rochin*, 342 U.S. at 172).

<sup>186</sup> *Id.* (quoting *Medina v. California*, 505 U.S. 437, 445 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977))).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See Eli Paul Mazur, “*I’m Innocent*”: Addressing Freestanding Claims of Actual Innocence in State and Federal Courts, 25 N.C. CENT. L.J. 197, 241 (2003); Garrett, *supra* note 58, at 1706. One commentator cleverly adapted Justice Cardozo’s conservative test in *Palko v. Connecticut* to identify a substantive due process violation to the question of the execution of an innocent person. Lugosi, *supra* note 37, at 495. This commentator proposed that the inquiry would be: “(1) Would the abolition of habeas

Alternatively, Congress could find support for a right to habeas relief based on actual innocence in the Eighth Amendment's prohibition against "cruel and unusual punishments."<sup>190</sup> The Supreme Court has held that punishment is excessive and unconstitutional if (1) it "is nothing more than the purposeless and needless imposition of pain and suffering,"<sup>191</sup> or (2) it is "grossly out of proportion to the severity of the crime."<sup>192</sup> In *Johnston v. Mississippi*, the Court held that Eighth Amendment protections do not cease after a defendant has been sentenced and convicted.<sup>193</sup> Thus, a defendant should be able to obtain habeas relief under the Eighth Amendment by presenting newly available evidence of innocence even after he has had a fair trial. Indeed, (1) incarcerating an innocent person epitomizes the "purposeless and needless imposition of pain and suffering," and (2) any punishment is disproportionate if the defendant is innocent of the crime. In his *Herrera* dissent, Justice Blackmun emphasized that the Eighth Amendment's "proscription is not static but rather reflects evolving standards of decency,"<sup>194</sup> and thought it was "crystal clear that the execution of an innocent person is 'at odds with contemporary standards of fairness and decency.'"<sup>195</sup>

There is clearly a constitutional basis to make a freestanding claim of actual innocence a ground for habeas relief. However, because the Court is unlikely to ever acknowledge such a claim, Congress should instead amend the habeas statutes to make innocence a basis for habeas relief. Due process and the Eighth Amendment both require that a prisoner with newly available evidence of innocence have a meaningful forum to present this evidence even when he cannot point to a procedural violation in his underlying state criminal trial.

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corpus to free the factually innocent and to prevent their eventual execution violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental? (2) Would a fair and enlightened system of liberty and justice exist if innocent people are convicted, imprisoned and executed?" *Id.* This commentator thought that "Justice Cardozo would unquestionably agree that neither liberty nor justice would exist if the innocent were sacrificed." *Id.* at 496.

<sup>190</sup> U.S. CONST. amend. VIII.

<sup>191</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

<sup>192</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

<sup>193</sup> 486 U.S. 578 (1988). Additionally, in *Ford v. Wainwright*, the petitioner had been convicted of murder and sentenced to death. 477 U.S. 399, 401 (1986). Although there was no suggestion that he was incompetent at the time of his offense, at trial, or at sentencing, subsequent changes in his behavior raised doubts about his sanity. *Id.* at 401-02. The Court held that the Eighth Amendment required an additional hearing to determine whether Ford was mentally competent, and that he could not be executed if he were incompetent. *Id.* at 418.

<sup>194</sup> *Herrera v. Collins*, 506 U.S. 390, 431 (1993) (Blackmun, J., dissenting) (citing *Ford*, 477 U.S. at 406).

<sup>195</sup> *Id.* (quoting *Spaziano v. Florida*, 468 U.S. 447, 465 (1984)).

*B. In Order Not to Overwhelm Federal Habeas Courts, Congress Needs to Strictly Limit What Evidence of Innocence Will Be Appropriate Grounds For Relief*

Allowing a state prisoner to petition for habeas relief based on a claim of actual innocence has the potential to open federal courthouse doors to a flood of frivolous petitions. A federal habeas judge faced with a slew of these petitions may conclude that the chance of finding one innocent prisoner deserving relief is not worth the search. Indeed, it “must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.”<sup>196</sup> Thus, a number of requirements must be satisfied before relief can be granted.

First, the petitioner will have to present newly *available* evidence of actual innocence. Examples of evidence that could suffice are: DNA evidence that was not available at the time of trial; documentation of an iron-clad alibi, perhaps a videotape surfacing that conclusively proves that the prisoner was elsewhere when the crime was committed;<sup>197</sup> or in a homicide case, a situation where the “dead” victim is found living. In contrast to hard scientific evidence, issues of credibility, such as witness recantations and situations where someone later confesses to the crime are too unreliable and should not be the basis for an actual innocence claim. The petitioner will have to do more than just provide a collection of small pieces of new evidence that merely chip away at the state’s case. Furthermore, the evidence cannot just be newly *presented*, otherwise the petitioner could just bring a claim that his trial counsel was ineffective for failing to present this evidence at his underlying state trial. This is already a recognized basis for habeas relief under *Strickland v. Washington*.<sup>198</sup> If this evidence could have been presented at trial, the petitioner will have to bring his habeas claim under one of the already recognized procedural bases and comply with the AEDPA and the Court’s strict procedural guidelines.

Second, before bringing his federal habeas petition, the prisoner must present his new evidence to the state court. Federalism requires that the petitioner exhaust available state judicial remedies before seeking federal habeas relief.<sup>199</sup> Because the prisoner was originally convicted in state court, a state forum should have the first opportunity to hear the prisoner’s new evidence and reverse his conviction if warranted. Federal courts should not interfere with ongoing state criminal prosecutions,<sup>200</sup> and the “principle of comity that underlies the exhaustion doctrine [for

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<sup>196</sup> *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

<sup>197</sup> As technology becomes more and more advanced, safeguards will need to be imposed to ensure that such a video is indeed genuine.

<sup>198</sup> 466 U.S. 668 (1984).

<sup>199</sup> CHEMERINSKY, *supra* note 132, at 916.

<sup>200</sup> *Id.*; see also *Younger v. Harris*, 401 U.S. 37, 41 (1971).

federal habeas proceedings] would be ill served by a rule that allowed a federal district court ‘to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.’<sup>201</sup> Not only would this exhaustion requirement help prevent innocence claims from overwhelming federal habeas courts, it would also provide strong incentives for states to make adequate post-conviction remedies available.

Finally, the prisoner will need to do much more than just raise some doubt about his guilt. Because the state already met its burden to prove the prisoner was *guilty beyond a reasonable doubt*, the newly available evidence must prove *innocence beyond a reasonable doubt*.<sup>202</sup> If a judge finds that the petitioner’s evidence meets this stringent standard, he can grant habeas relief.

## VII. CONCLUSION

A prisoner with newly available evidence of innocence needs a forum in which to present it. The majority of federal courts will not hear this evidence if the habeas petitioner cannot point to something procedural that went wrong in his underlying trial. The chance for relief in state court varies widely depending on the state, and many states have strict procedural requirements such as short statutes of limitations and restrictions on post-conviction access to evidence. Furthermore, state governors, prosecutors, police, and even judges are influenced by politics and reluctant to admit mistakes. Their ties to day-to-day crime are closer than their federal counterparts’, and state court judges are likely to be swayed by fear that a released prisoner will later do something wrong. Because the Supreme Court is unlikely to ever make innocence more than a gateway, Congress should amend the habeas statutes to make freestanding innocence a basis for federal habeas relief.

A federal right to habeas relief based on newly available evidence has the potential to raise federalism concerns—after all, federal courts are not forums in which to relitigate state trials. However, federalism interests could easily be served by requiring a petitioner to have a state

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<sup>201</sup> Murray v. Carrier, 477 U.S. 478, 489 (1986) (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)).

<sup>202</sup> In his *Herrera* dissent, Justice Blackmun proposed, “to obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent.” *Herrera v. Collins*, 506 U.S. 390, 442 (1993) (Blackmun, J., dissenting). Commentators have suggested that either this, or the lower *Schlup* standard, that it is “more likely than not” that no reasonable jury would convict in light of the new evidence, should be the petitioner’s burden of proof for a freestanding innocence claim. *See, e.g.*, Garrett, *supra* note 58, at 1638. However, in order for federal courts to quickly sift through numerous frivolous petitions, the standard should be higher. Because the prisoner is seeking to challenge the determination of guilt after he has had a fair trial, the burden should shift to him to prove beyond a reasonable doubt that he is actually innocent.



## 2010] FREESTANDING INNOCENCE AND HABEAS RELIEF 1681

court hear his claim first. Additionally, federal courts already engage in lengthy analyses of state prisoner claims of actual innocence under the miscarriage of justice exception and innocence gateways to procedural default. This has not undone the federal system even though the federal habeas court has to review the sufficiency of the evidence in the underlying state conviction. Allowing freestanding innocence claims would be a much cleaner way to grant relief than relying on a mess of innocence gateways, and federal habeas courts would be more likely to find innocent petitioners truly deserving of relief.

Actual innocence claims would not overwhelm federal courts. Recognizing a federal right to relief may actually reduce the burden on federal courts because state courts may be more likely to grant relief based on actual innocence if it is pursuant to a federal statute, eliminating the need for a habeas petitioner to even go to federal court. The risk of fraudulent innocence claims would be no more disruptive than the current attempts to satisfy the innocence gateway standards to get past procedural default. A freestanding innocence claim would require a much higher showing of innocence (proof beyond a reasonable doubt) than the *Schlup* innocence gateway (more likely than not). Thus, habeas courts could quickly sift through and dismiss petitions with little merit.

Finally, although allowing freestanding innocence claims may undermine the finality of a criminal conviction, such a disruption is not an adequate reason to deny relief. The “Court has never held . . . that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254.”<sup>203</sup> Actual innocence claims are necessary if the public is going to have faith in the criminal justice system. Public respect for the system largely rests on the community’s belief that the criminal justice system has two characteristics: (1) that the system usually correctly separates guilt from innocence, and (2) that when (1) fails, the system fixes its own mistakes.<sup>204</sup>

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<sup>203</sup> *Reed v. Ross*, 468 U.S. 1, 15 (1984).

<sup>204</sup> *Lappas*, *supra* note 109, at 12.