SUPREME COURT OF THE UNITED STATES

No. 91–7328

LEONEL TORRES HERRERA, PETITIONER *v.* JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January 25, 1993]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

We granted certiorari on the question whether it violates due process or constitutes cruel and unusual punishment for a State to execute a person who, having been convicted of murder after a full and fair trial, later alleges that newly discovered evidence shows him to be "actually innocent." I would have preferred to decide that question, particularly since, as the Court's discussion shows, it is perfectly clear what the answer is: There is no basis in text, tradition, or even in contemporary practice (if that were enough), for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction. In saying that such a right exists, the dissenters apply nothing but their personal opinions to invalidate the rules of more than two thirds of the States, and a Federal Rule of Criminal Procedure for which this Court itself is responsible. If the system that has been in place for 200 years (and remains widely approved) "shocks" the dissenters' consciences, *post*, at 1, perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of "conscience-shocking" as a legal test.

I nonetheless join the entirety of the Court's opinion, including the final portion (pages 26–28)—because there is no legal error in deciding a case by assuming *arguendo* that an asserted constitutional

right exists, and because I can understand, or at least am accustomed to, the reluctance of the present Court to admit publicly that Our Perfect Constitution[1] 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. With any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon.

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[1]My reference is to an article by Professor Monaghan, which discusses the unhappy truth that not every problem was meant to be solved by the United States Constitution, nor can be. See Monaghan, Our Perfect Constitution, 56 N. Y. U. L. Rev. 353 (1981).

My concern is that in making life easier for ourselves we not appear to make it harder for the lower federal courts, imposing upon them the burden of regularly analyzing newly-discovered-evidence-of-innocence claims in capital cases (in which event such federal claims, it can confidently be predicted, will become routine and even repetitive). A number of Courts of Appeals have hitherto held, largely in reliance on our unelaborated statement in *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963), that newly discovered evidence relevant only to a state prisoner's guilt or innocence is not a basis for federal habeas corpus relief. See, *e.g.*, *Boyd* v. *Puckett*, 905 F. 2d 895, 896–897 (CA5), cert. denied, 498 U. S. 988 (1990); *Stockton* v. *Virginia*, 852 F. 2d 740, 749 (CA4 1988), cert. denied, 489 U. S. 1071 (1989); *Swindle* v. *Davis*, 846 F. 2d 706, 707 (CA11 1988) (*per curiam*); *Byrd* v. *Armontrout*, 880 F. 2d 1, 8 (CA8 1989), cert. denied, 494 U. S. 1019 (1990); *Burks* v. *Egeler*, 512 F. 2d 221, 230 (CA6), cert. denied, 423 U. S. 937 (1975). I do not understand it to be the import of today's decision that those holdings are to be replaced with a strange regime that assumes permanently, though only "*arguendo*," that a constitutional right exists, and expends substantial judicial resources on that assumption. The Court's extensive and scholarly discussion of the question presented in the present case does nothing but support our statement in *Townsend*, and strengthen the validity of the holdings based upon it.