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 BLACKMUN, with whom JUSTICE STEVENS and JUSTICE SOUTER join with respect to Parts I-IV, dissenting.

Nothing could be more contrary to contemporary standards of decency, see *Ford* v. *Wainwright*, 477 U. S. 399, 406 (1986), or more shocking to the conscience, see *Rochin* v. *California*, 342 U. S. 165, 172 (1952), than to execute a person who is actually innocent.

I therefore must disagree with the long and general discussion that precedes the Court's disposition of this case. See *ante*, at 6–26. That discussion, of course, is dictum because the Court assumes, "for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of `actual innocence' made after trial would render the execution of a defendant unconstitutional." *Ante*, at 26. Without articulating the standard it is applying, however, the Court then decides that this petitioner has not made a sufficiently persuasive case. Because I believe that in the first instance the District Court should decide whether petitioner is entitled to a hearing and whether he is entitled to relief on the merits of his claim, I would reverse the order of the Court of Appeals and remand this case for further proceedings in the District Court.

The Court's enumeration, *ante*, at 7, of the constitutional rights of criminal defendants surely is entirely

beside the point. These protections sometimes fail.[1] We really are being asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence. Despite the State of Texas' astonishing protestation to the contrary, see Tr. of Oral Arg. 37, I do not see how the answer can be anything but "yes."

The Eighth Amendment prohibits "cruel and unusual punishments." This proscription is not static but rather reflects evolving standards of decency. *Ford* v. *Wainwright*, 477 U. S., at 406; *Gregg* v. *Georgia*, 428 U. S. 153, 171 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.); *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion); *Weems* v. *United States*, 217 U. S. 349, 373 (1910). I think it is crystal clear that the execution of an innocent person is "at odds with contemporary standards of fairness and decency." *Spaziano* v. *Florida*, 468 U. S. 447, 465 (1984). Indeed, it is at odds with any standard of

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[1]One impressive study has concluded that 23 innocent people have been executed in the United States in this century, including one as recently as 1984. Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 36, 173–179 (1987); M. Radelet, H. Bedau, & C. Putnam, In Spite of Innocence 282–356 (1992). The majority cites this study to show that clemency has been exercised frequently in capital cases when showings of actual innocence have been made. See *ante*, at 24. But the study also shows that requests for clemency by persons the authors believe were innocent have been refused. See, *e.g.*, Bedau & Radelet, 40 Stan. L. Rev., at 91 (discussing James Adams who was executed in Florida on May 10, 1984); M. Radelet, H. Bedau, & C. Putnam, In Spite of Innocence, at 5–10 (same).

decency that I can imagine.

This Court has ruled that punishment is excessive and unconstitutional if it is "nothing more than the purposeless and needless imposition of pain and suffering," or if it is "grossly out of proportion to the severity of the crime." *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion); *Gregg* v. *Georgia*, 428 U. S., at 173 (opinion of Stewart, Powell, and STEVENS, JJ.). It has held that death is an excessive punishment for rape, *Coker* v. *Georgia*, 433 U. S., at 592, and for mere participation in a robbery during which a killing takes place. *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982). If it is violative of the Eighth Amendment to execute someone who is guilty of those crimes, then it plainly is violative of the Eighth Amendment to execute a person who is actually innocent. Executing an innocent person epito-mizes "the purposeless and needless imposition of pain and suffering." *Coker* v. *Georgia*, 433 U. S., at 592.[2]

The protection of the Eighth Amendment does not end once a defendant has been validly convicted and sentenced. In *Johnson* v. *Mississippi*, 486 U. S. 578

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[2]It also may violate the Eighth Amendment to imprison someone who is actually innocent. See *Robinson* v. *California*, 370 U. S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the `crime' of having a common cold"). On the other hand, this Court has noted that "`death is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality.'" *Beck* v. *Alabama*, 447 U. S. 625, 637 (1980), quoting *Gardner* v. *Florida*, 430 U. S. 349, 357 (1977) (opinion of STEVENS, J.). We are not asked to decide in this case whether petitioner's continued imprisonment would violate the Constitution if he actually is innocent, see Brief for Petitioner 39, n. 52; Tr. of Oral Arg. 3–5, and I do not address that question.

(1988), the petitioner had been convicted of murder and sentenced to death on the basis of three aggravating circumstances. One of those circumstances was that he previously had been convicted of a violent felony in the State of New York. After Johnson had been sentenced to death, the New York Court of Appeals reversed his prior conviction. Although there was no question that the prior conviction was valid at the time of Johnson's sentencing, this Court held that the Eighth Amendment required review of the sentence because "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Id.*, at 590.[3] In *Ford* v. *Wainwright*, *supra*, the petitioner had been convicted of murder and sentenced to death. There was no suggestion that he was incompetent at the time of his offense, at trial, or at sentencing, but subsequently he exhibited changes in behavior that raised doubts about his sanity. This Court held that Florida was required under the Eighth Amendment to provide an additional hearing to determine whether Ford was men-tally competent, and that he could not be executed if he were incompetent. 477 U. S., at 410 (plurality opinion); *id.*, at 422–423 (Powell, J., concurring in part and concurring in the judgment). Both *Johnson* and *Ford* recognize that capital

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[3]The majority attempts to distinguish *Johnson* on the ground that Mississippi previously had considered claims like Johnson's by writ of error *coram nobis*. *Ante*, at 15. We considered Mississippi's past practice in entertaining such claims, however, to determine not whether an Eighth Amendment violation had occurred but whether there was an independent and adequate state ground preventing us from reaching the merits of Johnson's claim. See 486 U. S., at 587–589. Respondent does not argue that there is any independent and adequate state ground that would prevent us from reaching the merits in this case.

defendants may be entitled to further proceedings because of an intervening development even though they have been validly convicted and sentenced to death.

Respondent and the United States as *amicus curiae* argue that the Eighth Amendment does not apply to petitioner because he is challenging his guilt, not his punishment. Brief for Respondent 21–23; Brief for United States as *Amicus Curiae* 9–12. The majority attempts to distinguish *Ford* on that basis. *Ante*, at 14.[4] Such reasoning, however, not only contradicts our decision in *Beck* v. *Alabama*, 447 U. S. 625 (1980), but also fundamentally misconceives the nature of petitioner's argument. Whether petitioner is viewed as challenging simply his death sentence or also his continued detention, he still is challenging the State's right to punish him. Respondent and the United States would impose a clear line between guilt and punishment, reasoning that every claim that concerns guilt necessarily does not involve punishment. Such a division is far too facile. What respondent and the United States fail to recognize is that the legitimacy of punishment is inextricably intertwined with guilt.

Beck makes this clear. In *Beck*, the petitioner was convicted of the capital crime of robbery-intentional killing. Under Alabama law, however, the trial court was prohibited from giving the jury the option of

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[4]The Court also suggests that *Ford* is distinguishable because "unlike the question of guilt or innocence . . . the issue of sanity is properly considered in proximity to the execution." *Ante*, at 14–15. Like insanity, however, newly discovered evidence of innocence may not appear until long after the conviction and sentence. In *Johnson*, the New York Court of Appeals decision that required reconsideration of Johnson's sentence came five years after he had been sentenced to death. 486 U. S., at 580–582.

convicting him of the lesser included offense of felony murder. We held that precluding the instruction injected an impermissible element of uncertainty into the guilt phase of the trial.

> "To insure that the death penalty is indeed imposed on the basis of `reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the State] is constitutionally prohibited from withdrawing that option in a capital case." 447 U. S., at 638 (footnote omitted).

The decision in *Beck* establishes that, at least in capital cases, the Eighth Amendment requires more than reliabil-ity in sentencing. It also mandates a reliable determination of guilt. See also *Spaziano* v. *Florida*, 468 U. S., at 456.

The Court also suggests that allowing petitioner to raise his claim of innocence would not serve society's interest in the reliable imposition of the death penalty because it might require a new trial that would be less accurate than the first. *Ante*, at 12. This suggestion misses the point entirely. The question is not whether a second trial would be more reliable than the first but whether, in light of new evidence, the result of the first trial is sufficiently reliable for the State to carry out a death sentence. Furthermore, it is far from clear that a State will seek to retry the rare prisoner who prevails on a claim of actual innocence. As explained in part III, *infra*, I believe a prisoner must show not just that there was probably a reasonable doubt about his guilt but that he is probably actually innocent. I find it difficult to believe that any State would chose to retry a person who meets this

standard.

I believe it contrary to any standard of decency to execute someone who is actually innocent. Because the Eighth Amendment applies to questions of guilt or innocence, *Beck* v. *Alabama*, 447 U. S., at 638, and to persons upon whom a valid sentence of death has been imposed, *Johnson* v. *Mississippi*, 486 U. S., at 590, I also believe that petitioner may raise an Eighth Amendment challenge to his punishment on the ground that he is actually innocent.

Execution of the innocent is equally offensive to the Due Process Clause of the Fourteenth Amendment. The majority's discussion misinterprets petitioner's Fourteenth Amendment claim as raising a procedural rather than a substantive due process challenge.[5]

> "The Due Process Clause of the Fifth Amendment provides that `No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .' This Court has held that the Due Process Clause protects individuals against two types of government action. So-called `substantive due process' prevents the government from engaging in conduct that `shocks the conscience,' *Rochin* v. *California*, 342 U. S. 165, 172 (1952), or interferes with rights `implicit in the concept of ordered liberty,' *Palko* v. *Connecticut*, 302 U. S. 319, 325–326 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). This requirement has traditionally

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[5]The majority's explanation for its failure to address petitioner's substantive due process argument is fatuous. The majority would deny petitioner the opportunity to bring a substantive due process claim of actual innocence because a jury has previously found that he is not actually innocent. See *ante*, at 16, n. 6. To borrow a phrase, this "puts the cart before the horse." *Ibid*.

Even under the procedural due process framework of *Medina* v. *California*, 505 U.S. ___ (1992), the majority's analysis is incomplete, for it fails to consider "whether the rule transgresses any recognized principle of `fundamental fairness' in operation." *Id.*, at ___ (slip op. 10), quoting *Dowling* v. *United States*, 493 U.S. 342, 352 (1990).

> been referred to as `procedural' due process." *United States* v. *Salerno*, 481 U. S. 739, 746 (1987).

Petitioner cites not *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), or *Medina* v. *California*, 505 U. S. ___ (1992), in support of his due process claim, but *Rochin*. Brief for Petitioner 32–33.

Just last Term, we had occasion to explain the role of substantive due process in our constitutional scheme. Quoting the second Justice Harlan, we said:

> "`[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points . . . . It is a rational contin-uum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .'" *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U. S. ___, ___ (1992) (slip op. 6), quoting *Poe* v. *Ullman*, 367 U. S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

Petitioner's claim falls within our due process precedents. In *Rochin*, deputy sheriffs investigating narcotics sales broke into Rochin's room and observed him put two capsules in his mouth. The deputies attempted to remove the capsules from his mouth and, having failed, took Rochin to a hospital and had his stomach pumped. The capsules were found to contain morphine. The Court held that the deputies' conduct "shock[ed] the conscience" and violated due process. 342 U. S., at 172. "Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too

close to the rack and the screw to permit of constitutional differentiation." *Ibid.* The lethal injection that petitioner faces as an allegedly innocent person is certainly closer to the rack and the screw than the stomach pump condemned in *Rochin*. Execution of an innocent person is the ultimate "`arbitrary impositio[n].'" *Planned Parenthood*, 505 U. S., at ___ (slip op. 6). It is an imposition from which one never recovers and for which one can never be compensated. Thus, I also believe that petitioner may raise a substantive due process challenge to his punishment on the ground that he is actually innocent.

Given my conclusion that it violates the Eighth and Fourteenth Amendments to execute a person who is actually innocent, I find no bar in *Townsend* v. *Sain*, 372 U. S. 293 (1963), to consideration of an actual innocence claim. Newly discovered evidence of petitioner's innocence does bear on the constitutionality of his execution. Of course, it could be argued this is in some tension with *Townsend*'s statement, *id.*, at 317, that "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." That statement, however, is no more than distant dictum here, for we never had been asked to consider whether the execution of an innocent person violates the Constitution.

The majority's discussion of petitioner's constitutional claims is even more perverse when viewed in the light of this Court's recent habeas jurisprudence. Beginning with a trio of decisions in 1986, this Court shifted the focus of federal habeas review of successive, abusive, or defaulted claims away from the preservation of constitutional rights to

a fact-based inquiry into the habeas petitioner's guilt or innocence. See *Kuhlmann* v. *Wilson*, 477 U. S. 436, 454 (plurality opinion); *Murray* v. *Carrier*, 477 U. S. 478, 496 *Smith* v. *Murray*, 477 U. S. 527, 537; see also *McCleskey* v. *Zant*, 499 U. S. ___, ___ (1991) (slip op. 24–25). The Court sought to strike a balance between the State's interest in the finality of its criminal judgments and the prisoner's interest in access to a forum to test the basic justice of his sentence. *Kuhlmann* v. *Wilson*, 477 U. S., at 452. In striking this balance, the Court adopted the view of Judge Friendly that there should be an exception to the concept of finality when a prisoner can make a colorable claim of actual innocence. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970).

Justice Powell, writing for the plurality in *Wilson*, explained the reason for focusing on innocence:

> "The prisoner may have a vital interest in having a second chance to test the fundamental justice of his incarceration. Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate 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." 477 U. S., at 452.

In other words, 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." It is obvious that this reasoning extends beyond the context of successive, abusive, or defaulted claims to substantive claims of actual

innocence. Indeed, Judge Friendly recognized that substantive claims of actual innocence should be cognizable on federal habeas. 38 U. Chi. L. Rev., at 159–160, and n. 87.

Having adopted an "actual innocence" requirement for review of abusive, successive, or defaulted claims, however, the majority would now take the position that "the claim of `actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Ante*, at 13. In other words, having held that a prisoner who is incarcerated in violation of the Constitution must show he is actually innocent to obtain relief, the majority would now hold that a prisoner who is actually innocent must show a constitutional violation to obtain relief. The only principle that would appear to reconcile these two positions is the principle that habeas relief should be denied whenever possible.

The Eighth and Fourteenth Amendments, of course, are binding on the States, and one would normally expect the States to adopt procedures to consider claims of actual innocence based on newly discovered evidence. See *Ford* v. *Wainwright*, 477 U. S., at 411–417 (plurality opinion) (minimum requirements for state-court proceeding to determine competency to be executed). The majority's disposition of this case, however, leaves the States uncertain of their constitutional obligations.

Whatever procedures a State might adopt to hear actual innocence claims, one thing is certain: The possibility of executive clemency is *not* sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments. The majority correctly points out: "A

pardon is an act of grace." *Ante*, at 22. 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. Indeed, in *Ford* v. *Wainwright*, we explicitly rejected the argument that executive clemency was adequate to vindicate the Eighth Amendment right not to be executed if one is insane. 477 U. S., at 416. The possibility of executive clemency "exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless." *Solem* v. *Helm*, 463 U. S. 277, 303 (1983).

"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803). If the exercise of a legal right turns on "an act of grace," then we no longer live under a government of laws. "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." *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943). It is understandable, therefore, that the majority does not say that the vindication of petitioner's constitutional rights may be left to executive clemency.

Like other constitutional claims, Eighth and Fourteenth Amendment claims of actual innocence advanced on behalf of a state prisoner can and should be heard in state court. If a State provides a judicial procedure for raising such claims, the prisoner may be required to exhaust that procedure before

taking his claim of actual innocence to federal court. See 28 U. S. C. 2254(b) and (c). Furthermore, state-court determinations of factual issues relating to the claim would be entitled to a presumption of correctness in any subsequent federal habeas proceeding. See 28 U. S. C. §2254(d).

Texas provides no judicial procedure for hearing petitioner's claim of actual innocence and his habeas petition was properly filed in district court under 28 U. S. C. §2254. The district court is entitled to dismiss the petition summarily only if "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief." 28 U. S. C. §2254 Rule 4. If, as is the case here, the petition raises factual questions and the State has failed to provide a full and fair hearing, the district court is required to hold an evidentiary hearing. *Townsend* v. *Sain*, 372 U. S., at 313.

Because the present federal petition is petitioner's second, he must either show cause for and prejudice from failing to raise the claim in his first petition or show that he falls within the "actual-innocence" exception to the cause and prejudice requirement. *McCleskey* v. *Zant*, 499 U. S., at ___ (slip op. 25–26). If petitioner can show that he is entitled to relief on the merits of his actual-innocence claim, however, he certainly can show that he falls within the "actual-innocence" exception to the cause and prejudice requirement and *McCleskey* would not bar relief.

The question that remains is what showing should be required to obtain relief on the merits of an Eighth or Fourteenth Amendment claim of actual innocence. I agree with the majority that "in state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant." *Ante*, at 25. I also think that "a truly persuasive demonstration of `actual innocence' made after trial

would render the execution of a defendant unconstitutional." *Ante*, at 26. The question is what "a truly persuasive demonstration" entails, a question the majority's disposition of this case leaves open.

In articulating the "actual-innocence" exception in our habeas jurisprudence, this Court has adopted a standard requiring the petitioner to show a "`fair probability that, in light of all the evidence . . . , the trier of facts would have entertained a reasonable doubt of his guilt.'" *Kuhlmann* v. *Wilson*, 477 U. S., at 455, n. 17. In other words, the habeas petitioner must show that there probably would be a reasonable doubt. See also *Murray* v. *Carrier*, 477 U. S., at 496 (exception applies when a constitutional violation has "probably resulted" in a mistaken conviction); *McCleskey* v. *Zant*, 499 U.S., at ___ (slip op. 25) (exception applies when a constitutional violation "probably has caused" a mistaken conviction).[6]

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[6]Last Term in *Sawyer* v. *Whitley*, 505 U. S. ___ (1992), this Court adopted a different standard for determining whether a federal habeas petitioner bringing a successive, abusive, or defaulted claim has shown "actual innocence" of the death penalty. Under *Sawyer*, the petitioner must "show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under applicable state law." *Id.*, at ___ (slip op. 1). That standard would be inappropriate here. First, it requires a showing of constitutional error in the trial process, which, for reasons already explained, is inappropriate when petitioner makes a substantive claim of actual innocence. Second, it draws its "no reasonable juror" standard from *Jackson* v. *Virginia*'s standard for sufficiency of the evidence. As I explain below, however, sufficiency of the evidence review differs in important ways from the question of actual innocence. Third, the Court developed this standard

I think the standard for relief on the merits of an actual-innocence claim must be higher than the threshold standard for merely reaching that claim or any other claim that has been procedurally defaulted or is successive or abusive. I would hold that, to obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent. This standard is supported by several considerations. First, new evidence of innocence may be discovered long after the defendant's conviction. Given the passage of time, it may be difficult for the State to retry a defendant who obtains relief from his conviction or sentence on an actual-innocence claim. The actual-innocence proceeding thus may constitute the final word on whether the defendant may be punished. In light of this fact, an otherwise constitutionally valid conviction or sentence should not be set aside lightly. Second, conviction after a constitutionally adequate trial strips the defendant of the presumption of innocence. The government bears the burden of proving the defendant's guilt beyond a reasonable doubt, *Jackson* v. *Virginia*, 443 U. S. 307, 315 (1979); *In re Winship*, 397 U. S. 358, 364 (1970), but once the government has done so, the burden of proving innocence must shift to the convicted defendant. The actual-innocence inquiry is therefore distinguishable from review for sufficiency of the evidence, where the question is not whether the defendant is innocent but whether the government has met its constitutional burden of proving the defendant's guilt beyond a reasonable doubt. When a defendant seeks to challenge the determination of guilt after he has been validly convicted and sentenced, it is fair to place on him the burden of proving his innocence, not just raising

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for prisoners who are concededly guilty of capital crimes. Here, petitioner claims that he is actually innocent of the capital crime.

doubt about his guilt.

In considering whether a prisoner is entitled to relief on an actual-innocence claim, a court should take all the evidence into account, giving due regard to its reliability. See *Sawyer* v. *Whitley*, 505 U. S., at ___, n. 5 (1992) (slip op. 5, n. 5); *Kuhlmann* v. *Wilson*, 477 U. S., at 455, n. 17; Friendly, 38 U. Chi. L. Rev., at 160. Because placing the burden on the prisoner to prove innocence creates a presumption that the conviction is valid, it is not necessary or appropriate to make further presumptions about the reliability of newly discovered evidence generally. Rather, the court charged with deciding such a claim should make a case-by-case determination about the reliability of the newly discovered evidence under the circumstances. The court then should weigh the evidence in favor of the prisoner against the evidence of his guilt. Obviously, the stronger the evidence of the prisoner's guilt, the more persuasive the newly discovered evidence of innocence must be. A prisoner raising an actual-innocence claim in a federal habeas petition is not entitled to discovery as a matter of right. *Harris* v. *Nelson*, 394 U. S. 286, 295 (1969); 28 U. S. C. §2254 Rule 6. The district court retains discretion to order discovery, how-ever, when it would help the court make a reliable determination with respect to the prisoner's claim. *Harris* v. *Nelson*, 395 U. S., at 299–300; see Advisory Committee Note to 28 U. S. C. §2254 Rule 6.

It should be clear that the standard I would adopt would not convert the federal courts into "`forums in which to relitigate state trials.'" *Ante*, at 9, quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983). It would not "require the habeas court to hear testimony from the witnesses who testified at the trial," *ante*, at 11, though, if the petition warrants a hearing, it may require the habeas court to hear the testimony of "those who made the statements in the affidavits which petitioner has presented." *Ibid.* I

believe that if a prisoner can show that he is probably actually innocent, in light of all the evidence, then he has made "a truly persuasive demonstration," *ante*, at 26, and his execution would violate the Constitution. I would so hold.

In this case, the District Court determined that petitioner's newly discovered evidence warranted further consideration. Because the District Court doubted its own authority to consider the new evidence, it thought that petitioner's claim of actual innocence should be brought in state court, see App. 38–39, but it clearly did not think that petitioner's evidence was so insubstantial that it could be dismissed without any hearing at all.[7] I would reverse the order of the Court of Appeals and remand the case to the District Court to consider whether petitioner has shown, in light of all the evidence, that he is probably actually innocent.

I think it is unwise for this Court to step into the shoes of a district court and rule on this petition in the first instance. If this Court wishes to act as a district court, however, it must also be bound by the rules that govern consideration of habeas petitions in district court. A district court may summarily dismiss a habeas petition only if "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief." 28 U.S.C. §2254 Rule 4. In one of the affidavits, Hector

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[7]JUSTICE O'CONNOR reads too much into the fact that the District Court failed to pass on the sufficiency of the affidavits, did not suggest that it wished to hold an evidentiary hearing, and did not retain jurisdiction after the state court action was filed. *Ante*, at 6–7. The explanation for each of these actions, as JUSTICE O'CONNOR notes, is that the District Court believed that it could offer no relief in any event. *Ante*, at 6.

Villarreal, a licensed attorney and former state court judge, swears under penalty of perjury that his client Raul Herrera confessed that he, and not petitioner, committed the murders. No matter what the majority may think of the inconsistencies in the affidavits or the strength of the evidence presented at trial, this affidavit alone is sufficient to raise factual questions concerning petitioner's innocence that cannot be resolved simply by examining the affidavits and the petition.

I do not understand why the majority so severely faults petitioner for relying only on affidavits. *Ante*, at 26. It is common to rely on affidavits at the preliminary-consideration stage of a habeas proceeding. The opportunity for cross-examination and credibility determinations comes at the hearing, assuming that the petitioner is entitled to one. It makes no sense for this Court to impugn the reliability of petitioner's evidence on the ground that its credibility has not been tested when the reason its credibility has not been tested is that petitioner's habeas proceeding has been truncated by the Court of Appeals and now by this Court. In its haste to deny petitioner relief, the majority seems to confuse the question whether the petition may be dismissed summarily with the question whether petitioner is entitled to relief on the merits of his claim.

I have voiced disappointment over this Court's obvious eagerness to do away with any restriction on the States' power to execute whomever and however they please. See *Coleman* v. *Thompson*, 501 U. S. ___, ___ (1991) (slip op. 1) (dissenting opinion). See also *Coleman* v. *Thompson*, 504 U. S. ___ (1992) (dissent from denial of stay of execution). I have also expressed doubts about whether, in the absence of such restrictions, capital punishment remains constitutional at all. *Sawyer* v. *Whitley*, 505 U. S., at

___ (slip op. 8–11) (opinion concurring in the judgment). Of one thing, however, I am certain. Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who can show that he is innocent comes perilously close to simple murder.