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]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Leonel Torres Herrera was convicted of capital murder and sentenced to death in January 1982. He unsuccessfully challenged the conviction on direct appeal and state collateral proceedings in the Texas state courts, and in a federal habeas petition. In February 1992—10 years after his conviction—he urged in a second federal habeas petition that he was "actually innocent" of the murder for which he was sentenced to death, and that the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process of law therefore forbid his execution. He supported this claim with affidavits tending to show that his now-dead brother, rather than he, had been the perpetrator of the crime. Petitioner urges us to hold that this showing of innocence entitles him to relief in this federal habeas proceeding. We hold that it does not.

Shortly before 11 p.m. on an evening in late September 1981, the body of Texas Department of Public Safety Officer David Rucker was found by a passerby on a stretch of highway about six miles east of Los Fresnos,

Texas, a few miles north of Brownsville in the Rio Grande Valley. Rucker's body was lying beside his patrol car. He had been shot in the head.

At about the same time, Los Fresnos Police Officer Enrique Carrisalez observed a speeding vehicle traveling west towards Los Fresnos, away from the place where Rucker's body had been found, along the same road. Carrisalez, who was accompanied in his patrol car by Enrique Hernandez, turned on his flashing red lights and pursued the speeding vehicle. After the car had stopped briefly at a red light, it signaled that it would pull over and did so. The patrol car pulled up behind it. Carrisalez took a flashlight and walked toward the car of the speeder. The driver opened his door and exchanged a few words with Carrisalez before firing at least one shot at Carrisalez' chest. The officer died nine days later.

Petitioner Herrera was arrested a few days after the shootings and charged with the capital murder of both Carrisalez and Rucker. He was tried and found guilty of the capital murder of Carrisalez in January 1982, and sentenced to death. In July 1982, petitioner pleaded guilty to the murder of Rucker.

At petitioner's trial for the murder of Carrisalez, Hernandez, who had witnessed Carrisalez' slaying from the officer's patrol car, identified petitioner as the person who had wielded the gun. A declaration by Officer Carrisalez to the same effect, made while he was in the hospital, was also admitted. Through a license plate check, it was shown that the speeding car involved in Carrisalez' murder was registered to petitioner's "live-in" girlfriend. Petitioner was known to drive this car, and he had a set of keys to the car in his pants pocket when he was arrested. Hernandez identified the car as the vehicle from which the murderer had emerged to fire the fatal shot. He also testified that there had been only one person in the car that night.

The evidence showed that Herrera's Social Security

card had been found alongside Rucker's patrol car on the night he was killed. Splatters of blood on the car identified as the vehicle involved in the shootings, and on petitioner's blue jeans and wallet were identified as type A blood—the same type which Rucker had. (Herrera has type O blood.) Similar evidence with respect to strands of hair found in the car indicated that the hair was Rucker's and not Herrera's. A handwritten letter was also found on the person of petitioner when he was arrested, which strongly implied that he had killed Rucker.[1]

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[1] The letter read: "To whom it may concern: I am terribly sorry for those I have brought grief to their lives. Who knows why? We cannot change the future's problems with problems from the past. What I did was for a cause and purpose. One law runs others, and in the world we live in, that's the way it is.

"I'm not a tormented person. . . . I believe in the law. What would it be without this *[sic]* men that risk their lives for others, and that's what they should be doing—protecting life, property, and the pursuit of happiness. Sometimes, the law gets too involved with other things that profit them. The most laws that they make for people to break them, in other words, to encourage crime.

"What happened to Rucker was for a certain reason. I knew him as Mike Tatum. He was in my business, and he violated some of its laws and suffered the penalty, like the one you have for me when the time comes.

"My personal life, which has been a conspiracy since my high school days, has nothing to do with what has happened. The other officer that became part of our lives, me and Rucker's (Tatum), that night had not to do in this [*sic*]. He was out to do what he had to do, protect, but that's life. There's a lot of us that wear different faces in lives every day, and that

Petitioner appealed his conviction and sentence, arguing, among other things, that Hernandez' and Carrisalez' identifications were unreliable and improperly admitted. The Texas Court of Criminal Appeals affirmed, *Herrera* v. *State,* 682 S. W. 2d 313 (1984), and we denied certiorari, 471 U. S. 1131 (1985). Petitioner's application for state habeas relief was denied. *Ex parte Herrera,* No. 12,848–02 (Tex. Crim. App., Aug. 2, 1985). Petitioner then filed a federal habeas petition, again challenging the identifications offered against him at trial. This petition was denied, see 904 F. 2d 944 (CA5), and we again denied certiorari. 498 U. S. 925 (1990).

Petitioner next returned to state court and filed a second habeas petition, raising, among other things, a claim of "actual innocence" based on newly discovered evidence. In support of this claim petitioner presented the affidavits of Hector Villarreal, an attorney who had represented petitioner's brother, Raul Herrera, Sr., and of Juan Franco Palacious, one of Raul Sr.'s former cellmates. Both individuals claimed that Raul Sr., who died in 1984, had told them that he —and not petitioner—had killed Officers Rucker and

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is what causes problems for all. [Unintelligible word].

"You have wrote all you want of my life, but think about yours, also. [Signed Leonel Herrera].

"I have tapes and pictures to prove what I have said. I will prove my side if you accept to listen. You [unintelligible word] freedom of speech, even a criminal has that right. I will present myself if this is read word for word over the media, I will turn myself in; if not, don't have millions of men out there working just on me while others—robbers, rapists, or burglars—are taking advantage of the law's time. Excuse my spelling and writing. It's hard at times like this." App. to Brief for United States as *Amicus Curiae* 3a–4a.

Carrisalez.[2] The State District Court denied this application, finding that "no evidence at trial remotely suggest[ed] that anyone other than [petitioner] committed the offense." *Ex parte Herrera,* No. 81–CR-672–C (Tex. 197th Jud. Dist., Jan. 14, 1991), ¶35. The Texas Court of Criminal Appeals affirmed, *Ex parte Herrera,* 819 S. W. 2d 528 (1991), and we denied certiorari, *Herrera* v. *Texas,* 502 U. S. ––– (1992).

In February 1992, petitioner lodged the instant habeas petition—his second—in federal court, alleging, among other things, that he is innocent of the murders of Rucker and Carrisalez, and that his execution would thus violate the Eighth and Fourteenth Amendments. In addition to proffering the above affidavits, petitioner presented the affidavits of Raul Herrera, Jr., Raul Sr.'s son, and Jose Ybarra, Jr., a schoolmate of the Herrera brothers. Raul Jr. averred that he had witnessed his father

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[2]Villarreal's affidavit is dated December 11, 1990. He attested that while he was representing Raul Sr. on a charge of attempted murder in 1984, Raul Sr. had told him that he, petitioner, their father, Officer Rucker, and the Hidalgo County Sheriff were involved in a drug-trafficking scheme; that he was the one who had shot Officers Rucker and Carrisalez; that he didn't tell anyone about this because he thought petitioner would be acquitted; and that after petitioner was convicted and sentenced to death, he began blackmailing the Hidalgo County Sheriff. According to Villarreal, Raul Sr. was killed by Jose Lopez, who worked with the sheriff on drug-trafficking matters and was present when Raul Sr. murdered Rucker and Carrisalez, to silence him.

Palacious' affidavit is dated December 10, 1990. He attested that while he and Raul Sr. shared a cell together in the Hidalgo County jail in 1984, Raul Sr. told him that he had shot Rucker and Carrisalez.

shoot Officers Rucker and Carrisalez and petitioner was not present. Raul Jr. was nine years old at the time of the killings. Ybarra alleged that Raul Sr. told him one summer night in 1983 that he had shot the two police officers.[3] Petitioner alleged that law enforcement officials were aware of this evidence, and had withheld it in violation of *Brady* v. *Maryland,* 373 U. S. 83 (1963).

The District Court dismissed most of petitioner's claims as an abuse of the writ. No. M-92–30 (SD Tex. Feb. 17, 1992). However, "in order to ensure that Petitioner can assert his constitutional claims and out of a sense of fairness and due process," the District Court granted petitioner's request for a stay of execution so that he could present his claim of actual innocence, along with the Raul Jr. and Ybarra affidavits, in state court. App. 38–39. Although it initially dismissed petitioner's *Brady* claim on the ground that petitioner had failed to present "any evidence of withholding exculpatory material by the prosecution," App. 37, the District Court also granted an evidentiary hearing on this claim after reconsideration, *id.,* at 54.

The Court of Appeals vacated the stay of execution. 954 F. 2d 1029 (CA5 1992). It agreed with the District Court's initial conclusion that there was no evidentiary basis for petitioner's *Brady* claim, and found disingenuous petitioner's attempt to couch his claim of actual innocence in *Brady* terms. 954 F. 2d, at 1032. Absent an accom-panying constitutional violation, the Court of Appeals held that petitioner's claim of actual innocence was not cognizable

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[3]Raul Jr.'s affidavit is dated January 29, 1992. Ybarra's affidavit is dated January 9, 1991. It was initially submitted with Petitioner's Reply to State's Brief in Response to Petitioner's Petition for Writ of Habeas Corpus filed January 18, 1991, in the Texas Court of Criminal Appeals.

because, under *Townsend* v. *Sain,* 372 U. S. 293, 317 (1963), "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." See 954 F. 2d at 1034.[4] We granted certiorari, 502 U. S. ––– (1992), and the Texas Court of Criminal Appeals stayed petitioner's execution. We now affirm.

Petitioner asserts that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of a person who is innocent of the crime for which he was convicted. This proposition has an elemental appeal, as would the similar proposition that the Constitution prohibits the imprisonment of one who is innocent of the crime for which he was convicted. After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent. See *United States* v. *Nobles,* 422 U. S. 225, 230 (1975). But the evidence upon which petitioner's claim of innocence rests was not produced at his trial, but rather eight years later. In any system of criminal justice, "innocence" or "guilt" must be determined in some sort of a judicial proceeding. Petitioner's showing of innocence, and indeed his constitutional claim for relief based upon that showing, must be evaluated in the light of the previous proceedings in this case, which have stretched over a span of 10 years.

A person when first charged with a crime is entitled to a presumption of innocence, and may insist that

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[4]After the Court of Appeals vacated the stay of execution, petitioner attached a new affidavit by Raul Jr. to his Petition for Rehearing, which was denied. The affidavit alleges that during petitioner's trial, various law enforcement officials and the Hidalgo County Sheriff told Raul Jr. not to say what happened on the night of the shootings and threatened his family.

his guilt be established beyond a reasonable doubt. *In re Winship,* 397 U. S. 358 (1970). Other constitutional provisions also have the effect of ensuring against the risk of convicting an innocent person. See, *e.g.*, *Coy* v. *Iowa,* 487 U. S. 1012 (1988) (right to confront adverse witnesses); *Taylor* v. *Illinois,* 484 U. S. 400 (1988) (right to compulsory process); *Strickland* v. *Washington,* 466 U. S. 668 (1984) (right to effective assistance of counsel); *Winship, supra* (prosecution must prove guilt beyond a reasonable doubt); *Duncan* v. *Louisiana,* 391 U. S. 145 (1968) (right to jury trial); *Brady* v. *Maryland,* 373 U. S. 83 (1963) (prosecution must disclose exculpatory evidence); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963) (right to assistance of counsel); *In re Murchison,* 349 U. S. 133, 136 (1955) (right to "fair trial in a fair tribunal"). In capital cases, we have required additional protections because of the nature of the penalty at stake. See, *e.g., Beck* v. *Alabama,* 447 U. S. 625 (1980) (jury must be given option of convicting the defendant of a lesser offense). All of these constitutional safeguards, of course, make it more difficult for the State to rebut and finally overturn the presumption of innocence which attaches to every criminal defendant. But we have also observed that "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *Patterson* v. *New York,* 432 U.S. 197, 208 (1977). To conclude otherwise would all but paralyze our system for enforcement of the criminal law.

Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. Cf. *Ross* v. *Moffitt,* 417 U. S. 600, 610 (1974) ("The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable

doubt"). Here, it is not disputed that the State met its burden of proving at trial that petitioner was guilty of the capital murder of Officer Carrisalez beyond a reasonable doubt. Thus, in the eyes of the law, petitioner does not come before the Court as one who is "innocent," but on the contrary as one who has been convicted by due process of law of two brutal murders.

Based on affidavits here filed, petitioner claims that evidence never presented to the trial court proves him innocent notwithstanding the verdict reached at his trial. Such a claim is not cognizable in the state courts of Texas. For to obtain a new trial based on newly dis-covered evidence, a defendant must file a motion within 30 days after imposition or suspension of sentence. Tex. Rule App. Proc. 31(a)(1) (1992). The Texas courts have construed this 30–day time limit as jurisdictional. See *Beathard* v. *State,* 767 S. W. 2d 423, 433 (Tex. Crim. App. 1989); *Drew* v. *State,* 743 S. W. 2d 207, 222–223 (Tex. Crim. App. 1987).

Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. Chief Justice Warren made this clear in *Townsend* v. *Sain,* 372 U. S. 293, 317 (1963) (emphasis added):

> "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*."

This rule is grounded in the principle that federal

habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact. See, *e.g., Moore* v. *Dempsey*, 261 U. S. 86, 87–88 (1923) (Holmes, J.) ("[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved"); *Hyde* v. *Shine*, 199 U. S. 62, 84 (1905) ("[I]t is well settled that upon *habeas corpus* the court will not weigh the evidence") (emphasis in original); *Ex parte Terry,* 128 U. S. 289, 305 (1888) ("As the writ of *habeas corpus* does not perform the office of a writ of error or an appeal, [the facts establishing guilt] cannot be re-examined or reviewed in this collateral proceeding") (emphasis in original).

More recent authority construing federal habeas statutes speaks in a similar vein. "Federal courts are not forums in which to relitigate state trials." *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983). The guilt or innocence determination in state criminal trials is "a decisive and portentous event." *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977). "Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." *Ibid.* Few rulings would be more disruptive of our federal system than to provide for federal habeas review of free-standing claims of actual innocence.

Our decision in *Jackson* v. *Virginia*, 443 U. S. 307 (1979), comes as close to authorizing evidentiary review of a state court conviction on federal habeas as any of our cases. There, we held that a federal habeas court may review a claim that the evidence adduced at a state trial was not sufficient to convict a criminal defendant beyond a reasonable doubt. But in so holding, we emphasized:

> ``[T]his inquiry does not require a court to `ask itself whether *it* believes that the evidence at the

> trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.,* at 318–319 (citations omitted) (emphasis in original).

We specifically noted that "the standard announced . . . does not permit a court to make its own subjective determination of guilt or innocence." *Id.,* at 320, n. 13.

The type of federal habeas review sought by petitioner here is different in critical respects than that authorized by *Jackson*. First, the *Jackson* inquiry is aimed at determining whether there has been an independent constitutional violation—*i.e.*, a conviction based on evidence that fails to meet the *Winship* standard. Thus, federal habeas courts act in their historic capacity—to assure that the habeas petitioner is not being held in violation of his or her federal constitutional rights. Second, the sufficiency of the evidence review authorized by *Jackson* is limited to "record evidence." 443 U. S., at 318. *Jackson* does not extend to nonrecord evidence, including newly discovered evidence. Finally, the *Jackson* inquiry does not focus on whether the trier of fact made the *correct* guilt or innocence determination, but rather whether it made a *rational* decision to convict or acquit.

Petitioner is understandably imprecise in describing the sort of federal relief to which a suitable showing of actual innocence would entitle him. In his brief he states that the federal habeas court should have "an important initial opportunity to hear the evidence and

resolve the merits of Petitioner's claim." Brief for Petitioner 42. Acceptance of this view would presumably require the habeas court to hear testimony from the witnesses who testified at trial as well as those who made the statements in the affidavits which petitioner has presented, and to determine anew whether or not petitioner is guilty of the murder of Officer Carrisalez. Indeed, the dissent's approach differs little from that hypothesized here.

The dissent would place the burden on petitioner to show that he is "probably" innocent. *Post*, at 14–15. Although petitioner would not be entitled to discovery "as a matter of right," the District Court would retain its "discretion to order discovery . . . when it would help the court make a reliable determination with respect to the prisoner's claim." *Post,* at 16. And although the District Court would not be required to hear testimony from the witnesses who testified at trial or the affiants upon whom petitioner relies, it would allow the District Court to do so "if the petition warrants a hearing." *Post,* at 16. At the end of the day, the dissent would have the District Court "make a case-by-case determination about the reliability of newly discovered evidence under the circumstances," and then "weigh the evidence in favor of the prisoner against the evidence of his guilt." *Post,* at 15.

The dissent fails to articulate the relief that would be available if petitioner were to meets its "probable innocence" standard. Would it be commutation of petitioner's death sentence, new trial, or unconditional release from imprisonment? The typical relief granted in federal habeas corpus is a conditional order of release unless the State elects to retry the successful habeas petitioner, or in a capital case a similar conditional order vacating the death sentence. Were petitioner to satisfy the dissent's "probable innocence" standard, therefore, the District Court would presumably be required to grant a

conditional order of relief, which would in effect require the State to retry petitioner 10 years after his first trial, not because of any constitutional violation which had occurred at the first trial, but simply because of a belief that in light of petitioner's new found evidence a jury might find him not guilty at a second trial.

Yet there is no guarantee that the guilt or innocence determination would be any more exact. To the contrary, the passage of time only diminishes the reliability of criminal adjudications. See *McCleskey* v. *Zant,* 499 U. S. ––– (1991) (slip op., at 22) ("[W]hen a habeas petitioner succeeds in obtaining a new trial, the `erosion of memory and dispersion of witnesses that occur with the passage of time' prejudice the government and diminish the chances of a reliable criminal adjudication") (quoting *Kuhlmann* v. *Wilson,* 477 U. S. 436, 453 (1986) (plurality opinion) (internal quotation marks omitted; citation omitted)); *United States* v. *Smith,* 331 U. S. 469, 476 (1947). Under the dissent's approach, the District Court would be placed in the even more difficult position of having to weigh the probative value of "hot" and "cold" evidence on petitioner's guilt or innocence.

This is not to say that our habeas jurisprudence casts a blind eye towards innocence. In a series of cases culminating with *Sawyer* v. *Whitley,* 505 U. S. ––– (1992), decided last Term, we have held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration of

innocent persons. See *McCleskey*, *supra*, at ––– (slip op., at 33). But this body of our habeas jurisprudence makes clear that a 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.

Petitioner in this case is simply not entitled to habeas relief based on the reasoning of this line of cases. For he does not seek excusal of a procedural error so that he may bring an independent constitutional claim challenging his conviction or sentence, but rather argues that he is entitled to habeas relief because newly discovered evidence shows that his conviction is factually incorrect. The fundamental miscarriage of justice exception is available "only where the prisoner *supplements* his constitutional claim with a colorable showing of factual innocence." *Kuhlmann*, *supra*, at 454 (emphasis added). We have never held that it extends to free-standing claims of actual innocence. Therefore, the exception is inapplicable here.

Petitioner asserts that this case is different because he has been sentenced to death. But we have "refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus." *Murray* v. *Giarratano,* 492 U. S. 1, 9 (1989) (plurality opinion). We have, of course, held that the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed. See, *e.g., McKoy* v. *North Carolina,* 494 U. S. 433 (1990) (unanimity requirement impermissibly limits jurors' consideration of mitigating evidence); *Eddings* v. *Oklahoma,* 455 U. S. 105 (1982) (jury must be allowed to consider all of a capital defendant's mitigating character evidence); *Lockett* v. *Ohio,* 438 U. S. 586, 604 (1978) (plurality opinion) (same). But petitioner's claim does not fit well into the doctrine of

these cases, since, as we have pointed out, it is far from clear that a second trial 10

years after the first trial would produce a more reliable result.

Perhaps mindful of this, petitioner urges not that he necessarily receive a new trial, but that his death sentence simply be vacated if a federal habeas court deems that a satisfactory showing of "actual innocence" has been made. Tr. of Oral Arg. 19–20. But such a result is scarcely logical; petitioner's claim is not that some error was made in imposing a capital sentence upon him, but that a fundamental error was made in finding him guilty of the underlying murder in the first place. It would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison.

Petitioner argues that our decision in *Ford* v. *Wainwright,* 477 U. S. 399 (1986), supports his position. The plurality in *Ford* held that, because the Eighth Amendment prohibits the execution of insane persons, certain procedural protections inhere in the sanity determination. "[I]f the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact," Justice Marshall wrote, "then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being." *Id.,* at 411. Because the Florida scheme for determining the sanity of persons sentenced to death failed "to achieve even the minimal degree of reliability," *id.,* at 413, the plurality concluded that Ford was entitled to an evidentiary hearing on his sanity before the District Court.

Unlike petitioner here, Ford did not challenge the validity of his conviction. Rather, he challenged the constitutionality of his death sentence in view of his claim of insanity. Because Ford's claim went to a matter of punishment—not guilt—it was properly examined within the purview of the Eighth Amendment. Moreover, unlike

the question of guilt or innocence, which becomes more uncertain with time for evidentiary reasons, the issue of sanity is properly considered in proximity to the execution. Finally, unlike the sanity determination under the Florida scheme at issue in *Ford,* the guilt or innocence determination in our system of criminal justice is made "with the high regard for truth that befits a decision affecting the life or death of a human being." *Id.,* at 411.

Petitioner also relies on *Johnson* v. *Mississippi,* 486 U. S. 578 (1988), where we held that the Eighth Amendment requires reexamination of a death sentence based in part on a prior felony conviction which was set aside in the rendering State after the capital sentence was imposed. There, the State insisted that it was too late in the day to raise this point. But we pointed out that the Mississippi Supreme Court had previously considered similar claims by writ of error *coram nobis*. Thus, there was no need to override state law relating to newly discovered evidence in order to consider Johnson's claim on the merits. Here, there is no doubt that petitioner seeks additional process—an evidentiary hearing on his claim of "actual innocence" based on newly discovered evidence—which is not available under Texas law more than 30 days after imposition or suspension of sentence. Tex. Rule App. Proc. 31(a)(1) (1992).[5]

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[5]The dissent relies on *Beck* v. *Alabama*, 447 U. S. 625 (1980), for the proposition that, "at least in capital cases, the Eighth Amendment requires more than reliability in sentencing. It also mandates a reliable determination of guilt." *Post*, at 6. To the extent *Beck* rests on Eighth Amendment grounds, it simply emphasizes the importance of ensuring the reliability of the guilt determination in capital cases in the first instance. We have difficulty extending this principle to hold that a capital defendant who has been

Alternatively, petitioner invokes the Fourteenth Amendment's guarantee of due process of law in support of his claim that his showing of actual innocence entitles him to a new trial, or at least to a vacation of his death sentence.[6] "[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition," we have "exercis[ed] substantial deference to legislative judgments in this area." *Medina* v. *California,* 505 U. S. ––––, ––– (1992) (slip op., at 7–8). Thus, we have found criminal process lacking only where it "`offends

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afforded a full and fair trial may challenge his conviction on federal habeas based on after-discovered evidence.

[6]The dissent takes us to task for examining petitioner's Fourteenth Amendment claim in terms of procedural rather than substantive due process. Because "[e]xecution of an innocent person is the ultimate `arbitrary impositio[n],'" *post,* at 9, quoting *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U. S. —-, —- (1992) (slip op., at 6) (internal quotation marks omitted), the dissent concludes that "petitioner may raise a substantive due process challenge to his punishment on the ground that he is actually innocent." *Post,* at 8. But the dissent puts the cart before the horse. For its due process analysis rests on the assumption that petitioner is in fact innocent. However, as we have discussed, petitioner does not come before this Court as an innocent man, but rather as one who has been convicted by due process of law of two capital murders. The question before us, then, is not whether due process prohibits the execution of an innocent person, but rather whether it entitles petitioner to judicial review of his "actual innocence" claim. This issue is properly analyzed only in terms of procedural due process.

some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Ibid.* (quoting *Patterson* v. *New York,* 432 U. S. 197, 202 (1977)). "Historical practice is probative of whether a procedural rule can be characterized as fundamental." 505 U. S., at ––––.

The Constitution itself, of course, makes no mention of new trials. New trials in criminal cases were not granted in England until the end of the 17th century. And even then, they were available only in misdemeanor cases, though the writ of error *coram nobis* was available for some errors of fact in felony cases. Orfield, New Trial in

Federal Criminal Cases, 2 Vill. L. Rev. 293, 304 (1957). The First Congress provided for new trials for "reasons for which new trials have usually been granted in courts of law." Act of Sept. 24, 1789, ch. 20, §17, 1 Stat. 83. This rule was early held to extend to criminal cases. See *Sparf and Hansen* v. *United States,* 156 U. S. 51, 175 (1895) (Gray, J., dissenting) (citing cases). One of the grounds upon which new trials were granted was newly discovered evidence. See F. Wharton, Criminal Pleading and Practice §§854–874, pp. 584–592 (8th ed. 1880).

The early federal cases adhere to the common-law rule that a new trial may be granted only during the term of court in which the final judgment was entered. See, *e.g., United States* v. *Mayer,* 235 U. S. 55, 67 (1914); *United States* v. *Simmons,* 27 F. Cas. 1080, (No. 16,289) (CCEDNY 1878). Otherwise, "the court at a subsequent term has power to correct inaccuracies in mere matters of form, or clerical errors." 235 U. S., at 67. In 1934, this Court departed from the common-law rule and adopted a time limit—60 days after final judgment—for filing new trial motions based on newly discovered evidence. Rule II(3), Criminal Rules of Practice and Procedure, 292 U. S. 659, 662. Four years later, we amended Rule II(3) to allow such motions in capital cases "at any time" before the execution took place. 304 U. S. 592, 592 (1938) (codified at 18 U. S. C. §688 (1940)).

There ensued a debate as to whether this Court should abolish the time limit for filing new trial motions based on newly discovered evidence to prevent a miscarriage of justice, or retain a time limit even in capital cases to promote finality. See Orfield, *supra*, at 299–304. In 1945, we set a two–year time limit for filing new trial motions based on newly discovered evidence and abolished the exception for capital cases. Rule 33, Federal Rules of Criminal Procedure, 327 U. S. 821, 855–856 ("A motion for new

trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment").[7] We have strictly construed the Rule 33 time limits. Cf. *United States* v. *Smith,* 331 U. S. 469, 473 (1947). And the Rule's treatment of new trials based on newly discovered evidence has not changed since its adoption.

The American Colonies adopted the English common law on new trials. Riddell, New Trial in Present Practice, 27 Yale L. J. 353, 360 (1917). Thus, where new trials were available, motions for such relief typically had to be filed before the expiration of the term during which the trial was held. H. Underhill, Criminal Evidence 579, n. 1 (1898); J. Bassett, Criminal Pleading and Practice 313 (1885). Over time, many States enacted statutes providing for new trials in all types of cases. Some States also extended the time period for filing new trial motions beyond the term of court, but most States required

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[7]In response to the second preliminary draft of the Federal Rules of Criminal Procedure, Chief Justice Harlan Stone forwarded a memorandum on behalf of the Court to the Rules Advisory Committee with various comments and suggestions, including the following: "It is suggested that there should be a definite time limit within which motions for new trial based on newly discovered evidence should be made, unless the trial court in its discretion, for good cause shown, allows the motion to be filed. Is it not desirable that at some point of time further consideration of criminal cases by the court should be at an end, after which appeals should be made to Executive clemency alone?" 7 Drafting History of the Federal Rules of Criminal Procedure 3, 7 (M. Wilken & N. Triffin eds. 1991) (responding to proposed Rule 35). As noted above, we eventually rejected the adoption of a flexible time limit for new trial motions, opting instead for a strict two-year time limit.

that such motions be made within a few days after the verdict was rendered or before the judgment was entered. See American Law Institute Code of Criminal Procedure 1040–1042 (Official Draft 1931) (reviewing contemporary new trials rules).

The practice in the States today, while of limited relevance to our historical inquiry, is divergent. Texas is one of 17 States that requires a new trial motion based on newly discovered evidence to be made within 60 days of judgment.[8] One State adheres to the common-law rule and requires that such a motion be filed during the term in which judgment was rendered.[9] Eighteen jurisdictions have time limits ranging between 1 and 3 years, with 10 States and the District of Columbia following the 2–year federal time limit.[10] Only 15 States allow a new trial motion

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[8]Ala. Code § 15–17–5 (1982) (30 days); Ariz. Rule Crim. Proc. 24.2(a) (1987) (60 days); Ark. Rule Crim. Proc. 36.22 (1992) (30 days); Fla. Rule Crim. Proc. 3.590 (1992) (10 days); Haw. Rule Penal Proc. 33 (1992) (10 days); Ill. Rev. Stat., ch. 38, ¶116–1 (1991) (30 days); Ind. Rule Crim. Proc. 16 (1992) (30 days); Mich. Ct. Rule Crim. Proc. 6.431(A)(1) (1992) (42 days); Minn. Rule Crim. Proc. 26.04 (3) (1992) (15 days); Mo. Rule Crim. Proc. 29.11 (b) (1992) (15–25 days); Mont. Code Ann. §46–16–702(2) (1991) (30 days); S. D. Codified Laws § 23A-29–1 (1988) (10 days); Tenn. Rule Crim. Proc. 33(b) (1992) (30 days); Tex. Rule App. Proc. 31(a)(1) (1992) (30 days); Utah Rule Crim. Proc. 24(c) (1992) (10 days); Va. Sup. Ct. Rule 3A:15(b) (1992) (21 days); Wis. Stat. §809.30(2)(b) (1989–1990) (20 days).

[9]Miss. Circuit Ct. Crim. Rule 5.16 (1992).

[10]Alaska Rule Ct., Crim. Rule 33 (1988) (two years); Conn. Gen. Stat. §§52–270, 52–582 (1991) (three years); Del. Ct. Crim. Rule 33 (1987) (two years); D. C. Super. Ct. Crim. Rule 33 (1992) (two years); Kan. Stat. Ann. §22–3501 (1988) (two years); La. Code

based on newly discovered evidence to be filed more than 3 years after conviction. Of these States, 4 have waivable time limits of less than 120 days, 2 have waivable time limits of more than 120 days, and 9 States have no time limits.[11]

In light of the historical availability of new trials, our own amendments to Rule 33, and the contemporary practice in the States, we cannot say that Texas'

Crim. Proc. Ann., Art. 853 (West 1984) (one year); Maine Rule Crim. Proc. 33 (1992) (two years); Md. Rule Crim. Proc. 4–331(c) (1992) (one year); Neb. Rev. Stat. §29–2103 (1989) (three years); Nev. Rev. Stat. §176.515(3) (1991) (two years); N. H. Rev. Stat. Ann. §526:4 (1974) (three years); N. M. Rule Crim. Proc. 5–614(c) (1992) (two years); N. D. Rule Crim. Proc. 33(b) (1992–1993) (two years); Okla. Ct. Rule Crim. Proc., ch. 15, §953 (1992) (one year); R. I. Super. Ct. Rule Crim. Proc. 33 (1991–1992) (two years); Vt. Rule Crim. Proc. 33 (1983) (two years); Wash. Crim. Rule 7.8(b) (1993) (one year); Wyo. Rule Crim. Proc. 33(c) (1992) (two years).

[11]Cal. Penal Code Ann. §1181(8) (West 1985) (no time limit); Colo. Rule Crim. Proc. 33 (Supp. 1992) (no time limit); Ga. Code Ann. §§5–5–40, 5–5–41 (1982) (30 days, can be extended); Idaho Code §19–2407 (Supp. 1992) (14 days, can be extended); Iowa Rule Crim. Proc. 23 (1993) (45 days, can be waived); Ky. Rule Crim. Proc. 10.06 (1983) (one year, can be waived); Mass. Rule Crim. Proc. 30 (1979) (no time limit); N. J. Rule Crim. Prac. 3:20–2 (1993) (no time limit); N. Y. Crim. Proc. Law §440.10(1)(g) (McKinney 1983) (no time limit); N. C. Gen. Stat. §15A-1415(6) (1988) (no time limit); Ohio Rule Crim. Proc. 33A(6), B (1988) (120 days, can be waived); Ore. Rev. Stat. §136.535 (1991) (five days, can be waived); Pa. Rule Crim. Proc. 1123(d) (1992) (no time limit); S. C. Rule Crim. Proc. 29(b) (Supp. 1991) (no time limit); W. Va. Rule Crim. Proc. 33 (1992) (no time limit).

refusal to entertain petitioner's newly discovered evidence eight years after his conviction transgresses a principle of fundamental fairness "rooted in the traditions and conscience of our people." *Patterson* v. *New York,* 432 U. S., at 202 (internal quotation marks and citations omitted). This is not to say, however, that petitioner is left without a forum to raise his actual innocence claim. For under Texas law, petitioner may file a request for executive clemency. See Tex. Const., Art. IV., §11; Tex. Code Crim. Proc. Ann., Art. 48.01 (Vernon 1979). Clemency[12] is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.[13]

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[12]The term "clemency" refers not only to full or conditional pardons, but also commutations, remissions of fines, and reprieves. See Kobil, The Quality of Mercy Strained: Wresting the Pardoning Power from the King, 69 Tex. L. Rev. 569, 575–578 (1991).

[13]The dissent relies on the plurality opinion in *Ford* v. *Wainwright*, 477 U. S. 399 (1986), to support the proposition that "[t]he vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal." *Post*, at 11. But that case is inapposite insofar as it pertains to our discussion of clemency here. The *Ford* plurality held that Florida's procedures for entertaining post-trial claims of insanity, which vested the sanity determination entirely within the executive branch, were "inadequate to preclude federal redetermination of the constitutional issue [of Ford's sanity]." 477 U. S., at 416. Unlike Ford's claim of insanity, which had never been presented in a judicial proceeding, petitioner's claim of "actual innocence" comes 10 years after he was adjudged guilty beyond a reasonable doubt after a full and fair trial. As the

In England, the clemency power was vested in the Crown and can be traced back to the 700's. W. Humbert, The Pardoning Power of the President 9 (1941). Blackstone thought this "one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment." 4 W. Blackstone, Commentaries *397. Clemency provided the principal avenue of relief for individuals convicted of criminal offenses—most of which were capital—because there was no right of appeal until 1907. 1 L. Radzinowicz, A History of English Criminal Law 122 (1948). It was the only means by which one could challenge his conviction on the ground of innocence. United States Dept. of Justice, 3 Attorney General's Survey of Release Procedures 73 (1939).

Our Constitution adopts the British model and gives to the President the "Power to grant Reprieves and Pardons for Offences against the United States." Art. II, §2, cl. 1. In *United States* v. *Wilson,* 7 Pet. 150, 160–161 (1833), Chief Justice Marshall expounded on the President's pardon power:

> "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bears a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

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following discussion indicates, it is clear that clemency has provided the historic mechanism for obtaining relief in such circumstances.

> ``A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages."

See also *Ex parte Garland,* 4 Wall. 333, 380–381 (1867); The Federalist No. 74, pp. 447–449 (C. Rossiter ed. 1961) (A. Hamilton) ("The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt,

justice would wear a countenance too sanguinary and cruel").

Of course, although the Constitution vests in the President a pardon power, it does not require the States to enact a clemency mechanism. Yet since the British Colonies were founded, clemency has been available in America. C. Jensen, The Pardoning Power in the American States 3–4 (1922). The original States were reluctant to vest the clemency power in the executive. And although this power has gravitated toward the executive over time, several States have split the clemency power between the Governor and an advisory board selected by the legislature. See Survey of Release Procedures, *supra,* at 91–98. Today, all 36 States that authorize capital punishment have constitutional or statu
tory provisions for clemency.[14]

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[14]Ala. Const., Amend. 38, Ala. Code §15–18–100 (1982); Ariz. Const., Art. V, §5, Ariz. Rev. Stat. Ann. §§31–443, 31–445 (1986 and Supp. 1992); Ark. Const., Art. VI, §18, Ark. Code Ann. §§5–4–607, 16–93–204 (Supp. 1991); Cal. Const., Art. VII, §1, Cal. Govt. Code Ann. §12030(a) (West 1992); Colo. Const., Art. IV, §7, Colo. Rev. Stat. §§16–17–101, 16–17–102 (1986); Conn. Const., Art. IV, §13, Conn. Gen. Stat. §18–26 (1988); Del. Const., Art. VII, §1, Del. Code Ann., Tit. 29, §2103 (1991); Fla. Const., Art. IV, §8, Fla. Stat. §940.01 (Supp. 1991); Ga. Const., Art. IV, §2, ¶2, Ga. Code Ann. §§42–9–20, 42–9–42 (1991); Idaho Const., Art. IV, §7, Idaho Code §§20–240 (Supp. 1992), 67–804 (1989); Ill. Const., Art. V, §12, Ill. Rev. Stat., ch. 38, ¶1003–3–13 (1991); Ind. Const., Art. V, §17, Ind. Code §§11–9–2–1 to 11–9–2–4, 35–38–6–8 (1988); Ky. Const., §77; La. Const., Art. IV, §5(E), La. Rev. Stat. Ann. §15:572 (West 1992); Md. Const., Art. II, §20, Md. Ann. Code, Art. 27, §77 (1992), and Art. 41, §4–513 (1990); Miss. Const., Art. V, §124, Miss. Code Ann. §47–5–115 (1981); Mo. Const., Art. IV, §7,

Executive clemency has provided the "fail safe" in our criminal justice system. K. Moore, Pardons: Justice, Mercy, and the Public Interest 131 (1989). It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence. In his classic work, Professor Edwin Borchard compiled 65 cases in which it was later

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Mo. Rev. Stat. §§217.220 (Vernon Supp. 1992), 552.070 (Vernon 1987); Mont. Const., Art. VI, §12, Mont. Code Ann. §§46–23–301 to 46–23–316 (1991); Neb. Const., Art. IV, §13, Neb. Rev. Stat. §§83–1, 127 to 83–1, 132 (1987); Nev. Const., Art. V, §13, Nev. Rev. Stat. §213.080 (1991); N. H. Const., pt. 2, Art. 52, N. H. Rev. Stat. Ann. §4:23 (1988); N. J. Const., Art. V, §2, ¶1, N. J. Stat. Ann. §§2A:167–4, 2A:167–12 (West 1985); N. M. Const., Art. V, §6, N. M. Stat. Ann. §31–21–17 (1990); N. C. Const., Art. III, §5(6), N. C. Gen. Stat. §§147–23 to 147–25 (1987); Ohio Const., Art. III, §11, Ohio Rev. Code Ann. §§2967.1 to 2967.12 (1987 and Supp. 1991); Okla. Const., Art. VI, §10, Okla. Stat., Tit. 21, §701.11a (Supp. 1990); Ore. Const., Art. V, §14, Ore. Rev. Stat. §§144.640 to 144.670 (1991); Pa. Const., Art. IV, §9, 61 Pa. Stat. Ann., Tit. 61, §2130 (Purdon Supp. 1992); S. C. Const., Art. IV, §14, S. C. Code Ann. §§24–21–910 to 24–21–1000 (1977 and Supp. 1991); S. D. Const., Art. IV, §3, S. D. Codified Laws §§23A-27A-20 to 23A-27A-21, 24–14–1 (1988); Tenn. Const., Art. III, §6, Tenn. Code Ann. §§40–27–101 to 40–27–109 (1990); Tex. Const., Art. IV, §11, Tex. Code Crim. Proc. Ann. §48.01 (Vernon 1979); Utah Const., Art. VII, §12, Utah Code Ann. §77–27–5.5 (Supp. 1992); Va. Const., Art. V, §12, Va. Code Ann. §53.1–230 (1991); Wash. Const., Art. III, §9, Wash. Rev. Code §10.01.120 (1992); Wyo. Const., Art. IV, §5, Wyo. Stat. §7–13–801 (1987).

determined that individuals had been wrongfully convicted of crimes. Clemency provided the relief mechanism in 47 of these cases; the remaining cases ended in judgments of acquittals after new trials. E. Borchard, Convicting the Innocent (1932). Recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of "actual innocence" have been made. See M. Radelet, H. Bedau, & C. Putnam, In Spite of Innocence 282–356 (1992).[15]

In Texas, the Governor has the power, upon the recommendation of a majority of the Board of Pardons and Paroles, to grant clemency. Tex. Const., Art. IV, §11; Tex. Code Crim. Proc. Ann.; Art. 48.01 (Vernon 1979). The board's consideration is triggered upon request of the individual sentenced to death, his or her representative, or the Governor herself. In capital cases, a request may be made for a full pardon, Tex. Admin. Code, Tit. 37, §143.1 (West Supp. 1992), a commutation of death sentence to life imprisonment or appropriate maximum penalty, §143.57, or a reprieve of execution, §143.43. The Governor has the sole authority to grant one reprieve in any capital case not exceeding 30 days.

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[15]The dissent points to one study concluding that 23 innocent persons have been executed in the United States this century as support for the proposition that clemency requests by persons believed to be innocent are not always granted. See *post*, at 2, n. 1 (citing Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21 (1987)). Although we do not doubt that clemency—like the criminal

justice system itself—is fallible, we note that scholars have taken issue with this study. See Comment, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121 (1988).

§143.41(a).

The Texas clemency procedures contain specific guidelines for pardons on the ground of innocence. The board will entertain applications for a recommendation of full pardon because of innocence upon receipt of the following: "(1) a written unanimous recommendation of the current trial officials of the court of conviction; and/or (2) a certified order or judgment of a court having jurisdiction accompanied by certified copy of the findings of fact (if any); and (3) affidavits of witnesses upon which the finding of innocence is based." §143.2. In this case, petitioner has apparently sought a 30–day reprieve from the Governor, but has yet to apply for a pardon, or even a commutation, on the ground of innocence or otherwise. Tr. of Oral Arg. 7, 34.

As the foregoing discussion illustrates, in state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant. Federal habeas review of state convictions has traditionally been limited to claims of constitutional violations occurring in the course of the underlying state criminal proceedings. Our federal habeas cases have treated claims of "actual innocence," not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits, even though his habeas petition would otherwise be regarded as successive or abusive. History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.

We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal

habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold.

Petitioner's newly discovered evidence consists of affidavits. In the new trial context, motions based solely upon affidavits are disfavored because the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations. See Orfield, 2 Vill. L. Rev., at 333. Petitioner's affidavits are particularly suspect in this regard because, with the exception of Raul Herrera, Jr.'s, affidavit, they consist of hearsay. Likewise, in reviewing petitioner's new evidence, we are mindful that defendants often abuse new trial motions "as a method of delaying enforcement of just sentences." *United States* v. *Johnson,* 327 U. S. 106, 112 (1946). Although we are not presented with a new trial motion *per se*, we believe the likelihood of abuse is as great—or greater—here.

The affidavits filed in this habeas proceeding were given over eight years after petitioner's trial. No satisfactory explanation has been given as to why the affiants waited until the 11th hour—and, indeed, until after the alleged perpetrator of the murders himself was dead—to make their statements. Cf. *Taylor* v. *Illinois*, 484 U. S. 400, 414 (1988) ("[I]t is . . . reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed"). Equally troubling, no explanation has been offered as to why petitioner, by hypothesis an innocent man, pleaded guilty to the murder of Rucker.

Moreover, the affidavits themselves contain inconsistencies, and therefore fail to provide a convincing account of what took place on the night Officers Rucker and Carrisalez were killed. For instance, the affidavit of Raul Jr., who was nine years old at the time, indicates that there were three people in the speeding car from which the murderer emerged, whereas Hector Villarreal attested that Raul Sr. told him that there were two people in the car that night. Of course, Hernandez testified at petitioner's trial that the murderer was the only occupant of the car. The affidavits also conflict as to the direction in which the vehicle was heading when the murders took place, and petitioner's whereabouts on the night of the killings.

Finally, the affidavits must be considered in light of the proof of petitioner's guilt at trial—proof which included two eyewitness identifications, numerous pieces of circumstantial evidence, and a handwritten letter in which petitioner apologized for killing the officers and offered to turn himself in under certain conditions. See *supra*, at 2–3, and n. 1. That proof, even when considered alongside petitioner's belated affidavits, points strongly to petitioner's guilt.

This is not to say that petitioner's affidavits are without probative value. Had this sort of testimony been offered at trial, it could have been weighed by the jury, along with the evidence offered by the State and petitioner, in deliberating upon its verdict. Since the statements in the affidavits contradict the evidence received at trial, the jury would have had to decide important issues of credibility. But coming 10 years after petitioner's trial, this showing of innocence falls far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo,* to exist.

The judgment of the Court of Appeals is

Affirmed.