# Gateway to Justice: Constitutional Claims to Actual Innocence

SARAH A. MOURER†

"I believe it contrary to any standard of decency to execute someone who is actually innocent."

—Justice Blackmun*

"[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."

—Chief Justice Rehnquist quoting Justice Holmes‡

## I. INTRODUCTION

Blind faith in the justice system might lead one to assume that a trial in which constitutional rights are preserved would necessarily result in a just verdict. In other words, if a court protects the accused's constitutional rights, then no innocent man will ever be wrongly convicted. As a result of new technology (especially DNA testing), however, it is well recognized that innocent men and women are recurrently incarcerated and convicted *even in the absence of factual or constitutional error.* For the first time in history, the Supreme Court of the United States has come close to recognizing this reality.

On August 17, 2009, Troy Anthony Davis's freestanding innocence claim, unattached to any constitutional error or unreasonable application of federal law, was remanded by the United States Supreme Court to the Georgia district court for hearing and determination.[1] The Supreme Court, however, did not release the district court from the restrictions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[2] which requires Davis to show that the state court adjudication was based

† Sarah A. Mourer is an Assistant Professor of Clinical Legal Education at the University of Miami School of Law, and former Assistant Public Defender for Dade County, Florida. Professor Mourer directs the law school's wrongful convictions project and litigation skills program. Professor Mourer wishes to thank David Freitas, Danielle Knecht, Craig Trocino, Amanda Flannelly, Milton Hirsch, David Freitas, Dr. Stephen A. Mourer, Mary Mourer, and John and Charlie Calli for their support in the writing of this article.

* Herrera v. Collins, 506 U.S. 390, 435 (1993) (Blackmun, J., dissenting).

‡ *Id.* at 400–01 (majority opinion) (alterations in original) (quoting Moore v. Dempsey, 261 U.S. 86, 87–88, (1923)).

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

2. 28 U.S.C. § 2254 (2006).

on an "unreasonable application of clearly established Federal law."[3] Current case law and federal law are ill equipped to equitably cope with compelling claims of actual innocence. Habeas corpus jurisprudence, particularly AEDPA, is a haze of misleading obstacles for a petitioner with an actual innocence claim. In short, because Davis's innocence claim is unaccompanied by any other constitutional problems or errors in his trial, the federal courts' hands may be tied by AEDPA in taking action on his claim. Davis's innocence claim is convincing and forceful. Yet AEDPA is drafted in a manner that presumes that a trial devoid of any constitutional error or violations of federal law will never result in the conviction of an innocent person.

Presently, a habeas corpus petitioner claiming actual innocence must plead an independent constitutional error or error of federal law *in addition* to the innocence claim.[4] Such a rule is imprudent because the execution (and arguably incarceration) of an innocent individual undoubtedly violates the Constitution. Specifically, executing a factually innocent person violates the Eighth Amendment's prohibition against cruel and unusual punishment.[5] As such, any petitioner presenting a colorable claim to actual innocence per se has satisfied any requirement to offer a claim of a violation of federal law or constitutional error. The Supreme Court in *Davis* could have explicitly found that Davis's free-standing innocence claim met the requirements of AEDPA because of the potential Eighth Amendment violation. The *Davis* opinion is, however, silent regarding the Eighth Amendment.[6] The merits of finality and comity must come second to the avoidance of the supreme injustice of the execution of an innocent person. Nevertheless, the virtues of finality are not vacant. The remedy of the writ of habeas corpus is equitable relief at its core. The defendant seeking a hearing upon a writ is no longer cloaked with the presumption of innocence because AEDPA requires petitioners to show clear and convincing evidence of their innocence.[7] This standard promotes finality and will not overextend the federal judiciary or open never-ending petitions for habeas corpus.

We will examine the extent of wrongful convictions and the procedural paradox that complicates any actual innocence claim. Specifically, statutes attempting to insulate petitioners from constitutional errors or the misappropriation of law fail to provide adequate safeguards against wrongful convictions. DNA evidence and new technologies are exposing more and more wrongful convictions every day, revealing innocent

3. 28 U.S.C. § 2254(d)(1); *In re Davis*, 130 S. Ct. at 1.
4. 28 U.S.C. § 2254(a), (d)(1).
5. *See* U.S. CONST. amend. VIII.
6. *See In re Davis*, 130 S. Ct. at 1.
7. 28 U.S.C. § 2254(e)(1).

individuals who have had fair and impartial trials. We will then review Troy Davis's case. *Davis* is a compelling example of a case in which all constitutional errors (other than his actual innocence) have been resolved and what is left is the glaring conclusion that he very well might be innocent and on his way to execution. This article considers how the state and appellate courts may have resolved Davis's motions as well as Davis's second or successive writs under AEDPA, and explains why AEDPA presents obstacles to petitioners asserting actual innocence. This article also recommends to the federal district court mechanisms under AEDPA that will provide Davis with relief. Specifically, assuming it finds Davis's claim of innocence convincing, the federal district court may: (1) find pursuant to section 2254(d)(2) of AEDPA that the Georgia Supreme Court's decision was based on an unreasonable determination of facts because it failed to provide Davis with an evidentiary hearing despite volumes of new evidence; or (2) find that to deny Davis a remedy in the face of a persuasive claim to innocence would constitute an unconstitutional suspension of the writ of habeas corpus; or (3) find that the Georgia Supreme Court's decision was contrary to clearly established federal law, as determined by the Supreme Court of the United States under section 2254(d)(2) of AEDPA. Particularly, to execute an innocent person would violate clearly established federal law. The right to be free from wrongful execution pervades the justice system, the Constitution, and the individual rights on which the whole of criminal law rests. The prohibition against executing the innocent is also found more definitively in the Eighth Amendment's right against cruel and unusual punishment.[8] To execute a person with a compelling claim to innocence would also shock the conscience sufficiently to violate substantive due process.

Troy Davis has been on death row for over eighteen years.[9] There is no physical evidence against him. The murder weapon was never found. The only evidence against him consists of witness testimony. Seven of the nine witnesses recanted—most citing police pressure or coercion. One of the only two non-recanting witnesses is suspected of the murder himself and reportedly confessed to the murder.[10] Troy Davis has never been provided an evidentiary hearing—until now.[11] Will the federal court interpret the law (AEDPA) as denying Davis relief because Davis is not claiming that the state court made an unreasonable applica-

8. *See* U.S. CONST. amend. VIII.

9. For background information on the Troy Davis conviction, see Brenda Goodman, *As Execution Nears, Last Push from Inmate's Supporters*, N.Y. TIMES, July 15, 2007, at A23, *available at* http://www.nytimes.com/2007/07/15/us/15execute.html.

10. *See In re* Davis, 565 F.3d 810, 827 (11th Cir. 2009) (per curiam).

11. *See In re* Davis, 130 S. Ct. 1, 1 (2009).

tion of federal law *other* than interpreting his claim to innocence as not sufficiently credible to warrant relief? Under AEDPA, can a person be executed based on a subjective but unreasonable state court assessment of facts regarding guilt or innocence when a federal court, even the Supreme Court, disagrees with that assessment? Federal review of state court factual findings is not prohibited under AEDPA.[12] Federal courts may find themselves positioned to reconsider the longstanding practice of hesitating to review state court factual findings. The consequences of such hesitation become apparent with the federal courts' refusal to review state courts' factual findings (in the name of federalism and finality) resulting in the incarceration and even execution of innocent individuals.

## II. The Extent of Wrongful Convictions

Is what we know about wrongful convictions simply an interesting but infrequently encountered problem? In his 2006 concurring opinion in *Kansas v. Marsh*, Justice Scalia stated:

> It is a certainty that the opinion of a near-majority of the United States Supreme Court to the effect that our system condemns many innocent defendants to death will be trumpeted abroad as vindication of these criticisms. For that reason, I take the trouble to point out that the dissenting opinion has nothing substantial to support it.
>
> It should be noted at the outset that the dissent does not discuss a single case—not one—in which it is clear that a person was executed for a crime he did not commit.[13]

AEDPA is worded so as to limit the federal courts' role in protecting defendants against constitutional error and misapplication of the law. Justice Scalia is comfortable with this role for AEDPA because he believes that these protections alone protect the innocent from wrongful convictions.[14] Yet the data relating to wrongful convictions lead to the inescapable conclusion that once any constitutional or legal error has been corrected, wrongful convictions do still result. Not only do they occur, but they occur in statistically significant numbers. Nevertheless, AEDPA clothes state court findings of fact with a presumption of cor-

12. AEDPA states:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

13. Kansas v. Marsh, 548 U.S. 163, 188 (2006) (Scalia, J., concurring).

14. *See id.* at 198–99 (arguing that most death penalty cases are reversed because of legal errors and due process protections, not actual innocence).

rectness and restricts federal court's power to correct wrongful convictions. Would Justice Scalia assert that the federal judiciary cannot be expected to correct human error, even human error that results in the government-sanctioned and government-implemented execution of a human being?

Justice Souter, in his *Marsh* dissent, noted that from 1977 to 2000, in Illinois, thirteen prisoners sentenced to death had been released after several of them were "shown to be innocent."[15] All thirteen had "relatively little solid evidence" connecting them to the crimes.[16] During that same period, Illinois executed twelve defendants.[17] Souter even observed that Illinois had "wrongly convicted . . . more capital defendants than it had executed."[18] Ultimately, individuals are wrongfully incarcerated, even those facing the death penalty and those who had fair and constitutionally sound trials.

What we do know about wrongful convictions is only "the tip of the iceberg."[19] There have been at least 250 individuals exonerated post-conviction by DNA; seventeen of these individuals were sentenced to death prior to their exoneration and release.[20] It is notable that DNA samples are available in only five to ten percent of all felony cases.[21] Additionally, not every biological sample is tested.[22] Consequently, the wrongful convictions of which we are aware are only a small fraction of the existing number of wrongful convictions. Some experts estimate that wrongful convictions may amount to as many as five percent of all convictions each year.[23] National estimates indicate that there are at least

15. *Marsh*, 548 U.S. at 208 (Souter, J., dissenting).

16. *Id.* (quoting STATE OF ILLINOIS, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 7 (2002), http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf).

17. *Id.*

18. *Id.* at 208–09.

19. BARRY SCHECK & PETER NEUFELD, THE INNOCENCE PROJECT, 250 EXONERATED: TOO MANY WRONGFULLY CONVICTED 1 (2010), http://www.innocenceproject.org/news/250.php.

20. *Id.* at 2, 12; *see also* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L & CRIMINOLOGY 523, 523–24 (2005) (reporting that since 1989, 340 people have been exonerated after conviction of serious crimes).

21. THE INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION 3 (2009), http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf.

22. *See id.* (noting that many cases "will never have the benefit of DNA testing because the evidence has been lost or destroyed").

23. *See* Suzannah B. Gambell, Comment, *The Need to Revisit the* Neil v. Biggers *Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189, 191 n.18 (2006) (citing ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 4-1 (3d ed. 1997)) (noting that the 5% estimate may be high, and choosing instead to use a more conservative estimate of 0.6%).

10,000 wrongful convictions per year.[24] The total number of death row exonerees to date is 138.[25] Most wrongful convictions result from eyewitness misidentifications, false confessions, and perjury.[26] "Over 175 people have been wrongfully convicted based, in part, on eyewitness misidentification and later proven innocent [by] DNA testing."[27]

In the first eighty-two DNA exonerations, mistaken eyewitness identification was a factor in more than seventy percent of those cases, making it the leading cause of wrongful convictions in DNA cases.[28] The current law surrounding suggestive eyewitness identifications uses a due process analysis alone.[29] The current law's procedural due process view creates an inadequate rule, largely because it allows an eyewitness identification into evidence even if it is suggestive.[30] If a court finds that a witness's identification is suggestive, but nonetheless reliable, the government may admit it into evidence.[31]

In *Manson v. Brathwaite*, the Court used the reliability test it established in its 1972 *Neil v. Biggers* decision.[32] This test evaluates the credibility of witness identification to determine when a suggestive identification nevertheless is admissible because it meets the test for reliability.[33] The *Biggers* Court enumerated five factors to determine if a suggestive identification is reliable: (1) the witness's opportunity to view the suspect; (2) the witness's degree of attention; (3) the accuracy of the description; (4) the witness's level of certainty; and (5) the time between the incident and the confrontation, i.e., identification.[34]

In fact, the more suggestive an identification procedure is, paradox-

24. *Id.* at 190–91.

25. Death Penalty Information Center, Innocence and the Death Penalty, http://www.deathpenaltyinfo.org/innocence-and-death-penalty (last visited Apr. 12, 2010).

26. Gross et al., *supra* note 20, at 551.

27. THE INNOCENCE PROJECT, *supra* note 21, at 3.

28. Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 70 n.32 (2003); THE INNOCENCE PROJECT, *supra* note 21, at 3.

29. *See* Manson v. Brathwaite, 432 U.S. 98, 99 (1977); Neil v. Biggers, 409 U.S. 188, 196–98 (1972) (noting that procedural due process governs pretrial identification procedures); *cf.* Baker v. McCollan, 443 U.S. 137, 150, 152–53 (1979) (Stevens, J., dissenting) (suggesting that an alleged violation of procedural due process challenges the adequacy of procedures provided by the State or municipality in effecting the deprivation of liberty or property). *See generally* 16B AM. JUR. 2D *Constitutional Law* § 958 (2010).

30. Sarah Anne Mourer, *Reforming Eyewitness Identification Procedures Under the Fourth Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 49, 60 (2008).

31. *Id.* at 61 (citing *Manson*, 432 U.S. at 114).

32. *Manson*, 432 U.S. at 114 (citing *Biggers,* 409 U.S. at 199–200).

33. *Biggers*, 409 U.S. at 199. In *Biggers*, the Court admitted the identification of a suspect based upon a voice and visual showup to the witness. It held that although the showup might have been suggestive, it did not give rise to substantial likelihood of irreparable misidentification. *Id.* at 201.

34. *Id.* at 199–200.

ically, the more reliable a witness will appear.[35] For example, if an identifying witness is advised immediately after a lineup that she identified the suspect, she will report a higher level of confidence in her identification.[36] This report of confidence satisfies one of the *Biggers* factors and will indicate reliability of the identification to a court when, in truth, it may only be a reflection of the suggestion in the lineup procedure.[37] In fact, suggestive identification procedures result in witnesses giving responses that indicate greater reliability of the identification on all five of the *Biggers* factors.[38] Consequently, the current law permits, not infrequently, mistaken eyewitness identifications into evidence.[39] How frequently this occurs is difficult to ascertain. What we do know is that eyewitness identification testimony compels juries to convict.[40] Up to eighty percent of the time, jurors believe witnesses who make eyewitness identifications, regardless of whether the witnesses are correct.[41] On review, a federal court will not find constitutional error or misapplication of the law, despite the fact that the defendant may have been convicted on the basis of mistaken eyewitness testimony. An individual convicted on the basis of mistaken eyewitness testimony will have no remedy unless the witnesses recant or he falls within the five to ten percent of cases with available biological evidence for DNA testing.[42]

Defendants who face mistaken identification, police-coerced confessions, and faulty forensics may have constitutionally "fair" trials yet be factually innocent.[43] One recent article examines 137 convicted felons who had been exonerated by later DNA testing.[44] All had been convicted at trial using a reasonably wide range of false but "inculpa-

35. *See* Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & HUM. BEHAV. 1, 16–17 (2009).

36. *Id.* at 12.

37. *Id.* at 12.

38. *See id.* at 16–18.

39. Mourer, *supra* note 30, at 60.

40. *Id.* at 54.

41. Gary L. Wells et al., *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony,* 4 L. & HUM. BEHAV. 275, 278 (1980).

42. *See* THE INNOCENCE PROJECT, *supra* note 21, at 3.

43. In *Ex parte Blair*, a Texas case, the Defendant, Michael Blair, was charged with the capital murder of a seven-year-old girl after three eyewitnesses told the police that they saw him in the park where the murder occurred. On appeal, the defendant sought DNA testing on biological hair evidence proffered by the State that, while lacking probative value, was used in his conviction. The testing, which excluded the defendant as a potential contributor of biological evidence, did not occur until eight years after he was sent to death row. *See Ex parte* Blair, Nos. AP-75954, AP-75955, 2008 WL 2514174, at *1–2 (Tex. Crim. App. June 25, 2008); The Innocence Project—Know the Cases: Michael Blair, http://www.innocenceproject.org/Content/Michael_Blair.php (last visited Apr. 25, 2010).

44. *See* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009).

tory" forensic evidence.[45] Of the 137 exonerees, a review of the trial transcripts revealed that invalid forensic science testimony was not only common, but prevalent.[46] The invalid testimony came from 72 forensic analysts called to testify by the prosecution and employed by 52 different laboratories, practices or hospitals from 25 states.[47] In the absence of DNA testing, a defendant's guilt or innocence is a subjective "factual" assessment.

By most standards, and certainly by clear and convincing evidence, Texas recently executed an innocent man. Todd Willingham was convicted and executed by Texas for willfully setting a fire to his home.[48] State arson experts testified at Willingham's trial that Willingham poured combustible fluid on the floors of his house and intentionally set it on fire, killing his three children.[49] After Willingham's execution, the Chicago Tribune, the Innocence Project, and the Texas Forensic Science Commission all published independent arson reports indicating that the state arson expert's testimony used to convict Willingham was unreliable.[50] The Texas Forensic Science Commission engaged Craig Beyler, a highly respected fire scientist, to study the Willingham evidence.[51] Beyler delivered a fifty-one page report that classified the methods and procedures used by the Texas state fire experts as junk science.[52]

Because of cases like Todd Willingham's and progress in the area of forensic sciences and technology, more and more wrongful convictions are being exposed. DNA testing provides the primary source of exonerations. Recall however, that the vast majority (over ninety percent) of criminal cases do not have biological evidence suitable for DNA

45. *Id.* at 1–2, 15, 34–35.

46. *Id.* at 1–2.

47. *Id.* at 9.

48. Willingham v. State, 897 S.W.2d 351, 354 (Tex. Crim. App. 1995) (affirming the jury's guilty verdict and the trial court's death sentence); David Grann, *Trial By Fire: Did Texas Execute an Innocent Man?*, THE NEW YORKER, Sept. 7, 2009, *available at* http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann.

49. *Willingham*, 897 S.W.2d at 354; *see also* Grann, *supra* note 48, at 14–15 (contesting the arson evidence analyzed in Willingham's case).

50. *See* Steve Mills & Maurice Possley, *Man Executed on Disproved Forensics,* CHI. TRIB., Dec. 9, 2004, http://www.chicagotribune.com/news/nationworld/chi-0412090169dec09,0,1173806.story; THE INNOCENCE PROJECT, REPORT ON THE PEER REVIEW OF THE EXPERT TESTIMONY IN THE CASES OF *State of Texas v. Cameron Todd Willingham* and *State of Texas v. Ernest Ray Willis* 3–4 (2006), http://www.innocenceproject.org/docs/ArsonReviewReport.pdf; CRAIG L. BEYLER, TEXAS FORENSIC SCIENCE COMMISSION, ANALYSIS OF THE FIRE INVESTIGATION METHODS AND PROCEDURES USED IN THE CRIMINAL ARSON CASES AGAINST ERNEST RAY WILLIS AND CAMERON TODD WILLINGHAM 45–51 (2009), http://www.docstoc.com/docs/document-preview.aspx?doc_id=10401390.

51. *See* BEYLER, *supra* note 50, at app. A at A-1.

52. *See id.* at 45–51 (noting that the investigation "did not comport" with modern standards of arson investigation").

testing.[53] Research shows that in twenty-five percent of sexual assault cases referred to the FBI, the primary suspect was excluded by DNA testing.[54] Without the advantage of DNA testing, the primary suspect presumably would have been arrested and tried. Studies show that approximately sixty percent of felony trials result in convictions.[55] These numbers suggest that without DNA testing, 15 innocent people would be convicted out of every 100 sexual assault prosecutions.[56] There is no viable argument that these same estimates do not hold true for the other ninety percent of criminal cases in which DNA testing is, in fact, not available. Hence, a fair estimate of wrongful convictions in totality is nearly fifteen percent. Nonetheless, Justice Scalia maintains with dogged confidence that the Constitution's protections are sufficient, insisting that the error rate for innocent persons in jail is 0.027%.[57] It forces us to wonder if Justice Scalia has misplaced the decimal point. Criminal defendants who are convicted of crimes and who later become exonerated by DNA evidence can nevertheless have trials technically free of procedural error and misapplication of the law.[58] Troy Davis's constitutional claims have been resolved.[59] His only claim left standing is a compelling and persuasive claim to actual innocence.[60]

## III. Procedural History: Troy Davis

Friday night, August 18, 1989, in a Savannah, Georgia Burger King parking lot, Sylvester "Red" Coles was harassing a homeless man, Larry

53. *See supra* note 21 and accompanying text.

54. Peter Neufeld & Barry C. Scheck, *Foreword* to Edward Connors et al., U.S. Dep't of Justice, Convictions by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial, at xxviii (1996), *available at* http://www.ncjrs.gov/pdffiles/dnaevid.pdf.

55. Bureau of Justice Statistics (BJS) - FAQ Detail, http://bjs.ojp.usdoj.gov/index.cfm?ty=qa&iid=403 (last visited Apr. 19, 2010).

56. Sixty percent of twenty-five.

57. *See* Kansas v. Marsh, 548 U.S. 163, 197–98 (2006) (Scalia, J., concurring) (quoting Joshua Marquis, Op-Ed., *The Innocent and the Shammed*, N.Y. Times, Jan. 26, 2006, at A23).

58. *See, e.g.*, People v. Newsome, 443 N.E.2d 634 (Ill. App. Ct. 1982) (affirming defendant's conviction and sentence to death, finding no constitutional error); State v. Winslow, 740 N.W.2d 794 (Neb. 2007) (holding that under the DNA Testing Act, relief is available to defendants whether they were convicted following trial or convicted based on a plea); *Ex parte* Blair, Nos. AP-75954, AP-75955, 2008 WL 2514174 (Tex. Crim. App. June 25, 2008) (granting defendant's habeas petition only after he established that no juror could have reasonably convicted him based on the post-conviction DNA evidence). All three defendants were later exonerated. *See* The Innocence Project, Know the Cases: Michael Blair, http://www.innocenceproject.org/Content/Michael_Blair.php (last visited May 5, 2010); Center on Wrongful Convictions, James Newsome, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilNewsomeSummary.html (last visited May 5, 2010); The Innocence Project, Know the Cases: Thomas Winslow, http://www.innocenceproject.org/Content/Thomas_Winslow.php (last visited May 5, 2010).

59. *See* Davis v. Terry, 465 F.3d 1249 (11th Cir. 2006).

60. *See In re* Davis, 130 S. Ct. 1, 1 (2009).

Young.[61] Troy Davis was present.[62] Darrell "D.D." Collins was also present.[63] Someone hit Larry Young.[64] Police Officer Mark MacPhail responded.[65] Someone shot Officer MacPhail three times.[66] The police had no leads until the following day when "Red" arrived at the police station.[67] "Red" stated that he was present at the shooting and claimed that Davis was the shooter.[68] "Red" was accompanied by his attorney at the police station.[69] From that point forward, all police investigation focused on Troy Davis and exclusively Troy Davis.[70]

A Georgia jury convicted Davis for the murder of MacPhail and sentenced him to death.[71] The Supreme Court of Georgia affirmed his conviction and death sentence.[72] Subsequently, his state habeas corpus petition was denied, and its denial affirmed.[73] Davis then filed his first federal habeas corpus petition, asserting *Giglio*,[74] *Brady*,[75] and *Strickland*[76] violations.[77] Davis did not raise these constitutional violations in state court; therefore, he confronted a procedural bar to raising these claims.[78] In order to overcome the procedural bar, Davis asserted actual innocence pursuant to *Schlup v. Delo*.[79] The merits of Davis's innocence claim were not substantively considered; they served solely as a procedural gateway to open the door for his constitutional claims.[80] Davis's constitutional claims were denied. That decision was affirmed.[81]

61. *In re* Davis, 565 F.3d 810, 828 (11th Cir. 2009) (Barkett, J., dissenting).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. Goodman, *supra* note 9, at A23.
70. *In re Davis*, 565 F.3d at 828 (Barkett, J., dissenting).
71. *Id.* at 813 (majority opinion) (per curiam).
72. *See* Davis v. State, 426 S.E.2d 844 (Ga. 1993).
73. *See* Davis v. Turpin, 539 S.E.2d 129 (Ga. 2000).
74. *See* Giglio v. United States, 405 U.S. 150, 153–55 (1972) (holding that the prosecution has a duty to present all material evidence to the jury, and that presenting false evidence or failing to disclose material evidence constitutes a violation of due process requiring a new trial.)
75. *See* Strickland v. Washington, 466 U.S. 668, 687–91 (1984) (holding that the proper standard to judge attorney performance under the Sixth Amendment right to counsel is the objective standard of "reasonably effective assistance").
76. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").
77. *In re* Davis, 565 F.3d 810, 813 (11th Cir. 2009) (per curiam).
78. *Id.*
79. 513 U.S. 298 (1995).
80. *In re Davis*, 565 F.3d at 813.
81. *See* Davis v. Terry, 465 F.3d 1249, 1256 (11th Cir. 2006).

Thereafter, Davis filed "an extraordinary motion" for a new trial in state court, offering newly discovered evidence.[82] Davis presented an unusually large amount of new evidence. Yet it is important to note that it was not the first time that Davis had pled the evidence. In Davis's first federal habeas petition, he documented the new evidence in claiming his innocence. The Eleventh Circuit made it clear, however, that Davis had not made a *substantive* claim of innocence, but a procedural one.[83] His pleading of innocence in the first federal habeas petition was made for purposes of opening the door for the merits of his constitutional claims to be heard. This new evidence included:

> (1) seven affidavits containing recantations of eyewitnesses who testified at trial; (2) three affidavits averring post-trial confessions to the murder by . . . "Red" Coles . . . ; (3) several affidavits of persons who had not previously testified who were either present at the scene of the murder or in the general area immediately following the crime; (4) two expert affidavits addressing ballistic evidence and eyewitness identifications; (5) affidavits of jurors; and (6) a general cache of additional affidavits.[84]

The state trial court denied the motion for a new trial. The Supreme Court of Georgia granted Davis's application for discretionary appeal, but ultimately affirmed the trial court's order denying his extraordinary motion for a new trial.[85] The court rejected the affidavits based on the lack of credibility generally afforded recanted testimony, stating that "[t]rial testimony is closer in time to the crimes, when memories are more trustworthy. Furthermore, the trial process itself, including public oaths, cross-examination, and the superintendence of a trial judge, lends special credibility to trial testimony."[86] The Georgia Supreme Court was influenced by the fact that one original eyewitness had not recanted his testimony.[87] This eyewitness was "Red" Coles—the same "Red" Coles accused of being the shooter in affidavits.[88] The Georgia Supreme Court used the standard that the new evidence must be "so material that it would probably produce a different verdict" at trial, and the court found that Davis's new evidence did not meet this standard.[89] The court's opinion overlooks that, after presentation of Davis's current evidence, of the nine original trial witnesses, only two eyewitnesses remained that

82. *In re Davis*, 565 F.3d at 814.

83. *Id.* (citing *Davis*, 465 F.3d at 1251).

84. *Id.*

85. *See* Davis v. State, 660 S.E.2d 354, 357 (Ga. 2008).

86. *Id.* at 358.

87. *See id.* at 363.

88. *Id.*

89. *Id.* at 362–63.

identified Davis.[90] Of the two remaining witnesses, one is "Red" Coles—a suspect himself.[91] Three affidavits state that Coles confessed to the killing.[92] No one at this time contends that Davis confessed to the murder.[93] The second non-recanting witness is Steve Sanders who *admitted to the police that he would be unable to identify the shooter*.[94] Steve Sanders only identified Davis two years later at trial.[95] Affidavits of the recanting witnesses recount pressure from the police to finger Davis.[96]

Following the Georgia Supreme Court's denial, the Georgia State Board of Pardons and Paroles rescinded its stay of execution and denied clemency for Davis.[97] It stated that "[a]fter an exhaustive review of all available information regarding the Troy Davis case and after considering all possible reasons for granting clemency, the Board . . . determined that clemency is not warranted."[98]

Subsequently, Davis filed a second federal habeas corpus petition in the United States District Court, and the district court's denial was appealed to the U.S. Court of Appeals for the Eleventh Circuit[99] In what the Eleventh Circuit deemed an "actual innocence plus" requirement, Davis's freestanding innocence claim was denied under section 2244 of AEDPA.[100] The court unequivocally declined to interpret *Herrera v. Collins*[101] as permitting a freestanding innocence claim on federal habeas review. Quoting *Herrera*, the court in *Davis* noted "*for the sake of argument* in deciding [the] case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional . . . ."[102] The court noted that claims of actual innocence based on newly discovered evidence have never been recognized absent an independent constitutional violation in the lower court's proceeding.[103]

The Eleventh Circuit found that Davis's claim did not meet the

90. *See id.* at 359–60; *In re* Davis, 565 F.3d 810, 827 (11th Cir. 2009) (Barkett, J., dissenting).

91. *In re Davis*, 565 F.3d at 827 (Barkett, J., dissenting).

92. *Id.* at 828.

93. *Id.*

94. *Id.* at 827.

95. *Id.*

96. *See* Davis v. State, 660 S.E.2d 354, 359–60 (Ga. 2008).

97. *In re Davis*, 565 F.3d at 815.

98. *Id.* at 816 (alterations in original).

99. *Id.*

100. *Id.* at 823–24 (citing 28 U.S.C. § 2244(b)(2)(B) (2006)).

101. 506 U.S. 390 (1993).

102. *In re Davis*, 565 F.3d at 816–17 (alteration in original) (emphasis added) (quoting *Herrera*, 506 U.S. at 417).

103. *Id.* at 817.

requirements of section 2244(b)(2)(B).[104] First, with regard to subsection (i), the requirement states that a successive habeas claim must be dismissed unless "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence."[105] The court framed this question in terms of whether Davis could have, at the time of his first federal habeas petition, discovered the evidence he presented in his second habeas petition.[106] Davis did, in fact, plead his newly discovered evidence reflecting his innocence in his first federal habeas petition, but the court regarded the evidence as procedural pursuant to *Schlup* to open the door to his substantive claims. Davis asserted that he was, in fact, diligent in gathering the new evidence, and his diligence is apparent because he brought forth such evidence in his first federal habeas petition.[107] The Eleventh Circuit rejected this argument, citing the language of the statute.[108] Section (B)(i) asks if the petitioner *could* have discovered the evidence earlier.[109] Davis presented his new evidence in his first federal writ; therefore, he *did* discover it earlier than the filing of his second federal habeas petition. Consequently, the circuit court found that the requirements of section (B)(i) were generally not met.[110]

Second, the Eleventh Circuit looked to the requirements of subsection (ii), which states that a petitioner must "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[111] The court found that this requires a showing of clear and convincing evidence of actual innocence *in addition* to an independent constitutional error.[112] The court used a literal reading of the statute, going as far as to substitute the words "that petitioner is innocent" for "constitutional error" in order to demonstrate that Congress did not intend for actual innocence to suffice for the requisite constitutional error.[113] The court contended that if "actual innocence" met the "constitutional error" requirement of section 2244(b)(2)(B)(ii), then the statute would need to read: a petitioner must "establish by clear and convincing evidence that, but for *the fact that the applicant was actually innocent*,

104. *Id.* at 824.

105. 28 U.S.C. § 2244(b)(2)(B)(i).

106. *In re Davis*, 565 F.3d at 819.

107. *Id.*

108. *Id.* at 820.

109. 28 U.S.C. § 2244(b)(2)(B)(i).

110. *In re Davis*, 565 F.3d at 822. The court did find that one of the affidavits (the affidavit of trial witness Benjamin Gordon) did satisfy the due diligence requirement. *See id.*

111. 28 U.S.C. § 2244(b)(2)(B)(ii)).

112. *In re Davis*, 565 F.3d at 823.

113. *See id.*

no reasonable factfinder would have found the applicant guilty of the underlying offense."[114] The circuit court pointed out that such a reading of the statute is nonsensical because a defendant is not found "not guilty" *but for* his actual innocence; rather he should be found not guilty specifically *because* of his innocence.[115] However, such a literal analysis defies common sense because it is absurd to assert that the execution of a factually innocent individual is not error. Playing word games with statutes proves to be a risky business when the issue at hand is the potential execution of an innocent human being. It is fundamentally contrary to the nature of the equitable relief contemplated by the habeas writ to interpret its application with such rigidity. "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."[116] As Judge Barkett comments in her dissent:

> AEDPA cannot possibly be applied when to do so would offend the Constitution and the fundamental concept of justice that an innocent man should not be executed. In this case, the circumstances do not fit neatly into the narrow procedural confines delimited by AEDPA. But it is precisely this type of occasion that warrants judicial intervention.[117]

Yet the majority proceeded to conclude that, even if AEDPA contemplated actual innocence as the type of constitutional error adequate to permit the court to consider the merits of the petitioner's claim, Davis's new evidence was insufficient to meet the clear and convincing standard.[118] This is conceivable only because the circuit court patently ignored all of Davis's new evidence except one witness's affidavit, which was not presented in his first federal habeas.[119] Even on equitable grounds, the Eleventh Circuit found all of Davis's evidence insufficient to raise a concern that they were possibly sending an innocent man to his death.

## IV. Roadblocks to Actual Innocence Claims

Even defendants who have many constitutional errors in addition to their claims to innocence confront obstacles to having their petitions heard. Many confront time bars or other procedural roadblocks like Davis confronted with AEDPA. *Schlup v. Delo* addresses occasions

114. *Id.*
115. *Id.*
116. *Id.* at 828 (Barkett, J., dissenting) (quoting Harris v. Nelson, 394 U.S. 286, 291 (1969)).
117. *Id.* at 827–28.
118. *Id.* at 824 (majority opinion).
119. *See id.* at 822, 824 (discussing the affidavit of trial witness Benjamin Gordon).

where a petitioner asserting actual innocence confronts procedural barriers.[120] Schlup filed a federal habeas petition alleging ineffective assistance of counsel because his trial counsel failed to interview and call witnesses who could establish his innocence.[121] Schlup was procedurally barred from raising his constitutional Sixth Amendment right to counsel claim because of his failure to raise it on appeal in state court.[122] Schlup was convicted of the jailhouse murder of a fellow inmate.[123] At trial, he relied heavily on a videotape showing him present in the lunchroom sixty-five seconds before guards received the distress call.[124] Therefore, Schlup argued that he could not have committed the murder and made it to the lunchroom in such a short period of time.[125] Prosecutors at trial presented evidence that the guards were delayed in making the distress call, thereby giving Schlup time to make it to the lunchroom after committing the murder.[126] Schlup's trial attorney failed to interview and present John Green as a trial witness.[127] Green would have testified that he made a distress call immediately following the murder.[128]

Ultimately, the *Schlup* Court relaxed the standard for a time-barred defendant to file a second or successive federal habeas petition with a claim to actual innocence.[129] *Schlup* requires that the petitioner must show that it is more likely than not that no reasonable jury would have found petitioner guilty beyond a reasonable doubt in light of the new evidence.[130] If the petitioner meets these criteria, then the merits of his constitutional claims may be heard. However, *Schlup* does not provide a mechanism for a petitioner's innocence claim to be heard. The *Schlup* standard assumes that if a defendant's other constitutional claims are resolved, then an acquittal would be certain. The court inquiry depends on the validity of Schlup's constitutional ineffectiveness of counsel claim—not his innocence claim:

120. 513 U.S. 298 (1995).
121. *Id.* at 306.
122. *Id.* at 306 & n.15.
123. *Id.* at 301–02, 305.
124. *Id.* at 303.
125. *Id.*
126. *Id.* at 304.
127. *See id.* at 307–08, 309–10 & n.21.
128. *Id.* at 307–08, 310 & n.21.
129. The *Schlup* Court adopted the standard espoused in *Murray v. Carrier*, 477 U.S. 478 (1986), in which the petitioner must show that it is more likely than not that no reasonable jury would have found petitioner guilty beyond a reasonable doubt in light of the new evidence. The *Schlup* Court rejected the stricter standard from *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992), in which the petitioner must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner guilty. *Schlup*, 513 U.S. at 323–27. Interestingly, later in 1996 AEDPA adopted very similar language to the language in *Sawyer*. *See* 28 U.S.C. § 2244(b)(2)(B)(ii) (2006).
130. *Schlup*, 513 U.S. at 327.

> First, Schlup's claim of innocence does not by itself provide a basis for relief. Instead, his claim for relief depends critically on the validity of his *Strickland* and *Brady* claims. Schlup's claim of innocence is thus "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."[131]

This is precisely why the Eleventh Circuit in *Davis* is hypocritical when asserting that Davis is procedurally barred under AEDPA (when bringing a substantive innocence claim).[132] He previously brought that claim when he was unable to have the merits of the claim heard in his first federal habeas under *Schlup*. *Schlup* explicitly treats an actual innocence claim offered in connection with other constitutional error as procedural and not substantive.[133] Why is Davis not able to overcome the procedural bar by showing manifest injustice under *Schlup* by the innocence claim itself? In other words, under *Schlup*, Davis should substantively be permitted to raise his actual innocence claim by procedurally raising his innocence claim as a gateway to show manifest injustice.[134] If a compelling claim to innocence that amounts to manifest injustice may overcome other procedural bars, then why not this one?

As will be discussed, a convincing and persuasive claim to actual innocence is undeniably a constitutional claim.[135] It is questionable whether AEDPA codified *Schlup*. In that instance, section 2244(b)(2)(B)(i) would replace the *Schlup* standard. However, this position is flawed. AEDPA essentially adopts the previous standard from *Sawyer*.[136] Consequently, not only would a petitioner need to meet a burden in subsection (ii), but also in subsection (i). Thus, a petitioner would need both clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of an underlying offense (subsection ii), *and* the factual predicate for the claim could not have been discovered previously through the exercise of due diligence (subsection i). Therefore, the gateway to have

131. *Id.* at 315 (footnote omitted) (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)).

132. In *Davis*, the Eleventh Circuit found that Davis was procedurally time barred from raising his innocence claim under 28 U.S.C. § 2244(b)(2)(B)(i) because he raised the new evidence in his previous federal habeas petition. *See In re* Davis, 565 F.3d 810, 822 (11th Cir. 2009) (per curiam).

133. *Id.* at 314 ("Schlup's claim of innocence . . . is procedural, rather than substantive. His constitutional claims are based not on his innocence, but rather on his contention that the ineffectiveness of his counsel and the withholding of evidence by the prosecution denied him the full panoply of protections afforded to criminal defendants by the Constitution." (citations omitted)).

134. *See Schlup*, 513 U.S. at 314–15.

135. *See Herrera*, 506 U.S. at 417 ("We may assume . . . that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional . . . ."); *In re Davis*, 565 F.3d at 828–30 (Barkett, J., dissenting).

136. *See supra* note 129.

procedurally barred constitutional claims heard in second or successive federal habeas corpus writs is arguably codified from *Schlup* in AEDPA.

However, it appears that the lack of a procedural error itself is a requirement to meet the conditions of section 2244. The *Schlup* standard is intended to overcome the obstacle of procedural errors. It is counterintuitive to consider AEDPA as having replaced the *Schlup* standard. Further, section 2244 does not, on its face, present itself as a mechanism for overcoming procedural error or time-barred petitions. The statute solely concerns "second or successive" petitions[137] and is meant to promote finality and comity.[138] Accordingly, the *Schlup* standard makes sense as the appropriate standard for petitioners filing second or successive federal habeas petitions and facing procedural bars.

AEDPA, particularly section 2244(b)(2)(B)(i), might be such a bar faced by petitioners. If a defendant fails to timely present newly discovered evidence,[139] but that evidence meets the *Schlup* standard,[140] then the gateway is opened and the procedural bar overcome. In 2006, the Court in *House v. Bell* reiterated its holding in *Schlup*, stating that "prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'"[141] This supports the position that the *Schlup* standard remains the threshold to open the gateway to time barred constitutional claims, as opposed to the clear and convincing standard from section 2244. Petitioners who meet that standard may open the gate to the merits of their otherwise-barred constitutional claims. The unanswered questions are: What if the petitioner's barred constitutional claim is his actual innocence, as in *Davis*? What if the defendant's only remaining claim is his innocence?

## V. THE UNITED STATES SUPREME COURT'S DECISION IN *DAVIS*

Many courts are steadfast when it comes to their blind faith in the judicial system and the belief that only constitutional error and mistakes of law result in wrongful convictions. Such trust is so strong that Troy Davis was never granted an evidentiary hearing for his post-conviction affidavits at any level. Each court opined that his likelihood of innocence was not strong enough to provide him an evidentiary hearing or

137. *See* 28 U.S.C. § 2244(b)(1)–(2) (2006).

138. *Schlup*, 513 U.S. at 318.

139. This might occur if a defendant does not meet the requirements of 28 U.S.C. § 2244(b)(2)(B)(i).

140. This might occur if in light of the new evidence, it is more likely than not that no reasonable jury would have found the petitioner guilty. *See Schlup*, 513 U.S. at 327.

141. House v. Bell, 547 U.S. 518, 536–37 (2006) (quoting *Schlup*, 513 U.S. at 327).

remove his procedural bars[142] until the Supreme Court of the United States ruled on Troy Davis's petition for writ of habeas corpus on August 17, 2009. The Supreme Court remanded Davis's petition back to the district court for an evidentiary hearing.[143] The concurrence noted that no court had conducted a hearing to ascertain the reliability of the scores of supporting affidavits to determine if they met the requirement of "a truly persuasive demonstration of actual innocence."[144] However, the district court may be bound by the restrictions of AEDPA, particularly section 2254(d)(1), which states that Davis may obtain habeas relief only if he establishes that adjudication of the claim "resulted in a decision that was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States."[145] Even if the district court is persuaded by Davis's actual innocence claim, it may not grant his motion unless the Georgia Supreme Court's decision affirming the denial of his extraordinary motion for a new trial was contrary to, or was an unreasonable application of, clearly established federal law or Supreme Court precedent as required by AEDPA in section 2254(d)(1).

The aim of AEDPA is to promote finality and preserve judicial resources by providing significant deference to lower court factual findings.[146] AEDPA limits the federal courts' power by only allowing courts to consider unreasonable applications of law or constitutional errors.[147] It purposely restricts the availability of the habeas remedy for petitioners who seek continued and further factual review when such facts have already been considered.

Davis presented considerable new evidence in his state motion for a new trial.[148] The Georgia Supreme Court reviewed the evidence and made subjective judgments regarding its credibility. In determining whether Davis was entitled to a new trial, the Georgia Supreme Court applied the following legal standard: whether or not the new evidence is "*so material that it would probably produce a different verdict*."[149] The Georgia Supreme Court made the subjective determination (based on a review of the affidavits and documents) that the new evidence did not

142. *See In re* Davis, 565 F.3d 810, 824 (11th Cir. 2009) (per curiam); Davis v. State, 660 S.E.2d 354, 363 (Ga. 2008).

143. *See In re* Davis, 130 S. Ct. 1, 1 (2009).

144. *Id.* at 1 (Stevens, J., concurring) (quoting *In re Davis*, 565 F.3d at 827 (Barkett, J., dissenting)).

145. 28 U.S.C. § 2254(d)(1) (2006).

146. *In re Davis*, 565 F.3d at 817.

147. *See* 28 U.S.C. § 2254(d)(1).

148. *See Davis*, 660 S.E.2d at 358.

149. *Id.* at 362–63 (emphasis added) (quoting Timberlake v. State, 271 S.E.2d 792, 795 (Ga. 1980)).

meet this standard.[150] The Georgia Supreme Court did not utilize an evidentiary hearing in making this determination. In a federal habeas petition filed by a defendant in custody pursuant to a state court decision, "a determination of a factual issue made by a State court shall be presumed to be correct" unless the petitioner rebuts the presumption of correctness "by clear and convincing evidence."[151] The Court remanded the case to the district court to assess whether Davis meets the clear and convincing standard.[152] In his concurrence, Justice Stevens stated, "The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing."[153] Justice Scalia denounced the notion that any claim based solely on actual innocence is constitutionally cognizable, stating that "[t]his Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent."[154] The district court will now evaluate and make its own appraisal of Davis's new evidence and decide whether he meets the requisite standard. The inquiry remains: What remedy can the district court provide if it finds Davis's innocence claim persuasive?

## VI. From Finality to Reality

Although the United States Supreme Court declined to affirmatively act on the merits of the Davis writ, the door is cracked for the district court to act. If the district court is clearly convinced that Davis is innocent, it must grant his writ. Under AEDPA, particularly section 2254(e)(1), in an original writ for habeas corpus, the factual findings of the state court are presumed correct unless the defendant rebuts that burden by clear and convincing evidence. The Georgia Supreme Court's factual findings led to its conclusion that Davis's innocence claim failed. We propose that if Davis can rebut these findings in the evidentiary hearing, the federal district court is not powerless to grant Davis's writ under section 2254(d)(1).

First, the district court may find that, pursuant to section 2254(d)(2) of AEDPA, the Georgia Supreme Court's decision was based on an unreasonable determination of facts because the state court failed to provide Davis with an evidentiary hearing despite volumes of new evidence. Second, to deny Davis a remedy in the face of a persuasive claim to innocence would constitute an unconstitutional suspension of the rem-

150. *Id.* at 358.
151. 28 U.S.C. § 2254(e)(1) (2006).
152. *In re* Davis, 130 S. Ct. 1 (2009) (Stevens, J., concurring).
153. *Id.*
154. *Id.* at 3 (Scalia, J., dissenting).

edy of habeas corpus in violation of the Suspension Clause.[155] Third, the district court may find that the Georgia Supreme Court's decision was contrary to clearly established federal law, as determined by the United States Supreme Court. This is the standard required by section 2254(d)(1) of AEDPA, and it is the language that Justice Scalia believes will tie the hands of the federal courts and prevent them from acting on Davis's persuasive claim to innocence.[156]

The question the courts struggle with is whether a claim to actual innocence is a constitutionally cognizable claim in and of itself. The answer is yes. The right to be free from wrongful execution pervades the justice system, the Constitution, and the supporting right upon which the whole of criminal law rests. The prohibition against executing the innocent is also found more definitively in the Eighth Amendment's right against cruel and unusual punishment.[157] To execute a person with a compelling claim to innocence would also shock the conscience sufficiently to violate substantive due process.[158] Therefore, a freestanding innocence claim has independent constitutional significance on at least three different grounds, each of which is supportable and clearly established by the Constitution and the Supreme Court. Consequently, if the district court is convinced that Davis has a compelling claim to innocence, it is not restricted by section 2254(d)(1) of AEDPA. This is because the Georgia Supreme Court's finding violated clearly established federal law by sentencing an innocent person to death.

Until *Davis*, courts only dealt with this issue in hypothetical terms as in *Herrera* because they did not fathom that, absent constitutional error, a petitioner could be factually innocent. Nonetheless, at no time in a majority opinion has a court claimed that it would be constitutionally sound to execute an innocent human being.[159] The majority opinion in *Herrera* stated arguendo that *if* a defendant did state a truly persuasive claim of actual innocence, then it *would* render his execution unconstitu-

155. U.S. CONST. art. I, § 9, cl. 2.

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

157. *See* Herrera v. Collins, 506 U.S. 390, 431–35 (1993) (Blackmun, J., dissenting) (arguing that the execution of an innocent person violates the Eighth Amendment and any standard of decency); *In re* Davis, 565 F.3d 810, 829 (11th Cir. 2009) (Barkett, J., dissenting) ( "[I]t is absurd to suggest that executing a person for a crime of which he is innocent does not amount to cruel and unusual punishment.").

158. *In re Davis*, 565 F.3d at 830 (Barkett, J., dissenting) (citing *Herrera*, 506 U.S. at 430 (Blackmun, J., dissenting)).

159. *See In re Davis*, 130 S. Ct. at 3 (Scalia, J., dissenting) (noting that the Court has "repeatedly" left unresolved the question of whether the Constitution forbids execution of a defendant who is "actually" innocent); *Herrera*, 506 U.S. at 427 (O'Connor, J., concurring) ("First is what the Court does *not* hold. Nowhere does the Court state that the Constitution permits the execution of an actually innocent person.").

tional.[160] Herrera simply did not make a truly persuasive claim of actual innocence. The Court in *Herrera* stated as follows:

> 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.[161]

The *Herrera* Court framed this issue as a hypothetical and went on to hold that in any event, the defendant's claim fell "far short of any such threshold."[162] Justice Scalia regarded the issue of a freestanding claim to actual innocence that would meet the "extraordinarily high" threshold as "embarrassing."[163] Additionally, by the language of his concurrence, Justice Scalia seemed doubtful that the Court would ever encounter the issue again.[164] The Court in *Herrera* stated that "[c]laims 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."[165] Courts maintain 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."[166] This reflects federal habeas courts limiting their role in ensuring that the Constitution is not violated and in correcting errors of fact. We must assume that this does not imply that the legislature and courts posit that an error of fact should not be judicially corrected, but rather that errors of fact will be naturally corrected if constitutional errors are remedied. However, there are large numbers of incarcerated innocent individuals. Moreover, the number of individuals who had constitutionally adequate trials and appeals in state court is undoubtedly also substantial. To assert otherwise defies logic.

Federal habeas courts give great deference to state courts' assess-

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

161. *Id.*

162. *Id.*

163. *Id.* at 428 (Scalia, J., concurring).

164. *See id.* ("With any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon.").

165. *Id.* at 400 (majority opinion) (emphasis added).

166. Townsend v. Sain, 372 U.S. 293, 317 (1963), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

ment of facts.[167] State legislative judgments are similarly entitled to substantial deference in the area of criminal procedure.[168] Criminal process will be found lacking "only where it offends some principle of justice . . . ranked as fundamental."[169] Federalism issues require federal habeas courts to defer to state court findings of fact.[170] In fact, section 2254(e)(1) of AEDPA requires that a federal court presume that a state court factual finding is correct unless the petitioner can overcome that presumption by clear and convincing evidence.[171] It is noteworthy that this section in no way prohibits federal courts from reviewing state court findings of fact, but places the bar very high for the petitioner to meet the requisite clear and convincing burden to overcome the state's presumption of correctness. AEDPA further provides that a state court factual determination must stand unless the federal court determines that the factual determination was "unreasonable."[172] "The judicial function is to carry out the expressed legislative will and not to improve on the statute."[173] The legislative intent behind AEDPA was to prevent petitioners from having numerous "bite[s] of the apple."[174]

The Court in *Herrera* went as far as to speculate that "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence."[175] But Rule 20.4(a) of the Supreme Court Rules states that writs of habeas corpus are "rarely granted" pursuant to the court's original habeas jurisdiction.[176] In fact, freestanding claims of actual innocence on collateral attack are quite rare. Judge Friendly has stated that "the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime."[177] Admittedly, petitioners currently have no motivation to claim actual innocence in a federal habeas petition except to unlock the gateway to another constitutional claim. It is well settled that upon habeas corpus the court will not weigh the evidence.[178] Federal courts

167. *See, e.g.*, 28 U.S.C. § 2254(e)(1) (2006) (mandating a presumption of correctness for state court factual findings).

168. *Herrera*, 506 U.S. at 407 (citing Medina v. California, 505 U.S. 437, 445–46 (1992)).

169. *Id.* at 407–08 (internal quotation marks omitted).

170. Rice v. Collins, 546 U.S. 333, 344 (2006) (Breyer, J., concurring).

171. 28 U.S.C. § 2254(e)(1).

172. 28 U.S.C. § 2254(d)(2); *see also Rice*, 546 U.S. at 344 (Breyer, J., concurring).

173. 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 12.32 (2d ed. 2009).

174. *See* 141 CONG. REC. 15016, 15095 (1995) (statement of Sen. Dole).

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

176. SUP. CT. R. 20.4(a).

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

178. *See 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, these facts cannot be re-examined or reviewed in this collateral proceeding.").

are concerned with finality and reducing stress on the judicial system. Federal courts refuse to question state court factual findings or "relitigate state trials."[179] "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."[180]

Nonetheless, such limitations on access to writs of habeas corpus and courts' concern with finality rest on the premise that the AEDPA provisions insulate petitioners from other constitutional error or that the AEDPA provisions provide state courts with freedom in factual decision making, hence protecting defendants from wrongful execution and Eighth Amendment constitutional violations. Evidently, AEDPA does not provide adequate safeguards—unless a state court's imposition of a death sentence (when a federal court is clearly convinced of the petitioner's innocence) is considered contrary to clearly established federal law pursuant to section 2254(d)(1). This analysis comports with both precedent and the legislative intent of that provision.

In *Williams v. Taylor*, the Supreme Court held that the "contrary to" language of § 2254(d)(1) would be satisfied should a state court reach a decision opposing a Supreme Court decision made on materially indistinguishable facts.[181] In *Williams*, the plurality stated as follows:

> In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody—or, as in this case, his sentence of death— violates the Constitution, that independent judgment should prevail.[182]

Certainly, this makes sense, as the federal courts are in the best position to interpret federal law and the Constitution. In *Davis*, and in instances of freestanding claims of actual innocence, the assessment as to whether there has been a constitutional violation (specifically, of the Eighth Amendment or of substantive due process) necessarily involves a subjective assessment of facts indicating innocence. To some degree, it entails "second guessing" the state courts' evaluation of the facts. Nonetheless, such a re-evaluation is sometimes necessary to determine whether there has been a violation of the Eighth or Fourteenth Amendments at the state court level. Notably, should federal courts reassess

179. Barefoot v. Estelle, 463 U.S. 880, 887 (1983), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §102, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2253 (2006)).

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

181. Williams v. Taylor, 529 U.S. 362, 412–13 (2000).

182. *Id.* at 389 (plurality opinion).

state court factual findings on some denials of motions for new trials, the state courts would be encouraged to provide more frequent evidentiary hearings when appropriate. It is clear by any standard that *Davis* had adequate new evidence to mandate an evidentiary hearing at the state level. Had the state courts provided Davis with an evidentiary hearing in the first instance—one way or another—his innocence issue would have likely been resolved years ago. Either the state court would have found his claim to be persuasive and provided him a new trial, or the hearing would have resulted in clear documentation of exactly what the Georgia courts did not find credible about Davis's new evidence.

Since the Georgia courts failed to provide Davis with an evidentiary hearing, the U.S. district court might also find that the Georgia Supreme Court's decision was based on an unreasonable determination of the facts pursuant to section 2254(d)(2).[183] Very little has been written about this section of AEDPA since its inception in 1996. Surely, given the nature and extent of Davis's new evidence, the failure of the state court to provide him with an evidentiary hearing can be deemed an unreasonable determination of the facts under section 2254(d)(2) of AEDPA. The Georgia Supreme Court made a determination regarding his life or death absent an evidentiary hearing with live testimony, despite extensive new evidence. This is an unreasonable determination of facts per AEDPA. This alone should be sufficient to provide the district court jurisdiction to grant the Davis writ.

Moreover, for the district court to fail to provide a remedy to Davis would result in a suspension of the writ of habeas corpus in violation of the Suspension Clause.[184] The clause provides: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."[185] *Felker v. Turpin* established that, on its face, AEDPA did not restrain federal courts such that the statute violated the Suspension Clause.[186] Further, it established that AEDPA did not impinge upon the Supreme Court's original jurisdiction to hear writs.[187] However, it would arguably constitute a suspension of the writ in violation of the Suspension Clause if a factually innocent prisoner facing death had exhausted all state remedies and

183. 28 U.S.C. § 2254(d)(2) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

184. *See* U.S. CONST. art. 1, § 9, cl. 2.

185. *Id.*

186. Felker v. Turpin, 518 U.S. 651, 664 (1996).

187. *Id.* at 660–61.

was denied the Supreme Court's original jurisdiction for a writ of habeas under AEDPA. Such a prisoner would be incarcerated in clear violation of the Constitution with no remedy.[188] Clearly, executing an innocent person violates fundamental principles of justice, fairness, and morality. Executing an innocent person violates principles inherent in the Constitution and reflected in many Amendments.[189]

## VII. The Inherent Right to Freedom from Wrongful Execution

The first question to answer is whether it is clearly established that it is unconstitutional to execute an innocent person. Under section 2254(d)(1) of AEDPA, if a federal court finds that a state court's decision was contrary to clearly established federal law as determined by the Supreme Court of the United States, then it may grant a petitioner's application for writ of habeas corpus.[190] It follows that, if it is clearly established by the Supreme Court that imposing the death penalty on an innocent person violates the Constitution, then a court that imposes the death penalty on a factually innocent person would be violating clearly established federal law. Further, if a federal court determines that a death-sentenced individual's habeas petition establishes his innocence, then the federal court may find that the state court violated clearly established federal law by sentencing an innocent person to death. Consequently, the federal court would have the power to grant the petitioner's writ of habeas corpus under section 2254(d)(1) because the petitioner is factually innocent. This article proposes that our Constitution and companion case law encompasses an inherent and fundamental right to freedom from wrongful execution. This right is not only clearly established, but pervades all aspects of criminal law and is the foundation upon which criminal law rests. Accordingly, in the event that the United States district court finds that Troy Davis meets the threshold requirements of innocence, then the Georgia Supreme Court made a decision "contrary to clearly established federal law" by sentencing an innocent person to death.

188. *See id.* at 663 ("Congress made the writ generally available in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." (internal quotation marks omitted)).

189. It does not, however, follow that every immoral and unfair action automatically violates the Constitution or will meet the "contrary to . . . clearly established Federal law" requirement of AEDPA. The notion that the federal district court may find Davis's claim to innocence persuasive, yet find no legal mechanism to permit them to act on the merits on the claim, brings to mind the principle of legality. *Nullum crimen sine lege, nulla poena sine lege* (i.e., no crime without law, no punishment without law).

190. 28 U.S.C. § 2254(d)(1) (2006).

The central purpose of any system of criminal justice is to convict the guilty and free the innocent.[191] In fact, our system of justice and Constitution is framed around this fundamental concept.[192] The Sixth Amendment right to counsel protects the innocent from wrongful conviction, incarceration, and execution.[193] The Sixth Amendment right to confrontation encourages truth finding to protect the innocent from wrongful conviction, incarceration, and execution.[194] The Fifth Amendment right against self-incrimination is tailored to protect the accused from making false confessions at the hands of police badgering and to protect the innocent from wrongful conviction, incarceration, and execution.[195] The Fifth and Fourteenth Amendments' due process clauses guarantee that the accused will be free of procedural and substantive unfairness so that the innocent will be protected from wrongful conviction, incarceration, and execution.[196]

Scholars and Justices alike observe that executing an innocent person would shock the conscience.[197] Society's most closely held principles of justice rest upon the protection of the innocent. The adversary and criminal justice system is premised on the doctrine that an individual is entitled to the presumption of innocence until proven guilty beyond a reasonable doubt.[198] This is to protect the innocent.[199] Reasonable doubt is an extraordinarily high standard; one of subjective, near certitude of guilt.[200] The justice system embraces such a high standard despite the commonly accepted notion that the vast majority of criminal defendants are factually guilty. In part, the reasonable doubt standard withstands the test of time because it is essential to maintain the faith of the community.[201] As stated in *In re Winship*, "the moral force of the criminal law [must] not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[202] As such, should the moral force of the criminal law turn a blind eye to compelling claims of actual innocence, the fundamental confidence of the community in the judiciary is at risk. If not a single innocent man

191. United States v. Nobles, 422 U.S. 225, 230 (1975) (citing Berger v. United States, 295 U.S. 78, 88 (1935)).

192. *See id*.

193. U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 344–45(1963) (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

194. U.S. CONST. amend. VI.; Pointer v. Texas, 380 U.S. 400, 406 (1965).

195. U.S. CONST. amend. V; Miranda v. Arizona, 384 U.S. 436, 456–58, 460 (1966).

196. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

197. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring).

198. *In re* Winship, 397 U.S. 358, 363 (1970).

199. *Id.* at 363–64.

200. *Id.* at 364.

201. *Id.*

202. *Id.*

feels truly free from persecution and even execution, then there can be no true order or freedom.[203] Further, the reasonable doubt standard persists as the fundamental principle to protect the innocent, despite the inescapable reality that the standard will more likely acquit a number of guilty individuals than it will convict the innocent on deontological grounds. In other words, adherence to the standard is not outcome-based, but dependent on fundamental principles and values.[204] It is right because it is right. Similarly, it is fundamentally unjust and contrary to the morals of society to risk the execution of a potentially innocent human.

If a habeas petitioner presents evidence sufficient to indicate actual innocence, it would shock the conscience of the community, and arguably falls outside the category of "criminal law"; thus courts would be left without jurisdiction to punish the petitioner. The exact definition of "criminal law" has not been determined. Professor Hart defines criminal law as "a formal and solemn pronouncement of the moral condemnation of the *community*."[205] If "criminal" is defined as causing injury to society, and an individual is actually innocent of causing any injury to society, then the courts are without jurisdiction to impose penalty. Further, the imposition of pain requires justification.[206] The judiciary fails to legitimize the justice system when punishment is imposed with no moral justification. Bear in mind that defendants are punished in the name of citizens.[207] In a society that values individual liberty, the community demands that the punishment be fair, just, and moral. To ignore a clear and convincing claim of actual innocence pursuant to AEDPA in an original petition for writ of habeas corpus[208] or in a second or successive writ of habeas corpus[209]—whether or not the actual innocence claim is attached to an independent constitutional claim—would undermine the respect of the community in the justice system and render any current safeguards a farce. A district court ruling in *Davis* that its hands are tied

203. *See id.* ("It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.").

204. *See id.* at 361–64 (discussing the strong historical foundation of the reasonable doubt standard).

205. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401 (1958), *as reprinted in* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 3 (4th ed. 2007) (emphasis added).

206. *See* Enmund v. Florida, 458 U.S. 782, 798 (1982) ("Unless the death penalty . . . measurably contributes to one or both of [its social] goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion))).

207. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion).

208. *See* 28 U.S.C. § 2254 (2006).

209. *See* 28 U.S.C. § 2244(b)(2)(B)(ii).

to act on a persuasive claim to actual innocence because such a claim is not constitutionally cognizable would be the first step in dismantling the elemental structure of the justice system. This is precisely because so much of the judicial system is explicitly founded on the concept that the innocent shall be protected from harm. To be free from wrongful execution is a fundamental right that is constitutionally clear, established, and expected.

## VIII. Execution of a Person with a Persuasive Claim to Innocence Violates the Eighth Amendment

Although it is clear that the justice system is founded on the concept of protecting the innocent from wrongful conviction and execution, it provides clarity and efficiency to provide this fundamental right a home within the Constitution. The obvious residence for the right to be free from wrongful executions is the Eighth Amendment. The Eighth Amendment prohibits cruel and unusual punishment.[210] The full text of the Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[211] The Eighth Amendment was originally drafted to protect against torture and other barbaric methods of punishment.[212] However, the Amendment has been "interpreted in a flexible and dynamic manner" to reflect evolving standards of decency.[213] Assessment of these standards of decency involves a judgment of the public attitude with reference to a given sanction. Importantly, the penalty "*must* accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' "[214] We can hardly imagine a punishment more offensive to the dignity of man than wrongful execution of an innocent person.

The death penalty must not be imposed in an arbitrary or capricious manner or it violates the Eighth Amendment.[215] In making this determination, courts look to whether imposition of the death penalty will further the social goals of capital punishment.[216] In *Gregg v. Georgia*, when the Supreme Court of the United States found that the death penalty was not per se unconstitutional, the Court nonetheless required that the death penalty must meet certain social goals to be implemented.[217]

210. U.S. Const. amend. VIII.

211. *Id.*

212. *Gregg*, 428 U.S. at 169–70 (plurality opinion).

213. *Id.* at 171.

214. *Id.* at 173 (emphasis added) (quoting Trop v. Dulles 356 U.S. 86, 100 (1958) (plurality opinion)).

215. *Id.* at 188–89 (discussing the holding of Furman v. Georgia, 408 U.S. 238 (1972)).

216. Enmund v. Florida, 458 U.S. 782, 798 (1982).

217. *Gregg*, 428 U.S. at 183, 186–87 (plurality opinion).

Those social goals are deterrence and retribution.[218]

In *Coker v. Georgia*, a plurality of the Supreme Court found that imposition of the death penalty for the rape of an adult woman violated the Eighth Amendment.[219] It stated that, under *Gregg*, the death penalty is excessive punishment if it: (1) makes no measurable contribution to the acceptable social goals of the death penalty; or (2) is grossly disproportionate to the severity of the crime.[220] A punishment might fail the test on either prong.[221] "[A]ttention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted."[222]

In *Enmund v. Florida*, the Supreme Court held that imposition of the death penalty for a defendant found guilty of vicarious felony murder violated the Eighth Amendment.[223] In making this finding, the Court focused on the moral culpability of the defendant: "As was said of the crime of rape in *Coker*, we have the abiding conviction that the death penalty, which is 'unique in its severity and irrevocability,' is an excessive penalty for the [vicarious felony murderer] who, as such, does not take human life."[224] The majority stressed that the focus in death penalty cases must be on individual culpability.[225] Here, the petitioner was plainly less culpable than those who actually killed the victims.[226]

In *Atkins v. Virginia*, the Supreme Court found that the execution of mentally retarded individuals violates the Eighth Amendment.[227] The *Atkins* majority questioned whether executing a mentally retarded individual would further the purposes of the death penalty.[228] It asked: (1) would it promote deterrence; and (2) would it affect the goal of retribution?[229] The majority reasoned that because mentally retarded persons have a diminished mental capacity, executing them would not measurably deter them from committing such offenses.[230] Therefore, the goal of deterrence would not be met by execution.[231] Retribution relies on the

218. *Id.* at 183.
219. 433 U.S. 584, 592 (1977) (plurality opinion).
220. *Id.* (citing *Gregg*, 428 U.S. 153).
221. *Id.*
222. *Id.*
223. 458 U.S. 782, 797 (1982).
224. *Id.* (citation omitted) (quoting *Gregg*, 428 U.S. at 187).
225. *Id.* at 798.
226. *Id.*
227. 536 U.S. 304, 321 (2002).
228. *See id.* at 318–20.
229. *See id.* at 319–20.
230. *Id.*
231. *Id.* at 320.

moral desert of the offender to justify punishment.[232] A mentally handicapped individual by nature has a diminished moral culpability; therefore, justification for execution is considerably reduced.[233] Thus, the majority concluded that the execution of mentally retarded offenders would not measurably further the deterrent or retributive purposes of the death penalty.[234] So, it would be "nothing more than the purposeless and needless imposition of pain and suffering."[235] *Coker*, *Enmund*, and *Atkins* illustrate that the Eighth Amendment prohibits *purposeless* and *needless* imposition of pain and suffering.[236] Plainly, the execution of an innocent person is purposeless and needless.

The Eighth Amendment prohibits other punishments that courts have found to be disproportionately "needless," "arbitrary," or "excessive." *Roper v. Simmons* prohibits the executions of juveniles under the age of eighteen years old, citing a lack of moral culpability.[237] *Kennedy v. Louisiana* prohibits the death penalty for the rape of a child because the punishment is excessive and disproportionate.[238] *Furman v. Georgia* declared capital punishment (as then administered) unconstitutional as applied in a racially discriminatory manner.[239] In *Graham v. Florida*, the Supreme Court will soon decide whether a life sentence for a non-homicide offense committed when a juvenile was thirteen-years-old violates the Eighth Amendment.[240] The common denominator with Eighth Amendment jurisprudence is individual moral culpability. The unavoidable conclusion is that it is a flagrant violation of the Eighth Amendment to execute an innocent person.

Even before the Eighth Amendment's call for an end to torture and barbaric punishments, civilization embodied the value of protecting the innocent from punishment. The Constitution has simply evolved in a manner that the right to be free from wrongful persecution has been specifically protected by safeguarding defendants' *other* freedoms and rights. Courts attempt to insulate the accused from wrongful conviction by protecting the accused's other basic rights. In other words, the legislature and judiciary have historically functioned under the perception (or misperception) that by shielding a defendant from constitutional errors at trial, or misapplication of law, a just and fair verdict will necessarily

232. *Id.* at 319.
233. *Id.*
234. *Id.* at 321.
235. *Id.* at 319 (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982)).
236. *See id.*; *Enmund*, 458 U.S. at 798; Coker v. Georgia, 433 U.S. 584, 592 (1977).
237. 543 U.S. 551, 570–71, 578 (2005).
238. 128 S. Ct. 2641, 2658, 2660 (2008).
239. 408 U.S. 238 (1972) (per curiam).
240. *See* 982 So. 2d 43 (Fla. Dist. Ct. App. 2008), *cert. granted*, 129 S. Ct. 2157 (2009).

result. With advancing technology, ability to detect trial error, and evolving standards of fairness and justice, courts are now becoming obliged to recognize freestanding claims of innocence where the accused may have otherwise had a fair trial.

Determining whether a petitioner has a clear and convincing claim to innocence that rises to the level of a violation of clearly established federal law requires a subjective assessment of facts by a federal court. Courts must routinely interpret facts to follow the law. In *McDaniel v. Brown*, the Supreme Court stated that the Nevada district court's rejection of the defendant's insufficiency of evidence claim under the *Jackson* standard was not unreasonable under section 2254(d)(1) of AEDPA.[241] The *Jackson* standard of review for federal habeas claims is whether "upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt."[242] This standard requires the court to make an assessment of the facts of the case. Countless other legal judgments entail judicial appraisals of facts. For example, to determine whether an identification procedure is reliable and therefore admissible, courts evaluate eyewitness visibility.[243] To determine potential Fourth Amendment violations or Fifth Amendment motions involving alleged police misconduct, courts assess witness credibility. To grant or deny motions for judgments of acquittal, courts balance and the weigh the facts. Unreasonable missteps on the part of the court on any of these subjective interpretations of facts may result in federal review. There is no sensible reason why claims of actual innocence should not be subject to federal review in the same manner.

## IX. Wrongful Executions as Violations of Substantive Due Process

A claim of actual innocence cannot escape a fundamental fairness analysis. A freestanding actual innocence claim is a substantive due process claim, as opposed to a procedural due process claim, precisely because it is not attached to an independent constitutional error or other mistake of law. Indeed, it is substantive because the defendant may, in fact, be innocent despite the fact that nothing was procedurally wrong with the case. To execute a factually innocent person would destroy our concept of ordered liberty. Such is the heart of substantive due process.[244]

241. McDaniel v. Brown, 130 S. Ct. 665, 672 (2010) (per curiam) (referring to the standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979)).

242. *Id.* at 667 (quoting *Jackson*, 443 U.S. at 324).

243. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

244. *See* Palko v. Connecticut, 302 U.S. 319, 324–26 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784, 794 (1969).

In March 2009, in *Davis v. Wilson*, a Pennsylvania district court rejected an Eighth Amendment claim based on actual innocence.[245] However, the court did analyze the innocence claim under the Fourteenth Amendment's guarantee of substantive due process.[246] The standard of review for a substantive due process challenge requires the aggrieved person to establish that the action "shocks the court's conscience."[247] The prisoner was incarcerated for seventy-five days but claimed his innocence.[248] The court indicated that this was potentially "conscience shocking," in violation of the Fourteenth Amendment:

> Rather than an Eighth Amendment claim, we find that [the prisoner's] claim of being actually innocent of the disciplinary charge to be really a claim that he was denied substantive due process, i.e., that it is fundamentally unfair or conscience shocking that an innocent inmate should be made to suffer disciplinary custody for an infraction that he did not commit, a claim which we address below.[249]

The court went on to deny said claim and found that its conscience was not shocked by the prisoner's seventy-five-day incarceration, despite accepting that the prisoner was in fact innocent of the offense.[250]

Even if a court found that a seventy-five day incarceration of an innocent person was less than conscience shocking, any rational court should find the execution of a factually innocent person conscience shocking. In fact, several Justices have stated just so. Justice Stevens stated in his concurrence in the recent *In re Davis* opinion that "it would be an atrocious violation of our Constitution and the principles upon which it is based to execute an innocent person."[251] Justice Blackmun stated in his dissent in *Herrera* that "[n]othing could be more contrary to contemporary standards of decency or more shocking to the conscience than to execute a person who is actually innocent."[252]

Similar to Eighth Amendment jurisprudence, substantive due pro-

245. No. 08-589, 2009 WL 688912, at *4–5 (W.D. Pa. Mar. 12, 2009). The *Davis* court analyzed the Eighth Amendment issue according to the Supreme Court's decision in *Wilson v. Seiter*. *See id.* at *3–5 (citing Wilson v. Seiter, 501 U.S. 294 (1991)). For a discussion of *Seiter*'s "deliberate indifference" standard, see *infra* Part X.

246. *Davis*, 2009 WL 688912, at *5.

247. *Id.* at *10 (citing Hunterson v. DiSabato, 308 F.3d 236, 247 n.10 (3d Cir. 2002)); *see also* Rochin v. California, 342 U.S. 165, 172 (1952). The "shocks the conscience" standard applies to substantive due process challenges of executive action, whereas a different standard applies to legislative action. *Davis*, 2009 WL 688912, at * 10.

248. *Davis*, 2009 WL 688912, at *4.

249. *Id.* at *5.

250. *Id.* at *10.

251. *In re* Davis, 130 S. Ct. 1 (2009) (quoting *In re* Davis, 565 F.3d 810, 830 (11th Cir. 2009) (Barkett, J., dissenting)) (internal quotation marks omitted).

252. Herrera v. Collins, 506 U.S. 390, 430 (1993) (Blackmun, J. dissenting) (citations omitted).

cess jurisprudence also contains an arbitrary and capricious element. "The reason a substantive due process claim is also called an 'arbitrary and capricious due process claim' is because a showing that the government has acted arbitrarily and capriciously is a prerequisite for such a claim."[253] "The substantive component of the Due Process Clause limits what governments may do regardless of the fairness of procedures that it employs, and covers government conduct in both legislative and executive capacities."[254] Consequently, even where a petitioner has a constitutionally and procedurally correct trial, but nevertheless has a compelling claim to factual innocence, it would be capricious and arbitrary to implement the death penalty, or any penalty. This is true because punishment would no longer retain moral or rational justification.

## X. The Question of Innocence and Second Guessing

Petitioners filing federal habeas petitions and facing procedurals bars may present their innocence claims procedurally by opening the gateway under *Schlup* (in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt).[255] In a second or successive federal habeas petition, petitioners may have their innocence claims heard substantively under section 2244(b)(2) of AEDPA, but must show by clear and convincing evidence that but for constitutional error no reasonable fact finder would have found petitioner guilty.[256] We assert that it would be constitutional error to sentence an innocent person to death. In an original habeas pursuant to section 2254, the federal court must find that the state court made a decision contrary to clearly established federal law, and show by clear and convincing evidence that the state court decision was in error.[257] Again, sentencing an innocent person to death would violate the Eighth Amendment and substantive due process, and constitute a decision contrary to federal law.

This article does not suggest that courts and judges should provide defendants the proverbial never-ending bites at the apple or fail to provide finality to criminal cases. Nor does it suggest that errors will never happen. It does suggest that when the consequence of those errors is the death of an innocence person, heightened care must be taken to avoid that consequence. Although this article suggests avenues in which defendants may open the gateway to file federal habeas petitions, the

253. Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1374 (11th Cir. 1993).
254. Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 399 (3d Cir. 2000).
255. *See supra* Part IV.
256. 28 U.S.C. § 2244(b)(2)(B)(i)–(ii) (2006).
257. 28 U.S.C. § 2254(d)(1), (e)(1).

floodgates will not be opened. Defendants now have the burden of proof when filing writs of habeas corpus and maintain an exceedingly high standard of proof. Very few petitioners are able to secure new exculpatory evidence to meet the clear and convincing standard.[258] In any event, justice and equity demand that finality take its proper place when balanced against the interests of incarcerating and particularly executing the potentially innocent.[259] "[I]n appropriate cases, the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration."[260] To better protect the innocent from wrongful conviction and minimize federal review, the judiciary should expand and improve the procedural protections afforded an accused at trial. The earlier discussion regarding *Neil v. Biggers* and suggestive identification procedures provides an example.[261] The current case law, relying solely on a due process analysis, allows suggestive identification procedures into evidence at trial if the court finds the identification to be reliable.[262] This due process interpretation is one cause of wrongful convictions.[263] Other areas where defendants' protections may be improved include providing defendants the right to access the prosecution's biological evidence for DNA testing[264] and heightened standards for the admissibility of expert testimony.

Eighth Amendment jurisprudence discusses the requirement of deliberate indifference.[265] In *Wilson v. Seiter* the petitioner claimed a violation of the Eighth Amendment due to his confinement conditions.[266] The court held that a prisoner claiming that the conditions of his confinement violated the Eighth Amendment must show that prison officials had a culpable state of mind.[267] Specifically, the Court cited *Gregg*, noting the requirement for "unnecessary *and wanton* infliction of

258. Schlup v. Delo, 513 U.S. 298, 324 (1995).

259. *See id.* at 319–21.

260. *Id.* at 320–21 (quoting Murray v. Carrier, 477 U.S. 478, 495 (1986)) (internal quotation marks omitted).

261. *See supra* Part II.

262. *See* Mourer, *supra* note 30, at 60–61 (citing Manson v. Brathwaite, 432 U.S. 98, 114 (1977)).

263. *Id.* at 73 (suggesting a Fourth Amendment analysis of identification procedures, rather than a Fifth Amendment due process analysis).

264. *See* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2316 (2009) (discussing numerous state and federal legislations that grant defendants access to biological and DNA evidence).

265. *See, e.g.*, Wilson v. Seiter, 501 U.S. 294, 297 (1991).

266. *Id.* at 296.

267. *Id.* at 297, 299.

*pain*."[268] Essentially, the Court found that inadvertent infliction of needless pain is not unconstitutional.[269] Based on this theory, Eighth Amendment jurisprudence dictates that arbitrary, excessive, pointless, and even barbaric punishments are constitutional if implemented in good faith. The justification for this rationale is that, if a punishment is meted out inadvertently, then it is not a punishment at all.[270] "The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century . . . ."[271] The prisoner in *Seiter* claimed an Eighth Amendment violation based on a number of complaints regarding his confinement, including overcrowding, unsanitary conditions, and generally inadequate facilities.[272] The Court remanded the case to determine whether these conditions were imposed for the purposes of punishing the defendant.[273] Further, the Court found that prison officials and any other government agents implementing punishment must act with "deliberate indifference" in order to trigger Eighth Amendment protections.[274]

Thus, the freestanding actual innocence claim issue is raised. Is it fair to pose the issue as to what degree a court, jury, or any governmental body is certain of an individual's guilt or innocence? As established above, executing a factually innocent person violates the Eighth Amendment.[275] The question arises as to what—if any—level of governmental willfulness is required to activate Eighth Amendment protections. In this context, it is worth noting that we are discussing the *knowing execution* of an innocent person. In both *In re Davis* and *Herrera*, the issue before the Court was whether a compelling and convincing claim to actual innocence will state a ground for relief in a federal habeas corpus action, absent an independent constitutional claim.[276] Consequently, the courts ask whether or not a petitioner has grounds for relief even when the court is convinced and consequently *aware* that the petitioner may be innocent. Under AEDPA, the petitioner must show by clear and convincing evidence that the decision by the lower court was in error.[277] In essence, the federal court must be clearly convinced that the petitioner is innocent in order to grant the writ. Certainly, implementation of the

268. *Id.* at 297 (second emphasis added) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion)).

269. *Id.* at 299.

270. *Id.* at 300.

271. Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985).

272. *Seiter*, 501 U.S. at 296.

273. *Id.* at 305–06.

274. *Id.* at 297, 303.

275. *See supra* Part VIII.

276. *See In re* Davis, 130 S. Ct. 1, 1 (2009); Herrera v. Collins, 506 U.S. 390, 397–98 (1993).

277. 28 U.S.C. §§ 2244(b)(2)(B)(ii), 2254(e)(1) (2006).

death penalty with clear and convincing belief of petitioner's innocence would satisfy *Seiter*'s requisite willfulness requirement and meet any definition of "punishment" for Eighth Amendment purposes.

If society is willing to accept death as a punishment, it must accept the subjective nature of the decision to implement the death penalty. It is firmly established that, at the trial level, one must be found guilty beyond a reasonable doubt. After the defendant has been found guilty, he is no longer cloaked with the presumption of innocence. Even if he is sentenced to die, a state court prisoner must prove his innocence by clear and convincing evidence in federal court before obtaining a new trial or evidentiary hearing pursuant to AEDPA. Given the finality of death and the sanctity of human life, we may question: if a court merely has sufficient doubts as to the guilt of a petitioner, does it not morally—if not legally—have a duty to inquire further or provide the petitioner with an evidentiary hearing?[278]

## XI. Death Is Different

Death is different. Dire consequences of factual error make it different, different because the death sentence is "unique in its severity and irrevocability."[279] A thorough analysis of the benefits and costs of capital punishment is beyond the scope of this article. As discussed, guilt and innocence is a subjective assessment with no foolproof method to gauge reliability or measure outcomes. Death is permanent. Death penalty cases cost seventy percent more than non-death penalty cases.[280] If Florida abolished the death penalty and instead instituted life without parole, it would save fifty-one million dollars per year.[281] Research shows that the costs associated with the death penalty divert resources from genuine crime control measures.[282] As discussed with Eighth Amendment death penalty jurisprudence, community support for the death penalty is an essential component for its constitutionality.[283] Public support for the death penalty is diminishing in the United States. Roughly half of the population now prefers life without parole over

278. *See, e.g.*, People v. Lopez, 525 N.E.2d. 5, 6 (N.Y. 1988) (stating that a trial court has a duty of further inquiry if defendant's recitation of facts during a guilty plea casts significant doubt upon guilt).

279. Gregg v. Georgia, 428 US 153, 187 (1976) (plurality opinion).

280. According to one study, the median cost of a capital case is $1.26 million, and non-death penalty cases have a median cost of $740,000. Amnestyusa.org, Death Penalty Cost, http://www.amnestyusa.org/death-penalty/death-penalty-facts (follow "Death Penalty Cost" hyperlink) (last visited Apr. 25, 2010).

281. S.V. Date, *The High Price of Killing Killers: Death Penalty Prosecutions Cost Taxpayers Millions Annually*, Palm Beach Post, Jan. 4, 2000, at 1A.

282. *See id.*

283. *See supra* Part VIII.

death as punishment for the crime of murder.[284] Further, it is well documented that the death penalty continues to be implemented in a discriminatory manner.[285] "Since 1977, the overwhelming majority of death row defendants have been executed for killing white victims," despite the fact that African-Americans comprise roughly half of all homicide victims.[286] Unless the conclusion is that a white person's life is more valuable than a black person's life, we must conclude capital punishment is discriminatory and arbitrary as applied.[287] A partial answer to all of these issues is to abolish the death penalty. The issue of finality, at least with respect to death cases, would be resolved. The valid and difficult struggle between finality and fair review on capital cases would be extinguished. The very real and poignant matter of the sanctity of human life, the risk of wrongful execution, and the dignity and civility of the justice system generally justifies critical reconsideration.

## XII. CONCLUSION

The district court that will hear Troy Davis's case on remand has already asked for briefing as to whether a freestanding claim to innocence has constitutional significance.[288] The court can find constitutional significance specifically in the Eighth Amendment and more broadly through substantive due process. The right against wrongful execution is a deep-seated and inherent precept upon which the entire justice system is built and premised.

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284. Amnestyusa.org, Death Penalty Trends, http://www.amnestyusa.org/death-penalty/death-penalty-facts (follow "Death Penalty Trends" hyperlink) (last visited Apr. 25, 2010).

285. *See* U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5–6 (1990), *available at* http://archive.gao.gov/t2pbat11/140845.pdf (synthesizing 28 studies and finding a "pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty"); Amnestyusa.org, Death Penalty and Race, http://www.amnestyusa.org/death-penalty-facts (follow "Death Penalty and Race" hyperlink) (last visited Apr. 25, 2010) (citing a 2003 study and two 2007 studies which indicated racial disparities against African Americans in death penalty cases).

286. Amnestyusa.org, *supra* note 285.

287. Some states are recognizing such racial disparity. Governor Beverly Perdue of North Carolina recently signed the state's Racial Justice Act into law, concluding:

> I have always been a supporter of death penalty, but I have always believed it must be carried out fairly. The Racial Justice Act ensures that when North Carolina hands down our state's harshest punishment to our most heinous criminals—the decision is based on the facts and the law, not racial prejudice.

*Perdue Signs Racial Justice Act*, WRAL.COM, Aug. 11, 2009, http://www.wral.com/newss/state/story/5769609.

"The law allows pre-trial defendants and death-row inmates to challenge racial bias in the death penalty system through the use of statistical studies." Death Penalty Information Center, *Gov. Perdue Signs North Carolina's Racial Justice Act—NAACP Commends Passage*, http://www.deathpenaltyinfo.org/gov-perdue-signs-north-carolinas-racial-justice-act-naacp-commends-passage (last visited Apr. 25, 2010).

288. Myrna S. Raeder, *Postconviction Claims of Innocence*, CRIM. JUST., Fall 2009, at 14, 21.

Even if the district court chooses to honor the freestanding claim to innocence, Davis still faces the high threshold standard of clear and convincing evidence. The federal district court has the key to unlock the gate to save otherwise helpless defendants with colorable freestanding innocence claims. The gate, however, is not a floodgate. If federal courts do not find defendants' claims to be clear and convincing, defendants will not be entitled to hearings. In any event, if federal courts do suffer an increased burden and realize that there are many petitioners facing execution with unrecognized, convincing claims to innocence, then certainly the judiciary should rejoice in discovering the latent injustice. Should such claims not surface, then no one is worse for the change.

Troy Davis stands on the edge of a decision that could revolutionize habeas corpus jurisprudence and expose the true degree of wrongful convictions. Alternatively, the district court's decision could herald the onset of the dismantling of protections for the accused and the beginning of serious community uncertainty and lack of faith in the judicial system. Justice Scalia's view that no innocent person can be convicted under a cloak of fairness and constitutional perfection is contradicted by the mere numbers of wrongful convictions. It simply defies common sense to suggest that the judiciary does not and has not convicted and executed innocent persons who had fair and error free trials and appeals. Humans are imperfect, prone to mistakes and error. To err is human, to fail to admit error is sinful.