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Post-Conviction Determination of Innocence for Death Row Inmates

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Kelli Hinson

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I. INTRODUCTION

On April 20, 1994, death row inmate Gary Graham received news that the Texas Court of Criminal Appeals opened yet another door through which Graham can pursue his claims of actual innocence. This judgment, the latest in a continuing legal battle over the fate of Gary Graham, fails to provide a satisfactory answer to the question that the Supreme Court grappled with in Herrera v. Collins: What does the Due Process Clause of the Constitution require when a prisoner has a claim of "actual innocence" supported by newly discovered evidence? Gary Graham, like Leonell Torres Herrera before him, claims that the Due Process Clause prevents the state from executing an individual who possesses new exonerating evidence.

A due process challenge is normally appropriate if the defendant claims that the state is punishing him without having made an appropriate determination of guilt. The question presented by the Graham case is not, however, whether the Due Process Clause allows the state to execute an innocent man, because the defendant has been tried and convicted and, consequently, the presumption of his innocence has vanished. The question is, rather, whether the state must provide a post-conviction avenue by which a prisoner can introduce newly discovered evidence of his innocence, and if so, what the appropriate avenue is. The Supreme Court has held that in a state criminal proceeding "the trial is the paramount event for determining the guilt or innocence of the defendant." Therefore, while the presumption of innocence plays a vital role in our justice system at the trial level, in post-conviction proceedings the defendant comes before the court not as an innocent person but as a convicted criminal.

Graham first raised his "actual innocence" defense in a habeas corpus petition five years after his conviction. Traditionally, courts have not considered the discovery of new evidence purporting to exonerate the accused to be a valid ground for habeas corpus relief. Gary Graham

8. Bell, 441 U.S. at 533.
9. Herrera, 113 S. Ct. at 870 (O'Connor, J., concurring). O'Connor maintained that the execution of a truly innocent person would violate the Constitution, but claimed that Herrera was not innocent "in any sense of the word." Id.
11. Townsend v. Sain, 372 U.S. 293, 317 (1963); Ex parte Binder, 660 S.W.2d 103, 106 (Tex. Crim. App. 1983) (Ex parte Binder has been overruled to the extent that it conflicts
maintains that this policy violates the Eighth and Fourteenth Amendments to the Constitution because it would allow an innocent person to be executed. The Supreme Court has previously rejected this argument and held in *Herrera v. Collins*, 12 a case very similar to Graham's, that the criminal justice procedures already in place adequately protect an accused's constitutional rights. 13 The Texas Court of Criminal Appeals applied this rule to the *Graham* case and originally refused to hear his claim of actual innocence on collateral appeal absent some constitutional violation. 14 Collateral appeals put additional costs and burdens on the system which are not justified by the possible minute decrease in the risk of executing an innocent person. 15

These costs and burdens of additional post-conviction remedies are also unnecessary because defendants possessing allegedly exonerating evidence already have adequate and more appropriate avenues to pursue. First, if the evidence was available at the time of trial and was not brought forth because of incompetence or lack of due diligence on the part of counsel, then the appropriate avenue for relief is a constitutional claim of ineffective assistance of counsel. 16 Society appears to have lost confidence in the reliability of criminal adjudications, 17 but much of that confidence could be restored by ensuring that all defendants have quality representation at the trial level. 18 Second, if the evidence has come to light since trial, but too late to file a motion for new trial, and this evidence is truly persuasive as to the accused's innocence, then the accused can seek executive clemency. 19

Graham is now, however, challenging the constitutionality of these clemency procedures as well. After the court refused to examine Graham's new evidence in the habeas corpus context as per *Herrera*, Graham filed another petition alleging that the Texas Board of Pardons and Paroles violated his due process rights by denying him executive relief without the benefit of a hearing on his application. 20 The Texas Supreme Court has yet to rule on this, Graham's latest attack on the constitutionality of the Texas criminal justice system. Unfortunately, the Texas Court of Criminal Appeals, while vacating a civil injunction preventing Gra-


13. Id. at 860.
15. See infra section VIII.
16. The Court of Criminal Appeals refused to grant relief to Graham on the ground of ineffective assistance of counsel. *Ex parte Graham*, 853 S.W.2d at 565.
ham's execution, opened the door to yet another habeas corpus proceeding based on Graham's claim of actual innocence.\textsuperscript{21}

This comment will attempt to detail the procedures already in place for a defendant to attack his trial-court conviction, analyze the claims that Graham has made regarding the adequacy of these procedures,\textsuperscript{22} and explain why the author believes that the state already adequately protects

\begin{itemize}
  \item \textit{State ex rel. Holmes}, 1994 Tex. Crim. App. LEXIS 52; see also infra notes 158-65 and accompanying text.
  \item A chronology of Graham's procedural history to date, as compiled by Houston reporter Dalton Smith, may prove helpful:
    \begin{itemize}
      \item May 13, 1981 — Bobby Grant Lambert murdered.
      \item October 28, 1981 — Gary Graham convicted.
      \item June 12, 1984 — Conviction and sentence affirmed by Texas Court of Criminal Appeals.
      \item July 30, 1987 — First scheduled date for execution.
      \item February 19, 1988 — Habeas corpus relief denied by the Court of Criminal Appeals (after execution date changed three times).
      \item August 31, 1988 — Federal district court denied habeas relief and Graham given stay of execution by U.S. Fifth Circuit Court of Appeals, but then affirmed in district court.
      \item July 3, 1989 — U.S. Supreme Court vacates Fifth Circuit judgment and remands the case to appeals court.
      \item March 7, 1990 — On review, the Fifth Circuit panel reverses the state district court.
      \item January 3, 1992 — Fifth Circuit en banc reverses the Fifth Circuit panel and affirms the denial of habeas relief.
      \item January 8, 1992 — U.S. Supreme Court grants certiorari.
      \item January 25, 1993 — U.S. Supreme Court affirms the Fifth Circuit ruling of January 3, 1992.
      \item March 11, 1993 — Execution scheduled for new date of April 29.
      \item April 26, 1993 — Graham seeks habeas relief in state district court of conviction, first raising claim of "actual innocence" denied by trial court.
      \item April 27, 1993 — Court of Criminal Appeals denies relief and stay of execution.
      \item April 28, 1993 — Governor Ann Richards grants 30-day reprieve (despite 10-7 vote by Board of Pardons and Paroles against reprieve).
      \item May 23, 1993 — Graham requests executive clemency for second time from Board of Pardons and Paroles (three days before first reprieve is to run out). Board decides not to act on second request for clemency.
      \item May 24, 1993 — Certiorari denied by U.S. Supreme Court.
      \item June 2, 1993 — Graham requests reconsideration by Court of Criminal Appeals which partially granted request and stayed execution pending outcome of another death penalty case ruling.
      \item July 7, 1993 — Trial court sets execution date for August 17.
      \item July 21, 1993 — Graham seeks injunction and mandamus in civil district court in Austin (299th Judicial District) for evidentiary hearing before Board of Pardons and Paroles.
      \item August 9, 1993 — State Civil District Judge Peter Lowery of Austin signs letter of stay August 3, but then signs order on August 9 ordering hearing by Board of Pardons and Parole to be held August 10.
      \item Harris County District Attorney John Holmes asks Court of Criminal Appeals for leave to file writ of prohibition and/or mandamus against Judge Lowery.
      \item August 12, 1993 — Court of Criminal Appeals denies Holmes's request because appeal to Third Court of Civil Appeals of Texas (in Austin) vacated injunction order of Judge Lowery.
      \item August 13, 1993 — Graham seeks stay of execution from Third Court of Civil Appeals, which grants writ enjoining execution pending resolution of appeal. Graham also seeks habeas relief for the second time from U.S. district court and appeals to Fifth Circuit. That appeal was still pending as of the date of this comment.
      \item August 15, 1993 — Court of Criminal Appeals grants stay of execution on its own motion (by 5 to 4 vote).
      \item November 9, 1993 — Court of Criminal Appeals reconsiders motions and grants leave to file and consolidate motions relating to jurisdiction of Court of Civil Appeals and habeas corpus relief.
    \end{itemize}
\end{itemize}
the rights of death-row inmates and that additional procedures are not only unnecessary, but would not be effective even if implemented.

II. DUE PROCESS REQUIREMENTS

Gary Graham has exhausted the normal appeals and post-conviction relief process. He now claims to possess newly-discovered evidence that will exonerate him, and maintains that he has a due process right to a hearing on that evidence. The Due Process Clause of the United States Constitution provides that no "state [shall] deprive any person of life, liberty, or property, without due process of law." The Texas Constitution contains a similar provision in its Bill of Rights, as does every state in this nation. The Supreme Court has determined that the Due Process Clause requires two things: fundamental fairness and rationality. A state's criminal procedures do not violate due process unless they "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental," or "shock[ ] the conscience." Consequently, the Supreme Court is quite hesitant to use the Due Process Clause as a means to promulgate state rules of criminal procedure. The Bill of Rights enumerates many constitutional criminal safeguards and the Court has not felt it necessary to interfere with state legislative judgment and expand those safeguards under the "open-ended rubric of the Due Process Clause."

III. STATE'S DISCRETION

The United States Constitution delegates administration of the criminal justice system largely to the individual states. As mentioned above, a state's procedures do not violate the Due Process Clause merely because other methods or procedures might be more fair or provide a

April 20, 1994 — Court of Criminal Appeals enters order vacating civil court injunction, but opens new door for post conviction habeas corpus relief where a claim of actual innocence is based on newly discovered evidence.


24. *Ex parte Graham*, 853 S.W.2d at 566.


26. "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any way disenfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19; TEX. CRIM. PROC. CODE ANN. § 1.04 (Vernon 1977).


32. *Id.*

"surer promise of protection to the prisoner at the bar."34 States are given discretion in formulating their own criminal procedures and safeguards.35 The Constitution does not even require that states provide an appeals process "however grave the offence of which the accused is convicted."36 Prisoners also have no constitutional right to collateral attack or habeas corpus review.37 In fact, habeas corpus is a purely civil remedy, rather than an integral part of the criminal justice process.38 The Supreme Court held this rule applicable even to capital cases.39 States have in their discretion, however, historically provided two avenues for review of state criminal proceedings; direct appeal and habeas corpus.40

A. Direct Appeals

All states now provide some method of appeal from criminal convictions.41 A direct appeal attacks errors of law that are apparent from the record. Errors of fact are not open to review.42 While the Constitution does not guarantee a defendant the right to appeal,43 when a state does decide to provide such an avenue, the Constitution provides equal protection44 and due process guarantees.45 Moreover, once the state establishes the process, the courts cannot diminish it.46 In addition to the establishment of an appeals process, most states provide that the courts must inform a defendant of his right to appeal at the time of sentencing.47

34. Rochin, 342 U.S. at 168.
35. Id.
36. McKane v. Durston, 153 U.S. 684, 687 (1894); see also Andrews v. Swartz, 156 U.S. 272, 274-75 (1895). Due process "does not require the state to adopt a particular form of procedure, so long as it appears that the accused has had . . . an adequate opportunity to defend himself in the prosecution." Rogers v. Peck, 199 U.S. 425, 435 (1905).
40. Finley, 481 U.S. at 556-57.
42. 4 TEX. JUR. 3d Appellate Review § 2 (1980).
44. See, e.g., Griffin, 351 U.S. at 12 (holding that indigent defendants were entitled to a free trial transcript); Douglas v. California, 372 U.S. 353, 356 (1963) (holding that an indigent defendant was entitled to an appeal decision in which the "appellate court passes on the merits of his case only after having the full benefit of written briefs and oral argument by counsel").
45. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 724 (1969) (holding that a defendant's "exercise of a right of appeal" must be "free and unfettered").
46. 4 TEX. JUR. 3d Appellate Review § 3 (1980).
47. See, e.g., Fed. R. Crim. P. 32(a)(2):
After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.
The right to appeal is not synonymous with the right of the defendant to obtain review of every issue. First, the appellate courts will not consider objections that were not properly presented at trial and, therefore, not ruled on by the trial judge. Second, appellate courts will not review questions of fact at all. Finally, appellate courts will not consider a "harmless error" that did not prejudice the defendant, even if it was properly raised and perfected. The policy behind this rule is that “[a] defendant is entitled to a fair trial but not a perfect one.”

B. Habeas Corpus

In addition to direct appeal, the Texas Constitution provides that prisoners have a right to habeas corpus and that this right may not be suspended. The federal courts can assume jurisdiction if the prisoner has been denied a constitutional right and a federal court may discharge from custody any person restrained by state courts in violation of the United States Constitution. Today, after much expansion, proper grounds for habeas corpus review include jurisdictional defects and denials of fundamental constitutional rights. Title 28 of the United States Code, section 2255, provides that habeas corpus relief is available when: “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack . . . .” In other words, habeas corpus is appropriate only if the defendant has been denied the “substance of a fair trial.” To avoid federal fact-finding in state cases then, the state must merely ensure that its fact-finding procedures are adequate.

The United States Code provides that the state court’s findings of fact are presumed correct unless the defendant can show that an exception applies. The exceptions include showing that a “factfinding procedure employed by the State court was not adequate to afford a full and fair hearing, . . . the applicant did not receive a full, fair, and adequate hearing in the State court proceeding, . . . [or] the applicant was otherwise denied due process of law in the State court proceeding.” In other words, the

49. 4 TEX. JUR. 3d Appellate Review § 2 (1980).
50. FED. R. CRIM. P. 52(a) defines harmless error as “any error, defect, irregularity or variance which does not affect substantial rights.”
52. “The writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual.” TEX. CONST. art. I, § 12; see also TEX. CRIM. PROC. CODE ANN. § 1.08 (Vernon 1977).
59. Id.
defendant must point to a specific constitutional right that was abridged or a particular unfairness concerning the trial that would imply that his due process rights were denied. Habeas corpus review focuses on the legality of the proceedings, not the merits of the case. The relevant inquiry is "whether the totality of state process assures us of a reasoned probability that justice is done, rather than whether in some ultimate sense the truth was in fact found."

In his case, however, Gary Graham is not pointing to a particular constitutional violation, but instead he is claiming that he is "actually innocent" of the crime for which he was convicted. Habeas corpus gives federal courts the power only to question the state court's procedure, not to question the jury's determination of the facts. The court does not judge the defendant's guilt or innocence, but rather the legality of his detention. New evidence, even when purporting to prove "actual innocence," is not a valid ground for collateral attack either in Texas courts or federal courts, because the trial court is more familiar with all the circumstances of the trial and is therefore a more appropriate place to make determinations of fact. Even though newly discovered evidence is never grounds for habeas corpus relief, under some circumstances it can be grounds for a new trial.

C. Motion for New Trial

A motion for a new trial is appropriate in some cases of newly discovered evidence, but it is not the appropriate remedy for Gary Graham. Both Texas courts and federal courts have the authority to grant a new trial on the basis of newly discovered evidence. In order for new evidence to constitute grounds for a new trial, however, the defendant must prove:

1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is

61. Ex parte Binder, 660 S.W.2d 103, 104-05 (Tex. Crim. App. 1988) (citing Shaver v. Ellis, 255 F.2d 509, 511 (5th Cir. 1958)). The court can, however, provide habeas corpus relief based on the merits in a case in which the record is "totally devoid" of evidence of the defendant's guilt. See generally Thompson v. City of Louisville, 362 U.S. 199 (1960).
64. Ex parte Binder, 660 S.W.2d at 106.
65. Id.
67. Howell, 172 F.2d at 216; see also Herrera, 113 S. Ct. at 869 (holding that "in state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant").
In 1946, the United States Supreme Court approved and adopted this standard, as articulated by the Georgia Supreme Court. As the facts of the Graham case show, Graham did not meet the qualifications for the granting of a new trial. Graham could have brought out the evidence at the trial and the evidence was not so material that it probably would have produced a different result. Graham proffered an alibi supported only by two of Graham's cousins and a woman now married to Graham. Graham could not reasonably claim that this evidence came to his knowledge after the trial.

Even if Graham did meet the substantive qualifications for a new trial based on discovery of new evidence, there is also a time limit for filing such motions. Under Texas law, motions for new trial must be filed within thirty days of sentencing, in part because of the strong policy against re-trying cases several years after the first trial. Consequently, even if Graham could meet the new evidence requirements, his motion would not be considered due to its untimeliness. Graham was originally convicted in 1981, five years before the witnesses brought forth the "new evidence." Nevertheless, the Supreme Court has examined the history of motions for new trial and the current federal and state rules, and has determined that the availability of a new trial several years after conviction is not a part of fundamental fairness, and thus, not required by due process.

IV. THE SUPREME COURT'S VIEW: HERRERA V. COLLINS

The Supreme Court heard Herrera V. Collins as a case of first impression. For the first time, the Court addressed the question of whether or not, in the absence of a constitutional violation, a defendant's claim of actual innocence could serve as grounds for federal habeas corpus or some other form of judicial remedy. The Court held that the above described procedures, already in place, satisfied the defendant's due process rights. The Court went on to state that the judicial system is not
required to take “every conceivable step” to ensure the guilt of the defendant before execution.\textsuperscript{84}

A. FACTS OF CASE

The facts of Herrera’s case are similar to those of Gary Graham. The body of a Texas Department of Public Safety Officer, David Rucker, was found on the highway near Los Fresnos, Texas, in September 1981. Officer Rucker had been shot in the head and left by the side of his patrol car. Another officer, Enrique Carrisalez (accompanied by Enrique Hernandez) was in the area and noticed a speeding vehicle traveling away from the area where Rucker lay dead. Officer Carrisalez turned on his lights and pulled the car over, pulling up beside the vehicle. As Carrisalez walked toward the car, the driver opened his door and, after exchanging a few words with the officer, shot the officer in the chest. Carrisalez died nine days later, but not before identifying Herrera as his assailant. Hernandez, the passenger in the patrol car, also identified Herrera.

Police arrested Leonel Torres Herrera and charged him with the capital murders of Rucker and Carrisalez. At the trial for the murder of officer Carrisalez, the prosecution presented eye-witness identifications by Carrisalez and Hernandez. The prosecution also proffered evidence that the car involved in the Carrisalez shooting was registered to Herrera’s live-in girlfriend; that Herrera had the keys to the car in his pocket at the time of arrest; that Herrera’s Social Security card was found beside Rucker’s patrol car on the night of the shootings; and that type A blood samples (the same type as Officer Rucker) and strands of Rucker’s hair were found in the car, on Herrera’s jeans, and in his wallet. In addition, the prosecution offered a hand-written letter that strongly implied Herrera’s guilt, which was found on his person at the time of his arrest.

B. PROCEDURAL HISTORY

In January 1982, a jury found Herrera guilty of the capital murder of Officer Carrisalez and sentenced him to death.\textsuperscript{85} Herrera appealed on the grounds that the eye-witness identifications by Hernandez and Carrisalez were unreliable and should not have been admitted. The Texas Court of Criminal Appeals affirmed Herrera’s conviction,\textsuperscript{86} and the Supreme Court denied certiorari.\textsuperscript{87}

Herrera then began to go through the collateral appeals process, still challenging the eye-witness identifications. The State denied his application for state habeas corpus relief. The federal courts also denied his habeas corpus petition, and the Supreme Court denied certiorari.

\textsuperscript{84} Id.
\textsuperscript{85} Later, in July 1982, Herrera pled guilty to the capital murder of Officer Rucker.
\textsuperscript{87} Herrera v. Texas, 471 U.S. 1131 (1985).
Herrera then returned to the state courts and filed a second state habeas corpus petition, arguing that he was "actually innocent" and had newly discovered evidence. Herrera presented two affidavits in support of his innocence; one from Hector Villarreal, an attorney of Herrera's brother, Raul Herrera, Sr., and one from Juan Franco Palacious, a former cellmate of Raul Herrera, Sr. Both men claimed that Raul Herrera, Sr., who died in 1984, confessed to them that he had killed both Carrisalez and Rucker. The district court denied this petition also. The Texas Court of Criminal Appeals affirmed and the United States Supreme Court again denied certiorari.

In February 1992, Herrera filed his second habeas petition in federal court, again arguing that he was "actually innocent" and that his execution would therefore violate the Eighth Amendment ban on cruel and unusual punishment and the Fourteenth Amendment guarantee of due process. In support of this claim, Herrera offered the above-mentioned affidavits and additional affidavits from Raul Herrera, Jr. (Raul Herrera, Sr.'s son) and Jose Ybarra, Jr. Raul Jr., who was nine years old at the time of the shootings, claimed that he witnessed his father shoot both officers and that Herrera was not present at either time. Ybarra, a family friend of the Herreras, stated that Raul Sr. confessed to him in 1983 that he had shot the two officers.

The district court granted a stay of execution so that Herrera could present his claim of actual innocence to the state court. The court of appeals then vacated the stay on the ground that a claim of actual innocence, even when supported by newly discovered evidence, is not appropriate grounds for federal habeas corpus relief. The United States Supreme Court granted certiorari and the Texas Court of Criminal Appeals stayed Herrera's execution pending resolution of the case.

C. Herrera's Argument

Herrera argued that the newly presented evidence was sufficient to show his innocence and should therefore entitle him to habeas corpus relief. He maintained that the execution of an innocent person would violate the Eighth and Fourteenth Amendments and, because there was no available post-conviction procedure for raising a claim of actual innocence, federal courts were required to provide habeas review. Herrera stressed that he had no existing avenue available to pursue these claims because he had missed the deadline for a motion for new trial and discovery of new evidence is not grounds for state habeas corpus relief. Herrera argued that due process consequently demands that the federal

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88. U.S. CONST. amend. VIII; see also TEX. CONST. art. I, § 13. The Court dismissed Herrera's Eighth Amendment claim because he was objecting to the determination of guilt, not to the method of punishment. Herrera, 113 S. Ct. at 863. The dissent, however, did not find this a valid distinction. Id. at 877 (Blackmun, J., dissenting).
89. Herrera, 113 S. Ct. at 859; see also supra notes 52-68 and accompanying text.
90. See supra notes 76-80 and accompanying text.
91. See supra notes 52-68 and accompanying text.
courts step in to guard a defendant’s constitutional rights, especially in a capital case.

D. Court’s Holding

Herrera’s motion was denied, but the Supreme Court fell short of answering the most controversial issue in the case; whether or not the Constitution requires habeas relief where a defendant has made a “truly persuasive demonstration” of his innocence. The Court reached its decision by assuming, for the sake of argument, that such a showing would entitle the defendant to federal relief if there were no available state remedy, but held that Herrera had failed to make this threshold showing. The Court did not define this threshold, merely stating that it would be “extraordinarily high” and that Herrera’s affidavits and contradicting trial testimony, especially coming ten years after the defendant’s conviction, “fail[] far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, arguendo, to exist.” With this, the Court suggested that the Constitution might require some form of substantive federal review of the defendant’s innocence given different facts. The opinion has left the states “uncertain of their constitutional obligations.”

92. See Hawk v. Olson, 326 U.S. 271, 276 (1945) (citing White v. Ragen, 324 U.S. 760, 764 (1945)).
93. See California v. Ramos, 463 U.S. 992, 998-99 (1983) (recognizing that there is a qualitative difference between the death penalty and all other forms of punishment, and that this difference demands a correspondingly greater degree of federal scrutiny); see also Ford v. Wainwright, 477 U.S. 399, 411 (1986); Gardner v. Florida, 430 U.S. 349, 357-58 (1977).
94. Herrera, 113 S. Ct. at 869. The Court held that resolving the issue of whether a truly persuasive showing of innocence would entitle the defendant to habeas corpus relief was “neither necessary nor advisable in this case.” Id. at 871.
95. Id. Justice Scalia, however, would not agree that such a right exists and claimed that the dissent, in arguing such a right does exist, relied on “nothing but their personal opinions to invalidate the rules of more than two thirds of the States, and a Federal Rule of Criminal Procedure.” Id. at 875 (Scalia, J., concurring).
96. Id. at 869.
97. Id. at 870 (italics omitted). The Court found Herrera’s new evidence unconvincing for several reasons. First, the affidavits were obtained without cross-examination or evidence of demeanor and credibility. Second, all the affidavits, except that of Raul Herrera, Jr., contained only hearsay. Third, Herrera provided the Court with no satisfactory explanation as to why the evidence was not presented at trial, but rather, after the alleged perpetrator of the murder was dead. Id. at 869. The Court also wrote that Herrera’s claim for relief must be looked at “in the light of the previous proceedings . . . which have stretched over a span of 10 years.” Id. at 859.
98. Hoffman, supra note 82, at 833. In fact, Justice O’Connor suggested that if the state constitutional procedures and the executive pardon and clemency procedures work as they should, the question may never have to be resolved. Herrera, 113 S. Ct. at 874 (O’Connor, J., concurring).
V. EX PARTE GRAHAM \(^{100}\) — ROUND ONE

Gary Graham's case again brought to the forefront the question of what due process requires when a defendant makes a claim of "actual innocence" after he has exhausted the existing collateral appeals system. The facts of Graham's case are very similar to those that confronted the Supreme Court in Herrera. \(^{101}\) On May 17, 1981, a 53-year-old man stopped at a grocery store in north Houston. He picked up a few items and paid with a $100 bill. A young black man, later identified as Graham, followed him out of the store and attempted to rob him. Unfortunately, the assailant shot and killed Bobby Lambert in the struggle that followed. A jury convicted Gary Graham of the murder and sentenced him to death. Although Graham plead guilty to ten similar robberies, including two in which the victims were shot, he maintained that he was innocent of the crime for which he was sentenced to death. To support this claim, three alibi witnesses (two cousins and Graham's present wife) came forward to testify that Graham was with them on the night of the murder. These witnesses did not testify in the 1981 trial and made no attempt to come forward until 1986, when they gave "confused and contradictory testimony" to a district court judge who found them not to be credible. \(^{102}\) Graham has exhausted the judicial process in his case, \(^{103}\) yet he attempted to obtain a post-conviction hearing to consider his claims of actual innocence in light of the new evidence. \(^{104}\) The Texas Court of Criminal Appeals refused to consider Graham's claims of actual innocence in the habeas corpus setting. \(^{105}\) The concurrences, however, expressed serious doubt as to the constitutional validity of that ruling because of the undefined threshold standard articulated in Herrera v. Collins. \(^{106}\) Judge Maloney of the Texas Court of Criminal Appeals proposed that the standard should be "whether the newly discovered evidence, if true, would create a doubt as to the efficacy of the verdict to the extent that it undermines our confidence in the verdict and that it is probable that the verdict would be different." \(^{107}\) Maloney also suggested that, for several reasons, Graham had succeeded in meeting the standard that Herrera was unable to meet. \(^{108}\) First, the affidavits in Graham's case attested to Graham's whereabouts on the night of the murder. Unlike the affidavits in Herrera's case, they do not rely on hearsay. \(^{109}\) Second, Judge Maloney claimed that the affidavits in Graham's case were not in-

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\(^{100}\) 853 S.W.2d 565 (Tex. Crim. App. 1993).

\(^{101}\) See supra sections IV.A., B.


\(^{103}\) State ex rel. Holmes v. Third Court of Appeals, 860 S.W.2d 873 (Tex. Crim. App. 1993).

\(^{104}\) Id.

\(^{105}\) Ex parte Graham, 853 S.W.2d at 566.

\(^{106}\) Supra note 98 and accompanying text.

\(^{107}\) Ex parte Graham, 853 S.W.2d at 567 (Maloney, J., concurring and dissenting).

\(^{108}\) Id. at 569.

\(^{109}\) Id.
consistent with each other.\textsuperscript{110} Third, Maloney asserted that, unlike Herrera, Graham had a legitimate excuse for not presenting these witnesses at trial; his attorney did not contact them.\textsuperscript{111} Fourth, in addition to the affidavits attesting to Graham's alibi, also presented were several eye witnesses to the crime who were prepared to testify that Graham was not the assailant.\textsuperscript{112} Fifth, unlike in Herrera's case, there was no physical evidence linking Graham to the crime scene, such that the alibi evidence would carry more weight.\textsuperscript{113} Finally, Graham neither confessed to this crime nor made any incriminating statements.\textsuperscript{114} Maloney, in her concurrence and dissent, maintained that the strength of this evidence, taken together and examined in light of the State's evidence at trial, met the requisite threshold that Herrera failed to meet. Consequently, Maloney argued that Graham should be granted a hearing to determine the credibility of this new evidence and possibly granted a new trial.\textsuperscript{115} The majority, however, did not agree that Graham met the threshold and denied relief on the question of actual innocence.\textsuperscript{116}

VI. GRAHAM V. TEXAS BOARD OF PARDONS AND PAROLES\textsuperscript{117} — ROUND TWO

A. IS THE CLEMENCY SYSTEM ADEQUATE?

Much of the courts' previous willingness to cut off habeas corpus review as an avenue for introducing allegedly exonerating evidence has been based on the availability of the clemency system as a "fail safe." The clemency system occupies an important position in our criminal justice system.\textsuperscript{118} When there is actually a substantial doubt as to a defendant's guilt, but the appellate and collateral proceedings do not supply relief, society is able to rely on the "extrajudicial remedy of clemency [to] ensure that the offender is not punished unfairly."\textsuperscript{119} Executive clemency has always been the traditional avenue for relief in cases where evidence of innocence is discovered too late to file a motion for new trial.\textsuperscript{120} Gra-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Id. The legitimacy of this excuse, however, is questionable considering the fact that the Court of Criminal Appeals refused to grant relief on the ground of ineffective assistance of counsel. \textit{Ex parte Graham}, 853 S.W.2d at 565.
\item \textsuperscript{112} \textit{Ex parte Graham}, 853 S.W.2d at 569 (Maloney, J., concurring and dissenting).
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id. at 566. The Court did stay Graham's execution pending the outcome of Johnson v. Texas, which was at the United States Supreme Court on the issue of whether or not the jury instructions allowed the jury to adequately consider Johnson's youth as a mitigating factor in sentencing. Johnson v. Texas, 113 S. Ct. 2658, 2669 (1993).
\item \textsuperscript{117} Cited and discussed in State \textit{ex rel.} Holmes v. Third Court of Appeals, 860 S.W.2d 873 (Tex. Crim. App. 1993).
\item \textsuperscript{118} Daniel T. Kobil, \textit{The Quality of Mercy Strained: Wrestling the Pardoning Power from the King}, 69 Tex. L. Rev. 569, 639 (1991).
\item \textsuperscript{119} Id. at 625.
\item \textsuperscript{120} Herrera v. Collins, 113 S. Ct. 853, 869 (1993).
\end{itemize}
\end{footnotesize}
ham, however, has also claimed that the current clemency procedures violate due process.

On July 21, 1993, Graham filed a petition for declaratory, injunctive, and mandamus relief on the grounds that the Texas Board of Pardons and Paroles violated his due process rights by denying him a "full-blown, trial-like hearing on his application for executive clemency." The district court temporarily enjoined Graham’s execution until the Board granted the requested hearing. The Board, however, did not hold the requested hearing and Graham’s execution was not rescheduled. Instead, the Board filed for appeal, which automatically suspended the court-imposed injunction. On August 13, 1993, pursuant to a motion by Graham, the court of appeals issued another injunction preventing Graham’s execution until final disposition of the appeal so that Texas courts could confront the issue of whether the due process clause requires the executive to provide a prisoner with a due course of law hearing before denying clemency.

B. History of Clemency

The practice of executive clemency relief is derived from the English common-law, and is now available in all fifty states and in every nation with the exception of China. In the United States, the President has the power under the Constitution to grant reprieves and pardons. The governor in each state also has clemency power. Under the clemency system, the executive can either pardon the defendant—that is, declare him innocent, release him from prison, and clear his record—or commute the death sentence to a lesser sentence. Clemency is a more appropriate remedy for claims of actual innocence than additional judicial procedures for several reasons. "Clemency has long been considered an extraordinary remedy that can be extended for virtually any reason...." Clemency is appropriate in these types of cases because the clemency system allows the executive to take into account extraordinary circumstances in individual cases and is an avenue relatively free of technical restrictions.

121. Graham v. Texas Bd. of Pardons and Paroles (cited and discussed in State ex rel Holmes v. Third Court of Appeals, 860 S.W.2d 873, 879 (Tex. Crim. App. 1993) (Campbell, J., dissenting)).
123. Kobil, supra note 118, at 575.
124. U.S. CONST. art. II, § 2, cl. 1. "The President... shall have Power to grant Reprieves and Pardons for offences against the United States, except in Cases of Impeachment." Id.
125. See, e.g., 37 TEX. ADMIN. CODE § 143 (West 1994). The power of governors to grant reprieves is a state power, not one granted or controlled by the Federal Constitution. Rogers v. Peck, 199 U.S. 425, 435 (1905) (citing Lambert v. Barrett, 159 U.S. 660, 663 (1895)).
126. Kobil, supra note 118, at 576-77.
128. Kobil, supra note 118, at 578.
Courts have long recognized the value of this extrajudicial remedy. In a case similar to both *Herrera* and *Graham*, the defendant sought to introduce newly discovered evidence in a collateral appeal and the court held that Texas law provided the defendant with no judicial remedy. Similarly, the Texas Court of Criminal Appeals refused to grant another criminal defendant habeas corpus relief based on newly discovered evidence, but rather, suggested that the defendant “pursue any remedies the state executive branch ha[d] to offer.”

C. PROBLEMS WITH THE CLEMENCY SYSTEM

Critics of the clemency system suggest, however, that for several reasons, the system is not an adequate safeguard of offenders' constitutional rights. First, some argue that because the clemency system lacks the control of formalized procedures, it cannot be an adequate relief mechanism. Commentator Paul Bator, for example, argues that federal habeas corpus proceedings were designed specifically to be a federal remedy for an inadequate state pardons system. Justice Blackmun wrote in *Herrera* that “one thing is certain: The possibility of executive clemency is not sufficient to satisfy the requirements of the . . . Fourteenth Amendment[ ].”

Second, the effectiveness and reliability of executive clemency can be diminished, in practice, by political pressures and other factors. Governors have been removed from office or have had their political careers cut short because of their use of clemency power in unpopular cases. A third argument against relying on clemency as a fail-safe remedy is that, by definition, clemency is an “act of grace,” and the vindication of a constitutional right should not be made to turn on an act of grace or on the unreviewable whim of the executive. The Supreme Court held long ago that a legal right ceases to have meaning if the laws furnish no remedy when that right is violated.

D. GRAHAM'S CLAIM

Graham claims that, for these and other reasons, the current clemency process is not an adequate procedural vehicle for actual innocence claims. He points to the inadequacy of Texas procedures specifically. The Texas

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130. Shaver v. Ellis, 255 F.2d 509, 511 (5th Cir. 1958).
132. *Ex parte* Graham, 853 S.W.2d 565, 568 (Tex. Crim. App. 1993) (Maloney, J., concurring and dissenting). “The very purpose of a Bill of Rights [is] to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *Id.* (quoting West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).
136. *Id.* at 607.
137. *Ex parte Graham*, 853 S.W.2d at 568 (Maloney, J., concurring and dissenting).
138. *Id.* (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).
Constitution authorizes the governor to grant clemency and pardons. The Texas Administrative Code provides further guidance as to the procedures involved in obtaining a grant of clemency or pardon based on actual innocence. Section 143.2 provides that the Board will only consider applications for clemency based on innocence of the offense if provided with:

1. a written unanimous recommendation of the current trial officials of the court of conviction; and/or
2. a certified order or judgment of a court having jurisdiction accompanied by certified copy of the findings of fact (if any); and
3. affidavits of witnesses upon which the finding of innocence is based.

Section 143.6 further provides that while an inmate is in prison, a pardon will not be considered unless “exceptional circumstances exist.” Graham argues that the language of the statute implies the need for a hearing on the offender’s innocence claim in which the prisoner could provide the required documents. The Third Court of Appeals enjoined Graham’s execution pending resolution of the appeal.

The United States Supreme Court has refused to hold that a defendant has any “right” to executive clemency. The Court held in Connecticut Board of Pardons v. Dumschat that “the mere existence of a power to commute a lawfully imposed sentence, and the granting of commutations to many petitioners, create no right or ‘entitlement.’ A state cannot be required to explain its reasons for a decision when [the state] is not required to act on prescribed grounds.” In that case, the prisoner, Dumschat, was convicted of murder and sentenced to life imprisonment. The Connecticut Board of Pardons has the power to commute life sentences and thereby accelerate the date at which the prisoner will be eligible for parole. The Board gives favorable treatment to approximately seventy-five percent of prisoners with life sentences. The Board rejected Dumschat’s repeated applications for a commutation without explanation. Dumschat then filed suit against the Board under 42 U.S.C. § 1983, claiming that the Board violated his due process rights by denying his

139. TEX. CONST. art. IV, § 11(b).
140. 37 TEX. ADMIN. CODE § 143.2 (West 1994).
141. Id. § 143.6.
143. The Texas Court of Criminal Appeals, however, vacated that injunction, holding that the civil court had no jurisdiction to stay a scheduled execution and circumvent the decision of the Court of Criminal Appeals. State ex rel. Holmes, 1994 Tex. Crim. App. LEXIS 52, at *20.
145. Id. at 467.
146. Dumschat was convicted in 1964 and would have become eligible for parole in December 1983. An inmate with a life sentence in Connecticut must serve at least 25 years, less a maximum of 5 years’ good-time credits, unless the Board of Pardons commutes the sentence. Id. at 460 n.1 (citing CONN. GEN. STAT. § 54-125 (1981)).
applications without providing him with a written statement detailing the reasons for the denial.

The district court held "(a) that Dumschat had a constitutionally protected liberty entitlement in the pardon process, and (b) that his due process rights had been violated when the Board of Pardons failed to give 'a written statement of reasons and facts relied on' in denying commutation."\(^{147}\) Moreover, the court held that all state prisoners with life sentences have the "constitutionally protected expectancy of commutation and therefore that they have a right to a statement of reasons when commutation is not granted."\(^{148}\) The court of appeals affirmed\(^{149}\) and held that a brief statement of reasons for a denial is "not only constitutionally sufficient but also constitutionally necessary."\(^{150}\) The Supreme Court reversed on the grounds that Dumschat had no entitlement to the pardon, and therefore, the state was not required to explain its reasons for denial.\(^{151}\) The Court held that, given the fact that there was no underlying right to a pardon, the due process protection was never triggered.\(^{152}\) The Court supported this proposition by quoting a previous Supreme Court decision:

> There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right . . . \(^{153}\)

The fact that the Board has been generous in commuting life sentences does not convert the expectation of commutation from a mere hope into a constitutionally protected right.\(^{154}\)

Relying on this reasoning, the Texas Supreme Court should deny Gary Graham's petition for a judicially imposed hearing on his clemency application. If prisoners such as Graham do not have a constitutionally protected interest in executive leniency, then they are not entitled to due process with regard to that leniency. The decisionmaker is given discre-

\(^{147}\) Id. at 461 (citing Connecticut Bd. of Pardons v. Dumschat, 432 F. Supp. 1310, 1315 (D. Conn. 1977)).

\(^{148}\) Id. at 462.

\(^{149}\) Dumschat v. Board of Pardons, 593 F.2d 165, 166 (2d Cir. 1979). The Supreme Court remanded the case back to the court for reconsideration in light of the Supreme Court's decision in Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979). The court of appeals affirmed its previous decision and stated that Connecticut's pardon system "offers only the 'mere hope' of pardon; it does not create a legitimate expectation of freedom and therefore does not implicate due process," but went on to hold that "[t]he overwhelming likelihood that Connecticut life inmates will be pardoned and released before they complete their minimum terms gives them a constitutionally protected liberty interest in pardon proceedings." Dumschat, 452 U.S. at 462-63 (quoting Dumschat v. Board of Pardons, 618 F.2d 216, 219-20 (2d Cir. 1980)).

\(^{150}\) Dumschat, 452 U.S. at 462 (quoting 618 F.2d at 222).

\(^{151}\) Id. at 467.

\(^{152}\) Id. at 464.

\(^{153}\) Id. (quoting Greenholtz, 442 U.S. at 7).

\(^{154}\) Id.
tion to deny the relief "for any constitutionally permissible reason or for no reason at all."155

VII. STATE EX REL. HOLMES V. HONORABLE COURT OF APPEALS FOR THE THIRD DISTRICT156 — ROUND THREE

The Texas Court of Appeals has not yet ruled on Graham's request for a hearing on his clemency application. The court did, however, grant an injunction precluding the state from executing Graham pending the outcome of the appeal. John Holmes, the Harris County District Attorney, and the Texas Board of Pardons and Paroles consequently sought a writ of mandamus from the Texas Court of Criminal Appeals ordering the civil court of appeals to withdraw its injunction on the grounds that the civil court had no jurisdiction to circumvent decisions of the court of criminal appeals. The Texas Court of Criminal Appeals agreed and vacated the injunction.157 The court went on, in a purely advisory fashion,158 to overrule Ex parte Binder159 and declare habeas corpus an appropriate avenue to assert a claim of actual innocence.160 The court then adopted the standard proposed by Judge Maloney in her dissent in Ex parte Graham,161 holding that if a prisoner can show that the new evidence, if true, would "create a doubt as to the efficacy of the verdict to the extent that it undermines our confidence in the verdict and that it is probable that the verdict would be different," the prisoner must be afforded an opportunity to present that evidence to the habeas court.162 Once the prisoner meets this standard, he has the burden to prove that "based on proffered newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt."163

155. Id. at 467 (Brennan, J., concurring) (citing Meachum v. Fano, 427 U.S. 215, 228 (1976)).
157. State ex rel. Holmes, Tex. Crim. App. LEXIS 52, at *19-22. The majority wrote: If it be the law in Texas that every district judge must be satisfied before a death sentence may be carried out, and any district judge may prevent the execution of such a sentence upon grounds which this Court has rejected, then this Court is not a court of last resort in criminal matters in this state. Id. at *19-20 (citing Wilson v. Briggs, 351 S.W.2d 892, 896 (Tex. Crim. App. 1961)).
158. Id. at *95 (Clinton, J., dissenting). The majority's dicta concerning claims of actual innocence is "wholly unnecessary to disposition of the applications for writ of mandamus and prohibition. In this respect, the majority opinion is baldly, unabashedly advisory." Id.
159. 660 S.W.2d 103 (Tex. Crim. App. 1983); see supra notes 61-64 and accompanying text.
161. See supra notes 107-16 and accompanying text.
163. Id. at *32 (citing Jackson v. Virginia, 443 U.S. 307, 324 (1979) (internal quotations omitted)). Judge Clinton, however, argued that, by choosing this impossibly high standard, the majority had negated their attempts to provide death row inmates an avenue for relief. "This is so because any evidence sufficient to support a jury's verdict beyond a reasonable doubt at trial will also be sufficient to support a rational jury's guilty verdict even after
This opinion of the Texas Court of Criminal Appeals is way off the mark. Allowing this new ground for habeas review opens the flood gates and gives every convicted felon the opportunity to relitigate his innocence.\textsuperscript{164}

VIII. ACTUAL INNOCENCE — THE FINAL ROUND?

It is hard to predict where the courts will go after the latest decision from the Texas Court of Criminal Appeals. A defendant's claim of "actual innocence" seems to throw courts into a tailspin, but they must be sure to balance the defendant's right to have new evidence admitted against the public's interests in the integrity of the adversary process and in the fair and efficient administration of justice.\textsuperscript{165}

A. ACTUAL INNOCENCE AS A GATEWAY

Exactly where this balance will be drawn is unclear. The courts seem to be moving more and more toward a substantive, rather than a procedural view of due process, and it seems likely that habeas relief in the future will become contingent, to a greater extent, on the merits of a prisoner's case.\textsuperscript{166} Even before Texas hinted that a claim of innocence may be an independent ground for habeas corpus relief, the courts had taken the position that some of the procedural restrictions on habeas relief could be avoided if the prisoner could provide evidence of "actual innocence," thereby making the claim a "gateway" through which a petitioner could have his constitutional claims heard.\textsuperscript{167}

The United States Supreme Court dealt with this issue in \textit{McCleskey v. Zant.}\textsuperscript{168} Warren McCleskey was convicted and sentenced to death in 1978 for the murder of an off-duty policeman who entered a Georgia furniture store in the middle of an armed robbery. McCleskey then spent the next ten years attacking his conviction with both direct and collateral appeals. The Supreme Court, in 1991, denied McCleskey's most recent application for federal habeas corpus relief on the grounds of abuse of writ.\textsuperscript{169}

The Court held, however, that if the petitioner could show that denial of his petition would result in a fundamental miscarriage of justice, he might be excused from the penalties of abuse of writ.\textsuperscript{170} This "miscar-

\textsuperscript{164} \textit{Id.} at *98 (Clinton, J., dissenting).

\textsuperscript{165} \textit{Id.} at 819; \textit{Herrera v. Collins}, 113 S. Ct. 853, 862 (1993); \textit{see also} \textit{Murray v. Carrier}, 477 U.S. 478, 496 (1986).


\textsuperscript{167} Hoffman, supra note 82, at 820.


\textsuperscript{169} \textit{Id.} at 489.

\textsuperscript{170} \textit{Id.} at 495.
riage of justice exception" provides an additional safeguard against executing a prisoner who is actually innocent, because if the petitioner can supplement his habeas petition with a "colorable showing of factual innocence," the federal courts will be required to entertain that petition and evaluate the petitioner's constitutional claims notwithstanding the abuse of writ doctrine.  

B. Future of Substantive Review

The judiciary seems to be attempting to erect a system of "perfect death-penalty procedures that can guarantee a perfect result." This goal is unrealistic. The costs of providing additional review of the merits of a defendant's case must be weighed against the risk that our present procedures will reach an erroneous result in order to determine whether the additional procedures are necessary.

1. Risks

Obviously, our criminal justice system should not allow an innocent person to be executed when he can prove his innocence. For that reason, and because of the special nature of the death penalty, the Constitution requires a "heightened standard of reliability" in capital cases. The processes by which the states convict individuals are reliable and provide many safeguards to prevent an innocent person from being convicted. Society should be able to depend on the states to regulate these safeguards because they have an interest in accurate trial verdicts. This interest includes avoiding the public outrage that would accompany an inaccurate conviction, supporting a prisoner who should not be incarcerated, and protecting society from the dangers of erroneously released prisoners.

These interests are magnified in the case of a defendant accused of a capital crime. The states, therefore, have typically provided additional safeguards for capital cases. First, the option of sentencing a defendant to

171. Id.
172. Hoffman, supra note 82, at 818.
173. Ford v. Wainwright, 477 U.S. 399, 411 (1986) (requiring a "high regard for truth that befits a decision affecting the life or death of a human being").
176. Id.
177. Herrera, 113 S. Ct. at 860.
death is reserved for a limited number of crimes. Second, the state must give advance notice to the defendant of its intention to ask for the death penalty and the aggravating circumstances that it seeks to prove. Third, the sentence is decided in a post-verdict penalty phase in front of a jury and the defendant is represented by counsel during that proceeding. Fourth, aggravating factors must be proven by the state beyond a reasonable doubt. Fifth, consideration is given to mitigating factors. Finally, the sentence must be imposed by a unanimous decision of the jury.

In addition, the system of both direct and collateral review makes it even more unlikely that an innocent defendant will actually be put to death. The states provide for automatic state supreme court review of capital convictions. The states also give a defendant the opportunity to pursue avenues of collateral review such as habeas corpus. Finally, a defendant may appeal to the executive for clemency. Amazingly, even given the extensive procedural safeguards afforded to a criminal defendant in a capital trial and direct review, some critics have suggested that we obviously have little confidence in that system if we are willing to allow such an expenditure of resources for collateral appeal.

A 1987 study conducted by Hugo Bedau and Michael Radelet suggests that, in fact, 350 defendants have been convicted of capital or potentially capital crimes and later found to be innocent. The authors claim that this number includes only defendants who were “factually innocent” and excludes those that should have been let off on some technical ground, but in fact committed the crime. The authors blame these erroneous convictions on four types of error: police error prior to trial; prosecution error before or during the trial; witness error; and miscellaneous error.

For several reasons, this study can be misleading if the reader is not aware of the classes of defendants included in the 350 total. That number includes many cases in which the death penalty either could not have been, or was not imposed. The authors included defendants who were convicted of a non-capital form of a crime (such as murder).

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179. Id.
180. Id.
181. Id. at 147-48.
182. Id. at 148.
183. Id.
185. Markman & Cassell, supra note 178, at 148.
186. Id. at 148-50.
187. Id. at 148.
188. Friendly, supra note 17, at 145.
190. Id. at 45-46.
191. Id. at 56. The authors of the study did not specify what types of offenses they grouped in the “miscellaneous” category.
192. Id. at 32.
DEATH ROW INMATES

ants who were convicted of a capital crime but given a sentence other than the death penalty, and defendants who were convicted in states that either did not authorize the death penalty, or did not permit the death penalty for that particular crime. Only twenty-three of the cases cited ended in execution of the accused. Critics of the study argue that by expanding the study group to encompass “potentially capital crimes,” the authors have greatly overstated the threat of executing an innocent person, given that only 6.6% of the study group is even relevant to the issue of wrongful execution.

Moreover, only four of these executions have taken place since 1943, and only one since the advent of the procedural safeguards articulated after Furman v. Georgia in 1972. Stephen Markman and Paul Cassell, critics of the Bedau-Radelet study, wrote that contrary to the authors’ intentions, the study actually confirms the fact that the risk of executing an innocent person is too small to force a change in current sentencing procedures.

In addition to the enlarged group of defendants included in the study, Markman and Cassell question Bedau and Radelet’s use of the phrase “found to be innocent,” because Bedau and Radelet do not provide much authority for their findings of “innocence” other than their own personal evaluation of the record. Ultimately, Markman and Cassell conclude that absolutely no persuasive evidence exists that an innocent person has been executed in over twenty-five years. Even if this conclusion is wrong, however, that does not mean that our procedural system is faulty. As the Supreme Court recently pointed out, “[c]ourts do make mistakes.” No system of justice can guarantee that any decision will ultimately be “correct.” While society should, of course, strive to have a fair and efficient judicial system, criminal procedure should not cater to the irrational fear that somewhere, some error might be made.

193. Id. at 31-32.
194. Bedau & Rachelet, supra note 189, at 33.
195. Id. at 36.
196. Markman & Cassell, supra note 178, at 124.
197. Bedau & Radelet, supra note 189, at 72. This accounts for only 0.22% of the executions performed during that time period.
198. Markman & Cassell, supra note 178, at 24 (referring to Furman v. Georgia, 408 U.S. 238 (1972)). Since 1972, the Supreme Court has greatly limited jury discretion in deciding whether or not to impose the death penalty. States are now required to “channel the discretion” of jurors so as to minimize the risk of arbitrary decisions. Johnson v. Texas, 113 S. Ct. 2658, 2664-65 (1993). Markman and Cassell compare this to “studying traffic deaths before the adoption of traffic signals.” Markman & Cassell, supra note 178, at 72.
199. Markman & Cassell, supra note 178, at 121.
200. Id. at 126-27. While Bedau and Radelet concede that they have no “proof” that the defendants in their study are factually innocent, they abide by their conclusions and question what would constitute adequate proof. Hugo A. Bedau & Michael L. Radelet, The Myth of Infallibility: A Reply to Markman and Cassell, 41 Stan. L. Rev. 161, 164 (1988).
201. Markman & Cassell, supra note 178, at 150.
204. Id. at 453.
2. Costs

The huge costs of additional collateral proceedings are to be weighed against the very small risk of executing someone who is actually innocent. These costs fall into four areas: disrespect for the finality of judgments; problems with federalism issues; expenditure of judicial resources; and the possibility that the process will be manipulated by defendants. 205

a. Finality

States have an important interest in finality, and continual habeas corpus attacks on a judgment "strike[ ] at [the] finality" of that judgment. 206 In the interest of order and stability, findings of fact made by the trial court should not be disturbed unless there are "most extraordinary circumstances." 207 Finality in determinations of guilt is necessary and beneficial for several reasons. First, the deterrent effect of punishment is greater if others believe that the sentence is final. 208 Second, rehabilitation cannot be effective until a defendant believes that judgment is final. 209 Commentator Henry Friendly echoes this reasoning, arguing that "[u]nbounded willingness to entertain attacks on convictions must interfere with at least one aim of punishment — a realization by the convict that he is justly subject to sanction [and] that he stands in need of rehabilitation." 210 Third, the passage of time, the erosion of memories, and the dispersion of witnesses make a second fact determination less reliable than the first. 211 Moreover, the longer the delay, the less reliable any determination of an issue giving rise to the collateral attack will be. 212

These benefits of finality outweigh any illusory notion that the truth will be found if society puts forth enough effort. 213 The legal community apparently harbors a strong, but ill-founded belief that if only the procedures could be improved, the criminal justice system could achieve perfect results. 214

206. Id. at 491.
209. Id.
210. Friendly, supra note 17, at 146 (internal quotation marks omitted).
212. Friendly, supra note 17, at 147.
213. Commentator Paul Bator, while agreeing that extensive collateral review attacks the finality of judgments, questions why finality seems so important with regard to questions of guilt and innocence and yet is almost ignored with regard to constitutional violations. This disparity seems especially odd considering that constitutional questions are in large part technical and questions of guilt and innocence are so fundamental to achieving justice. Bator, supra note 62, at 509.
214. Hoffman, supra note 82, at 822.
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b. Federalism

A second cost of federal collateral review is the problem it creates concerning federalism. The federal system trusts administration of the criminal justice system to the states.\(^{215}\) "[P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government."\(^{216}\) Federal habeas corpus review of state criminal convictions therefore interferes with state powers.\(^{217}\) Federal interference is warranted only when there is an invasion of constitutionally secured, fundamental rights.\(^{218}\) The Supreme Court recognizes this and is not anxious to construe the Constitution so as to interfere with the individual states' power to administer justice.\(^{219}\) After all, the states have just as large an interest in the accuracy of convictions as the federal government and can be expected to generate equally accurate results.\(^{220}\)

c. Judicial Resources

A third cost of allowing additional collateral review of judgments is the additional burden it would place on an already over-worked judicial system. Petitions for federal habeas corpus relief began to "overwhelm" the federal docket in 1953 and the number of petitions has steadily increased ever since.\(^{221}\) These petitions strain the judicial system not only in terms of financial resources, but in terms of intellectual, moral, and political resources as well.\(^{222}\) This added strain limits the courts' capacity to resolve primary disputes.\(^{223}\) Justice Rehnquist, writing for the Court in \textit{Herrera}, maintained that "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of free-standing claims of actual innocence."\(^{224}\)

d. Potential for Abuse by Defendants

Federal courts have traditionally disfavored new claims brought in habeas corpus proceedings that could have, and should have, been brought forth earlier.\(^{225}\) This is especially true when the claims are brought forth only once execution is imminent.\(^{226}\) The present system of collateral review is already subject to much abuse and manipulation by

\(^{217}\) \textit{McCleskey}, 499 U.S. at 491.
\(^{218}\) Rogers \textit{v.} Peck, 199 U.S. 256, 260 (1905).
\(^{220}\) Reed, \textit{supra} note 175, at 1143.
\(^{221}\) Friendly, \textit{supra} note 17, at 143-44.
\(^{222}\) Bator, \textit{supra} note 62, at 451.
\(^{223}\) \textit{McCleskey}, 499 U.S. at 491.
\(^{224}\) Herrera \textit{v.} Collins, 113 S. Ct. 853, 861 (1993). Justice Blackmun countered, however, that if adopted, his standard of "probable innocence" would not turn the federal courts into "forums in which to relitigate state trials." \textit{Id.} at 883 (Blackmun, J., dissenting) (quoting from the majority opinion).
\(^{226}\) \textit{Id.}
prisoners. The Court in *Herrera* suggested that collateral attacks, like new trial motions, are often abused "as a method of delaying enforcement of just sentences."\(^{227}\) *Woodward v. Hutchins*\(^{228}\) is one example of this type of abuse. After exhausting his state remedies, Hutchins filed successive applications for federal habeas corpus, raising claims that should have been raised in his first petition. Another example is *Gomez v. United States District Court for the Northern District of California.*\(^{229}\) In that case, the Court was confronted with a fifth writ of habeas corpus, labeling the efforts an "obvious attempt at manipulation."\(^{230}\) The presumption of abuse is strengthened when a writ is supported by a defense witness who is not identified "until after the 11th hour has passed."\(^{231}\)

### 3. Balancing Test

When the substantial costs of allowing additional collateral review are weighed against the small chance that, without them, the system risks executing an innocent individual, the advisability of the extra measures seems questionable, especially in light of the fact that "even perfect procedures cannot guarantee perfect results."\(^{232}\) Additionally, a second trial, several years after the first, is not likely to produce a more reliable result because of the decreased availability and memories of the witnesses.\(^{233}\) Society is therefore faced with the possibility of incurring all the costs of these additional procedural steps with no corresponding reduction in the risk of executing an innocent person.

These additional post-conviction procedures are unattractive not only because of the high cost-to-benefit ratio associated with them, but also because other, more adequate remedies exist for a prisoner who claims to possess new evidence of his innocence.

### IX. INEFFECTIVE ASSISTANCE OF COUNSEL

Commentator Paul Bator once wrote, "if a job can be done well once, it should not be done twice."\(^{234}\) The logic of this argument is sound and suggests that before society overhauls the system of collateral review, time and money would be better spent making sure the job is done well in the first instance. In fact, "[t]he high standard for newly discovered evidence claims presupposes that all the essential elements of a presump-

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\(^{227}\) *Herrera*, 113 S. Ct. at 869 (quoting United States v. Johnson, 327 U.S. 106, 112 (1946)).


\(^{230}\) *Id.* at 1653.

\(^{231}\) Taylor v. Illinois, 484 U.S. 400, 414 (1988). *Herrera* presented affidavits supporting his innocence 10 years after his conviction, but these were fraught with inconsistencies, providing no explanation as to why certain witnesses had not come forward at the trial. *Herrera*, 113 S. Ct. at 869-70. The witnesses that gave affidavits in the *Graham* case did not come forward until five years after Graham's conviction. Curtis, *supra* note 102.

\(^{232}\) Hoffman, *supra* note 82, at 825.

\(^{233}\) *Herrera*, 113 S. Ct. at 862.

tively accurate and fair proceeding were present in the proceeding whose result is challenged." 235

In order for society to have confidence in the criminal justice system, indigent defendants must have quality representation. 236 If the evidence of innocence that the defendant seeks to have considered existed at the time of trial, yet was not introduced by counsel, the defendant may obtain direct review or habeas corpus relief on the grounds of ineffective assistance of counsel. 237 Under such review, the question is whether or not there is a "reasonable probability that, absent the errors [by counsel], the factfinder would have had reasonable doubt respecting guilt." 238 If the defendant cannot meet this relatively low standard, the evidence should not later be examined in collateral review under the pretext of being "newly discovered." Redress for ineffective assistance of counsel is simply a much more appropriate avenue in such a situation. "An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker . . . ." 239

Texas courts have overturned convictions where the defendant's attorney failed to make adequate investigations. 240 The court in Ex parte Raborn, 241 for example, vacated the defendant's conviction on the grounds of ineffective assistance of counsel. 242 Raborn's attorney did not conduct an independent investigation of the facts in the case, but instead relied solely on discussions with the prosecutor. The extent of counsel's duty to conduct pretrial investigation is difficult to measure, but should be judged in context with the information the attorney had at the time and not by what in hindsight seems reasonable. 243 Certainly, if Graham's attorney failed to interview alibi witnesses alleged by Graham to have existed at the time of trial, Graham's remedy, if any, lies in a claim of ineffective assistance of counsel rather than in collateral review of his guilt or innocence. 244

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." 245 The right to effective counsel is not only a Sixth Amendment right, but is also considered a right under Fourteenth Amendment due process and is therefore binding

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236. Huff, supra note 18, at 586.
237. Strickland, 466 U.S. at 697.
238. Id. at 695.
239. Id. at 694.
242. Id. at 605.
243. Strickland, 466 U.S. at 680.
244. Graham did raise this claim, but the Court of Criminal Appeals refused to grant relief on those grounds. Ex parte Graham, 853 S.W.2d 565, 565 (Tex. Crim. App. 1993).
245. U.S. CONST. amend. VI.
on the states. In addition to these federal guarantees, the Texas Constitution also provides for a right to be heard by counsel.

Historically, the United States Supreme Court has gradually expanded the meaning of the "right to counsel." In 1932, the Court first held that the Sixth and Fourteenth Amendments required states to provide assistance of counsel to persons charged with committing a capital crime. In 1938, the Court extended this right to defendants in all federal criminal prosecutions, whether or not the defendant was charged with a capital crime. Four years later, the Court held that in noncapital state cases, the defendant's right to counsel was to be determined on a case-by-case basis according to the particular circumstances and difficulties of the case. In Gideon v. Wainwright, the Court overruled the above reasoning and held that the right to counsel was applicable to state defendants under the Due Process Clause; therefore, states were required to provide indigent defendants with counsel in all felony cases. Finally, the Court expanded the right to counsel to include all cases in which imprisonment might be imposed.

Typically, the states have utilized two systems for providing indigent defendants with counsel for their defense: the assignment and defender systems. In an assignment system, judges select private practice attorneys to represent certain clients, either by a rotation system or at random. The problem with this system is that, while it does spread the responsibility out among the members of the bar, many private practice lawyers are inexperienced in criminal law and are therefore not accustomed to dealing with indigent clients. This combination tends to breed in the attorneys an attitude of resentment and callousness toward the defendants. In a defender system, attorneys are hired by the state or county to defend indigent clients on a continual basis. This system produces representation by attorneys with more criminal law experience and a larger collection of resources.

Regardless of the system employed, however, "[t]hat a person who happens to be a lawyer is present at trial alongside the accused . . . is not

246. Huff, supra note 18, at 588.
247. "In all criminal prosecutions the accused shall have . . . the right of being heard by himself or counsel, or both . . . ." TEX. CONST. art. I, § 10.
248. See Powell v. Alabama, 287 U.S. 45 (1932); see also Strickland, 466 U.S. at 684.
250. Hernandez, 726 S.W.2d at 72 (citing Betts v. Brady, 316 U.S. 455 (1942)).
251. Id. (citing Gideon v. Wainwright, 372 U.S. 335 (1963)); see also Strickland, 466 U.S. at 684.
254. Id.
255. Id. at 603-604.
256. Id. at 594.
257. Id. at 604. Some critics argue that in order to make representation equal for both paying and nonpaying defendants, indigent defendants must be provided with a good criminal lawyer, not merely a good lawyer. Id. at 593.
enough to satisfy the constitutional command.\textsuperscript{258} Commentator Richard Huff suggests that in order to provide equal protection for indigent clients, the appointed counsel should provide quality representation:

Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.\textsuperscript{259}

Courts have had difficulty articulating a test for determining whether or not a defendant has received effective assistance. What is fairly consistent, however, is that this standard is not high.\textsuperscript{260} The courts, when reviewing effectiveness of counsel, begin with a strong presumption that the representation was reasonable; the defendant must then prove that the representation in fact fell below some standard.\textsuperscript{261} The majority of jurisdictions require only that the defense counsel did not reduce the trial to a "sham, farce, or mockery of justice."\textsuperscript{262} Many have argued that the "mockery" or "farce" test is not sufficient to protect a defendant's constitutional rights.\textsuperscript{263} An alternate, and some argue more appropriate, test is "whether or not the accused was convicted on the merits of the case, and not by the neglect or default of his attorney."\textsuperscript{264}

The Fifth Circuit employs a slightly higher standard for judging effectiveness. The standard articulated is that the attorney must be "reasonably likely to render and rendering reasonably effective assistance."\textsuperscript{265} The court later clarified that standard and added that the representation must be "at least equal to that expected from compensated counsel of an accused's own choosing."\textsuperscript{266}

In 1984, the United States Supreme Court attempted to articulate a federal standard for determining the effectiveness of counsel based on objective reasonableness and held that the defendant must prove that his counsel's performance fell below the prevailing professional norms.\textsuperscript{267} The Court went on to say that the same standard should apply in all at-

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\textsuperscript{258} Strickland, 466 U.S. at 685. \\
\textsuperscript{259} Huff, supra note 18, at 591 (quoting Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968)). \\
\textsuperscript{260} Id. at 590. \\
\textsuperscript{261} Strickland, 466 U.S. at 690. \\
\textsuperscript{262} Huff, supra note 18, at 590; Lewis, supra note 240, at 300. \\
\textsuperscript{263} Lewis, supra note 240, at 316. \\
\textsuperscript{264} Id. at 317. \\
\textsuperscript{265} Huff, supra note 18, at 590 (quoting MacKenna v. Ellis, 280 F.2d 592, 599, modified 289 F.2d 928 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961)); Ex parte Raborn, 658 S.W.2d at 602; see also Ex parte Duffy, 607 S.W.2d 507 (Tex. Crim. App. 1980). \\
\textsuperscript{266} Huff, supra note 18, at 591 (quoting Johnson v. United States, 328 F.2d 605, 606 (5th Cir. 1964)). \\
\textsuperscript{267} Strickland, 466 U.S. at 690.
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tacks on conviction, whether by direct appeal, motion for new trial, or collateral habeas corpus proceeding.\textsuperscript{268}

In \textit{Hernandez v. Texas}\textsuperscript{269} the Texas Court of Criminal Appeals addressed the issue of whether or not the Texas Constitution requires a higher standard than that articulated in \textit{Strickland}.\textsuperscript{270} The court held that Texas courts "will follow in full the \textit{Strickland} standards."\textsuperscript{271} This standard of reasonableness, however, now adopted by the United States Supreme Court as well as Texas courts, is very vague.

In reality, courts seem to "proceed on a case by case basis, recognizing that the guidelines are too indefinite to distinguish the effective from the ineffective, the competent from the incompetent and the diligent from the indifferent."\textsuperscript{272} Courts have found that a defendant's counsel was so ineffective as to prejudice the defendant's rights in several circumstances, including when there was a lack of awareness of a basic rule of law important to the defense,\textsuperscript{273} a conflict of interest,\textsuperscript{274} a lack of pre-trial investigation and preparation,\textsuperscript{275} or a failure to pursue or enter an insanity defense.\textsuperscript{276} On the other hand, courts have found that counsel was not so ineffective as to deprive a defendant of his constitutional right to counsel merely because the attorney gave what turned out to be bad advice\textsuperscript{277} or because the attorney was inexperienced.\textsuperscript{278}

By increasing the quality of representation at the trial level, the system can hopefully avoid eleventh hour claims from defendants who allege that they possess exonerating evidence. Increasing accuracy at the trial level is an efficient safeguard for defendants' rights. There are, however, two costs to this type of remedy. First, the system must be financed and better lawyers are apt to cost taxpayers more; but this cost could be offset by a reduction in the amount of collateral review that society tolerates once it becomes more confident of the accuracy of the conviction.\textsuperscript{279} Second, extensive criticism of appointed counsel's performance and the threat of being labeled "ineffective" could seriously affect the willingness of some attorneys to serve in this capacity.\textsuperscript{280} Despite these costs, however, if the Texas courts would provide a meaningful remedy for ineffect-
tive assistance of counsel, additional procedural safeguards for claims of actual innocence would be unnecessary.

X. CONCLUSION

In its latest decision, the Texas Court of Criminal Appeals took the position that, while an otherwise constitutionally valid conviction should not be set aside lightly, a convicted felon who can meet the articulated threshold standard must be allowed to seek state habeas corpus relief on the basis of newly discovered evidence. This decision overrules precedent and gives every convicted inmate a “crowbar to open the door to a state forum in our trial courts . . . to relitigate his conviction years after he or she has already enjoyed every protection our criminal justice system extends to those individuals who were, at one time, presumptively innocent.”

This decision is inappropriate given the fact that there are better and more efficient ways to guarantee the guilt of defendants, including our clemency system and ineffective assistance of counsel claims. In fact, if the Court of Criminal Appeals believed that Graham had alibi witnesses available and his counsel did not call those witnesses, its denial of his ineffective assistance claim is hard to understand. Furthermore, the court only vacated the civil court’s injunction; the civil court apparently can continue with Graham’s appeal concerning the adequacy of the clemency process. The dissent pointed out that it “seems odd for the majority to allow that lawsuit to proceed while suggesting that Graham should raise another claim in another forum.” In the author’s view, this decision is not only odd, but also unnecessary and imprudent, having the potential to “open a crack in the prison walls through which a flood of convicts may escape.” At the very least, one more layer has been added to the seemingly endless buildup of procedural protections for death row inmates.

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282. Id. at *28-29 (overruling Ex parte Binder, 660 S.W.2d 103 (Tex. Crim. App. 1983)).
283. Id. at *48 (White, J., concurring and dissenting).
286. Id.