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

The judgment of the Court of Appeals is

Affirmed.

Justice O'Connor, with whom Justice Kennedy joins, concurring.

I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed-- contrary to contemporary standards of decency,- post, at 1 (dissenting opinion) (relying on Ford v. Wainwright, 477 U. S. 499, 406 (1986)), "shocking to the conscience," post, at 1 (relying on Rochin v. California, 342 U. S. 165, 172 (1952)), or offensive to a -`-principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,-'- ante, at 16 (opinion of the Court) (quoting Medina v. California, 505 U.S. ___, ___ (1992) (slip op. 7-8), in turn quoting Patterson v. New York, 432 U. S. 197, 202 (1977))-the execution of a legally and factually innocent person would be a constitutionally intolerable event. Dispositive to this case, however, is an equally fundamental fact: Petitioner is not innocent, in any sense of the word.

As the Court explains, ante, at 7-8, petitioner is not innocent in the eyes of the law because, in our system of justice, "the trial is the paramount event for determining the guilt or innocence of the defendant." Ante, at 25. Accord, post, at 13 (dissenting opinion). In petitioner's case, that paramount event occurred 10 years ago. He was tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants. At the conclusion of that trial, the jury found petitioner guilty beyond a reasonable doubt. Petitioner therefore does not appear before us as an innocent man
on the verge of execution. He is instead a legally guilty one who, refusing to accept the jury's verdict, demands a hearing in which to have his culpability determined once again. Ante, at 8 (opinion of the Court).

Consequently, the issue before us is not whether a State can execute the innocent. It is, as the Court notes, whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, 10 years after conviction, notwithstanding his failure to demonstrate that constitutional error infected his trial. Ante, at 16, n. 6; see ante, at 8. In most circumstances, that question would answer itself in the negative. Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent. Ante, at 7 (opinion of the Court). The question similarly would be answered in the negative today, except for the disturbing nature of the claim before us. Petitioner contends not only that the Constitution's protections -sometimes fail,- post, at 2 (dissenting opinion), but that their failure in

his case will result in his execution- even though he is factually innocent and has evidence to prove it.

Exercising restraint, the Court and Justice White assume for the sake of argument that, if a prisoner were to make an exceptionally strong showing of actual innocence, the execution could not go forward. Justice Blackmun, in contrast, would expressly so hold; he would also announce the precise burden of proof. Compare ante, at 26 (opinion of the Court) ("We 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"), and ante, at 1 (White, J., concurring in judgment) (assuming that a persuasive showing of actual innocence would render a conviction unconstitutional but explaining that, even under such an assumption, -petitioner would at the very least be required to show 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 reasonable doubt.' Jackson v. Virginia, 443 U. S. 307, 314 (1979)-), with post, at 14 (dissenting opinion) (I would hold that, to obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent). Resolving the issue is neither necessary nor advisable in this case. The question is a sensitive and, to say the least, troubling one. It implicates not just the life of a single individual, but also the State's powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations. Indeed, as the Court persuasively demonstrates, ante, at 7-26, throughout our history the federal courts have assumed that they should not and could not intervene to prevent an execution so long as the prisoner had been convicted after a constitutionally adequate trial. The prisoner's sole remedy was a pardon or clemency.

Nonetheless, the proper disposition of this case is neither difficult nor troubling. No matter what the Court might say about claims of actual innocence today, petitioner could not obtain relief. The record overwhelmingly demonstrates that petitioner deliberately shot and killed Officers Rucker and Carrisalez the night of September 29, 1981; petitioner's new evidence is bereft of credibility. Indeed, despite its stinging criticism of the Court's decision, not even the dissent expresses a belief that petitioner might possibly be actually innocent. Nor could it: The record makes it abundantly clear that petitioner is not somehow the future victim of -simple murder,- post, at 18 (dissenting opinion), but instead himself the established perpetrator of two brutal and tragic ones.

Petitioner's first victim was Texas Department of Public Safety Officer David Rucker, whose body was found lying beside his patrol car. The body's condition indicated that a struggle had taken place and that Rucker had been shot in the head at rather close range. Petitioner's Social Security card was found nearby. Shortly after Rucker's body was discovered, petitioner's second victim, Los Fresnos Police Officer Enrique Carrisalez, stopped a car speeding away from the murder scene. When Carrisalez approached, the driver shot him. Carrisalez lived long enough to identify petitioner as his assailant. Enrique Hernandez, a civilian who was riding with Carrisalez, also identified petitioner as the culprit. Moreover, at the time of the stop, Carrisalez radioed a description of the car and its license plates to the police station. The license plates corresponded to a car that petitioner was known to drive. Although the car belonged to petitioner's girlfriend, she did not have a set of keys; petitioner did. He even had a set in his pocket at the time of his arrest.

/* The opinion at this point is trying to make a virtue out of the overwhelming evidence against Herrerra. The point here being that the case is not one that should be used to determine the point. */

When the police arrested petitioner, they found more than car keys; they also found evidence of the struggle between petitioner and Officer Rucker. Human blood was spattered across the hood, the left front fender, the grill, and the interior of petitioner's car. There were spots of blood on petitioner's jeans; blood had even managed to splash into his wallet. The blood was, like Rucker's and unlike petitioner's, type A. Blood samples also matched Rucker's enzyme profile. Only 6% of the Nation's population shares both Rucker's blood type and his enzyme profile.

But the most compelling piece of evidence was entirely of petitioner's own making. When the police arrested petitioner, he had in his possession a signed letter in which he acknowledged responsibility for the murders; at the end of the letter, petitioner offered to turn himself in:

> I am terribly sorry for those [to whom] I have brought grief . . . . What happened to Rucker was for a certain reason. . . . [H]e violated some of [the] laws [of my drug business] and suffered the penalty, like the one you have for me when the time comes. . . . The other officer [Carrisalez] . . . had not[hing] to do [with] this. He was out to do what he had to do, protect, but that's life. . . . [I]f this is read word for word over the media, I will turn myself in . . . .- Ante, at 3, n. 1 (opinion of the Court).

There can be no doubt about the letter's meaning. When the police attempted to interrogate petitioner about the killings, he told them -`it was all in the letter'- and suggested that, if -they wanted to know what happened,- they should read it. Herrera v. State, 682 S. W. 2d 313, 317 (Tex. Crim. App. 1984), cert. denied, 471 U. S. 1131 (1985).

Now, 10 years after being convicted on that seemingly dispositive evidence, petitioner has collected four affidavits that he claims prove his innocence. The affidavits allege that petitioner's brother, who died six years before the affidavits were executed, was the killer- and that petitioner was not. Affidavits like these are not uncommon, especially in capital cases. They are an unfortunate although understandable occurrence. It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism.

These affidavits are no exception. They are suspect, produced as they were at the eleventh hour with no reasonable explanation for the nearly decade-long delay. See ante, at 27 (opinion of the Court). Worse, they conveniently blame a dead man- someone who will neither contest the allegations nor suffer punishment as a result of them. Moreover, they contradict each other on numerous points, including the number of people in the murderer's car and the direction it was heading when Officer Carrisalez stopped it. Ibid. They do not even agree on when Officer Rucker was killed. According to one, Rucker was killed when he and the murderer met at a highway rest stop. Brief for Petitioner 30. In contrast, another asserts that there was an

initial meeting, but that Rucker was not killed until afterward when he -pulled [the murderer's car] over- on the highway. Id., at 27. And the affidavits are inconsistent with petitioner's own admission of guilt. The affidavits blame petitioner's deceased brother for both the Rucker and Carrisalez homicides- even though petitioner pleaded guilty to murdering Rucker and contested only the Carrisalez slaying.

Most critical of all, however, the affidavits pale when compared to the proof at trial. While some bits of circumstantial evidence can be explained, petitioner offers no plausible excuse for the most damaging piece of evidence, the signed letter in which petitioner confessed and offered to turn himself in. One could hardly ask for more unimpeachable -or more unimpeached- evidence of guilt.

The conclusion seems inescapable: Petitioner is guilty. The dissent does not contend otherwise. Instead, it urges us to defer to the District Court's determination that petitioner's evidence was not -so insubstantial that it could be dismissed without any hearing at all.- Post, at 16. I do not read the District Court's decision as making any such determination. Nowhere in its opinion did the District Court question the accuracy of the jury's verdict. Nor did it pass on the sufficiency of the affidavits. The District Court did not even suggest that it wished to hold an evidentiary hearing on petitioner's actual innocence claims. Indeed, the District Court apparently believed that a hearing would be futile because the court could offer no relief in any event. As the court explained, claims of -newly discovered evidence bearing directly upon guilt or innocence- are not cognizable on habeas corpus -unless the petition implicates a constitutional violation.- App. 38.

As the dissent admits, post, at 16, the District Court had an altogether different reason for entering a stay of execution. It believed, from a "sense of fairness and due process," App. 38, that petitioner should have the chance
to present his affidavits to the state courts. Id., at 38-39; ante, at 5 (opinion of the Court). But the District Court did not hold that the state courts should hold a hearing either; it instead ordered the habeas petition dismissed and the stay lifted once the state court action was filed, without further condition. App. 39. As the Court of Appeals recognized, that rationale was insufficient to support the stay order. Texas courts do not recognize new evidence claims on collateral review. Id., at 67-68. Nor would they entertain petitioner's claim as a motion for a new trial; under Texas law, such motions must be made within 30 days of trial. See ante, at 8, 18-19 (opinion of the Court); App. 68. Because petitioner could not have obtained relief -or even a hearing- through the state courts, it was error for the District Court to enter a stay permitting him to try.

Of course, the Texas courts would not be free to turn petitioner away if the Constitution required otherwise. But the District Court did not hold that the Constitution required them to entertain petitioner's claim. On these facts, that would be an extraordinary holding. Petitioner did not raise his claim shortly after Texas' 30-day limit expired; he raised it eight years too late. Consequently, the District Court would have had to conclude not that Texas' 30-day limit for new evidence claims was too short to comport with due process, but that applying an 8-year limit to petitioner would be. As the Court demonstrates today, see ante, at 16-20, there is little in fairness or history to support such a conclusion.

But even if the District Court did hold that further federal proceedings were warranted, surely it abused its discretion. The affidavits do not reveal a likelihood of actual innocence. See ante, at 1-3, 26-28 (opinion of the Court); supra, at 5-10. In-person repetition of the affiants' accounts at an evidentiary hearing could not alter that; the accounts are, on their face and when compared to the proof at trial, unconvincing. As a result, further proceedings were improper even under the rather lax standard the dissent urges, for -`it plainly appear[ed] from the face of the petition and [the] exhibits annexed to it that the petitioner [wa]s not entitled to relief.'- Post, at 16 (quoting 28 U. S. C. 2254 Rule 4).

The abuse of discretion is particularly egregious given the procedural posture. The District Court actually entered an order staying the execution. Such stays on "second or successive federal habeas petition[s] should be granted only when there are `substantial grounds upon which relief might be granted,'" Delo v. Stokes, 495 U. S. 320, 321 (1990) (quoting Barefoot v. Estelle, 463 U. S. 880, 895 (1983)), and only when the equities favor the petitioner, see Gomez v. United States District Court for the Northern Dist. of California, 503 U. S. ___, ___ (1992) (slip op. 1) (Whether a claim is framed -as a habeas petition or 1983 action, [what is sought] is an equitable remedy. . . . A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief-). Petitioner's claim satisfied neither condition. The grounds petitioner offered in his habeas petition were anything but substantial. And the equities favored the State. Petitioner delayed presenting his new evidence until eight years after conviction- without offering a semblance of a reasonable excuse for the inordinate delay. At some point in time, the State's interest in finality must outweigh the prisoner's interest in yet another round of litigation. In this case, that point was well short of eight years.

Unless federal proceedings and relief-if they are to be had at all-are reserved for -extraordinarily high- and -truly persuasive demonstration[s] of `actual innocence'- that cannot be presented to state authorities, ante, at 26 (opinion of the Court), the federal courts will be deluged with frivolous claims of actual innocence. Justice Jackson explained the dangers of such circumstances some 40 years ago:

> It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search. Brown v. Allen, 344 U. S. 443, 537 (1953) (concurring in result).

If the federal courts are to entertain claims of actual innocence, their attention, efforts, and energy must be reserved for the truly extraordinary case; they ought not be forced to sort through the insubstantial and the incredible as well.

* * *

Ultimately, two things about this case are clear. First is what the Court does not hold. Nowhere does the Court state that the Constitution permits the execution of an actually innocent person. Instead, the Court assumes for the sake of argument that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that

federal habeas relief would be warranted if no state avenue were open to process the claim. Second is what petitioner has not demonstrated. Petitioner has failed to make a persuasive showing of actual innocence. Not one judge- no state court judge, not the District Court Judge, none of the three Judges of the Court of Appeals, and none of the Justices of this Court- has expressed doubt about petitioner's guilt. Accordingly, the Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence. That difficult question remains open. If the Constitution's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, it may never require resolution at all.

Justice Scalia, with whom Justice Thomas joins, concurring.

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

I nonetheless join the entirety of the Court's opinion, including the final portion (pages 26-28)-because there is no legal error in deciding a case by assuming arguendo that an asserted constitutional right exists, and because I can understand, or at least am accustomed to, the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate. With any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon.

My concern is that in making life easier for ourselves we not appear to make it harder for the lower federal courts, imposing upon them the burden of regularly analyzing newly-discovered-evidence-of-innocence claims in capital cases (in which event such federal claims, it can confidently be predicted, will become routine and even repetitive). A number of Courts of Appeals have hitherto held, largely in reliance on our unelaborated statement in Townsend v. Sain, 372 U. S. 293, 317 (1963), that newly discovered evidence relevant only to a state prisoner's guilt or innocence is not a basis for federal habeas corpus relief. See, e.g., Boyd v. Puckett, 905 F. 2d 895, 896-897 (CA5), cert. denied, 498 U. S. 988 (1990); Stockton v. Virginia, 852 F. 2d 740, 749 (CA4 1988), cert. denied, 489
U.S. 1071 (1989); Swindle v. Davis, 846 F. 2d 706, 707 (CA11 1988) (per curiam); Byrd v. Armontrout, 880 F. 2d 1, 8 (CA8 1989), cert. denied, 494 U. S. 1019 (1990); Burks v. Egeler,

512 F. 2d 221, 230 (CA6), cert. denied, 423 U. S. 937 (1975). I do not understand it to be the import of today's decision that those holdings are to be replaced with a strange regime that assumes permanently, though only -arguendo,- that a constitutional right exists, and expends substantial judicial resources on that assumption. The Court's extensive and scholarly discussion of the question presented in the present case does nothing but support our statement in Townsend, and strengthen the validity of the holdings based upon it.

Justice White, concurring in the judgment.

In voting to affirm, I assume that a persuasive showing of -actual innocence- made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case. To be entitled to relief, however, petitioner would at the very least be required to show 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." Jackson v. Virginia, 443 U. S. 307, 324 (1979). For the reasons stated in the Court's opinion, petitioner's showing falls far short of satisfying even that standard, and I therefore concur in the judgment.

Justice Blackmun, with whom Justice Stevens and Justice Souter join with respect to Parts I-IV, dissenting.

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

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

I

The Court's enumeration, ante, at 7, of the constitutional rights of criminal defendants surely is entirely beside the point. These protections sometimes fail. We really are being asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence. Despite the State of Texas' astonishing protestation to the contrary, see Tr. of Oral Arg. 37, I do not see how the answer can be anything but -yes.-

A

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

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

The protection of the Eighth Amendment does not end once a defendant has been validly convicted and sentenced. In Johnson v. Mississippi, 486 U. S. 578 (1988), the petitioner had been convicted of murder and sentenced to death on the basis of three aggravating circumstances. One of those circumstances was that he previously had been convicted of a violent felony in the State of New York. After Johnson had been sentenced to death, the New York Court of Appeals reversed his prior conviction. Although there was no question that the prior conviction was valid at the time of Johnson's sentencing, this Court held that the Eighth Amendment required review of the sentence because "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." Id., at 590. In Ford v. Wainwright, supra, the petitioner had been convicted of murder and sentenced to death. There was no suggestion that he was incompetent at the time of his offense, at trial, or at sentencing, but subsequently he exhibited changes in behavior that raised doubts about his sanity. This Court held that Florida was required under the Eighth Amendment to provide an additional hearing to determine whether Ford was mentally competent, and that he could not be executed if he were incompetent. 477 U. S., at 410 (plurality opinion); id., at 422-423 (Powell, J., concurring in part and concurring in the judgment). Both Johnson and Ford recognize that capital defendants may be entitled to further proceedings because of an intervening development even though they have been validly convicted and sentenced to death.

Respondent and the United States as amicus curiae argue that the Eighth Amendment does not apply to petitioner because he is challenging his guilt, not his punishment. Brief for Respondent 21-23; Brief for United States as Amicus Curiae 9-12. The majority attempts to distinguish Ford on that basis. Ante, at 14. Such reasoning, however, not only contradicts our decision in Beck v. Alabama, 447 U. S. 625 (1980), but also fundamentally misconceives the nature of petitioner's argument. Whether petitioner is viewed as challenging simply his death sentence or also his continued detention, he still is challenging the State's right to punish him.

Respondent and the United States would impose a clear line between guilt and punishment, reasoning that every claim that concerns guilt necessarily does not involve punishment. Such a division is far too facile. What respondent and the United States fail to recognize is that the legitimacy of punishment is inextricably intertwined with guilt.

Beck makes this clear. In Beck, the petitioner was convicted of the capital crime of robbery-intentional killing. Under Alabama law, however, the trial court was prohibited from giving the jury the option of convicting him of the lesser included offense of felony murder. We held that precluding the instruction injected an impermissible element of uncertainty into the guilt phase of the trial.

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

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

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

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

B

Execution of the innocent is equally offensive to the Due Process Clause of the Fourteenth Amendment. The majority's discussion misinterprets petitioner's Fourteenth Amendment claim as raising a procedural rather than a substantive due process challenge. "The Due Process Clause of the Fifth Amendment
provides that `No person shall . . . be deprived of life, liberty, or property, without due process of

law . . . .' This Court has held that the Due Process Clause protects individuals against two types of government action. So-called `substantive due process' prevents the government from engaging in conduct that `shocks the conscience,' Rochin v. California, 342 U. S. 165, 172 (1952), or interferes with rights `implicit in the concept of ordered liberty,' Palko v. Connecticut, 302
U.S. 319, 325-326 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. Mathews v. Eldridge, 424 U. S. 319, 335 (1976). This requirement has traditionally been referred to as `procedural' due process.- United States v. Salerno, 481 U. S. 739, 746 (1987). Petitioner cites not Mathews v. Eldridge, 424 U. S. 319 (1976), or Medina v. California, 505 U. S. ___ (1992), in support of his due process claim, but Rochin. Brief for Petitioner 32-33.

Just last Term, we had occasion to explain the role of substantive due process in our constitutional scheme. Quoting the second Justice Harlan, we said: "`[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This liberty- is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .'" Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U. S. ___, ___ (1992) (slip op. 6), quoting Poe v. Ullman, 367 U. S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

Petitioner's claim falls within our due process precedents. In Rochin, deputy sheriffs investigating narcotics sales broke into Rochin's room and observed him put two capsules in his mouth. The deputies attempted to remove the capsules from his mouth and, having failed, took Rochin to a hospital and had his stomach pumped. The capsules were found to contain morphine. The Court held that the deputies' conduct -shock[ed] the conscience- and violated due process. 342 U. S., at 172. -Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents- this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.- Ibid. The lethal injection that petitioner faces as an allegedly innocent person is certainly closer to the rack and the screw than the stomach pump condemned in Rochin. Execution of an innocent person is the ultimate -`arbitrary impositio[n].'- Planned Parenthood, 505 U. S., at ___ (slip op. 6). It is an imposition from which one never recovers and for which one can never be compensated. Thus, I also believe that petitioner may raise a substantive due process challenge to his punishment on the ground that he is actually innocent.

C

Given my conclusion that it violates the Eighth and Fourteenth Amendments to execute a person who is actually innocent, I find no bar in Townsend v. Sain, 372 U.S. 293 (1963), to consideration of an actual innocence claim. Newly discovered evidence of petitioner's innocence does bear on the constitutionality of his execution. Of course, it could be argued this is in some tension with Townsend's statement, id., at 317, that "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." That statement, however, is no more than distant dictum here, for we never had been

asked to consider whether the execution of an innocent person violates the Constitution.

II

The majority's discussion of petitioner's constitutional claims is even more perverse when viewed in the light of this Court's recent habeas jurisprudence. Beginning with a trio of decisions in 1986, this Court shifted the focus of federal habeas review of successive, abusive, or defaulted claims away from the preservation of constitutional rights to a fact-based inquiry into the habeas petitioner's guilt or innocence. See Kuhlmann v. Wilson, 477 U. S. 436, 454 (plurality opinion); Murray v. Carrier, 477 U. S. 478, 496 Smith v. Murray, 477 U. S. 527, 537; see also McCleskey v. Zant, 499 U. S. ___, ___ (1991) (slip op. 24-25). The Court sought to strike a balance between the State's interest in the finality of its criminal judgments and the prisoner's interest in access to a forum to test the basic justice of his sentence. Kuhlmann v. Wilson, 477 U.S., at 452. In striking this balance, the Court adopted the view of Judge Friendly that there should be an exception to the concept of finality when a prisoner can make a colorable claim of actual innocence. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970).

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

> The prisoner may have a vital interest in having a second chance to test the fundamental justice of his incarceration. Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated. That interest does not extend, however, to prisoners whose guilt is conceded or plain.- 477 U. S., at 452.

In other words, even a prisoner who appears to have had a constitutionally perfect trial, "retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated." It is obvious that this reasoning extends beyond the context of successive, abusive, or defaulted claims to substantive claims of actual innocence. Indeed, Judge Friendly recognized that substantive claims of actual innocence should be cognizable on federal habeas. 38 U. Chi. L. Rev., at 159-160, and n. 87.

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

III

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

A

Whatever procedures a State might adopt to hear actual innocence claims, one thing is certain: The possibility of executive clemency is not sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments. The majority correctly points out: "A pardon is an act of grace." Ante, at 22. The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal. Indeed, in Ford v. Wainwright, we explicitly rejected the argument that executive clemency was adequate to vindicate the Eighth Amendment right not to be executed if one is insane. 477 U. S., at 416. The possibility of executive clemency "exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless." Solem v. Helm, 463 U. S. 277, 303 (1983).

"The government of the United States has been emphatically termed a government of laws, and not of men. It
will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Marbury v. Madison, 1 Cranch 137, 163 (1803). If the exercise of a legal right turns on -an act of grace,- then we no longer live under a government of laws. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." West Virginia State Board of Education v. Barnette, 319 U. S. 624, 638 (1943). It is understandable, therefore, that the majority does not say that the vindication of petitioner's constitutional rights may be left to executive clemency.

B

Like other constitutional claims, Eighth and Fourteenth Amendment claims of actual innocence advanced on behalf
of a state prisoner can and should be heard in state court. If a State provides a judicial procedure for raising such claims, the prisoner may be required to exhaust that procedure before taking his claim of actual innocence to federal court. See 28 U. S. C. 2254(b) and (c). Furthermore, state-court determinations of factual issues relating to the claim would be entitled to a presumption of correctness in any subsequent federal habeas proceeding. See 28 U. S. C. 2254(d).

Texas provides no judicial procedure for hearing petitioner's claim of actual innocence and his habeas petition was properly filed in district court under 28 U. S. C. 2254. The district court is entitled to dismiss the petition summarily only if "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief." 28 U. S. C.

2254 Rule 4. If, as is the case here, the petition raises factual questions and the State has failed to provide a full and fair hearing, the district court is required to hold an evidentiary hearing. Townsend v. Sain, 372 U. S., at 313.

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

C

The question that remains is what showing should be required to obtain relief on the merits of an Eighth or Fourteenth Amendment claim of actual innocence. I agree with the majority that "in state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant." Ante, at 25. I also think that -a truly persuasive demonstration of `actual innocence' made after trial would render the execution of a defendant unconstitutional.- Ante, at 26. The question is what -a truly persuasive demonstration- entails, a question the majority's disposition of this case leaves open.

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

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

whether the defendant is innocent but whether the government has met its constitutional burden of proving the defendant's guilt beyond a reasonable doubt. When a defendant seeks to challenge the determination of guilt after he has been validly convicted and sentenced, it is fair to place on him the burden of proving his innocence, not just raising doubt about his guilt.

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

It should be clear that the standard I would adopt would not convert the federal courts into -`forums in which to relitigate state trials.'- Ante, at 9, quoting Barefoot v. Estelle, 463 U. S. 880, 887 (1983). It would not "require the habeas court to hear testimony from the witnesses who testified at the trial," ante, at 11, though, if the petition warrants a hearing, it may require the habeas court to hear the testimony of -those who made the statements in the affidavits which petitioner has presented.- Ibid. I believe that if a prisoner can show that he is probably actually innocent, in light of all the evidence, then he has made -a truly persuasive demonstration,- ante, at 26, and his execution would violate the Constitution. I would so hold.

IV

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

I think it is unwise for this Court to step into the shoes of a district court and rule on this petition in the first instance. If this Court wishes to act as a district court, however, it must also be bound by the rules that govern consideration of habeas petitions in district court. A district court may summarily dismiss a habeas petition only if -it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief.- 28 U.S.C. 2254 Rule 4. In one of the affidavits, Hector Villarreal, a licensed attorney and former state court judge, swears under penalty of perjury that his client Raul Herrera confessed that he, and not

petitioner, committed the murders. No matter what the majority may think of the inconsistencies in the affidavits or the strength of the evidence presented at trial, this affidavit alone is sufficient to raise factual questions concerning petitioner's innocence that cannot be resolved simply by examining the affidavits and the petition.

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

V

I have voiced disappointment over this Court's obvious eagerness to do away with any restriction on the States' power to execute whomever and however they please. See Coleman v. Thompson, 501 U. S. ___, ___ (1991) (slip op. 1) (dissenting opinion). See also Coleman v. Thompson, 504 U. S. ___ (1992) (dissent from denial of stay of execution). I have also expressed doubts about whether, in the absence of such restrictions, capital punishment remains constitutional at all. Sawyer v. Whitley, 505 U.S., at ___ (slip op. 8-11) (opinion concurring in the judgment). Of one thing, however, I am certain. Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who
can show that he is innocent comes perilously close to simple murder.