SUPREME COURT OF THE UNITED STATES

No. 91–7328

LEONEL TORRES HERRERA, PETITIONER *v.* JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January 25, 1993]

JUSTICE 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.

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
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> 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.

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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 demon-

stration 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.