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United States Supreme Court

FACTS

Officer David Rucker, who had been fatally shot to death in the head, was found lying beside his patrol car near Los Fresnos, Texas at around 11:00 on the evening of September 29, 1981. At approximately the same time that Rucker's body was found, Officer Enrique Carrisalez pulled over a speeding vehicle in Los Fresnos. As Carrisalez approached the driver of the car, he was shot in the chest and died nine days later.

A few days after Carrisalez's death, Leonel Torres Herrera was arrested and charged with the capital murders of Officers Rucker and Carrisalez. Evidence of Herrera's guilt included an eyewitness identification of Herrera as the murderer of Carrisalez,[1] and a declaration made by Carrisalez while in the hospital identifying Herrera as the person who shot him. Further, the speeding car that Carrisalez pulled over was traced to Herrera's girlfriend, with whom Herrera lived, and Officer Hernandez, Carrisalez's partner, identified the car as the one they pulled over and the car from which the fatal shots were fired.

Herrera's Social Security card was found near Rucker's patrol car on the night the officer was killed and blood found on Herrera's clothing, wallet and girlfriend's car matched Rucker's blood type.[2] Evidence suggested that a hair found in Herrera's girlfriend's car was Rucker's, not Herrera's. Police discovered a handwritten letter on Herrera's person that implicated him in the murder of Rucker.

Herrera was found guilty in January, 1982 of the capital murder of Officer Carrisalez and was sentenced to death. In July of 1982, he pleaded guilty to the murder of Officer Rucker.

Herrera appealed his conviction and sentence on the grounds that Hernandez's and Carrisalez's identifications were unreliable and should not have been admitted against him at trial.[3] The Texas Court of Criminal Appeals, however, affirmed his conviction and sentence.[4] Herrera's subsequent state habeas petition and petition for certiorari to the United States Supreme Court were denied.[5] Herrera filed his first federal habeas petition which was denied,[6] and the Supreme Court again denied certiorari.[7]

In his second state habeas petition, Herrera argued that he was "actually innocent" and proffered affidavits in support of his claim. The affidavits asserted that Herrera's now-deceased brother, Raul Herrera, Sr., had admitted to killing the police officers.[8] The state court denied Herrera's petition, finding that "no evidence at trial remotely suggested that anyone other than [Leonel Herrera] committed the offense."[9] The Texas Court of Criminal Appeals affirmed the state court[10] and the Supreme Court denied certiorari.[11]

Herrera argued, in his second federal habeas petition filed in 1992, that because he was innocent of the capital murders of both officers, his execution would violate the Eighth and Fourteenth Amendments. In support of his petition, Herrera offered two more affidavits alleging that Herrera's brother was the actual murderer. Herrera also claimed that police were aware of the evidence contained in the affidavits and, by withholding it, the State had violated his due process rights pursuant to *Brady v. Maryland*.[12]

The federal district court granted Herrera's request for a stay of execution so that Herrera could present his actual innocence claim to the state court, but denied most of his other claims as an abuse of the writ. The district court granted an evidentiary hearing on Herrera's *Brady* claim. The federal court of appeals vacated the stay of execution and found Herrera's *Brady* claim to be a "disingenuous" attempt to have his newly discovered evidence heard.[13] The court of appeals held 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."[14] The United States Supreme Court granted certiorari and the Texas Court of Criminal Appeals stayed Herrera's execution.

HOLDING

The Supreme Court affirmed the judgment of the court of appeals, holding that the trial is "the paramount event for determining the guilt or innocence of the defendant."[15] Absent an independent constitutional violation, newly discovered evidence is not grounds for federal habeas relief since, in the federal habeas context, review of the evidence is limited to evidence which is in the record.[16] A showing of actual innocence may be a means to have an otherwise barred constitutional claim heard, but it is not by itself a basis for federal relief.[17] Claims of actual innocence based on newly discovered evidence that is found too late to meet state procedural requirements may be remedied not through the federal courts, but through executive clemency.[18] The Court assumed *arguendo* that executing a petitioner with a truly persuasive demonstration of actual innocence is unconstitutional if a state does not allow a claim of innocence to be redressed through such avenues as executive clemency.[19]

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1 The identification was made by Carrisalez's partner, Officer Hernandez. *Herrera v. Collins*, 113 S. Ct. at 857 (1992).

2 Justice O'Connor, in her concurring opinion, wrote that "[t]he 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." *Herrera*, 113 S. Ct. at 872 (O'Connor, J., concurring).

3 *Herrera v. State*, 682 S. W. 2d 313 (1984).

4 *Id.*

5 *Herrera v. Texas*, 471 U. S. 1131 (1985).

6 *Herrera v. Collins*, 904 F. 2d 944 (5th Cir. 1990).

7 *Herrera v. Collins*, 498 U. S. 925 (1990).

8 Raul Herrera, Sr. had died in 1984.

9 *Ex parte Herrera*, No. 81-CR-672-C (Tex. 197th Jud. Dist., Jan. 14, 1991).

10 *Ex parte Herrera*, 819 S. W. 2d 528 (1991).

11 *Herrera v. Texas*, 112 S. Ct. 1074 (1992).

12 373 U. S. 83 (1963).

13 *Herrera v. Collins*, 954 F. 2d 1029 (5th Cir. 1992).

14 *Id.* at 1034.

15 *Herrera*, 113 S. Ct. at 869.

16 *Id.* at 860.

17 *Id.* at 862-863.

18 *Id.* at 866.

19 *Id.* at 869.

ANALYSIS / APPLICATION IN VIRGINIA

The Court agreed that it would be unconstitutional to punish a person for a crime he did not commit since the purpose of our "criminal justice system is to convict the guilty and free the innocent."[20] The Court noted, however, that Herrera's showing of innocence must be considered in light of the previous proceedings and the fact that the evidence produced to support his claim was produced not at trial, but eight years later.

The Court began its reasoning by noting constitutional provisions that protect innocent persons from being convicted. For example, a person charged with a crime is presumed innocent and the state must prove his guilt beyond a reasonable doubt.[21] In capital cases, the Constitution requires additional protections not afforded to those charged with a non-capital crime.[22] But once a defendant is found guilty, the presumption of innocence disappears and thus, the Court wrote, Herrera "does not come before the Court as one who is 'innocent,' but on the contrary as one who has been convicted by due process of law of two brutal murders."[23]

Herrera argued that the affidavits established his innocence notwithstanding the verdict at trial.[24] Herrera further claimed that "the federal habeas court should have 'an important initial opportunity to hear the evidence and resolve the merits of Petitioner's claim.'"[25] The Court interpreted Herrera's argument as requiring the federal court to hear testimony of trial witnesses and of witnesses relevant to the newly discovered evidence and then to re-determine whether or not the petitioner was guilty of the crime of which he was convicted. However, because Herrera failed to state an underlying constitutional violation that occurred during the trial as a basis for why the newly discovered evidence was not heard, the Court held that he could not seek federal habeas corpus relief.[26]

The Court reasoned that the purpose of federal courts, in the context of habeas corpus petitions, is to guarantee that individuals are not held in prison in violation of the Constitution.[27] Federal courts are not expected to re-examine or reweigh evidence relevant to the guilt of the petitioner; evidence presented to a federal court on habeas must be relevant to the constitutionality of the petitioner's detention.[28] Were federal courts to begin to hear solely evidence of guilt or innocence absent any constitutional violation, the majority feared that the federal system would be completely disrupted.[29]

Jackson v. Virginia,[30] the Court suggested, "comes as close to authorizing evidentiary review of a state court conviction on federal habeas as any of our cases."[31] However, the Court distinguished *Jackson* from the instant claim, reasoning that *Jackson* allows inquiry only into whether there has been a constitutional violation of the *Winship* standard requiring proof of guilt beyond a reasonable doubt.[32] Further, *Jackson* permits the federal court to review only the record evidence.[33]

Federal habeas corpus relief usually takes the form of a conditional order of release. This type of relief would normally require that the State retry the petitioner, which in Herrera's case would be ten years after the crime was committed. The passage of time, the Court argued, at best would make the guilt/innocence determination no more exact than the first trial and, in fact, probably more unreliable.[34]

Claims of "actual innocence"[35] may enable petitioners who normally would be barred from seeking federal habeas relief because of successive petitions or abuse of the writ to obtain federal habeas relief. However, in such a situation, a claim of "actual innocence" is not itself the basis of relief, but is merely a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."[36] The Court wrote that "free-standing claims of actual innocence" have no forum in the federal habeas context.[37]

The Court also rejected Herrera's claim that his showing of actual innocence entitled him to a new trial as a matter of due process.[38] The Court noted that it historically has deferred to state legislatures' judgments in the area of criminal procedure and had found state criminal procedure wanting "only where it '"offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."'"[39] That Texas required motions for new trials to be filed within 30 days of the petitioner's conviction and refused to hear Herrera's claim of actual innocence eight years later did not violate principles of fundamental fairness, the Court held.[40]

The Court summarily dismissed Herrera's more limited argument that he should not necessarily receive a new trial but that the federal habeas court should be able to vacate his death sentence, pursuant to the Due Process Clause of the Fourteenth Amendment, if he were able to show actual innocence. The Court reasoned that if Herrera were truly innocent of the underlying crime, "[i]t would be a rather strange jurisprudence... which held that under our Constitution

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20 *Id.* at 859 (citing *United States v. Nobles*, 422 U.S. 225, 230 (1975)).

21 *Id.* (citing *In re Winship*, 397 U.S. 358 (1970)).

22 *Id.* at 860 (citing *Beck v. Alabama*, 447 U. S. 625 (1980)).

23 *Id.*

24 The Court noted that Herrera could not argue the claim in state court because he did not meet Texas' required 30-day deadline for filing a motion for a new trial. *Id.*

25 *Id.* at 861 (quoting Brief for Petitioner at 42).

26 *Id.* at 860 (citing *Townsend v. Sain*, 372 U.S. 293, 317 (1963)).

27 *Id.* (citing *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923)).

28 *Id.* (citing *Townsend v. Sain*, 372 U.S. 293, 317 (1963)).

29 *Id.* at 861.

30 443 U.S. 307 (1979) (holding that federal habeas courts may ask whether trial evidence was sufficient to convict the defendant beyond a reasonable doubt).

31 *Herrera*, 113 S. Ct. at 861.

32 *Id.*

33 *Id.*

34 *Id.*

35 To successfully claim "actual innocence" at the federal level, a habeas petitioner must show that a constitutional violation has probably resulted in the conviction of one who is innocent of the crime of which he was convicted. *Murray v. Carrier*, 477 U.S. 478 (1986). One convicted of capital murder may successfully argue that he is "innocent of death" by showing "based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." *Sawyer v. Whitley*, 112 S. Ct. 2514, 2523 (1992). *See also* case summary of *Sawyer*, Capital Defense Digest, Vol. 5, No. 1, p. 18 (1992).

36 *Herrera*, 113 S. Ct. at 862.

37 *Id.* at 862-63. In his dissenting opinion, Justice Blackmun wrote that "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." *Id.* at 880-81 (Blackmun, J., dissenting).

38 *Id.* at 864.

39 *Id.* (quoting *Medina v. California* 112 S. Ct. 2572 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977))).

40 *Id.* at 866.

he could not be executed, but that he could spend the rest of his life in prison."[41]

Although it rejected all of Herrera's claims for judicial relief, the Court suggested that Herrera still had a "forum to raise his actual innocence claim" by seeking executive clemency from the governor of Texas.[42] Describing executive clemency as the "'fail safe' in our criminal justice system,"[43] the Court stated that "recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of 'actual innocence' have been made."[44]

Had Texas had no executive clemency provision or other "fail safe" for petitioners sentenced to death, the Court assumed "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...."[45] However, the showing in such a situation would have to be extraordinarily high due to the need for finality in capital cases. Herrera's showing, the Court found, fell "far short" of this high threshold, especially since it was based upon affidavits, which the majority stated are often used to abuse new trial motions because no credibility determinations may be made through cross examination.[46]

In Virginia, motions for new trials based on newly discovered evidence are "addressed to the sound discretion of the trial judge, are not looked upon with favor, are considered with special care and caution, and are awarded with great reluctance"[47] since the judiciary views such motions as fraught with the opportunity and motive for fraud.[48] The moving party must establish that the proffered evidence was discovered after trial, that the evidence could not have been acquired by the movant through reasonable diligence before trial, that it is not simply cumulative, corroborative, or collateral, and that the evidence is material in that it should produce opposite results on the merits at a second trial.[49] Therefore, the standard imposed upon the Virginia defendant who moves for a new trial is difficult to meet.

However, Justice White, concurring in the judgment of *Herrera*, wrote that: "To be entitled to relief... 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.'"[50] Justice White's standard suggests that the petitioner who can show that he is not guilty beyond a reasonable doubt may be granted an evidentiary hearing despite the state procedural bars against the claim.

The likelihood that a defendant will receive clemency from the Governor of Virginia is slim. In Virginia, the Governor has the power to commute capital punishment[51] and to grant pardons and reprieves.[52] Only two death row inmates have had their sentences commuted in Virginia since 1972:[53] Joseph Giarratano and Herbert Bassette, Jr. (both by Governor L. Douglas Wilder).[54]

Because the chances of the Virginia trial court granting a defendant's motion for a new trial based on new evidence or of the Governor's granting clemency are small, *Herrera*'s holding re-emphasizes the importance of "federalizing" the issues in capital cases. Since free-standing claims of actual innocence (i.e. those based on no federal issue) have no place in the federal forum, it is crucial that defense counsel make motions and objections on federal constitutional grounds beginning pre-trial. Appellate and habeas counsel also will want to explore ineffective assistance of trial counsel claims as a possible means of providing a constitutional basis for the consideration of newly discovered evidence which otherwise would be barred. Foremost, however, *Herrera* drives home the need for trial counsel to engage in a thorough investigation before trial of all possible evidentiary sources, because once a conviction and death sentence are secured, it will be extremely difficult to have any new evidence that comes to light entertained in a judicial forum.

Summary and analysis by:
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41 *Id.* at 863.

42 In Texas, the petitioner, the petitioner's representative, or the Governor may request that the Board of Pardons and Paroles grant clemency. Tex. Admin. Code Tit. 37, §143.1 (West Supp. 1992). A full pardon, a commutation of the death sentence to life imprisonment or other penalty, or a reprieve from execution may be requested in capital cases. Tex. Admin. Code Tit. 37, §143.1 and § 143.57. The Governor has sole authority to grant one reprieve not exceeding 30 days in any capital case. Tex. Admin. Code Tit. 37, §141.41(a).

The Board of Pardons and Paroles will review applications for a full pardon when it receives: "(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." Tex. Admin. Code Tit. 37, § 143.2.

43 *Herrera*, 113 S. Ct. at 868 (citing K. Moore, Pardons: Justice, Mercy, and the Public Interest 131 (1989)).

44 *Id.* at 868 (citing M. Radelet, H. Bedau, & C. Putnam, In Spite of Innocence 282-356 (1992)). In contrast, Justice Blackmun, dissenting, wrote that the Court, in *Ford v. Wainwright*, 477 U.S. 399 (1986), "explicitly rejected the argument that executive clemency was adequate to vindicate the Eighth Amendment right not to be executed if one is insane. [citation omitted] 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.'" *Id.* at 881 (quoting *Solem v. Helm*, 463 U.S. 277, 303 (1983)).

45 *Id.* at 869.

46 *Id.* The Court found Herrera's affidavits dubious because of several inconsistencies among them. That the affidavits were filed at "the 11th hour" and after the alleged perpetrator of the murders was dead was also highly questionable to the Court as was the fact that Herrera pleaded guilty to one of the murders. In light of the evidence presented at Herrera's trial, the newly discovered evidence before the Court did not outweigh the strong proof of guilt at the trial level.

Justice Blackmun noted, however, in his dissent, that "[i]t 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 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 this Court." *Id.* at 884 (Blackmun, J., dissenting).

47 *Odum v. Commonwealth*, 225 Va. 123, 130, 301 S.E.2d 145, 149 (1983) (citing *Lewis v. Commonwealth*, 209 Va. 602, 608, 166 S.E.2d 248, 253 (1969)).

48 *Whittington v. Commonwealth*, 5 Va. App. 212, 220, 361 S.E.2d 449, 454 (1987) (citing *Lewis v. Commonwealth*, 193 Va. 612, 625, 70 S.E.2d 293, 301 (1952)).

49 *Whittington*, 5 Va. App. at 220, 361 S.E.2d at 454; *Payne v. Commonwealth*, 233 Va. 460, 472, 357 S.E.2d 500, 507 (1987); *Odum v. Commonwealth*, 225 Va. 123, 130, 301 S.E.2d 145, 149 (1983).

50 *Herrera*, 113 S. Ct. at 875 (White, J., concurring) (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)).

51 Va. Code Ann. §53.1-230 (1992).

52 Va. Code Ann. §53.1-229 (1992). The Virginia Parole Board's role in the clemency process appears to be merely investigatory. Va. Code Ann. §53.1-231 (1992).

53 *Cf. Furman v. Georgia*, 408 U.S. 238 (1972) (holding that capital punishment, as then administered, was unconstitutional).

54 *See e.g.*, Harris, *Va. Death Sentence Commuted; Wilder Cites Doubts About Inmate's Guilt*. W. Post. Jan. 23. 1992. at D1.