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Actual Innocence and Habeas Corpus: *In re Troy Davis*

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Summary

In re Davis presented the Supreme Court with another opportunity to decide whether a state death row inmate, who on the basis of newly available evidence establishes that he is actually innocent, is entitled to habeas corpus relief to prevent his execution. Under existing law, newly discovered evidence of innocence may permit a federal court to consider an inmate's claim (otherwise barred) that his conviction or sentence was the product of constitutional error (constitutional error plus innocence). The Court has never held that a freestanding claim of innocence may alone suffice. On two occasions, in *Herrera* and in *House*, however, it has said that, assuming for argument the right to consideration of a freestanding claim, the evidence on the record in the cases before it did not satisfy the level of persuasion necessary for such relief.

Davis, convicted and sentenced to death for the murder of a moonlighting police officer, had to overcome several obstacles before habeas relief could be granted. First, the Court would have to recognize the right to relief based solely on a claim of innocence. Then, it would have to identify the level of persuasion required for relief on that basis (i.e., how compelling must proof of innocence be?). Then, the evidence (new and old) would have to satisfy that standard. Before those issues could be reached, however, Davis had to overcome the statutory bar on claims previously rejected in state court (second or successive petition bar). In an effort to do so, Davis filed his habeas petition with the Supreme Court rather than with a lower federal court.

The Court transferred Davis's "original" petition to a federal district court with instructions to receive evidence and make findings of fact relating to Davis's claim of innocence. Justice Scalia, in dissent, described as a fool's errand sending the district court on search for evidence of innocence when the statutory bar would preclude relief regardless of the result of the search. Justice Stevens disagreed in a separate concurring opinion. He argued that the district court might conclude either that the statutory bar does not apply to original petitions; or does not apply in the same manner; or does not apply because the bar is constitutionally invalid in cases of actual innocence.

The District Court conducted an extensive examination of the evidence and concluded that (1) the Eighth Amendment precludes execution of the actually innocent; (2) the clear and convincing evidence standard is the appropriate standard by which to judge such claims; and (3) Davis failed to satisfy the standard. Both the District and Circuit Court concluded any appeal must be to the Supreme Court.

On March 28, 2011, the Supreme Court declined to review the lower court opinion and denied petitions for writs of certiorari and habeas corpus, leaving for another day the broader issues raised in *Davis*.

Related CRS Reports include CRS Report R41011, *Habeas Corpus Legislation in the 111th Congress* (includes a discussion of "actual innocent" proposals); CRS Report RL33391, *Federal Habeas Corpus: A Brief Legal Overview*; and CRS Report RS22432, *Federal Habeas Corpus: An Abridged Sketch*.

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Introduction

Thus far, the Supreme Court has held in abeyance the two-part question of whether "a truly persuasive demonstration of actual innocence made after [a state] trial would render the execution a defendant unconstitutional, and warrant federal habeas relief."[1] In August 2009, the Supreme Court transferred to the U.S. District Court for the Southern District of Georgia Davis's habeas petition which raises these very questions.[2] The District concluded that the constitutional right exists; however, it determined that the facts of Davis's case do not warrant habeas relief.[3] The Circuit Court, like the District Court, concluded that only the Supreme Court could review the District Court's determinations.[4] On March 28, 2011, the Supreme Court declined to review the lower court opinion.[5] At the same time, it denied petitions for writs of certiorari and habeas corpus, leaving for another day the underlying question.[6]

Background

Davis was convicted of murder, obstruction of a police officer, aggravated assault, and possession of a firearm during the commission of a felony.[7] The murder victim was a police officer, moonlighting in his police uniform as a bus station security guard, who was shot when he responded to a disturbance outside a fast food restaurant next to the bus station.[8] The jury found two aggravating factors—murder of a police officer in the performance of his duty and murder committed after first wounding the victim—and Davis was sentenced to death.[9]

The Georgia Supreme Court affirmed his conviction and sentence[10] and subsequently affirmed the denial of his petition for post conviction relief under Georgia law.[11] Davis then petitioned the federal district court for habeas relief, based on newly discovered evidence, on the grounds that the trial prosecutor had knowingly presented false testimony; that the prosecutor had failed to disclose material exculpatory evidence; and that his trial lawyer had been constitutionally ineffective.[12] He also asserted his actual innocence as an exception to the procedural default rule that bars habeas relief for claims which the state courts have not be given an opportunity to resolve.[13] The district court rejected his constitutional claims.[14] The court of appeals affirmed.[15]

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[1] *House v. Bell*, 547 U.S. 518, 554 (2006), quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993); see also *District Attorney's Office v. Osborne*, 129 S.Ct. 2308, 2321(2009).

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

[3] *In re Davis*, No. CV409-130, 2010 WL 3385081, at *70 (S.D.Ga. Aug. 24, 2010).

[4] *Davis v. Terry*, ___ F.3d ___, ___ (11th Cir. Nov. 5, 2010).

[5] *In re Davis*, 131 S.Ct. ___ (No. 08-1443)(Mar. 28, 2011).

[6] *Davis v. Humphrey*, 131 S.Ct. ___ (No. 10-949)(Mar. 28, 2011); *Davis v. Humphrey*, 131 S.Ct. ___ (No. 10-950)(Mar. 28, 2011).

[7] *Davis v. State*, 263 Ga.5, 5, 426 S.E.2d 844, 845 (1993).

[8] *Id.* 263 Ga. at 6, 426 S.E.2d at 846.

[9] *Id.* 263 Ga. at 9, 426 S.E.2d at 848.

[10] *Id.* 263 Ga. at 5, 426 S.E.2d at 845.

[11] *Davis v. Turpin*, 273 Ga. 244, 539 S.E.2d 129 (2000).

[12] *In re Davis*, 565 F.3d 810, 813 (11th Cir. 2009).

[13] *Id.*

[14] *Davis v. Terry*, 465 F.3d 1249, 1251 (11th Cir. 2006).

[15] *Id.* at 1256.

Davis then petitioned the Georgia courts for a new trial based on recantations of seven of the witnesses at trial, statements of witnesses who had not testified at trial, and evidence indicating another man committed the murder.[16] The Georgia Supreme Court affirmed the denial of his petition.[17] Four members of the Court, however, dissented, in the belief that in considering whether a new trial should be granted the majority had "weighed [Davis's new] evidence too lightly."[18] Davis next sought the approval of the federal court of appeals to file a second federal habeas petition arguing that he merited federal habeas relief because he is actually innocent of the murder for which he was convicted.[19]

A divided panel denied his application. In the eyes of the majority, he had failed to overcome either of the two requirements necessary for the presentation of a second habeas petition. First, the evidence in support of his claim was either not new or at least not newly discoverable as required in the habeas statute, 28 U.S.C. 2244(b)(2)(B)(i)("facts that could not have been discovered previously through the exercise of due diligence").[20] Second, in the mind of the majority, Davis's application was insufficient both as a matter of weight and for want of a constitutional error under the standard of 28 U.S.C. 2244(b)(2)(B)(ii)("sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense").[21] It did point out that Davis was free to file an original habeas petition with the Supreme Court.[22] The dissenting member of the panel argued that the application to permit a second habeas petition should be granted when a death row inmate makes a viable claim of actual innocence.[23]

After Davis filed his petition with the Supreme Court, the Court transferred his petition for habeas relief to the United States District Court for the Southern District of Georgia with instructions to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[24] The district court also understands that it, "could determine that portions of the Anti-terrorism and Effective Death Penalty Act ('AEDPA') do not apply to Habeas Corpus Petitions filed under the Supreme Court's original jurisdiction or that AEDPA cannot preclude a Petitioner from bring a claim of 'actual innocence.'"[25] The understanding flows not from the language of the Supreme Court's transfer order itself, but apparently from the language of Justice Steven's concurrence which accompanies the order.[26] Justice Stevens suggested three avenues to relief in response to Justice Scalia's dissenting quip that the transfer sends the district court on a "fool's errand"—it has been instructed to probe the evidence of Davis's innocence but must conclude that habeas relief is barred in another event. Not so, wrote Justice Stevens:

> Justice Scalia assumes as a matter of law that, '[e]ven if the District Court were to be persuaded by Davis's affidavits, it would have no power to grant relief' in light of 28 U.S.C.

[16] *In re Davis*, 565 F.3d 810, 814 (11th Cir. 2009).

[17] *Davis v. State*, 283 Ga. 438, 448, 660 S.E.2d 354, 363 (2008).

[18] *Id.* 283 Ga. at 450, 660 S.E.2d at 364 (Sears, C.J., dissenting).

[19] *In re Davis*, 565 F.3d 810, 816 (11th Cir. 2009).

[20] *Id.* at 819-22.

[21] *Id.* at 822-24.

[22] *Id.* at 826.

[23] *Id.* at 831 (Barkett, J., dissenting).

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

[25] *In re Davis*, 2009 WL 2750976 (S.D.Ga. Aug. 26, 2009).

[26] Cf., *id.* at fn.3.

> §2254(d)(1) [relating to the binding effect of state court determinations of law unless contrary to, or an unreasonable application of, clearly established federal law]. For several reasons, however, this transfer is by no means 'a fool's errand.' The District Court may conclude that §2254(d)(1) does not apply, or does not apply with the same rigidity, to as original habeas petition such as this. The court may also find it relevant to the AEDPA analysis that Davis is bringing an 'actual innocence' claim. Even if the court finds that §2254(d)(1) applies in full, it is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence. Alternatively, the court may find in such a case that the statute's text is satisfied, because decisions of this Court clearly support the proposition that it would be an atrocious violation of our Constitution and the principles upon which it is based to execute an innocent person. In re Davis, 130 S.Ct. at 1-2 (Stevens, J., concurring) (internal and quotation marks citations omitted).

The district court also begins with the belief that section 2244(b)'s jurisdictional bar on second or successive habeas petitions does not apply to petitions filed originally with the Supreme Court.[27]

Original Habeas Petitions in the Supreme Court

The Judiciary Act of 1789, which established the federal court system, declared that "all the before mentioned courts of the United States [, the Supreme Court, circuit courts, and district courts] shall have power to issue writs of ... habeas corpus.... And that either of the justices of the supreme court, as well as judges of the district courts shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment."[28]

In 1867, Congress substantially increased the jurisdiction of federal courts to issue the writ by authorizing its issuance "in all cases," state or federal, "where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[29] At the same time, Congress modified and codified much of the procedure associated with the writ.[30] The expansion included a clarification of the Supreme Court's appellate jurisdiction over the habeas decisions of the lower federal courts other than military prisoners.[31]

Notwithstanding the exception for prisoners held under military authority, the first case to come before the Court under its new appellate authority involved William McCardle, a Mississippi

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[27] *Id.* (In the Order transferring this case neither the concurrence nor the dissent mentioned the possibility that the jurisdictional bars in 28 U.S.C. §2244(b) apply to this petition ... Of course, the jurisdictional bar in §2244(b)(3) does not apply to original petitions for habeas corpus filed before the Supreme Court. *Felker v. Turpin*, 518 U.S. 651, 662-63 ... (1996).... While *Felker* does not decide the applicability of §2244(b)(1)-(2) to habeas petitions transferred to the district court ... it certainly suggests that these provisions are inapposite ... In dicta, the Eleventh Circuit Court of Appeals also suggested that §2244(b)(1)-(2) is inapplicable to petitions for habeas corpus originally filed in the Supreme Court, *In re* Davis, 656 F.3d 810, 826-27 (11th Cir. 2009) ...").

[28] 1 Stat. 81-82 (1789).

[29] "That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States; and it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of habeas corpus, which application shall be in writing and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known; and the said justice or judge to whom such application shall be made shall forthwith award a writ of habeas corpus, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the constitution or laws of the United States," 14 Stat. 385-86 (1867).

[30] 15 Stat. 44 (1868); see *Ex parte McCardle*, 74 U.S. (7 Wall.). 506 (1869).

[31] 15 Stat. 44 (1868); see *Ex parte McCardle*, 74 U.S. (7 Wall.). 506 (1869).

newspaper editor, arrested by military authorities for trial by a military commission under the reconstruction laws on charges of inciting "insurrection, disorder and violence."[32] His petition for a writ of habeas corpus was denied by the federal circuit court, and he appealed to the Supreme Court.[33]

The government moved to dismiss the appeal on the ground that appeal had been expressly excluded in cases involving Confederate sympathizers held in military custody. The Court denied the motion—because the military custody exception applied only to the expansion of habeas afforded by the 1867 Act while *McCardle* called upon the pre-existing habeas authority of the Judiciary Act of 1789—and set the case for argument, *Ex parte McCardle*, 73 U.S.(6 Wall.) 318 (1868). But before the case could be decided on its merits, Congress repealed the law vesting appellate jurisdiction in the Court.[34]

Its jurisdiction to decide the appeal having been withdrawn, the Court dismissed the appeal for want of jurisdiction, *Ex parte McCardle*, 74 U.S.(7 Wall.) 506 (1868). In doing so, however, the Court made it clear that the loss of its jurisdiction to hear appeals in habeas cases did not mean the loss of its ability to review lower court habeas decisions altogether.[35] The review available prior to the 1867 Act remained available just as the Court had described in its earlier *McCardle* case:

> But, though the exercise of appellate jurisdiction over judgments of inferior tribunals was not unknown to the practice of this court before the act of 1867, it was attended by some inconvenience and embarrassment. It was necessary to use the writ of *certiorari* in addition to the writ of *habeas corpus*, and there was no regulated and established practice for the guidance of parties invoking the jurisdiction, 73 U.S.(6 Wall.) at 324.[36]

The Court reexamined and confirmed this view the following year when it concluded that it had jurisdiction under writs of habeas corpus and certiorari to review the case of another Mississippi newspaper man held by military authorities. The 1868 Act repealed appellate jurisdiction vested in the Court by the 1867 Act. The 1868 Act did not repeal any of the provisions of the Judiciary Act of 1789; the Court's earlier authority to review habeas cases from the lower federal courts

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[32] Fairman, *Reconstruction and Reunion 1864-88*, VI HISTORY OF THE SUPREME COURT OF THE UNITED STATES 437 (1971).

[33] *Id.* at 438-40.

[34] "That so much of the act approved February five, eighteen hundred and sixty seven [14 Stat. 385] ... as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed," 15 Stat. 44 (1868).

[35] "Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised. Ex parte McCardle, 6 Wallace, 324," 74 U.S. at 515.

[36] The writ of certiorari cited by the Court was not the statutorily fortified writ we now know, but a considerably more modest version. It worked to remove an indictment or other record and thus proceedings from an inferior court. Both writs were required because (1) the Supreme Court's original jurisdiction could not be statutorily increased, *Marbury v. Madison*, 5 U.S.(1 Cranch) 103 (1807), and thus an "original" writ could only issue from the Court in aid of its appellate jurisdiction; (2) but habeas, unaided, did not remove proceedings from a lower court since it only demanded the presence of a prisoner and his or her custodian to appear before the court; (3) certiorari, unaided, was likewise insufficient since it accomplished no more than to retrieve process and records from an inferior court, Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUPREME COURT REVIEW 153, 154 ("The two [writs] were complimentary. Certiorari removed the record, but not the prisoner; habeas corpus removed the prisoner, but not the record").

through writs of habeas corpus, aided by writs of certiorari, remained available, *Ex parte Yerger*, 75 U.S.(8 Wall.) 85 (1869).

After *McCardle* and *Yerger*, Congress restored the Court's jurisdiction to review habeas cases under less cumbersome appellate procedures in 1885, 23 Stat. 437. Once Congress reopened more normal means of Supreme Court review in habeas cases, recourse to the original writ of habeas corpus in the Supreme Court described in *McCardle* and *Yerger* had been infrequent and rarely successful. Seen only as a burdensome way station of the unartful and ill advised, its best known chronicler urged its effective abandonment.[37]

The question as to the scope of Congress's control over Court's appellate jurisdiction in habeas cases surfaced again when a prisoner challenged the AEDPA's habeas limitations in *Felker v. Turpin*, 518 U.S. 651 (1996). In particular, Felker argued that the provisions of 28 U.S.C. 2244(b)(3)(E) which declared neither appealable nor "subject to a petition for rehearing or for a writ of certiorari" the appellate court determination of whether to authorize a second or successive habeas petition.

As before, the Court took no offense to the limitation of habeas appellate jurisdiction. Since the AEDPA "does not repeal [the Court's] authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, §2," 518 U. S. at 661-62. Review remained possible under the "original" writ of habeas corpus.

It offered the Court in *Felker* precisely what it supplied in *McCardle* and *Yerger*, a means of preserving Supreme Court review, under circumstances where Congress rather clearly intended to deny that possibility, without forcing the Court to address the question of whether Congress's efforts exceeded its constitutional authority.

The Supreme Court, in an opinion by Chief Justice Rehnquist, declared that "although the Act does impose new conditions on [the Court's] authority to grant relief, it does not deprive [the] Court of jurisdiction to entertain original habeas petitions," *Felker v. Turpin*, 518 U.S. at 658. Just as *McCardle* and *Yerger* "declined to find a repeal of §14 of the Judiciary Act of 1789 as applied to [the] Court by implication ... [*Felker*] decline[s] to find a similar repeal of §2241 of Title 28," 518 U.S. at 661.[38]

Felker sought not only review, but reversal. The Court refused to grant relief under its original writ authority because Felker's claims satisfied neither the demands of the act nor those of the Court's Rule 20.[39] It stopped short of holding, however, that it was required to follow the act's

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[37] Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUPREME COURT REVIEW 153, 206-7.

[38] The symmetry is less than perfect, however, since *McCardle* and *Yerger* found the dual authority in two distinct sources, the Judiciary Act of 1789 and the Act of 1867 while the Court points to section 2241 as the contemporary source of both. Moreover, while the nineteenth century Congress purported to do no more than withdraw appellate jurisdiction, its twentieth century successor sought to curtail certiorari jurisdiction as well.

Justice Stevens's concurrence identifies additional sources of review authority with the observation that the AEDPA "does not purport to limit our jurisdiction under [section 1254(1)] to review interlocutory orders in such cases, to limit our jurisdiction under 1254(2)[relating to Supreme Court review of questions certified by a court of appeals seeking instruction], or to limit our jurisdiction under the All Writs Act, 28 U.S.C. §1651," 518 U.S. at 666 (Stevens, J. joined by Souter & Breyer, JJ.)(concurring).

[39] 518 U.S. at 665 ("Our Rule 20.4(a) delineates the standards under which we grant such [original] writs of habeas corpus: 'A petition seeking the issuance of a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§2241 and 2242, and in particular with the provision in the last paragraph of §2242 requiring a statement of the reason for not making application to the district court of the district in which the applicant is held. If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted

standards in its original writ determinations: "Whether or not we are bound by these restrictions [of the AEDPA], they certainly inform our consideration of original habeas petitions," 518 U.S. at 663. Its reticence may have been calculated to avoid any suggestion that the suspension or exception clauses had become dead letters.[40]

Although it concluded that Felker had not demonstrated the "exceptional circumstances" required for issuance of a writ sought originally from the Court, the Court did not say why, nor did it indicate when such exceptional circumstances might exist. On the other hand, the Court's denial makes it clear that *McCardle* and *Yerger* notwithstanding, legislative barriers that block access to the more heavily traveled paths to review do not by themselves constitute the necessary exception circumstances.

Congress and the Suspension Clause

The issue of Congress's constitutional authority to absolutely bar access to the writ, which the Court avoided in *Felker*, it was compelled to face in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).[41] Boumediene was among the foreign nationals detained at the U.S. Naval Station at Guantanamo Bay, Cuba. Until *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the United States questioned whether habeas remained available to citizens seized in a combat zone. Thereafter, the Defense Department established tribunals to determine whether detainees were in fact enemy combatants, but until *Rasul v. Bush*, 542 U.S. 466 (2004), questioned whether detainees held in Guantanamo rested beyond the habeas reach of U.S. courts.

While the detainees' subsequent habeas petitions were pending, Congress passed the Detainee Treatment Act providing combatant status review tribunal procedures and stating that "no court, justice, or judge shall have jurisdiction to hear or consider" a habeas petition filed on behalf of a foreign national detained in Guantanamo, 119 Stat. 2742 (2006). After the Court held that the Detainee Treatment Act provision did not apply to cases pending prior to its enactment, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), Congress passed the Military Commissions Act which made the provision applicable to pending cases, 120 Stat. 2636 (2007).

In that posture, the Court faced two questions. First, were foreign nationals detained in Guantanamo entitled to the protection of the suspension clause—that clause which declared that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of

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available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted.' Reviewing petitioner's claims here, they do not materially differ from numerous other claims made by successive habeas petitioners which we have had occasion to review on stay applications to this Court. Neither of them satisfies the requirements of the relevant provisions of the Act, let alone the requirement that there be 'exceptional circumstances' justifying the issuance of the writ").

[40] The Court rejected Felker's suspension challenge based on the AEDPA's restrictions on second or successive petitions because the restrictions were compatible with contemporary habeas jurisprudence, 518 U.S. at 664 (internal citations omitted)("The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.' In McCleskey v. Zant, we said that 'the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions. The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process, and we hold that they do not amount to a 'suspension' of the writ contrary to Article I, § 9'").

[41] For a more detailed discussion of *Boumediene* and related detainee issues see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*.

Rebellion or Invasion the public Safety may require it"?[42] Second, if so, did the clause preclude curtailment of habeas jurisdiction in the manner of the Military Commissions Act provision?

First, the Court concluded that the suspension clause "has full effect at Guantanamo Bay" and that the Military Commission Act did not constitute a formal suspension of the writ.[43] Then, it addressed the question of "whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus" in the Detainee Treatment Act's combatant status review tribunal procedures.[44]

The Court found little precedent to guide its "adequate substitute" assessment. *Felker* involved a suspension clause challenge, but the provisions there did little more than replicate and codify pre-existing habeas jurisprudence. Besides, *Felker* arose following a state criminal conviction, hardly a close parallel to the federal detention without trial of *Boumediene.*[45]

Two other "habeas substitute" cases—*Swain v. Pressley*, 430 U.S. 372 (1977) and *United States v. Hayman*, 342 U.S. 205 (1952)—do little to explain the characteristics of an adequate substitute, because they involved statutes designed to expand rather than curtail habeas relief.[46]

So the Court identified, in the context of *Boumediene*, essential features of habeas corpus and any adequate substitute. First, it noted that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application of interpretation of relevant law."[47] Second, "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings."[48] Thus, "when a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is more pressing."[49] Third, "[f]or the writ of habeas corpus, or its substitute to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occur during [prior] proceedings."[50] Fourth, it must have "some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding."[51]

The Court found the Detainee Treatment Act procedures wanting when assessed against the standards of an adequate substitute for normal habeas procedures.[52] Thus, the provision of the Military Commissions Act, purporting to curtail habeas jurisdiction with respect to Guantanamo detainees, constitutes an unconstitutional suspension of the writ.[53]

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[42] U.S. Const. Art.I, §9, cl.2.

[43] *Boumediene v. Bush*, 128 S.Ct. 2229, 2262 (2008).

[44] *Id.*

[45] *Id.* at 2264.

[46] *Id.* at 2264-265.

[47] *Id.* at 2266.

[48] *Id.* at 2268.

[49] *Id.* at 2269.

[50] *Id.* at 2270.

[51] *Id.*

[52] *Id.* at 2274.

[53] *Id.*

Actual Innocence

On a few occasions, the Court has identified the prospect of innocence as a "gateway" through various procedural obstacles that would otherwise bar habeas review of a state prisoner's assertion of a constitutionally defective conviction or sentence. For example, the prospect of actual innocence based on evidence discovered after trial stands as an exception to the general rule that a federal court may not entertain the habeas petition of a state prisoner who has failed to afford state courts the opportunity to resolve his asserted constitutional defect. "The standard requires the habeas petitioner to show that a constitutional violation has *probably* resulted in the conviction of one who is actually innocent. To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence," *Schlup v. Delo*, 513 U.S. 298, 327 (1995)(emphasis added).

Earlier, the Court had imposed a more demanding standard for a habeas petition asserting actual innocence with respect to factors required for imposition of the death penalty (rather than conviction): the petitioner must "show *by clear and convincing evidence* that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty," *Sawyer v. Whitley*, 505 U.S. 333, 350 (1992)(emphasis added).

Neither standard is as demanding as that required for the habeas court to issue the writ based on insufficient evidence of guilt upon which to base a state conviction: an "applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt," *Jackson v. Virginia*, 443 U.S. 307 324 (1979).

In the midst of the Court's actual-innocence-plus-constitutional-defect decisions stands *Herrera v. Collins.*[54] Herrera, convicted of murder and sentenced to death 10 years earlier, sought habeas relief based on newly discovered evidence which he asserted established his innocence.[55] Faced with a claim of actual innocence unsupported by any claim of constitutional defect, the Court declared:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold.[56]

Six members of the Court went further and were willing to endorse the view that the Constitution would preclude execution of an undisputedly innocent individual.[57]

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[54] 506 U.S. 390 (1993).

[55] *Id.* at 396.

[56] *Id*. at 417.

[57] *Id.* at 419 (O'Connor, J., with Kennedy, J., concurring)("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution"); *id.* at 429 (White, J., concurring)("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"); *id.* at 430 (Blackmun, J., with Stevens and Souter, JJ., dissenting)(citations omitted)("Nothing could be more

A decade later, the Court again confronted the issue and responded in much the same way, "whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it," *House v. Bell*.[58] The case does indicate, however, that the level of persuasion required of a freestanding innocence claim is higher than that required of an innocence-plus-constitutional-defect claim—for House was found to have met the innocence-plus standard, but not the freestanding innocence standard.[59]

Davis

To succeed, Davis's petition may have to survive several inquiries. First, does the Constitution prohibit the execution of an individual, convicted and sentenced under constitutionally adequate procedures, but shown to be actually innocent? Second, if so, is original habeas relief available to such an individual? Third, do any statutory or judicial constraints limit entertainment of such a petition? Fourth, do any otherwise dispositive statutory impediments constitute unconstitutional suspension of the writ? Fifth, if actual innocence is a basis for habeas relief, how persuasive must be the proof of innocence to warrant relief? Sixth, does the evidence in *Davis* meet this standard?

On the first question, six members of the *Herrera* Court clearly believed that the execution of an indisputably innocent man would constitute cruel and unusual punishment, a violation of due process, or both.[60] Only two thought otherwise.[61] Moreover, the transfer to district court suggests that a sufficient number of the members of the Court believe that under the appropriate circumstances actual innocence might supply the grounds for habeas relief.

The Court in *Felker* suggested that the statutory impediments to normal habeas review may guide, but they do not necessarily bind, a court asked to entertain an original petition ("Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions").[62] A court's consideration is also likely to be influenced by the prudential rules developed by the Supreme Court over the years, some which are reflected in statute and some which are not. Here, the most pertinent of these would seem to include rules relating to second or successive habeas petitions, to the deference owed state courts, and to the announcement of new principles of constitutional law at the behest of state habeas petitioner.

Section 2244(b) of title 28 of the United States Code calls for the dismissal of a claim under usual habeas procedures that was presented in an earlier habeas petition or that was omitted from an

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contrary to contemporary standards of decency or more shocking to the conscience than to execute a person who is actually innocent").

[58] 547 U.S. 518, 555 (2004).

[59] *Id.* ("The sequence of the Court's decisions in *Herrera* and *Schlup*—first leaving unresolved the status of freestanding claims and then establishing the gateway standard—implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*. It follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera*").

[60] *Herrera v. Collins*, 506 U.S. at 419 (O'Connor, J., with Kennedy, J., concurring); *id.* at 429 (White, J., concurring); *id.* at 430 (Blackmun, J., with Stevens and Souter, JJ., dissenting).

[61] *Id.* at 427-48 (Scalia, J., with Thomas, J., dissenting)("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 decision 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").

[62] *Felker v. Turpin*, 518 U.S. 651, 663 (1996).

earlier petition.[63] An omission may be excused if based either on a new, retroactively applicable, constitutional interpretation by the Supreme Court or on newly discovered evidence that establishes by clear and convincing evidence that but for the constitutional error asserted in the claim no reasonable jury would have convicted the petitioner.[64] The section is built upon an earlier Supreme Court second or successive petition rule that used a standard of probability rather than clear and convincing evidence ("The *Carrier* standard requires the habeas petitioner to show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence").[65]

The *Davis* District Court has already indicated that it "will not revisit the issue of the applicability of [the section 2244(b)] bars," *In re Davis*, 2009 WL 2750976, n.3 (S.D.Ga. Aug. 7, 2009).

Under usual habeas procedure, legal rulings of state courts are entitled to deference. Once a state court has ruled on the merits of a claim, section 2254(d) of title 28 of the United States Code precludes habeas relief based on the same claim, unless the state court decision resulted in a decision contrary to, or involving an unreasonable application of, Supreme Court precedent or resulted in a decision based upon an unreasonable determination of the facts.[66] The section has no counterpart in earlier Supreme Court precedent. As Justice Stevens observed, "[t]he District Court may conclude that §2254(d)(1) does not apply, or does not apply with the same rigidity, to an original habeas petition such as this.... Even if the court finds that §2254(d)(1) applies in full, it is arguably unconstitutional [under the suspension clause] to the extent it bars relief for a death row inmate who has established his innocence. Alternatively, the court may find in such a case that the statute's text is satisfied, because decisions of this Court clearly support the proposition that it 'would be an atrocious violation of our Constitution and the principles upon which it is based' to execute an innocent person."[67]

Under usual habeas procedure, the *Teague* doctrine might be triggered in the absence of clear Supreme Court precedent that recognizes that the Constitution precludes execution of an individual, convicted and sentenced under constitutional blameless procedures, who is nevertheless actually innocent. Under the doctrine, a state prisoner may not use habeas to claim the benefit of a new rule, that is, a constitutional interpretation not in place when his conviction became final.[68] *Teague* applies unless the new constitutional interpretation (1) prohibits proscription of the underlying conduct of conviction or (2) is a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal procedure."[69]

Assuming innocence warrants habeas relief, what level of persuasion is necessary? "In *Herrera* ... the Court described the threshold for any hypothetical freestanding innocence claim as 'extraordinarily high.'"[70] Higher, *House* would say, than the *Schlup* threshold ("more likely than not that no reasonable juror ... would lack reasonable doubt").[71] Higher, some might say, in a

[63] 28 U.S.C. 2244(b)(1), (2).

[64] 28 U.S.C. 2244(b)(2)(A), (B).

[65] *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

[66] 28 U.S.C. 2254(d).

[67] *In re Davis*, 130 S.Ct. 1, 1-2 (Stevens, J., concurring).

[68] *O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997), citing inter alia *Teague v. Lane*, 489 U.S. 288, 301, 311 (1989).

[69] *Whorton v. Bockting*, 549 U.S. 406, 416 (2007), quoting *Teague v. Lane*, 489 U.S. at 311.

[70] *House v. Bell*, 547 U.S. 518, 555 (2006), quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

[71] *House v. Bell*, 547 U.S. at 554-55.

simple innocence case than the clear-and-convincing-evidence threshold that the statute applies in an innocence-plus-constitution-defect case ("establish by clear and convincing evidence that but for the constitutional error, no reasonable fact-finder would have found the applicant guilty").[72]

Regardless of any standard established, it remains to be seen whether Davis—unlike Herrera or House before him—will be able to assemble and present evidence sufficient to satisfy it. The District Court to which the Court transferred the case thought not.[73]

Davis after Transfer

The District Court conducted a hearing and an extensive examination of the record. Its analysis began with a search of Supreme Court cases to determine whether the Eighth Amendment precludes execution of a defendant who is actually innocent. What do the cases say the Eighth Amendment's cruel and unusual punishment clause condemns? As the district court understood the Supreme Court's *Graham* decision, it condemns punishments that offend "the evolving standards of decency that mark the progress of a maturing society."[74] State practices, particular state legislative action, read in the light of Supreme Court precedents, point to the line between permissible and impermissible punishments under this standard.[75] In the case of executing the actually innocent, all but three states have enacted statutes which allow innocent defendants to challenge their erroneous capital convictions, and in two of the remaining three states capital punishment is not a sentencing option.[76] Moreover, the Supreme Court's precedents make it clear that the Eighth Amendment permits execution of a defendant only after it has been established that he has been responsible for the death of another,[77] and when the execution serves the penological purposes served by the death penalty (retribution and deterrence).[78]

Having reasoned that the Eighth Amendment forbids execution of the actually innocent, the District Court proceeded to the question of what must a convicted defendant prove to establish that he is actually innocent. Its understanding of the case law persuaded the district court to borrow the "clear and convincing evidence" standard from *Sawyer*, which meant, "Mr. Davis must show by clear and convincing evidence that no reasonable juror would have convicted him in the light of the new evidence."[79]

This he could not do. In the eyes of the District Court, "while Mr. Davis's new evidence casts some additional, minimal doubt on his conviction, ... [t]he vast majority of the evidence at trial remains intact, and the new evidence is largely not credible or lacking in probative value. After

[72] E.g., 28 U.S.C. 2254(e)(2)(B).

[73] *In re Davis*, No. CV409-130, 2010 WL 3385081, at *70 (S.D.Ga. Aug. 24, 2010).

[74] *Id.* at *36-37, citing *Graham v. Florida*, 130 S.Ct. 2011, 2021 (2010), and the standard from *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

[75] *Id.* at 38, citing *Graham v. Florida*, 130 S.Ct. at 2022, *Roper v. Simmons*, 543 U.S. 551, 572 (2005), and *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2650 (2008).

[76] *Id.* at 38-41.

[77] *Id.* at 42, quoting *Graham v. Florida*, 130 S.Ct. at 2027 ("The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers").

[78] *Id.* at 41, citing *Kennedy v. Louisiana*, 128 S.Ct. at 2661.

[79] *Id.* at 47.

careful consideration, the Court finds that Mr. Davis has failed to make a showing of actual innocence that would entitle him to habeas relief in federal court."[80]

The District Court had noted at the outset that any appeal of its conclusions would be directly to the Supreme Court,[81] a position with which the circuit court agreed.[82] The District Court's conclusion that Davis failed to establish his actual innocence seemed to permit the Supreme Court to dispose of the case summarily. On March 28, 2011, it did so without written opinion.[83]

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[80] *Id.* at 70.

[81] *Id.* at 1 n.1.

[82] *Davis v. Terry*, ___ F.3d ___, ___ (11th Cir. Nov. 5, 2010).

[83] *In re Davis*, 131 S.Ct. ___ (No. 08-1443)(Mar. 28, 2011)(denying review); *Davis v. Humphrey*, 131 S.Ct. ___ (No. 10-949)(Mar. 28, 2011)(denying certiorari); *Davis v. Humphrey*, 131 S.Ct. ___ (No. 10-950)(Mar. 28, 2011)(dismissing the appeal and denying petitions for a writ of habeas corpus and for a common law writ of certiorari).