2743.48 Wrongful imprisonment civil action against state.

(A) As used in this section and section 2743.49 of the Revised Code, a "wrongfully imprisoned individual" means an individual who satisfies each of the following:

(1) The individual was charged with a violation of a section of the Revised Code by an indictment or information, and the violation charged was an aggravated felony, felony, or misdemeanor.

(2) The individual was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense by the court or jury involved, and the offense of which the individual was found guilty was an aggravated felony, felony, or misdemeanor.

(3) The individual was sentenced to an indefinite or definite term of imprisonment in a state correctional institution for the offense of which the individual was found guilty.

(4) The individual's conviction was vacated, dismissed, or reversed on appeal and all of the following apply:

(a) No criminal proceeding is pending against the individual for any act associated with that conviction.

(b) The prosecuting attorney in the case, within one year after the date of the vacating, dismissal, or reversal, has not sought any further appeal of right or upon leave of court, provided that this division does not limit or affect the seeking of any such appeal after the expiration of that one-year period as described in division (C)(3) of this section.

(c) The prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation, within one year after the date of the vacating, dismissal, or reversal, has not brought a criminal proceeding against the individual for any act associated with that conviction, provided that this division does not limit or affect the bringing of any such proceeding after the expiration of that one-year period as described in division (C)(3) of this section.

(5) Subsequent to sentencing or during or subsequent to imprisonment, an error in procedure was discovered that occurred prior to, during, or after sentencing, that involved a violation of the Brady Rule which violated the individual's rights to a fair trial under the Ohio

Constitution or the United States Constitution, and that resulted in the individual's release, or it was determined by the court of common pleas in the county where the underlying criminal action was initiated either that the offense of which the individual was found guilty, including all lesser-included offenses, was not committed by the individual or that no offense was committed by any person. In addition to any other application of the provisions of this division regarding an error in procedure that occurred prior to, during, or after sentencing, as those provisions exist on and after the effective date of this amendment, if an individual had a claim dismissed, has a claim pending, or did not file a claim because the state of the law in effect prior to the effective date of this amendment barred the claim or made the claim appear to be futile, those provisions apply with respect to the individual and the claim and, on or after that effective date, the individual may file a claim and obtain the benefit of those provisions.

(B)

(1) A person may file a civil action to be declared a wrongfully imprisoned individual in the court of common pleas in the county where the underlying criminal action was initiated. That civil action shall be separate from the underlying finding of guilt . Upon the filing of a civil action to be determined a wrongfully imprisoned individual, the attorney general shall be served with a copy of the complaint and shall be heard.

(2) When the court of common pleas in the county where the underlying criminal action was initiated determines that a person is a wrongfully imprisoned individual, the court shall provide the person with a copy of this section and orally inform the person and the person's attorney of the person's rights under this section to commence a civil action against the state in the court of claims because of the person's wrongful imprisonment and to be represented in that civil action by counsel of the person's own choice.

(3) The court described in division (B)(1) of this section shall notify the clerk of the court of claims, in writing and within seven days after the date of the entry of its determination that the person is a wrongfully imprisoned individual, of the name and proposed mailing address of the person and of the fact that the person has the rights to commence a civil action and to have legal representation as provided in this section. The clerk of the court of claims shall

maintain in the clerk's office a list of wrongfully imprisoned individuals for whom notices are received under this section and shall create files in the clerk's office for each such individual.

(4) Within sixty days after the date of the entry of the determination by the court of common pleas in the county where the underlying criminal action was initiated that a person is a wrongfully imprisoned individual, the clerk of the court of claims shall forward a preliminary judgment to the president of the controlling board requesting the payment of fifty per cent of the amount described in division (E)(2)(b) of this section to the wrongfully imprisoned individual. The board shall take all actions necessary to cause the payment of that amount out of the emergency purposes special purpose account of the board.

(5) If an individual was serving at the time of the wrongful imprisonment concurrent sentences on other convictions that were not vacated, dismissed, or reversed on appeal, the individual is not eligible for compensation as described in this section for any portion of that wrongful imprisonment that occurred during a concurrent sentence of that nature.

(C)

(1) In a civil action under this section, a wrongfully imprisoned individual has the right to have counsel of the individual's own choice.

(2) If a wrongfully imprisoned individual who is the subject of a court determination as described in division (B)(2) of this section does not commence a civil action under this section within six months after the entry of that determination, the clerk of the court of claims shall send a letter to the wrongfully imprisoned individual, at the address set forth in the notice received from the court of common pleas pursuant to division (B)(3) of this section or to any later address provided by the wrongfully imprisoned individual, that reminds the wrongfully imprisoned individual of the wrongfully imprisoned individual's rights under this section. Until the statute of limitations provided in division (H) of this section expires and unless the wrongfully imprisoned individual commences a civil action under this section, the clerk of the court of claims shall send a similar letter in a similar manner to the wrongfully imprisoned individual at least once each three months after the sending of the first reminder.

(3) If an individual has been determined by the court of common pleas in the county where the underlying criminal action was initiated to be a wrongfully imprisoned individual, as described in division (A) of this section, both of the following apply:

(a) The finding under division (A)(4)(b) of this section does not affect or negate any right or authority the prosecuting attorney in the case may have to seek, after the expiration of the one-year period described in that division, a further appeal of right or upon leave of court with respect to the conviction that was vacated, dismissed, or reversed on appeal, and the prosecuting attorney may seek such a further appeal after the expiration of that period.

(b) The finding under division (A)(4)(c) of this section does not affect or negate any right or authority the prosecuting attorney in the case may have under any other provision of law to bring, after the expiration of the one-year period described in that division, a criminal proceeding against the individual for any act associated with the conviction that was vacated, dismissed, or reversed on appeal, and the prosecuting attorney may bring such a proceeding after the expiration of that period as provided under any other provision of law.

(D) Notwithstanding any provisions of this chapter to the contrary, a wrongfully imprisoned individual has and may file a civil action against the state, in the court of claims, to recover a sum of money as described in this section, because of the individual's wrongful imprisonment. The court of claims shall have exclusive, original jurisdiction over such a civil action. The civil action shall proceed, be heard, and be determined as provided in sections 2743.01 to 2743.20 of the Revised Code, except that if a provision of this section conflicts with a provision in any of those sections, the provision in this section controls.

(E)

(1) In a civil action as described in division (D) of this section, the complainant may establish that the claimant is a wrongfully imprisoned individual by submitting to the court of claims a certified copy of the judgment entry of the court of common pleas associated with the claimant's conviction and sentencing, and a certified copy of the entry of the determination of the court of common pleas that the claimant is a wrongfully imprisoned individual under division (B)(2) of this section. No other evidence shall be required of the complainant to

establish that the claimant is a wrongfully imprisoned individual, and the claimant shall be irrebuttably presumed to be a wrongfully imprisoned individual.

(2) In a civil action as described in division (D) of this section, upon presentation of requisite proof to the court of claims, a wrongfully imprisoned individual is entitled to receive a sum of money that equals the total of each of the following amounts:

(a) The amount of any fine or court costs imposed and paid, and the reasonable attorney's fees and other expenses incurred by the wrongfully imprisoned individual in connection with all associated criminal proceedings and appeals, and, if applicable, in connection with obtaining the wrongfully imprisoned individual's discharge from confinement in the state correctional institution;

(b) For each full year of imprisonment in the state correctional institution for the offense of which the wrongfully imprisoned individual was found guilty, forty thousand three hundred thirty dollars or the adjusted amount determined by the auditor of state pursuant to section 2743.49 of the Revised Code, and for each part of a year of being so imprisoned, a pro-rated share of forty thousand three hundred thirty dollars or the adjusted amount determined by the auditor of state pursuant to section 2743.49 of the Revised Code;

(c) Any loss of wages, salary, or other earned income that directly resulted from the wrongfully imprisoned individual's arrest, prosecution, conviction, and wrongful imprisonment;

(d) The amount of the following cost debts the department of rehabilitation and correction recovered from the wrongfully imprisoned individual who was in custody of the department or under the department's supervision:

(i) Any user fee or copayment for services at a detention facility, including, but not limited to, a fee or copayment for sick call visits;

(ii) The cost of housing and feeding the wrongfully imprisoned individual in a detention facility;

(iii) The cost of supervision of the wrongfully imprisoned individual;

(iv) The cost of any ancillary services provided to the wrongfully imprisoned individual.

(F)

(1) If the court of claims determines in a civil action as described in division (D) of this section that the complainant is a wrongfully imprisoned individual, it shall enter judgment for the wrongfully imprisoned individual in the amount of the sum of money to which the wrongfully imprisoned individual is entitled under division (E)(2) of this section. In determining that sum, the court of claims shall not take into consideration any expenses incurred by the state or any of its political subdivisions in connection with the arrest, prosecution, and imprisonment of the wrongfully imprisoned individual, including, but not limited to, expenses for food, clothing, shelter, and medical services. The court shall reduce that sum by the amount of the payment to the wrongfully imprisoned individual described in division (B)(4) of this section.

(2) If the wrongfully imprisoned individual was represented in the civil action under this section by counsel of the wrongfully imprisoned individual's own choice, the court of claims shall include in the judgment entry referred to in division (F)(1) of this section an award for the reasonable attorney's fees of that counsel. These fees shall be paid as provided in division (G) of this section.

(3) If the wrongfully imprisoned individual owes any debt to the state or any of its political subdivisions, the court of claims, in the judgment entry referred to in division (F)(1) of this section, shall deduct the amount of any such debts that are known from the sum of money to which the wrongfully imprisoned individual is entitled under division (E)(2) of this section. The court shall include in the judgment entry an award to the state or a political subdivision, whichever is applicable, of any amount deducted pursuant to this division. These amounts shall be paid as provided in division (G) of this section.

(4)

(a) If, at the time of the judgment entry referred to in division (F)(1) of this section, the wrongfully imprisoned individual has won or received a qualifying monetary award or recovery that arose from any conduct that resulted in or contributed to the person being determined to be a wrongfully imprisoned individual, all of the following apply:

(i) The court of claims, in the judgment entry, shall deduct the amount of the award or recovery in the action that the wrongfully imprisoned individual actually collected prior to the time of the judgment entry, after the payment of the individual's attorney's fees and costs related to the litigation, from the sum of money to which the wrongfully imprisoned individual is entitled under division (E)(2) of this section. If the wrongfully imprisoned individual has won or received two or more qualifying monetary awards or recoveries of the type described in division (F)(4)(a) of this section, the court shall aggregate the amounts of all of those awards or recoveries that the individual actually collected prior to the date of the judgment entry, and the aggregate amount shall be the amount deducted under this division from the sum of money to which the wrongfully imprisoned individual is entitled under division (E)(2) of this section. The court shall include in the judgment entry an award to the state of any amount deducted pursuant to this division. These amounts shall be paid as provided in division (G) of this section.

(ii) If the wrongfully imprisoned individual actually collects any amount of the qualifying monetary award or recovery after the date of the judgment entry referred to in division (F)(1) of this section, the wrongfully imprisoned individual shall reimburse the state for the sum of money paid under the judgment entry referred to in division (F)(1) of this section, after the deduction of the individual's attorney's fees and costs related to the litigation, for the amount of the qualifying monetary award or recovery actually collected after that date. A reimbursement required under this division shall not exceed the amount that the wrongfully imprisoned individual actually collects under the qualifying monetary award or recovery. If the wrongfully imprisoned individual has won or received two or more qualifying monetary awards or recoveries of the type described in division (F)(4)(a) of this section and actually collects any amount of two or more of those qualifying monetary awards or recoveries after the date of the judgment entry referred to in division (F)(1) of this section, the court shall apply this division separately with respect to each such qualifying monetary award or recovery.

(iii) The total amount a court deducts under division (F)(4)(a)(i) of this section with respect to a qualifying monetary award or recovery plus the total amount of a reimbursement required under division (F)(4)(a)(ii) of this section with respect to that same qualifying monetary

award or recovery shall not exceed the amount that the wrongfully imprisoned individual actually collects under that qualifying monetary award or recovery.

(b) If division (F)(4)(a) of this section does not apply and if, after the time of the judgment entry referred to in division (F)(1) of this section, the wrongfully imprisoned individual wins a qualifying monetary award or recovery that arose from any conduct that resulted in or contributed to the person being determined to be a wrongfully imprisoned individual, the wrongfully imprisoned individual shall reimburse the state for the sum of money paid under the judgment entry referred to in division (F)(1) of this section, after the deduction of the individual's attorney's fees and costs related to the litigation. A reimbursement required under this division shall not exceed the amount that the wrongfully imprisoned individual actually collects under the qualifying monetary award or recovery. If the wrongfully imprisoned individual has won or received two or more such qualifying monetary awards or recoveries, the court shall apply this division separately with respect to each such qualifying monetary award or recovery.

(c) Divisions (F)(4)(a) and (b) of this section apply only with respect to judgment entries referred to in division (F)(1) of this section that are entered on or after the effective date of divisions (F)(4)(a) and (b) of this section.

(5) If, after the time of the judgment entry referred to in division (F)(1) of this section, the wrongfully imprisoned individual is convicted of or pleads guilty to an offense that is based on any act associated with the conviction that was vacated, reversed, or dismissed on appeal and that was the basis of the person being determined to be a wrongfully imprisoned individual, the wrongfully imprisoned individual shall reimburse the state for the entire sum of money paid under the judgment entry referred to in division (F)(1) of this section.

(6) The state consents to be sued by a wrongfully imprisoned individual because the imprisonment was wrongful, and to liability on its part because of that fact, only as provided in this section. However, this section does not affect any liability of the state or of its employees to a wrongfully imprisoned individual on a claim for relief that is not based on the fact of the wrongful imprisonment, including, but not limited to, a claim for relief that arises out of circumstances occurring during the wrongfully imprisoned individual's confinement in the state correctional institution.

(G) The clerk of the court of claims shall forward a certified copy of a judgment under division (F) of this section to the president of the controlling board. The board shall take all actions necessary to cause the payment of the judgment out of the emergency purposes special purpose account of the board.

(H) To be eligible to recover a sum of money as described in this section because of wrongful imprisonment, both of the following shall apply to a wrongfully imprisoned individual:

(1) The wrongfully imprisoned individual shall not have been, prior to September 24, 1986, the subject of an act of the general assembly that authorized an award of compensation for the wrongful imprisonment or have been the subject of an action before the former sundry claims board that resulted in an award of compensation for the wrongful imprisonment.

(2) The wrongfully imprisoned individual shall commence a civil action under this section in the court of claims no later than two years after the date of the entry of the determination of the court of common pleas that the individual is a wrongfully imprisoned individual under division (B)(2) of this section.

(I) No determination of a court of common pleas as specified in division (B) of this section or of the court of claims as described in division (D) of this section that a person is a wrongfully imprisoned individual, and no finding in the civil action that results in either of those determinations, is admissible as evidence in any criminal proceeding that is pending at the time of, or is commenced subsequent to, that civil action.

(J)

(1) As used in division (A) of this section, "Brady Rule" means the rule established pursuant to the decision of the United States supreme court in Brady v. Maryland (1963), 373 U.S. 83.

(2) As used in divisions (F)(3) to (5) of this section:

(a) "State" and "political subdivisions" have the same meanings as in section 2743.01 of the Revised Code.

(b) "Qualifying monetary award or recovery" means a monetary award won in, or a monetary recovery received through a settlement in, a civil action under section 1983 of Title 42 of the United States Code, 93 Stat. 1284 (1979), 42 U.S.C. 1983, as amended.

Amended by 132nd General Assembly File No. TBD, HB 411, §1, eff. 3/22/2019.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Amended by 129th General Assembly File No.127, HB 487, §101.01, eff. 9/10/2012.

Amended by 128th General Assembly File No.52, HB 338, §1, eff. 9/17/2010.

Effective Date: 04-09-2003.

2945.80 Written motion for new trial.

Application for a new trial shall be made by motion upon written grounds, and except for the cause of newly discovered evidence material for the person applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be filed within three days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial in which case it shall be filed within three days from the order of the court finding that he was unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days following the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within three days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

Effective Date: 11-01-1965.

2953.21 Post conviction relief petition.

(A)

(1)

(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, any person who has been convicted of a criminal offense and sentenced to death and who claims that there was a denial or infringement of the person's rights under either of those Constitutions that creates a reasonable probability of an altered verdict, and any person who has been convicted of a criminal offense that is a felony and who is an offender for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the

aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(c) As used in divisions (A)(1)(a) and (b) of this section, "former section 2953.82 of the Revised Code" means section 2953.82 of the Revised Code as it existed prior to July 6, 2010.

(d) At any time in conjunction with the filing of a petition for postconviction relief under division (A) of this section by a person who has been sentenced to death, or with the litigation of a petition so filed, the court, for good cause shown, may authorize the petitioner in seeking the postconviction relief and the prosecuting attorney of the county served by the court in defending the proceeding, to take depositions and to issue subpoenas and subpoenas duces tecum in accordance with divisions (A)(1)(d), (A)(1)(e), and (C) of this section, and to any other form of discovery as in a civil action that the court in its discretion permits. The court may limit the extent of discovery under this division. In addition to discovery that is relevant to the claim and was available under Criminal Rule 16 through conclusion of the original criminal trial, the court, for good cause shown, may authorize the petitioner or prosecuting attorney to take depositions and issue subpoenas and subpoenas duces tecum in either of the following circumstances:

(i) For any witness who testified at trial or who was disclosed by the state prior to trial, except as otherwise provided in this division, the petitioner or prosecuting attorney shows clear and convincing evidence that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict. This division does not apply if the witness was unavailable for trial or would not voluntarily be interviewed by the defendant or prosecuting attorney.

(ii) For any witness with respect to whom division (A)(1)(d)(i) of this section does not apply, the petitioner or prosecuting attorney shows good cause that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict.

(e) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1)(d) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as described in that division, within ten days after the docketing of the request, or within any other time that the court sets for good cause shown, the prosecuting attorney shall respond by answer or motion to the petitioner's request or the petitioner shall respond by answer or motion to the prosecuting attorney's request, whichever is applicable.

(f) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1)(d) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as described in that division, upon motion by the petitioner, the prosecuting attorney, or the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from oppression or undue burden or expense, including but not limited to the orders described in divisions (A)(1)(g)(i) to (viii) of this section. The court also may make any such order if, in its discretion, it determines that the discovery sought would be irrelevant to the claims made in the petition; and if the court makes any such order on that basis, it shall explain in the order the reasons why the discovery would be irrelevant.

(g) If a petitioner, prosecuting attorney, or person from whom discovery is sought makes a motion for an order under division (A)(1)(f) of this section and the order is denied in whole or in part, the court, on terms and conditions as are just, may order that any party or person provide or permit discovery as described in division (A)(1)(d) of this section. The provisions of Civil Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion, except that in no case shall a court require a petitioner who is indigent to pay expenses under those provisions.

Before any person moves for an order under division (A)(1)(f) of this section, that person shall make a reasonable effort to resolve the matter through discussion with the petitioner or prosecuting attorney seeking discovery. A motion for an order under division (A)(1)(f) of

this section shall be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph.

The orders that may be made under division (A)(1)(f) of this section include, but are not limited to, any of the following:

(i) That the discovery not be had;

(ii) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(iii) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(iv) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;

(v) That discovery be conducted with no one present except persons designated by the court;

(vi) That a deposition after being sealed be opened only by order of the court;

(vii) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(viii) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(h) Any postconviction discovery authorized under division (A)(1)(d) of this section shall be completed not later than eighteen months after the start of the discovery proceedings unless, for good cause shown, the court extends that period for completing the discovery.

(i) Nothing in division (A)(1)(d) of this section authorizes, or shall be construed as authorizing, the relitigation, or discovery in support of relitigation, of any matter barred by the doctrine of res judicata.

(j) Division (A)(1) of this section does not apply to any person who has been convicted of a criminal offense and sentenced to death and who has unsuccessfully raised the same claims in a petition for postconviction relief.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(6) Notwithstanding any law or court rule to the contrary, there is no limit on the number of pages in, or on the length of, a petition filed under division (A) of this section by a person who has been sentenced to death. If any court rule specifies a limit on the number of pages in, or on the length of, a petition filed under division (A) of this section or on a prosecuting attorney's response to such a petition by answer or motion and a person who has been sentenced to death files a petition that exceeds the limit specified for the petition, the prosecuting attorney may respond by an answer or motion that exceeds the limit specified for the response.

(B) The clerk of the court in which the petition for postconviction relief and, if applicable, a request for postconviction discovery described in division (A)(1)(d) of this section is filed shall docket the petition and the request and bring them promptly to the attention of the court. The clerk of the court in which the petition for postconviction relief and, if applicable, a request for postconviction discovery described in division (A)(1)(d) of this section is filed immediately shall forward a copy of the petition and a copy of the request if filed by the petitioner to the prosecuting attorney of the county served by the court. If the request for postconviction discovery is filed by the prosecuting attorney, the clerk of the court immediately shall forward a copy of the request to the petitioner or the petitioner's counsel.

(C) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests a deposition or the prosecuting attorney in the case requests a deposition, and if the court grants the request under division (A)(1)(d) of this section, the court shall notify the petitioner or the petitioner's counsel and the prosecuting attorney. The deposition shall be conducted pursuant to divisions (B), (D), and (E) of Criminal Rule 15. Notwithstanding division (C) of Criminal Rule 15, the petitioner is not entitled to attend the deposition. The prosecuting attorney shall be permitted to attend and participate in any deposition.

(D) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the

files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the dismissal of the petition and of each claim it contains.

(E) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Division (A)(6) of this section applies with respect to the prosecuting attorney's response. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(F) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(G) A petitioner who files a petition under division (A) of this section may amend the petition as follows:

(1) If the petition was filed by a person who has been sentenced to death, at any time that is not later than one hundred eighty days after the petition is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings.

(2) If division (G)(1) of this section does not apply, at any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings.

(3) The petitioner may amend the petition with leave of court at any time after the expiration of the applicable period specified in division (G)(1) or (2) of this section.

(H) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the denial of relief on the petition and of each claim it contains. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (F) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. If the petitioner has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the finding of grounds for granting the relief, with respect to each claim contained in the petition. The court also may make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (F) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(I) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(J)

(1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary,

that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (J)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (J)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (J) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (J)(2) of this section.

(K) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

Amended by 131st General Assembly File No. TBD, SB 139, §1, eff. 4/6/2017.

Amended by 130th General Assembly File No. TBD, HB 663, §1, eff. 3/23/2015.

Amended by 128th General Assembly File No.30, SB 77, §1, eff. 7/6/2010.

Effective Date: 10-29-2003; 07-11-2006

Ohio Criminal Rule of Procedure 33 - New Trial

(A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:**(1)** Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;**(2)** Misconduct of the jury, prosecuting attorney, or the witnesses for the state;**(3)** Accident or surprise which ordinary prudence could not have guarded against;**(4)** That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;**(5)** Error of law occurring at the trial;**(6)** When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

(B) Motion for new trial; form, time. Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and

convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

(C) Affidavits required. The causes enumerated in subsection (A)(2) and (3) must be sustained by affidavit showing their truth, and may be controverted by affidavit.

(D) Procedure when new trial granted. When a new trial is granted by the trial court, or when a new trial is awarded on appeal, the accused shall stand trial upon the charge or charges of which he was convicted.

(E) Invalid grounds for new trial. No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:**(1)** An inaccuracy or imperfection in the indictment, information, or complaint, provided that the charge is sufficient to fairly and reasonably inform the defendant of all the essential elements of the charge against him.**(2)** A variance between the allegations and the proof thereof, unless the defendant is misled or prejudiced thereby;**(3)** The admission or rejection of any evidence offered against or for the defendant, unless the defendant was or may have been prejudiced thereby;**(4)** A misdirection of the jury, unless the defendant was or may have been prejudiced thereby;**(5)** Any other cause, unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial.

(F) Motion for new trial not a condition for appellate review. A motion for a new trial is not a prerequisite to obtain appellate review.

Ohio. Crim. R. 33

Effective: July 1, 1973.

Ohio Criminal Rule of Procedure 35 - Post-Conviction Petition

(A) A petition for post-conviction relief pursuant to section 2953.21 of the Revised Code shall contain a case history, statement of facts, and separately identified grounds for relief. Each ground for relief shall not exceed three pages in length. (See recommended Form XV in Appendix of Forms.) A petition may be accompanied by an attachment of exhibits or other supporting materials. A trial court may extend the page limits provided in this rule, request further briefing on any ground for relief presented, or direct the petitioner to file a supplemental petition in the recommended form.

(B) The clerk of court immediately shall send a copy of the petition to the prosecuting attorney. Upon order of the trial court, the clerk of court shall duplicate all or any part of the record that the trial court requires.

(C) The trial court shall file its ruling upon a petition for post-conviction relief, including findings of fact and conclusions of law if required by law, not later than one hundred eighty days after the petition is filed.
Ohio. Crim. R. 35

Effective: July 1, 1997.

42 USCS § 1983, Part 1 of 15

Current through Public Law 116-108, approved January 24, 2020, with a gap of Public Law 116-92 through Public Law 116-94.

- **United States Code Service**
- **TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 — 161)**
- **CHAPTER 21. CIVIL RIGHTS (§§ 1981 — 2000h-6)**
- **GENERALLY (§§ 1981 — 1996b)**

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

History

HISTORY:

Act R. S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284; Oct. 19, 1996, P. L. 104-317, Title III, § 309(c), 110 Stat. 3853.

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1. *Brady v. Maryland, 373 U.S. 83*
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Content Type	Narrowed by
Cases	-None-

Brady v. Maryland

Supreme Court of the United States

March 18-19, 1963, Argued ; May 13, 1963, Decided

No. 490

Reporter
373 U.S. 83 *; 83 S. Ct. 1194 **; 10 L. Ed. 2d 215 ***; 1963 U.S. LEXIS 1615 ****

BRADY v. MARYLAND

Prior History: [**1]** CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

Disposition: *226 Md. 422, 174 A. 2d 167*, affirmed.

Core Terms

suppression, confession, due process, new trial, guilt, murder, sentence, issue of guilt, criminal case, first degree, trial court, innocence

Case Summary

Procedural Posture

Certiorari was granted to a decision of the Court of Appeals of Maryland to consider whether petitioner was denied a federal right when the appeals court restricted its grant of a new murder trial to the question of punishment, leaving the determination of guilt undisturbed. The appeals court granted a retrial after holding that suppression of evidence by the state violated petitioner's rights under the *Due Process Clause, U.S. Const. amend. XIV*.

Overview

A judgment granting petitioner a new murder trial that was restricted to the issue of punishment was affirmed. After petitioner was convicted of murder and sentenced to death, he learned that the State withheld a statement in which another individual admitted the actual homicide. The Court held that suppression of evidence favorable to an accused upon request violated the *Due Process Clause, U.S. Const. amend. XIV*, where the evidence was material to guilt or punishment, regardless of the State's good or bad faith. The suppression of evidence violated petitioner's due process rights and required a retrial on the sentence. The Court held, however, that it could not assume that if the suppressed evidence had been used at the first trial, the ruling that the statement was inadmissible as to guilt might have been disregarded by the jury. In Maryland, it was the trial court, not the jury, which ruled on the admissibility of evidence relating to guilt. The appeals court's statement that nothing in the suppressed confession could have reduced petitioner's offense below a first degree murder was a ruling on the admissibility of the confession as to the issue of innocence or guilt.

Outcome

The judgment granting petitioner a new trial restricted to the issue of punishment was affirmed where the suppression of evidence by the state violated petitioner's right to due process of law and required a retrial on the sentence. The Court held, however, that the appeals court had ruled the suppressed confession was inadmissible as to the issue of petitioner's guilt.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN1[] Discovery & Inspection, Brady Materials

The suppression of evidence favorable to an accused is itself sufficient to amount to a denial of due process.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

Criminal Law & Procedure > ... > Discovery & Inspection > Discovery Misconduct > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN2[] Brady Materials, Brady Claims

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview

HN3[] Juries & Jurors, Province of Court & Jury

In Maryland, trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused.

Lawyers' Edition Display

Summary

After the petitioner had been convicted in a Maryland state court on a charge of murder in the first degree (committed in the course of a robbery) and had been sentenced to death, he learned of an extrajudicial confession of his accomplice, tried separately, admitting the actual homicide. This confession had been suppressed by the prosecution notwithstanding a request by the petitioner's counsel to allow him to examine the accomplice's extrajudicial statements. Upon appeal from the trial court's dismissal of his petition for postconviction relief, the Maryland Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law, and remanded the case for a retrial of the question of punishment only. (*226 Md 422, 174 A2d 167*.)

On certiorari, the United States Supreme Court affirmed. In an opinion by Douglas, J., expressing the views of six members of the Court, it was held that (1) the prosecution's suppression of the accomplice's confession violated the *due process clause of the Fourteenth Amendment*, but (2) neither that clause nor the *equal protection clause* of that amendment was violated by restricting the new trial to the question of punishment.

White, J., concurred in a separate opinion, expressing the view that the Court should not have reached the due process question which it decided. He concurred in the Court's disposition of petitioner's equal protection argument.

Harlan, J., joined by Black, J., dissented, expressing the view that because of uncertainty in the pertinent Maryland law and because the Maryland Court of Appeals did not in terms address itself to the equal protection question, the judgment below should have been vacated and the case remanded to the Court of

Appeals for further consideration.

Headnotes

APPEAL §95 > finality of state court judgment. -- > Headnote:
LEdHN[1] [1]

A decision of the highest court of a state in which the trial court's dismissal of a prisoner's petition for postconviction relief was reversed on the ground that suppression of the evidence by the prosecution denied petitioner due process of law, and by which the case was remanded for a retrial of the question of punishment, not the question of guilt, is a "final judgment" within the meaning of 28 USC 1257(3), under which the United States Supreme Court may review a judgment of a state court only if it is final.

CONSTITUTIONAL LAW §840.5 > due process -- prosecution's suppression of accomplice's confession. -- > Headnote:
LEdHN[2] [2]

The due process clause of the Fourteenth Amendment is violated by the prosecution's suppression--before and at the accused's state trial on a charge of murder committed in the course of robbery and after defense counsel's request to allow him examination of the extrajudicial statements of his accomplice--of a statement of the accomplice admitting that the latter committed the actual homicide.

CONSTITUTIONAL LAW §840 > due process -- prosecution's suppression of evidence. -- > Headnote:
LEdHN[3] [3]

The suppression by the prosecution of evidence favorable to and requested by an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

TRIAL §45 > relative functions of court and jury -- admissibility of evidence. -- > Headnote:
LEdHN[4] [4]

Notwithstanding the provision in the Maryland Constitution that the jury in a criminal case are the judges of law, as well as of fact, under Maryland law it is the court and not the jury that passes on the admissibility of evidence pertinent to the issue of innocence or guilt of the accused.

CRIMINAL LAW §74 > postconviction proceedings -- construction of state court judgment. -- > Headnote:
LEdHN[5] [5]

A statement in a state court judgment reversing the trial court's dismissal of a prisoner's petition for postconviction relief and remanding the case for a retrial of the question of punishment, that nothing in an accomplice's confession suppressed by the prosecution could have reduced the accused's offense below murder in the first degree, is a ruling on the admissibility of the confession on the issue of innocence or guilt.

CONSTITUTIONAL LAW §500 > CONSTITUTIONAL LAW §840.5 > prosecution's suppression of accomplice's confession -- restricting new trial to question of punishment. -- > Headnote:
LEdHN[6] [6]

Neither the due process clause nor the equal protection clause of the Fourteenth Amendment is violated by a state court's restricting to the question of punishment a new trial granted an accused because of the prosecution's suppression of an accomplice's confession, where the state court ruled that nothing in the suppressed confession could have reduced the accused's offense below murder in the first degree, thereby ruling on the admissibility of the confession on the issue of innocence or guilt, and under the law of the state this issue was for the court, not the jury, to determine.

Syllabus

In separate trials in a Maryland Court, where the jury is the judge of both the law and the facts but the court passes on the admissibility of the evidence, petitioner and a companion were convicted of first-degree murder and sentenced to death. At his trial, petitioner admitted participating in the crime but claimed that his companion did the actual killing. In his summation to the jury, petitioner's counsel conceded that petitioner was guilty of murder in the first degree and asked only that the jury return that verdict "without capital punishment." Prior to the trial, petitioner's counsel had requested the prosecution to allow him to examine the companion's extrajudicial statements. Several of these were shown to him; but one in which the companion admitted the actual killing was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted and sentenced and after his conviction had **[****2]** been affirmed by the Maryland Court of Appeals. In a post-conviction proceeding, the Maryland Court of Appeals held that suppression of the evidence by the prosecutor denied petitioner due process of law, and it remanded the case for a new trial of the question of punishment, but not the question of guilt, since it was of the opinion that nothing in the suppressed confession "could have reduced [petitioner's] offense below murder in the first degree." *Held*: Petitioner was not denied a federal constitutional right when his new trial was restricted to the question of punishment; and the judgment is affirmed. Pp. 84-91.

(a) Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Pp. 86-88.

(b) When the Court of Appeals restricted petitioner's new trial to the question of punishment, it did not deny him due process or equal protection of the laws under the *Fourteenth Amendment*, since the suppressed evidence was admissible only on the issue of punishment. Pp. 88-91.

Counsel: E. Clinton Bamberger, **[****3]** Jr. argued the cause for petitioner. With him on the brief was John Martin Jones, Jr.

Thomas W. Jamison III, Special Assistant Attorney General of Maryland, argued the cause for respondent. With him on the brief were Thomas B. Finan, Attorney General, and Robert C. Murphy, Deputy Attorney General.

Judges: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

Opinion by: DOUGLAS

Opinion

[*84] [*217] [**1195]** Opinion of the Court by MR. JUSTICE **DOUGLAS**, announced by MR. JUSTICE **BRENNAN**.

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. *220 Md. 454, 154 A. 2d 434*. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment." Prior to the trial petitioner's counsel had requested the prosecution to allow **[****4]** him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief under the *Maryland* ***[*85]*** *Post Conviction Procedure Act. 222 Md. 442, 160 A. 2d 912*. The petition for post-conviction relief was dismissed by the trial court; and on appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and

remanded the case for a retrial of the question of punishment, not the question of guilt. 226 Md. 422, 174 A. 2d 167. The case is here on certiorari, *371 U.S. 812*. [1]

[**5]** The **[**1196]** crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words "without capital punishment." 3 Md. Ann. Code, 1957, Art. 27, § 413. In Maryland, by reason of the state constitution, the jury in a criminal case are "the Judges of Law, as well as of fact." Art. XV, § 5. The question presented is whether petitioner was denied a **[***218]** federal right when the Court of Appeals restricted the new trial to the question of punishment.

[*86] LEdHN[2][↑] [2]We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals -- United States ex rel. Almeida v. Baldi, 195 F.2d 815, and United States ex rel. Thompson v. Dye, 221 F.2d 763 -- which, we agree, state the correct constitutional rule.

This ruling is an extension **[****6]** of Mooney v. Holohan, 294 U.S. 103, 112, where the Court ruled on what nondisclosure by a prosecutor violates due process:

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

In Pyle v. Kansas, 317 U.S. 213, 215-216, we phrased the rule in broader terms:

"Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if **[****7]** proven, would entitle petitioner to release from his present custody. Mooney v. Holohan, 294 U.S. 103. "

[*87] The Third Circuit in the *Baldi* case construed that statement in *Pyle* v. *Kansas* to mean that HN1[↑] the "suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due process. 195 F.2d, at 820. In Napue v. Illinois, 360 U.S. 264, 269, we extended the test formulated in *Mooney* v. *Holohan* when we said: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." And see Alcorta v. Texas, 355 U.S. 28; Wilde v. Wyoming, 362 U.S. 607. Cf. Durley v. Mayo, 351 U.S. 277, 285 (dissenting opinion).

LEdHN[3][↑] [3]We now hold that HN2[↑] the suppression by the prosecution of evidence favorable to **[****8]** an accused upon request violates **[**1197]** due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney* v. *Holohan* is not punishment of

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[1] LEdHN[1][↑] [1]

Neither party suggests that the decision below is not a "final judgment" within the meaning of 28 U. S. C. § 1257 (3), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that "Final judgment in a criminal case means sentence. The sentence is the judgment" (Berman v. United States, 302 U.S. 211, 212) cannot be applied here. If in fact the Fourteenth Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt "that presents a serious and unsettled question" (Cohen v. Beneficial Loan Corp., 337 U.S. 541, 547) that "is fundamental to the further conduct of the case" (United States v. General Motors Corp., 323 U.S. 373, 377). This question is "independent of, and unaffected by" (Radio Station WOW v. Johnson, 326 U.S. 120, 126) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See Largent v. Texas, 318 U.S. 418, 421-422. Cf. Local No. 438 v. Curry, 371 U.S. 542, 549.

society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins **[***219]** its point whenever justice is done its citizens in the courts." [2] A prosecution that withholds evidence on demand of an accused which, if made available, **[*88]** would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals. *226 Md., at 427, 174 A. 2d, at 169*. **[****9]**

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. In justification of that ruling the Court of Appeals stated:

"There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, **[****10]** Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. . . . It would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence *in considering the punishment of the defendant Brady*.

"Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady. . . .

"The appellant's sole claim of prejudice goes to the punishment imposed. *If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree*. We, therefore, see no occasion to retry that issue." *226 Md., at 429-430, 174 A. 2d, at 171*. (Italics added.)

[*89] If this were a jurisdiction where the jury was not the judge of the law, a different question would be presented. But since it is, how can the Maryland Court of **[****11]** Appeals state that nothing in the suppressed confession could have reduced petitioner's offense "below murder in the first degree"? If, as a matter of Maryland law, juries in criminal cases could determine the admissibility of such evidence on the issue of innocence or guilt, the question would seem to be foreclosed.

But Maryland's constitutional provision making the jury in criminal **[**1198]** cases "the Judges of Law" does not mean precisely what it seems to say. [3] The present status of that provision was reviewed recently in *Giles v. State, 229 Md. 370, 183 A. 2d 359*, appeal dismissed, *372 U.S. 767*, where the several **[***220]** exceptions, added by statute or carved out by judicial construction, are reviewed. One of those exceptions, material here, is that "***HN3***[↑] Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused." *229 Md., at 383, 183 A. 2d, at 365*. The cases cited make up a long line going back nearly a century. *Wheeler v. State, 42 Md. 563, 570*, **[****12]** stated that instructions to the jury were advisory only, "except in regard to questions as to what shall be considered as evidence." And the court "having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction." *Bell v. State, 57 Md. 108, 120*. And see *Beard v. State, 71 Md. 275, 280, 17 A. 1044, 1045*; *Dick v. State, 107 Md. 11, 21, 68 A. 286, 290*. Cf. *Vogel v. State, 163 Md. 267, 162 A. 705*.

[*90] ***LEdHN[4]***[↑] [4]***LEdHN[5]***[↑] [5]***LEdHN[6]***[↑] [6]We usually walk on treacherous **[****13]** ground

[2] Judge Simon E. Sobeloff when Solicitor General put the idea as follows in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954:

"The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts."

[3] See Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa. L. Rev. 34, 39, 43; Prescott, Juries as Judges of the Law: Should the Practice be Continued, 60 Md. St. Bar Assn. Rept. 246, 253-254.

when we explore state law, [4] for state courts, state agencies, and state legislatures are its final expositors under our federal regime. But, as we read the Maryland decisions, it is the court, not the jury, that passes on the "admissibility of evidence" pertinent to "the issue of the innocence or guilt of the accused." *Giles v. State, supra.* In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession "could have reduced the appellant Brady's offense below murder in the first degree." We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record. [5] But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a **[*91]** bifurcated **[****14]** trial (cf. *Williams v. New York, 337 U.S. 241*) denies him due process or violates the *Equal Protection Clause of the Fourteenth Amendment*.

[**15]** *Affirmed*.

Separate opinion of MR. JUSTICE WHITE.

1. The Maryland Court of Appeals declared, "The suppression or withholding **[***221]** by the State of material evidence exculpatory to an accused is a violation **[**1199]** of due process" without citing the United States Constitution or the Maryland Constitution which also has a due process clause. [*] We therefore cannot be sure which Constitution was invoked by the court below and thus whether the State, the only party aggrieved by this portion of the judgment, could even bring the issue here if it desired to do so. See *New York City v. Central Savings Bank, 306 U.S. 661*; *Minnesota v. National Tea Co., 309 U.S. 551*. But in any event, there is no cross-petition by the State, nor has it challenged the correctness of the ruling below that a new trial on punishment was called for by the requirements of due process. In my view, therefore, the Court should not reach the due process question which it decides. It certainly is not the case, as it may be suggested, that without it we would have only a state law question, for assuming the court below was correct in finding a violation of **[****16]** petitioner's rights in the suppression of evidence, the federal question he wants decided here still remains, namely, whether denying him a new trial on guilt as well as punishment deprives him of equal protection. There is thus a federal question to deal with in this Court, cf. *Bell v. Hood, 327 U.S. 678*, **[*92]** wholly aside from the due process question involving the suppression of evidence. The majority opinion makes this unmistakably clear. Before dealing with the due process issue it says, "The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment." After discussing at some length and disposing of the suppression matter in federal constitutional terms it says the question still to be decided is the same as it was before: "The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment."

[**17]** The result, of course, is that the due process discussion by the Court is wholly advisory.

2. In any event the Court's due process advice goes substantially beyond the holding below. I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for now, to the rulemaking or legislative process after full consideration by legislators, bench, and bar.

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[4] For one unhappy incident of recent vintage see *Oklahoma Packing Co*. v. *Oklahoma Gas & Electric Co., 309 U.S. 4*, that replaced an earlier opinion in the same case, ***309 U.S. 703***.

[5] "In the matter of confessions a hybrid situation exists. It is the duty of the Court to determine from the proof, usually taken out of the presence of the jury, if they were freely and voluntarily made, etc., and admissible. If admitted, the jury is entitled to hear and consider proof of the circumstances surrounding their obtention, the better to determine their weight and sufficiency. The fact that the Court admits them clothes them with no presumption for the jury's purposes that they are either true or were freely and voluntarily made. However, after a confession has been admitted and read to the jury the judge may change his mind and strike it out of the record. Does he strike it out of the jury's mind?" Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa. L. Rev. 34, 39. See also *Bell v. State, supra, at 120*; *Vogel v. State, 163 Md., at 272, 162 A., at 706-707*.

[*] Md. Const., Art. 23; *Home Utilities Co., Inc., v. Revere Copper & Brass, Inc., 209 Md. 610, 122 A. 2d 109*; *Raymond v. State, 192 Md. 602, 65 A. 2d 285*; *County Comm'rs of Anne Arundel County v. English, 182 Md. 514, 35 A. 2d 135*; *Oursler v. Tawes, 178 Md. 471, 13 A. 2d 763*.

3. I concur in the Court's disposition of petitioner's equal protection argument.

Dissent by: HARLAN

Dissent

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK joins, dissenting.

I think this case presents only a single federal question: did the order of the Maryland Court of Appeals granting a new trial, limited to the issue of punishment, violate petitioner's *Fourteenth Amendment* right to equal protection? [1] In my opinion an affirmative answer would **[*93]** **[***222]** be required *if* the Boblit statement would have been admissible on the issue of guilt at petitioner's original trial. This indeed seems to be the clear implication of this Court's opinion.

[**18]** The Court, however, holds that the *Fourteenth Amendment* was not infringed because it considers the Court of Appeals' opinion, and the other Maryland cases dealing with Maryland's constitutional provision making juries in criminal cases "the Judges of Law, as **[**1200]** well as of fact," as establishing that the Boblit statement would not have been admissible at the original trial on the issue of petitioner's guilt.

But I cannot read the Court of Appeals' opinion with any such assurance. That opinion can as easily, and perhaps more easily, be read as indicating that the new trial limitation followed from the Court of Appeals' concept of its power, under § 645G of the Maryland Post Conviction Procedure Act, Md. Code, Art. 27 (1960 Cum. Supp.) and Rule 870 of the Maryland Rules of Procedure, to fashion appropriate relief meeting the peculiar circumstances of this case, [2] rather than from the view that the Boblit statement would have been relevant at the original trial only on the issue of punishment. *226 Md., at 430, 174 A. 2d, at 171*. This interpretation is indeed fortified by the Court of Appeals' earlier general discussion as to the admissibility of third-party **[****19]** confessions, which falls short of saying anything that is dispositive **[*94]** of the crucial issue here. *226 Md., at 427-429, 174 A. 2d, at 170*. [3]

[**20]** Nor do I find anything in any of the other Maryland cases cited by the Court (*ante*, p. 89) which bears on the admissibility *vel non* of the Boblit statement on the issue of guilt. None of these cases suggests anything more relevant here than that a jury may not "overrule" the trial court on questions relating to the admissibility of evidence. Indeed they are by no means clear as to what happens if the jury in fact undertakes to do so. In this very case, for example, the trial court charged that "in the final analysis the jury are the judges of both the *law* and the facts, and the verdict in this case is *entirely* the jury's responsibility." (Emphasis added.)

Moreover, uncertainty on this score is compounded by the State's acknowledgment at the oral argument here that the withheld Boblit statement *would* have been admissible at the trial on the issue of guilt. [4]

[**21]** In **[***223]** this state of uncertainty as to the proper answer to the critical underlying issue of state law, and in view of the fact that the Court of Appeals did not in terms **[*95]** address itself to the equal protection question, I do not see how we can properly resolve this case at this juncture. I think the appropriate course is to vacate the judgment of the State Court of Appeals and

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[1] I agree with my Brother WHITE that there is no necessity for deciding in this case the broad due process questions with which the Court deals at pp. 86-88 of its opinion.

[2] Section 645G provides in part: "If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper." Rule 870 provides that the Court of Appeals "will either affirm or reverse the judgment from which the appeal was taken, or direct the manner in which it shall be modified, changed or amended."

[3] It is noteworthy that the Court of Appeals did not indicate that it was limiting in any way the authority of *Day v. State, 196 Md. 384, 76 A. 2d 729*. In that case two defendants were jointly tried and convicted of felony murder. Each admitted participating in the felony but accused the other of the homicide. On appeal the defendants attacked the trial court's denial of a severance, and the State argued that neither defendant was harmed by the statements put in evidence at the joint trial because admission of the felony amounted to admission of guilt of felony murder. Nevertheless the Court of Appeals found an abuse of discretion and ordered separate new trials on all issues.

[4] In response to a question from the Bench as to whether Boblit's statement, had it been offered at petitioner's original trial, would have been admissible for all purposes, counsel for the State, after some colloquy, stated: "It would have been, yes."

remand the case to that court for further consideration in light of the governing constitutional principle stated at the outset of this opinion. Cf. *Minnesota v. National Tea Co., 309 U.S. 551*.

References

Annotation References:

1. Suppression of evidence by prosecution in criminal case as vitiating conviction. *33 ALR2d 1421*.

2. Conviction on testimony known to prosecution to be perjured as denial of due process. 2 L ed 2d 1575, 3 L ed 2d 1991.

3. Obtaining conviction on perjured testimony known to prosecuting authorities to be perjured, as denial of due process. 98 ALR 411.

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Cases	-None-

Bundy v. State

Supreme Court of Ohio

February 4, 2015, Submitted; June 4, 2015, Decided

No. 2014-0189

Reporter
143 Ohio St. 3d 237 *; 2015-Ohio-2138 **; 36 N.E.3d 158 ***; 2015 Ohio LEXIS 1389 ****

BUNDY, APPELLEE, v. THE STATE OF OHIO, APPELLANT.

Prior History: APPEAL from the Court of Appeals for Montgomery County, No. 25665, 2013-Ohio-5619 **[****1]** .

Bundy v. State, 2013-Ohio-5619, 2013 Ohio App. LEXIS 5887 (Ohio Ct. App., Montgomery County, Dec. 20, 2013)

Disposition: Judgment reversed and cause remanded.

HOLDINGS: [1]-Because a claimant seeking a declaration that he was a wrongfully imprisoned individual did not satisfy the actual-innocence standard of R.C. 2743.48(A)(5) by showing that his conviction was reversed solely because the statute describing the offense could not be enforced on constitutional grounds, defendant, whose conviction for failure to register as a sex offender had been reversed on constitutional grounds, was not entitled to relief under the wrongful imprisonment statute.

Outcome
Judgment reversed and cause remanded.

Core Terms

imprisoned, invalidation, claimant, wrongfully, innocence, court of appeals, guilty plea, trial court, actual-innocence, reclassification, charged offense, wrongful-imprisonment, retroactive, convicted, sentence, cases, actual innocence, sex offender, address-verification, eligibility, predicated, provisions, declaring, vacated, felony, constitutional grounds, criminal charge, inoperative, violations, offenses

Case Summary

Overview

LexisNexis® Headnotes

Evidence > Burdens of Proof > Preponderance of Evidence

Governments > State & Territorial Governments > Claims By & Against

Torts > Intentional Torts > False Imprisonment > General Overview

HN1[] **Burdens of Proof, Preponderance of Evidence**

Actions against the state for wrongful imprisonment are

governed by R.C. 2743.48, which places the burden on a claimant to prove by a preponderance of the evidence that he or she meets the definition of a "wrongfully imprisoned individual."

Governments > State & Territorial
Governments > Claims By & Against

Torts > Intentional Torts > False Imprisonment > Elements

HN2[] State & Territorial Governments, Claims By & Against

To meet the definition of "wrongfully imprisoned individual," the claimant must satisfy each of the following requirements: (1) He was charged with a violation of the Revised Code by an indictment or information, and the violation was an aggravated felony or felony. (2) He was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense, and the offense of which he was found guilty was an aggravated felony or felony. (3) He was sentenced to an indefinite or definite term of imprisonment in a state correctional institution for the offense. (4) His conviction was vacated, dismissed, or reversed on appeal, the prosecutor cannot or will not seek any further appeal of right or upon leave of court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecutor attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction. (5) Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in his release, or it was determined by the court of common pleas in the county where the underlying criminal action was initiated that the charged offense, including all lesser-included offenses, either was not committed by him or was not committed by any person. R.C. 2743.48(A).

Governments > State & Territorial
Governments > Claims By & Against

Torts > Intentional Torts > False Imprisonment > Elements

HN3[] State & Territorial Governments, Claims By & Against

If a common pleas court determines that a claimant satisfies each of the five requirements of R.C. 2743.48(A) and declares that the claimant is therefore a wrongfully imprisoned individual, the claimant is then entitled to pursue an action in the Court of Claims against the state for compensation for the time spent in prison, for any fines or expenses incurred during legal proceedings, and for any loss of income directly caused by the imprisonment. R.C. 2743.48(E)(2).

Governments > State & Territorial
Governments > Claims By & Against

Torts > Intentional Torts > False Imprisonment > General Overview

HN4[] State & Territorial Governments, Claims By & Against

The cause of action created by the legislature in R.C. 2743.48 constitutes a waiver of the immunity from civil liability that is normally retained by the state. The terms of eligibility and the relief provided in R.C. 2743.48 demonstrate that the state's exposure to potential liability for wrongful imprisonment is very broad in some respects and very narrow in others. Exposure is broad in that compensation freely flows to an eligible claimant without regard to any alleged wrongdoing by the state or other parties and without the significant evidentiary burdens normally placed on a criminal defendant suing the state in tort. But exposure to liability is also narrow in that only a very limited class of individuals can meet the five simple but strict requirements of R.C. 2743.48(A).

Governments > State & Territorial
Governments > Claims By & Against

Torts > Intentional Torts > False Imprisonment > Elements

HN5[] State & Territorial Governments, Claims By & Against

In order to establish actual innocence, a claimant must prove that the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person. R.C. 2743.48(A)(5).

Governments > State & Territorial
Governments > Claims By & Against

Torts > Intentional Torts > False Imprisonment > Elements

HN6 **State & Territorial Governments, Claims By & Against**

An acquittal merely establishes the state's failure to meet its burden of proving one or more elements of the offense charged beyond a reasonable doubt. It does not necessarily establish that the charged offense was not committed or that the defendant was innocent for purposes of R.C. 2743.48(A)(5).

Evidence > Burdens of Proof > Allocation

Governments > State & Territorial
Governments > Claims By & Against

Torts > Intentional Torts > False Imprisonment > General Overview

HN7 **Burdens of Proof, Allocation**

In the context of a wrongful-imprisonment action, there is no difference between an acquittal by a fact finder and the reversal of a conviction for insufficient evidence: both are based on a dearth of evidence of guilt, not on a showing of actual innocence. Neither of these two outcomes relieves a claimant of the burden of affirmatively proving that he did not commit the charged offense or any lesser included offenses.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Governments > State & Territorial
Governments > Claims By & Against

Torts > Intentional Torts > False Imprisonment > Elements

HN8 **Burdens of Proof, Prosecution**

A criminal defendant has the fundamental right to a presumption of innocence, among many other constitutional safeguards, at the trial on the criminal charge. But the presumption of innocence does not extend beyond the trial: once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. Legal innocence does not translate to a presumption of factual innocence for purposes of R.C. 2743.48(A)(5).

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > General Overview

HN9 **Postconviction Proceedings, Sex Offenders**

The general offense of failing to verify an address, in violation of R.C. 2950.06, existed and continues to exist as a valid offense.

Governments > Legislation > Interpretation

HN10 **Legislation, Interpretation**

To determine legislative intent, courts look to the plain language of the statute.

Governments > Legislation > Interpretation

HN11 **Legislation, Interpretation**

A court has a duty to give effect to the words chosen by the General Assembly and not to add or delete words to reach a desired effect.

Governments > State & Territorial
Governments > Claims By & Against

Torts > Intentional Torts > False Imprisonment > Elements

HN12 **State & Territorial Governments, Claims By & Against**

R.C. 2743.48(A)(2) limits relief solely to claimants who "did not plead guilty" to their underlying criminal charges. The plain language of R.C. 2743.48(A)(2) provides no exception for guilty pleas that were later vacated.

Governments > State & Territorial

Governments > Claims By & Against

Torts > Intentional Torts > False Imprisonment > Elements

HN13[] **State & Territorial Governments, Claims By & Against**

Just as the subsequent vacation of a plea does not mean that the defendant did not plead guilty to the offense for purposes of *R.C. 2743.48*, the subsequent invalidation of a statute does not mean that the charged offense was not committed by the defendant.

Governments > State & Territorial
Governments > Claims By & Against

Torts > Intentional Torts > False Imprisonment > Elements

HN14[] **State & Territorial Governments, Claims By & Against**

A claimant seeking a declaration that he is a wrongfully imprisoned individual does not satisfy the actual-innocence standard of *R.C. 2743.48(A)(5)* by showing that his conviction was reversed solely because the statute describing the offense could not be enforced on constitutional grounds.

Headnotes/Summary

Headnotes

Wrongful imprisonment—R.C. 2743.48—Actual-innocence standard—Claimant whose conviction was reversed solely due to unconstitutionality of statute under which he was prosecuted does not satisfy actual-innocence standard of R.C. 2743.48(A)(5).

Syllabus

[*237] [*159] SYLLABUS OF THE COURT**

A claimant seeking a declaration that he is a wrongfully imprisoned individual does not satisfy the actual-innocence standard of *R.C. 2743.48(A)(5)* by showing that his conviction was reversed solely because the statute describing the offense could not be enforced on constitutional grounds.

Counsel: Michael DeWine, Attorney General, Eric E. Murphy, State Solicitor, Stephen P. Carney and Samuel C. Peterson, Deputy Solicitors, and Debra Gorrell Wehrle, Senior Assistant Attorney General, for appellant.

Christopher W. Thompson and Anthony Comunale, for appellee.

Judges: O'CONNOR, C.J. O'DONNELL, LANZINGER, KENNEDY, and FRENCH, JJ., concur. PFEIFER, J., concurs in judgment only. O'NEILL, J., dissents.

Opinion by: O'CONNOR

Opinion

O'CONNOR, C.J.

[P1]** This case arises from a civil action by appellee, David Bundy, seeking a declaratory judgment that he was a "wrongfully imprisoned individual" within the meaning of *R.C. 2743.48*. Bundy claims eligibility, as a wrongfully imprisoned individual, **[****2]** to seek compensation from appellant, the state of Ohio, for the prison time he served before the reversal of his conviction for failure to register as a sex offender pursuant to our decision in *State v. Bodyke, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753*. The issue presented in this appeal is whether the invalidation of a statute on constitutional grounds requires the conclusion that **[*238]** any criminal offenses predicated upon that statute were never committed, thereby satisfying the actual-innocence standard of *R.C. 2743.48(A)(5)*. We hold that it does not, and we therefore reverse the judgment of the court of appeals.

RELEVANT BACKGROUND

[P2]** The parties agree on the following facts.

[P3]** Bundy was classified as a sexually oriented offender under Megan's Law, Am.Sub.H.B. No. 180, 146 Ohio Laws, Part II, 2560, 2601. Pursuant to the versions of R.C. 2950.04 and 2950.06 in effect at that time, Bundy was required to register with the sheriff in any county where he came to temporarily or permanently reside, and he was required to verify his address in October of every year. *See* State v. Cook, 83 Ohio St.3d 404, 408, 1998-Ohio-291, 700 N.E.2d 570 (1998) (upholding retroactive application of registration and address-verification statutes).

[P4]** In November 2003, Bundy pleaded guilty to a fifth-degree felony violation of R.C. 2950.04 for failing to register with the county sheriff and was sentenced **[****3]** to five years of community control.

[P5]** In 2007, the General Assembly repealed Megan's Law, effective January 1, 2008, and replaced it with new standards for sex-offender classification and registration pursuant to the federal Adam Walsh Child Protection and Safety Act, Section 16901 et seq., Title 42, U.S.Code. 2007 Am.Sub.S.B. No. 10. *See also* Bodyke at ¶ 18-20. This new classification scheme, known as Ohio's Adam Walsh Act ("AWA"), was codified at R.C. Chapter 2950. The new standards applied retroactively, and the attorney general's office was charged with reclassifying all previously convicted sex offenders in conformity with the tiered system of the AWA. R.C. 2950.031; R.C. 2950.032. *See also* Bodyke at ¶ 22. Accordingly, the attorney general notified Bundy at the end of 2007 that he **[***160]** had been reclassified as a Tier II sex offender. As a consequence of this new classification, Bundy's obligation under R.C. 2950.06 to periodically verify his address increased from a frequency of once every year to once every 180 days. Bundy's next verification date was set for March 14, 2008.

[P6]** Bundy failed to verify his address with the county sheriff in March 2008, and he was charged with a third-degree felony violation of R.C. 2950.06. In a bench trial in October 2008, Bundy was convicted and sentenced to **[****4]** three years in prison. The trial court ordered Bundy's sentence to be served concurrently with a one-year prison sentence from a separate case that is not at issue in the current appeal.

[P7]** The Second District Court of Appeals affirmed Bundy's address-verification conviction on appeal, holding that the reclassification provisions and new registration requirements were constitutionally sound. State v. Bundy, 2d Dist. ***[*239]*** Montgomery Nos. 23063 and 23064, 2009-Ohio-5395. We accepted Bundy's discretionary appeal and held the cause pending our decision in *Bodyke*. *State v. Bundy, 124 Ohio St.3d 1473, 2010-Ohio-354, 921 N.E.2d 245*.

[P8]** In *Bodyke*, we held that the sex-offender reclassification process of the AWA, codified in R.C. 2950.031 and 2950.032, violated the separation-of-powers doctrine. *Id.* at paragraphs two and three of the syllabus. As a result of the constitutional infirmity of Bundy's reclassification under the AWA, we reversed Bundy's conviction. In re Sexual Offender Reclassification Cases, 126 Ohio St.3d 322, 2010-Ohio-3753, 933 N.E.2d 801, ¶ 55. On remand to the Montgomery County Court of Common Pleas, the state dismissed the address-verification charge without prejudice. Bundy was released from prison in September 2010.

[P9]** In June 2011, Bundy filed a complaint in the court of common pleas seeking a declaration pursuant to R.C. 2743.48 that he had been wrongfully imprisoned for his failure to comply with **[****5]** the requirements of the AWA and that he was eligible to proceed for monetary relief against the state in the Court of Claims. Bundy moved for summary judgment, arguing that *Bodyke* rendered the AWA reclassification process void ab initio, requiring the conclusion that Bundy had not violated any criminal law. The state opposed Bundy's motion and filed a cross-motion for summary judgment, arguing that the mere repeal or invalidation of a statute does not require a finding that defendants whose convictions were predicated upon the statute were factually innocent.

[P10]** The trial court determined that Bundy had not been wrongfully imprisoned while he was serving his concurrent one-year sentence from a separate case. But with respect to the portion of Bundy's incarceration that was solely attributable to his AWA address-verification violation, the trial court found Bundy's argument to be meritorious on the authority of three recent decisions from the Eighth District Court of Appeals: Ballard v. State, 8th Dist. Cuyahoga No. 97882, 2012-Ohio-3086; Johnson v. State, 8th Dist. Cuyahoga No. 98050, 2012-Ohio-3964; Mohammad v. State, 8th Dist. Cuyahoga No. 98655, 2012-Ohio-5517. In these cases, the Eighth District held that the invalidation of certain provisions of the AWA on

constitutional grounds caused any guilty pleas to violations of those provisions to become legal nullities, **[****6]** and the pleas therefore did "not exist for purposes of determining whether a person has the right to seek compensation under R.C. 2743.48." *Mohammad at ¶ 18*, citing *Ballard* and *Johnson*.

[P11] [***161]** The trial court noted that Bundy's conviction was in conformity with then-existing law, but pursuant to *Ballard, Johnson*, and *Mohammad*, the court determined that the invalidation of the law required the conclusion that no violation had been committed. The trial court therefore declared Bundy to be a wrongfully imprisoned individual. The state appealed.

[P12] [*240]** While the state's appeal was pending before the Second District Court of Appeals, this court summarily reversed *Ballard*, *Johnson*, and *Mohammad* based on our decision in *Dunbar v. State, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111*. *Ballard v. State, 136 Ohio St.3d 83, 2013-Ohio-2412, 990 N.E.2d 590*; *Johnson v. State, 136 Ohio St.3d 84, 2013-Ohio-2413, 990 N.E.2d 590*; *Mohammad v. State, 136 Ohio St.3d 326, 2013-Ohio-3669, 995 N.E.2d 228*. In *Dunbar*, we held that vacating a guilty plea does not erase the plea as though it never existed, *id. at ¶ 15*, and "a person who has pled guilty to an offense is not eligible to be declared a wrongfully imprisoned individual," *id. at ¶ 19*.

[P13]** The Second District Court of Appeals reviewed the state's appeal in light of *Dunbar*, but found *Dunbar*'s holding to be inapplicable because Bundy's case did not involve a guilty plea. The court of appeals adhered to the reasoning in the trial court and in **[****7]** the Eighth District decisions and held that Bundy could not have committed the AWA address-verification offense, because the offense itself was a nullity pursuant to *Bodyke*. The court of appeals therefore agreed that for his time in prison that was solely attributable to his AWA address-verification conviction, Bundy qualified as a wrongfully imprisoned individual.

[P14]** The state sought this court's discretionary review, and we accepted the following proposition of law:

> A wrongful-imprisonment claim may succeed only if the claimant shows, under the actual-innocence requirement, that he did not commit the acts for which he was convicted. That requirement is not met if a claimant's conviction was set aside solely because a predicate criminal statute was invalidated as unconstitutional.

Bundy v. State, 138 Ohio St.3d 1492, 2014-Ohio-2021, 8 N.E.3d 963.

ANALYSIS

[P15]** ***HN1***[↑] Actions against the state for wrongful imprisonment are governed by *R.C. 2743.48*, which places the burden on a claimant to prove by a preponderance of the evidence that he or she meets the definition of a "wrongfully imprisoned individual." *Doss v. State, 135 Ohio St.3d 211, 2012-Ohio-5678, 985 N.E.2d 1229*, at paragraph one of the syllabus. ***HN2***[↑] To meet that definition, the claimant must satisfy each of the following requirements:

> (1) The individual was charged with a violation of a section **[****8]** of the Revised Code by an indictment or information, and the violation charged was an aggravated felony or felony.
>
> **[*241]** (2) The individual was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense by the court or jury involved, and the offense of which the individual was found guilty was an aggravated felony or felony.
>
> (3) The individual was sentenced to an indefinite or definite term of imprisonment in a state correctional **[***162]** institution for the offense of which the individual was found guilty.
>
> (4) The individual's conviction was vacated, dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction.
>
> (5) Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release, or it was determined by the court of common pleas in the county where the underlying **[****9]** criminal action was initiated that the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.

R.C. 2743.48(A).

[P16]** HN3[] If a common pleas court determines that a claimant satisfies each of the five requirements of R.C. 2743.48(A) and declares that the claimant is therefore a wrongfully imprisoned individual, the claimant is then entitled to pursue an action in the Court of Claims against the state for compensation for the time spent in prison, for any fines or expenses incurred during legal proceedings, and for any loss of income directly caused by the imprisonment. R.C. 2743.48(E)(2).

[P17]** HN4[] The cause of action created by the legislature in R.C. 2743.48 constitutes a waiver of the immunity from civil liability that is normally retained by the state. Walden v. State, 47 Ohio St.3d 47, 53, 547 N.E.2d 962 (1989). The terms of eligibility and the relief provided in R.C. 2743.48 demonstrate that the state's exposure to potential liability for wrongful imprisonment is very broad in some respects and very narrow in others. Exposure is broad in that compensation freely flows to an eligible claimant without regard to any alleged wrongdoing by the state or other parties and without the significant evidentiary burdens normally placed on a criminal defendant **[****10]** suing the state in tort. *Compare* Feliciano v. Kreiger, 50 Ohio St.2d 69, 71, 362 N.E.2d 646 (1977) (requiring a plaintiff claiming that he was jailed unlawfully to prove intent and lack of privilege to establish a claim of false imprisonment). But exposure to liability is **[*242]** also narrow in that only a very limited class of individuals can meet the five simple but strict requirements of R.C. 2743.48(A).

[P18]** The state's appeal focuses solely on the fifth requirement, R.C. 2743.48(A)(5), and solely on the second alternative method of satisfying that requirement through what is commonly called the "actual innocence" standard.[1] Doss, 135 Ohio St.3d 211, 2012-Ohio-5678, 985 N.E.2d 1229, ¶ 12. HN5[] In order to establish actual innocence, a claimant must prove that "the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person." R.C. 2743.48(A)(5).

[P19]** The limits of the actual-innocence standard and other provisions of the **[***163]** wrongful-imprisonment statute have been tested repeatedly since the statute's original enactment in 1986. **[****11]** In our earliest review of the statute, we were called upon to determine whether a judgment of acquittal was sufficient by itself to establish actual innocence. Walden at 47. We rejected the notion, explaining that HN6[] an acquittal merely establishes the state's failure to meet its burden of proving one or more elements of the offense charged beyond a reasonable doubt. It does not necessarily establish that the charged offense was not committed or that the defendant was innocent. Id. at 51-52.

[P20]** More recently, this court rejected an attempt to extend the actual-innocence standard to include the reversal of a conviction due to a lack of legally sufficient evidence. *Doss*. HN7[] In the context of a wrongful-imprisonment action, we found no difference between an acquittal by a fact finder and the reversal of a conviction for insufficient evidence: both are based "on a dearth of evidence of guilt," not on a showing of actual innocence. Id. at ¶ 20. We concluded that neither of these two outcomes relieves a claimant of the burden of affirmatively proving that he did not commit the charged offense or any lesser included offenses. *Id.*

[P21]** Walden and Doss exemplify the principle that HN8[] a criminal defendant has the fundamental right to **[****12]** a presumption of innocence, among many other constitutional safeguards, at the trial on the criminal charge. *See* Herrera v. Collins, 506 U.S. 390, 398-399, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). But the presumption of innocence does not extend beyond the trial: "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." Id. at 399. And our decisions in *Walden* and *Doss* make it clear that legal innocence does not translate to a presumption of factual innocence for purposes of R.C. 2743.48(A)(5).

[P22]** **[*243]** Though Bundy may not have been factually innocent of the act or omission that formed the basis of his criminal charge, he nonetheless claims to have established that "the charged offense * * * was not committed," R.C. 2743.48(A)(5), because his charged offense—a violation of R.C. 2950.06was predicated upon laws—R.C. 2950.031 and 2950.032that were found to be unconstitutional. He argues that when a law is invalidated as unconstitutional, it must be treated as though it had never existed, pursuant to Norton v. Shelby Cty., 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178 (1886). Thus, because the predicate statutes did not

[1] Because Bundy claimed to have satisfied R.C. 2743.48(A)(5) exclusively by a showing of actual innocence, and because the state has not argued against Bundy's alleged satisfaction of R.C. 2743.48(A)(1) through (4), we make no assessment of Bundy's eligibility under the wrongful-imprisonment statute apart from the actual-innocence claim.

exist, Bundy asserts he could not have committed any offense based on them.

[P23]** As an initial matter, *HN9*[] the general offense of failing to verify an address, in violation of R.C. 2950.06, existed and continues to exist as a valid offense. **[****13]** This case does not involve "the kind of conduct that cannot constitutionally be punished in the first instance." United States v. United States Coin & Currency, 401 U.S. 715, 723, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971). Instead, it involves conduct that has been and continues to be a perfectly sound basis for a criminal charge, but that was, for a time, immune from prosecution because the statutes underlying the charge violated the separation-of-powers doctrine. Bodyke, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, at paragraphs two and three of the syllabus.

[P24]** Further, the holding in *Norton* that "[a]n unconstitutional act is * * * as inoperative as though it had never been passed," Norton at 442, 6 S.Ct. 1121, does not apply to Bundy's case in the way that he desires.

[P25]** **[***164]** In *Norton*, a legislative act created a board of county commissioners and empowered the board to subscribe to stock in railroads, issue bonds, and levy taxes for recoupment, all of which were functions within the exclusive authority of the county court at the time. Id. at 436. The act was declared unconstitutional by the state's highest court, and the controversy in *Norton* was whether acts already performed by the board should remain binding, with the premise that the commissioners had acted as de facto officers. Id. at 435-436. The United States Supreme Court determined that the commissioners had not acted as de facto **[****14]** officers, differentiating between "the unconstitutionality of acts appointing the officer" and "acts creating the office" itself. Id. at 448. The illegality of an appointment does not affect the validity of the appointee's acts. *Id.* But when no office legally exists, the officer's acts have no validity. Id. at 449. It is in this context that the United States Supreme Court held that when a legislative act creating an office is unconstitutional, the act "is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." Id. at 442. **[*244]** And accordingly, the acts of the "officers" were not binding, as there was no "office" for them to fill. Id. at 441.

[P26]** The continued validity of Norton's broadly stated holding is uncertain,[2] but it is clear from the Norton decision that its retroactive nullification of the law functioned as a legal fiction and not as a nullification of an operative fact. Specifically, after declaring the acts of the officers to be invalid, *Norton* examined whether any authorized entity had revalidated those acts by ratifying them. Id. at 451-452. If Bundy were correct that such acts must be treated **[****15]** as though they never existed, *Norton*'s remaining analysis would not be necessary as there would no longer be any acts to ratify. Moreover, *Norton* concludes by explicitly declining to examine whether the unauthorized acts may be cured or reversed, and the court expressly states that the case before it "is simply a question as to the validity of the bonds" issued by the purported officers. Id. at 454. Thus, the analysis in *Norton* is limited to the validity of the unauthorized acts themselves.

[P27]** In the context of Bundy's case, the validity of his sex-offender reclassification has already been settled. We declared that the General Assembly's reclassification provisions in the AWA violated the separation-of-powers **[****16]** doctrine and were therefore invalid from their inception. Bodyke, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, paragraphs two and three of the syllabus. The potential applicability of *Norton* begins and ends there. The only remaining issue is the nature of the remedy available to Bundy, if any.

[P28]** The question whether the courts should devise remedies that are retroactive **[***165]** or merely prospective when a statute is declared to be unconstitutional has long been the subject of debate. But that question is of no import here for two reasons. First, it has already been answered, as the judicial remedy for the constitutional violation was the reinstatement of prior sex-offender classifications under Megan's Law. Bodyke at ¶ 66. And the remedy was imposed retroactively, so that prior convictions were

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[2] *See* Chicot Cty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374, 60 S.Ct. 317, 84 L.Ed. 329 (1940) (expressly limiting *Norton* regarding the practical effects of the constitutional invalidation of a statute); Lemon v. Kurtzman, 411 U.S. 192, 198, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973) ("we have receded from *Norton* in a host of criminal decisions"). The holding in *Norton* is now considered a symbol of one extreme of the judicial pendulum that has swung back and forth on the concept of retroactivity. *See* Alison L. LaCroix, *Temporal Imperialism*, 158 U.Pa.L.Rev. 1329, 1352 (2010) (describing *Norton* as "a maximalist version of retroactivity" in line with the Blackstonian, "declaratory" model of law).

vacated and cases with enhanced penalties were remanded for resentencing when they were based on AWA reclassification. State v. Gingell, 128 Ohio St.3d 444, 2011-Ohio-1481, 946 N.E.2d 192, ¶ 8; State v. Howard, 134 Ohio St.3d 467, 2012-Ohio-5738, 983 N.E.2d 341. Second, the additional remedy currently sought by Bundy is not a judicial remedy or one that **[*245]** arises under the Constitution, but is instead a *statutory* remedy, extended solely by legislative grace and controlled by the language of the statute itself.[3]

[P29]** With *Norton*'s applicability clarified, we can conclude that regardless of any legal fiction that might result from the constitutional invalidation of an offense, the offense itself is not erased from objective reality. The statute defining Bundy's offense existed as a historical fact, as did Bundy's act or omission that formed the basis of his criminal **[****18]** charge. And regardless of how far-reaching certain remedies for constitutional violations might be, either in time or in scope, the remedy available to Bundy is statutory and therefore is limited to whatever the General Assembly intended to afford. In short, Bundy has no constitutional right to the remedies provided in R.C. 2743.48.

[P30]** ***HN10***[↑] To determine legislative intent, we look to the plain language of the statute. Summerville v. Forest Park, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 18. The pertinent language from the actual-innocence standard of the wrongful-imprisonment statute requires a claimant to establish that "the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person." R.C. 2743.48(A)(5). Nothing in this language indicates an intention to exclude from the term "offense" certain kinds of constitutional violations. Accepting Bundy's position would require us to add a third criterion to the actual-innocence standard: "or the statute defining the offense was declared unenforceable on constitutional grounds." We decline to make such an addition, as it is axiomatic that***HN11***[↑] a court has a duty to give effect to the words chosen by the General Assembly and not to add or delete words to reach a desired effect. **[****19]** Cleveland Elec. Illum. Co. v. Cleveland, 37 Ohio St.3d 50, 524 N.E.2d 441 (1988), paragraph three of the syllabus.

[P31]** **[***166]** We similarly declined to embellish the plain and unambiguous language of a different portion of the wrongful-imprisonment statute, ***HN12***[↑] R.C. 2743.48(A)(2), which limits relief solely to claimants who "did not plead guilty" to their underlying criminal charges. Dunbar v. State, 136 Ohio St.3d 181, 2013-Ohio-2163, ***[*246]*** 992 N.E.2d 1111. Dunbar maintained that although he had initially pleaded guilty in his criminal case, the subsequent vacation of his plea rendered it a legal nullity and therefore nonexistent for purposes of the statute. Id. at ¶ 13. We held that the plain language of R.C. 2743.48(A)(2) provided no exception for guilty pleas that were later vacated. Id. at ¶ 19-20.

[P32]** Although different statutory provisions are involved in Dunbar and the present case, the arguments are strikingly similar: both claimants have attempted to insert ambiguities into the plain language of R.C. 2743.48 through legal doctrines that are wholly separate from the intent of the legislature. ***HN13***[↑] Just as the subsequent vacation of a plea does not mean that the defendant "did not plead guilty" to the offense in *Dunbar*, the subsequent invalidation of a statute does not mean that "the charged offense * * * was not committed" by Bundy. Should the General Assembly intend to broaden the criteria to allow **[****20]** for defendants in Bundy's situation to take advantage of R.C. 2743.48, it must do so by enacting new legislation. There is no dispute that despite being put on notice of his new registration obligations as a Tier II sex offender, Bundy failed to verify his current residence address with the sheriff on March 14, 2008, thereby violating R.C. 2950.06. *Bodyke*'s later invalidation of the statutes for reclassifying sex offenders meant that the increased requirements of R.C. 2950.06 could not be constitutionally enforced against Bundy, and his conviction for failing to comply with those requirements

[3] For these same reasons, none of the authorities cited in the dissenting opinion would **[****17]** require a different result than the one we reach today. To the contrary, we declared "what the law is" and rendered the challenged statute inoperative in Bodyke and subsequent cases, leaving no discrepancy with Marbury v. Madison, 5 U.S. 137, 2 L.Ed. 60 (1803) (declaring certain federal legislation to be unconstitutional and rendering it inoperative), or State ex rel. Huston v. Perry Cty. Commrs., 5 Ohio St. 497, 506 (1856) (declaring certain state legislation to be unconstitutional and rendering it inoperative). And as a result, Bundy was "entitled to go free," leaving no discrepancy with Justice Ginsburg's concurring opinion in Bond v. United States, 564 U.S. 211, 131 S.Ct. 2355, 2367, 180 L.Ed.2d 269 (2011) (Ginsburg, J., concurring) ("If a law is invalid as applied to the criminal defendant's conduct, the defendant is entitled to go free"). None of these cases stand for the notion that a defendant such as Bundy has a due-process right to a finding of actual innocence under R.C. 2743.48(A)(5), and the dissent's reliance on them is therefore misplaced.

was thus reversed. However, the reversal of his conviction on constitutional grounds does not establish that on March 14, 2008, the violation of R.C. 2950.06 "was not committed" by Bundy. He therefore fails to satisfy the innocence standard of the wrongful-imprisonment statute.

CONCLUSION

[P33]** HN14[↑] A claimant seeking a declaration that he is a wrongfully imprisoned individual does not satisfy the actual-innocence standard of R.C. 2743.48(A)(5) by showing that his conviction was reversed solely because the statute describing the offense could not be enforced on constitutional grounds. Bundy therefore does not meet the definition of a wrongfully imprisoned individual and **[****21]** is not entitled to seek compensation from the state. We reverse the judgment of the Second District Court of Appeals and remand the cause to the trial court to enter an order of dismissal.

Judgment reversed and cause remanded.

O'DONNELL, LANZINGER, KENNEDY, and FRENCH, JJ., concur.

PFEIFER, J., concurs in judgment only.

O'NEILL, J., dissents.

Dissent by: O'NEILL

Dissent

[*247] O'NEILL, J., dissenting.

[P34]** Respectfully, I dissent. Rather than reversing the judgment of the court of appeals and ordering the trial court to dismiss this action, I would take this opportunity to adopt a clearly understood rule of law. One who has been convicted of a crime that is found by a court *not to be a crime* has been wrongfully convicted. It is that simple, and justice demands no less.

[P35]** "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule **[***167]** to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." Marbury v. Madison, 5 U.S. 137, 177, 2 L.Ed. 60 (1803). When Chief Justice John Marshall wrote these words for a unanimous United States Supreme Court more than two centuries ago, he declared a core principle of our legal system with **[****22]** roots descending back into the mists of time: Judges may invalidate unconstitutional laws and must resolve cases as if the unconstitutional law were never put into place.

[P36]** We have before us today a sufficiently similar case. Bundy has established that the criminal offense he was imprisoned for was predicated on a law that violated the separation of powers. *See* State v. Bodyke, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, paragraph two of the syllabus. The law was therefore a legislative overreach purporting to grant unconstitutional authority to the executive branch in violation of Ohio's Constitution. In *Marbury*, the legislature had purported to expand the original jurisdiction of the United States Supreme Court. Marbury, 5 U.S. at 175-176, 2 L.Ed. 60 The court invalidated a section of the Judiciary Act of 1789 without providing the relief granted by that section, resolving the case as if the section had never been enacted. Id. at 177 ("an act of the legislature, repugnant to the constitution, is void").

[P37]** If a law is enacted that extends beyond the power of the legislature enacting it, it is bedrock law that the enactment is and was a nullity without the force and effect of law. State ex rel. Huston v. Perry Cty. Commrs., 5 Ohio St. 497, 506 (1856). "In short, a law 'beyond the power of Congress,' for any reason, is 'no law at all.'" Bond v. United States, 564 U.S. 211, 131 S.Ct. 2355, 2368, 180 L.Ed.2d 269 (2011) (Ginsburg, J., concurring), **[****23]** quoting Nigro v. United States, 276 U.S. 332, 341, 48 S.Ct. 388, 72 L.Ed. 600 (1928). It logically follows that one who is convicted of violating a law that has no legal force has been wrongfully convicted. "'An offence created by [an unconstitutional law],' the Court has held, 'is not a crime.' Ex parte Siebold, 100 U.S. 371, 376, 25 L.Ed. 717 (1880)." (Brackets sic.) Bond at 2367 (Ginsburg, J., concurring). Consequently, if the state imprisons a person based on a wrongful conviction, that person is and always was legally and factually innocent. "'A conviction under [such a law] is **[*248]** not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.' * * * If a law is invalid as applied to the criminal defendant's conduct, the defendant is entitled to go free." (Brackets sic.) Bond at 2367 (Ginsburg, J., concurring), quoting Siebold at 376-377.

[P38]** I would affirm the judgment of the Second

District Court of Appeals and remand to the trial court for execution of that court's judgment.

[P39]** Therefore, I dissent.

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1. *Doss v. State, 135 Ohio St. 3d 211*
   Client/Matter: -None-
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   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

Doss v. State

Supreme Court of Ohio

September 26, 2012, Submitted; December 6, 2012, Decided

No. 2012-0162

Reporter
135 Ohio St. 3d 211 *; 2012-Ohio-5678 **; 985 N.E.2d 1229 ***; 2012 Ohio LEXIS 3086 ****; 2012 WL 6553273

DOSS, APPELLEE, v. THE STATE OF OHIO, APPELLANT.

Subsequent History: Reconsideration denied by *Doss v. State, 2012 Ohio 5966, 2012 Ohio LEXIS 3193 (Ohio, Dec. 19, 2012)*

Prior History: [**1]** APPEAL from the Court of Appeals for Cuyahoga County, No. 96452,

Doss v. State, 2011 Ohio 6429, 2011 Ohio App. LEXIS 5286 (Ohio Ct. App., Cuyahoga County, Dec. 15, 2011).

Disposition: Judgment reversed and cause remanded.

Core Terms

imprisoned, innocence, wrongfully, summary judgment, vacated, convictions, preponderance of evidence, trial court, actual innocence, substantial impairment, court of appeals, claimant, felony, insufficient evidence, common pleas, wrongful-imprisonment, beyond a reasonable doubt, lesser included offense, burden of proof, charged offense, sentenced, eligible, prison, guilt, rape

Case Summary

Procedural Posture
Appellee prisoner challenged his rape and kidnapping convictions on several grounds, including a challenge to the evidence that the alleged victim's ability to consent was substantially impaired due to a mental or physical condition and that defendant knew of that substantial impairment. His conviction was reversed on appeal. The prisoner moved for summary judgment on his declaratory judgment action which was granted. Appellant state appealed.

Overview

After his release, the prisoner filed an action for declaratory judgment pursuant to *R.C. 2743.48* in which he sought compensation from the state for wrongful imprisonment. The state opposed the motion for summary judgment, offering the transcripts from the criminal trial to show that there were issues of fact and arguing that the prisoner had failed to establish his innocence by a preponderance of the evidence. The reviewing court found that he differing burdens of proof explain why a vacation of Doss's conviction does not prove his innocence. The appellate court held that the evidence was insufficient to sustain the convictions and that the state failed to prove the prisoner's guilt beyond a reasonable doubt. But that ruling did not answer the question whether the prisoner could show by a preponderance of the evidence that he did not know, or could not reasonably have known, of the alleged victim's incapacity. Even though the prisoner's successful appeal may have provided some support for his claim of wrongful imprisonment, it was not enough. He carried the burden of proof to affirmatively establish his innocence under *R.C. 2743.48(A)(5)*.

Outcome
The judgment was reversed.

LexisNexis® Headnotes

Civil Rights Law > General Overview

HN1 **Civil Rights Law**

The General Assembly has developed a two-step process to compensate those who have been wrongfully imprisoned. The first step is an action in the common pleas court seeking a preliminary factual determination of wrongful imprisonment; the second step is an action in the court of claims to recover money damages. The wrongful-imprisonment statute, *R.C. 2743.48*, authorizes civil actions against the state, for specified monetary amounts, in the court of claims by certain wrongfully imprisoned individuals. The statute was designed to replace the former practice of compensating those wrongfully imprisoned by ad hoc moral-claims legislation. Under the statutory scheme, a claimant must be determined to be a "wrongfully imprisoned individual" by the court of common pleas before being permitted to file for compensation against the state of Ohio in the Court of Claims. *R.C. 2305.02* and *2743.48(B)(2)*.

Civil Rights Law > General Overview

Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment

HN2 **Civil Rights Law**

See *R.C. 2743.48*.

Civil Rights Law > General Overview

HN3 **Civil Rights Law**

A plaintiff in a civil case for wrongful imprisonment must first prove that he or she is a "wrongfully imprisoned individual."

Civil Rights Law > General Overview

HN4 **Civil Rights Law**

When a person claiming compensation for wrongful imprisonment has obtained a judgment of acquittal, that judgment is not to be given preclusive effect, because an acquittal is a determination that the state has not met its burden of proof. It is not necessarily a finding that the accused is innocent. For this reason, a claimant advancing a wrongful-imprisonment claim must affirmatively prove her innocence by a preponderance of the evidence.

Civil Rights Law > General Overview

HN5 **Civil Rights Law**

When a court vacates or reverses a criminal conviction based on insufficiency of the evidence, the court is saying that the state has not proven the elements of the offense beyond a reasonable doubt; it is not saying that innocence has been proven. Thus, reversal on insufficiency of the evidence does not automatically mean that the defendant was wrongfully imprisoned. If the legislature had intended to compensate all persons whose convictions are reversed based on insufficient evidence, it could have explicitly stated this in *R.C. 2743.48*.

Headnotes/Summary

Headnotes

Wrongful imprisonment—R.C. 2743.48—Claimant in common pleas court cannot be declared eligible for compensation in Court of Claims unless claimant has affirmatively demonstrated that he is actually innocent of charges for which he was imprisoned—Acquittal or finding of legal insufficiency of evidence is not enough to establish actual innocence.

Syllabus

[*1230] [*211] SYLLABUS OF THE COURT**

1. One who claims to be a "wrongfully imprisoned individual" under *R.C. 2743.48* must prove all of the factors in *R.C. 2743.48(A)* by a preponderance of the evidence before seeking compensation from the state for wrongful imprisonment.

2. A trial court adjudicating proof of innocence pursuant to *R.C. 2743.48(A)(5)* may not find that the claimant was wrongfully imprisoned based solely on an appellate court judgment vacating a felony conviction due to insufficient evidence and discharging the prisoner without a remand for a new trial.

Counsel: Mancino, Mancino & Mancino and Paul Mancino Jr., for appellee.

Michael DeWine, Attorney General, Alexandra T. Schimmer, Solicitor General, and Matthew P. Hampton, Deputy Solicitor; and William D. Mason, Cuyahoga County Prosecuting Attorney, and John F. Manley and T. Allan Regas, Assistant Prosecuting Attorneys, for appellant.

Judges: LANZINGER, J. O'CONNOR, C.J., and PFEIFER, LUNDBERG STRATTON, O'DONNELL, CUPP, and MCGEE BROWN, JJ., concur.

Opinion by: LANZINGER

Opinion

LANZINGER, J.

[P1] [***1230]** In this case, we determine that Iran Doss is not entitled to summary judgment that he is a "wrongfully **[****2]** imprisoned individual" eligible to sue the state for compensation pursuant to *R.C. 2743.48* based solely on the appellate court's decision to reverse and vacate his conviction and order his immediate release from prison. We therefore reverse the judgment of the court of appeals and remand to the trial court for further proceedings.

I. Background

[P2]** Appellee, Iran Doss, was convicted by a jury in 2006 of one count of rape and one count of kidnapping. He was classified as a sexually oriented offender, sentenced to four years in prison, and ordered to pay restitution and a fine.

[P3] [*212]** On appeal, Doss challenged his rape and kidnapping convictions on several grounds, including a challenge to the evidence that the alleged victim's ability to consent was substantially impaired due to a mental or physical condition and that Doss knew of that substantial impairment. The Eighth District, in a two-to-one decision, concluded that there was sufficient evidence to support a finding that the other party's capacity to consent was substantially impaired and that Doss knew (or had reason to know) of the substantial impairment. **[***1231]** *State v. Doss, 8th Dist. No. 88443, 2007 Ohio 6483* ("Doss I").

[P4]** Upon reconsideration, **[****3]** a split panel vacated both the kidnapping and the rape convictions. *State v. Doss, 8th Dist. No. 88443, 2008 Ohio 449* (*"Doss II"*). The *Doss II* majority held that the state failed to present sufficient evidence showing that Doss knew or had reason to know that the alleged victim's ability to consent was substantially impaired. *Id. at ¶21-23*. The court vacated the convictions and ordered Doss discharged from prison.

[P5]** The state appealed the vacation of the rape conviction, but we declined review. *State v. Doss, 118 Ohio St.3d 1507, 2008 Ohio 3369, 889 N.E.2d 1025*. After his release, Doss filed an action for declaratory judgment pursuant to *R.C. 2743.48* in the Cuyahoga County Court of Common Pleas, seeking compensation from the state for wrongful imprisonment. On July 2, 2010, he filed a motion for summary judgment, citing the decision in *Doss II*. The motion, which contained no attachments or exhibits, was two and a half pages long and cited only the appellate judgment in *Doss II* as a basis for finding eligibility. The state opposed the motion for summary judgment, offering the transcripts from the criminal trial to show that there were issues of fact and arguing that Doss had failed to **[****4]** establish his innocence by a preponderance of the evidence.

[P6]** The trial court granted Doss's motion for summary judgment for the following reason: "The court of appeals' decision to reverse and vacate plaintiff Doss's conviction and order his immediate release can only be interpreted to mean that either plaintiff Doss was innocent of the charges upon which he was convicted, or that no crime was committed by plaintiff Doss, or both."

[P7]** The court of appeals affirmed the grant of summary judgment, in yet another two-to-one decision. *Doss v. State, 8th Dist. No. 96452, 2011 Ohio 6429* (*"Doss III"*). The majority reiterated that its review of the record in *Doss II* had revealed that Doss's statement was the only evidence of the alleged victim's mental condition and that the state had presented no evidence that Doss knew, or should have known, that the alleged victim's ability to resist or consent was substantially impaired because of voluntary intoxication. *Id. at ¶ 15*. The court of appeals found no genuine issue of fact and no error in the trial court's entry of summary judgment.

[P8]** The dissenting judge stated,

> **[*213]** Our holding in [*Doss II*] does not mean that Doss is innocent—merely that, based upon **[****5]** the evidence the state presented, Doss's guilt could not be established beyond a reasonable doubt. The same cannot automatically be said of whether Doss can show by a preponderance of the evidence that he did not know or reasonably should not have known of the victim's incapacity.

Id. at ¶ 21 (Celebrezze, J., dissenting).

[P9]** We accepted jurisdiction to address the state's propositions of law: (1) "A trial court adjudicating a contested claim of innocence may not grant summary judgment in favor of a former inmate based solely on an appeals court finding that a criminal conviction was not supported by sufficient evidence" and (2) "Under *R.C. 2743.48* an inmate must prove actual innocence by a preponderance of the evidence, which is a separate and distinct legal standard than whether [sic] the evidence in a criminal case is sufficient to **[***1232]** convict a person beyond a reasonable doubt." *See Doss v. State, 131 Ohio St.3d 1498, 2012 Ohio 1501, 964 N.E.2d 439*.

II. Analysis

[P10]** ***HN1***[↑] The General Assembly has developed a two-step process to compensate those who have been wrongfully imprisoned. The first step is an action in the common pleas court seeking a preliminary factual determination of wrongful imprisonment; **[****6]** the second step is an action in the Court of Claims to recover money damages. *Griffith v. Cleveland, 128 Ohio St.3d 35, 2010 Ohio 4905, 941 N.E.2d 1157*, paragraph two of the syllabus. The wrongful-imprisonment statute, *R.C. 2743.48*, was added to the Revised Code in 1986 by Sub.H.B. No. 609 "to authorize civil actions against the state, for specified monetary amounts, in the Court of Claims by certain wrongfully imprisoned individuals." 141 Ohio Laws, Part III, 5351. The statute was designed to replace the former practice of compensating those wrongfully imprisoned by ad hoc moral-claims legislation. *Walden v. State, 47 Ohio St.3d 47, 49, 547 N.E.2d 962 (1989)*. Under the statutory scheme, a claimant must be determined to be a "wrongfully imprisoned individual" by the court of common pleas before being permitted to file for compensation against the state of Ohio in the Court of Claims. *R.C. 2305.02* and *2743.48(B)(2)*; *Griffith v. Cleveland*, paragraph two of the syllabus.

[*214] *The Wrongful-Imprisonment Statute*

[P11]** ***HN2***[↑] *R.C. 2743.48* provides:

> (A) As used in this section and *section 2743.49 of the Revised Code*, a "wrongfully imprisoned individual" means an individual who satisfies each of the following:
>
> (1) **[****7]** The individual was charged with a violation of a section of the Revised Code by an indictment or information, and the violation charged was an aggravated felony or felony.
> (2) The individual was found guilty of, but did not plead guilty to, the particular charge or a lesser included offense by the court or jury involved, and the offense of which the individual was found guilty was an aggravated felony or felony.
> (3) The individual was sentenced to an indefinite or definite term of imprisonment in a state correctional institution for the offense of which the individual was found guilty.
> (4) The individual's conviction was vacated, dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that

conviction.

(5) Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release, or it was determined **[****8]** by the court of common pleas in the county where the underlying criminal action was initiated *that the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person*.

(Emphasis added.)

[P12]** Thus, *HN3*[↑] a plaintiff in a civil case for wrongful imprisonment must first prove that he or she is a "wrongfully imprisoned **[***1233]** individual." In this case, proof of the factors in R.C. 2743.48(A)(1) through (4) is undisputed. Doss was convicted of a felony to which he did not plead guilty, he was sentenced to a prison term, his conviction was vacated upon appeal, and he is not subject to further charges. The fifth factor of R.C. 2743.48(A) may be fulfilled in one of two ways: (1) subsequent to sentencing and during or subsequent to imprisonment, "an error in procedure resulted in the individual's release" or (2) the charged offense (and any lesser included offense) was not committed by the individual or no crime was committed at all (actual innocence). R.C. 2743.48(A)(5).

[P13]** **[*215]** This court's decision in Walden v. State, 47 Ohio St.3d 47, 547 N.E.2d 962, precludes a claimant from relying solely on a judgment of acquittal to establish actual innocence. **[****9]** In *Walden*, the state appealed determinations of wrongful imprisonment for two individuals. One of them, Linda Walden, had been acquitted of murder. When she sought a determination that she had been wrongfully imprisoned, the trial court granted summary judgment in her favor, reasoning that the judgment of acquittal precluded the state from contesting her innocence. The state's appeal was consolidated with its appeal in the case of Nathaniel Ellis. Ellis had been convicted of felonious assault, but the court of appeals reversed and remanded for a new trial. On retrial, Ellis was acquitted by a general verdict, after which he sought a determination that he was a wrongfully imprisoned individual. The trial court held that Ellis was entitled to compensation. In nearly identical opinions released on the same day, the court of appeals held that the two defendants were entitled to compensation for wrongful imprisonment.

[P14]** In construing a former version of R.C. 2743.48(A), we held that *HN4*[↑] when a person claiming compensation for wrongful imprisonment has obtained a judgment of acquittal, that judgment is not to be given preclusive effect, because an acquittal is a determination that the state has **[****10]** not met its burden of proof. It is not necessarily a finding that the accused is innocent. For this reason, a claimant advancing a wrongful-imprisonment claim "must affirmatively prove her innocence by a preponderance of the evidence." *Id. at 52*. We explained that in enacting the statute, the "General Assembly intended that the court of common pleas actively separate those who were wrongfully imprisoned from those who have merely avoided criminal liability." *Id*. Even though the statute examined in *Walden* was an earlier version of R.C. 2743.48, the *Walden* holding is still applicable. Griffith v. Cleveland, 128 Ohio St.3d 35, 2010 Ohio 4905, 941 N.E.2d 1157, ¶ 30. R.C. 2743.48(A)(5) requires an affirmative showing of innocence beyond proof of an acquittal.

[P15]** *HN5*[↑] When a court vacates or reverses a criminal conviction based on insufficiency of the evidence, the court is saying that the state has not proven the elements of the offense beyond a reasonable doubt; it is not saying that innocence has been proven. Thus, reversal on insufficiency of the evidence does not automatically mean that the defendant was wrongfully imprisoned. Chandler v. State, 95 Ohio App.3d 142, 641 N.E.2d 1382 (8th Dist.1994). **[****11]** If the legislature had intended to compensate all persons whose convictions are reversed based on insufficient evidence, it could have explicitly stated this in R.C. 2743.48. *See* Ratcliff v. State, 94 Ohio App.3d 179, 182, 640 N.E.2d 560 (4thDist.1994).

[P16]** In this case, Doss argues that the vacation of his convictions and discharge from prison are proof of his actual innocence. In contrast, the state **[*216]** asserts that R.C. 2743.48 establishes a **[***1234]** civil rather than a criminal action and that in contrast with the burden of proof in a criminal trial, the wrongful-imprisonment statute places the burden of proof on the claimant to affirmatively show by a preponderance of the evidence that he or she was actually innocent of the charged offense, including all lesser included offenses. A judgment of acquittal is not enough. The state contends that in support of his action for declaratory judgment, Doss did not provide the trial court with any additional evidence to prove that the other party consented, or that he did not know and could not reasonably have known of any impairment of her ability to consent, or any other proof of his actual innocence of the charge of rape and all lesser included offenses.

[**12]** The trial and appellate courts, therefore, granted Doss a preliminary determination of eligibility for compensation without the required affirmative proof of his actual innocence.

[P17]** The differing burdens of proof explain why a vacation of Doss's conviction does not prove his innocence. The appellate court held that the evidence was insufficient to sustain the convictions and that the state failed to prove Doss's guilt beyond a reasonable doubt. But that ruling does not answer the question whether Doss can show by a preponderance of the evidence that he did not know, or could not reasonably have known, of the alleged victim's incapacity. *See Ratcliff v. State at 182* (evidence insufficient to prove guilt beyond a reasonable doubt does not necessarily prove innocence by a preponderance of the evidence). Preponderance of the evidence is a distinct legal standard from beyond a reasonable doubt. By not requiring more of Doss, the lower courts contravened the mandate of *R.C. 2743.48(A)(5)* by dispensing with the additional requirement of affirmative proof that the criminal action was not committed by him or by any person. Even though Doss's successful appeal may have provided some support for **[****13]** his claim of wrongful imprisonment, it is not enough. He had the burden of proof to affirmatively establish his innocence under *R.C. 2743.48(A)(5)*. *State ex rel. Tubbs-Jones v. Suster, 84 Ohio St.3d 70, 72, 1998 Ohio 275, 701 N.E.2d 1002 (1998)*.

Proof Offered to Support Summary Judgment

[P18]** To analyze whether Doss affirmatively established his innocence by a preponderance of the evidence, we must examine the evidence that he submitted in support of his motion for summary judgment. To prevail on the motion, he must have demonstrated that there was no genuine issue of material fact, that he was entitled to judgment as a matter of law, and that reasonable minds, viewing the evidence in the light most favorable to the nonmoving party, can come to only one conclusion, which is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc., 127 Ohio St.3d 54, 2010 Ohio 4505, 936 N.E.2d 481, ¶ 29*. Appellate review is de novo. *Id*.

[P19]** **[*217]** The record shows that Doss filed his motion for summary judgment relying solely on the Eighth District's decision in *Doss II*. And the trial court granted summary judgment on that basis alone. Specifically, the trial court stated:

> The court of appeals' decision to reverse and vacate **[****14]** plaintiff Doss's conviction and order his immediate release *can only be interpreted to mean* that either plaintiff Doss was innocent of the charges upon which he was convicted, or that no crime was committed by plaintiff Doss, or both.

(Emphasis added.)

[P20]** This conclusion was incorrect. The trial court relied solely on the **[***1235]** court of appeals' reversal and vacation of the conviction to hold that Doss was entitled to judgment as a matter of law. It did not require a hearing or additional evidence. It simply cited the court of appeals' holding that the state had not offered sufficient evidence to prove Doss's convictions. And in affirming the trial court's grant of summary judgment, the Eighth District correctly acknowledged *Walden's* rule that an acquittal does not necessarily establish actual innocence, but then applied the rule incorrectly. Despite the jury's verdict of guilt and without any evidence from Doss, the majority held that the record showed insufficient evidence of the alleged victim's substantial impairment. Thus, the judgment of the trial court that found Doss to be eligible for compensation and the appellate court's judgment affirming that finding were not based upon an affirmative **[****15]** showing of actual innocence. They were based on a dearth of evidence of guilt. Both courts relieved Doss of his statutory obligation to prove by a preponderance of the evidence that he did not commit the charged offense, including all lesser included offenses, an obligation that must be fulfilled before he is allowed to claim the status of one who was "wrongfully imprisoned."

[P21]** To show actual innocence under the wrongful-imprisonment statute, Doss must prove that "the charged offense, including all lesser-included offenses, either was not committed by [him] or was not committed by any person." *R.C. 2743.48(A)(5)*. This court has emphasized that this standard is not satisfied by an acquittal or a finding of legal insufficiency of the evidence. *Walden, 47 Ohio St.3d at 52, 547 N.E.2d 962*. The General Assembly requires a showing of innocence to be made affirmatively and adjudicated de novo before a claimant can be found to be eligible for compensation in a wrongful-imprisonment action.

III. Conclusion

[P22]** Not every person who is released from prison because of a successful appeal is entitled to compensation. The legislature set forth a procedure for **[*218]** claimants like Doss to follow in *R.C. 2743.48*,

[**16]** so that the common pleas court could actively separate demonstrably innocent persons who have been wrongfully imprisoned from persons who have merely avoided criminal liability. We hold that one who claims to be a "wrongfully imprisoned individual" under *R.C. 2743.48* must prove all of the factors in *R.C. 2743.48(A)* by a preponderance of the evidence before seeking compensation from the state for wrongful imprisonment. We also hold that a trial court adjudicating proof of innocence pursuant to *R.C. 2743.48(A)(5)* may not find that a claimant has been wrongfully imprisoned based solely on an appellate court judgment vacating a felony conviction due to insufficient evidence and discharging the prisoner without a remand for a new trial. We therefore reverse the judgment of the court of appeals and remand this matter to the trial court for further proceedings.

Judgment reversed and cause remanded.

O'CONNOR, C.J., and PFEIFER, LUNDBERG STRATTON, O'DONNELL, CUPP, and MCGEE BROWN, JJ., concur.

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1. *Herrera v. Collins, 506 U.S. 390*
   Client/Matter: -None-
   Search Terms: 506 U.S. 390
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

Herrera v. Collins

Supreme Court of the United States

October 7, 1992, Argued ; January 25, 1993, Decided

No. 91-7328

Reporter
506 U.S. 390 *; 113 S. Ct. 853 **; 122 L. Ed. 2d 203 ***; 1993 U.S. LEXIS 1017 ****; 61 U.S.L.W. 4108; 93 Cal. Daily Op. Service 512; 93 Daily Journal DAR 1024; 6 Fla. L. Weekly Fed. S 882

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

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Disposition: *954 F.2d 1029*, affirmed.

Core Terms

innocence, guilt, actual innocence, newly discovered evidence, district court, murder, convicted, new trial, death sentence, sentence, reliability, pardon, cases, capital case, constitutional claim, persuasive, clemency, killed, habeas petition, actual-innocence, proceedings, beyond a reasonable doubt, constitutional violation, motion for a new trial, time limit, demonstration, merits, innocent person, federal court, due process

Case Summary

Procedural Posture
The United States Court of Appeals for the Fifth Circuit affirmed the denial of petitioner inmate's request for a writ of habeas corpus. The court granted certiorari to review the denial.

Overview
Over 10 years after the inmate was convicted of capital murder, he filed a habeas corpus petition arguing that he was actually innocent of the crime. The inmate supported his claim with affidavits collected years after the trial indicating that his brother committed the murder. The inmate argued that his showing of innocence entitled him to federal habeas relief. The court held that the inmate's claim of actual innocence based on newly discovered evidence was not a ground for federal habeas corpus relief absent an independent constitutional violation. The State met its burden of proving at trial that the inmate was guilty of the capital murder beyond a reasonable doubt. Thus, the inmate did not come before the courts as one who was "innocent," but as one who had been convicted by due process of law. Texas' refusal to entertain the inmate's newly discovered evidence eight years after his conviction did not transgress any principle of fundamental fairness.

Outcome
The judgment denying the inmate's petition for habeas corpus was affirmed.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Criminal Process > Compulsory Process

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Duty of Disclosure

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > ... > Fundamental Rights > Criminal Process > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Evidence > Inferences & Presumptions > Presumptions

HN1[] Criminal Process, Compulsory Process

A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. Other constitutional provisions also have the effect of ensuring against the risk of convicting an innocent person. In capital cases, additional protections are required because of the nature of the penalty at stake. All of these constitutional safeguards, of course, make it more difficult for the state to rebut and finally overturn the presumption of innocence which attaches to every criminal defendant. But due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person. Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Criminal Law & Procedure > Sentencing > Suspension

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > Proof of Innocence

HN2[] Postconviction Proceedings, Motions for New Trial

To obtain a new trial based on newly discovered evidence, a defendant must file a motion within 30 days after imposition or suspension of sentence. Tex. R. App. P. 31(a)(1) (1992). The Texas courts have construed this 30-day time limit as jurisdictional.

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > General Overview

HN3[] Discovery, Relevance of Discoverable Information

Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; 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.

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > Exceptions

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > General Overview

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of Justice > Miscarriage of Justice

Criminal Law & Procedure > ... > Exceptions to Default > Actual Innocence & Miscarriage of

Justice > Proof of Innocence

HN4[] **Actual Innocence & Miscarriage of Justice, Exceptions**

A petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons. But this body of habeas jurisprudence makes clear that a 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.

Lawyers' Edition Display

Decision

Affidavits supporting accused's claim of "actual innocence" held not sufficient to entitle accused to federal habeas corpus relief from death sentence.

Summary

On an evening in September 1981, the body of a law enforcement officer was found by a passerby beside the officer's patrol car on a Texas highway. The officer had been shot in the head. At about the same time, another law enforcement officer observed a speeding vehicle traveling along the same road, away from the place where the first officer's body had been found. The second officer pursued the vehicle, which eventually pulled over. When the second officer walked toward the vehicle, the driver of the vehicle opened his door and fired at least one shot at the second officer, who died 9 days later. An individual was arrested and charged with the capital murder of both officers. At the accused's trial in Texas state court for the murder of the second officer, the evidence included (1) testimony by the second officer's partner that the accused was the person who wielded the gun; (2) a declaration to the same effect by the second officer while he was in the hospital; (3) a showing that (a) the speeding vehicle involved was registered to the accused's girlfriend, (b) the accused was known to drive the vehicle, and (c) the accused had a set of keys to the vehicle in his pocket when he was arrested; (4) testimony by the second officer's partner that the vehicle identified was the one from which the murderer had emerged, and that there had been only one person in the vehicle; (5) a showing that the accused's Social Security card had been found alongside the first officer's patrol car; (6) a showing that blood on the vehicle involved, and on the accused's pants and wallet, was the same type as the first officer's blood, and a different type than the accused's blood; (7) a showing that strands of hair found in the vehicle were the first officer's, and not the accused's; and (8) a handwritten letter which was found on the accused's person when he was arrested, and which strongly implied that he had killed the first officer. In January 1982, the accused was found guilty of murdering the second officer and was sentenced to death. Six months later, the accused pleaded guilty to the murder of the first officer. Notwithstanding the accused's argument that the identifications made by the second officer and his partner had been improperly admitted, the accused's conviction and sentence for the murder of the second officer were upheld on direct review. The accused was unsuccessful in a petition for state habeas corpus relief, and his subsequent federal habeas corpus petition challenging the identifications was denied. Following such denial--and more than 8 years after the accused's trial--the accused filed a second petition for state habeas corpus relief. In his petition, the accused, supported by two affiants who stated that the accused's now-dead brother had told them that he had killed both officers, claimed that he was actually innocent of murdering the second officer. This petition likewise was denied. Thereafter, in February 1992--10 years after his conviction--the accused filed in the United States District Court for the Southern District of Texas his second federal habeas corpus petition, in which he claimed "actual innocence" of the second officer's murder, and that his execution would thus violate the Federal Constitution under (1) the *cruel and unusual punishment clause of the Eighth Amendment*; and (2) the *due process clause of the Fourteenth Amendment*. In support of such claim, the accused submitted the two affidavits filed with the preceding state petition plus two additional affidavits. One of the additional affidavits also averred that the accused's brother had told the affiant that he had committed the murders, and the other affidavit was from the brother's son--a 9-year old at the time of the killings--who stated that he had witnessed his father shoot the officers. The District Court granted the accused's request for a stay of execution so that the accused's claim of actual innocence, along with the two

affidavits not proffered with the accused's state petition, could be presented in state court. On appeal, the United States Court of Appeals for the Fifth Circuit, vacating the stay, expressed the view that the existence merely of newly discovered evidence relevant to the guilt of a state prisoner was not a ground for federal habeas corpus relief (*954 F2d 1029*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Rehnquist, Ch. J., joined by O'Connor, Scalia, Kennedy,and Thomas, JJ., it was held that the accused was not entitled to federal habeas corpus relief, because (1) the rule that a federal habeas corpus petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence (a) was applicable only where the petitioner supplemented his constitutional claim with a colorable showing of factual innocence and, (b) was inapplicable to free-standing claims of actual innocence; (2) it could not be said that Texas' refusal to entertain the accused's newly discovered evidence transgressed a principle of fundamental fairness rooted in the traditions and conscience of the people, so as to violate the *Fourteenth Amendment*; and (3) even assuming 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, the showing by the accused 10 years after his conviction fell far short of the extraordinarily high threshold showing for the right to federal habeas corpus relief in light of the proof of the accused's guilt at trial.

O'Connor, J., joined by Kennedy, J., concurring, expressed the view that (1) the execution of a legally and factually innocent person would be a constitutionally intolerable event; but (2) resolving the question whether a federal court, in a habeas corpus proceeding, may entertain a convincing claim of actual innocence by a petitioner under a state death sentence was neither necessary nor advisable in the case at hand, since the accused was not innocent in any sense of the word.

Scalia, J., joined by Thomas, J., concurring, expressed the view that (1) there was no basis in text, tradition, or contemporary practice for finding in the Constitution a right to demand judicial consideration of newly discovered evidence brought forward after conviction; and (2) the Supreme Court should not impose upon the lower federal courts the burden of regularly analyzing claims in federal habeas corpus petitions alleging newly discovered evidence of innocence in capital cases.

White, J., concurring in the judgment, expressed the view that (1) to be entitled to relief on a claim of "actual innocence" after the time for presenting newly discovered evidence has expired, a federal habeas corpus petitioner should be required to show at least that, based on such evidence and the record before the convicting jury, no rational trier of fact could find proof of guilt beyond a reasonable doubt; and (2) the accused's showing in the case at hand fell far short of such standard.

Blackmun, J., joined in pertinent part by Stevensand Souter, JJ., dissenting, expressed the view that (1) the execution of a person who has been validly convicted and sentenced, but who can prove his innocence with newly discovered evidence, was forbidden by the *Eighth* and *Fourteenth Amendments*; (2) to obtain relief on a claim of "actual innocence," a federal habeas corpus petitioner must show that he probably is innocent; and (3) the Court of Appeals' decision should be reversed, and the case should be remanded to the District Court to consider whether the accused has shown, in light of all the evidence, that he probably is actually innocent.

Headnotes

HABEAS CORPUS §118 > federal relief -- state death sentence -- accused claiming "actual innocence" -- sufficiency of affidavits -- > Headnote:
LEdHN[1A][] [1A]*LEdHN[1B]*[] [1B]*LEdHN[1C]*[] [1C]*LEdHN[1D]*[] [1D]

An accused who was convicted in state court and sentenced to death for the capital murder of a law enforcement officer, who had been fatally shot one night on a highway following a chase of a speeding vehicle, is not entitled to federal habeas corpus relief with respect to a petition filed 10 years after his conviction in which the accused claims "actual innocence" of the murder based on four affidavits submitted more than 8 years after the accused's trial, where (1) evidence at the trial included (a) testimony by the victim's partner that the accused was the person who wielded the gun, (b) a declaration to the same effect by the victim while he was in the hospital before he died, (c) a showing that the speeding vehicle involved was registered to the accused's girlfriend, that the accused was known to

drive the vehicle, and that the accused had a set of keys to the vehicle in his pocket when he was arrested, (d) testimony by the victim's partner that the vehicle identified was the one from which the murderer had emerged, and that there had been only one person in the vehicle, (e) a showing that the accused's Social Security card had been found alongside the patrol car of another murdered officer, (f) a showing that blood on the vehicle involved, and on the accused's pants and wallet, was the same type as the blood of the other murdered officer, and a different type than the blood of the accused, (g) a showing that strands of hair found in the vehicle were the other murdered officer's, and not the accused's, and (h) a handwritten letter which was found on the accused's person when he was arrested, and which strongly implied that he had killed the victim, and (2) with respect to the accused's federal habeas corpus petition, (a) three of the affidavits submitted in support aver that the accused's deceased brother told the affiants that he had killed both the officer who was the murder victim in the trial and another officer who was killed the same night and to whose murder the accused pleaded guilty six months after the trial, and thus consist of hearsay, (b) the other affidavit is from the deceased brother's son who when he was 9 years old allegedly witnessed his father commit the murders, (c) the affidavits contain inconsistencies, and (d) no explanation is given either as to why the affiants waited until the 11th hour to make their statements, or why the accused--by hypothesis an innocent man--pleaded guilty to the murder of the other officer; assuming 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, the affidavits offered by the accused fall far short of the extraordinarily high threshold showing for the right to federal habeas corpus relief in light of the proof of the accused's guilt at trial. (Blackmun, Stevens, and Souter, JJ., dissented from this holding.)

HABEAS CORPUS §118 > consideration of previous proceedings -- > Headnote:
LEdHN[2][] [2]

A federal habeas corpus petitioner's showing in support of a claim of actual innocence, and his federal constitutional claim for relief based upon such showing, must be evaluated in the light of the previous proceedings in the petitioner's case.

EVIDENCE §194 > presumption of innocence -- > Headnote:
LEdHN[3A][] [3A]*LEdHN[3B]*[] [3B]

A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt; however, once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears.

CONSTITUTIONAL LAW §848 > due process in convicting -- > Headnote:
LEdHN[4][] [4]

Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.

NEW TRIAL §10 > newly discovered evidence -- > Headnote:
LEdHN[5][] [5]

A claim, several years after a conviction, that evidence never presented to a criminal trial court proves an accused innocent notwithstanding the verdict rendered at trial is not cognizable in the state courts of Texas, because the 30-day time limit, after imposition or suspension of sentence by a Texas court, within which a defendant must file a motion for a new trial based on newly discovered evidence is jurisdictional.

HABEAS CORPUS §44 > constitutional violations -- errors of fact -- > Headnote:
LEdHN[6][] [6]

The rule that the mere existence of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus is grounded in the principle that federal habeas corpus courts sit to insure that individuals are not imprisoned in violation of

the Federal Constitution, and not to correct errors of fact.

HABEAS CORPUS §18 > federal courts -- state criminal trials -- > Headnote:
LEdHN[7] [7]

Federal habeas corpus courts are not forums in which to relitigate state criminal trials.

HABEAS CORPUS §113 > abusive or successive claims -- federal consideration of merits -- miscarriage of justice -- actual innocence -- > Headnote:
LEdHN[8] [8]

The exception for fundamental miscarriage of justice, under which exception a federal habeas corpus petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence, is grounded in the equitable discretion of federal habeas corpus courts to see that federal constitutional errors do not result in the incarceration of innocent persons; for purposes of such exception, a claim of actual innocence is not itself a constitutional claim, but instead is a gateway through which a habeas corpus petitioner must pass to have his otherwise barred constitutional claim considered on the merits; the exception is applicable only where the petitioner supplements his constitutional claim with a colorable showing of factual innocence, and thus it is inapplicable to free-standing claims of actual innocence.

CONSTITUTIONAL LAW §848.7 > due process -- death sentence -- analysis of "actual innocence" claim -- > Headnote:
LEdHN[9A] [9A]LEdHN[9B] [9B]

The question whether the due process clause of the *Federal Constitution's Fourteenth Amendment* entitles a federal habeas corpus petitioner, who has been convicted by due process of law of two capital murders and sentenced to death, to judicial review of a claim of "actual innocence" is properly analyzed in terms of procedural due process, rather than substantive due process. (Blackmun, Stevens, and Souter, JJ., dissented from this holding.)

CONSTITUTIONAL LAW §831 > due process -- criminal matters -- > Headnote:
LEdHN[10] [10]

Historical practice is probative of whether a procedural rule can be characterized as fundamental, for purposes of applying the rule that criminal process is lacking under the due process clause of the *Federal Constitution's Fourteenth Amendment* only where it offends some principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental.

CONSTITUTIONAL LAW §848.7 > due process -- death sentence -- review of newly discovered evidence -- > Headnote:
LEdHN[11A] [11A]LEdHN[11B] [11B]

A state's refusal, pursuant to its 30-day time limit, to entertain an accused's newly discovered evidence 8 years after the accused's conviction and death sentence does not transgress a principle of fundamental fairness rooted in the traditions and conscience of the people, so as to violate the due process clause of the *Federal Constitution's Fourteenth Amendment*, in light of (1) the historical availability of new trials, which under common law could be granted only during the term of the court in which the final judgment was entered; (2) amendments to *Rule 33 of the Federal Rules of Criminal Procedure*, which set a 2-year time limit for filing new trial motions based on newly discovered evidence and abolished an exception for capital cases; and (3) the contemporary practice in the states with respect to new trial motions based on newly discovered evidence, under which practice most states have set time limits ranging from 10 days to 3 years.

CRIMINAL LAW §97 > executive clemency -- > Headnote:
LEdHN[12A] [12A]LEdHN[12B] [12B]

Although the Federal Constitution does not require the states to enact an executive clemency mechanism, executive clemency (1) is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted, and (2) has been the traditional remedy for convicted persons' claims of innocence based on new evidence discovered too late to file a new trial motion.

NEW TRIAL §16 > use of affidavits -- > Headnote: LEdHN[13][] [13]

In the new trial context, motions based solely upon affidavits are disfavored because the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations.

Syllabus

On the basis of proof which included two eyewitness identifications, numerous pieces of circumstantial evidence, and petitioner Herrera's handwritten letter impliedly admitting his guilt, Herrera was convicted of the capital murder of Police Officer Carrisalez and sentenced to death in January 1982. After pleading guilty, in July 1982, to the related capital murder of Officer Rucker, Herrera unsuccessfully challenged the Carrisalez conviction on direct appeal and in two collateral proceedings in the Texas state courts, and in a federal habeas petition. Ten years after his conviction, he urged in a second federal habeas proceeding that newly discovered evidence demonstrated that he was "actually innocent" of the murders of Carrisalez and Rucker, and that the *Eighth [****2] Amendment's* prohibition against cruel and unusual punishment and the *Fourteenth Amendment's* due process guarantee therefore forbid his execution. He supported this claim with affidavits tending to show that his now-dead brother had committed the murders. The District Court, *inter alia*, granted his request for a stay of execution so that he could present his actual innocence claim and the supporting affidavits in state court. In vacating the stay, the Court of Appeals held that the claim was not cognizable on federal habeas absent an accompanying federal constitutional violation.

Held: Herrera's claim of actual innocence does not entitle him to federal habeas relief. Pp. 398-419.

(a) Herrera's constitutional claim for relief based upon his newly discovered evidence of innocence must be evaluated in light of the previous 10 years of proceedings in this case. In criminal cases, the trial is the paramount event for determining the defendant's guilt or innocence. Where, as here, a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the constitutional presumption of innocence disappears. Federal habeas courts do not sit to correct errors **[****3]** of fact, but to ensure that individuals are not imprisoned in violation of the Constitution. See, *e. g.*, *Moore v. Dempsey, 261 U.S. 86, 87-88, 67 L. Ed. 543, 43 S. Ct. 265*. Thus, claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the course of the underlying state criminal proceedings. See *Townsend v. Sain, 372 U.S. 293, 317, 9 L. Ed. 2d 770, 83 S. Ct. 745*. The rule that a petitioner subject to defenses of abusive or successive use of the habeas writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence, see, *e. g.*, *Sawyer v. Whitley, 505 U.S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514*, is inapplicable in this case. For Herrera does not seek relief from a procedural error so that he may bring an independent constitutional claim challenging his conviction or sentence, but rather argues that he is entitled to habeas relief because new evidence shows that his conviction is factually incorrect. To allow a federal court to grant him typical habeas relief -- a conditional order releasing him unless the State elects to retry him or vacating his death sentence -- **[****4]** would in effect require a new trial 10 years after the first trial, not because of any constitutional violation at the first trial, but simply because of a belief that in light of his new found evidence a jury might find him not guilty at a second trial. It is far from clear that this would produce a more reliable determination of guilt or innocence, since the passage of time only diminishes the reliability of criminal adjudications. *Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781*, *Ford v. Wainwright, 477 U.S. 399, 91 L. Ed. 2d 335, 106 S. Ct. 2595*, and *Johnson v. Mississippi, 486 U.S. 578, 100 L. Ed. 2d 575, 108 S. Ct. 1981*, distinguished. Pp. 398-407.

(b) Herrera's contention that the *Fourteenth*

Amendment's due process guarantee supports his claim that his showing of innocence entitles him to a new trial, or at least to a vacation of his death sentence, is unpersuasive. Because state legislative judgments are entitled to substantial deference in the criminal procedure area, criminal process will be found lacking only where it offends some principle of justice so rooted in tradition and conscience as to be ranked as fundamental. See, *e. g.*, *Patterson v. New York, 432 U.S. 197, 202, 53 L. Ed. 2d 281, 97 S. Ct. 2319*. It cannot be said that the refusal of Texas -- which **[****5]** requires a new trial motion based on newly discovered evidence to be made within 30 days of imposition or suspension of sentence -- to entertain Herrera's new evidence eight years after his conviction transgresses a principle of fundamental fairness, in light of the Constitution's silence on the subject of new trials, the historical availability of new trials based on newly discovered evidence, this Court's amendments to *Federal Rule of Criminal Procedure 33* to impose a time limit for filing new trial motions based on newly discovered evidence, and the contemporary practice in the States, only nine of which have no time limits for the filing of such motions. Pp. 407-412.

(c) Herrera is not left without a forum to raise his actual innocence claim. He may file a request for clemency under Texas law, which contains specific guidelines for pardons on the ground of innocence. History shows that executive clemency is the traditional "fail safe" remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion. Pp. 412-417.

(d) Even assuming, for the sake of argument, that in a capital case a truly persuasive post-trial demonstration of "actual **[****6]** innocence" would render a defendant's execution unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim, Herrera's showing of innocence falls far short of the threshold showing which would have to be made in order to trigger relief. That threshold would necessarily be extraordinarily high because of the very disruptive effect that entertaining such claims 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. Although not without probative value, Herrera's affidavits are insufficient to meet such a standard, since they were obtained without the benefit of cross-examination and an opportunity to make credibility determinations; consist, with one exception, of hearsay; are likely to have been presented as a means of delaying Herrera's sentence; were produced not at the trial, but over eight years later and only after the death of the alleged perpetrator, without a satisfactory explanation for the delay or for why Herrera pleaded guilty to the Rucker murder; contain inconsistencies, and therefore fail to provide a convincing **[****7]** account of what took place on the night of the murders; and do not overcome the strong proof of Herrera's guilt that was presented at trial. Pp. 417-419.

Counsel: Talbot D'Alemberte argued the cause for petitioner. With him on the brief were Robert L. McGlasson, Phyllis L. Crocker, and Mark Evan Olive.

Margaret Portman Griffey, Assistant Attorney General of Texas, argued the cause for respondent. With her on the brief were Dan Morales, Attorney General, Will Pryor, First Assistant Attorney General, Mary F. Keller, Deputy Attorney General, and Michael P. Hodge, Dana E. Parker, and Joan C. Barton, Assistant Attorneys General.

Paul J. Larkin, Jr., argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Solicitor General Starr, Assistant Attorney General Mueller, and Deputy Solicitor General Roberts.

Judges: REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which KENNEDY, J., joined, post, p. 419. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, post, p. 427. WHITE, J., filed an opinion concurring in the judgment, post, p. 429. BLACKMUN, J., filed a dissenting opinion, in Parts I, II, III, and IV of which STEVENS and SOUTER, JJ., joined, post, p. 430.

Opinion by: REHNQUIST

Opinion

[*393] [*212] [**856]** CHIEF JUSTICE **REHNQUIST** delivered the opinion of the Court.

LEdHN[1A][↑] [1A]Petitioner Leonel Torres Herrera was convicted of capital murder and sentenced to death in January 1982. He unsuccessfully challenged the conviction on direct appeal and state collateral proceedings in the Texas state courts, and in a federal habeas petition. In February 1992 -- 10 years after his conviction -- he urged in a second federal habeas petition that he was "actually innocent" of the murder for which he was sentenced to death, and that the *Eighth Amendment's* prohibition against cruel and unusual punishment and the **[****8]** *Fourteenth Amendment's* **[**857]** guarantee of due process of law therefore forbid his execution. He supported this claim with affidavits tending to show that his now-dead brother, rather than he, had been the perpetrator of the crime. Petitioner urges us to hold that this showing of innocence entitles him to relief in this federal habeas proceeding. We hold that it does not.

Shortly before 11 p.m. on an evening in late September 1981, the body of Texas Department of Public Safety Officer David Rucker was found by a passer-by on a stretch of highway about six miles east of Los Fresnos, Texas, a few miles north of Brownsville in the Rio Grande Valley. Rucker's body was lying beside his patrol car. He had been shot in the head.

At about the same time, Los Fresnos Police Officer Enrique Carrisalez observed a speeding vehicle traveling west towards Los Fresnos, away from the place where Rucker's body had been found, along the same road. Carrisalez, who was accompanied in his patrol car by Enrique Hernandez, turned on his flashing red lights and pursued the speeding **[*394]** vehicle. After the car had stopped briefly at a red light, it signaled that it would pull over and did so. The patrol car pulled up behind **[****9]** it. Carrisalez took a flashlight and walked toward the car of the speeder. The driver opened his door and exchanged a few words with Carrisalez before firing at least one shot at Carrisalez' chest. The officer died nine days later.

Petitioner Herrera was arrested a few days after the shootings and charged with the capital murder of both Carrisalez and Rucker. He was tried and found guilty of the capital murder of Carrisalez in January 1982, and sentenced to death. In July 1982, petitioner pleaded guilty to the murder of Rucker.

At petitioner's trial for the murder of Carrisalez, Hernandez, who had witnessed Carrisalez' slaying from the officer's patrol car, identified petitioner as the person who had wielded the gun. A declaration by Officer Carrisalez to the same effect, made while he was in the hospital, was also admitted. Through **[***213]** a license plate check, it was shown that the speeding car involved in Carrisalez' murder was registered to petitioner's "live-in" girlfriend. Petitioner was known to drive this car, and he had a set of keys to the car in his pants pocket when he was arrested. Hernandez identified the car as the vehicle from which the murderer had emerged to fire the fatal **[****10]** shot. He also testified that there had been only one person in the car that night.

The evidence showed that Herrera's Social Security card had been found alongside Rucker's patrol car on the night he was killed. Splatters of blood on the car identified as the vehicle involved in the shootings, and on petitioner's blue jeans and wallet were identified as type A blood -- the same type which Rucker had. (Herrera has type O blood.) Similar evidence with respect to strands of hair found in the car indicated that the hair was Rucker's and not Herrera's. A handwritten letter was also found on the person of petitioner **[*395]** when he was arrested, which strongly implied that he had killed Rucker. [1]

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[1] The letter read: "To whom it may concern: I am terribly sorry for those I have brought grief to their lives. Who knows why? We cannot change the future's problems with problems from the past. What I did was for a cause and purpose. One law runs others, and in the world we live in, that's the way it is.

"I'm not a tormented person. . . . I believe in the law. What would it be without this *[sic]* men that risk their lives for others, and that's what they should be doing -- protecting life, property, and the pursuit of happiness. Sometimes, the law gets too involved with other things that profit them. The most laws that they make for people to break them, in other words, to encourage crime.

"What happened to Rucker was for a certain reason. I knew him as Mike Tatum. He was in my business, and he violated some of its laws and suffered the penalty, like the one you have for me when the time comes.

"My personal life, which has been a conspiracy since my high school days, has nothing to do with what has happened. The other officer that became part of our lives, me and Rucker's (Tatum), that night had not to do in this *[sic]*. He was out to do what he had to do, protect, but that's life. There's a lot of us that wear different faces in lives every day, and that is what causes problems for all. [Unintelligible word].

"You have wrote all you want of my life, but think about yours, also. [Signed Leonel Herrera].

"I have tapes and pictures to prove what I have said. I will prove my side if you accept to listen. You [unintelligible word]

[**11]** **[**858]** Petitioner appealed his conviction and sentence, arguing, among other things, that Hernandez' and Carrisalez' identifications were unreliable and improperly admitted. The Texas Court of Criminal Appeals affirmed, *Herrera v. State, 682 S.W.2d 313 (1984)*, and we denied certiorari, *471 U.S. 1131 (1985)*. Petitioner's application for state habeas relief was denied. *Ex parte Herrera*, No. 12,848-02 (Tex. Crim. App., Aug. 2, 1985). Petitioner then filed a federal habeas **[*396]** petition, again challenging the identifications offered against him at trial. This petition was denied, see *904 F.2d 944* (CA5), and we again denied certiorari, *498 U.S. 925 (1990)*.

Petitioner next returned to state court and filed a second habeas petition, raising, among other things, a claim of "actual innocence" based on **[***214]** newly discovered evidence. In support of this claim petitioner presented the affidavits of Hector Villarreal, an attorney who had represented petitioner's brother, Raul Herrera, Sr., and of Juan Franco Palacious, one of Raul, Senior's former cellmates. Both individuals claimed that Raul, Senior, who died in 1984, had told them that he -- and not petitioner -- had killed Officers Rucker and Carrisalez. [2] **[****12]** The State District Court denied this application, finding that "no evidence at trial remotely suggest[ed] that anyone other than [petitioner] committed the offense." *Ex parte Herrera*, No. 81-CR-672-C (Tex. 197th Jud. Dist., Jan. 14, 1991), P35. The Texas Court of Criminal Appeals affirmed, *Ex parte Herrera, 819 S.W.2d 528 (1991)*, and we denied certiorari, *Herrera v. Texas, 502 U.S. 1085, 117 L. Ed. 2d 279, 112 S. Ct. 1074 (1992)*.

[**13]** In February 1992, petitioner lodged the instant habeas petition -- his second -- in federal court, alleging, among other things, that he is innocent of the murders of Rucker and Carrisalez, and that his execution would thus violate the *Eighth* **[*397]** and *Fourteenth Amendments*. In addition to proffering the above affidavits, petitioner presented the affidavits of Raul Herrera, Jr., Raul, Senior's son, and Jose Ybarra, Jr., a schoolmate of the Herrera brothers. Raul, Junior, averred that he had witnessed his father shoot Officers Rucker and Carrisalez and petitioner was not present. Raul, Junior, was nine years old at the time of the killings. Ybarra alleged that Raul, Senior, told him one summer night in 1983 that he had shot the two police officers. [3] Petitioner alleged that law enforcement officials were aware of this evidence, **[**859]** and had withheld it in violation of *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*.

[**14]** The District Court dismissed most of petitioner's claims as an abuse of the writ. No. M-92-30 (SD Tex., Feb. 17, 1992). However, "in order to ensure that Petitioner can assert his constitutional claims and out of a sense of fairness and due process," the District Court granted petitioner's request for a stay of execution so that he could present his claim of actual innocence, along with the Raul, Junior, and Ybarra affidavits, in state court. App. 38-39. Although it initially dismissed petitioner's *Brady* claim on the ground that petitioner had failed to present "any evidence of withholding exculpatory material by the prosecution," App. 37, the District Court also granted an evidentiary **[***215]** hearing on this claim after reconsideration, *id.*, at 54.

The Court of Appeals vacated the stay of execution. *954 F.2d 1029 (CA5 1992)*. It agreed with the District Court's initial conclusion that there was no evidentiary basis for petitioner's *Brady* claim, and found disingenuous petitioner's attempt to couch his claim of actual innocence in *Brady* terms. *954 F.2d, at 1032*. Absent an accompanying constitutional violation, the Court of Appeals held that petitioner's claim **[*398]** of

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freedom of speech, even a criminal has that right. I will present myself if this is read word for word over the media, I will turn myself in; if not, don't have millions of men out there working just on me while others -- robbers, rapists, or burglars -- are taking advantage of the law's time. Excuse my spelling and writing. It's hard at times like this." App. to Brief for United States as *Amicus Curiae* 3a-4a.

[2] Villarreal's affidavit is dated December 11, 1990. He attested that while he was representing Raul, Senior, on a charge of attempted murder in 1984, Raul, Senior, had told him that he, petitioner, their father, Officer Rucker, and the Hidalgo County Sheriff were involved in a drugtrafficking scheme; that he was the one who had shot Officers Rucker and Carrisalez; that he did not tell anyone about this because he thought petitioner would be acquitted; and that after petitioner was convicted and sentenced to death, he began blackmailing the Hidalgo County Sheriff. According to Villarreal, Raul, Senior, was killed by Jose Lopez, who worked with the sheriff on drug-trafficking matters and was present when Raul, Senior, murdered Rucker and Carrisalez, to silence him.

Palacious' affidavit is dated December 10, 1990. He attested that while he and Raul, Senior, shared a cell together in the Hidalgo County jail in 1984, Raul, Senior, told him that he had shot Rucker and Carrisalez.

[3] Raul, Junior's affidavit is dated January 29, 1992. Ybarra's affidavit is dated January 9, 1991. It was initially submitted with Petitioner's Reply to State's Brief in Response to Petitioner's Petition for Writ of Habeas Corpus filed January 18, 1991, in the Texas Court of Criminal Appeals.

actual innocence **[****15]** was not cognizable because, under *Townsend v. Sain, 372 U.S. 293, 317, 9 L. Ed. 2d 770, 83 S. Ct. 745 (1963)*, "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." See *954 F.2d at 1034*. [4] We granted certiorari, *502 U.S. 1085 (1992)*, and the Texas Court of Criminal Appeals stayed petitioner's execution. We now affirm.

LEdHN[2][↑] [2]Petitioner asserts that the *Eighth* and *Fourteenth Amendments to the United States Constitution* prohibit the execution of a person who is innocent of the crime for which he was convicted. This proposition has an elemental appeal, as would the similar proposition that **[****16]** the Constitution prohibits the imprisonment of one who is innocent of the crime for which he was convicted. After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent. See *United States v. Nobles, 422 U.S. 225, 230, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975)*. But the evidence upon which petitioner's claim of innocence rests was not produced at his trial, but rather eight years later. In any system of criminal justice, "innocence" or "guilt" must be determined in some sort of a judicial proceeding. Petitioner's showing of innocence, and indeed his constitutional claim for relief based upon that showing, must be evaluated in the light of the previous proceedings in this case, which have stretched over a span of 10 years.

LEdHN[3A][↑] [3A]***LEdHN[4]***[↑] [4]***HN1***[↑] A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. *In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)*. Other constitutional provisions also have the effect of ensuring against the risk of convicting an innocent **[*399]** person. See, *e. g., Coy v. Iowa, 487 U.S. 1012, 101 L. Ed. 2d 857, 108 S. Ct. 2798 (1988)* (right to confront adverse witnesses); *Taylor v. Illinois, 484 U.S. 400, **[****17]** 98 L. Ed. 2d 798, 108 S. Ct. 646 (1988)* (right to compulsory process); *Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)* (right to effective assistance of counsel); *Winship, supra* (prosecution must prove guilt beyond a reasonable doubt); *Duncan v. Louisiana, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968)* (right to jury trial); *Brady v. Maryland, supra* (prosecution must **[**860]** disclose exculpatory evidence); *Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, **[***216]** 83 S. Ct. 792 (1963)* (right to assistance of counsel); *In re Murchison, 349 U.S. 133, 136, 99 L. Ed. 942, 75 S. Ct. 623 (1955)* (right to "fair trial in a fair tribunal"). In capital cases, we have required additional protections because of the nature of the penalty at stake. See, *e. g., Beck v. Alabama, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980)* (jury must be given option of convicting the defendant of a lesser offense). All of these constitutional safeguards, of course, make it more difficult for the State to rebut and finally overturn the presumption of innocence which attaches to every criminal defendant. But we have also observed that "due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *Patterson v. New York, **[****18]** 432 U.S. 197, 208, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977)*. To conclude otherwise would all but paralyze our system for enforcement of the criminal law.

LEdHN[3B][↑] [3B]Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. Cf. *Ross v. Moffitt, 417 U.S. 600, 610, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974)* ("The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt"). Here, it is not disputed that the State met its burden of proving at trial that petitioner was guilty of the capital murder of Officer Carrisalez beyond a reasonable doubt. Thus, in the eyes of the law, petitioner does not come before the Court as one who is "innocent," but, on the **[*400]** contrary, as one who has been convicted by due process of law of two brutal murders.

LEdHN[5][↑] [5]Based on affidavits here filed, petitioner claims that evidence never presented to the trial court proves him innocent notwithstanding the verdict reached at his trial. Such a claim is not cognizable in the state courts of Texas. For ***HN2***[↑] to obtain a new trial based on newly discovered evidence, a defendant must file a motion within 30 days **[****19]** after imposition or suspension of sentence. Tex. Rule App. Proc. 31(a)(1) (1992). The Texas courts have construed this 30-day time limit as jurisdictional. See

[4] After the Court of Appeals vacated the stay of execution, petitioner attached a new affidavit by Raul, Junior, to his petition for rehearing, which was denied. The affidavit alleges that during petitioner's trial, various law enforcement officials and the Hidalgo County Sheriff told Raul, Junior, not to say what happened on the night of the shootings and threatened his family.

Beathard v. State, 767 S.W.2d 423, 433 (Tex. Crim. App. 1989); *Drew v. State, 743 S.W.2d 207, 222-223 (Tex. Crim. App. 1987)*.

LEdHN[6][↑] [6]Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. Chief Justice Warren made this clear in *Townsend v. Sain, supra, at 317* (emphasis added):

> **HN3**[↑] "Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; *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*."

This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are **[****20]** not imprisoned in violation of the Constitution -- not **[***217]** to correct errors of fact. See, *e. g., Moore v. Dempsey, 261 U.S. 86, 87-88, 67 L. Ed. 543, 43 S. Ct. 265 (1923)* (Holmes, J.) ("What we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved"); **[*401]** *Hyde v. Shine, 199 U.S. 62, 84, 50 L. Ed. 90, 25 S. Ct. 760 (1905)* ("It is well settled that upon *habeas corpus* the court will not weigh the evidence") (emphasis in original); *Ex parte Terry, 128 U.S. 289, 305, 32 L. Ed. 405, 9 S. Ct. 77 (1888)* ("As the writ of *habeas corpus* does not perform the office of a writ of error or an appeal, [the facts establishing guilt] cannot be re-examined **[**861]** or reviewed in this collateral proceeding") (emphasis in original).

LEdHN[7][↑] [7]More recent authority construing federal habeas statutes speaks in a similar vein. "Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle, 463 U.S. 880, 887, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983)*.The guilt or innocence determination in state criminal trials is "a decisive and portentous event." *Wainwright v. Sykes, 433 U.S. 72, 90, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977)*. "Society's resources have been concentrated at that time and place in order to decide, **[****21]** within the limits of human fallibility, the question of guilt or innocence of one of its citizens." *Ibid*. Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.

Our decision in *Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)*, comes as close to authorizing evidentiary review of a state-court conviction on federal habeas as any of our cases. There, we held that a federal habeas court may review a claim that the evidence adduced at a state trial was not sufficient to convict a criminal defendant beyond a reasonable doubt. But in so holding, we emphasized:

> "This inquiry does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to **[****22]** draw reasonable **[*402]** inferences from basic facts to ultimate facts." *Id., at 318-319* (citations omitted; emphasis in original).

We specifically noted that "the standard announced . . . does not permit a court to make its own subjective determination of guilt or innocence." *Id., at 320, n. 13*.

The type of federal habeas review sought by petitioner here is different in critical respects than that authorized by *Jackson*. First, the *Jackson* inquiry is aimed at determining whether there has been an independent constitutional violation -- *i. e.*, a conviction based on evidence that fails to meet the *Winship* standard. Thus, federal habeas courts act in their historic capacity -- to assure that the habeas petitioner is not **[***218]** being held in violation of his or her federal constitutional rights. Second, the sufficiency of the evidence review authorized by *Jackson* is limited to "record evidence." *443 U.S. at 318*. *Jackson* does not extend to nonrecord evidence, including newly discovered evidence. Finally, the *Jackson* inquiry does not focus on whether the trier of fact made the *correct* guilt or innocence determination, but rather whether it made a *rational* **[****23]** decision to convict or acquit.

Petitioner is understandably imprecise in describing the sort of federal relief to which a suitable showing of

actual innocence would entitle him. In his brief he states that the federal habeas court should have "an important initial opportunity to hear the evidence and resolve the merits of Petitioner's claim." Brief for Petitioner 42. Acceptance of this view would presumably require the habeas court to hear testimony from the witnesses who testified at trial as well as those who made the statements in the affidavits which petitioner has presented, and to determine anew whether or not petitioner is guilty of the murder of Officer Carrisalez. Indeed, the dissent's approach differs little from that hypothesized here.

The dissent would place the burden on petitioner to show that he is "probably" innocent. *Post*, at 442. Although **[*403]** petitioner would not be entitled to discovery "as a matter of right," the District Court would retain its "discretion to order discovery . . . when it would help the court make a reliable determination with respect to the prisoner's **[**862]** claim." *Post*, at 444. And although the District Court would not be required to hear testimony **[****24]** from the witnesses who testified at trial or the affiants upon whom petitioner relies, the dissent would allow the District Court to do so "if the petition warrants a hearing." *Ibid.* At the end of the day, the dissent would have the District Court "make a case-by-case determination about the reliability of the newly discovered evidence under the circumstances," and then "weigh the evidence in favor of the prisoner against the evidence of his guilt." *Post*, at 443.

The dissent fails to articulate the relief that would be available if petitioner were to meets its "probable innocence" standard. Would it be commutation of petitioner's death sentence, new trial, or unconditional release from imprisonment? The typical relief granted in federal habeas corpus is a conditional order of release unless the State elects to retry the successful habeas petitioner, or in a capital case a similar conditional order vacating the death sentence. Were petitioner to satisfy the dissent's "probable innocence" standard, therefore, the District Court would presumably be required to grant a conditional order of relief, which would in effect require the State to retry petitioner 10 years after his first trial, **[****25]** not because of any constitutional violation which had occurred at the first trial, but simply because of a belief that in light of petitioner's new-found evidence a jury might find him not guilty at a second trial.

Yet there is no guarantee that the guilt or innocence determination would be any more exact. To the contrary, the passage of time only **[***219]** diminishes the reliability of criminal adjudications. See *McCleskey v. Zant, 499 U.S. 467, 491, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991)* ("When a habeas petitioner succeeds in obtaining a new trial, the 'erosion of memory and dispersion of witnesses **[*404]** that occur with the passage of time' prejudice the government and diminish the chances of a reliable criminal adjudication") (quoting *Kuhlmann v. Wilson, 477 U.S. 436, 453, 91 L. Ed. 2d 364, 106 S. Ct. 2616 (1986)* (plurality opinion) (internal quotation marks omitted; citation omitted)); *United States v. Smith, 331 U.S. 469, 476, 91 L. Ed. 1610, 67 S. Ct. 1330 (1947)*. Under the dissent's approach, the District Court would be placed in the even more difficult position of having to weigh the probative value of "hot" and "cold" evidence on petitioner's guilt or innocence.

LEdHN[8][8]This is not to say that our habeas jurisprudence casts a blind eye toward innocence. **[****26]** In a series of cases culminating with *Sawyer v. Whitley, 505 U.S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992)*, decided last Term, we have held that ***HN4***[ ] a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons. See *McCleskey, supra, at 502*. But this body of our habeas jurisprudence makes clear that a 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.

Petitioner in this case is simply not entitled to habeas relief based on the reasoning of this line of cases. For he does not seek excusal of a procedural error so that he may bring an independent constitutional claim challenging his conviction or sentence, but rather argues that he is entitled to habeas relief because newly **[****27]** discovered evidence shows that his conviction is factually incorrect. The fundamental miscarriage of justice exception is available "only where the prisoner *supplements* his constitutional claim with a colorable showing of factual innocence." *Kuhlmann, supra, at 454* (emphasis added). We have never held that **[**863]** it extends to **[*405]** freestanding claims of actual innocence. Therefore, the exception is inapplicable here.

Petitioner asserts that this case is different because he has been sentenced to death. But we have "refused to

hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus." *Murray v. Giarratano, 492 U.S. 1, 9, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989)* (plurality opinion). We have, of course, held that the *Eighth Amendment* requires increased reliability of the process by which capital punishment may be imposed. See, *e. g., McKoy v. North Carolina, 494 U.S. 433, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (1990)* (unanimity requirement impermissibly limits jurors' consideration of mitigating evidence); *Eddings v. Oklahoma, 455 U.S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982)* (jury must be allowed to consider all of a capital defendant's mitigating character evidence); **[***220]** *Lockett v. Ohio, 438 U.S. 586, 604, **[****28]** 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978)* (plurality opinion) (same). But petitioner's claim does not fit well into the doctrine of these cases, since, as we have pointed out, it is far from clear that a second trial 10 years after the first trial would produce a more reliable result.

Perhaps mindful of this, petitioner urges not that he necessarily receive a new trial, but that his death sentence simply be vacated if a federal habeas court deems that a satisfactory showing of "actual innocence" has been made. Tr. of Oral Arg. 19-20. But such a result is scarcely logical; petitioner's claim is not that some error was made in imposing a capital sentence upon him, but that a fundamental error was made in finding him guilty of the underlying murder in the first place. It would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison.

Petitioner argues that our decision in *Ford v. Wainwright, 477 U.S. 399, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986)*, supports his position. The plurality in *Ford* held that, because the *Eighth Amendment* prohibits the execution of insane persons, certain procedural protections inhere **[****29]** in the sanity determination. "If the Constitution **[*406]** renders the fact or timing of his execution contingent upon establishment of a further fact," Justice Marshall wrote, "then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being." *Id., at 411*. Because the Florida scheme for determining the sanity of persons sentenced to death failed "to achieve even the minimal degree of reliability," *id., at 413*, the plurality concluded that Ford was entitled to an evidentiary hearing on his sanity before the District Court.

Unlike petitioner here, Ford did not challenge the validity of his conviction. Rather, he challenged the constitutionality of his death sentence in view of his claim of insanity. Because Ford's claim went to a matter of punishment -- not guilt -- it was properly examined within the purview of the *Eighth Amendment*. Moreover, unlike the question of guilt or innocence, which becomes more uncertain with time for evidentiary reasons, the issue of sanity is properly considered in proximity to the execution. Finally, unlike the sanity determination under the Florida scheme at issue in *Ford*, the guilt **[****30]** or innocence determination in our system of criminal justice is made "with the high regard for truth that befits a decision affecting the life or death of a human being." *Id., at 411*.

Petitioner also relies on *Johnson v. Mississippi, 486 U.S. 578, 100 L. Ed. 2d 575, 108 S. Ct. 1981 (1988)*, where we held that the *Eighth Amendment* requires reexamination of a death sentence based in part on a prior felony conviction which was set aside in the rendering State after the capital sentence was imposed. There, the State insisted **[**864]** that it was too late in the day to raise this point. But we pointed out that the Mississippi Supreme Court had previously considered similar claims by writ of error *coram nobis*. Thus, there was no need to override state law relating to newly discovered evidence in order to consider Johnson's **[***221]** claim on the merits. Here, there is no doubt that petitioner seeks additional process -- an evidentiary hearing on his claim of "actual innocence" based on **[*407]** newly discovered evidence -- which is not available under Texas law more than 30 days after imposition or suspension of sentence. Tex. Rule App. Proc. 31(a)(1) (1992). [5]

[**31]** ***LEdHN[9A]*** [9A]***LEdHN[10]***

[5] The dissent relies on *Beck v. Alabama, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980)*, for the proposition that, "at least in capital cases, the *Eighth Amendment* requires more than reliability in sentencing. It also mandates a reliable determination of guilt." *Post*, at 434. To the extent *Beck* rests on *Eighth Amendment* grounds, it simply emphasizes the importance of ensuring the reliability of the guilt determination in capital cases in the first instance. We have difficulty extending this principle to hold that a capital defendant who has been afforded a full and fair trial may challenge his conviction on federal habeas based on after-discovered evidence.

[10]Alternatively, petitioner invokes the Fourteenth Amendment's guarantee of due process of law in support of his claim that his showing of actual innocence entitles him to a new trial, or at least to a vacation of his death sentence. [6] "Because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition," we have "exercis[ed] substantial deference to legislative judgments in this area." Medina v. California, 505 U.S. 437, 445-446, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992). Thus, we have found criminal process lacking only where it "'offends some principle of justice so rooted in the traditions and **[*408]** conscience of our people as to be ranked as fundamental.'" *Ibid*. (quoting Patterson v. New York, 432 U.S. 197, 202, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977)). "Historical practice is probative of whether a procedural rule can be characterized as fundamental." 505 U.S. at 446.

LEdHN[9B][↑] [9B]

[**32]** LEdHN[11A][↑] [11A]The Constitution itself, of course, makes no mention of new trials. New trials in criminal cases were not granted in England until the end of the 17th century. And even then, they were available only in misdemeanor cases, though the writ of error *coram nobis* was available for some errors of fact in felony cases. Orfield, New Trial in Federal Criminal Cases, 2 Vill. L. Rev. 293, 304 (1957). The First Congress provided for new trials for "reasons for which new trials have usually been granted in courts of law." Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83. This rule was early held to extend to criminal cases. See Sparf **[***222]** v. United States, 156 U.S. 51, 175, 39 L. Ed. 343, 15 S. Ct. 273 (1895) (Gray, J., dissenting) (citing cases). One of the grounds upon which new trials were granted was newly discovered evidence. See F. Wharton, Criminal Pleading and Practice §§ 854-874, pp. 584-592 (8th ed. 1880).

The early federal cases adhere to the common-law rule that a new trial may be granted only during the term of court in which the **[**865]** final judgment was entered. See, *e. g.*, United States v. Mayer, 235 U.S. 55, 67, 59 L. Ed. 129, 35 S. Ct. 16 (1914); United States v. Simmons, 14 Blatchf. 473, 27 F. Cas. 1080 (No. 16,289) (CC EDNY **[****33]** 1878). Otherwise, "the court at a subsequent term has power to correct inaccuracies in mere matters of form, or clerical errors." 235 U.S. at 67. In 1934, this Court departed from the common-law rule and adopted a time limit -- 60 days after final judgment -- for filing new trial motions based on newly discovered evidence. Rule II(3), *Criminal Rules of Practice and Procedure, 292 U.S. 659, 662*. Four years later, we amended Rule II(3) to allow such motions in capital cases "at any time" before the execution took place. *304 U.S. 592 (1938)* (codified at 18 U.S.C. § 688 (1940)).

[*409] There ensued a debate as to whether this Court should abolish the time limit for filing new trial motions based on newly discovered evidence to prevent a miscarriage of justice, or retain a time limit even in capital cases to promote finality. See Orfield, *supra*, at 299-304. In 1946, we set a 2-year time limit for filing new trial motions based on newly discovered evidence and abolished the exception for capital cases. Rule 33, Federal Rules of Criminal Procedure, *327 U.S. 821, 855-856* ("A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years **[****34]** after final judgment"). [7] We

[6] The dissent takes us to task for examining petitioner's Fourteenth Amendment claim in terms of procedural, rather than substantive, due process. Because "execution of an innocent person is the ultimate 'arbitrary imposition,'" *post*, at 437, quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 848, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) (internal quotation marks omitted), the dissent concludes that "petitioner may raise a substantive due process challenge to his punishment on the ground that he is actually innocent," *post*, at 437. But the dissent puts the cart before the horse. For its due process analysis rests on the assumption that petitioner is in fact innocent. However, as we have discussed, petitioner does not come before this Court as an innocent man, but rather as one who has been convicted by due process of law of two capital murders. The question before us, then, is not whether due process prohibits the execution of an innocent person, but rather whether it entitles petitioner to judicial review of his "actual innocence" claim. This issue is properly analyzed only in terms of procedural due process.

[7] In response to the second preliminary draft of the Federal Rules of Criminal Procedure, Chief Justice Harlan Stone forwarded a memorandum on behalf of the Court to the Rules Advisory Committee with various comments and suggestions, including the following: "It is suggested that there should be a definite time limit within which motions for new trial based on newly discovered evidence should be made, unless the trial court in its discretion, for good cause shown, allows the motion to be filed. Is it not desirable that at some point of time further consideration of criminal cases by the court should be at an end, after which appeals should be made to Executive

have strictly construed the Rule 33 time limits. Cf. United States v. Smith, 331 U.S. 469, 473, 91 L. Ed. 1610, 67 S. Ct. 1330 (1947). And the Rule's treatment of new trials based on newly discovered evidence has not changed since its adoption.

[**35]** The American Colonies adopted the English common law on new trials. Riddell, New Trial in Present Practice, 27 Yale L. J. 353, 360 (1917). Thus, where new trials were available, motions for such relief typically had to be filed before the expiration of the term during which the trial was held. H. Underhill, Criminal Evidence 579, n. 1 (1898); J. Bassett, Criminal Pleading and Practice 313 (1885). Over time, many States enacted statutes providing for new trials **[*410]** in all types of cases. Some States also extended the time period for filing new trial motions beyond **[***223]** the term of court, but most States required that such motions be made within a few days after the verdict was rendered or before the judgment was entered. See American Law Institute Code of Criminal Procedure 1040-1042 (Official Draft 1931) (reviewing contemporary new trials rules).

The practice in the States today, while of limited relevance to our historical inquiry, is divergent. Texas is one of 17 States that requires a new trial motion based on newly discovered evidence to be made within 60 days of judgment. [8] One State adheres to the **[**866]** common-law rule and requires that such a motion be filed during the term in which judgment **[****36]** was rendered. [9] Eighteen jurisdictions have time limits ranging between one and three years, with 10 States and the District of Columbia following the 2-year federal time limit. [10] **[*411]** Only 15 States allow a new trial motion based on newly discovered evidence to be filed more than three years after conviction. Of these States, four have waivable time limits of less than 120 days, two have waivable time limits of more than 120 days, and nine States have no time limits. [11]

[**37]** LEdHN[11B][↑] [11B]LEdHN[12A][↑] [12A]In light of the historical availability of new trials, our own amendments to Rule 33, and the contemporary practice in the States, we cannot say that Texas' refusal to entertain petitioner's newly discovered evidence eight years after his conviction transgresses a principle of fundamental fairness "rooted in the traditions and conscience of our people." Patterson v. New York, 432 U.S. at 202 (internal quotation marks and citations **[***224]** omitted). This is not to say, however, that petitioner is left without a forum to raise his actual innocence claim. For under Texas law, petitioner may file a request for executive clemency. See Tex. Const., Art. IV, § 11; Tex. Code Crim. Proc. Ann., Art. 48.01

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clemency alone?" 7 Drafting History of the Federal Rules of Criminal Procedure 3, 7 (M. Wilken & N. Triffin eds. 1991) (responding to proposed Rule 35). As noted above, we eventually rejected the adoption of a flexible time limit for new trial motions, opting instead for a strict 2-year time limit.

[8] Ala. Code § 15-17-5 (1982) (30 days); Ariz. Rule Crim. Proc. 24.2(a) (1987) (60 days); Ark. Rule Crim. Proc. 36.22 (1992) (30 days); Fla. Rule Crim. Proc. 3.590 (1992) (10 days); Haw. Rule Penal Proc. 33 (1992) (10 days); Ill. Rev. Stat., ch. 38, P116-1 (1991) (30 days); Ind. Rule Crim. Proc. 16 (1992) (30 days); Mich. Ct. Rule Crim. Proc. 6.431(A)(1) (1992) (42 days); Minn. Rule Crim. Proc. 26.04(3) (1992) (15 days); Mo. Rule Crim. Proc. 29.11(b) (1992) (15-25 days); Mont. Code Ann. § 46-16-702(2) (1991) (30 days); S. D. Codified Laws § 23A-29-1 (1988) (10 days); Tenn. Rule Crim. Proc. 33(b) (1992) (30 days); Tex. Rule App. Proc. 31(a)(1) (1992) (30 days); Utah Rule Crim. Proc. 24(c) (1992) (10 days); Va. Sup. Ct. Rule 3A:15(b) (1992) (21 days); ***Wis. Stat. § 809.30(2)(b)*** (1989-1990) (20 days).

[9] Miss. Cir. Ct. Crim. Rule 5.16 (1992).

[10] Alaska Rule Ct., Crim. Rule 33 (1988) (two years); Conn. Gen. Stat. §§ 52-270, 52-582 (1991) (three years); Del. Ct. Crim. Rule 33 (1987) (two years); D. C. Super. Ct. Crim. Rule 33 (1992) (two years); Kan. Stat. Ann. § 22-3501 (1988) (two years); La. Code Crim. Proc. Ann., Art. 853 (West 1984) (one year); Maine Rule Crim. Proc. 33 (1992) (two years); Md. Rule Crim. Proc. 4-331(c) (1992) (one year); Neb. Rev. Stat. § 29-2103 (1989) (three years); Nev. Rev. Stat. § 176.515(3) (1991) (two years); N. H. Rev. Stat. Ann. § 526:4 (1974) (three years); N. M. Rule Crim. Proc. 5-614(c) (1992) (two years); N. D. Rule Crim. Proc. 33(b) (1992-1993) (two years); Okla. Ct. Rule Crim. Proc., ch. 15, § 953 (1992) (one year); R. I. Super. Ct. Rule Crim. Proc. 33 (1991-1992) (two years); Vt. Rule Crim. Proc. 33 (1983) (two years); Wash. Crim. Rule 7.8(b) (1993) (one year); Wyo. Rule Crim. Proc. 33(c) (1992) (two years).

[11] Cal. Penal Code Ann. § 1181(8) (West 1985) (no time limit); Colo. Rule Crim. Proc. 33 (Supp. 1992) (no time limit); Ga. Code Ann. §§ 5-5-40, 5-5-41 (1982) (30 days, can be extended); Idaho Code § 19-2407 (Supp. 1992) (14 days, can be extended); Iowa Rule Crim. Proc. 23 (1993) (45 days, can be waived); Ky. Rule Crim. Proc. 10.06 (1983) (one year, can be waived); Mass. Rule Crim. Proc. 30 (1979) (no time limit); N. J. Rule Crim. Prac. 3:20-2 (1993) (no time limit); N. Y. Crim. Proc. Law § 440.10(1)(g) (McKinney 1983) (no time limit); N.

(Vernon 1979). Clemency [12] is deeply rooted in our Anglo-American tradition **[*412]** of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted. [13]

[**38]** In England, the clemency power was vested in the Crown and can be traced back to the 700's. W. Humbert, The Pardoning Power **[**867]** of the President 9 (1941). Blackstone thought this "one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment." 4 W. Blackstone, Commentaries *397. Clemency provided the principal avenue of relief for individuals convicted of criminal offenses -- most of which were capital -- because there was no right of appeal until 1907. 1 L. Radzinowicz, A History of English Criminal Law 122 (1948). It was the only means by which one could challenge his conviction on the ground of innocence. United States Dept. of Justice, 3 Attorney General's Survey of Release Procedures 73 (1939).

Our Constitution adopts the British model and gives to the President the "Power to grant Reprieves and Pardons for Offences against the United States." Art. II, § 2, cl. 1. In **[*413]** *United States* v. *Wilson*, 7 Pet. 150, 160-161 **[****39]** (1833), Chief Justice Marshall expounded on the President's pardon power:

> "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.
>
> "A pardon is an act of grace, proceeding from the power entrusted with the execution of the **[***225]** laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. **[****40]** The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages."

See also *Ex parte Garland, 71 U.S. 333, 4 Wall. 333, 380-381, 18 L. Ed. 366 (1867)*; The Federalist No. 74, pp. 447-449 (C. Rossiter ed. 1961) (A. Hamilton) ("The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions **[*414]** in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel").

LEdHN[12B][↑] [12B]Of course, although the Constitution vests in the President a pardon power, it does not require the States to enact a clemency

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C. Gen. Stat. § 15A-1415(6) (1988) (no time limit); Ohio Rule Crim. Proc. 33A(6), B (1988) (120 days, can be waived); *Ore. Rev. Stat. § 136.535* (1991) (five days, can be waived); Pa. Rule Crim. Proc. 1123(d) (1992) (no time limit); S. C. Rule Crim. Proc. 29(b) (Supp. 1991) (no time limit); W. Va. Rule Crim. Proc. 33 (1992) (no time limit).

[12] The term "clemency" refers not only to full or conditional pardons, but also commutations, remissions of fines, and reprieves. See Kobil, The Quality of Mercy Strained: Wresting the Pardoning Power from the King, *69 Texas L. Rev. 569, 575-578 (1991)*.

[13] The dissent relies on the plurality opinion in *Ford v. Wainwright, 477 U.S. 399, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986)*, to support the proposition that "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." *Post*, at 440. But that case is inapposite insofar as it pertains to our discussion of clemency here. The *Ford* plurality held that Florida's procedures for entertaining post-trial claims of insanity, which vested the sanity determination entirely within the executive branch, were "inadequate to preclude federal redetermination of the constitutional issue [of Ford's sanity]." *477 U.S. at 416*. Unlike Ford's claim of insanity, which had never been presented in a judicial proceeding, petitioner's claim of "actual innocence" comes 10 years after he was adjudged guilty beyond a reasonable doubt after a full and fair trial. As the following discussion indicates, it is clear that clemency has provided the historic mechanism for obtaining relief in such circumstances.

mechanism. Yet since the British Colonies were founded, clemency has been available in America. C. Jensen, The Pardoning Power in the American States 3-4 (1922). The original States were reluctant to vest the clemency power in the executive. And although this power has gravitated toward the executive over time, several States have split the clemency power between **[****41]** the Governor and an advisory board selected by the legislature. See Survey of Release Procedures, *supra*, at 91-98. Today, all 36 States that authorize capital punishment have constitutional or statutory provisions for clemency. [14]

[*415] [**42] [***226] [**868]** Executive clemency has provided the "fail safe" in our criminal justice system. K. Moore, Pardons: Justice, Mercy, and the Public Interest 131 (1989). It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence. In his classic work, Professor Edwin Borchard compiled 65 cases in which it was later determined that individuals had been wrongfully convicted of crimes. Clemency provided the relief mechanism in 47 of these cases; the remaining cases ended in judgments of acquittals after new trials. E. Borchard, Convicting the Innocent (1932). 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. See M. Radelet, H. Bedau, & C. Putnam, In Spite of Innocence 282-356 (1992). [15]

[*416] [**43]** In Texas, the Governor has the power, upon the recommendation of a majority of the Board of Pardons and Paroles, to grant clemency. *Tex. Const., Art. IV, § 11*; *Tex. Code Crim. Proc. Ann., Art. 48.01* (Vernon 1979). The board's consideration is triggered upon request of the individual sentenced to death, his or her representative, or the Governor herself. In capital cases, a request may be made for a full pardon, Tex. Admin. Code, Tit. 37, § 143.1 (West Supp. 1992), a commutation of death sentence to life imprisonment or appropriate maximum penalty, § 143.57, or a reprieve of execution, § 143.43. The Governor has the sole authority to grant one reprieve in any capital case not exceeding 30 days. § 143.41(a).

The Texas clemency procedures contain specific guidelines for pardons on the ground of innocence. The

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[14] Ala. Const., Amdt. 38, *Ala. Code § 15-18-100* (1982); *Ariz. Const., Art. V, § 5*, *Ariz. Rev. Stat. Ann. §§ 31-443*, *31-445* (1986 and Supp. 1992); *Ark. Const., Art. VI, § 18*, *Ark. Code Ann. §§ 5-4-607*, *16-93-204* (Supp. 1991); *Cal. Const., Art. VII, § 1*, *Cal. Govt. Code Ann. § 12030(a)* (West 1992); *Colo. Const., Art. IV, § 7*, *Colo. Rev. Stat. §§ 16-17-101*, *16-17-102* (1986); *Conn. Const., Art. IV, § 13*, *Conn. Gen. Stat. § 18-26* (1988); *Del. Const., Art. VII, § 1*, *Del. Code Ann., Tit. 29, § 2103* (1991); *Fla. Const., Art. IV, § 8*, *Fla. Stat. § 940.01* (Supp. 1991); Ga. Const., Art. IV, § 2, P2, *Ga. Code Ann. §§ 42-9-20*, *42-9-42* (1991); *Idaho Const., Art. IV, § 7*, *Idaho Code §§ 20-240* (Supp. 1992), 67-804 (1989); *Ill. Const., Art. V, § 12*, Ill. Rev. Stat., ch. 38, P1003-3-13 (1991); *Ind. Const., Art. V, § 17*, *Ind. Code §§ 11-9-2-1 to 11-9-2-4*, *35-38-6-8* (1988); Ky. Const., § 77; *La. Const., Art. IV, § 5(E)*, *La. Rev. Stat. Ann. § 15:572* (West 1992); *Md. Const., Art. II, § 20*, Md. Ann. Code, Art. 27, § 77 (1992), and Art. 41, § 4-513 (1990); *Miss. Const., Art. V, § 124*, *Miss. Code Ann. § 47-5-115* (1981); Mo. Const., Art. IV, § 7, *Mo. Rev. Stat. §§ 217.220* (Vernon Supp. 1992), 552.070 (Vernon 1987); *Mont. Const., Art. VI, § 12*, *Mont. Code Ann. §§ 46-23-301 to 46-23-316* (1991); *Neb. Const., Art. IV, § 13*, Neb. Rev. Stat. §§ 83-1, 127 to 83-1, 132 (1987); *Nev. Const., Art. V, § 13*, *Nev. Rev. Stat. § 213.080* (1991); N. H. Const., pt. 2, Art. 52, *N. H. Rev. Stat. Ann. § 4:23* (1988); N. J. Const., Art. V, § 2, P1, *N. J. Stat. Ann. §§ 2A:167-4*, *2A:167-12* (West 1985); *N. M. Const., Art. V, § 6*, *N. M. Stat. Ann. § 31-21-17* (1990); *N. C. Const., Art. III, § 5(6)*, *N. C. Gen. Stat. §§ 147-23 to 147-25* (1987); ***Ohio Const., Art. III, § 11***, Ohio Rev. Code Ann. §§ 2967.1 to 2967.12 (1987 and Supp. 1991); ***Okla. Const., Art. VI, § 10***, *Okla. Stat., Tit. 21, § 701.11a* (Supp. 1990); *Ore. Const., Art. V, § 14*, *Ore. Rev. Stat. §§ 144.640 to 144.670* (1991); *Pa. Const., Art. IV, § 9*, *Pa. Stat. Ann., Tit. 61, § 2130* (Purdon Supp. 1992); *S. C. Const., Art. IV, § 14*, *S. C. Code Ann. §§ 24-21-910 to 24-21-1000* (1977 and Supp. 1991); *S. D. Const., Art. IV, § 3*, *S. D. Codified Laws §§ 23A-27A-20 to 23A-27A-21*, *24-14-1* (1988); *Tenn. Const., Art. III, § 6*, *Tenn. Code Ann. §§ 40-27-101 to 40-27-109* (1990); *Tex. Const., Art. IV, § 11*, *Tex. Code Crim. Proc. Ann., Art. 48.01* (Vernon 1979); *Utah Const., Art. VII, § 12*, *Utah Code Ann. § 77-27-5.5* (Supp. 1992); *Va. Const., Art. V, § 12*, *Va. Code Ann. § 53.1-230* (1991); *Wash. Const., Art. III, § 9*, *Wash. Rev. Code § 10.01.120* (1992); *Wyo. Const., Art. IV, § 5*, *Wyo. Stat. § 7-13-801* (1987).

[15] The dissent points to one study concluding that 23 innocent persons have been executed in the United States this century as support for the proposition that clemency requests by persons believed to be innocent are not always granted. See *post*, at 430-431, n. 1 (citing Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, *40 Stan. L. Rev. 21 (1987)*). Although we do not doubt that clemency -- like the criminal justice system itself -- is fallible, we note that scholars have taken issue with this study. See Markman & Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, *41 Stan. L. Rev. 121 (1988)*.

board will entertain applications for a recommendation of full pardon **[**869]** because of innocence upon receipt of the following: "(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 **[****44]** upon which the finding of innocence is based." § 143.2. In this case, petitioner has apparently sought a 30-day reprieve from the Governor, but has yet to apply for a pardon, or even a commutation, on the ground **[***227]** of innocence or otherwise. Tr. of Oral Arg. 7, 34.

As the foregoing discussion illustrates, in state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant. Federal habeas review of state convictions has traditionally been limited to claims of constitutional violations occurring in the course of the underlying state criminal proceedings. Our federal habeas cases have treated claims of "actual innocence," not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits, even though his habeas **[*417]** petition would otherwise be regarded as successive or abusive. History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.

LEdHN[1B][↑] [1B]We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive **[****45]** 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.

LEdHN[1C][↑] [1C]LEdHN[13][↑] [13]Petitioner's newly discovered evidence consists of affidavits. In the new trial context, motions based solely upon affidavits are disfavored because the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations. See Orfield, 2 Vill. L. Rev., at 333. Petitioner's affidavits are particularly suspect in this regard because, with the exception of Raul Herrera, Jr.'s affidavit, they consist of hearsay. Likewise, in reviewing petitioner's new evidence, we are mindful that defendants often abuse new **[****46]** trial motions "as a method of delaying enforcement of just sentences." *United States v. Johnson, 327 U.S. 106, 112, 90 L. Ed. 562, 66 S. Ct. 464 (1946)*. Although we are not presented with a new trial motion *per se*, we believe the likelihood of abuse is as great -- or greater -- here.

LEdHN[1D][↑] [1D]The affidavits filed in this habeas proceeding were given over eight years after petitioner's trial. No satisfactory explanation has been given as to why the affiants waited until the 11th hour -- and, indeed, until after the alleged perpetrator **[*418]** of the murders himself was dead -- to make their statements. Cf. *Taylor v. Illinois, 484 U.S. at 414* ("It is . . . reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed"). Equally troubling, no explanation has been offered as to why petitioner, by hypothesis an innocent man, pleaded guilty to the murder of Rucker.

Moreover, the affidavits themselves contain inconsistencies, and therefore fail to provide a convincing account of what took place on the **[***228]** night Officers Rucker and Carrisalez were killed. For instance, the affidavit of Raul, Junior, who was nine years old at the time, indicates **[****47]** that there were three people in the speeding car from which the murderer **[**870]** emerged, whereas Hector Villarreal attested that Raul, Senior, told him that there were two people in the car that night. Of course, Hernandez testified at petitioner's trial that the murderer was the only occupant of the car. The affidavits also conflict as to the direction in which the vehicle was heading when the murders took place and petitioner's whereabouts on the night of the killings.

Finally, the affidavits must be considered in light of the proof of petitioner's guilt at trial -- proof which included two eyewitness identifications, numerous pieces of circumstantial evidence, and a handwritten letter in which petitioner apologized for killing the officers and offered to turn himself in under certain conditions. See *supra, at 393-395*, and n. 1. That proof, even when considered alongside petitioner's belated affidavits, points strongly to petitioner's guilt.

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 **[****48]** 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 **[*419]** 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.

Concur by: O'CONNOR; SCALIA; WHITE

Concur

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 430 (dissenting opinion) (relying on *Ford v. Wainwright, 477 U.S. 399, 406, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986)*), "shocking to the conscience," *post*, at 430 (relying on *Rochin v. California, 342 U.S. 165, 172, 96 L. Ed. 183, 72 S. Ct. 205 (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 407-408 (opinion of the Court) (quoting *Medina v. California, 505 U.S. 437, 445-446, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992)*, **[****49]** in turn quoting *Patterson v. New York, 432 U.S. 197, 202, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (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 398-400, petitioner is not innocent in **[***229]** 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 416. Accord, *post*, at 441 (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 **[*420]** the jury's verdict, demands a hearing in which to have his culpability determined once again. *Ante*, at 399-400.

Consequently, the issue before **[****50]** 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 407, n. 6; see *ante*, at 399-400. In most circumstances, **[**871]** 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 398-399. 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 430 (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 **[****51]** 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 417 (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 429 (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 **[*421]** 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, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)*"), with *post*, at 442 (dissenting opinion) ("I would hold that, to obtain relief on a claim of actual innocence, the petitioner **[***230]** must show that he probably **[****52]** 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 398-417, 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. **[****53]** Nor could it: The record makes it abundantly clear that petitioner is not somehow the future victim of "simple murder," *post*, at 446 (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 **[*422]** 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 **[**872]** 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, **[****54]** 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 **[***231]** 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. . . . He violated some of [the] laws [of my drug business] and suffered the penalty, like the one you have for me when **[****55]** 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. . . . If **[*423]** this is read word for word over the media, I will turn myself in . . . .'" *Ante*, at 395, n. 1.

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, 86 L. Ed. 2d 282, 105 S. Ct. 2665 (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, **[****56]** 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 11th hour with no reasonable explanation for the nearly decade-long delay. See *ante*, at 417-418. 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. *Ante*, at 418. 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 **[*424]** brother for *both* the Rucker and Carrisalez homicides -- even though petitioner pleaded guilty to murdering Rucker **[****57]** 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 **[**873]** 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.

[*232]** 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 444. 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 **[****58]** 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 444, 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 397. 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 **[*425]** 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 400, 410; App. 68. Because petitioner **[****59]** 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 408-411, 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 393-395, 417-419; *supra, at 423-427*. In-person repetition of the affiants' accounts at an evidentiary **[****60]** hearing could not alter that; the accounts are, on their face and when **[***233]** 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 445 (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 **[*426]** federal habeas petition[s]

should be granted only when there are 'substantial grounds upon which relief might be **[**874]** granted,'" *Delo v. Stokes, 495 U.S. 320, 321, 109 L. Ed. 2d 325, 110 S. Ct. 1880 (1990)* (quoting *Barefoot v. Estelle, 463 U.S. 880, 895, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983)*), and only when the equities favor the petitioner, see *Gomez v. United States Dist. Court for Northern Dist. of Cal., 503 U.S. 653, 654, 118 L. Ed. 2d 293 (1992)* (Whether a claim is framed "as a habeas petition or as a [*42 U.S.C.] § 1983* action, [what is sought is] an equitable remedy. . . . A court may consider the last-minute nature of an application to stay execution **[****61]** 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 417, 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 **[****62]** the search." *Brown v. Allen, 344 U.S. 443, 537, 97 L. Ed. 469, 73 S. Ct. 397 (1953)* (concurring in result).

If the federal courts are to entertain claims of actual innocence, their attention, efforts, and energy must be reserved **[*427]** 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 **[***234]** 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, **[****63]** 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 **[*428]** 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 **[**875]** exists, the dissenters apply nothing but their personal opinions to invalidate the rules of more than two-thirds of the States, and a Federal **[****64]** 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) "shock[s]" the dissenters' consciences, *post*, at 430, 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, *ante*, at 417-419 -- 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

[*] My reference is to an article by Professor Monaghan, which

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.

[**65]** 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 **[***235]** 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 **[*429]** reliance on our unelaborated statement in *Townsend v. Sain, 372 U.S. 293, 317, 9 L. Ed. 2d 770, 83 S. Ct. 745 (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, 112 L. Ed. 2d 537, 111 S. Ct. 526 (1990)*; *Stockton v. Virginia, 852 F.2d 740, 749 (CA4 1988)*, cert. denied, *489 U.S. 1071, 103 L. Ed. 2d 822, 109 S. Ct. 1354 (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, 108 L. Ed. 2d 501, 110 S. Ct. 1326 (1990)*; *Burks v. Egeler, 512 F.2d 221, 230* (CA6), cert. denied, *423 U.S. 937, 46 L. Ed. 2d 270, 96 S. Ct. 297 (1975)*. I do not understand it to be the import of today's decision that those holdings are to be replaced with a strange **[****66]** 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, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (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.

Dissent by: BLACKMUN

Dissent

[*430] **[**876]** JUSTICE **[****67]** 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, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986)*, or more shocking to the conscience, see *Rochin v. California, 342 U.S. 165, 172, 96 L. Ed. 183, 72 S. Ct. 205 (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 398-417. 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 417. **[***236]** 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 **[****68]** case for further proceedings in the District Court.

I

The Court's enumeration, *ante*, at 398-399, of the constitutional rights of criminal defendants surely is

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discusses the unhappy truth that not every problem was meant to be solved by the United States Constitution, nor can be. See Monaghan, Our Perfect Constitution, 56 N. Y. U. L. Rev. 353 (1981).

entirely beside the point. These protections sometimes fail. [1] We really **[*431]** 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."

[**69]** 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, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976)* (opinion of Stewart, Powell, and STEVENS, JJ.); *Trop v. Dulles, 356 U.S. 86, 101, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958)* (plurality opinion); *Weems v. United States, 217 U.S. 349, 373, 54 L. Ed. 793, 30 S. Ct. 544 (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, 82 L. Ed. 2d 340, 104 S. Ct. 3154 (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, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (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 **[****70]** in a robbery during which a killing takes place, *Enmund v. Florida, 458 U.S. 782, 797, 73 L. Ed. 2d 1140, **[**877]** 102 S. Ct. 3368 (1982)*. If it is violative of the *Eighth Amendment* to execute someone who **[***237]** 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 **[*432]** purposeless and needless imposition of pain and suffering." *Coker v. Georgia, 433 U.S. at 592*. [2]

[**71]** 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, 100 L. Ed. 2d 575, 108 S. Ct. 1981 (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*. [3] In *Ford* v. *Wainwright*, the

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[1] One impressive study has concluded that 23 innocent people have been executed in the United States in this century, including one as recently as 1984. Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, *40 Stan. L. Rev. 21, 36, 173-179 (1987)*; M. Radelet, H. Bedau, & C. Putnam, In Spite of Innocence 282-356 (1992). The majority cites this study to show that clemency has been exercised frequently in capital cases when showings of actual innocence have been made. See *ante*, at 415. But the study also shows that requests for clemency by persons the authors believe were innocent have been refused. See, *e. g.*, Bedau & Radelet, 40 Stan. L. Rev., at 91 (discussing James Adams who was executed in Florida on May 10, 1984); Radelet, Bedau, & Putnam, In Spite of Innocence, at 5-10 (same).

[2] It also may violate the *Eighth Amendment* to imprison someone who is actually innocent. See *Robinson v. California, 370 U.S. 660, 667, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962)* ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"). On the other hand, this Court has noted that "'death is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality.'" *Beck v. Alabama, 447 U.S. 625, 637, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980)*, quoting *Gardner v. Florida, 430 U.S. 349, 357, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977)* (opinion of STEVENS, J.). We are not asked to decide in this case whether petitioner's continued imprisonment would violate the Constitution if he actually is innocent, see Brief for Petitioner 39, n. 52; Tr. of Oral Arg. 3-5, and I do not address that question.

[3] The majority attempts to distinguish *Johnson* on the ground that Mississippi previously had considered claims like Johnson's by writ of error *coram nobis. Ante*, at 406-407. We considered Mississippi's past practice in entertaining such claims, however, to determine not whether an *Eighth Amendment* violation had occurred but whether there was an independent and adequate state ground preventing us from reaching the merits of Johnson's claim. See *486 U.S. at 587-589*. Respondent does not argue that there is any independent

petitioner had been convicted of murder and sentenced **[*433]** 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 **[****72]** 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 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.

[**73]** Respondent and the United States as *amicus curiae* argue that the *Eighth Amendment* does not apply to petitioner because he is challenging **[***238]** 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 405-406. [4] Such reasoning, however, not **[**878]** only contradicts our decision in *Beck v. Alabama, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (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 **[*434]** legitimacy of punishment is inextricably intertwined with guilt.

[**74]** *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." *Id., 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, **[****75]** 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 403-404. 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 **[***239]** claim of actual innocence. As explained in Part III, *infra*, I believe a prisoner must show not just that there **[*435]** 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 choose 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 **[****76]** 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.

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and adequate state ground that would prevent us from reaching the merits in this case.

[4] The Court also suggests that *Ford* is distinguishable because "unlike the question of guilt or innocence . . . the issue of sanity is properly considered in proximity to the execution." *Ante*, at 406. Like insanity, however, newly discovered evidence of innocence may not appear until long after the conviction and sentence. In *Johnson*, the New York Court of Appeals decision that required reconsideration of Johnson's sentence came five years after he had been sentenced to death. *486 U.S. at 580-582*.

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. [5]

> **[**879]** "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 **[*436]** government from engaging in conduct that 'shocks the conscience,' *Rochin v. California, 342 U.S. 165, 172, 96 L. Ed. 183, 72 S. Ct. 205 (1952)*, or interferes with rights 'implicit in the concept of ordered liberty,' *Palko v. Connecticut, 302 U.S. 319, 325-326, 82 L. Ed. 288, 58 S. Ct. 149 (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 **[****77]** manner. *Mathews v. Eldridge, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)*. This requirement has traditionally been referred to as 'procedural' due process." *United States v. Salerno, 481 U.S. 739, 746, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987)*.

Petitioner cites not *Mathews v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)*, or *Medina v. California, 505 U.S. 437, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992)*, in support of his due process claim, but *Rochin*. Brief for Petitioner 32-33.

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[5] The majority's explanation for its failure to address petitioner's substantive due process argument is fatuous. The majority would deny petitioner the opportunity to bring a substantive due process claim of actual innocence because a jury has previously found that he is not actually innocent. See *ante*, at 407, n. 6. To borrow a phrase, this "puts the cart before the horse." *Ibid.*

Even under the procedural due process framework of *Medina v. California, 505 U.S. 437, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992)*, the majority's analysis is incomplete, for it fails to consider "whether the rule transgresses any recognized principle of 'fundamental fairness' in operation." *Id., at 448*, quoting *Dowling v. United States, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990)*.

[**78]** 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:

> "'The **[***240]** 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 Pa. v. Casey, 505 U.S. 833, 848, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992)*, quoting *Poe v. Ullman, 367 U.S. 497, 543, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961)* (opinion 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 **[*437]** found to contain morphine. The Court held that the deputies' **[****79]** 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 imposition.'" *Planned Parenthood, 505 U.S. at 848*. 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.

[880]** 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, 9 L. Ed. 2d 770, 83 S. Ct. 745 (1963)*, to consideration **[****80]** 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 **[*438]** Court's recent habeas jurisprudence. Beginning with a trio **[***241]** 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, 91 L. Ed. 2d 364, 106 S. Ct. 2616* (plurality opinion); *Murray v. Carrier, 477 U.S. 478, 496, 91 L. Ed. 2d 397, 106 S. Ct. 2639*; *Smith v. Murray, 477 U.S. 527, 537, 91 L. Ed. 2d 434, 106 S. Ct. 2661*; see also *McCleskey v. Zant, 499 U.S. 467, 493-494, 113 L. Ed. 2d 517, [****81] 111 S. Ct. 1454 (1991)*. 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. **[****82]** 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 **[*439]** 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 "a 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 404. 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, **[****83]** the majority would now hold that a **[**881]** 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.

[*242]** 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 **[*440]** correctly points out: "'A pardon is an act of grace.'" *Ante*, at 413. The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive **[****84]** 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, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (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, 5 U.S. 137, 1 Cranch 137, 163, 2 L. Ed. 60 (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* **[****85]** *Bd. of Ed. v. Barnette, 319 U.S. 624, 638, 87 L. Ed. 1628, 63 S. Ct. 1178 (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 **[*441]** determinations of factual issues relating to the claim would be entitled to a presumption of correctness in any subsequent federal **[***243]** habeas proceeding. See *§ 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 *§ 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." **[****86]** *§ 2254 Rule 4*. If, as is the case here, the petition raises factual questions **[**882]** 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 494-495*. 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 416. I also think that "a truly persuasive **[****87]** demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." *Ante*, at 417. The question is what "a truly persuasive demonstration" entails, a question the majority's disposition of this case leaves open.

[*442] 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 the 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 494* (exception applies when a constitutional violation "probably has caused" a mistaken conviction). [6]

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[6] Last Term in *Sawyer v. Whitley, 505 U.S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992)*, this Court adopted a different standard for determining whether a federal habeas petitioner bringing a successive, abusive, or defaulted claim has shown "actual innocence" of the death penalty. Under *Sawyer*, the petitioner must "show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under

[**88]** **[***244]** 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 **[*443]** 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 **[**883]** 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, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)*; *In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)*, but once **[****89]** 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 339, n. 5 (1992)*; *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, **[****90]** 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. **[*444]** 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 **[***245]** claim in a federal habeas petition is not entitled to discovery as a matter of right. *Harris v. Nelson, 394 U.S. 286, 295, 22 L. Ed. 2d 281, 89 S. Ct. 1082 (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, 394 U.S. at 299-300*; see Advisory Committee Note on Rule 6, 28 U.S.C., pp. 421-422.

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 401, quoting *Barefoot v. Estelle, 463 U.S. 880, 887, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983)*. It would not "require the habeas court to hear testimony from the witnesses who testified at trial," **[****91]** *ante*, at 402, 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 417, 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

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applicable state law." *Id., at 336*. That standard would be inappropriate here. First, it requires a showing of constitutional error in the trial process, which, for reasons already explained, is inappropriate when petitioner makes a substantive claim of actual innocence. Second, it draws its "no reasonable juror" standard from the standard for sufficiency of the evidence set forth in *Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)*. As I explain below, however, sufficiency of the evidence review differs in important ways from the question of actual innocence. Third, the Court developed this standard for prisoners who are concededly guilty of capital crimes. Here, petitioner claims that he is actually innocent of the capital crime.

that it could be dismissed without any hearing at all. [7] I would reverse the order of the **[*445]** Court of **[**884]** 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.

[**92]** 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, Sr., confessed that he, and not petitioner, committed the murders. No matter what the majority may think of the inconsistencies in **[***246]** 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 417. It is common to rely on affidavits at the preliminary-consideration **[****93]** 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 **[*446]** 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. 722, 758-759, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991)* (dissenting opinion). See also *Coleman v. Thompson, 504 U.S. 188, 189, 119 L. Ed. 2d 1, 112 S. Ct. 1845 (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. **[****94]** Whitley, 505 U.S. at 343-345* (opinion concurring in 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.

References

39 Am Jur 2d, Habeas Corpus 17, *59*, *66*, *114*, *152*, *153*

16 Federal Procedure, L Ed, Habeas Corpus 41:209

10 Federal Procedural Forms, L Ed, Habeas Corpus 36:31, 36:59

20 Am Jur Trials 1, Federal Habeas Corpus Practice; 39 Am Jur Trials 157, Historical Aspects and Procedural Limitations of Federal Habeas Corpus

L Ed Digest, Habeas Corpus 118

L Ed Index, Capital Offenses and Punishment; Habeas Corpus

ALR Index, Capital Offenses and Punishment; Habeas Corpus

Annotation References:

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed **[****95]** or carried out. *90 L Ed 2d 1001*.

Supreme Court's construction and application of *28*

[7] JUSTICE O'CONNOR reads too much into the fact that the District Court failed to pass on the sufficiency of the affidavits, did not suggest that it wished to hold an evidentiary hearing, and did not retain jurisdiction after the state-court action was filed. *Ante*, at 424. The explanation for each of these actions, as JUSTICE O'CONNOR notes, is that the District Court believed that it could offer no relief in any event. *Ibid*.

USCS 2254(d), which provides that in federal habeas corpus proceedings, state court's factual determinations must be presumed to be correct. *88 L Ed 2d 963*.

Necessity of hearing in federal habeas corpus proceedings challenging validity of conviction of crime--Supreme Court cases. *9 L Ed 2d 1246*.

Abuse of writ as basis for dismissal of state prisoner's second or successive petition for federal habeas corpus. *60 ALR Fed 481*.

What constitutes "newly discovered evidence" within meaning of *Rule 33 of Federal Rules of Criminal Procedure* relating to motions for new trial. *44 ALR Fed 13*.

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1. *Imbler v. Pachtman, 424 U.S. 409*
   Client/Matter: -None-
   Search Terms: imbler v. pachtman, 424 u.s. 409
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

Imbler v. Pachtman

Supreme Court of the United States

Argued November 3, 1975 ; March 2, 1976

No. 74-5435.

Reporter
424 U.S. 409 *; 96 S. Ct. 984 **; 47 L. Ed. 2d 128 ***; 1976 U.S. LEXIS 25 ****

petition.

IMBLER *v.* PACHTMAN, DISTRICT ATTORNEY

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Disposition: The Court affirmed the judgment

Core Terms

immunity, absolute immunity, suits, suppression, judicial process, common law, witnesses, damages, cases, deprivation, qualified immunity, reasons, constitutional right, false testimony, prosecutorial, extending, prosecute, malicious prosecution suit, judicial proceedings, state official, identification, common-law, decisions, corpus, gunman, exculpatory evidence, public prosecutor, damage suit, investigator, indictment

Case Summary

Procedural Posture

Petitioner challenged a decision of the United States Court of Appeals for the Ninth Circuit, which held that respondent prosecutor was immune from liability under *42 U.S.C.S. § 1983* for his role in the petitioner's conviction that was later vacated on a habeas corpus

Overview

Petitioner was convicted of murder. Respondent was the state prosecuting attorney that conducted the trial. Petitioner thereafter successfully sought a writ of habeas corpus and his conviction was vacated based upon evidence that respondent himself had uncovered, and instances of misconduct at trial. Respondent was then sued under *42 U.S.C.S. § 1983*, because petitioner claimed respondent had engaged in a conspiracy to unlawfully charge and convict him. Respondent moved to dismiss, which was granted by the district court and affirmed by the court of appeals and Supreme Court. The Supreme Court held that public policy required that prosecutors, in initiating a prosecution and in presenting the state's case, enjoyed the same absolute immunity from civil liability under *§ 1983* that they had at common law in malicious prosecution suits. The court stated that qualified immunity only could have an adverse effect upon the functioning of the criminal justice system, but also noted that respondent's activities here were intimately associated with the judicial process, and declined to hold whether immunity also applied to a prosecutor's role as an administrator or investigative officer.

Outcome
The Court affirmed the judgment.

LexisNexis® Headnotes

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN1 **Protection of Rights, Section 1983 Actions**

See 42 U.S.C.S. § 1983.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

Torts > Public Entity Liability > Immunities > Judicial Immunity

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Governments > Courts > Judges > Judicial Immunity

Governments > Legislation > Interpretation

HN2 **Local Officials, Customs & Policies**

42 U.S.C.S. § 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN3 **Local Officials, Customs & Policies**

The procedural difference between absolute and the qualified immunities under 42 U.S.C.S. § 1983 is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.

Civil Rights Law > ... > Scope > Law Enforcement Officials > General Overview

Torts > Public Entity Liability > Immunities > Judicial Immunity

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN4 **Scope, Law Enforcement Officials**

Early United States Supreme Court decisions regarding which officials in different branches of government are differently amenable to suit under 42 U.S.C.S. § 1983 are predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it. The liability of a state prosecutor under § 1983 is determined in the same manner.

Governments > Federal Government > Employees & Officials

Torts > Intentional Torts > Malicious Prosecution > General Overview

Torts > Public Entity Liability > Immunities > General Overview

HN5 **Federal Government, Employees & Officials**

A special assistant to the Attorney General of the United States, in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy.

Governments > State & Territorial Governments > Employees & Officials

Torts > Public Entity Liability > Immunities > Judicial Immunity

Torts > Public Entity Liability > Immunities > General Overview

HN6 **State & Territorial Governments, Employees & Officials**

The common-law immunity of a prosecutor is based upon the same considerations that underlie the common- law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

Civil Rights Law > ... > Scope > Law Enforcement Officials > General Overview

Criminal Law & Procedure > Counsel > Prosecutors

Governments > State & Territorial Governments > Employees & Officials

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Torts > Public Entity Liability > Immunities > General Overview

HN7 **Scope, Law Enforcement Officials**

Public policy considerations dictate the same absolute immunity under *42 U.S.C.S. § 1983* that a prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice.

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

Governments > State & Territorial Governments > Employees & Officials

Torts > Public Entity Liability > Immunities > Judicial Immunity

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

Civil Rights Law > Protection of Rights > Procedural Matters > Criminal Penalties

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN8 **Scope, Government Actions**

The immunity of prosecutors from liability in suits under *42 U.S.C.S. § 1983* does not leave the public powerless to deter misconduct or to punish that which occurs. The policy considerations which compel civil immunity for certain governmental officials do not place them beyond the reach of the criminal law.

Civil Rights Law > ... > Scope > Law Enforcement Officials > General Overview

Governments > State & Territorial Governments > Claims By & Against

Torts > Public Entity Liability > Immunities > Judicial Immunity

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Governments > State & Territorial Governments > Employees & Officials

HN9 **Scope, Law Enforcement Officials**

In initiating a prosecution and in presenting the State's case, a prosecutor is immune from a civil suit for damages under *42 U.S.C.S. § 1983*.

Lawyers' Edition Display

Summary

After obtaining his release from a state prison through federal habeas corpus proceedings in which it was found that the prosecuting attorney in a California state court murder prosecution had knowingly used false testimony and suppressed evidence favorable to the defense, the accused in the state prosecution instituted an action against the prosecuting attorney and certain police officers in the United States District Court for the Central District of California, seeking to recover damages under *42 USCS 1983*, which provides that any person who acts under color of state law to deprive another of a constitutional right shall be liable to the injured party in an action at law. The plaintiff alleged that a conspiracy among the defendants to unlawfully charge and convict him had caused him loss of liberty and other injury, the gravamen of the complaint against the prosecuting attorney being that he had knowingly or negligently used false evidence and suppressed material evidence at the criminal trial. The District Court dismissed the complaint as to the prosecuting attorney, holding that as a public prosecutor, he was immune from civil liability for acts done as part of his official functions. The United States Court of Appeals for the Ninth Circuit affirmed (*500 F2d 1301*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Powell, J., expressing the view of five members of the court, it was held that (1) a state prosecutor who acted within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the state's case was absolutely immune from a civil suit for damages for alleged deprivations of the defendant's constitutional rights under *42 USCS 1983*, and *(2)* such absolute immunity from liability was applicable even where the prosecutor knowingly used perjured testimony, deliberately withheld exculpatory information, or failed to make full disclosure of all facts casting doubt upon the state's testimony.

White, J., joined by Brennan and Marshall, JJ., concurred in the judgment, expressing the view that (1) while a prosecutor should have absolute immunity from a suit for damages under *42 USCS 1983* when the action was based on a claim that he knew or should have known that a state witness had testified falsely, such absolute immunity should not be extended to suits charging unconstitutional suppression of evidence, and (2) the complaint was properly dismissed in the case at bar, since the only theory of recovery adequately alleged was based on the prosecuting attorney's alleged knowing use of false testimony.

Stevens, J., did not participate.

Headnotes

RIGHTS §12.5 > liability for infringement -- state prosecutor -- immunity -- > Headnote:
LEdHN[1A] [1A]***LEdHN[1B]*** [1B]***LEdHN[1C]*** [1C]

A state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the state's case is absolutely immune from a civil suit for damages for alleged deprivations of the defendant's constitutional rights under *42 USCS 1983*, which provides that every person who acts under color of state law to deprive another of a constitutional right shall be liable to the injured party in an action at law.

RIGHTS §12.5 > liability for infringement -- tort immunities and defenses -- > Headnote:
LEdHN[2] [2]

42 USCS 1983, which provides that every person who acts under color of state law to deprive another of a constitutional right shall be liable to the injured party in an action at law, is to be read in harmony with general principles of tort immunities and defenses, rather than in derogation of them.

JUDGES §14 > immunity from liability -- common law -- > Headnote:
LEdHN[3] [3]

At common law, judges are absolutely immune from liability for damages for acts committed within their judicial jurisdiction.

OFFICERS §61 > liability -- absolute or qualified immunity -- > Headnote:
LEdHN[4A] [4A]***LEdHN[4B]*** [4B]

With regard to a government official's immunity from civil

liability, an absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity; the fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.

ATTORNEYS §1 > liability -- malicious prosecution -- > Headnote:
LEdHN[5] [5]

At common law, a prosecuting attorney is absolutely immune from a civil action for malicious prosecution.

ATTORNEYS §3 > duties -- > Headnote:
LEdHN[6] [6]

A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court.

TRIAL §2 > criminal case -- discretion of prosecution and defense -- > Headnote:
LEdHN[7] [7]

Both the prosecution and the defense in a criminal prosecution have wide discretion in the conduct of the trial and the presentation of evidence.

SLANDER §15 > privilege -- courtroom statements -- > Headnote:
LEdHN[8A] [8A]LEdHN[8B] [8B]

In the law of defamation, there is an absolute privilege for any courtroom statement relevant to the subject matter of the proceedings; in the case of lawyers, the privilege extends to their briefs and pleadings as well.

LAW §840 > ATTORNEYS §3 > duty of prosecutor -- disclosure of exculpatory evidence -- > Headnote:
LEdHN[9A] [9A]LEdHN[9B] [9B]

The prosecutor has the duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation; at trial, such duty is enforced by the requirements of due process, but after a conviction, the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.

RIGHTS §12.5 > liability for infringement -- prosecutor's immunity -- > Headnote:
LEdHN[10A] [10A]LEdHN[10B] [10B]

A prosecutor, acting within the scope of his duties in initiating and prosecuting a case, has the same absolute immunity from liability for damages under 42 USCS 1983 for alleged violation of another's constitutional rights that a prosecutor enjoys at common law, notwithstanding that such immunity leaves the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty; there is no exception to such prosecutorial immunity even where the person asserting violation of his civil rights has successfully petitioned for habeas corpus relief.

RIGHTS §12.5 > ATTORNEYS §1 > infringement by prosecutor -- criminal liability -- > Headnote:
LEdHN[11] [11]

A prosecutor who, while acting within the scope of his duties in initiating and prosecuting a case, willfully deprives the accused of his constitutional rights is subject to criminal punishment under 18 USCS 242, which makes it a crime for a person, acting under color of law, to deprive another of any right protected by the Constitution or laws of the United States, and is subject to professional discipline or disbarment.

ATTORNEYS §3 > powers -- control of testimony --

> Headnote:
LEdHN[12A][ ] [12A]LEdHN[12B][ ] [12B]

Controlling the presentation of his witness' testimony is a task fairly within a prosecuting attorney's function as an advocate.

ATTORNEYS §3 > duties -- > Headnote:
LEdHN[13A][ ] [13A]LEdHN[13B][ ] [13B]

The duties of a prosecutor in his role as advocate for the state involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom.

RIGHTS §12.5 > liability for infringement -- state prosecutor -- immunity -- > Headnote:
LEdHN[14A][ ] [14A]LEdHN[14B][ ] [14B]

A state prosecutor's absolute immunity from liability for damages under 42 USCS 1983 for acts done in the scope of his duties in initiating and prosecuting a case, which acts allegedly deprived the accused of constitutional rights, is applicable even where the prosecutor (1) knowingly used perjured testimony at the trial, (2) deliberately withheld exculpatory information, or (3) failed to make a full disclosure of all facts casting doubt upon the state's testimony.

Syllabus

Petitioner, convicted of murder, unsuccessfully petitioned for state habeas corpus on the basis of respondent prosecuting attorney's revelation of newly discovered evidence, and charged that respondent had knowingly used false testimony and suppressed material evidence at petitioner's trial. Petitioner thereafter filed a federal habeas corpus petition based on the same allegations, and ultimately obtained his release. He then brought an action against respondent and others under 42 U.S.C. § 1983, seeking damages for loss of liberty allegedly caused by unlawful prosecution, but the District Court held that respondent was immune from liability under § 1983, and the Court of Appeals affirmed. *Held:* A state prosecuting attorney who, as here, acted within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the State's case, is absolutely immune from a civil suit for damages under § 1983 for alleged deprivations of the accused's constitutional rights. Pp. 417-431.

[**2]** (a) Section 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them. Tenney v. Brandhove, 341 U.S. 367. Pp. 417-419.

(b) The same considerations of public policy that underlie the common-law rule of absolute immunity of a prosecutor from a suit for malicious prosecution likewise dictate absolute immunity under § 1983. Although such immunity leaves the genuinely wronged criminal defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty, the alternative of qualifying a prosecutor's immunity would disserve the broader public interest in that it would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system and would often prejudice criminal defendants by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. Pp. 420-428.

500 F.2d 1301, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. WHITE, J., filed **[****3]** an opinion concurring in the judgment, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 432. STEVENS, J., took no part in the consideration or decision of the case.

Counsel: *Roger S. Hanson* argued the cause and filed a brief for petitioner.

John P. Farrell argued the cause for respondent. With him on the brief was *John H. Larson.*

Solicitor General Bork argued the cause for the United States as *amicus curiae.* With him on the brief were *Acting Assistant Attorney General Keeney, Deputy*

Solicitor General Friedman, Harry R. Sachse, and *Jerome M. Feit.* *

[**4]**

Opinion by: POWELL

Opinion

[*410] [*132] [**985]** MR. JUSTICE **POWELL** delivered the opinion of the Court.

LEdHN[1A][↑] [1A]The question presented in this case is whether a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is amenable to suit under *42 U.S.C. § 1983* for alleged deprivations of the defendant's constitutional rights. The Court of Appeals for the Ninth Circuit held that he is not. *500 F. 2d 1301*. We affirm.

I

The events which culminated in this suit span many years and several judicial proceedings. They began in **[*411]** January 1961, when two men attempted to rob a Los **[**986]** Angeles market run by Morris Hasson. One shot and fatally wounded Hasson, and the two fled in different directions. Ten days later Leonard Lingo was killed while attempting a robbery in Pomona, Cal., but his two accomplices escaped. Paul Imbler, petitioner in this case, turned himself in the next day as one of those accomplices. Subsequent investigation led the Los Angeles District Attorney to believe **[****5]** that Imbler and Lingo had perpetrated the first crime as well, and that Imbler had killed Hasson. Imbler was charged with first-degree felony murder for Hasson's death.

The State's case consisted of eyewitness testimony from Hasson's wife and identification testimony from three men who had seen Hasson's assailants fleeing after the shooting. Mrs. Hasson was unable to identify the gunman because a hat had obscured his face, but from police photographs she identified the killer's companion as Leonard Lingo. The primary identification witness was Alfred Costello, a passerby on the night of the crime, who testified that he had a clear view both as the gunman emerged from the market and again a few moments later when the fleeing gunman -- after losing his hat -- turned to fire a shot at Costello [1] and to shed his coat [2] before **[***133]** continuing on. Costello positively identified Imbler as the gunman. The second identification witness, an attendant at a parking lot through which the gunman ultimately escaped, testified that he had a side and front view as the man passed. Finally, a customer who was leaving Hasson's market as the robbers entered **[*412]** testified that **[****6]** he had a good look then and as they exited moments later. All of these witnesses identified Imbler as the gunman, and the customer also identified the second man as Leonard Lingo. Rigorous cross-examination failed to shake any of these witnesses. [3]

Imbler's defense was an alibi. He claimed to have spent the night of the Hasson killing bar-hopping with several persons, and to have met Lingo for the first time the morning before the attempted robbery in Pomona.This testimony was corroborated by Mayes, the other accomplice in the Pomona robbery, who also claimed to have accompanied Imbler **[****7]** on the earlier rounds of the bars. The jury found Imbler guilty and fixed punishment at death. [4] On appeal the Supreme Court of California affirmed unanimously over numerous contentions of error. *People v. Imbler, 57 Cal. 2d 711, 371 P. 2d 304 (1962)*.

Shortly thereafter Deputy District Attorney Richard Pachtman, who had been the prosecutor at Imbler's trial and who is the respondent before this Court, wrote to

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* Evelle J. Younger, Attorney General, *Jack R. Winkler,* Chief Assistant Attorney General, *S. Clark Moore,* Assistant Attorney General, and *Russell Iungerich* and *Edward T. Fogel, Jr.,* Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging affirmance.

Joseph P. Busch and *Patrick F. Healy* filed a brief for the National District Attorneys Association as *amicus curiae.*

[1] This shot formed the basis of a second count against Imbler for assault, which was tried with the murder count.

[2] This coat, identified by Mrs. Hasson as that worn by her husband's assailant, yielded a gun determined by ballistics evidence to be the murder weapon.

[3] A fourth man who saw Hasson's killer leaving the scene identified Imbler in a pretrial lineup, but police were unable to find him at the time of trial.

[4] Imbler also received a 10-year prison term on the assault charge. See n. 1, *supra.*

the Governor of California describing evidence turned up after trial by himself and an investigator for the state correctional authority. In substance, the evidence consisted of newly discovered corroborating witnesses for Imbler's alibi, as well as new revelations about prime witness Costello's background which indicated that he was less trustworthy than he had represented originally to Pachtman and in his testimony. Pachtman noted that leads to some of this information had been available **[****8]** to Imbler's counsel prior to trial but apparently **[*413]** had not been developed, that Costello had testified convincingly and withstood intense cross-examination, and that none of the new evidence was conclusive of Imbler's innocence. He explained that he wrote from a belief that "a prosecuting attorney has a duty to be fair and see that all true facts, whether helpful to the case or not, should be presented." [5]

[987]** Imbler filed a state habeas corpus petition shortly after Pachtman's letter. The Supreme Court of California appointed one of its retired justices as referee to hold a hearing, at which Costello **[****9]** was the main attraction. He recanted his trial identification of Imbler, and it also was established that on cross-examination and redirect he had painted a picture of his own background that **[***134]** was more flattering than true. Imbler's corroborating witnesses, uncovered by prosecutor Pachtman's investigations, also testified.

In his brief to the Supreme Court of California on this habeas petition, Imbler's counsel described Pachtman's post-trial detective work as "[i]n the highest tradition of law enforcement and justice," and as a premier example of "devotion to duty." [6] But he also charged that the prosecution had knowingly used false testimony and suppressed material evidence at Imbler's trial. [7] In a thorough opinion by then Justice Traynor, the Supreme Court of California unanimously rejected these contentions and denied the writ. *In re Imbler, **[*414]** 60 Cal. 2d 554, 387 P. 2d 6 (1963)*. The California court noted that the hearing record fully supported the referee's finding that Costello's recantation of his identification lacked credibility compared to the original identification itself, *id., at 562, 387 P. 2d, at 10-11*, **[****10]** and that the new corroborating witnesses who appeared on Imbler's behalf were unsure of their stories or were otherwise impeached, *id., at 569-570, 387 P. 2d, at 14*.

In 1964, the year after denial of his state habeas petition, Imbler succeeded in having his death sentence overturned on grounds unrelated to this case. *In re Imbler, 61 Cal. 2d 556, 393 P. 2d 687 (1964)*. Rather than resentence him, the State stipulated to life imprisonment. There the matter lay for several years, until in late 1967 or early 1968 Imbler filed a habeas corpus petition in Federal District Court based on the same contentions previously urged upon and rejected by the Supreme Court of California.

The District Court held no hearing. Instead, it decided the petition upon the record, including Pachtman's letter to the Governor **[****11]** and the transcript of the referee's hearing ordered by the Supreme Court of California. Reading that record quite differently than had the seven justices of the State Supreme Court, the District Court found eight instances of state misconduct at Imbler's trial, the cumulative effect of which required issuance of the writ. *Imbler v. Craven, 298 F. Supp. 795, 812 (CD Cal. 1969)*. Six occurred during Costello's testimony and amounted in the court's view to the culpable use by the prosecution of misleading or false testimony. [8] The other two instances were suppressions of **[*415]** evidence favorable to Imbler by a police fingerprint expert who testified at trial and by the police who investigated Hasson's murder. [9] The District

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[5] Brief for Respondent, App. A, p. 6. The record does not indicate what specific action was taken in response to Pachtman's letter. We do note that the letter was dated August 17, 1962, and that Imbler's execution, scheduled for September 12, 1962, subsequently was stayed. The letter became a part of the permanent record in the case available to the courts in all subsequent litigation.

[6] Brief for Respondent 5.

[7] See generally *Napue v. Illinois, 360 U.S. 264 (1959)*; *Brady v. Maryland, 373 U.S. 83 (1963)*.

[8] The District Court found that Costello had given certain ambiguous or misleading testimony, and had lied flatly about his criminal record, his education, and his current income. As to the misleading testimony, the court found that either Pachtman or a police officer present in the courtroom knew it was misleading. As to the false testimony, the District Court concluded that Pachtman had "cause to suspect" its falsity although, apparently, no actual knowledge thereof. See *298 F. Supp. at, 799-807*. The Supreme Court of California earlier had addressed and rejected allegations based on many of the same parts of Costello's testimony. It found either an absence of falsehood or an absence of prosecutorial knowledge in each instance. See *In re Imbler, 60 Cal. 2d 554, 562-565*, and n. 3, *387 P. 2d 6, 10-12, and n. 3 (1963)*.

[9] See *298 F.Supp., at 809-811*. The Supreme Court of California earlier had rejected similar allegations. See *In re*

[*135]** Court ordered that the **[**988]** writ of habeas corpus issue unless California retried Imbler within 60 days, and denied a petition for rehearing.

[**12]** The State appealed to the Court of Appeals for the Ninth Circuit, claiming that the District Court had failed to give appropriate deference to the factual determinations of the Supreme Court of California as required by *28 U.S.C. § 2254 (d)*. The Court of Appeals affirmed, finding that the District Court had merely "reached different conclusions than the state court in applying federal constitutional standards to [the] facts," *Imbler v. California, 424 F. 2d 631, 632*, and certiorari was denied, *400 U.S. 865 (1970)*. California chose not to retry Imbler, and he was released.

At this point, after a decade of litigation and with Imbler now free, the stage was set forth present suit. In April 1972, Imbler filed a civil rights action, under *42 U.S.C. § 1983* and related statutes, against respondent Pachtman, the police fingerprint expert, and various other officers of the Los Angeles police force. He alleged **[*416]** that a conspiracy among them unlawfully to charge and convict him had caused him loss of liberty and other grievous injury. He demanded $2.7 million in actual and exemplary **[****13]** damages from each defendant, plus $15,000 attorney's fees.

Imbler attempted to incorporate into his complaint the District Court's decision granting the writ of habeas corpus, and for the most part tracked that court's opinion in setting out the overt acts in furtherance of the alleged conspiracy. The gravamen of his complaint against Pachtman was that he had "with intent, and on other occasions with negligence" allowed Costello to give false testimony as found by the District Court, and that the fingerprint expert's suppression of evidence was "chargeable under federal law" to Pachtman. In addition Imbler claimed that Pachtman had prosecuted him with knowledge of a lie detector test that had "cleared" Imbler, and that Pachtman had used at trial a police artist's sketch of Hasson's killer made shortly after the crime and allegedly altered to resemble Imbler more closely after the investigation had focused upon him.

Pachtman moved under *Fed. Rule Civ. Proc. 12 (b)(6)* to have the complaint dismissed as to him. The District Court, noting that public prosecutors repeatedly had been held immune from civil liability for "acts done as part of their traditional official functions, **[****14]** " found that Pachtman's alleged acts fell into that category and granted his motion. Following the entry of final judgment as to Pachtman under *Fed. Rule Civ. Proc. 54 (b)*, Imbler appealed to the Court of Appeals for the Ninth Circuit. That court, one judge dissenting, affirmed the District Court in an opinion finding Pachtman's alleged acts to have been committed "during prosecutorial activities which can only be characterized as an 'integral part of the judicial process,'" *500 F. 2d, at 1302*, quoting **[*417]** *Marlowe v. Coakley, 404 F. 2d 70 (CA9 1968)*. We granted certiorari to consider the important and recurring issue of prosecutorial liability under the Civil Rights Act of 1871. *420 U.S. 945 (1975)*.

[*136]** II

Title *42 U.S.C. § 1983* provides that "[e]very person" who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages. [10] The statute thus creates a species of tort liability that on its face admits of no immunities, and **[**989]** some have argued that it should be applied as stringently as it reads. [11] **[****15]** But that view has not prevailed.

This Court first considered the implications of the statute's literal sweep in *Tenney v. Brandhove, 341 U.S. 367 (1951)*. **[****16]** There it was claimed that members of a state legislative committee had called the plaintiff to appear before them, not for a proper legislative purpose, but to intimidate him into silence on certain matters of public concern, and thereby had deprived him of his constitutional rights. Because legislators in both England and this country had enjoyed absolute immunity for their official actions, *Tenney* squarely presented the issue of whether the Reconstruction Congress had intended to **[*418]**

Imbler, supra, at 566-568, 387 P. 2d, at 12-13.

[10] Title *42 U.S.C. § 1983*, originally passed as § 1 of the Civil Rights Act of 1871, 17 Stat. 13, reads in full:

> *HN1*[↑] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[11] See, *e.g.*, *Pierson v. Ray, 386 U.S. 547, 559 (1967)* (Douglas, J., dissenting); *Tenney v. Brandhove, 341 U.S. 367, 382-383 (1951)* (Douglas, J., dissenting).

restrict the availability in § 1983 suits of those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials. The Court concluded that immunities "well grounded in history and reason" had not been abrogated "by covert inclusion in the general language" of § 1983. 341 U.S., at 376. Regardless of any unworthy purpose animating their actions, legislators were held to enjoy under this statute their usual immunity when acting "in a field where legislators traditionally have power to act." Id., at 379.

[**17]** LEdHN[2][↑] [2]LEdHN[3][↑] [3]LEdHN[4A][↑] [4A]The decision in *Tenney* established that § 1983 HN2[↑] is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them. Before today the Court has had occasion to consider the liability of several types of government officials in addition to legislators. The common-law absolute immunity of judges for "acts committed within their judicial jurisdiction," see Bradley v. Fisher, 13 Wall. 335 (1872), was found to be preserved under § 1983 in Pierson v. Ray, 386 U.S. 547, 554-555 (1967). [12] In the same case, local police **[***137]** officers sued for a deprivation of liberty resulting from unlawful arrest were held to enjoy under § 1983 a "good faith and probable cause" defense co-extensive with their defense to false arrest actions at **[*419]** common law. 386 U.S., at 555-557. We found qualified immunities appropriate in two recent cases. [13] **[****18]** In Scheuer v. Rhodes, 416 U.S. 232 (1974), we concluded that the Governor and other executive officials of a State had a qualified immunity that varied with "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action…." Id., at 247. [14] **[**990]** Last Term in Wood v. Strickland, 420 U.S. 308 (1975), we held that school officials, in the context of imposing disciplinary penalties, were not liable so long as they could not reasonably have known that their action violated students' clearly established constitutional rights, and provided they did not act with malicious intention to cause constitutional or other injury. Id., at 322; cf. O'Connor v. Donaldson, 422 U.S. 563, 577 (1975). In *Scheuer* and in *Wood,* as in the two earlier cases, the considerations underlying the nature of the immunity of the respective officials in suits at common law led to essentially the same immunity under § 1983. [15] See 420 U.S., at 318-321; 416 U.S., at 239-247, and n. 4. **[****19]**

[**20]** **[*420]** III

This case marks our first opportunity to address the § 1983 liability of a state prosecuting officer. The Courts of Appeals, however, have confronted the issue many times and under varying circumstances. Although the precise contours of their holdings have been unclear at times, at bottom they are virtually unanimous that a prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the **[***138]** scope of his prosecutorial duties. [16] These courts sometimes

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[12] The Court described the immunity of judges as follows:

"Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" 386 U.S., at 553-554 (citation omitted).

[13] LEdHN[4B][↑] [4B]

HN3[↑] The procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial. See Scheuer v. Rhodes, 416 U.S. 232, 238-239 (1974); Wood v. Strickland, 420 U.S. 308, 320-322 (1975).

[14] The elements of this immunity were described in *Scheuer* as follows:

"It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." 416 U.S., at 247-248.

[15] In *Tenney* v. *Brandhove,* of course, the Court looked to the immunity accorded legislators by the Federal and State Constitutions, as well as that developed by the common law. 341 U.S., at 372-375. See generally Doe v. McMillan, 412 U.S. 306 (1973).

[16] Fanale v. Sheehy, 385 F. 2d 866, 868 (CA2 1967); Bauers v. Heisel, 361 F. 2d 581 (CA3 1966), cert. denied, ***386 U.S. 1021 (1967)***; Carmack v. Gibson, 363 F. 2d 862,

have described the prosecutor's immunity as a form of "quasi-judicial" immunity and referred to it as derivative of the immunity of judges recognized in *Pierson v. Ray, supra.* [17] Petitioner focuses upon the "quasi-judicial" characterization, and contends that it illustrates a fundamental illogic in according absolute immunity to a prosecutor. He argues that the prosecutor, as a member of the executive branch, cannot claim the immunity reserved for the judiciary, but only a qualified immunity **[*421]** akin to that accorded other executive officials in this Court's previous cases.

[**21]** Petitioner takes an overly simplistic approach to the issue of prosecutorial liability. As noted above, our ***HN4***[⬆] earlier decisions on *§ 1983* immunities were not products of judicial fiat that officials in different branches of government are differently amenable to suit under *§ 1983*. Rather, each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it. The liability of a state prosecutor under *§ 1983* must be determined in the same manner.

A

The function of a prosecutor that most often invites a common-law tort action is his decision to initiate a prosecution, as this may lead to a suit for malicious prosecution if the State's case misfires. The first American case to address the question of a prosecutor's amenability to such an action was *Griffith v. Slinkard, 146 Ind. 117, 44 **[**991]** N.E. 1001 (1896)*. [18] The complaint charged that a local prosecutor without probable cause added the plaintiff's name to a grand jury true bill after the grand jurors had refused to indict him, with the result that the plaintiff was arrested and forced to appear in court repeatedly **[****22]** before the charge finally was *nolle prossed.* Despite allegations of malice, the Supreme Court of Indiana dismissed the action on the ground that the prosecutor was absolutely immune. *Id., at 122, 44 N.E., at 1002*.

[*422] The *Griffith* view on prosecutorial immunity became the clear majority rule on the issue. [19] The question eventually came to this Court on **[***139]** writ of certiorari to the Court of Appeals for the Second Circuit. In *Yaselli v. Goff, 12 F. 2d 396 (1926)*, the claim was that the defendant, a Special Assistant to the Attorney General of the United **[****23]** States, maliciously and without probable cause procured plaintiff's grand jury indictment by the willful introduction of false and misleading evidence. Plaintiff sought some $300,000 in damages for having been subjected to the rigors of a trial in which the court ultimately directed a verdict against the Government. The District Court dismissed the complaint, and the Court of Appeals affirmed. After reviewing the development of the doctrine of prosecutorial immunity, *id., at 399-404*, that court stated: S

"In our opinion the law requires us to hold that ***HN5***[⬆] a special assistant to the Attorney General of the United States, in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy." *Id., at 406*.I

After briefing and oral argument, this Court affirmed the Court of Appeals in a *per curiam* opinion. *Yaselli v. Goff, 275 U.S. 503 (1927)*. **[****24]**

LEdHN[5][⬆] [5]***HN6***[⬆] The common-law immunity of a prosecutor is based upon the same considerations that underlie the common- **[*423]** law immunities of judges and grand jurors acting within the scope of their duties. [20] These include concern that harassment by

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864 (CA5 1966); *Tyler v. Witkowski, 511 F. 2d 449, 450-451 (CA7 1975)*; *Barnes v. Dorsey, 480 F. 2d 1057, 1060 (CA8 1973)*; *Kostal v. Stoner, 292 F. 2d 492, 493 (CA10 1961)*, cert. denied, ***369 U.S. 868 (1962)***; cf. *Guerro v. Mulhearn, 498 F. 2d 1249, 1255-1256 (CA1 1974)*; *Weathers v. Ebert, 505 F. 2d 514, 515-516 (CA4 1974)*. But compare *Hurlburt v. Graham, 323 F. 2d 723 (CA6 1963)*, with *Hilliard v. Williams, 465 F. 2d 1212* (CA6), cert. denied, ***409 U.S. 1029 (1972)***. See Part IV, *infra.*

[17] *E.g., Tyler v. Witkowski, supra, at 450*; *Kostal v. Stoner, supra, at 493*; *Hampton v. City of Chicago, 484 F. 2d 602, 608 (CA7 1973)*, cert. denied, ***415 U.S. 917 (1974)***. See n. 20, *infra.*

[18] The Supreme Court of Indiana in *Griffith* cited an earlier Massachusetts decision, apparently as authority for its own holding. But that case, *Parker v. Huntington, 68 Mass. 124 (1854)*, involved the elements of a malicious prosecution cause of action rather than the immunity of a prosecutor. See also Note, 73 U. Pa. L. Rev. 300, 304 (1925).

[19] *Smith v. Parman, 101 Kan. 115, 165 P. 663 (1917)*; *Semmes v. Collins, 120 Miss. 265, 82 So. 145 (1919)*; *Kittler v. Kelsch, 56 N.D. 227, 216 N.W. 898 (1927)*; ***Watts v. Gerking, 111 Ore. 654, 228 P. 135 (1924)*** (on rehearing). Contra, *Leong Yau v. Carden, 23 Haw. 362 (1916)*.

[20] The immunity of a judge for acts within his jurisdiction has

unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required **[****25]** by his public trust. One court expressed both considerations as follows: S

"The office of public prosecutor is one which must be administered with courage **[**992]** and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. **[*424]** There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the **[***140]** case…. The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement." *Pearson v. Reed, 6 Cal. App. 2d 277, 287, 44 P. 2d 592, 597 (1935)*.I

See also *Yaselli v. Goff, 12 F. 2d, at 404-406*.

[**26]** ***LEdHN[1B]***[⬆] [1B]The common-law rule of immunity is thus well settled. [21] We now must determine whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under *§ 1983*. We think they do.

LEdHN[6][⬆] [6]If a prosecutor had only **[****27]** a qualified immunity, the threat of *§ 1983* suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a **[*425]** suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Cf. *Bradley v. Fisher, 13 Wall., at 348*; *Pierson v. Ray, 386 U.S., at 554*. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. The prosecutor's possible knowledge of a witness' **[****28]** falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and -- ultimately in every case -- the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. [22] The presentation of such issues in a *§ 1983* action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury.

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roots extending to the earliest days of the common law. See *Floyd* v. *Barker,* 12 Coke 23, 77 Eng. Rep. 1305 (1608). Chancellor Kent traced some of its history in *Yates v. Lansing, 5 Johns. 282 (N.Y. 1810)*, and this Court accepted the rule of judicial immunity in *Bradley v. Fisher, 13 Wall. 335 (1872)*. See n. 12, *supra.* The immunity of grand jurors, an almost equally venerable common-law tenet, see *Floyd* v. *Barker, supra,* also has been adopted in this country. See, *e.g., Turpen v. Booth, 56 Cal. 65 (1880)*; ***Hunter v. Mathis, 40 Ind. 356 (1872)***. Courts that have extended the same immunity to the prosecutor have sometimes remarked on the fact that all three officials - judge, grand juror, and prosecutor - exercise a discretionary judgment on the basis of evidence presented to them. *Smith v. Parman, supra*, ***Watts v. Gerking, supra.*** It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as "quasi-judicial" officers, and their immunities being termed "quasi--judicial" as well. See, *e.g., Turpen v. Booth, supra, at 69*; *Watts v. Gerking, supra, at 661, 228 P., at 138*.

[21] See, *e.g., Gregoire v. Biddle, 177 F. 2d 579 (CA2 1949)*, cert. denied, ***339 U.S. 949 (1950)***; *Cooper v. O'Connor, 69 App. D.C. 100, 99 F. 2d 135, 140-141 (1938)*; *Anderson v. Rohrer, 3 F. Supp. 367 (SD Fla. 1933)*; *Pearson v. Reed, 6 Cal. App. 2d 277, 44 P. 2d 592 (1935)*; *Anderson v. Manley, 181 Wash. 327, 43 P. 2d 39 (1935)*. See generally ***Restatement of Torts § 656*** and comment b (1938); 1 F. Harper & F. James, The Law of Torts § 4.3, pp. 305-306 (1956).

[22] This is illustrated by the history of the disagreement as to the culpability of the prosecutor's conduct in this case. We express no opinion as to which of the courts was correct. See nn. 8 and 9, *supra.*

It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity **[***141]** than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender **[**993]** colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique **[*426]** and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials. Cf. *Bradley v. Fisher, supra, at 349*. **[****29]**

LEdHN[7][] [7] *LEdHN[8A]*[] [8A]The affording of only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system. Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. [23] The veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify, as is illustrated by the history of this case. If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, **[****30]** the triers of fact in criminal cases often would be denied relevant evidence. [24]

[**31]** **[*427]** *LEdHN[9A]*[] [9A]The ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to *§ 1983* liability. Various post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment. [25]

[**32]** *LEdHN[10A]*[] [10A]We **[***142]** conclude that *HN7*[] the considerations outlined above dictate the same absolute immunity under *§ 1983* that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning **[*428]** **[**994]** of the criminal justice system. [26] Moreover, it often would prejudice

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[23] *LEdHN[8B]*[] [8B]

In the law of defamation, a concern for the airing of all evidence has resulted in an absolute privilege for any courtroom statement relevant to the subject matter of the proceeding. In the case of lawyers the privilege extends to their briefs and pleadings as well. See generally 1 T. Cooley, Law of Torts § 153 (4th ed. 1932); 1 F. Harper & F. James, *supra,* § 5.22. In the leading case of *Hoar v. Wood, 44 Mass. 193 (1841)*, Chief Justice Shaw expressed the policy decision as follows:

"Subject to this restriction [of relevancy], it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes and advocating and sustaining the rights, of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions." *Id., at 197-198*.

[24] A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages. Cf. American Bar Association Project on Standards for Criminal Justice, Prosecution and Defense Function § 3.9 (c) (Approved Draft 1971).

[25] *LEdHN[9B]*[] [9B]

The possibility of personal liability also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation. At trial this duty is enforced by the requirements of due process, but after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction. Cf. ABA Code of Professional Responsibility § EC 7-13 (1969); ABA, Standards, *supra,* § 3.11. Indeed, the record in this case suggests that respondent's recognition of this duty led to the post-conviction hearing which in turn resulted ultimately in the District Court's granting of the writ of habeas corpus.

[26] In addressing the consequences of subjecting judges to suits for damages under *§ 1983*, the Court has commented:

defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. With the issue thus framed, we find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution:

> "As is so often the case, the answer must be found in a balance **[****33]** between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire v. Biddle, 177 F. 2d 579, 581 (CA2 1949)*, cert. denied, *339 U.S. 949 (1950)*.

See *Yaselli v. Goff, 12 F. 2d, at 404*; cf. *Wood v. Strickland, 420 U.S., at 320*.[27]

[**34]** ***LEdHN[11]***[] [11]We emphasize that ***HN8***[] the immunity of prosecutors from **[*429]** liability in suits under *§ 1983* does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of *18 U.S.C. § 242*, [28] the criminal analog of **[***143]** *§ 1983*. *O'Shea v. Littleton, 414 U.S. 488, 503 (1974)*; cf. *Gravel v. United States, 408 U.S. 606, 627 (1972)*. The prosecutor would fare no better for his willful acts. [29] Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his **[****35]** peers. [30] These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.

[**36]** **[*430]** IV

LEdHN[1C][] [1C] ***LEdHN[12A]***[] [12A] ***LEdHN[13A]***[] [13A] ***LEdHN[14A]***[] [14A]It remains to delineate the boundaries of our holding. As noted, *supra, at 416*, the Court of Appeals emphasized that each **[**995]** of respondent's challenged activities was an "integral part of the judicial process." *500 F. 2d, at 1302*. The purpose of the Court of Appeals' focus upon the functional nature of the activities rather than respondent's status was to distinguish and leave standing those cases, in its Circuit and in some others, which hold that a prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to the policeman's. [31] **[****38]** See *Pierson v. Ray, 386 U.S., at 557*. We

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"Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Pierson v. Ray, 386 U.S., at 554*.

[27] ***LEdHN[10B]***[] [10B]

Petitioner contends that his suit should be allowed, even if others would not be, because the District Court's issuance of the writ of habeas corpus shows that his suit has substance. We decline to carve out such an exception to prosecutorial immunity. Petitioner's success on habeas, where the question was the alleged misconduct by several state agents, does not necessarily establish the merit of his civil rights action where only the respondent's alleged wrongdoing is at issue. Certainly nothing determined on habeas would bind respondent, who was not a party. Moreover, using the habeas proceeding as a "door-opener" for a subsequent civil rights action would create the risk of injecting extraneous concerns into that proceeding. As we noted in the text, consideration of the habeas petition could well be colored by an awareness of potential prosecutorial liability.

[28] "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishment, paints, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."

[29] California also appears to provide for criminal punishment of a prosecutor who commits some of the acts ascribed to respondent by petitioner. *Cal. Penal Code § 127* (1970); cf. *In re Branch, 70 Cal. 2d 200, 210-211, 449 P. 2d 174, 181 (1969)*.

[30] See ABA Code of Professional Responsibility § EC 7-13. See generally ABA, Standards, *supra,* n. 24, §§ 1.1 (c), (e), and Commentary, pp. 44-45.

[31] Guerro v. *Mulhearn, 498 F. 2d, at 1256*; *Hampton v. City of Chicago, 484 F. 2d, at 608-609*; *Robichaud v. Ronan, 351 F. 2d 533, 537 (CA9 1965)*; cf. *Madison v. Purdy, 410 F. 2d 99 (CA5 1969)*; *Lewis v. Brautigam, 227 F. 2d 124 (CA5 1955)*. But cf. *Cambist Films, Inc. v. Duggan, 475 F.*

agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of **[****37]** the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. [32] We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative **[*431]** officer rather **[***144]** than that of advocate. [33] We hold only that *HN9*[↑] in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under *§ 1983*. [34] The judgment **[**996]** of the Court of Appeals for the Ninth Circuit accordingly is

Affirmed.

[**39]**

[**40]** MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

Concur by: WHITE

2d 887, 889 (CA3 1973).

[32] *LEdHN[12B]*[↑] [12B]

Both in his complaint in District Court and in his argument to us, petitioner characterizes some of respondent's actions as "police-related" or investigative. Specifically, he points to a request by respondent of the police during a courtroom recess that they hold off questioning Costello about a pending bad-check charge until after Costello had completed his testimony. Petitioner asserts that this request was an investigative activity because it was a direction to police officers engaged in the investigation of crime. Seen in its proper light, however, respondent's request of the officers was an effort to control the presentation of his witness' testimony, a task fairly within his function as an advocate.

[33] *LEdHN[13B]*[↑] [13B]

We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

[34] MR. JUSTICE WHITE, concurring in the judgment, would distinguish between willful use by a prosecutor of perjured testimony and willful suppression by a prosecutor of exculpatory information. In the former case, MR. JUSTICE WHITE agrees that absolute immunity is appropriate. He thinks, however, that only a qualified immunity is appropriate where information relevant to the defense is "unconstitutionally *withheld…* from the court." *Post,* at 443.

LEdHN[14B][↑] [14B]We do not accept the distinction urged by MR. JUSTICE WHITE for several reasons. As a matter of principle, we perceive no less an infringement of a defendant's rights by the knowing use of perjured testimony than by the deliberate withholding of exculpatory information. The conduct in either case is reprehensible, warranting criminal prosecution as well as disbarment. See *supra, at 429* nn. 29 and 30. Moreover, the distinction is not susceptible of practical application. A claim of using perjured testimony simply may be reframed and asserted as a claim of suppression of the evidence upon which the knowledge of perjury rested. That the two types of claims can thus be viewed is clear from our cases discussing the constitutional prohibitions against both practices. *Mooney v. Holohan, 294 U.S. 103, 110 (1935)*; *Alcorta v. Texas, 355 U.S. 28, 31-32 (1957)*; *Brady v. Maryland, 373 U.S. 83, 86 (1963)*; *Miller v. Pate, 386 U.S. 1, 4-6 (1967)*; *Giglio v. United States, 405 U.S. 150, 151-155 (1972)*. It is also illustrated by the history of this case: at least one of the charges of prosecutorial misconduct discussed by the Federal District Court in terms of suppression of evidence had been discussed by the Supreme Court of California in terms of use of perjured testimony. Compare *Imbler v. Craven, 298 F. Supp., at 809-811*, with *In re Imbler, 60 Cal. 2d, at 566-567, 387 P. 2d, at 12-13*. Denying absolute immunity from suppression claims could thus eviscerate, in many situations, the absolute immunity from claims of using perjured testimony.

We further think MR. JUSTICE WHITE'S suggestion, *post,* at 440 n. 5, that absolute immunity should be accorded only when the prosecutor makes a "full disclosure" of all facts casting doubt upon the State's testimony, would place upon the prosecutor a duty exceeding the disclosure requirements of *Brady* and its progeny, see *373 U.S., at 87*; *Moore v. Illinois, 408 U.S. 786, 795 (1972)*; cf. *Donnelly v. DeChristoforo, 416 U.S. 637, 647-648 (1974)*. It also would weaken the adversary system at the same time it interfered seriously with the legitimate exercise of prosecutorial discretion. **[*432]**

Concur

MR. JUSTICE **WHITE**, with whom MR. JUSTICE **BRENNAN** and MR. JUSTICE **MARSHALL** join, concurring in the judgment.

I concur in the judgment of the Court and in much of its reasoning. I agree with the Court that the gravamen **[***145]** of the complaint in this case is that the prosecutor knowingly used perjured testimony; and that a prosecutor is absolutely immune from suit for money damages under 42 U.S.C. § 1983 for presentation of testimony later determined to have been false, where the presentation of such testimony is alleged to have been unconstitutional solely because the prosecutor did not believe it or should not have believed it to be true. I write, however, because I believe that the Court's opinion may be read as **[*433]** extending to a prosecutor an immunity broader than that to which he was entitled at common law; broader than is necessary to decide this case; and broader than is necessary to to protect the judicial process. Most seriously, I disagree with any implication that *absolute* immunity for prosecutors extends to suits based on **[****41]** claims of unconstitutional suppression of evidence because I believe such a rule would threaten to *injure* the judicial process and to interfere with Congress' purpose in enacting 42 U.S.C. § 1983, without any support in statutory language or history.

I

Title 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution… shall be liable to the party injured in an action at law, suit in equity, or other proper preceding for redress."

As the language itself makes clear, the central purpose of § 1983 is to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an *official's* abuse of his position." Monroe v. Pape, 365 U.S. 167, 172 (1961) (emphasis added). The United States Constitution among other things, places substantial limitations upon state action, and the cause of **[****42]** action provided in 42 U.S.C. § 1983 is fundamentally one for "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." United States v. Classic, 313 U.S. 299, 326 (1941). It is manifest then that all state **[*434]** officials as a class cannot be immune absolutely from damage suits under 42 U.S.C. § 1983 and that to extend absolute immunity to any group of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create. Scheuer v. Rhodes, 416 U.S. 232, 243 (1974). Thus, as there is no language in 42 U.S.C. § 1983 **[**997]** extending *any* immunity to any state officials, the Court has not extended *absolute* immunity to such officials in the absence of the most convincing showing that the immunity is necessary. Accordingly, we have declined to construe § 1983 to extend absolute immunity from damage suits to a variety of state officials, Wood v. Strickland, 420 U.S. 308 (1975) (school **[***146]** board **[****43]** members); Scheuer v. Rhodes, supra (various executive officers, including the State's chief executive officer); Pierson v. Ray, 386 U.S. 547 (1967) (policemen); and this notwithstanding the fact that, at least with respect to high executive officers, absolute immunity from suit for damages would have applied at common law. Spalding v. Vilas, 161 U.S. 483 (1896); Alzua v. Johnson, 231 U.S. 106 (1913). Instead, we have construed the statute to extend only a qualified immunity to these officials, and they may be held liable for unconstitutional conduct absent "good faith." Wood v. Strickland, supra, at 315. Any other result would "deny much of the promise of § 1983." Id., at 322. Nonetheless, there are certain absolute immunities so firmly rooted in the common law and supported by such strong policy reasons that the Court has been unwilling to infer that Congress meant to abolish them in enacting 42 U.S.C. § 1983. Thus, we have held state legislators to be absolutely immune from liability for damages under § 1983 for their **[****44]** legislative acts, Tenney v. Brandhove, 341 U.S. 367 (1951), [1] and state **[*435]** judges to be absolutely immune from liability for their judicial acts, Pierson v. Ray, supra. [2]

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[1] The Court emphasized that the immunity had a lengthy history at common law, and was written into the United States Constitution in the "Speech or Debate Clause" and into many state constitutions as well. 341 U.S., at 372-373.

[2] The Court concluded that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the

In justifying absolute immunity for certain officials, both at common law and under *42 U.S.C. § 1983*, courts have invariably rested their decisions on the proposition **[****45]** that such immunity is necessary to protect the decision-making process in which the official is engaged. Thus legislative immunity was justified on the ground that such immunity was essential to protect "freedom of speech and action in the legislature" from the dampening effects of threatened lawsuits. *Tenney v. Brandhove, supra, at 372*. Similarly, absolute immunity for judges was justified on the ground that no matter how high the standard of proof is set, the burden of defending damage suits brought by disappointed litigants would "contribute not to principled and fearless decision-making but to intimidation." *Pierson v. Ray, supra, at 554*. In *Bradley v. Fisher, 13 Wall. 335, 347 (1872)*, the Court stated: S

"For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of **[****46]** this freedom, and would destroy that independence **[*436]** without which **[***147]** no judiciary can be either respectable or useful…."I

See also cases discussed in *Yaselli v. Goff, 12 F. 2d 396, 399-401 (CA2 1926)*, summarily aff'd, *275 U.S. 503 (1927)*.

The majority articulates other adverse consequences which may result from permitting **[**998]** suits to be maintained against public officials. Such suits may expose the official to an unjust damage award, *ante,* at 425; such suits will be expensive to defend even if the official prevails and will take the official's time away from his job, *ante,* at 425; and the liability of a prosecutor for unconstitutional behavior might induce a federal court in a habeas corpus proceeding to deny a valid constitutional claim in order to protect the prosecutor, *ante,* at 427. However, these adverse consequences are present with respect to suits against all **[****47]** state officials [3] and must necessarily have been rejected by Congress as a basis for absolute immunity under *42 U.S.C. § 1983*, for its **[*437]** enactment is a clear indication that at least some officials should be accountable in damages for their official acts. Thus, unless the threat of suit is also thought to injure the governmental decisionmaking process, the other unfortunate consequences flowing from damage suits against state officials are sufficient only to extend a qualified immunity to the official in question. Accordingly, the question whether a prosecutor enjoys an absolute immunity from damage suits under *§ 1983*, or only a qualified immunity, depends upon whether the common law and reason support the proposition that extending absolute immunity is necessary to protect the *judicial process.*

[**48]** II

The public prosecutor's absolute immunity from suit at common law is not so firmly entrenched as a judge's, but it has considerable support. The general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution. 1 F. Harper & F. James, The Law of Torts § 4.3, p. 305 n. 7 (1956) (hereafter Harper & James), and cases there cited; *Yaselli v. Goff, supra; Gregoire v. Biddle, 177 F. 2d 579 (CA2 1949)*; *Kauffman v. Moss, 420 F. 2d 1270 (CA3 1970)*; *Bauers v. Heisel, 361 F. 2d 581 (CA3 1965)*; *Tyler v. Witkowski, 511 F. 2d 449 (CA7 1975)*; *Hampton v. City of Chicago, 484 F. 2d 602 (CA7 1973)*; *Barnes v. Dorsey, 480 F. 2d 1057 (CA8 1973)*; *Duba v. McIntyre, 501 F. 2d 590 (CA8 1974)*; *Robichaud v. Ronan, 351 F. 2d 533 **[***148]** (CA9 1965)*. But see *Leong Yau v. Carden, 23 Haw. 362 (1916)*. The rule, like the rule extending absolute immunity to judges, rests on the proposition that absolute immunity is necessary to protect the judicial **[****49]** process.

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doctrine in *Bradley v. Fisher, 13 Wall. 335 (1872)*." *386 U.S., at 553-554*.

[3] Even the risk that decisions in habeas corpus proceedings will be skewed is applicable in the case of policemen; and if it supplies a sufficient reason to extend absolute immunity to prosecutors, it should have been a sufficient reason to extend such immunity to policemen. Indeed, it is fair to say that far more habeas corpus petitions turn on the constitutionality of action taken by policemen than turn on the constitutionality of action taken by prosecutors. We simply rely on the ability of federal judges correctly to apply the law to the facts with the knowledge that the overturning of a conviction on constitutional grounds hardly dooms the official in question to payment of a damage award in light of the qualified immunity which he possesses, and the inapplicability of the res judicata doctrine, *ante,* at 428 n. 27.

Absent immunity, "'it would be but human that they [prosecutors] might refrain from presenting to a grand jury or prosecuting a matter which in their judgment called for action; **[*438]** but which a jury might possibly determine otherwise.'" 1 Harper & James § 4.3, pp. 305-306, quoting *Yaselli v. Goff, 8 F. 2d 161, 162 (SDNY 1925)*. Indeed, in deciding whether or not to prosecute, the prosecutor performs a "quasi-judicial" function. 1 Harper & James 305; *Yaselli v. Goff, 12 F. 2d, at 404*. Judicial immunity had always been extended to grand jurors with respect to their actions in returning an indictment, *id., at 403*, and "'the public prosecutor, in deciding whether a particular prosecution shall be instituted… performs much the same function as a grand jury.'" *Id., at 404*, quoting *Smith v. Parman, 101 Kan. 115, 165 P. 633 (1917)*. The analogy to judicial immunity is a strong one. Moreover, **[**999]** the risk of injury to the judicial process from a rule permitting malicious prosecution suits against prosecutors is real. There is no one to sue the prosecutor **[****50]** for an erroneous decision *not* to prosecute. If suits for malicious prosecution were permitted, [4] the prosecutor's incentive would always be not to bring charges. Moreover, the "fear of being harassed by a vexatious suit, for acting according to their consciences" would always be the greater "where powerful" men are involved, 1 W. Hawkins, Pleas of the Crown 349 (6th ed. 1787). Accordingly, I agree with the majority that, with respect to suits based on claims that the prosecutor's decision to prosecute was malicious and without probable cause -- at least where there is no independent allegation that the prosecutor withheld exculpatory information from a grand jury or the court, see Part III, *infra* -- the judicial process is better served by absolute immunity than by any other rule.

[**51] [*439]** Public prosecutors were also absolutely immune at common law from suits for defamatory remarks made during and relevant to a judicial proceeding, 1 Harper & James §§ 5.21, 5.22; *Yaselli v. Goff, 12 F. 2d, at 402-403*; and this immunity was also based on the policy of protecting the judicial process. Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Col. L. Rev. 463 (1909). The immunity was not special to public prosecutors but extended to lawyers accused of making false and defamatory statements, or of eliciting false and defamatory testimony from witnesses; and it applied to suits against witnesses themselves for delivering false and defamatory testimony. 1 Harper & James § 5.22, pp. 423-424, and cases there cited; *King* v. *Skinner,* Lofft 55, 98 Eng. Rep. 529, 530 (K.B. 1772) (*per* **[***149]** Lord Mansfield); *Yaselli v. Goff, 12 F. 2d, at 403*. The reasons for this rule are also substantial. It is precisely the function of a judicial proceeding to determine where the truth lies. The ability of courts, under carefully developed procedures, to separate truth from **[****52]** falsity, and the importance of accurately resolving factual disputes in criminal (and civil) cases are such that those involved in judicial proceedings should be "given every encouragement to make a full disclosure of all pertinent information within their knowledge." 1 Harper & James § 5.22, p. 424. For a witness, this means he must be permitted to testify without fear of being sued if his testimony is disbelieved. For a lawyer, it means that he must be permitted to call witnesses without fear of being sued if the witness is disbelieved and it is alleged that the lawyer knew or should have known that the witness' testimony was false. Of course, witnesses should not be encouraged to testify falsely nor lawyers encouraged to call witnesses who testify falsely. However, if the risk of having to defend a civil damage suit is added to the deterrent against such **[*440]** conduct already provided by criminal laws against perjury and subornation of perjury, the risk of self-censorship becomes too great. This is particularly so because it is very difficult if not impossible for attorneys to be absolutely certain of the objective truth or falsity of the testimony which they present. **[****53]** A prosecutor faced with a decision whether or not to call a witness whom he believes, but whose credibility he knows will be in doubt and whose testimony may be disbelieved by the jury, should be given every incentive to submit that witness' testimony to the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies. S

"Absolute privilege has been conceded on obvious grounds of public policy to **[**1000]** insure freedom of speech where it is essential that freedom of speech should exist. It is essential to the ends of justice that all persons participating in judicial proceedings (to take a typical class for illustration) should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences."

[4] I agree with the majority that it is not sufficient merely to set the standard of proof in a malicious prosecution case very high. If this were done, it might be possible to eliminate the danger of an unjust damage award against a prosecutor. However, the risk of having to *defend* a suit -- even if certain of ultimate vindication -- would remain a substantial deterrent to fearless prosecution.

Veeder, *supra,* 9 Col. L. Rev., at 469.I

For the above-stated reasons, I agree with the majority that history and policy support an absolute immunity for prosecutors from suits based solely on claims [5] that they knew or should have known that the testimony of a witness called by the prosecution **[****54]** was false; and I would not attribute to Congress an intention to remove such immunity in enacting *42 U.S.C. § 1983*.

[*441] Since the gravamen of the complaint in this case is that the prosecutor knew or should have known that certain testimony of a witness called by him was untrue and since -- for reasons set forth below -- the other allegations in the complaint fail to state a cause of action on any **[***150]** other theory, I concur in the judgment in this case. However, insofar as the majority's opinion implies an absolute immunity from suits for constitutional violations other than those based on the prosecutor's decision to initiate proceedings **[****55]** or his actions in bringing information or argument to the court, I disagree. Most particularly I disagree with any implication that the absolute immunity extends to suits charging unconstitutional suppression of evidence. *Brady v. Maryland, 373 U.S. 83 (1963)*.

III

There was no absolute immunity at common law for prosecutors other than absolute immunity from suits for malicious prosecution and defamation. There were simply no other causes of action at common law brought against prosecutors for conduct committed in their official capacity. [6] There is, for example, no reported case of a suit at common law against a prosecutor for suppression or nondisclosure of exculpatory evidence. Thus, even if this Court had accepted the proposition, which **[*442]** it has not, *Scheuer v. Rhodes, 416 U.S. 232 (1974)*, that Congress incorporated in *42 U.S.C. § 1983* all immunities existing at common law, it would not follow that prosecutors are absolutely immune from suit for all unconstitutional acts committed in the course of doing their jobs. Secondly, it is by no means true that such blanket absolute immunity is necessary **[****56]** or even helpful in protecting the judicial process. It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which *§ 1983* was enacted. Absent special circumstances, such as those discussed in Part II, *supra,* with respect to actions attacking the decision to prosecute or the bringing of evidence or argument to the court, one would expect that the judicial **[**1001]** process would be protected -- and indeed its integrity enhanced -- by denial of immunity to prosecutors who engage in unconstitutional conduct.

[**57]** The absolute immunity extended to prosecutors in defamation cases is designed to encourage them to bring information to the court which will resolve the criminal case. That is its single justification. Lest they withhold valuable but questionable evidence or refrain from making valuable but questionable arguments, prosecutors are protected from liability for submitting before the court information later determined to have been false to their knowledge.[7] **[***151]** It would stand this immunity rule on its head, however, to apply it to a suit based on a claim that **[*443]** the prosecutor unconstitutionally *withheld* information from the court. Immunity from a suit based upon a claim that the prosecutor suppressed or withheld evidence would *discourage* precisely the disclosure of evidence sought to be encouraged by the rule granting prosecutors immunity from defamation suits. *Denial* of

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[5] For the reasons set forth in Part III, *infra,* absolute immunity would not apply to independent claims that the prosecutor has withheld facts tending to demonstrate the falsity of his witness' testimony where the alleged facts are sufficiently important to justify a finding of unconstitutional conduct on the part of the prosecutor.

[6] Immunity of public officials for false arrest was, unlike immunity of public officials for malicious prosecution, not absolute, 1 Harper & James §§ 3.17 and 3.18; and when prosecutors were sued for that tort, they were not held absolutely immune. *Schneider v. Shepherd, 192 Mich. 82, 158 N.W. 182 (1916)*. A similar result has obtained in the lower courts in suits under *42 U.S.C. § 1983* against prosecutors for initiating unconstitutional arrests. *Robichaud v. Ronan, 351 F. 2d 533 (CA9 1965)*; *Hampton v. Chicago, 484 F. 2d 602 (CA7 1973)*; *Wilhelm v. Turner, 431 F. 2d 177, 180-183 (CA8 1970)* (dictum); *Balistrieri v. Warren, 314 F. Supp. 824 (WD Wis. 1970)*. See also *Ames v. Vavreck, 356 F. Supp. 931 (Minn. 1973)*.

[7] The reasons for making a prosecutor absolutely immune from suits for defamation would apply with equal force to other suits based solely upon the prosecutor's conduct in the courtroom designed either to bring facts or arguments to the attention of the court. Thus, a prosecutor would be immune from a suit based on a claim that his summation was unconstitutional or that he deliberately elicited hearsay evidence in violation of the *Confrontation Clause*.

immunity for unconstitutional withholding of evidence would encourage such disclosure. A prosecutor seeking to protect himself from liability for failure to disclose evidence may be induced to disclose more than is required. But, this will hardly injure the judicial process. [8] **[****58]** Indeed, it will help it. Accordingly, lower courts have held that unconstitutional suppression of exculpatory evidence is beyond the scope of "duties constituting an integral part of the judicial process" and have refused to extend absolute immunity to suits based on such claims. *Hilliard v. Williams, 465 F. 2d 1212, 1218* (CA6), cert. denied, *409 U.S. 1029 (1972)*; *Haaf v. Grams, 355 F. Supp. 542, 545 (Minn. 1973)*; *Peterson v. Stanczak, 48 F.R.D. 426 (ND Ill. 1969)*. Contra, *Barnes v. Dorsey, 480 F. 2d 1057 (CA8 1973)*.

[**59]** Equally important, unlike constitutional violations committed in the courtroom -- improper summations, introduction of hearsay evidence in violation of the *Confrontation Clause*, knowing presentation of false testimony -- which truly are an "integral part of the judicial process," *ante,* at 416, the judicial process has no way to prevent or correct the constitutional violation of suppressing evidence. The judicial process will by definition be ignorant of the violation when it occurs; and it is **[*444]** reasonable to suspect that most such violations never surface. It is all the more important, then, to deter such violations by permitting damage actions under *42 U.S.C. § 1983* to be maintained in instances where violations do surface.

The stakes are high. In *Hilliard v. Williams, supra*, a woman was convicted of second-degree murder upon entirely circumstantial evidence. The most incriminating item of evidence was the fact that the jacket worn by the defendant at the time of arrest -- and some curtains -- appeared to have bloodstains on them. The defendant denied that the stains were bloodstains but was convicted and subsequently spent **[****60]** a year in jail. Fortunately, in that case, the defendant later found out that an FBI report -- of which the prosecutor had knowledge at the time of the trial and the existence of which he instructed a state investigator not to mention during his testimony -- concluded, after testing, that the stains **[**1002]** were *not* bloodstains. On retrial, the defendant was acquitted. She sued the prosecutor and the state investigator under *42 U.S.C. § 1983* claiming that the FBI report was unconstitutionally withheld under *Brady v. Maryland, 373 U.S. 83 (1963)*, and **[***152]** obtained a damage award against both after trial. The prosecutor's petition for certiorari is now pending before this Court. *Hilliard v. Williams, 516 F. 2d 1344 (CA6 1975)*, cert. pending, No. 75-272. The state investigator's petition, in which he claimed that he had only followed the prosecutor's orders, has been denied. *Clark v. Hilliard, 423 U.S. 1066 (1976)*. It is apparent that the injury to a defendant which can be caused by an unconstitutional suppression of exculpatory evidence is substantial, particularly **[****61]** if the evidence is never uncovered. It is virtually impossible to identify *any* injury to the judicial process resulting from a rule permitting suits for such unconstitutional **[*445]** conduct, and it is very easy to identify an injury to the process resulting from a rule which does not permit such suits. Where the reason for the rule extending absolute immunity to prosecutors disappears, it would truly be "monstrous to deny recovery." *Gregoire v. Biddle, 177 F. 2d, at 581*.

IV

The complaint in this case, while fundamentally based on the claim that the prosecutor knew or should have known that his witness had testified falsely in certain respects, does contain some allegations that exculpatory evidence and evidence relating to the witness' credibility had been suppressed. Insofar as the complaint is based on allegations of suppression or failure to disclose, the prosecutor should not, for the reasons set forth above, be absolutely immune. However, as the majority notes, the suppression of fingerprint evidence and the alleged suppression of information relating to certain pretrial lineups is not alleged to have been known in fact to the prosecutor **[****62]** -- it is simply claimed that the suppression is legally chargeable to him. While this may be so as a matter of federal habeas corpus law, it is untrue in a civil damage action. The result of a lie-detector test claimed to have been suppressed was allegedly known to respondent, but it would have been inadmissible at Imbler's trial and is thus not constitutionally required to be disclosed. The alteration of the police artist's composite sketch after Imbler was designated as the defendant is not alleged to have been suppressed -- and in fact appears not to have been suppressed. The opinion of the California Supreme

[8] There may be circumstances in which ongoing investigations or even the life of an informant might be jeopardized by public disclosure of information thought possibly to be exculpatory. However, these situations may adequately be dealt with by *in camera* disclosure to the trial judge. These considerations do not militate against disclosure, but merely affect the manner of disclosure.

Court on direct review of Imbler's conviction states that "the picture was modified later, following suggestions of Costello and other witnesses," and that court presumably had before it only the trial record. The other items allegedly suppressed **[*446]** all relate to background information about only one of the three eyewitnesses to testify for the State, and were in large part concededly known to the defense and thus may not be accurately described as suppressed. The single alleged fact not concededly known to the defense which might have been helpful to the defense **[****63]** was that the State's witness had written some bad checks for small amounts and that a criminal charge based on one check was outstanding against him. However, the witness had an extensive criminal record which was known to but not fully used by the defense. Thus, even taken as true, the failure to disclose the check charges is patently insufficient to support a claim of unconstitutional suppression of **[***153]** evidence. [9]

[9] The majority points out that the knowing use of perjured testimony is as reprehensible as the deliberate suppression of exculpatory evidence. This is beside the point. The reason for permitting suits against prosecutors for suppressing evidence is not that suppression is especially reprehensible but that the only effect on the process of permitting such suits will be a beneficial one -- more information will be disclosed to the court; whereas one of the effects of permitting suits for knowing use of perjured testimony will be detrimental to the process -- prosecutors may withhold questionable but valuable testimony from the court.

The majority argues that any "claim of using perjured testimony simply may be reframed and asserted as a claim of suppression." Our treatment of the allegations in this case conclusively refutes the argument. It is relatively easy to allege that a government witness testified falsely and that the prosecutor did not believe the witness; and, if the prosecutor's subjective belief is a sufficient basis for liability, the case would almost certainly have to go to trial. If such suits were permitted, *this* case would have to go to trial. It is another matter entirely to allege specific objective facts known to the prosecutor of sufficient importance to justify a conclusion that he violated a constitutional duty to disclose. It is no coincidence that petitioner failed to make any such allegations in this case. More to the point -- and quite apart from the relative difficulty of pleading a violation of *Brady v. Maryland, 373 U.S. 83 (1963)* -- a rule permitting suits based on withholding of specific facts unlike suits based on the prosecutor's disbelief of a witness' testimony will have no detrimental effect on the process. Risk of being sued for suppression will impel the prosecutor to err if at all on the side of overdisclosure. Risk of being sued for disbelieving a witness will impel the prosecutor to err on the side of withholding questionable evidence. The majority does not appear to respond to this point. Any suggestion that the distinction between suits based on suppression of facts helpful to the defense and suits based on other kinds of constitutional violations cannot be understood by district judges who would have to apply the rule is mystifying. The distinction is a simple one.

Finally, the majority states that the rule suggested in this concurring opinion "would place upon the prosecutor a duty exceeding the disclosure requirements of *Brady* and its progeny." The rule suggested in this opinion does no such thing. The constitutional obligation of the prosecutor remains utterly unchanged. We would simply not grant him *absolute immunity* from suits for committing violations of pre-existing constitutional disclosure requirements, if he committed those violations in bad faith.

[1003]** The Court **[*447]** has in the past, having due regard for the fact that the obligation of the government to disclose exculpatory evidence is an exception to the normal operation of an adversary system of justice, imposed on state prosecutors a constitutional obligation to turn over such evidence only when the evidence is of far greater significance than that involved here. See *Moore v. Illinois, 408 U.S. 786 (1972)*. Thus, the only constitutional violation adequately alleged against the prosecutor is that he knew in his mind that testimony presented by him was false; and from a suit based on such a violation, without more, the prosecutor is absolutely immune. For this reason, I concur in the judgment reached by the majority **[****64]** in this case.

[**65]**

References

15 Am Jur 2d, Civil Rights 67; *63 Am Jur 2d, Prosecuting Attorneys 34*

16 Am Jur Trials 205, Malicious Prosecution

42 USCS 1983

US L Ed Digest, Civil Rights 12.5; District and prosecuting Attorneys 1

ALR Digests, Civil Rights 1.3; District and Prosecuting Attorneys 5

L Ed Index to Annos, Civil Rights; District Attorneys

ALR Quick Index, Discrimination; District and Prosecuting Attorneys

Federal Quick Index, Civil Rights; District and Prosecuting Attorneys

Annotation References:

Supreme Court's construction of Civil Rights Act of 1871 (*42 USCS 1983*) providing private right of action for violation of federal rights. *43 L Ed 2d 833*.

Criminal liability ,under *18 USCS 241*, *242*, for depriving, or conspiring to deprive, a person of his civil rights . *20 L Ed 2d 1454*.

Conviction on testimony known to prosecution to be perjured as denial of due process. *2 L Ed 2d 1575, 3 L Ed 2d 1991*.

Withholding or suppression of evidence by prosecution **[****66]** in criminal case as vitiating conviction. *34 ALR3d 16*.

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution. *7 ALR3d 8*.

Private rights and remedies to enforce right based on civil rights statute. 171 ALR 920.

Immunity of prosecuting officer from action for malicious prosecution. 34 ALR 1504, 56 ALR 1255, 118 ALR 1450.

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Cases	-None-

Mansaray v. State

Supreme Court of Ohio

October 8, 2013, Submitted; March 5, 2014, Decided

No. 2012-1727

Reporter
138 Ohio St. 3d 277 *; 2014-Ohio-750 **; 6 N.E.3d 35 ***; 2014 Ohio LEXIS 446 ****; 2014 WL 866414

MANSARAY, APPELLEE, v. THE STATE OF OHIO, APPELLANT.

Prior History: [**1]** APPEAL from the Court of Appeals for Cuyahoga County, No. 98171,

Mansaray v. State, 2012 Ohio 3376, 2012 Ohio App. LEXIS 2969 (Ohio Ct. App., Cuyahoga County, July 26, 2012).

Disposition: Judgment reversed.

Core Terms

imprisonment, sentencing, proposition of law, wrongfully, court of appeals

Case Summary

Overview

HOLDINGS: [1]-When a defendant sought a declaration that he was a wrongfully imprisoned individual and sought to satisfy *R.C. 2743.48(A)(5)* by proving that an error in procedure resulted in his release, the error in procedure must have occurred subsequent to sentencing and during or subsequent to imprisonment; [2]-It was not necessary for the appellate court to discuss the state's propositions of law.

Outcome

Judgment reversed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Crimes Against Persons > False Imprisonment > Elements

HN1 **False Imprisonment, Elements**

One who claims to be a wrongfully imprisoned individual under *R.C. 2743.48* must prove all of the factors in *R.C. 2743.48(A)* by a preponderance of the evidence before seeking compensation from the state for wrongful imprisonment.

Criminal Law & Procedure > ... > Crimes Against Persons > False Imprisonment > Elements

HN2 **False Imprisonment, Elements**

R.C. 2743.48(A)(5) set forth the fifth element of the definition of "wrongfully imprisoned individual" as follows: Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release, or it was determined by a court of common pleas that the offense of which

the individual was found guilty, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.

Criminal Law & Procedure > ... > Crimes Against Persons > False Imprisonment > Elements

HN3 **False Imprisonment, Elements**

The fifth factor of R.C. 2743.48(A) may be fulfilled in one of two ways: (1) subsequent to sentencing and during or subsequent to imprisonment 'an error in procedure resulted in the individual's release' or (2) the charged offense (and any lesser included offense) was not committed by the individual or no crime was committed at all (actual innocence).

Criminal Law & Procedure > ... > Crimes Against Persons > False Imprisonment > Elements

HN4 **False Imprisonment, Elements**

The plain and ordinary meaning of the language in R.C. 2473.48 — Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release—is clear and unambiguous. It is obvious that to satisfy the provision something must happen subsequent to sentencing and imprisonment.

Criminal Law & Procedure > ... > Crimes Against Persons > False Imprisonment > Elements

HN5 **False Imprisonment, Elements**

Nothing in the language of R.C. 2743.48(A)(5) suggests, even indirectly, that the subsequent event is a judicial determination than an error occurred.

Criminal Law & Procedure > ... > Crimes Against Persons > False Imprisonment > Elements

HN6 **False Imprisonment, Elements**

When a defendant seeks a declaration that he is a wrongfully imprisoned individual and seeks to satisfy R.C. 2743.48(A)(5) by proving that an error in procedure resulted in his release, the error in procedure must have occurred subsequent to sentencing and during or subsequent to imprisonment.

Headnotes/Summary

Headnotes

Action against state for wrongful imprisonment—R.C. 2743.48(A)(5)—Error in procedure resulting in release.

Syllabus

[*35] [*278] SYLLABUS OF THE COURT**

When a defendant seeks a declaration that he is a wrongfully imprisoned individual and seeks to satisfy R.C. 2743.48(A)(5) by proving that an error in procedure resulted in his release, the error in procedure must have occurred subsequent to sentencing and during or subsequent to imprisonment.

Counsel: Friedman & Gilbert and Terry H. Gilbert, for appellee.

Timothy J. McGinty, Cuyahoga County Prosecuting Attorney, and Brian R. Gutkoski, Assistant Prosecuting Attorney, for appellant.

Judges: PFEIFER, J. O'CONNOR, C.J., and O'DONNELL, LANZINGER, KENNEDY, FRENCH, and O'NEILL, JJ., concur.

Opinion by: PFEIFER

Opinion

PFEIFER, J.

[P1]** Yanko Mansaray, appellee, asserts that he is a wrongfully imprisoned individual. We conclude to the contrary because he has not satisfied *R.C. 2743.48(A)(5)*, and we reverse the judgment of the court of appeals.

BACKGROUND

[P2]** The circumstances surrounding Mansaray's convictions underlying this civil case are described in the appellate court decision that reversed the convictions. *State v. Mansaray, 8th Dist. Cuyahoga No. 93562, 2010-Ohio-5119, 2010 WL 4132322*. In 2010, United States marshals had a warrant to arrest Rodney Williams. **[****2]** Acting on a reasonable belief that they would find him at appellee Yanko Mansaray's house, the marshals entered and searched for Williams. Instead of **[***36]** Williams, they found a large quantity of ecstasy pills. Based on this evidence, which Mansaray moved to suppress at trial, Mansaray was convicted of a drug offense and a related offense and sentenced to 11 years in prison.

[P3]** In late 2010, his convictions were reversed. The court of appeals concluded that the ecstasy pills found in his house should have been suppressed at trial. The court stated that the warrant issued for the arrest of Rodney Williams did not authorize the marshals to search Mansaray's house. According to his complaint, Mansaray was released on bond, and the charges against him were ultimately dismissed.

[P4]** Mansaray subsequently filed the complaint in this case, asserting, pursuant to *R.C. 2743.48*, that he is a wrongfully imprisoned individual. The trial court dismissed his complaint. The court of appeals reversed, concluding that Mansaray satisfied all five requirements of *R.C. 2743.48(A)(1) through (5)*. The state of Ohio appealed, and we accepted jurisdiction.

ANALYSIS

[P5]** **[*279]** The issue in this case is whether Mansaray is a "wrongfully **[****3]** imprisoned individual" as defined in *R.C. 2743.48(A)*. In *Doss v. State, 135 Ohio St.3d 211, 2012-Ohio-5678, 985 N.E.2d 1229*, paragraph one of the syllabus, we stated that ***HN1*** "[o]ne who claims to be a 'wrongfully imprisoned individual' under *R.C. 2743.48* must prove all of the factors in *R.C. 2743.48(A)* by a preponderance of the evidence before seeking compensation from the state for wrongful imprisonment." Because our conclusion with respect to *R.C. 2743.48(A)(5)* is dispositive, we will not address *R.C. 2743.48(A)(1) through (4)*.

R.C. 2743.48(A)(5)

[P6]** When Mansaray was in prison and when he filed his complaint, ***HN2*** *R.C. 2743.48(A)(5)* set forth the fifth element of the definition of "wrongfully imprisoned individual" as follows:

> Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release, or it was determined by a court of common pleas that the offense of which the individual was found guilty, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.

2002 Sub.S.B. No. 149, 149 Ohio Laws, Part II, 3545, and 2010 Sub.H.B. No. 338.

[P7]** ***HN3*** "The fifth factor of *R.C. 2743.48(A)* may be **[****4]** fulfilled in one of two ways: (1) subsequent to sentencing and during or subsequent to imprisonment 'an error in procedure resulted in the individual's release' or (2) the charged offense (and any lesser included offense) was not committed by the individual or no crime was committed at all (actual innocence)." *Doss at ¶ 12*. In this case, Mansaray has not alleged a claim of actual innocence. Accordingly, we will focus, as the court of appeals did, on the first method of satisfying *R.C. 2743.48(A)(5)*.

[P8]** ***HN4*** The plain and ordinary meaning of the language in the statute—"Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release"—is clear and unambiguous. *See Coventry Towers, Inc. v. Strongsville, 18 Ohio St.3d 120, 122, 18 Ohio B. 151, 480 N.E.2d 412 (1985)*. Nevertheless, the parties proffer vastly different interpretations. It is obvious that to satisfy the provision, something must happen subsequent **[***37]** to sentencing and imprisonment. The state's version is that the subsequent event is an error in procedure that occurs after sentencing and during or after imprisonment. Mansaray's version is that the subsequent event is a judicial determination **[****5]** **[*280]** that an error occurred, even if that error

occurred prior to sentencing and imprisonment.

The state's interpretation of RC. 2743.48(A)(5) is correct

[P9]** The state's version is the meaning that is obvious and common in large part because in the state's version, the introductory phrase modifies "error in procedure," the noun phrase closest to it. *Youngstown Club v. Porterfield, 21 Ohio St.2d 83, 86, 255 N.E.2d 262 (1970)*. In Mansaray's version, the introductory phrase modifies a noun phrase that doesn't appear in the statute: "a judicial determination that an error in procedure occurred." It is axiomatic that we will not insert words into a statute unless it is absolutely necessary, which it is not in this case. *Bernardini v. Conneaut Area City School Dist. Bd. of Edn., 58 Ohio St.2d 1, 4, 387 N.E.2d 1222 (1979)*. ***HN5***[⬆] Nothing in the language of the statute suggests, even indirectly, that the subsequent event is a judicial determination than an error occurred.

[P10]** Although Mansaray's version may be consistent with a reasonable or, in any event, a possible legislative objective, it is not an objective that is apparent. Nothing in the statute indicates that the General Assembly intended to open the state **[****6]** to liability for wrongful imprisonment when a conviction is reversed based on a procedural error that occurred prior to sentencing. Mansaray's interpretation would greatly expand the ability of defendants to seek compensation for wrongful imprisonment. If that is indeed what the General Assembly intended, it did a remarkable job of keeping it to itself—and it will be able to enact such legislation upon learning that we do not think that it has already done so.

[P11]** Finally, one last flaw in Mansaray's version of *R.C. 2743.48(A)(5)* is that this section of the statute will always be satisfied when a defendant satisfies *R.C. 2743.48(A)(1) through (4)*. When a defendant who satisfies *R.C. 2743.48(A)(1) through (4)* is released based on a determination that there has been an error in procedure, the determination will necessarily have occurred subsequent to sentencing and during or subsequent to imprisonment. We consider that to be an absurd result, which is to be avoided. Although satisfying *R.C. 2743.48(A)(5)* would not mean that a defendant is necessarily a wrongfully imprisoned individual, because a defendant would still have to satisfy *R.C. 2743.48(A)(1) through (4)*, Mansaray's version of *R.C. 2743.48(A)(5)* **[****7]** would swallow the actual-innocence part of the provision, rendering it superfluous. Nothing in the statute suggests that the General Assembly intended that result.

[P12]** We conclude that ***HN6***[⬆] when a defendant seeks a declaration that he is a wrongfully imprisoned individual and seeks to satisfy *R.C. 2743.48(A)(5)* by proving that an error in procedure resulted in his release, the error in procedure must have occurred subsequent to sentencing and during or subsequent to imprisonment.

[*281] *State's propositions of law*

[P13]** The state's first proposition of law states, "The *Fourth Amendment's* exclusionary rule is inapplicable to a subsequent civil proceeding for wrongful imprisonment under *R.C. 2743.48*." Given our analysis above, it is unnecessary for us to reach a conclusion with respect to this proposition of law, and we decline to embrace its categorical conclusion.

[P14]** The state's second proposition of law states, "*R.C. 2743.48(A)(5)* bars an action **[***38]** for wrongful imprisonment when the claimant's alleged 'error in procedure' is a trial court's denial of claimant's motion to suppress evidence that is subsequently reversed and the State elects to not retry the Defendant/Claimant." We also find it unnecessary to specifically **[****8]** address this proposition of law. Our analysis indicates that this proposition of law is in effect adopted because we cannot conceive of a situation in which a denial of a motion to suppress evidence would occur subsequent to sentencing and during or subsequent to imprisonment. Nevertheless, we are not inclined to endorse such a far-reaching proposition when it is not necessary to do so.

[P15]** The state's third proposition of law states, "Trial courts must not sua sponte take judicial notice of testimony or evidence in an underlying criminal proceeding when hearing a subsequent civil action for wrongful imprisonment under *R.C. 2743.48*." Again, given our analysis of *R.C. 2743.48*, it is not necessary to a resolution of this case for us to discuss this proposition of law.

CONCLUSION

[P16]** We conclude that the error in procedure, if that is what led to Mansaray's release from prison, did not occur subsequent to sentencing and during or

subsequent to imprisonment. Accordingly, Mansaray has not satisfied *R.C. 2743.48(A)(5)*, which means that on the facts of this case, he is not a wrongfully imprisoned individual. We reverse the judgment of the court of appeals.

Judgment reversed.

O'CONNOR, C.J., and O'DONNELL, **[****9]** LANZINGER, KENNEDY, FRENCH, and O'NEILL, JJ., concur.

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1. *State v. Barker, 149 Ohio St. 3d 1*
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   Search Type: Natural Language
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Cases	-None-

State v. Barker

Supreme Court of Ohio

November 17, 2015, Submitted; April 28, 2016, Decided

No. 2014-1560

Reporter
149 Ohio St. 3d 1 *; 2016-Ohio-2708 **; 73 N.E.3d 365 ***; 2016 Ohio LEXIS 1142 ****; 2016 WL 1697911

THE STATE OF OHIO, APPELLEE, v. BARKER, APPELLANT.

Prior History: APPEAL from the Court of Appeals for Hamilton County, No. C-130214, *2014-Ohio-3245* **[****1]** .

State v. Barker, 2014-Ohio-3245, 2014 Ohio App. LEXIS 3179 (Ohio Ct. App., Hamilton County, July 25, 2014)

Disposition: Judgment reversed and cause remanded.

HOLDINGS: [1]-The appellate court erred by finding that the statutory presumption of voluntariness created by *R.C. 2933.81(B)* based on an electronically recorded interrogation applied to appellant juvenile because the statute did not affect the analysis of whether a suspect knowingly, intelligently, and voluntarily waived his Miranda rights prior to making a statement to the police. As applied to juveniles, that presumption was unconstitutional; [2]-A totality of the circumstances analysis would necessarily have included consideration of factors such as appellant's age, the late-night time of the interrogation, the absence of a parent or guardian, his "borderline intelligence" and third-grade reading level, his statement that he was not familiar with Miranda rights other than having heard of them from television, and his apparent confusion about what an attorney was.

Core Terms

rights, juvenile, intelligently, knowingly, trial court, interrogation, voluntarily waive, recorded, due process, custodial interrogation, statutory presumption, electronically, waived, motion to suppress, Fifth Amendment, due-process, aggravated, suppressed, counts, court of appeals, burden of proof, plain error, murder, appellate court, specifications, confession, questioned, custodial statement, totality of the circumstances, constitutional right

Case Summary

Overview

Outcome
Judgment reversed and remanded.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Interrogation > Miranda

Rights > Notice & Warning

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

HN1[] Procedural Due Process, Scope of Protection

Miranda rights arise from the *Fifth Amendment to the United States Constitution*, whereas the necessity that a suspect's statement to police is voluntary implicates the guarantee of due process under the Fourteenth Amendment.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Due Process

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Self-Incrimination Privilege

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

HN2[] Criminal Process, Assistance of Counsel

The *Fifth Amendment to the United States Constitution* guarantees that no person shall be compelled in any criminal case to be a witness against himself, and that the accused shall have the Assistance of Counsel. The inherently coercive nature of custodial interrogation heightens the risk that a suspect will be denied the Fifth Amendment privilege not to be compelled to incriminate himself because custodial interrogation can undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely. That risk is even more troubling and acute when the subject of the interrogation is a juvenile.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Notice & Warning

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Self-Incrimination Privilege

HN3[] Procedural Due Process, Self-Incrimination Privilege

In light of the inherent coercion involved in custodial interrogation, Miranda established a set of prophylactic measures to safeguard the constitutional privilege against self-incrimination. In broad terms, Miranda held that the State may not use a defendant's statements from custodial interrogation unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Prior to questioning, the police must warn the suspect that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The Supreme Court has recognized the importance of a suspect's "real understanding" of his rights and his intelligent decision whether to exercise them.

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

Evidence > Burdens of Proof > Preponderance of Evidence

HN4[] Miranda Rights, Voluntary Waiver

If custodial interrogation continues in the absence of an attorney after a police officer advises a suspect of his rights, the government bears "a heavy burden" to demonstrate by a preponderance of the evidence that the suspect knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel before speaking to the police. A court may not presume a valid waiver either from the suspect's silence after warnings are given or from the fact that the suspect eventually confessed. Rather, the record must show that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. If the State does not satisfy its burden, no evidence obtained as a result of interrogation can be used.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

HN5[] Juvenile Proceedings, Statements of Juvenile

To determine whether a suspect knowingly, intelligently, and voluntarily waived his Miranda rights, courts examine the totality of the circumstances. When the suspect is a juvenile, the totality of the circumstances includes the juvenile's age, experience, education, background, and intelligence as well as his capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. A juvenile's access to advice from a parent, guardian, or custodian also plays a role in assuring that the juvenile's waiver is knowing, intelligent, and voluntary.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

HN6[] Burdens of Proof, Prosecution

R.C. 2933.81(B) states that all statements made by a person during a custodial interrogation in a place of detention are presumed to be voluntary if the statements made by the person are electronically recorded. Nothing in R.C. 2933.81(B) creates a presumption regarding a waiver of constitutional rights; by its terms, the legislative presumption applies only to whether a statement itself was voluntary. And, the voluntariness of a custodial statement does not answer whether the suspect knowingly, voluntarily, and intelligently waived his Miranda rights before making that statement, as those are distinct inquiries. Absent the State's compliance with Miranda and a suspect's valid waiver of his Fifth Amendment rights, even voluntary statements are inadmissible. There are no presumptions to aid the prosecution in proving a suspect's valid waiver of his Fifth Amendment rights. And, even if the statutory presumption in R.C. 2933.81(B) did encompass the voluntariness of a suspect's waiver, as opposed to merely the voluntariness of the suspect's statement itself, voluntariness is but one part of the inquiry under the Fifth Amendment. The State must prove not only that the suspect voluntarily waived his rights but also that the suspect acted knowingly and intelligently in doing so.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

HN7[] Burdens of Proof, Prosecution

A legislature may not supersede the constitutional rule announced in Miranda. Therefore, R.C. 2933.81(B) cannot lessen the protections announced in Miranda by removing the State's burden of proving a suspect's knowing, intelligent, and voluntary waiver of rights prior to making a statement during a custodial interrogation. Although Miranda allows for alternative legislative solutions that are at least as effective in apprising accused persons of their right and in assuring a continuous opportunity to exercise it, the act of recording a suspect's custodial statement does nothing to appraise a suspect of, or to protect the suspect's opportunity to exercise, his Fifth Amendment rights. While a recording might identify police coercion or its absence, nothing about the fact of recording ensures that a suspect understands his rights and knowingly and intelligently waives them. In short, applying R.C. 2933.81(B) to the question of a suspect's waiver of Miranda rights would impermissibly lower the State's burden of demonstrating a valid waiver of those rights.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Juvenile

Offenders > Juvenile Proceedings > Due Process

Criminal Law & Procedure > Commencement of Criminal
Proceedings > Interrogation > Voluntariness

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile

HN8 **Procedural Due Process, Scope of Protection**

Constitutional principles of due process preclude the use of coerced confessions as fundamentally unfair, regardless of whether the confession is true or false. Coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause. When a defendant challenges his confession as involuntary, due process requires that the state prove by a preponderance of the evidence that the confession was voluntary. The same standard applies to adults and juveniles. Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Due Process

Evidence > Burdens of Proof > Preponderance of Evidence

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile

Criminal Law & Procedure > Commencement of Criminal
Proceedings > Interrogation > Voluntariness

HN9 **Procedural Due Process, Self-Incrimination Privilege**

As applied to juveniles, the R.C. 2933.81(B) presumption violates due process. To satisfy due process with respect to a challenged confession, the State must prove by a preponderance of the evidence that the confession was voluntary. The due-process test for voluntariness takes into consideration the totality of the circumstances. The totality-of-the-circumstances test takes on even greater importance when applied to a juvenile. A 14- or 15-year-old cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. A 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, the court deals with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

HN10 **Procedural Due Process, Self-Incrimination Privilege**

The United States Supreme Court has refused to deviate from the totality-of-the-circumstances test when the question was whether a juvenile had waived his Miranda rights. The totality-of-the-circumstances test allows courts necessary flexibility to consider a juvenile's age and experience. The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation, including evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. It is these very features of the totality test that the statutory presumption in R.C. 2933.81(B) strips from the determination of

whether a juvenile's statement was voluntary.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Voluntary Waiver

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

HN11 **Juvenile Proceedings, Statements of Juvenile**

It is now commonly recognized that courts should take "special care" in scrutinizing a purported confession or waiver by a child. When an admission is obtained from a juvenile without counsel, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair. The totality of the circumstances from which a court must determine the voluntariness of a juvenile's statement includes not only the details of the interrogation but also the juvenile's unique characteristics.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

HN12 **Juvenile Proceedings, Statements of Juvenile**

Application of the statutory presumption would remove all consideration of the juvenile's unique characteristics from the due-process analysis unless the juvenile introduced evidence to disprove voluntariness when the interrogation was electronically recorded. But, there is no rational relationship between the existence of an electronic recording and the voluntariness of a suspect's statement. This is especially true where, as with *R.C. 2933.81(B)*, the statute requires only that the statement sought to be admitted, not the entire interrogation, be recorded.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Due Process

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements of Juvenile

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

HN13 **Procedural Due Process, Self-Incrimination Privilege**

In the end, the burden of establishing the voluntariness of a juvenile's custodial statement falls on the state. The Ohio General Assembly may not remove that burden via a presumption based on the existence of an electronic recording without running afoul of the due-process protections owed the child. States may adopt a higher standard under their own law, but they may not lessen the standard that the United States Constitution requires. *R.C. 2933.81(B)* impermissibly eliminates the State's burden of proving the voluntariness of a custodial statement when the statement was electronically recorded and, instead, places the burden on the defendant to prove that the statement was involuntary. For these reasons, *R.C. 2933.81(B)*, as applied to juveniles, is unconstitutional.

Headnotes/Summary

Headnotes

Constitutional law—Fifth Amendment—Rights to counsel and due process and privilege against self-incrimination—R.C. 2933.81(B)—Statutory presumption that electronically recorded statements made during custodial interrogation in place of detention are voluntary does not affect reviewing court's analysis of

whether defendant waived Miranda *rights—R.C. 2933.81(B) is unconstitutional as applied to juveniles because it impermissibly eliminates state's burden of proving voluntariness of custodial statement and places burden on defendant to prove that statement was involuntary—Court of appeals' judgment reversed and matter remanded*.

Counsel: Joseph T. Deters, Hamilton County Prosecuting Attorney, and Rachel Lipman Curran, Assistant Prosecuting Attorney, for appellee.

Timothy Young, Ohio Public Defender, and Sheryl Trzaska, Assistant Public Defender, for appellant.

Marsha L. Levick and Steven A. Drizin, urging reversal for amici curiae, Juvenile Law Center and Center on Wrongful Convictions of Youth, Bluhm Legal Clinic, Northwestern University School of Law.

Judges: FRENCH, J. O'CONNOR, C.J., and PFEIFER, LANZINGER, and O'NEILL, JJ., concur.
O'DONNELL, **[****2]** J., dissents, with an opinion joined by KENNEDY, J.

Opinion by: FRENCH

Opinion

[*368] [*1] FRENCH, J.**

[P1]** In this appeal, we examine the constitutional rights implicated by the custodial police interrogation of a juvenile suspect as well as the attendant constitutional limitations on interrogation that safeguard those rights. We also consider whether, and to what extent, the General Assembly may legislatively affect those rights and limitations without running afoul of due process.

[P2]** More specifically, we consider here the interaction between R.C. 2933.81(B) and a juvenile suspect's Fifth Amendment rights to counsel and against self-incrimination as articulated in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and his right to due process. As relevant here, R.C. 2933.81(B) provides as follows:

> All statements made by a person [suspected of enumerated crimes] during a custodial interrogation in a place of detention are presumed to be voluntary if the statements made by the person are electronically recorded. The person making the statements during the electronic recording of the custodial interrogation has the burden of proving that the statements made during the custodial interrogation were not voluntary.

[P3]** Appellant, Tyshawn Barker, argues that R.C. 2933.81(B) does not affect the analysis of whether a suspect intelligently, **[****3]** knowingly, and voluntarily waived **[*2]** his *Miranda* rights and, therefore, that appellee, the state of Ohio, retains the burden to prove a valid waiver. He also argues that as applied to statements a juvenile makes during a custodial interrogation, the R.C. 2933.81(B) presumption that such statements are voluntary is unconstitutional because it violates the juvenile's right to due process. On both counts, we agree.

Facts and procedural background

[P4]** On October 17, 2011, shortly before midnight, Cincinnati Police Detectives Kurt Ballman and Terry McGuffey questioned 15-year-old Barker at the offices of the Cincinnati Police Department Homicide Unit in relation to the fatal shootings of Ruddell Englemon and Carrielle Conn. Another suspect in the shootings, Dequantez Nixson, implicated Barker during questioning earlier that evening, and the police **[***369]** found Barker at Nixson's residence during the execution of a search warrant. Barker was undisputedly in police custody when he was questioned.

[P5]** The detectives began their interrogation, which was electronically recorded, at 11:57 p.m. by asking Barker his name, address, telephone number, school, mother's name, whether he could read and write, whether he had taken drugs or alcohol that **[****4]** day, and whether he had any health problems. The following exchange then occurred:

> DETECTIVE BALLMAN: I have got to read something to you. * * * What I'm going to do is I'm going to read you a notification.
> DEFENDANT BARKER: Um-hmm.

DETECTIVE BALLMAN: All right. When we are done I'm going to ask you if you understand it.
DEFENDANT BARKER: Okay.
DETECTIVE BALLMAN: And then I am going to ask you to sign it. You're not admitting to anything. I am just telling you it just says that I read you this, okay?
DEFENDANT BARKER: Okay.

[P6]** Detective Ballman proceeded to read Barker his *Miranda* rights—that he had the right to remain silent, that anything he said could be used as evidence against him, and that he had the right to the presence of an attorney, either retained or appointed if he could not afford one—as printed on a form entitled "CINCINNATI POLICE DEPARTMENT NOTIFICATION OF RIGHTS." Barker said that he understood what Detective Ballman had read, and he signed the notification-of-rights form below the preprinted statement, "I understand my **[*3]** rights." The form does not indicate that Barker was waiving his rights, nor did the detectives tell Barker that signing the form constituted a waiver.

[P7]** The **[****5]** detectives then questioned Barker's understanding of his rights:

DETECTIVE McGUFFEY: Tyshawn are you familiar with that form? You have heard of Miranda rights before?
DEFENDANT BARKER: No, sir, my first time.
DETECTIVE BALLMAN: First time you have read, but you have seen it on t.v., right?
DEFENDANT BARKER: Yes, sir.
DETECTIVE McGUFFEY: The whole thing about you have the right to remain silent and all that stuff?
DEFENDANT BARKER: Yeah.

[P8]** The detectives continued their interrogation without inquiring whether Barker wanted to continue or wanted to speak with an attorney, and Barker implicated himself in the shootings of Englemon and Conn.

[P9]** The detectives briefly questioned Barker again during the evening of October 18, 2011. When Detective Ballman stated that he was going to reread Barker his rights, Barker stated, "I seen an attorney—an attorney, whatever that is. * * * And she told me if you all to come up here just to ask for an attorney." Detective Ballman then asked whether Barker wanted to ask for an attorney, but Barker responded, "Just go on." Detective Ballman reread Barker his *Miranda* rights, and Barker again indicated that he understood. Detective Ballman wrote on the **[***370]** notification-of-rights **[****6]** form, "Attorney, still states will answer questions." The interview lasted only four minutes and consisted entirely of Barker's identification of codefendant Brendan Washington from a photograph.

[P10]** Barker was charged as a juvenile with aggravated murder and murder in relation to the deaths of Englemon and Conn. The juvenile court found probable cause to believe that Barker had committed the alleged offenses and ordered an amenability evaluation.

[P11]** Dr. Paul Deardorff evaluated Barker's mental health and filed a report with the juvenile court. Dr. Deardorff noted test evidence suggesting that Barker was "mildly mentally retarded," but he opined that Barker appeared to be "of borderline intelligence." Barker informed Dr. Deardorff that he had an individualized education program at school because "'I can't comprehend good.'" Barker's academic abilities ranged from the third-grade to the fifth-grade level, and Dr. Deardorff stated that Barker might suffer from a learning disability.

[P12]** **[*4]** Upon consideration of Dr. Deardorff's report and the evidence presented at the probable-cause hearing, the juvenile court relinquished jurisdiction and bound Barker over to the common pleas court.

[P13]** The Hamilton County **[****7]** Grand Jury indicted Barker on four counts of aggravated murder with firearm specifications and specifications that Barker, Washington, and Nixson purposefully killed Englemon and Conn to prevent their testimony in other criminal proceedings. The aggravated-murder counts related to Conn included additional specifications that Barker and his two codefendants committed the offense for the purpose of escaping detection, apprehension, trial or punishment for Englemon's death. The indictment also included two counts of conspiracy to commit, promote or facilitate aggravated murder, two counts of aggravated robbery, and three counts of tampering with evidence (on the night of Conn's murder), all with firearm specifications.

[P14]** Barker moved to suppress the statements he made during his custodial interrogation, arguing that he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights and that his statements were not voluntary. At the suppression hearing, the state introduced Barker's custodial statements through the interrogation transcript, the audio and video recordings, and the signed notification-of-rights form. Detective Ballman testified that he had no reason to believe

that **[****8]** Barker did not understand his *Miranda* rights. The state argued that because Barker's interrogation was electronically recorded, Barker had the burden under R.C. 2933.81(B) to demonstrate that his statements were involuntary. Barker's counsel cross-examined Detective Ballman but did not present any affirmative evidence.

[P15]** The trial court denied Barker's motion to suppress without mentioning either R.C. 2933.81(B) or the presumption of voluntariness. Although the trial court did not expressly find that Barker knowingly, intelligently, and voluntarily waived his *Miranda* rights, it found that Barker voluntarily made statements to the police after being properly advised of, and with an understanding of, his rights.

[P16]** Barker pled no contest to four counts of aggravated murder, two counts of aggravated robbery, and three counts of tampering with evidence, all with firearm specifications. The trial court found Barker guilty consistently with his pleas and sentenced him to an aggregate prison term of 25 years to life.

[P17] [***371]** On appeal, Barker initially challenged only his bindover and the effectiveness of his counsel during the bindover proceedings. In a supplemental brief, however, Barker additionally argued that the trial court **[****9]** erred by overruling his motion to suppress because he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights. As part of that argument, Barker asserted **[*5]** that R.C. 2933.81(B) has no bearing on the requirement that a waiver of constitutional rights must be knowing, intelligent, and voluntary.

[P18]** The First District Court of Appeals affirmed Barker's convictions. The First District acknowledged that courts determine whether a defendant has knowingly, intelligently, and voluntarily waived *Miranda* rights based on the totality of the circumstances, but it went on to state that "[w]here, as here, the interrogation of the defendant is recorded electronically, the statements made are presumed to have been made voluntarily." 2014-Ohio-3245, ¶ 12, citing R.C. 2933.81. The court stated that nothing in the record refuted the presumption that Barker's statements were voluntary. *Id.* The court also reviewed the recording of Barker's interrogation and stated that it found support for "the trial court's finding that [Barker] had voluntarily, knowingly and intelligently waived his *Miranda* rights," *id.* at ¶ 13, despite the absence of an express finding by the trial court to that effect.

[P19]** This court accepted jurisdiction to determine whether the presumption **[****10]** of voluntariness contained in R.C. 2933.81(B) violates due process when applied to a juvenile and whether that presumption affects a reviewing court's analysis of a purported waiver of *Miranda* rights. *See 141 Ohio St. 3d 1473, 2015-Ohio-554, 25 N.E.3d 1080*.

Analysis

[P20]** The constitutional rights implicated by custodial interrogation and the procedural safeguards in place to protect those rights guide our determination of the reach and constitutionality of R.C. 2933.81(B). This appeal involves related issues that arise out of separate constitutional rights: whether Barker intelligently, knowingly, and voluntarily waived his *Miranda* rights and whether Barker voluntarily decided to speak with the detectives. ***HN1***[⬆] *Miranda* rights arise from the Fifth Amendment to the United States Constitution, whereas the necessity that a suspect's statement to police is voluntary implicates the guarantee of due process under the Fourteenth Amendment. *See* Colorado v. Connelly, 479 U.S. 157, 169-170, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Here, Barker has challenged both whether the statements he made while in police custody were voluntary and whether he knowingly, intelligently, and voluntarily waived his *Miranda* rights before making the statements. We will address those challenges in reverse order.

Fifth Amendment* Miranda *rights

[P21]** ***HN2***[⬆] The Fifth Amendment to the United States Constitution guarantees that "'[n]o person * * * shall be compelled in any criminal case to be a witness against himself,'" and the Sixth Amendment guarantees that "'the accused **[****11]** shall * * * have the Assistance of Counsel.'" (Ellipses sic.) Miranda, 384 U.S. at ***[*6]*** 442, 86 S.Ct. 1602, 16 L.Ed.2d 694. The inherently coercive nature of custodial interrogation heightens the risk that a suspect will be denied the Fifth Amendment privilege not to be compelled to incriminate himself because custodial interrogation can "'undermine the individual's will to resist and * * * compel him to speak where he would not otherwise do so freely.'" (Ellipsis **[***372]** sic.) J.D.B. v. North Carolina, 564 U.S. 261, 269, 131 S.Ct. 2394, 2401, 180 L.Ed.2d 310 (2011), quoting Miranda at 467; Dickerson v. United States, 530 U.S. 428, 435, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). That risk is even more troubling and acute

when, as here, the subject of the interrogation is a juvenile. J.D.B. at 269.

[P22]** HN3[] In light of the inherent coercion involved in custodial interrogation, *Miranda* established "a set of prophylactic measures" to safeguard the constitutional privilege against self-incrimination. *Id.* In broad terms, *Miranda* held that the state may not use a defendant's statements from custodial interrogation "unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda at 444. Prior to questioning, the police must warn the suspect "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." **[****12]** *Id.* The Supreme Court recognized the importance of a suspect's "real understanding" of his rights and his intelligent decision whether to exercise them. Id. at 469.

[P23]** HN4[] If custodial interrogation continues in the absence of an attorney after a police officer advises a suspect of his rights, the government bears "a heavy burden" to demonstrate by a preponderance of the evidence that the suspect "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel" before speaking to the police. Miranda at 475, citing Escobedo v. Illinois, 378 U.S. 478, 490, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), fn. 14; Connelly, 479 U.S. at 169, 107 S.Ct. 515, 93 L.Ed.2d 473. *See also* State v. Treesh, 90 Ohio St.3d 460, 470, 2001-Ohio-4, 739 N.E.2d 749 (2001) (recognizing requirement of knowing, intelligent waiver). A court may not presume a valid waiver either from the suspect's silence after warnings are given or from the fact that the suspect eventually confessed. Miranda at 475. Rather, the record must show "'that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.'" *Id.*, quoting Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962). If the state does not satisfy its burden, "no evidence obtained as a result of interrogation can be used." Id. at 479.

[P24]** **[*7]** HN5[] To determine whether a suspect knowingly, intelligently, and voluntarily waived his *Miranda* rights, courts examine the totality of the circumstances. **[****13]** State v. Clark, 38 Ohio St.3d 252, 261, 527 N.E.2d 844 (1988). When the suspect is a juvenile, the totality of the circumstances includes "the juvenile's age, experience, education, background, and intelligence" as well as his "capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). A juvenile's access to advice from a parent, guardian or custodian also plays a role in assuring that the juvenile's waiver is knowing, intelligent, and voluntary. *See* In re C.S., 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 96.

R.C. 2933.81(B) does not apply to waiver of Fifth Amendment rights

[P25]** Barker's second proposition of law asserts that the R.C. 2933.81(B) presumption that an electronically recorded custodial statement is voluntary does **[***373]** not affect the analysis of whether a suspect waived his *Miranda* rights, i.e., his rights to remain silent and to have an attorney present. We turn, first, to the statute.

[P26]** HN6[] R.C. 2933.81(B) states that "[a]ll *statements* made by a person * * * during a custodial interrogation in a place of detention are presumed to be voluntary if the statements made by the person are electronically recorded." (Emphasis added.) Nothing in R.C. 2933.81(B) creates a presumption regarding a waiver of constitutional rights; by its terms, the legislative presumption applies only to whether a statement itself was voluntary. And the **[****14]** voluntariness of a custodial statement does not answer whether the suspect knowingly, voluntarily, and intelligently waived his *Miranda* rights before making that statement, as those are distinct inquiries. Connelly, 479 U.S. at 163-164, 169-170, 107 S.Ct. 515, 93 L.Ed.2d 473; State v. Eley, 77 Ohio St.3d 174, 178, 1996-Ohio-323, 672 N.E.2d 640 (1996). Absent the state's compliance with *Miranda* and a suspect's valid waiver of his Fifth Amendment rights, even voluntary statements are inadmissible. Dickerson, 530 U.S. at 444, 120 S.Ct. 2326, 147 L.Ed.2d 405.

[P27]** We have held that there are no presumptions to aid the prosecution in proving a suspect's valid waiver of his Fifth Amendment rights. State v. Edwards, 49 Ohio St.2d 31, 38, 358 N.E.2d 1051 (1976), *vacated on other groundsEdwards v. Ohio, 438 U.S. 911, 98 S. Ct. 3147, 57 L. Ed. 2d 1155 (1978)*. *See also* Miranda, 384 U.S. at 475, 86 S.Ct. 1602, 16 L.Ed.2d 694, quoting Carnley, 369 U.S. at 516, 82 S.Ct. 884, 8 L.Ed.2d 70. And even if the statutory presumption in R.C. 2933.81(B) did encompass the voluntariness of a suspect's waiver, as opposed to merely the voluntariness of the suspect's statement itself,

voluntariness is but one part of the inquiry under the *Fifth Amendment*. The state must prove not only that the suspect voluntarily waived his rights but also that the suspect acted **[*8]** knowingly and intelligently in doing so. *See State v. Dailey, 53 Ohio St.3d 88, 91-92, 559 N.E.2d 459 (1990)* (separately analyzing whether waiver was knowing and intelligent despite holding that a waiver is voluntary "absent evidence that [the suspect's] will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct").

[P28]** *HN7*[↑] A legislature may not supersede the **[****15]** constitutional rule announced in *Miranda*.*Dickerson at 444*. Therefore, *R.C. 2933.81(B)* cannot lessen the protections announced in *Miranda* by removing the state's burden of proving a suspect's knowing, intelligent, and voluntary waiver of rights prior to making a statement during a custodial interrogation. Although *Miranda* allows for alternative legislative solutions that are "'at least as effective in apprising accused persons of their right * * * and in assuring a continuous opportunity to exercise it,'" *Dickerson at 440*, quoting *Miranda at 467*, the act of recording a suspect's custodial statement does nothing to appraise a suspect of, or to protect the suspect's opportunity to exercise, his *Fifth Amendment* rights. While a recording might identify police coercion or its absence, nothing about the fact of recording ensures that a suspect understands his rights and knowingly and intelligently waives them. In short, applying *R.C. 2933.81(B)* to the question of a suspect's waiver of *Miranda* rights would impermissibly lower the state's burden of demonstrating a valid waiver of those rights.

[P29]** In this and other cases, the First District has conflated the questions of the voluntariness of a suspect's waiver of *Miranda* **[***374]** rights and the voluntariness of a suspect's custodial statement. Here, **[****16]** the First District applied *R.C. 2933.81(B)* in its discussion of the "Waiver of *Miranda* Rights," although it ultimately concluded that "[n]othing in the record refutes the presumption that [Barker's] *statements* were made voluntarily." (Emphasis added.) *2014-Ohio-3245, at ¶ 12*. It is not entirely clear from the First District's opinion how it applied *R.C. 2933.81(B)* with respect to the waiver issue in this case. But in other recent cases, the First District has expressly applied *R.C. 2933.81(B)* to the question whether a defendant knowingly, intelligently, and voluntarily waived *Miranda* rights and shifted the burden to the defendant to disprove waiver. *See In re K.C., 2015-Ohio-1613, 32 N.E.3d 988, ¶ 25 (1st Dist.)* (state bears the burden of proving knowing, intelligent, and voluntary waiver of *Miranda* rights when *R.C. 2933.81(B)* does not shift that burden to the defendant); *State v. Bell, 2015-Ohio-1711, 34 N.E.3d 405, ¶ 36 (1st Dist.)*, *appeal not accepted, 143 Ohio St. 3d 1480, 2015-Ohio-3958, 38 N.E.3d 901* (*R.C. 2933.81(B)* operates as an exception to the general rule that the state bears the burden to prove a knowing, intelligent, and voluntary waiver of *Miranda* rights).

[P30]** **[*9]** Contrary to the First District, we hold that the statutory presumption of voluntariness created by *R.C. 2933.81(B)* does not affect a reviewing court's analysis of whether a defendant waived his *Miranda* rights. The state retains the burden of proving a knowing, intelligent, and voluntary waiver by a preponderance **[****17]** of the evidence. *Miranda, 384 U.S. at 475, 86 S.Ct. 1602, 16 L.Ed.2d 694*; *Connelly, 479 U.S. at 169, 107 S.Ct. 515, 93 L.Ed.2d. 473*. Accordingly, we adopt Barker's second proposition of law.

Due-process rights

[P31]** *HN8*[↑] Constitutional principles of due process preclude the use of coerced confessions as fundamentally unfair, regardless of whether the confession is true or false. *Lego v. Twomey, 404 U.S. 477, 483, 485, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972)*, citing *Rogers v. Richmond, 365 U.S. 534, 540-541, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961)*. "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the *Due Process Clause*." *Connelly at 167*.

[P32]** When a defendant challenges his confession as involuntary, due process requires that the state prove by a preponderance of the evidence that the confession was voluntary. *Lego at 489*. The same standard applies to adults and juveniles: "'Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.'" *In re Gault, 387 U.S. 1, 27, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967)*, quoting with approval *Haley v. Ohio, 332 U.S. 596, 601, 68 S.Ct. 302, 92 L.Ed. 224 (1948)* (lead opinion). *See also In re Watson, 47 Ohio St.3d 86, 548 N.E.2d 210 (1989), paragraph one of the syllabus*.

[P33]** Barker's first proposition of law asserts that as applied to a juvenile, *R.C. 2933.81(B)* violates due process because juveniles require greater protections than adults during interrogation. Barker specifically

argues that application of R.C. 2933.81(B) to a juvenile impermissibly shifts the burden of proving voluntariness from the state and places on the juvenile the burden of proving involuntariness, **[****18]** in violation of due-process requirements. The state responds that Barker waived his due-process challenge by not raising it in the trial court or the court of appeals and that **[***375]** a decision on this issue would be merely advisory.

[P34]** The state introduced R.C. 2933.81(B) into this case by arguing, in response to Barker's claim that he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights, that the statute imposed upon Barker the burden of proving that his recorded statements were involuntary. As we have already held, however, R.C. 2933.81(B) does not affect the resolution of whether Barker validly waived his *Miranda* rights. Moreover, the trial court did not rely on R.C. 2933.81(B) in denying Barker's motion to suppress. The issue whether R.C. 2933.81(B)'s **[*10]** burden-shifting paradigm, as applied to juveniles, violated due process was not apparent in the trial court.

[P35]** Barker's argument in the court of appeals mirrored the argument made in his motion to suppress, i.e., that he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights. His appellate argument also asserted, presumably in response to the state's argument at the suppression hearing, that R.C. 2933.81(B) has no bearing on the requirement of a knowing, intelligent, and voluntary **[****19]** waiver. But the First District, while discussing Barker's argument that he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights, held that R.C. 2933.81(B) placed a burden on Barker to rebut the presumption that his statements to the police were voluntary.

[P36]** Barker concedes that he did not argue in either the trial court or the First District that application of R.C. 2933.81(B) to a juvenile would violate due process. But he claims that he raised that challenge "at the first opportunity—after the First District merged its analysis of whether [he] knowingly, intelligently, and voluntarily waived his *Miranda* rights * * * with the statutory presumption of voluntariness under R.C. 2933.81." Indeed, Barker had no reason to raise an as-applied due-process challenge in the trial court or in his appeal to the First District because the trial court did not apply R.C. 2933.81(B). It was the First District that applied R.C. 2933.81(B) in a manner that Barker contends violates due process. Barker promptly raised that challenge in his memorandum in support of jurisdiction before this court, and we accepted jurisdiction despite the state's assertion of waiver. *See 141 Ohio St. 3d 1473, 2015-Ohio-554, 25 N.E.3d 1080*.

[P37]** Despite the dissent's charge that a decision on this issue contravenes our law regarding **[****20]** forfeiture and waiver, we reject the state's invitation to sidestep the due-process issue in this case. Even were we to agree with the state that Barker waived his due-process challenge to the application of R.C. 2933.81(B) to juveniles, review is appropriate here. In the criminal context, this court has considered constitutional challenges to the application of statutes despite clear waiver "in specific cases of plain error or where the rights and interests involved may warrant it." *In re M.D., 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988)*. *Accord* Crim.R. 52(B). The constitutional rights at issue here and the importance of those rights to juveniles would justify our review even if Barker had waived a due-process challenge. Thus, contrary to the dissent's imputation, review of Barker's due-process challenge is consistent with the law of this state.

[P38]** HN9[↑] As applied to juveniles, the R.C. 2933.81(B) presumption violates due process. To satisfy due process with respect to a challenged confession, the state must prove by a preponderance of the evidence that the confession was voluntary. **[*11]** *Lego, 404 U.S. at 489, 92 S.Ct. 619, 30 L.Ed.2d 618*. The due-process test **[***376]** for voluntariness takes into consideration the totality of the circumstances. *Dickerson, 530 U.S. at 433-434, 120 S.Ct. 2326, 147 L.Ed.2d 405*, citing *Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)*.

[P39]** The totality-of-the-circumstances test takes on even greater importance when applied to a juvenile. **[****21]** A 14-or 15-year-old "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions." *Gallegos v. Colorado, 370 U.S. 49, 53-54, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962)*, citing *Haley, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224*. The United States Supreme Court has observed:

> [A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

Id. at 54.

[P40]** The United States Supreme Court's analysis in *Fare, 442 U.S. at 724-725, 99 S.Ct. 2560, 61 L.Ed.2d 197*, is instructive. There, ***HN10***[⬆] the Supreme Court refused to deviate from the totality-of-the-circumstances test when the question was whether a juvenile had waived his *Miranda* rights. The totality-of-the-circumstances test allows courts necessary flexibility to consider a juvenile's age and experience. *Id. at 725*. The court stated as follows:

> The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation, [including] evaluation of the juvenile's age, experience, education, **[****22]** background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his *Fifth Amendment* rights, and the consequences of waiving those rights.

Id. It is these very features of the totality test that the statutory presumption in *R.C. 2933.81(B)* strips from the determination of whether a juvenile's statement was voluntary.

[P41]** ***HN11***[⬆] "'It is now commonly recognized that courts should take "special care" in scrutinizing a purported confession or waiver by a child.'" *In re C.S., 115 Ohio St.3d 267, **[*12]** 2007-Ohio-4919, 874 N.E.2d 1177, at ¶ 106*, quoting *In re Manuel R., 207 Conn. 725, 737-738, 543 A.2d 719 (1988)*, citing *Haley, 332 U.S. at 599, 68 S.Ct. 302, 92 L.Ed. 224*. When an admission is obtained from a juvenile without counsel, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *In re Gault, 387 U.S. at 55, 87 S.Ct. 1428, 18 L.Ed.2d 527*.

[P42]** The totality of the circumstances from which a court must determine the voluntariness of a juvenile's statement includes not only the details of the interrogation but also the juvenile's unique characteristics. That analysis here would necessarily include consideration of factors such as Barker's age, the late-night time of the interrogation, the absence of a **[***377]** parent or guardian, Barker's "borderline **[****23]** intelligence" and third-grade reading level, Barker's statement that he was not familiar with *Miranda* rights other than having heard of them from television, and Barker's apparent confusion about what an attorney was. ***HN12***[⬆] Application of the statutory presumption would remove all consideration of the juvenile's unique characteristics from the due-process analysis unless the juvenile introduced evidence to disprove voluntariness when the interrogation was electronically recorded. But there is no rational relationship between the existence of an electronic recording and the voluntariness of a suspect's statement. This is especially true where, as with *R.C. 2933.81(B)*, the statute requires only that the *statement* sought to be admitted, not the entire interrogation, be recorded.

[P43]** ***HN13***[⬆] In the end, the burden of establishing the voluntariness of a juvenile's custodial statement falls on the state. The General Assembly may not remove that burden via a presumption based on the existence of an electronic recording without running afoul of the due-process protections owed the child. States may adopt a higher standard under their own law, *Lego, 404 U.S. at 489, 92 S.Ct. 619, 30 L.Ed.2d 618*, but they may not lessen the standard that the United States Constitution requires. **[****24]** *R.C. 2933.81(B)* impermissibly eliminates the state's burden of proving the voluntariness of a custodial statement when the statement was electronically recorded and, instead, places the burden on the defendant to prove that the statement was involuntary. For these reasons, we conclude that *R.C. 2933.81(B)*, as applied to juveniles, is unconstitutional. Accordingly, we adopt Barker's first proposition of law.

Conclusion

[P44]** The statutory presumption of voluntariness created by *R.C. 2933.81(B)* does not affect the analysis of whether a suspect knowingly, intelligently, and voluntarily waived his *Miranda* rights prior to making a statement to the police. As applied to juveniles, that presumption is unconstitutional. We therefore reverse the First District's judgment and remand this matter to that court to **[*13]** consider Barker's supplemental assignment of error without the *R.C. 2933.81(B)* presumption and with the understanding that the burden rested squarely on the state to demonstrate both that Barker knowingly, intelligently, and voluntarily waived his *Miranda* rights and that his statements to the police were voluntary.

Judgment reversed

and cause remanded.

O'CONNOR, C.J., and PFEIFER, LANZINGER, and O'NEILL, JJ., concur.

O'DONNELL, J., dissents, with an opinion **[****25]** joined by KENNEDY, J.

Dissent by: O'DONNELL

Dissent

O'DONNELL, J., dissenting.

[P45]** Respectfully, I dissent.

[P46]** The majority opinion is another example of the court's haste to change the law regarding juveniles in Ohio. This rush to judgment tramples our law regarding the forfeiture of matters not raised in the trial court or otherwise presented for appeal or properly considered by an appellate court and what should be considered in a plain error analysis.

[P47]** In this case, Tyshawn Barker failed to challenge the constitutionality of *R.C. 2933.81(B)* in either his motion to suppress his statements to police or in an assignment of error in the court of appeals, and he concedes in this court that "when the trial court overruled the motion **[***378]** to suppress, it did not apply the statutory presumption of voluntariness set forth in *R.C. 2933.81(B)*."

[P48]** The failure to challenge the constitutionality of a statute in the trial and appellate courts forfeits all but plain error on appeal, and the burden of demonstrating plain error is on the party asserting it. However, Barker has failed to demonstrate that the outcome would have been different, and there is nothing to suggest that but for the statutory presumption, his statement to police would have been suppressed. **[****26]**

[P49]** Accordingly, because the constitutionality of *R.C. 2933.81(B)* is not properly before the court, I would dismiss this appeal as improvidently accepted.

Facts and Procedural History

[P50]** Barker, Dequantez Nixson, Brendan Washington, and Carrielle Conn went to an apartment building intending to shoot Samuel Jeffries, who had recently filed domestic violence charges against Nixson's mother. Barker and Nixson waited in the hallway while Washington and Conn knocked on Jeffries's door. However, Ruddell Englemon answered the door, and according to Barker, Nixson, and Washington, Conn shot him before the group fled the scene. Englemon later died from his injuries.

[P51]** **[*14]** Two days later, Nixson, Barker, and Washington, concerned that Conn would go to the police, lured her out into an isolated wooded area near some railroad tracks and shot her several times, killing her.

[P52]** The next day, the police took Barker, who was 15 years old at the time, into custody, and Detective Kurt Ballman read him his *Miranda* rights and confirmed that he understood them before questioning Barker about the shootings. After Barker responded, "Yes, sir," and signed a form acknowledging that he had been informed of his rights, he made statements incriminating **[****27]** himself in both shootings.

[P53]** During a second interview, Barker informed detectives that he had seen an attorney, and when asked whether he wanted an attorney to be present, Barker stated, "I do want to talk to make the situation a little bit more better for you all, but—." Ballman replied to Barker, "Okay. You tell us what you want to do. * * * Are you asking for an attorney?" Barker answered, "Just go on." Ballman then reread Barker his *Miranda* rights and asked whether Barker understood. Barker replied, "Yes, sir." He then identified Washington from a photograph.

[P54]** The state filed a complaint in the juvenile court, alleging that Barker was delinquent for committing the aggravated murders of Conn and Englemon. The juvenile court found probable cause to believe that Barker committed these crimes and that he was not amenable to rehabilitation in the juvenile system, and it bound him over to the common pleas court.

[P55]** A grand jury indicted Barker for the aggravated murders of Englemon and Conn, with firearm specifications. There were also specifications that he and his two codefendants purposefully killed Englemon and Conn to prevent their testimony in other criminal proceedings and that they **[****28]** murdered Conn to escape detection, apprehension, trial, or punishment for Englemon's death. Barker was also indicted for conspiracy, aggravated robbery, and tampering with evidence, all with firearm specifications.

[P56]** Barker moved the trial court to suppress statements he made during the interrogation, asserting that he had not knowingly, intelligently, and voluntarily waived his *Miranda* rights. He did not, however, challenge the constitutionality of **[***379]** R.C. 2933.81(B). The trial court denied the motion, finding that Barker understood his rights and had voluntarily made statements to the police.

[P57]** Barker pleaded no contest to the charges against him. The trial court found him guilty of four counts of aggravated murder, two counts of aggravated robbery, and three counts of tampering with evidence, all with firearm specifications, and sentenced him to an aggregate term of 25 years to life in prison.

[P58] [*15]** Barker appealed to the First District Court of Appeals, arguing that defense counsel was ineffective for failing to present evidence on his behalf at his amenability hearing and that the juvenile court had abused its discretion when it bound him over for trial as an adult. He also filed a supplemental brief in **[****29]** which he argued that the trial court erred when it overruled his motion to suppress, asserting that he did not knowingly, intelligently, or voluntarily waive his *Miranda* rights. Barker did not challenge the constitutionality of R.C. 2933.81(B).

[P59]** The court of appeals affirmed Barker's convictions and held that the trial court's finding that Barker had knowingly, intelligently, and voluntarily waived his *Miranda* rights was supported by the record. The court of appeals stated that "[n]othing in the record refutes the presumption that Tyshawn's statements were made voluntarily" and that "[b]ased on our review of the recording, we conclude that the trial court's finding that Tyshawn had voluntarily, knowingly and intelligently waived his *Miranda* rights was supported by the record. The court properly denied the motion to suppress." 2014-Ohio-3245, ¶ 12-13.

Positions of the Parties

[P60]** On appeal to this court, Barker asserts that the court of appeals' application of R.C. 2933.81(B) is plain error because it implicates the constitutional protections of the Due Process Clause as applied to a juvenile and violates the constitutional protections set forth in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and its progeny. He argues for the first time in this case that the statutory presumption that a custodial statement is voluntary **[****30]** under R.C. 2933.81(B) is unconstitutional because it shifts the burden of proving that statements were voluntarily made from the state to the accused. He contends that a juvenile's will is more easily overborne by police pressure and inducements than an adult's and that requiring a juvenile to prove that a videotaped interrogation is involuntary thus violates due process. Barker further argues that the statutory presumption of voluntariness does not affect a reviewing court's analysis of whether the accused waived *Miranda* rights. He maintains that the court of appeals improperly applied the presumption from R.C. 2933.81(B) rather than the *Miranda* totality of the circumstances test.

[P61]** The state contends that res judicata bars Barker's claim that R.C. 2933.81(B) is unconstitutional because he did not raise the issue in the trial court or the court of appeals. It therefore maintains that Barker's request for this court to rule on the constitutionality of R.C. 2933.81(B) is tantamount to a request for an advisory opinion, because the trial court never presumed that Barker's statement was voluntary when it ruled on his motion to suppress, and the court of appeals did not apply the statute when considering whether Barker waived his **[*16]** *Miranda* rights but, **[****31]** rather, reviewed the totality of the circumstances surrounding his interrogation.

[P62]** Barker responds that the constitutionality of R.C. 2933.81(B) was properly **[***380]** preserved, because he filed a motion to suppress the statements made during his interrogation and the appellate court reviewed that issue.

[P63]** Accordingly, before this court addresses Barker's challenge to R.C. 2933.81(B), a determination should be made regarding whether the matter is properly before this court for review.

Law and Analysis

[P64]** In State v. Quarterman, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, we noted the "well-established rule that "'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court."'" *Id.* at ¶ 15, quoting State v. Awan, 22 Ohio St.3d 120, 122, 22 Ohio B. 199, 489 N.E.2d 277 (1986), quoting State v. Childs, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the

syllabus. And this court "will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court." State v. Price, 60 Ohio St.2d 136, 398 N.E.2d 772 (1979), paragraph two of the syllabus.

[P65]** Crim.R. 52(B) affords appellate courts discretion to correct "[p]lain errors or defects affecting substantial rights" notwithstanding the accused's failure to meet his obligation to bring **[****32]** those errors to the attention of the trial court. However, the accused bears the burden of proof to demonstrate plain error on the record, Quarterman at ¶ 16, and must show "an error, *i.e.*, a deviation from a legal rule" that constitutes "an 'obvious' defect in the trial proceedings," State v. Barnes, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240 (2002), quoting State v. Sanders, 92 Ohio St. 3d 245, 257, 2001-Ohio-189, 750 N.E.2d 90 (2001). However, even if the error is obvious, it must have affected substantial rights, and "[w]e have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." *Id.* Thus, as we recently clarified in State v. Rogers, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22, the accused is "required to demonstrate a reasonable *probability* that the error resulted in prejudice." (Emphasis sic.)

[P66]** But even when the accused demonstrates that a plain error affected the outcome of the proceeding, "an appellate court is not required to correct it; we have 'admonish[ed] courts to notice plain error "with the utmost caution, under exceptional circumstances and *only* to prevent a manifest miscarriage of justice."'" **[*17]** (Emphasis sic.) *Id.* at ¶ 23, quoting Barnes at 27, quoting State v. Long, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

[P67]** Here, Barker did not raise any challenge to R.C. 2933.81(B) in his motion to suppress filed in the trial court or in an assignment of error on appeal. Rather, he argued only that he did not **[****33]** knowingly, intelligently, or voluntarily waive his *Miranda* rights, and although he briefly addressed the statutory presumption of voluntariness in his appellate brief, he nonetheless did not question the statute's constitutionality before the appellate court. Accordingly, Barker has forfeited all but plain error, and it is his burden to demonstrate a reasonable probability that but for an error in applying R.C. 2933.81(B), his statements would have been suppressed.

[P68]** In my view, there is no reasonable probability that Barker's statements to police would have been suppressed, and reversal here is not necessary to correct a manifest miscarriage of justice. Importantly, Barker concedes that the trial court did not apply R.C. 2933.81(B) when it denied **[***381]** his motion to suppress, and therefore he cannot demonstrate that it committed any error, much less plain error, in this regard. And although the court of appeals acknowledged the existence of R.C. 2933.81(B), there is no indication that it would have ordered Barker's statements suppressed but for the statutory presumption that statements made during an electronically recorded interrogation of a suspect are voluntary. As the appellate court recognized, it had the duty to defer to the trial **[****34]** court's factual findings, and based on its independent review of the interrogation recording, it upheld the trial court's finding that Barker knowingly, intelligently, and voluntarily waived his *Miranda* rights. Nothing in the record shows that the statutory presumption materially impacted the appellate court's analysis or that the trial court erred in denying the motion to suppress.

[P69]** Thus, this is not a case in which the accused's statement to police would have been suppressed but for the presumption of voluntariness established by R.C. 2933.81(B), and because the constitutional question at issue here has not been presented for consideration by the trial and appellate court in the first instance, it is not properly before our court. For these reasons, I would dismiss the appeal as improvidently accepted.

KENNEDY, J., concurs in the foregoing opinion.

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