FREEING THE INNOCENT:
ACTUAL INNOCENCE AND THE WRIT OF HABEAS CORPUS

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Reasonable minds may disagree on many issues that arise in the criminal justice system. However, the one principle on which everybody would be expected to agree is that prisons are for the guilty and the courts should ensure that the innocent are freed. In fact, this elemental idea is far from universally accepted. See *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996), Judge Womack dissent. This article examines the constitutional basis for the contention that an actually innocent person should have access to the courts to challenge his conviction.

> *At the threshold, we must decide whether the Due Process Clause of the United States Constitution forbids, not just the execution, but the incarceration as well of an innocent person. We need not pause long to answer this question. . . . We think it clear . . . that the incarceration of an innocent person is as much a violation of the Due process Clause as is the execution of such a person. It follows that claims of actual innocence are cognizable by this Court in a postconviction habeas corpus proceeding whether the punishment assessed is death or confinement. In either case, such claims raise issues of federal constitutional magnitude.*
>
> *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996).

In a democratic society, two propositions are clear. Truth is the province of the judiciary, and courts, staffed by fallible humans, inevitably err. As a consequence, some means must exist to exonerate those legally guilty but actually innocent, balancing the State's interests in finality and efficiency with its interest in fair play. As the Court of Criminal Appeals has recognized, that means is the writ of habeas corpus.

The "Great Writ" of habeas corpus, "the most celebrated writ in the English Law," 3

William Blackstone, *Commentaries* at 129, offers protection against "illegal restraint or confinement." *Fay v. Noia*, 372 U.S. 391, 400 (1962). Habeas corpus relief is based on the principle "that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Id.* at 402. The Texas Constitution vests in the Courts the power to issue writs of habeas corpus, TEX. CONST. art. 5, § 5, construed to encompass claims raising jurisdictional or fundamental defects or constitutional issues. *Ex parte Tuley*, 109 S.W.3d 388 (Tex.Crim.App. 2002); *Ex parte Graves*, 70 S.W.3d 103, 109 (Tex.Crim.App. 2002). Claims of actual innocence raise issues of constitutional magnitude.

Federal Due Process

A. Introduction: *Herrera* and *Schlup* Claims

Assertions of actual innocence are categorized either as *Herrera*-type claims or *Schlup*-type claims. *Herrera v. Collins,* 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *Schlup v. Delo,* 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). *See Elizondo,* 947 S.W.2d at 208; *Ex Parte Franklin*, 72 S.W.3d 671 (Tex.Crim.App. 2002). A *Herrera*-type claim involves a substantive claim in which the applicant asserts a bare claim of innocence based solely on newly discovered evidence. *Schlup,* 513 U.S. at 314, 115 S.Ct. 851. *See also Elizondo,* 947 S.W.2d at 208. A *Schlup*-type claim, on the other hand, is a procedural claim in which the applicant's claim of innocence does not alone provide a basis for relief but is tied to a showing of constitutional error at trial. *Schlup,* 513 U.S. at 314, 115

S.Ct. 851.

The *Herrera* decision serves as sound precedent for recognition of habeas relief when an actual innocence claim alone is raised. In *Herrera*, six members of the Court suggested execution of the innocent was antithetical to our constitutional system. Justice O'Connor, joined by Justice Kennedy, stated that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." 506 U.S. at 420. Justice O'Connor then concluded that the existence of federal relief for such a person need not be addressed in the case before the Court. *Id.* Justice White stated that "a persuasive showing of actual innocence made after trial . . . would render unconstitutional the execution of the petitioner in this case." *Id.* at 429. He also declined to finally decide the issue on the record before the Court. Justice Blackmun, joined in dissent by Justices Souter and Stevens, stated that executing an innocent person is the "ultimate arbitrary imposition" and unquestionably violates both the Eighth and Fourteenth Amendments.[1] *Id.* at 437.

The Court of Criminal Appeals agreed with the "sound and fundamental principle of jurisprudence" that the execution of an innocent person "would surely constitute a violation of a constitutional or fundamental right." *Holmes v. Honorable Court of Appeals for the Third Dist,* 885 S.W.2d 389, 397 (Tex.Crim.App. 1994). In *Elizondo,* this Court extended its holding, verifying that the Due Process Clause of the Fourteenth Amendment forbids the incarceration of an innocent person. 947 S.W.2d at 204.

This principle is essential in a constitutional system. "After all, the central purpose

[1] Justices Scalia and Thomas, concurring in the judgment of the Court, indicated execution of the innocent would not transgress the Constitution. 506 U.S. at 427-430. The majority of the Court simply assumed violation, without deciding the issue.

of any system of criminal justice is to convict the guilty and free the innocent." *Herrera*, 506 U.S. at 399. *See United States v. Nobles*, 422 U.S. 225, 230, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). Further, in this context, no legally cognizable distinction exists between a prisoner sentenced to death and one sentenced to a term of imprisonment. "It would be a rather strange jurisprudence . . . which held that under our Constitution [the actually innocent] could not be executed, but that he could spend the rest of his life in prison." *Herrera*, 506 U.S. at 405.

Conceptually, relief for the actually innocent arises under the Due Process Clause of the Fourteenth Amendment. In fact, both procedural and substantive due process demand habeas relief under these circumstances.

B. <u>Due Process, Generally</u>

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" The Due Process Clause of the Fourteenth Amendment states the same as to the action of a State. The Clause protects individuals against two types of government action. "Substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952), or interferes with rights "implicit in the concept of ordered liberty." *Palko v. Connecticut,* 302 U.S. 319, 325-326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). Additionally, even when government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it still must be implemented in a fair manner. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47

L.Ed.2d 18 (1976). This requirement traditionally is denominated "procedural due process." *United States v. Salerno,* 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987). Both procedural and substantive due process provide bases for constitutional exoneration of a prisoner with a clear and convincing claim of actual innocence.

C. <u>Procedural Due Process</u>

Criminal process is deficient when it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 445-446, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 202, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)). The province and duty of the judiciary is to correct its own errors. Barring a prisoner with a genuine claim of actual innocence without offering a procedure for vindication of that claim by judicial review offends fundamental principles of justice.

A balancing of relevant interests reveals the necessity of recognizing a claim to procedural due process. Certainly, the State's interest in finality is important, but a society that knowingly imprisons the innocent cannot call itself just. The interest to the prisoner is paramount: No price can be placed on freedom. Further, the State has an interest in liberating the innocent: Any democratic society by definition cherishes freedom and abhors imprisoning the innocent. Finally, the cost to the State is slight. The judiciary will confront litigation of only a very few claims that satisfy an extraordinarily high standard.

As the Court noted in *Holmes*, a balance of interests compels the conclusion that due process requires provision of a judicial forum in which to litigate these claims. 885 S.W.2d

at 400. This high standard of proof minimizes any burden on the State. In fact, because the presumption of innocence dissolves upon a finding of guilt, the burden of proof can be placed upon the applicant. Consistently adhering to this high standard, the Court holds the habeas court must be "convinced that [the] new facts unquestionably establish [the applicant's innocence." *Elizondo*, 947 S.W.2d at 209 (quoting *Schlup*, 513 U.S. at 317). Specifically, the Court adheres to the views of the Supreme Court, expressed in *Schlup*, that when asserting a *Herrera*-type claim, the applicant must "demonstrate by clear and convincing evidence that no reasonable juror would convict him in light of the new evidence." *Elizondo*, 947 S.W.2d at 209. The Court amplified in *Franklin*, holding the evidence presented must constitute affirmative evidence of the applicant's innocence. 72 S.W.3d at 678.

Simply stated, the procedural component of the Due Process Clause mandates habeas relief for the actually innocent. A society cannot call itself free if it knowingly imprisons the innocent without providing a judicial venue in which to raise solid claims of innocence.

D. **Substantive Due Process**

Principles of substantive due process compel a like conclusion. "'[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . .'" *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 848, 112 S.Ct. 2791, 120 L.Ed.2d

674 (1992) (quoting *Poe v. Ullman,* 367 U.S. 497, 543, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961) (opinion dissenting from dismissal on jurisdictional grounds)). Knowingly to imprison the innocent is an arbitrary imposition and purposeless restraint. As the Court recognized in *Elizondo*, a constitutional society founded on due process simply cannot tolerate punishing the innocent. *See Elizondo*, 947 S.W.2d at 209.

Concededly, Justice Rehnquist, writing for the Court in *Herrera*, included some language tending to indicate substantive due process did not apply to analysis of the issue of whether federal habeas relief extended to claims of actual innocence. *See* 506 U.S. at 400-01. However, the comments begged the essential question – does imprisonment of the actually innocent violate the Constitution – and were predicated on concerns of federalism and the starkly limited nature of federal habeas corpus, neither of which is extant in state writs under Art. 11.07 or 11.071, Tex. Code Crim. Proc. Thus, Justice Rehnquist's exposition does not preclude recognition on the State level of a substantive due process claim.

Further, the Justice Rhenquist's reasoning is not sound. The Court disclaimed substantive due process as a source of recognition of freestanding innocence claims because a person convicted in a constitutionally fair trial is legally guilty. In other words, the actual innocence construct presupposes legal guilt. Thus, the Court reasoned, no question could arise regarding punishment of an innocent person. *Id.* at 407 n. 6. The very issue was whether the applicant was in fact innocent.

As the *Herrera* dissent underscored, however, and the Court of Criminal Appeals

affirmed in *Elizondo*, the habeas applicant does not attack the jury verdict. "Nowhere does [the] applicant claim that the verdict is invalid or should be invalidated. What he wants is a new trial based on newly discovered evidence which he claims proves his innocence." *Elizondo*, 947 S.W.2d at 209. However, the question is not whether the Constitution forbids punishment of a person who is legally guilty but factually innocent but whether it denounces punishing one who would be found legally innocent if tried today. *See* Charles R. Morse, *Habeas Corpus and "Actual Innocence":* Herrera v. Collins, 113 S.Ct. 853 (1993), 16 Harv. J. L. and Pub. Pol'y 848 (1993). The focus is on the present, not on the prior trial. This issue is amenable to substantive due process analysis.

In any event, the Court conceded that "a truly persuasive demonstration of 'actual innocence' would make a conviction unconstitutional. *Herrera*, 506 U.S. at 417. A "truly persuasive demonstration of innocence" undermines the construct of legal guilt to the extent that, at some point, it disappears. Application of principles of substantive due process is then invited. *See People v. Washington*, 171 Ill.2d 475, 488-489, 665 N.E.2d 1330 (1996). In the face of extraordinary evidence of actual innocence, denial of a judicial forum eviscerates due process.

This holding does not extend the Due Process Clause to "require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *See Patterson v. New York*, 432 U.S. 197, 208, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). This Court carefully balances the interests of the prisoner in access to a forum

to test the most basic justice of a sentence[2] and the interest of the State in finality and efficiency by granting relief in only the most extraordinary cases. Adherence to this standard assures the courts will not be overburdened with frivolous claims.

When the burden is so "exceedingly heavy" that the applicant must "unquestionably establish his innocence," *Ex parte Tuley*, 109 S.W.3d 388, 390 (Tex.Crim.App. 2002), the justice system will not experience any sort of cataclysmic tumult. In fact, experience demonstrates it hardly experiences a whimper. "Claims of actual innocence are rare and the cases in which relief is granted are even more rare." *Id.* at 394. The *Tuley* court empirically noted that, since the *Elizondo* decision, applicants had six years to file claims. No flood materialized. Nor, the court noted, did *Elizondo* encourage inmates or their friends and family to harass victims of crimes to encourage them to recant. *Id.* at 395. The only tangible effect of the ruling was to free the innocent. "The criminal justice system has done justice." *Id*.

Habeas is the essential and the only viable means of vindicating actual innocence claims. "The principal purpose of the writ of habeas corpus is to serve as a bulwark against convictions that violate fundamental fairness." *Engle v. Isaac*, 456 U.S. 107, 126, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Stevens, J., concurring). Habeas corpus is the last judicial inquiry into the validity of a criminal conviction, the final opportunity of the courts to correct their inevitable errors.

[2] *See Kuhlmann v. Wilson*, 477 U.S. 477 U.S. 436, 452, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986).

The system of executive clemency cannot accomplish this function. While the Court in *Herrera* called executive clemency the “fail safe” in our criminal justice system, 506 U.S. at 391, the Court did not hold that this device satisfies the commands of the Fourteenth Amendment, and the dissent persuasively argued it does not. As the majority concedes, "'A pardon is an act of grace.'" 506 U.S. at 413. The vindication of the actually innocent that is constitutionally commanded cannot be made to turn on the unreviewable discretion of an executive official or administrative tribunal. In *Ford v. Wainwright,* the Court recognized this, explicitly rejecting 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, 106 S.Ct. at 2605. 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, 103 S.Ct. 3001, 3016, 77 L.Ed.2d 637 (1983).

A like result obtains in due process analysis. "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. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). As the *Herrera* dissent recognized, we no longer live under a government of laws if the exercise of a legal right turns on "an act of grace." 506 U.S. at 440. "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 Bd. of Ed. v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943).

The Courts turn the Constitution on its head if it vests in the unreviewable discretion of executive officials the province of correcting the errors of the judiciary. The very concept of constitutional government is undermined. If the judicial system erred in convicting the innocent, the judicial system must correct its error. Habeas corpus stands as the only viable basis for achieving due process relief.