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Innocence Found: Retribution, Capital Punishment, and the Eighth Amendment

Judith M. Barger

INNOCENCE FOUND: RETRIBUTION, CAPITAL PUNISHMENT, AND THE EIGHTH AMENDMENT

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Although a majority of the United States Supreme Court theoretically accepts that the state-sanctioned killing of a factually innocent person is unconstitutional, it has been reluctant to announce a workable standard for individuals raising postconviction freestanding claims of actual innocence in capital cases. This Article explores how such claims should be addressed. It begins by examining the distinctions the Court has drawn between freestanding claims of innocence and those asserted in connection with other constitutional violations. Although the Court theoretically recognized the former in Herrera v. Collins, *it has failed to articulate a clear standard to govern these claims, and it left great confusion regarding the available remedy. This Article argues that the development of these standards and remedies must be guided by the retributive principles that serve as the basis of the Court's Eighth Amendment jurisprudence. With these principles in mind, this Article then proposes a tiered system of review for freestanding innocence claims that employs different standards depending on the remedy the petitioner seeks. This tiered system of standards and remedies would accord appropriate deference to the States' interests in finality and preservation of prosecutorial and judicial resources, confer appropriate weight to the substantial liberty interests of the petitioner subject to execution, and give valid effect to the requirements of the Eighth Amendment as it applies to capital cases.*

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"Wisdom too often never comes, and so one ought not to reject it merely because it comes late."[1]

For the last nineteen years,[2] the Supreme Court has wrestled with the issue of whether the Eighth Amendment prohibits the execution or imprisonment of a factually innocent[3] person (hereinafter referred to as "innocent person"). In the developing jurisprudence on the issue, a majority of the Court agrees that state-sanctioned killing of an innocent person would violate the Eighth Amendment but has struggled to develop a workable standard to apply when an individual raises the issue in light of evidence that is discovered postconviction. In fact, although the Court has implicitly recognized that an individual may make a postconviction freestanding claim of actual innocence in capital cases, the vague and onerous "standard" it applies has proven virtually impossible to meet.[4]

The Court's reluctance to announce a workable standard seems to derive from two interrelated sources of concern: (1) interference with the States' interest in finality in criminal cases; and (2) the burden of having to retry cases with "stale" evidence.[5] However, neither of these concerns is significant enough to overcome the Supreme Court's own Eighth Amendment capital jurisprudence, which focuses more acutely on the actual guilt of an individual as a condition of execution.

In the handful of innocence cases considered by the Supreme Court since its ruling in *Herrera v. Collins*,[6] the Court has refused to announce any specific standard, stating only that such claims require

1. Henslee v. Union Planters Nat'l Bank & Trust Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

2. The Supreme Court first addressed the constitutional propriety of executing an innocent person in *Herrera v. Collins*, 506 U.S. 390 (1993).

3. "Factually" or "actually" innocent are terms that refer to an individual who did not commit the crime for which he or she was convicted and sentenced to death. This definition should be distinguished from one that includes individuals who committed the charged crime but should not have been convicted due to a constitutional or other procedural error occurring at their trial.

4. The Supreme Court has yet to identify a set of facts that would satisfy this standard.

5. *Herrera*, 506 U.S. at 417.

6. 506 U.S. 390 (1993).

an "extraordinarily high"[7] burden and a "truly persuasive demonstration"[8] of innocence. However, when the death penalty is at issue, the Eighth Amendment requires a greater level of reliability to sustain an execution. This Article discusses how claims of innocence should be addressed within the context of capital punishment.[9] The Supreme Court's capital jurisprudence, which relies heavily on retributive theory, supports the application of a lesser standard when considering the issue of execution, as opposed to conviction. This discussion is divided into three parts: (1) the process of postconviction claims of innocence; (2) retributive themes in the Supreme Court's capital jurisprudence; and (3) considerations of innocence in the context of pending executions.

Part I of this Article explains how innocence claims are analyzed in the postconviction setting, while Part II discusses the Supreme Court's reliance on retributive theories in its capital jurisprudence. Finally, Part III of this Article proposes a standard to address postconviction claims of innocence that is consistent with the Eighth Amendment's retributive-based requirements in capital cases.

I. POSTCONVICTION CLAIMS OF INNOCENCE

Once an individual has been convicted by a judge or jury, and all direct appeals have been exhausted, there are two methods for raising a claim of actual innocence in federal court. The first, and most commonly used, method is to use a claim of innocence as a "gateway" to argue other constitutional issues that have been procedurally defaulted.[10] If the reviewing court finds that "it is more likely than not that no reasonable juror" would have found the defendant guilty beyond a reasonable doubt in light of new evidence of innocence, the defendant will be permitted access to a habeas forum to argue substantive constitutional issues, despite any

7. *Id.* at 417.

8. *Id.* at 427 (O'Connor, J., concurring).

9. This article does not defend the unworkable and yet to be defined "standard" announced by the Supreme Court in *Herrera*, which undoubtedly requires significant adjustment to legitimately enforce the Court's holding. Instead, it focuses on a narrower issue relating specifically to the constitutionality of executing someone who has made a colorable claim of innocence.

10. Schlup v. Delo, 513 U.S. 298, 315 (1995); *Herrera*, 506 U.S. at 404.

procedural roadblocks.[11] For example, in *Schlup v. Delo*,[12] the defendant used his claim of actual innocence as a gateway to argue his ineffective assistance of counsel and prosecutorial misconduct claims, not as a substantive claim in and of itself.[13] The applicable standard when using innocence as a "gateway" claim was described by the Court in *Schlup* as one that "imposes a lower burden of proof than the 'clear and convincing' standard."[14]

The second, much more contested method for arguing a postconviction claim of actual innocence is using the fact of innocence itself as the basis of a constitutional violation. Essentially, in this context, the proponent argues that continued incarceration or execution violates the Eighth Amendment because new evidence proves the conviction is invalid—that is, the defendant is factually innocent of the crime of conviction. This type of claim is commonly referred to as a "freestanding" claim of innocence—in the sense that it is not attached to another substantive constitutional claim or claims.[15]

The Supreme Court considered "freestanding" claims of innocence in the context of capital cases in *Herrera*.[16] Although six justices at least hypothetically agreed[17] that such claims could be presented by individuals who had been sentenced to death,[18] there was widespread disagreement regarding the standard of proof that should apply to such claims. The majority opinion, authored by Chief Justice Rehnquist, referred to a vague "extraordinarily high"

11. *Schlup*, 513 U.S. at 327.
12. 513 U.S. 298.
13. *Id.* at 306.
14. *Id.* at 327.
15. *Herrera*, 506 U.S. at 404–05.
16. *See id.* at 390–98.
17. Justices Rehnquist, Kennedy, and O'Connor "assume[d] for the sake of argument" that such a claim would exist (at least with respect to the execution of an innocent person), *id.* at 417, while Justices Blackmun, Stevens, and Souter indicated that they would affirmatively recognize the existence of such claim, *id.* at 435 (Blackmun, J., dissenting). Justices Scalia and Thomas indicated that freestanding claims of innocence are not constitutionally cognizable. *Id.* at 428 (Scalia, J., concurring).
18. The majority affirmatively held, quoting *Townsend v. Sain*, 372 U.S. 293, 317 (1963), that "absent an accompanying constitutional violation, . . . [a claim] of actual innocence was not cognizable because . . . '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.'" *Herrera*, 506 U.S. at 397–98 (citations omitted).

standard[19] but avoided further definition by finding that, regardless of the specific test applied, Herrera did not meet it. Justice O'Connor wrote a concurring opinion in which Justice Kennedy joined, indicating that the Court need not articulate a standard of proof at that time, but opining, for the sake of argument, that "a truly persuasive demonstration of actual innocence" would render an execution unconstitutional.[20] Justice White, in his concurring opinion, indicated that a freestanding innocence claim would, at the very least, require the petitioner 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.'"[21]

Finally, Justice Blackmun noted in his dissenting opinion (joined by Justices Stevens and Souter) that the standard for a petitioner seeking to overturn his conviction on a claim of actual innocence should be that he "probably is innocent."[22] He compared this standard to the one applied to a gateway innocence claim, which requires a 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,"[23] and indicated that it is an appropriately higher burden for the petitioner to meet. As opposed to "raising doubt about his guilt" in light of the new evidence, the petitioner in a postconviction innocence hearing would have the burden of actually proving his innocence under a preponderance of the evidence standard.[24] According to Justice Blackmun, this standard would balance the burdens appropriately in a postconviction setting—where the presumption of innocence no longer applies—and give due deference to the trial process.[25]

19. *Herrera*, 506 U.S. at 417.

20. *Id.* at 427 (O'Connor, J., concurring).

21. *Id.* at 429 (White, J., concurring) (quoting Jackson v. Virginia, 443 U.S. 307, 324 (1979)).

22. *Id.* at 442 (Blackmun, J., dissenting).

23. *Id.* (quoting Kuhlmann v. Wilson, 477 U.S. 436, 455, n.17 (1986)). This standard was further clarified in *Schlup*, where the Court held that a petitioner asserting a gateway claim of actual innocence must show that "in light of new evidence . . . it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Schlup v. Delo, 513 U.S. 298, 327 (1995).

24. *Herrera*, 506 U.S. at 442–43 (Blackmun, J., dissenting).

25. *Id.*

In addition to the varying degrees of suggested standards for the hypothetically recognized freestanding claim of actual innocence, the Court's *Herrera* decision also generated a great deal of confusion regarding the appropriate remedy that would apply if a petitioner were able to successfully present such a claim. The issue upon which the Court granted certiorari was "whether the Eighth and Fourteenth Amendments permit a state to *execute* an individual who is innocent of the crime for which he or she was convicted and sentenced to death."[26] This question seemingly limited any remedy to commutation of the death sentence imposed. Although Herrera himself urged that a new trial would not necessarily be required, the majority indicated that any habeas remedy must necessarily include release of the prisoner and the possibility of a new trial, stating that "[i]t would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution [an innocent person] could not be executed, but that he could spend the rest of his life in prison."[27] Additionally, one of the reasons for the "extraordinarily high" standard noted by the majority was the "enormous burden that having to retry cases based on often stale evidence would place on the States."[28]

Furthermore, in his dissenting opinion, Justice Blackmun indicated that shifting the burden of proof to the petitioner and requiring a higher burden than that imposed for a gateway innocence claim were appropriate given the difficulties inherent in retrying an older case and the possibility that the "actual-innocence proceeding thus may constitute the final word on whether the defendant may be punished."[29] Based on this statement, it is clear that Justice Blackmun anticipated the reversal of the petitioner's original conviction and a new trial as the appropriate remedy for freestanding innocence claims.

26. Brief for Petitioner, *Herrera*, 506 U.S. 390 (1993) (No. 91-7328), 1992 U.S. S. Ct. Briefs LEXIS 422, at *5.

27. *Herrera*, 506 U.S. at 405. Ironically, the Court's holding in *Schlup*—that an individual who can show that, "in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt" may nevertheless be constitutionally executed—seems an even stranger jurisprudence to postulate. *Schlup*, 513 U.S. at 299.

28. *Herrera*, 506 U.S. at 417.

29. *Id.* at 443.

Ten years later, in *House v. Bell*,[30] the issue of applicable remedy still appeared to be unresolved.[31] In this case, the petitioner presented both a gateway claim of innocence and a freestanding claim of innocence.[32] A mixture of judges from the Sixth Circuit Court of Appeals considered remedies ranging from sentencing relief, to a new trial, to outright release.[33] Two years later, the Supreme Court granted certiorari to consider whether House had presented sufficient evidence of either a gateway or freestanding claim of innocence.[34] This gave the Court the opportunity not only to specifically define the standard for a freestanding claim of actual innocence but also to clarify the available remedies. However, it chose to do neither. Instead, the Court found that House met the *Schlup* standard for gateway claims and remanded the case for consideration of his ineffective assistance and prosecutorial misconduct claims.[35] With regard to House's freestanding claim of innocence, the Court stated:

> House urges the Court to answer the question left open in *Herrera* and hold not only that freestanding innocence claims are possible but also that he has established one.
>
> *We decline to resolve this issue*. We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it. . . . The sequence of the Court's decisions in *Herrera* and *Schlup*—first leaving unresolved the status of freestanding claims and then establishing the gateway standard—implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*. It

30. 547 U.S. 518 (2006).

31. *See generally id.* (explaining that there is little resolution of what remedy should be used for freestanding innocence claims).

32. *Id.* at 554.

33. *Id.* at 535–36. In the initial review of House's habeas petition, one judge indicated that House "present[ed] a strong claim for habeas relief, at least at the sentencing phase of the case." *Id.* at 535 (quoting House v. Bell, 331 F.3d 767, 787 (6th Cir. 2002) (Gilman, J., dissenting)). On return to a fifteen judge en banc panel, six judges found that evidence of petitioner's innocence was so compelling that he was entitled to "immediate release" under Justice White's standard for freestanding innocence claims, and another judge found that the new evidence entitled petitioner to a new trial under the same standard. *Id.* at 535–36.

34. *Id.* at 536.

35. *Id.* at 555.

> follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera*.[36]

Although the Court refused to provide any further definition to the *Herrera* standard (or even formally recognize it), some clarification can be gleaned from its discussion of House's gateway innocence claim. Initially, the Court affirmed the standard announced in *Schlup* for such claims: "prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'"[37] After reviewing the new evidence presented by House, the Court found that "although the issue is close, . . . this is the rare case where—had the jury heard all the conflicting testimony—it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt" as to the guilt of the defendant.[38]

To truly understand the demanding nature of the proof required by the Court to satisfy this "lesser" standard, a review of the evidence presented by House is necessary. An en banc panel of the Sixth Circuit Court of Appeals conducted an exhaustive review of this evidence, which was summarized in Chief Judge Merritt's dissenting opinion as follows:

> Through extremely persuasive and affirmative evidence that Mr. Muncey killed his wife, House has shown that it is highly probable that he is completely innocent of any wrongdoing whatever. There is no reasonable basis for disbelieving the six witnesses who now incriminate Mr. Muncey as the perpetrator of the crime. The most compelling part of this new testimony involves his confession to the murder in front of two witnesses who have no connection to House and no bias against Mr. Muncey. Furthermore, before his wife's body was even located, he solicited a neighbor to fabricate an alibi on his behalf. He was heard returning home around the time of the murder.

36. *Id.* at 554–55 (emphasis added).
37. *Id.* at 536–37 (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)).
38. *Id.* at 554.

> And considering his history of domestic violence and his wife's plans to leave him he had a motive to kill. In contrast, there is no evidence of a motive for House. All of the state's physical evidence, both blood and semen, allegedly tying House to the murder, has been effectively rebutted. The new body of evidence as a whole so completely undermines the case against House and establishes a persuasive case against Muncey that, had it been presented at trial, no rational juror could have found evidence sufficient for conviction.[39]

Not only did House present persuasive evidence that the victim's husband was the actual killer, he rebutted, in its entirety, the forensic evidence that was presented and used by the prosecution at the trial not only as affirmative proof of House's presence at the scene of the crime but also of his alleged motive for the killing.[40] Given this evidence, it is not surprising that seven of the fifteen judges sitting on the en banc panel found that this evidence met the "extraordinarily high" *Herrera* standard.[41] However, even with the persuasively convincing evidence presented by House, the Supreme Court found that his claim just barely satisfied the less demanding gateway-claim standard.[42] If the *Herrera* freestanding claim standard is, in fact, higher than the *Schlup* gateway standard, it is no wonder that the Supreme Court has yet to find a set of facts that satisfies it. Were it not for the fact that House had substantive constitutional claims to argue in addition to his innocence, he likely would have been executed by now.[43]

39. House v. Bell, 386 F.3d 668, 708 (6th Cir. 2004) (Merritt, J., dissenting), *rev'd*, 547 U.S. 518 (2006).

40. *House*, 547 U.S. at 552–53. DNA testing revealed that the semen that was found on the victim's clothing was from her husband, not House (thereby eliminating the rape motive asserted by the prosecution), and the blood stains found on House's jeans, although belonging to the victim, were "too similar to blood collected during the autopsy . . . to have come from [the victim's] body on the night of the crime." *Id.* at 542.

41. *House*, 386 F.3d at 708 (Merritt, J., dissenting).

42. *House*, 547 U.S. at 554.

43. House v. Bell, No. 3:96-cv-883, 2007 WL 4568444, at *1 (E.D. Tenn. Dec. 20, 2007). Upon remand, a United States district court in the Eastern District of Tennessee granted Mr. House's habeas petition in part and remanded the case to the trial court to await the State's decision regarding reprosecution. *Id.* On July 2, 2008, House was released on bail. *Released from Death Row, but Not Exonerated*, NBCNEWS.COM (July 24, 2008, 10:35 PM EST), http://www.msnbc.msn.com/id/25836468#UDZyCmj6nFI. On May 12, 2009, the State dropped

Three years following its holding in *House*, the Supreme Court granted certiorari in a capital case involving a freestanding claim of innocence in the highly publicized and controversial case of Troy Davis.[44] In a memorandum opinion, the Court remanded the case to the United States District Court for the Southern District of Georgia for a hearing on Davis' innocence claim, based on the fact that

> seven of the State's key witnesses . . . recanted their trial testimony; several individuals have implicated the State's principal witness as the shooter; and *no* court, state or federal, has ever conducted a hearing to assess the reliability of the score of [postconviction] affidavits that, if reliable, would satisfy the threshold showing for a truly persuasive demonstration of actual innocence.[45]

This memorandum opinion fell short of holding that a *Herrera* claim had been established, but it is at least an implicit recognition of freestanding innocence claims and gives some additional insight into the applicable standard for such claims. On remand, the district court, choosing not to "dodge the question . . . squarely before it,"[46] ruled on both the cognizability of a freestanding claim of innocence and the applicable standard. After finding that execution of an innocent person would violate the Eighth and Fourteenth Amendments, the court went on to do what the Supreme Court scrupulously avoided in all prior innocence cases—it evaluated and ruled on the applicable standard for such claims.[47]

Davis argued that the appropriate standard is the showing of "a clear probability that any reasonable juror would have reasonable doubt about his guilt."[48] He quantified a "clear probability" at "a sixty percent chance."[49] On the other hand, the State argued, based on Justice White's concurrence in *Herrera* and Chief Justice

all charges against House due to lack of evidence. David G. Savage, *Murder Charges Dropped Because of DNA Evidence*, L.A. TIMES (May 13, 2009), http://articles.latimes.com/print/2009/may/13/nation/na-court-dna13.

44. *In re Davis*, 130 S. Ct. 1 (2009) (explaining that the Supreme Court granted writ of certiorari in this case).

45. *Id.* at 1 (internal citations omitted).

46. *In re* Davis, No. CV 409-130, 2010 WL 3385081, at *37 n.15 (S.D. Ga. Aug. 24, 2010), *cert. denied sub nom.* Davis v. Humphrey, 131 S. Ct. 1787, 1788 (2011).

47. *Id.* at *43–45.

48. *Id.* at *44.

49. *Id.*

Robert's dissent in *House*, that the appropriate standard is that "no rational trier of fact could find proof of guilt beyond a reasonable doubt."[50]

The district court found that the Supreme Court's innocence jurisprudence supported a standard that fell somewhere between the two proposed standards.[51] In reaching this conclusion, the court relied on the Supreme Court's description of burdens in *Schlup*, which noted that "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[52] After a comparison of the different standards of proof adopted by the Supreme Court in postconviction claims involving an actual innocence component, the district court found that the appropriate standard was one in which the petitioner must "show by clear and convincing evidence that no reasonable juror would have convicted him in the light of the new evidence."[53] The district court found this standard to be both an appropriate balance between the *Schlup* "more likely than not" standard, which applies to gateway claims of innocence, and the *Jackson* "no rational trier of fact" standard, which applies to claims contesting the sufficiency of the evidence in a given case. It also concluded this standard was sufficient to satisfy the "extraordinarily high" requirement referred to in *Herrera*.[54] Based on this standard, the district court then found that Davis had failed to prove his innocence and was, thus, not entitled to relief.[55] The Supreme Court denied Davis's petition for certiorari to review the

50. *Id.* at *44; Answer-Response and Brief in Support on Behalf of Respondent to Petition for a Writ of Habeas Corpus at 51–52, *In re* Davis, No. CV 409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010).

51. *In re Davis*, at *44–45.

52. *Id.* at *44 (quoting Schlup v. Delo, 513 U.S. 298, 325 (1995) (quoting In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring))).

53. *Id.* at *45.

54. *Id.* (quoting *Schlup*, 513 U.S. at 327; Herrera v. Collins, 506 U.S. 390, 392 (1993); Jackson v. Virginia, 443 U.S. 307, 308 (1979)).

55. *Id.* at *59–61.

district court's conclusion.[56] He was executed on September 21, 2011.[57]

As noted by Justice Blackmun in his *Herrera* dissent, "the legitimacy of punishment is inextricably intertwined with guilt."[58] This pronouncement is especially true within the context of capital punishment. As discussed in the following section, the Supreme Court's capital jurisprudence is based, in large part, on retributive principles that require actual guilt[59] as a legitimating principle, thereby necessitating an effective mechanism for considering postconviction claims of innocence.

II. RETRIBUTIVE THEMES IN THE SUPREME COURT'S CAPITAL JURISPRUDENCE

Over the last ten years, the Supreme Court has developed a firm line of Eighth Amendment capital jurisprudence, categorically invalidating the application of the death penalty in many instances.[60] In all of these cases, the Court applied its traditional two-part analysis consisting of an examination of national consensus and an application of its own independent judgment as the final arbiter of all things constitutional.[61] In its most recent decisions, the Court has placed a greater emphasis on the independent-judgment facet of the Eighth Amendment analysis.[62] Within this part of the analysis, the Court determines whether the application of the death penalty furthers any legitimate penological purpose.[63] According to the

56. Davis v. Humphrey, 131 S. Ct. 1787, 1788 (2011).

57. Colleen Curry & Michael S. James, *Troy Davis Executed After Stay Denied by Supreme Court*, ABC NEWS (Sept. 21, 2011), http://abcnews.go.com/US/troy-davis-executed-stay-denied-supreme-court/story?id=14571862#.UFym1ULIHpg.

58. Herrera v. Collins, 506 U.S. 390, 433–34 (1993) (Blackmun, J., dissenting) (acknowledging that six judges called for House's immediate release, while a seventh judge indicated that a new trial was necessitated under the circumstances).

59. "Actual" guilt should be distinguished from the notion of "legal" guilt discussed in Justice O'Connor's concurring opinion in *Herrera*, which occurs when an individual is convicted in a trial that is free of constitutional error. *Herrera*, 506 U.S. at 419–20 (O'Connor, J., concurring).

60. Kennedy v. Louisiana, 128 S. Ct. 2641, 2658 (2008); Roper v. Simmons, 543 U.S. 551, 578 (2005); Ford v. Wainwright, 477 U.S. 399, 410 (1986).

61. *See Kennedy*, 128 S. Ct. 2641; *Roper*, 543 U.S. 551; *Ford*, 477 U.S. 399.

62. *Kennedy*, 128 S. Ct. at 2658; *Roper*, 543 U.S. at 574–75.

63. *Roper*, 543 U.S. at 553. This focus is a departure from the Court's discussion of penological justifications as something separate from the overall proportionality analysis in the cases immediately following the invalidation of death penalty statutes nationwide in *Furman v.*

Court, the only two legitimate social purposes that can be served by the death penalty are deterrence and retribution.[64] Moreover, in its most recent decisions, the Court has focused mainly on retribution as the supporting rationale for the most severe punishment available.[65]

A. Retributive Theory Models

Retributive theory is based on two main premises: (1) that individuals act based on free will;[66] and (2) that it is appropriate to inflict proportional punishment on individuals who commit criminal wrongs.[67] Unlike the utilitarian theory, which looks to the future and generally requires some connection between punishment and the good of society as a whole, retribution focuses solely on the crime committed by the offender and the proportionality of the punishment at issue.

Although the retributive theory operates on the basic premise of "just deserts," several different variations have developed over the years. Initially, retribution can be divided into two main components: negative retributivism and positive retributivism.[68] Negative retributivism focuses solely on the immorality of punishing an innocent person—positing that "the retributive principle of just deserts is a necessary condition of punishment."[69] This form of retributivism is widely accepted as a legitimate limitation on utilitarian theory, which does not automatically condemn the

Georgia, 408 U.S. 238, 332–33 (1972) (explaining that punishments that are excessive violate the constitution). *See generally* Gregg v. Georgia, 428 U.S. 153, 206 (1976) (explaining the importance in analyzing the proportionality of a punishment).

64. *Gregg*, 428 U.S. at 183.

65. *See generally Kennedy*, 128 S. Ct. 2641, 2661–62 (explaining that retribution is the primary rationale for using the death penalty); *Roper*, 543 U.S. 551, 571 (explaining that retribution is a primary rationale for using the death penalty); Atkins v. Virginia, 536 U.S. 304, 319 (2002) (explaining that retribution is a primary rationale for using the death penalty).

66. *See* Tison v. Arizona, 481 U.S. 137, 173 (1987) (explaining that the retributive rationale for capital punishment is inappropriate where the defendant did not have the intent to commit the crime).

67. Graham v. Florida, 130 S. Ct. 2011, 2028 (2010) (citing Tison v. Arizona, 481 U.S. 137, 149 (1987)) (explaining that "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender").

68. Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1451 (1990) (citing J.L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS, Winter/Spring 1982, at 3, 4).

69. *Id.* at 1451.

punishment of an innocent person if the benefit to society as a whole outweighs the burden imposed on the innocent person.

Positive retributivism, on the other hand, is a much broader concept that not only decries the punishment of an innocent person, but also affirmatively requires punishment of the guilty—holding that "retributive justice is a necessary and sufficient condition of punishment."[70] This form of retributive theory is more controversial than negative retributivism, but it is commonly accepted as one of many legitimate penological goals.[71] Positive retributivism, however, has several subsets, which can be classified into two main categories: "assaultive" and "protective."[72]

While there are variations within each category of positive retributivism, assaultive retribution can generally be described as a vindictive, vengeance-based theory that "regard[s] criminals as rather like noxious insects to be ground under the heel of society."[73] At the other end of the positive retributivist spectrum is the protective variation, which views punishment as a means of securing moral balance in society—"that not only does a just society have a right to punish voluntary wrongdoers, but that criminals also have a right to be punished."[74]

One version of the protective variation of retributive theory has been described by Professor Joshua Dressler as follows:

> As Professor Herbert Morris has explained, society is composed of rules that forbid various form[s] of harmful conduct; compliance with these rules burdens each member of the community that exercises self-restraint. These same rules provide a benefit in the form of "noninterference by others with what each person values, such . . . as continuance of life and bodily security." As long as everyone follows the rules, an equilibrium exists—everyone is similarly benefitted and burdened. If a person fails to

70. *Id.*

71. *See generally Graham*, 130 S. Ct. 2011, 2028 (2010) (explaining that retribution is one "legitimate reason to punish").

72. Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1168–69 (1980).

73. JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 3 (1988) (citing 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81–82 (1883)).

74. Dressler, *supra* note 68, at 1452.

> exercise self-restraint when he could have—when he renounces a burden that others have assumed—he destroys the balance. He becomes a free rider: He has the benefits of the system of rules, without accepting the same burdens. Thus, a criminal owes a debt to society. It is fair, therefore, to require payment of the debt, i.e., punishment equal or proportional to the debt owed (i.e. the crime committed).[75]

Another variation of protective retributivism views the punishment as a means of restoring the victim's worth as a human being.[76] As noted by Professor Jean Hampton:

> [Criminal] conduct causes a moral injury, which means that it expresses and does damage to the acknowledgement and realization of the value of the victim. . . . [R]etribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.[77]

Essentially, this theory legitimizes punishment as a method for restoring a victim's societal and personal worth—focusing more on bringing the victim back up to his or her rightful place in society than on bringing the wrongdoer back down to his or her rightful place.

The Supreme Court has never specifically identified the form of retribution it considers appropriate under the Eighth Amendment. In fact, its capital jurisprudence includes references to both positive and negative retributive theory and to multiple variations within the positive retribution category. For example, in *Gregg v. Georgia*,[78] one of the Court's first cases following its categorical rejection of death penalty statutes nationwide in *Furman v. Georgia*,[79] the Court described retribution as "an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity

75. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW: THEORIES OF PUNISHMENT 17–18 (5th ed. 2009) (citing Herbert Morris, *Persons and Punishment*, 52 Monist 475, 477 (1968)).

76. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686 (1992).

77. *Id.* at 1685–86.

78. 428 U.S. 153 (1976).

79. 408 U.S. 238 (1972).

that the only adequate response may be the penalty of death."[80] The Court explained that retribution is accepted as a legitimate basis for the imposition of a death sentence because

> [t]he instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.[81]

These early statements seem to lean heavily toward assaultive forms of retribution—focusing on punishment for the sake of punishment.

However, in the Court's more recent capital jurisprudence, it refers to retribution in terms of both assaultive and protective theories. For example, in *Roper v. Simmons*,[82] Justice Kennedy seemingly embraced both theories with the following statement rejecting the application of the death penalty to juveniles: "Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult."[83] Additionally, in its most recent capital decision, *Kennedy v. Louisiana*,[84] Justice Kennedy described retribution as both a reflection of "society's and the victim's interests in seeing that the offender is repaid for the hurt he caused"[85] and a mechanism for "balanc[ing] the wrong to the victim."[86] The former statement

80. 428 U.S. at 184; *see also id*. at 184 n.30 ("Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else . . . . The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not." (quoting ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 207 (1950))).

81. *Id.* at 183 (quoting *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)).

82. 543 U.S. 551 (2005).

83. *Id.* at 571.

84. 128 S. Ct. 2641 (2008).

85. *Id.* at 2662.

86. *Id.*

focuses on the more vindictive form of assaultive retribution, and the latter refers to the moral balancing that is the basis of protective retribution. In *Graham v. Florida*,[87] Justice Kennedy, addressing the Cruel and Unusual Punishment Clause generally, further noted "the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes."[88]

Therefore, it appears that the Court applies a mixture of retributive theories within its Eighth Amendment analysis. However, regardless of the differences between the various theories of retribution, each accepts and demands one basic premise—only the guilty can be punished. This concept is especially true within the context of the death penalty. Unlike utilitarian theories, which might allow for the punishment of an innocent person (if it served the "greater good"),[89] retributive theory is only legitimately served if punishment fitting the crime is imposed on a factually guilty person. This realization is incorporated in all of the Supreme Court's decisions discussing retribution as a legitimizing theory for the imposition of a particular punishment. Most notably, in capital cases, the Court has found an insufficient nexus between retributive theory and the death penalty when categories of individuals and victims make the risk of wrongful conviction a possibility.[90]

B. Retributive Theory, Wrongful Conviction, and the Death Penalty

As noted above, when evaluating a categorical challenge to the imposition of a particular sentence, the Court first determines whether there is a national consensus for or against the punishment in the context at issue. Regardless of the results of this initial determination, the Court then independently determines whether imposing the particular punishment would violate the Eighth

87. 130 S. Ct. 2011 (2010).

88. *Id.* at 2021.

89. *See* Dressler, *supra* note 68, at 1452.

90. *E.g.*, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008); Atkins v. Virginia, 536 U.S. 304 (2002).

Amendment.[91] In this part of the analysis, the Court "considers whether the challenged sentencing practice serves legitimate penological goals,"[92] which include, in the context of the death penalty, retribution and deterrence.[93]

Although both retribution and deterrence are recognized as goals that may legitimately be furthered by the imposition of capital punishment, the Court has never assigned deterrence a significant role in the analysis. In fact, in *Gregg v. Georgia*, the Court noted, "Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive."[94] The Court went on to assume that the death penalty may have some deterrent value, leaving it to the states to determine the particular effect within each jurisdiction.[95] However, the Court placed a greater emphasis on retributive theory as a legitimate penological justification for the imposition of such a sentence.[96] In more recent years, the issue of the death penalty's deterrent effect has drawn much more heated criticism.[97] In fact, some justices have rejected the viability of deterrence as a legitimating factor for the death penalty altogether.[98]

91. *Graham*, 130 S. Ct. at 2026 ("Community consensus, while 'entitled to great weight,' is not itself determinative of whether a punishment is cruel and unusual." (quoting *Kennedy*, 128 S. Ct. at 2658)).

92. *Id.*; *see also Kennedy*, 128 S. Ct. at 2661 (examining whether a capital sentence for the crime of child rape satisfied the "distinct social purposes served by the death penalty"); Roper v. Simmons, 543 U.S. 551, 571–75 (2005) (considering whether a capital sentence imposed on a juvenile would further any legitimate penological goals); *Atkins*, 536 U.S. at 318–20 (explaining why the accepted justifications for the death penalty could not support the execution of an intellectually disabled individual).

93. Gregg v. Georgia, 428 U.S. 153, 183 (1976).

94. *Id.* at 184–85.

95. *Id.* at 185–86.

96. *Id.* (explaining that retribution was a proper consideration to weigh in determining whether the death penalty should be imposed).

97. *See generally* Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489 (2009) (arguing that the death penalty is not a deterrent); Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1 (1996) (arguing that the death penalty is not a deterrent).

98. Ring v. Arizona, 536 U.S. 584, 614 (2002) ("[R]etribution provides the main justification for capital punishment") (Breyer, J., concurring) (citing Spanziano v. Florida, 468 U.S. 447, 477–81 (1984) (Stevens, J., concurring in part and dissenting in part)).

Given the importance of the Court's independent analysis in death penalty challenges and the overriding focus on retribution as the most viable penological theory justifying capital punishment, the Court's application of this theory should be accorded great weight within an Eighth Amendment analysis. Determining the role of retribution in an Eighth Amendment analysis is best accomplished by examining the Supreme Court's capital jurisprudence.

In *Atkins v. Virginia*,[99] the Supreme Court addressed the constitutionality of imposing the death penalty on an "intellectually disabled" individual.[100] In assessing whether the execution of such an individual meaningfully contributes to retribution, the Court considered the increased possibility of false confessions and wrongful executions that such individuals faced.[101] The Court noted its concern that the possibility of inappropriately imposed death sentences "is enhanced . . . by the possibility of false confessions" and the fact that intellectually disabled defendants "may be less able to give meaningful assistance to their counsel."[102] Ultimately, these factors—along with the general evidentiary difficulties[103] encountered by such intellectually disabled individuals—led the Court to find that they "face a special risk of wrongful execution."[104] Although the Court's retribution analysis also focused on the lesser culpability of this group of individuals, its recognition of the risk of wrongful conviction and wrongful execution[105] is compelling. In

99. 536 U.S. 304, (2002).

100. *Id.* at 307 (explaining that the issue in the case is whether executions of "intellectually disabled" individuals are "'cruel and unusual punishments' prohibited by the Eighth Amendment to the Federal Constitution"). The American Association on Intellectual and Developmental Disabilities (formerly known as the American Association on Mental Retardation or AAMR) suggests that the term "intellectual disability" is more appropriate than the traditional reference to "mental retardation." Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELL. & DEVELOPMENTAL DISABILITIES J. 116, 118 (2007).

101. Atkins v. Virginia, 536 U.S. 304, 320–21 (2002).

102. *Id.*

103. The Court found that intellectually disabled defendants had a "lesser ability" to "make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." *Id.* at 320. The Court also noted that such individuals are "typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 320–21.

104. *Id.* at 321.

105. "Wrongful execution" refers to insufficient evidence to support a death sentence, as opposed to insufficient evidence to support the underlying conviction. *Id.* at 305, 319.

fact, the Court specifically voiced its concern regarding wrongful convictions in the context of the death penalty as follows:

> Despite the heavy burden that the prosecution must shoulder in capital cases, we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. These exonerations have included at least one [intellectually disabled] person who unwittingly confessed to a crime that he did not commit.[106]

The mere possibility of either a wrongful conviction or death sentence was enough, in combination with the other factors considered, to lead the Court to conclude that intellectually disabled individuals should be categorically excluded from application of the death penalty.[107]

This trend continued in *Kennedy v. Louisiana*, in which the Court addressed whether the Eighth Amendment categorically excludes the death penalty in child rape cases.[108] In its discussion of retribution, the Court noted:

> There are . . . serious systemic concerns in prosecuting the crime of child rape that are relevant to the constitutionality of making it a capital offense. The problem of unreliable, induced, and even imagined child testimony means there is a "special risk of wrongful execution" in some child rape cases. This undermines, at least to some degree, the meaningful contribution of the death penalty to legitimate goals of punishment.
>
> . . . Although capital punishment does bring retribution, and the legislature here has chosen to use it for this end, its judgment must be weighed, in deciding the constitutional question, against the special risks of unreliable testimony with respect to this crime.[109]

106. *Atkins*, 536 U.S. at 320, n.25.

107. Such factors include the lesser culpability of an intellectually disabled individual who, by definition, has a diminished capacity "to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 318.

108. Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (discussing whether a categorical rule exempting child rape from the death penalty was appropriate).

109. *Id.* at 2663 (citation omitted).

Similar to its holding in *Atkins*, the Court again instituted a categorical ban on the imposition of the death penalty based—in significant part—on the mere possibility of a wrongful conviction.[110] Instead of coming from characteristics specific to the defendant, this time the threat of wrongful conviction was generated by the status of the victim.[111] In both instances, the Court found that the possibility of wrongful conviction eliminated any meaningful contribution the death penalty might have had to retributive theory.[112]

Even outside the context of the death penalty, the Court has viewed the possibility of inaccurate sentencing decisions and wrongful convictions as significant factors in its Eighth Amendment analysis. In *Graham v. Florida*, the Court discussed the issues that arise with juvenile defendants:

> [T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense . . . [which is] likely to impair the quality of a juvenile defendant's representation. . . . A categorical rule [against the imposition of a life without parole sentence] avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve [such sentence] for a nonhomicide [crime].[113]

Whether relating to the inability of an accused to work with counsel effectively, or to reliability issues inherent with certain categories of witnesses, the Supreme Court has consistently found that the risks of wrongful conviction and punishment are not only relevant to the Eighth Amendment analysis but also militate in favor of constitutional restrictions on sentencing.[114]

110. *Id.* at 2645.

111. *Id.* at 2641.

112. *Id.* at 444; *Atkins*, 536 U.S. at 321.

113. Graham v. Florida, 130 S. Ct. 2011, 2032 (2010) (citations omitted).

114. *Id.* (holding that life without parole cannot be imposed on a juvenile for a non-homicide offense); *see also Kennedy*, 554 U.S. at 413 (explaining that there should be a constitutional restriction on the death penalty for individuals who raped children); *Atkins*, 536 U.S. at 319

In response to the Supreme Court's confusing jurisprudence on the viability of freestanding claims of innocence, at least one lower court has considered the issue of retribution specifically as it relates to a postconviction claim of innocence in a capital case. In *In re Davis*,[115] a federal district court in the Southern District of Georgia recognized the viability of a freestanding claim of innocence based, in part, on the fact that "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[116] The court went on to compare the theory of retribution to the idea of revenge:

> While retribution and revenge overlap, they are not the same. Retribution aims to restore a harmonious balance to society; revenge sates individual desires. Retribution restores balance by providing a wrongdoer with his just deserts. However, balance is restored only with accuracy; a mislaid blow, no matter how swift, only increases the moral imbalance by imposing additional unjustified suffering. Revenge, meanwhile, requires only that another suffer as much as the victim. It desires swiftness, but requires minimal accuracy. Revenge may be derived from either the deserving party or a simple scapegoat. When retribution is taken against the correct party, both revenge and retribution may be had, but neither should be mistaken for the other.[117]

Ultimately, the court found, under a traditional Eighth Amendment categorical analysis, that the execution of an individual who could make a postconviction showing of innocence constitutes cruel and unusual punishment.[118]

Taken as a whole, this body of jurisprudence illustrates the overriding importance of retributive theory in the context of death penalty cases and the intimate connection between and among

(explaining that the death penalty as applied to mentally incompetent individuals is unconstitutional and should be categorically restricted).

115. No. CV 409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010), *cert. denied sub nom.* Davis v. Humphrey, 131 S. Ct. 1787, 1788 (2011).

116. *Id.* at *43 (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).

117. *Id.* at *43, n.35 (citation omitted) (citing Graham v. Florida, 130 S. Ct. 2011, 2028 (2010); Enmund v. Florida, 458 U.S. 782, 801 (1982)).

118. *Id.* at *43. The court ultimately concluded that Davis was not entitled to relief because he was unable to make a sufficient showing of actual innocence. *Id.* at *61.

retribution, actual guilt, and execution. With these concepts in mind, the following section discusses how freestanding innocence claims should be addressed in the context of capital cases.

III. ADDRESSING INNOCENCE IN THE CONTEXT OF PENDING EXECUTIONS

The Supreme Court's reliance on retributive theory as a significant legitimating factor for the imposition of a death penalty and retribution's determinative requirement of actual guilt[119] both support a tiered approach to the consideration of freestanding actual-innocence claims in capital cases. Under this tiered system of review, different standards should apply depending on the remedy at issue, with a lower standard applying to commutation of sentence, as opposed to reversal of conviction and the possibility of a new trial. As discussed below, this tiered approach is supported by the Supreme Court's Eighth Amendment retribution-based jurisprudence, and it effectively balances society's interest in avoiding the execution of an innocent person against the burden inherent in retrying potentially stale cases. The approach that best implements Eighth Amendment principles is one that allows freestanding claims of innocence in capital cases and requires (1) commutation of a death sentence if the petitioner can show that in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt,"[120] and (2) a new trial where petitioner can prove his innocence under a higher standard, such as the clear and convincing evidence standard adopted by the district court in *In re Davis*.[121]

It should initially be noted that it is not unusual for the Court to consider postconviction impediments to execution. In *Ford v. Wainwright*,[122] the Court held that the Eighth Amendment prohibits the execution of a mentally incompetent person and that a convicted defendant is entitled to a hearing prior to execution if competency is

119. This is true regardless of the particular theory of retribution at issue. *See supra* Part I.

120. This is the same standard the Court applies to gateway innocence claims, as announced in *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

121. *See supra* Part II.

122. 477 U.S. 399 (1986).

an issue.[123] As noted by Justice Blackmun in his dissenting opinion in *Herrera*, the Court's decision in *Ford* recognizes 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."[124] The *Herrera* majority discounted any reliance on *Ford* as supporting the viability of freestanding innocence claims, but it did so based on the misguided notion that "Ford's claim went to a matter of punishment—not guilt," and was therefore "properly examined within the purview of the Eighth Amendment."[125] This argument, however, does not give proper consideration to the definitive connection between retributive theory and actual guilt. As noted by Justice Blackmun, "the legitimacy of punishment is inextricably intertwined with guilt."[126] This concept is especially true in the context of capital cases, where the legality of the punishment is so closely tied to retributive theory and its accompanying requirement of actual guilt.

The Court's decision in *Ford* bears this out, as it relies in large part on the lack of retributive effect in finding that the execution of an insane person violates the Eighth Amendment.[127] As noted by Justice Marshall in the majority opinion, "We may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life."[128]

The differences of opinion among Supreme Court justices and lower courts regarding the applicable standard for a freestanding claim of innocence seems to derive primarily from confusion or disagreement over the appropriate remedy for such a claim. The Court's concern regarding burdens associated with the relitigation of guilt and innocence issues supports a higher standard for freestanding claims of innocence where the requested remedy is

123. *Id.* at 410.

124. Herrera v. Collins, 506 U.S. 390, 433 (1993) (Blackmun, J., dissenting).

125. *Id.* at 406.

126. *Id.* at 433–34.

127. The Court noted that "[m]ore recent commentators opine that the community's quest for 'retribution'—the need to offset a criminal act by a punishment of equivalent 'moral quality'—is not served by execution of an insane person, which has a 'lesser value' than that of the crime for which he is to be punished." *Ford*, 477 U.S. at 408 (citing Geoffrey C. Hazard & W. David Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 387 (1962)).

128. *Id.* at 409.

retrial. However, there is no reason why retrial—and its associated "extraordinarily high" standard—must stand as the only option available to the petitioner who can show that "it is more likely than not" that he is innocent. Under such circumstances, it is more appropriate to apply the remedy of commutation of sentence, as opposed to foreclosing the petitioner from any relief at all and proceeding with the execution of a person who is probably innocent.

Neither of the concerns noted by the Supreme Court in *Herrera*—retrial burden[129] and finality[130]—is triggered by the commutation of a death sentence under a freestanding innocence claim. Certainly, the Eighth Amendment requires more than turning a blind eye[131] to the probable execution of an innocent person under the guise of "finality." In the context of the death penalty, the finality upon which the Eighth Amendment focuses concerns the punishment at issue, not the criminal process.[132] If it is more likely than not that we are about to execute an innocent person, such punishment truly does come "perilously close to simple murder."[133]

A lower standard for commutation of a death sentence is also supported by the Eighth Amendment and its reliance on retributive theory, which requires more than the fiction of guilt derived from an otherwise constitutionally sound conviction. Retribution demands actual guilt as a legitimating premise for punishment—especially in the context of the death penalty. As the Innocence Project has proven time and time again,[134] mistakes are made across the nation in the

129. *Herrera*, 506 U.S. at 392.

130. *Id.* at 426.

131. "This is not to say that our habeas jurisprudence casts a blind eye toward innocence." *Id.* at 404 (indicating that gateway claims are sufficient constitutional consideration of innocence).

132. The Supreme Court has noted on many occasions, most recently in *Kennedy v. Louisiana*, that "death is different" as a class of punishment due to its severity and ultimate finality. Kennedy v. Louisiana, 128 S. Ct. 2641, 2654 (2008) (citing Gregg v. Georgia, 428 U.S. 153, 187 (1976)).

133. *Herrera*, 506 U.S. at 446 (Blackmun, J., dissenting).

134. FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT, 149–78 (2003) (discussing the exoneration of 98 death row prisoners between 1973 and 2001); Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); *Innocence Project Case Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/ (last visited Apr. 13, 2012) (indicating 289 post-conviction DNA exonerations in the history of the United States, 17 of which were individuals on death row); *O'Connor Questions Death Penalty*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/2100-280_162-299592.html.

criminal justice system[135]—even when constitutional requirements are followed. To ignore these mistakes is to ignore the legitimating premise of the death penalty itself.

The appropriate standard for commutation of a death sentence is the less demanding "more likely than not" standard applied to gateway innocence claims. In *Schlup v. Delo* the Court noted:

> [A] standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. . . . [The standard of proof thus reflects] the relative importance attached to the ultimate decision.[136]

In *Schlup*, the Court explained that the primary difference between a gateway claim of innocence and a freestanding claim of innocence (and their correspondingly different standards) hinged on the validity accorded to the original trials in each case.[137] Because gateway claims are accompanied by an assertion of constitutional error at the trial level, the petitioner's conviction is not "entitled to the same degree of respect"[138] as one "that is the product of an error free trial,"[139] as would be the case with freestanding claims. Although this distinction may be relevant when the remedy requested is a new trial, it is not applicable when the only issue under consideration is the execution of an innocent person. When

135. As noted by Chief Judge Merritt in his dissenting opinion in *House v. Bell*, 386 F.3d 688, 709 (2004) (Meritt, C.J., dissenting):

> High on the list of the causes for mistakes are the kinds of errors we see in this case: the misinterpretation or abuse of scientific evidence, the adverse inferences drawn from the prior record of a defendant, particularly one who is a stranger in the local community, the failure of counsel to uncover (until it is too late) witnesses who could exonerate the defendant, and the existence of one or more other suspects with a motive to commit the offense. Once the initial trial and appeal have occurred, it is clear from the studies that the state, and its officials who have prosecuted, sentenced and reviewed the case, are inclined to persevere in the belief that the state was right all along. They tend to close ranks and resist admission of error. Intelligent citizens who strongly believe in the reliability of the capital sanction are also inclined to persevere in the belief that a case raising the 'embarrassing question' will never really arise and close ranks with the state in resisting the admission of error. This case is a good example of how these errors can lead to the execution of a defendant who is actually innocent.

136. Schlup v. Delo, 513 U.S. 298, 325 (citing In re Winship, 397 U.S. 358, 370 (1970)).

137. *Id.*

138. *Id.* at 316.

139. *Id.*

commutation of a death sentence is the applicable remedy, the Eighth Amendment, with its retribution-based analysis, requires greater reliability. Therefore, the underlying conviction should not be accorded the same weight as it would carry otherwise, and the standard applied to the petitioner can be appropriately lowered.

In the context of postconviction claims of innocence in capital cases, the primary concerns to be weighed include the petitioner's interest in avoiding the injustice of a wrongful execution and the systemic interests in finality, comity, and conservation of judicial resources.[140] The relative value assigned to each of these concerns changes dramatically based on the particular remedy at issue. The State's interest in finality, as associated with the burden of retrying cases, is virtually nonexistent when the only issue under consideration is commutation of sentence. Any interest in finality that the State might have in this context pales in comparison to the individual's interest in avoiding a wrongful execution based on a claim of innocence. Conversely, if the remedy at issue is a new trial, the relative value of the State's concern increases and supports the application of a greater burden on the petitioner.

The Court's holding in *Ford v. Wainwright* also supports the application of a lesser standard for claims relating solely to the constitutionality of an execution.[141] Although the Court left it to the States to develop specific standards for a pre-execution competency determination, including the burden of proof that must be met by an individual claiming incompetency, its preferred standard is a preponderance of the evidence.[142] Although this analysis does not require reconsideration of an issue previously litigated at trial, the lower standard reflects the balancing of interests inherent when considering an impending execution.

In summary, the tiered system of review proposed in this Article would permit an individual submitting a freestanding claim of actual innocence to argue for a new trial under the enhanced standard of

140. Murray v. Carrier, 477 U.S. 478, 495 (1986).

141. *Id.* at 427 (explaining "a constitutionally acceptable procedure may be far less formal than a trial").

142. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-5.7(c)–(f) cmt. at 295–301 (1989); Richard J. Bonnie, *The Death Penalty and Mental Illness: Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1173–74 (2005).

review implied by the Court in *Herrera*[143] or, if he is unable to meet that standard, to seek commutation of his death sentence under the lesser "more likely than not" standard applied to gateway innocence claims. This system would accord appropriate deference to the systemic interests in finality and preservation of prosecutorial and judicial resources, confer appropriate weight to the substantial liberty interests of the petitioner subject to execution, and give valid effect to the requirements of the Eighth Amendment as it applies to capital cases.

IV. CONCLUSION

The Supreme Court has gone so far as to exclude entire groups of individuals[144] and crimes[145] from application of the death penalty based on the mere speculative possibility that an innocent person might be convicted and sentenced to death. Certainly, this Eighth Amendment retribution-based concern also extends to a situation in which an individual who has been convicted and sentenced to death can make a colorable postconviction claim of innocence by showing that, based on new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[146] A tiered system of standards and remedies for freestanding innocence claims best balances the concerns of all: the petitioner, the State, and the Eighth Amendment.

143. The "clear and convincing" standard enunciated by the district court in *In Re Davis* is an appropriately enhanced standard for a freestanding claim seeking a new trial. *See supra* Part I.

144. *See generally* Graham v. Florida, 130 S. Ct. 2011 (2010) (excluding juveniles from application of a life without parole sentence for a non-homicide offense); Atkins v. Virginia, 536 U.S. 304 (2002) (excluding intellectually disabled individuals from the death penalty). Although it was not specifically discussed within *Roper v. Simmons*, 504 U.S. 551 (2005), certainly the same concern would weigh heavily against the imposition of a death sentence on a juvenile defendant.

145. *See generally* Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (excluding the crime of child rape from application of the death penalty).

146. Schlup v. Delo, 513 U.S. 298, 327 (1995).