ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

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

CASE NO: 91-7328

PLACE: Washington, D.C.

DATE: October 7, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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LEONEL TORRES HERRERA, :

Petitioner :

v. : No. 91-7328

JAMES A. COLLINS, DIRECTOR, :

TEXAS DEPARTMENT OF :

CRIMINAL JUSTICE, :

INSTITUTIONAL DIVISION :

- - - - - - - - - - - - - - - - - - X

Washington, D.C.

Wednesday, October 7, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

TALBOT D'ALEMBERTE, ESQ., Tallahassee, Florida; on behalf of the Petitioner.

MARGARET P. GRIFFEY, ESQ., Assistant Attorney General of Texas, Austin, Texas; on behalf of the Respondent.

PAUL J. LARKIN, JR., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; United States, as amicus curiae supporting Respondent.

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P R O C E E D I N G S

(10:59 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 91-7328, Leonel Torres Herrera v. James A. Collins.

You may proceed, Mr. D'Alemberte.

ORAL ARGUMENT OF TALBOT D'ALEMBERTE

ON BEHALF OF THE PETITIONER

MR. D'ALEMBERTE: Thank you, Mr. Chief Justice, and may it please the Court:

The case of Leonel Herrera brings to the Court the question of whether or not a person with a colorable claim of innocence is entitled to have a hearing before being executed by the state.

QUESTION: (Inaudible)

MR. D'ALEMBERTE: Your Honor, we are not challenging the conviction below, we are basing this submission on --

QUESTION: You mean innocence of the death penalty, so to speak.

MR. D'ALEMBERTE: Your Honor, it's our contention that he should not be executed while he has a colorable claim of innocence, but our submission is based on the Eighth and Fourteenth Amendment.

QUESTION: Is it innocence in the sense that he

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didn't commit the crime?

MR. D'ALEMBERTE: It is, Your Honor.

QUESTION: So it does go to the guilt and not just the sentence.

MR. D'ALEMBERTE: It does, Your Honor, although in our submission the relief that we request does not seek complete justice at this stage. We are just simply saying at this stage that Leonel Herrera may not be executed while he has a colorable claim of innocence. And all we sought at this stage is that Judge Hinojosa at the trial level take evidence about our colorable claim of innocence, which he agreed to do, and that process before Judge Hinojosa was aborted by the decision of the Fifth Circuit.

QUESTION: But at bottom you have a claim of innocence of the conviction, I mean that goes to the merits of the conviction, do you not?

MR. D'ALEMBERTE: We do, Your Honor, and ultimately --

QUESTION: So how does the Eighth Amendment bear on that?

MR. D'ALEMBERTE: Your Honor, the Eighth Amendment only gets us step one. We respectfully submit that because of the grounds of our claim we in this submission only ask that the state not be allowed to

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execute Leonel Herrera. We recognize that that does not reach a complete justice. It's really not entirely symmetrical in our judgment. We would like for it to be symmetrical. We would like to see at some point a larger principle, but we do not urge that larger principle here.

QUESTION: Now the question presented, the first question presented, as I read it, says whether the Eighth and Fourteenth Amendments permit a state to execute an individual who is innocent of the crime for which he was convicted and sentenced.

MR. D'ALEMBERTE: That's correct, Your Honor.

QUESTION: Now, you don't really think that's the way the case comes to us, do you? There's an allegation of innocence. He comes to us as a guilty defendant. He has been found guilty.

MR. D'ALEMBERTE: Your Honor, he was found guilty by a state court and now a Federal judge has ruled that there's a colorable claim of innocence and has sought to proceed.

QUESTION: But the question was not presented to us in the language you have just used, a colorable claim of innocence.

MR. D'ALEMBERTE: Your Honor, perhaps there has been some error in that. The whole point of this is that the, is that in order to get to a showing of innocence you

have to plead first of all innocence and then a Federal district judge has to use the various habeas procedures to act on that claim of innocence and make a determination. That whole process was going forward before Judge Hinojosa when the Fifth Circuit stopped the process.

QUESTION: Well, now most states have provisions for letting a convicted defendant come in with new evidence, limited to a certain amount of time. Isn't that right?

MR. D'ALEMBERTE: I know other states do. I don't agree with the states count in this, but I think quite a large number.

QUESTION: And in this case it has been some years, I guess.

MR. D'ALEMBERTE: It has been 10 years, Your Honor.

QUESTION: And the state's period for coming in with new evidence has been exhausted long before.

MR. D'ALEMBERTE: It's a 30-day period, Your Honor, in Texas. And the Texas court to whom we tried to take this claim originally simply said it was not a claim, no jurisdiction for that claim.

QUESTION: And Texas does have a method by which someone in Herrera's position could ask for clemency or relief through the governor, I guess?

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MR. D'ALEMBERTE: There is at least a theoretical process, Your Honor.

QUESTION: Well, there is a process on the books where that can be done?

MR. D'ALEMBERTE: It is, Your Honor. It's not --

QUESTION: And that has not been resorted to at this stage?

MR. D'ALEMBERTE: Yes, Your Honor, we applied for that process. We have not had a hearing and we have not had clemency.

QUESTION: That's pending?

MR. D'ALEMBERTE: Perhaps so, Your Honor. Under the Texas rules it's not even clear that we're entitled to be before the Texas Board of Pardons and Parole. The only way to get there it seems to me as I read their rules is that all members of the prosecution team, that is not just the prosecution, the prosecutor, the sheriff, and the judge have to make application and have to agree to that submission, or alternatively there is to be a court judgment perhaps supported by affidavits.

So the possibility if we went forward with this matter before Judge Hinojosa and got a judgment of actual innocence, that might give us an entry point to the Texas clemency proceeding. But there's not any great history of

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clemency or pardons being granted in terms of either granting mercy or on basis of innocence in Texas, although there have been Texas cases. We know at least Randall Dale Adams where a person was actually innocent, but that process did not work for --

QUESTION: Would you be challenging, would you be making this argument if Texas had a, say a 5-year time limit?

MR. D'ALEMBERTE: Yes, sir. Your Honor, I believe that innocence is a value which trumps all other time limits, and in that I go back to Judge Friendly's 1970 law review article in which he said that innocence ought to be a paramount virtue and you have to look at that --

QUESTION: But do you think that, do you think that a judge presented with newly discovered evidence of guilt or innocence of the offense, do you think he's entitled before ordering a hearing to ask himself or herself well, even with the newly discovered evidence is there any argument that the Jackson rule, that Jackson is not or is satisfied?

MR. D'ALEMBERTE: Yes, in general, Your Honor, it seems to me that's exactly the process that ought to be followed, that a judge ought to look first of all to see whether the pleading stage is satisfied. If so, then pick

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up and look at the case and to look at the case as the Federal habeas rules permit, step by step. Judge Hinojosa was in that process, and I perfectly well agree that at some point the district judge says there's not enough here to go forward --

QUESTION: He doesn't need to grant a hearing if he thinks that --

MR. D'ALEMBERTE: Exactly, Your Honor.

QUESTION: -- the submission is, falls short of the threshold.

MR. D'ALEMBERTE: Precisely. And Judge Hinojosa was about that process when it was interrupted.

QUESTION: But let's say we disagreed with you that there's no time limit on claims of innocence.

MR. D'ALEMBERTE: Yes, sir.

QUESTION: And let's say that we would say to ourselves at least they have to come in before 10 years. Now you, you wouldn't win this case just because the state has a 30-day limit, would you?

MR. D'ALEMBERTE: No, Your Honor. Any time limit that cuts -- that's the design of the safety valve that this Court has talked about at various times, Justice White. And as I look at this history over the years of when we have learned about actual innocence I think the lesson it teaches me is that many times we don't learn

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until many years later of actual innocence.

QUESTION: But the safety valve this Court has talked about, Mr. D'Alemberte, is in connection with a claim of innocence that is traceable to some constitutional violation. It isn't just a free-standing claim of innocence. You're asking for something quite different than what we provided for example in Sawyer as a basis for defeating the claim of abuse of the writ.

MR. D'ALEMBERTE: Justice Rehnquist, Mr. Chief Justice, I do appreciate the fact that a great deal of the safety valve discussion, the discussion about miscarriage of justice does seem to be linked in some way with an underlying constitutional claim.

QUESTION: Well, it doesn't just seem to be, it is.

MR. D'ALEMBERTE: Then I stand corrected, Your Honor. I read some of those passages as indicating that a pure miscarriage of justice that would --

QUESTION: Well, did you read Sawyer against Whitley?

MR. D'ALEMBERTE: I did read Sawyer carefully, Your Honor, and I understood that although in our submission we do not think Sawyer directly controls, certainly the Sawyer decision adopted and promulgated the standard of Kuhlmann, and we believe that Kuhlmann

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controls. And I do concede that there is, there does seem to be a connection between the claim of innocence and the constitutional claim.

QUESTION: And you would abrogate that in your submission?

MR. D'ALEMBERTE: Your Honor, we make this submission --

QUESTION: Well, counsel, isn't there a constitutional rule about what, how much evidence there has to be to convict? Doesn't Jackson say that the evidence has to reach a certain standard?

MR. D'ALEMBERTE: Your Honor, we don't think --

QUESTION: Doesn't it or not?

MR. D'ALEMBERTE: Jackson says that on a pure, on a review of the original record there is indeed, Your Honor, a standard to be applied. We do not use the Jackson standard, however, in other habeas claims. We don't use it in habeas context.

QUESTION: But in any event there is a constitutional rule about the quantum of evidence that there needs to be to convict.

MR. D'ALEMBERTE: Yes, sir, there is, and I --

QUESTION: And you're saying that, you're saying that with the newly discovered evidence that standard would not be met.

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MR. D'ALEMBERTE: No, Your Honor, I believe --

QUESTION: Aren't you? Aren't you?

MR. D'ALEMBERTE: No, sir. I think what we're saying is that we are prepared to meet the standard which was announced in Kuhlmann case in 1986, and I believe adopted by the Chief Justice's opinion in Sawyer last term. And that standard, I believe, is the standard of whether or not there's a probability that the original jury verdict was in error.

QUESTION: Except your submission does not require that that error be traced to any Federal constitutional violation.

MR. D'ALEMBERTE: Your Honor, our submission at this stage does not. If I may go back and --

QUESTION: Well, no, you're answered my question. It does not.

MR. D'ALEMBERTE: It does not because of the history, Your Honor, and that is that the Fifth Circuit stepped into a process. And it's the Fifth Circuit's decision that says actual innocence is not a ground for Federal habeas that makes this question so very stark before this Court.

QUESTION: Well --

QUESTION: Excuse me.

QUESTION: Exactly what is the constitutional

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rule you would have this Court adopt? It's not clear to me.

MR. D'ALEMBERTE: Your Honor, it is the rule that we believe the Court has adopted in Ford. It's also a rule that was adopted earlier in Robinson v. California, and it's the idea that our protections against cruel and unusual punishment protect against anything that's barbaric. We believe that execution of someone who is innocent, execution of someone who has --

QUESTION: Well, that goes back to my initial question. We don't have an innocent person here. We have a person who has been convicted of the murder. You have allegations coming up later of new evidence. So in that context what is the rule you are asking us to adopt?

MR. D'ALEMBERTE: Your Honor, I believe that the rule is analogous to the rule announced in Ford. We did not know in Ford whether the person --

QUESTION: Well, just, just can you tell me the rule you would have us adopt, then we can talk about authorities.

MR. D'ALEMBERTE: I'm sorry. Your Honor, the rule that we would suggest is the rule that says that an inmate with a colorable claim of innocence may not be executed without provision for a hearing, due process to determine the merits of that claim.

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QUESTION: And if they commuted his sentence to life then that would be the end of the case?

MR. D'ALEMBERTE: That would be the end of this case, Your Honor. I don't --

QUESTION: Well, but I don't see why the principle is any different. Why is it --

QUESTION: That's not cruel and unusual? That's not cruel and unusual, to leave him in prison for life although he has a colorable --

MR. D'ALEMBERTE: Your Honor, it may well be, although I do not know what the reach of the Eighth Amendment is. It's very clear to me that something so basic as executing a person with a colorable claim of innocence is reached by the Eighth Amendment. Now I'm not sure how far beyond that it reaches, but it's pretty clear to me that it reaches at least that far.

QUESTION: Well, don't we have to consider how far beyond that it reaches? I mean, if the argument you make is valid surely it should apply to everyone who is in prison as well.

MR. D'ALEMBERTE: Your Honor, that's my intuition as well, but our submission is only on this narrow point.

QUESTION: Well, but I think one has to consider how much damage we do to the system of criminal justice if

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we apply it across the board to all prisoners, no matter how much after the fact they choose to bring in new evidence raising a colorable claim of innocence. The witnesses from the prior trial are dead or gone. The burden this would put upon a system of justice is enormous.

MR. D'ALEMBERTE: Your Honor, first of all we're not asking for the very broad rule which you suggest in your question.

QUESTION: But I'm saying it's illogical not to ask for the broad rule. If the principle of constitutionality you're asserting is correct, I don't see why it's any more justified to keep someone in prison for life than it is to, than it is to execute them.

MR. D'ALEMBERTE: And perhaps, Your Honor, this Court will at some point reach that, but it need not reach that point on this submission because we do maintain, along with earlier court decisions, that death is different and that all of the many claims that the state makes for all the processes that might be available, they are clearly not available to someone who has been executed.

QUESTION: Well, now Texas or any other state is free to adopt the rule you're arguing for, isn't it, by legislation? I mean, they could do that.

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MR. D'ALEMBERTE: Indeed, Your Honor, there was legislation that was vetoed by the governor back in 1984.

QUESTION: Have other states adopted it?

MR. D'ALEMBERTE: Your Honor, not that I know of.

QUESTION: No state has adopted it. Did it ever exist in the common law?

MR. D'ALEMBERTE: I'm not aware of the principle that I now advocate --

QUESTION: There has always been in the common law as far as I know a rule that you must bring in new evidence within a certain period, a relatively short period. I think it was 30 days, wasn't it?

MR. D'ALEMBERTE: I didn't remember that being in common law, Your Honor.

QUESTION: Well, whatever the period was. I think it was. But there has always been such a period. Where do you get this intuition that it is unconstitutional? If no state has it now and it has never been the case in the common law, how have you decided that it's unconstitutional?

QUESTION: Maybe you read some of the majority opinions instead of just the dissents and got some of those thoughts about death being different.

(Laughter.)

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QUESTION: What basis do you have for it other than your intuition?

MR. D'ALEMBERTE: Your Honor, when I read the phrases used by this Court referring to miscarriages of justice and I began to put in my mind what is the greatest possible miscarriage of justice, it occurs to me that the greatest one that I could formulate would be the execution of an innocent person or the execution of a person who had a colorable claim of innocence. You would not want that person to be executed without hearing that case.

And in the same way, Justice O'Connor, that I do believe that the idea that would give a process to make the determination of whether or not the person is innocent in the same way that would give a process to find out whether they were insane. That's the reason I referred to Ford.

QUESTION: Well, let me ask you this. Suppose that Texas allowed a new trial 10 years later on the basis of this evidence, but went ahead and put in all the evidence it had before. Would there be enough evidence that would enable a jury to return a guilty verdict again, notwithstanding the new evidence?

MR. D'ALEMBERTE: Based on the record available right now?

QUESTION: Yes.

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MR. D'ALEMBERTE: Your Honor, I --

QUESTION: Could the jury disbelieve these late coming affidavits and continue to find Mr. Herrera guilty?

MR. D'ALEMBERTE: Your Honor, of course these affidavits in a full evidentiary hearing would be turned into extra witnesses being placed before a trial.

QUESTION: Yes.

MR. D'ALEMBERTE: I think our burden is to show that a jury, based on all the evidence, not just the evidence that is judged by the Jackson standard but all the evidence judged under the Kuhlmann standard, would mean that a jury probably would not have reached that result, and that --

QUESTION: Probably would not.

MR. D'ALEMBERTE: That's right. That's my understanding, that's my reading of Kuhlmann, Your Honor, quite directly.

QUESTION: This is a full scale trial before the Federal judge, or does he just examine affidavits?

MR. D'ALEMBERTE: Your Honor, it seems to me that this is a staged proceeding in much the way that all habeas cases are, under great control of the Federal district judge under the habeas rules. And so it is initially not a trial, it is first of all a review of the pleadings to find out if they're adequate. And at that

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point we then come forward with support for our pleadings, which we have done in affidavit form, and that's the place where we were before we were interrupted.

QUESTION: And what if you win on that hearing? Then what?

MR. D'ALEMBERTE: If we win on the hearing I was just talking about then, Your Honor, we go forward, we'll get the other discovery which we need to have in this case. Recognize that we're investigating, Your Honor --

QUESTION: Well, I know, but what if you --

MR. D'ALEMBERTE: Oh, if we go forward to the evidentiary hearing, all the way to the evidentiary hearing.

QUESTION: Yes.

MR. D'ALEMBERTE: At that point, Your Honor, if we prevail in convincing the Federal judge that we indeed are correct, there is a claim of innocence --

QUESTION: Then you have a probable, would probably have an effect on the jury. Then you're going to get a new trial?

MR. D'ALEMBERTE: No, sir. At that point all that happens is what has happened under Ford. At that point --

QUESTION: But you would have a new sentencing hearing.

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MR. D'ALEMBERTE: No, sir. It's simply that the state may not execute Leonel Herrera. That's as far as we go in this case, Your Honor.

QUESTION: He has to, the state has to impose some new sentence then, doesn't it?

MR. D'ALEMBERTE: Your Honor, at that point the state simply may not execute Mr. Herrera in the same way that they may not execute Alvin Ford.

QUESTION: Well, can they --

QUESTION: The evidentiary hearing that you're talking about before the Federal judge, this is the testimony of witnesses, I take it, just as you would have had in the original case.

MR. D'ALEMBERTE: Your Honor, it may or may not be. And the reason I give you that answer is let's look at the example of the Virginia case that came up last term, the Coleman case. The Coleman case operated through the system much in the same way that our case has begun to operate through the system, but there was no appellate court to sit in, step in and cut off the Coleman proceedings. The Coleman proceedings went forward, the judge looked at the affidavits and other material and said based on what I see there is no reason to have an evidentiary hearing. We think that power still rests with the Federal district judge. He doesn't have to go forward

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for a full evidentiary hearing.

QUESTION: But somewhere down the line if the judge thinks otherwise there is a full evidentiary hearing.

MR. D'ALEMBERTE: If we make our showing along the way.

QUESTION: Okay. And at that full evidentiary hearing all the witnesses that testified at the trial I suppose testify again?

MR. D'ALEMBERTE: They may, Your Honor, but the state gets the benefit under the rule that we suggest, essentially it's Judge Henry Friendly's rule, the state gets the benefit of putting in the full trial transcript. They don't have to retry the case. They have the benefit of a case which they say was already overwhelming. So they get to put that case in and the judge looks at, plus anything else the state wants to put in, and at that point they get to make the --

QUESTION: So this is really in effect a new sentencing hearing.

MR. D'ALEMBERTE: In essence, Your Honor, it is a, I think it's more in the nature of a Ford hearing finding out whether the state could execute somebody at that time.

QUESTION: Well, I know, but usually people,

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even in Florida the jury is the one who first hears all that stuff and makes a recommendation.

MR. D'ALEMBERTE: Yes, sir.

QUESTION: Isn't that right? Why shouldn't that be -- if you, if you have this, if the judge thinks that you have a colorable claim, why shouldn't it go to a jury trial first?

MR. D'ALEMBERTE: Your Honor, that's obviously an option for the state if the state wants to take it back there, but I do not see that the rule we advance compels the state to do that.

QUESTION: You spoke of discovery. What's the discovery for?

MR. D'ALEMBERTE: Your Honor, the discovery is absolutely crucial to us in this case. Recognize that we're in the situation --

QUESTION: Well, I thought you've got your newly discovered evidence. What more do you want to discover?

MR. D'ALEMBERTE: Your Honor, there is a great deal of additional evidence which we have indicated in our pleadings. Pleading the file with the Federal court, it was the opening pleading on February 13, told the court about the kind of problems we have had in investigating this event, these events in south Texas.

QUESTION: No, but it sounds to me as though

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you're simply talking about a reinvestigation de novo as opposed to a proceeding to evaluate the potential effect of newly discovered evidence.

MR. D'ALEMBERTE: Your Honor, we're talking about both, and the record --

QUESTION: You're saying you want to see if you can find some more newly discovered evidence.

MR. D'ALEMBERTE: Absolutely, Your Honor, and the reason we --

QUESTION: Well, what if you didn't have any to begin with? Would you be entitled to some kind of a reexamination proceeding without that?

MR. D'ALEMBERTE: I think, no, Your Honor, I think we have to make the threshold showing to a Federal district judge, as we have done in this case, that we are entitled to go forward. The Federal district judge was taking this as the judge should, step by step by step. The first step is to find out whether we met the pleading test. We did. The second step is to see whether we had any evidence to support that pleading. We brought forward the affidavits.

The next step I believe is for the Federal district judge to give us the kind of protection from the, from Texas execution, and the kind of protections that are contemplated in the habeas rules which I understand to be

the permission to use the processes of the court to do an investigation.

QUESTION: Well, it sounds to me as though you're saying that there's some kind of initial threshold quantum of claimed newly discovered evidence which entitles you in effect to have a new evidentiary investigation, and that's a very different thing from either the common law or the statutory proceedings I would suppose in most states for the evaluation of newly discovered evidence when under the rules that is an available proceeding for you to bring. You're talking about something much more.

MR. D'ALEMBERTE: Judge Souter, I think I'm talking about the thing that happens in most habeas proceedings. The judge has discretion to allow us to take the discovery. And the reason that I linger on the point in my colloquy with you is that this is absolutely critical to us. Understand what is going on in south Texas.

QUESTION: Why isn't it critical to you to have a determination of the potential effect of the newly discovered evidence that you have brought forward and already proffered to the court?

MR. D'ALEMBERTE: Because that's an incomplete record, Your Honor. The district judge wasn't even, had

just begun to deal with this. This was interrupted by the state and by the Fifth Circuit at the beginning of the proceeding, not at the completion. This isn't a full habeas record we've got. The state stepped in and the Fifth Circuit stepped in and stopped this process of the --

QUESTION: Yes. Would you not agree though that, perhaps not in this case but in cases like this, the district judge does have some discretion to say well, you've got one affidavit there but I think it's so highly improbable that I'm not going to go forward? That's certainly an option for the judge?

MR. D'ALEMBERTE: Absolutely, Judge, Justice Stevens. In fact that was an option that was available to Judge Hinojosa. It was the option available to the judge who sat on Kuhlmann. The difficulty with this case is we stopped a process which is rational.

QUESTION: Now, of course, counsel, in Kuhlmann the question was the sufficience of the evidence under Jackson v. Virginia. There it was a standard. That is not what you're arguing here, so the cases are quite different.

MR. D'ALEMBERTE: Your Honor, actually I did reread the trial judge's order in that case and I thought that the standard applied by the trial judge in Kuhlmann

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was the Kuhlmann standard from the 1986 decision of this Court.

QUESTION: Yes.

MR. D'ALEMBERTE: And I believe that that's the probability standard, and that's the standard, I believe, that Judge Friendly framed in his 1970 article and has been adopted by the --

QUESTION: But that was just a threshold to determine whether or not we could hear other allegations of constitutional error, which is quite different from this case. Let me ask you in this case, counsel, suppose a defendant elects not to bring forward a certain line of testimony in order to protect his brother who is the true perpetrator of the crime. The defendant is innocent. He is convicted. Can he later demand a new hearing?

MR. D'ALEMBERTE: Your Honor, if it's a claim of, if it's a colorable claim of innocence --

QUESTION: Well, he's innocent. We all know he's innocent.

MR. D'ALEMBERTE: Yes, sir. I believe he later --

QUESTION: So in other words you have two shots at the judicial system? You can elect a strategy that fails and then because you're really innocent you can start all over again? You can double deal the judicial

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system in that way just because death is at issue?

MR. D'ALEMBERTE: And because innocence is a paramount value, yes, Your Honor.

QUESTION: So newly discovered evidence is no part of your claim? That is not essential to your claim?

MR. D'ALEMBERTE: It's the beginning point of our claim.

QUESTION: No. It seems to me that your answer to Justice Kennedy makes it very clear that the evidence does not have to be newly discovered.

MR. D'ALEMBERTE: I'm sorry, I thought you, I thought his question was hypothetical. I thought you were asking about my claim. Leonel Herrera's claim has evidence.

QUESTION: Yes, I realize that, but the rule that you are urging us to adopt as a constitutional necessity does not require a newly discovered evidence condition.

MR. D'ALEMBERTE: We believe if it's going to be a safety valve and if it's going to apply anywhere it ought to apply in context of death cases, and we believe that innocence is such a paramount value that opportunity to prove innocence should be open to --

QUESTION: Well, it's such a paramount value, I suppose, if the defendant elects to remain silent. He's

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an innocent defendant. The trial goes badly for him, and now he wants to testify and say all he knows about that. I would say he must get a new hearing under your view, because innocence is paramount.

MR. D'ALEMBERTE: No, Your Honor, only if the district judge finds that there's a colorable claim.

QUESTION: Well, I want to know -- we're entitled to probe the parameters of the rule that you are suggesting that we adopt in this Court.

MR. D'ALEMBERTE: Yes, sir.

QUESTION: And in my view all of your submissions so far indicate that the answer to my hypothetical question must be in the affirmative.

MR. D'ALEMBERTE: Your Honor, I'm sorry I have to give the negative answer. All we suggest is it goes before a judge who uses it at his discretion.

QUESTION: But we are, Mr. D'Alemberte, charged with developing and expounding the rule that that judge must follow. And you are arguing to us for a rule that would require that judge at least to exercise his discretion whether or not to hold a hearing in the situation which we suppose, and I want to know what guides that discretion.

MR. D'ALEMBERTE: Then, Your Honor, thank you for phrasing the question that way because the rule we

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advocate is a rule which permits a judge in his discretion to hear the case, and the rule that we suggest guides the discretion are the rules already established by this Court and the rules that worked perfectly well in the Kuhlmann case. And the rule is, first of all for pleading stage we can go to Blackledge as to determination of the case. After the full submission we look to the Kuhlmann standard.

QUESTION: Well, Mr. D'Alemberte --

QUESTION: Again you must remember all those were thresholds to reaching other constitutional errors, which is not what you're arguing in this case.

MR. D'ALEMBERTE: Your Honor, may I, may I make the point that on our original submission before Judge Hinojosa we did in fact have other constitutional error. It's only because Judge Hinojosa found those abused in his application of McCleskey, and we think that may have been in error. But there was a chance, if the case had stayed before Judge Hinojosa, for Judge Hinojosa to correct that error when he found that our claim of innocence was indeed valid to then let us proceed on claims 2 through 5. So just to make clear, that was not our original submission. We only got in this posture because of Hinojosa's ruling about McCleskey and the Fifth Circuit decision.

QUESTION: May I ask whether on the facts before

us here it would be an abuse of discretion for the judge to refuse a hearing?

MR. D'ALEMBERTE: Your Honor, I do not submit that it would be an abuse.

QUESTION: It would be perfectly all right if faced with what you have brought forward the judge said I don't believe it, we're not going to have a hearing?

MR. D'ALEMBERTE: Your Honor, I think a district judge might look at the full record and make a determination that we do not have enough at this point or some later point. Judge Hinojosa, who lives in the valley, been there since 1983, believes that we do have enough and asked us, and gave us permission to come forward and make further demonstration. And the further demonstration, in answer to Judge Souter, was to get the processes of the court to be able to look at law enforcement misconduct. That's just so hard to get at.

QUESTION: But you wouldn't be here, you wouldn't be here if the district judge hadn't made that finding?

MR. D'ALEMBERTE: We believe that the district judge looked at our evidence --

QUESTION: Would you be here arguing this case had Judge Hinojosa turned it down?

MR. D'ALEMBERTE: No, if the district judge had

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thrown us out we would not be urging that the limited rule necessary for the court is the rule that says a judge may entertain our claim.

QUESTION: Thank you, Mr. D'Alemberte.

Ms. Griffey, we'll hear from you.

ORAL ARGUMENT OF MARGARET P. GRIFFEY

ON BEHALF OF THE RESPONDENT

MS. GRIFFEY: Mr. Chief Justice, and may it please the Court:

Post trial consideration of newly asserted evidence relevant to guilt and the reassessment of the likelihood of guilt based on such evidence by a reviewing court is not required by the Constitution, nor can authority for such review be derived from the Constitution under existing constitutional analysis. The trial is the constitutionally designated procedure for the determination of guilt and the executive clemency is the mechanism envisioned by the drafters of the Federal Constitution and the constitutions of the 50 states to correct an unjust conviction or to prevent the imposition of an apparently unjust sentence when that conviction or sentence cannot be corrected by existing standards or procedures.

The rule proposed by Herrera would require reviewing court to reassess the likelihood of guilt

whenever a defendant asserts additional evidence after trial in an attempt to establish a reasonable doubt. Such a rule would transform the trial into but a preliminary determination of guilt, it would encourage sand bagging of available evidence in defenses, and in the capital context would require a reviewing court to enter repeated stays of execution to consider a defendant's untimely assertions of newly discovered evidence.

Such post trial reassessment of the likelihood of guilt would be inherently less reliable than the trial process itself. It would require a reviewing court to weigh unreliable, motivated evidence advanced years after trial by the defendant against the cold trial record. As this Court has recognized, an alibi defense can easily be fabricated and a defense witness who is not identified until the eleventh hour is inherently suspect. As a practical matter a defendant's actual innocence could only under the most unusual circumstances be characterized as newly discovered. A defendant normally knows whether he committed the crime or not.

Where, as is true in Herrera's case, a defendant fails to offer any defense at trial but simply puts the state to his proof, the assertion immediately prior to his scheduled execution date of a claim of actual innocence based on newly asserted evidence must be presumptively

unreliable. Herrera's case demonstrates both the inappropriateness of a reviewing court's relitigating guilt and the potential for abuse is inherent in constitutionalizing such a procedure. Herrera's newly asserted evidence, if true, would necessarily have been available to him at the time of trial upon the exercise of due diligence.

QUESTION: You don't disagree with the proposition, I take it, that innocence is paramount? Do you disagree with that?

MS. GRIFFEY: Innocence is paramount to --

QUESTION: Well, that's the proposition we're supposedly debating here. Is that -- does Texas not believe that innocence is paramount?

MS. GRIFFEY: Certainly innocence is paramount. The designated procedure for determining innocence is the trial process itself.

QUESTION: What's at issue here is whether that proposition shall become a provision of the Federal Constitution, meaning that Federal courts shall always have to sit in judgment of whether innocence has been adequately determined. Isn't that what we have before us?

MS. GRIFFEY: Right. And it is the state's position that the determination of guilt that is accomplished at the trial process is the only

determination of guilt that if the state chooses to afford, for instance via a motion for a new trial mechanism, a vehicle whereby a defendant can assert additional evidence relevant to guilt, that is within the state's prerogative.

QUESTION: The defendant can bring later educed evidence before the governor of Texas?

MS. GRIFFEY: Definitely.

QUESTION: Has this been presented to him yet?

MS. GRIFFEY: My understanding upon an inquiry to the governor's office is that they have presented a request for a reprieve. That would be a 30-day reprieve that can only be given once by the governor. It does not require the vote of the Board of the Pardons and Paroles for her to grant this reprieve, and that the basis of the request for the reprieve was to allow additional time to develop a claim of actual innocence. That request has never been ruled upon.

QUESTION: If the Board of Pardons were to deny the request I assume it's because the Board of Pardons thinks that the individual is guilty, or not? If the Board of Pardons believes that the man is innocent are they authorized nonetheless to allow his execution to proceed?

MS. GRIFFEY: Yes, they would be.

QUESTION: They would be?

MS. GRIFFEY: Yes.

QUESTION: Does that happen?

MS. GRIFFEY: That has not happened in my knowledge. I have heard of no reports of anything like that.

QUESTION: Of course the Texas Board of Pardons hasn't set aside a great many death sentences, has it?

MS. GRIFFEY: No, they haven't.

QUESTION: It's not one of their favorite activities.

MS. GRIFFEY: I think that that, and that is a criticism that of course has been levelled at the clemency process, is that it, you don't often see a death sentence being set aside. Of course this can reflect many factors, one being that most people on death row are actually guilty, and number two, the fact that many of the considerations that used to lead to the exercise of clemency are now part of the individualized sentencing concerns that are required by the Eighth Amendment in the capital sentencing context.

QUESTION: I know a few --

QUESTION: Has Texas exercised the right to grant clemency in a death case in the last 15 to 18 years?

MS. GRIFFEY: No. They did grant a reprieve

within the last year, there was a 30-day reprieve, and ultimately the Board of Pardons and Paroles voted against the clemency procedure.

At this point I would like to make one notation in response to a question from the Court. There are three ways by which a request for clemency can be raised in the Texas system. One is upon the request of the governor herself. She can request that the board consider the matter. The other is the request of the majority of trial officials, which includes the prosecutor, the trial judge, and the sheriff of the county. And the third way is the request of the defendant and the defendant's counsel. That way is only available in the capital sentencing context.

QUESTION: That, the third way can be, it can be submitted to the clemency board or whatever simply on the basis of the request of the defendant and the defendant's counsel in a capital case?

MS. GRIFFEY: That's correct.

QUESTION: I didn't understand. Was that done here and has not been acted upon?

MS. GRIFFEY: What was done here was a request for the 30-day reprieve to allow them to develop additional evidence to, you know, to make a thorough request for clemency.

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Herrera's newly asserted evidence --

QUESTION: I suppose, you know, you're ready for the tough questions. Suppose you have a video tape which conclusively shows the person is innocent and you have a state which as a matter of policy or law or both simply does not hear new evidence claims in its clemency proceeding. Is there a Federal constitutional violation in your view?

MS. GRIFFEY: No, Your Honor, there is not. In our view there --

QUESTION: It would not be violative of the Constitution then to execute the person under those circumstances?

MS. GRIFFEY: No, it would not be violative of the Constitution under those circumstances. I don't think that circumstance is likely to happen. I think that it underestimates the interests that the governor has in seeing to it that not only the executive authority but the authority of the criminal system itself is carried out accurately and appropriately, and it would only undermine the confidence of the citizenry if the governor or the board were to act in an arbitrary manner.

And I also to think it's important to note at this point that clemency and commutation is a procedure and a mechanism that operates to the advantage of the

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defendant. It would operate to the advantage of Herrera in this case. Because it is not bound by procedural rules and burdens of proof and technical limitations, it can be exercised based on evidence that would not be admissible at trial and it can be based on less than a reasonable doubt. And in Herrera's case there would be nothing to prevent the governor granting him clemency even though a jury could easily reject his evidence and find him guilty upon his newly asserted evidence and find him guilty beyond a reasonable doubt upon retrial.

QUESTION: And the governor is more accountable to the electorate than are the courts. Is that an additional factor?

MS. GRIFFEY: I would say in Texas, given the fact that we have an elected judiciary, that's a hard call.

QUESTION: I was thinking of the Federal courts.

MS. GRIFFEY: Yes, definitely. That is true. And I think also the governor, being closer to the scene of the offense, so to speak, is better able to marshall the information necessary to make that clemency determination.

QUESTION: Ms. Griffey, your argument on this point is really much like the argument that the state made in the Ford case on executing a person who is not

competent to know what's happening.

MS. GRIFFEY: It is, Your Honor, but there are several factors that distinguish the Ford case. First of all, the post trial determination of competency required by Ford was well founded in both the historical and the contemporary practice. By contrast, the limitless retrial and reassessment of newly asserted evidence proposed by Herrera would impose upon a reviewing court a process of review that is without historical or common law precedent and one that is far from the unanimously accepted practice of the states.

QUESTION: Of course the same was true of Jackson against Virginia. They never had looked at the weight of the evidence before that case, and frankly I dissented in that case because I thought it was going to lead to a parade of horribles, we would be having retrials over and over and over again. My predictions didn't turn out. Sometimes these are, they don't really have to have as many hearings as you suggest.

MS. GRIFFEY: Well, of course Jackson v. Virginia is a due process case --

QUESTION: But there was a minimum standard of evidence that was required, which was created in that case for the first time.

MS. GRIFFEY: But it is the state's position

that the due process rights that are derived from the due process clause are limited to the procedures that adhere to the process by which a defendant is brought to trial, tried, and sentenced.

QUESTION: Correct, but under the Eighth Amendment, as your opponent has stressed, we have had several procedural rules that are more stringent in the death context because the court has said death is different. I don't know if you ask us to abandon that or you just want to assume that we, if we adopt this we must adopt it for every misdemeanor and everything else. Do you agree that death is different?

MS. GRIFFEY: Yes, I do, and I agree though that the heightened requirement of reliability in the capital context is designed to assure the reliability of the sentencing process. At issue here is not the reliability of the sentencing process. What we have here is an issue as to whether the defendant is in fact guilty. We don't even have an issue as to the reliability of the trial process in this case, so how, you know, we don't really have any unreliability of process.

QUESTION: Are you defending the decision below on the grounds that the court used?

MS. GRIFFEY: Yes, I am, Your Honor. It is my contention that --

QUESTION: Well, the court said this evidence wouldn't, wouldn't be heard because it wasn't, didn't go to some constitutional, show some constitutional violation. Is that right?

MS. GRIFFEY: That's my contention and my contention is that unlike Ford the Eighth Amendment does not dictate a constitutional violation in this case and that no constitutional violation can be derived under existing due process analysis. And so for that reason --

QUESTION: Of course the very issue in the case is whether, if there is sufficiently persuasive evidence, and assume it's just everyone would agree that it establishes innocence, but his trial was fair, the jury just made a mistake. Is there a constitutional right under the Eighth Amendment not to be executed when you're innocent? That's the issue. And I think you're saying no, there's no such right.

MS. GRIFFEY: That is what I'm saying, Your Honor.

QUESTION: But that is the issue, isn't it? Is it whether -- assuming he can establish his innocence, would it violate the Eighth Amendment to execute him even if he had a fair trial?

MS. GRIFFEY: I think that's the issue and I think that no, it would not. It would not violate the

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Eighth Amendment as long as he has been found guilty in a trial process to which all the myriad of constitutional protections adhered and there was no constitutional violation --

QUESTION: The fact that a mistake was made and a man may be executed does not raise a constitutional issue? That's what it boils down to.

QUESTION: Do you think, I thought the issue was whether or not a death penalty would have been imposed in light of the newly discovered evidence, not guilt or innocence of the crime.

MS. GRIFFEY: The way I understood the issue was that a death penalty couldn't be imposed upon someone who you had latter day evidence that raised an issue as to actual evidence, as to actual innocence, although perhaps you could impose a sentence of life without the possibility of parole upon that person.

QUESTION: How did the court of appeals go about it? Did it talk about innocence of the death penalty or innocence of the crime?

MS. GRIFFEY: They just said that there was no constitutional violation in this case and that newly discovered evidence relevant to guilt was not cognizable in the absence of a constitutional violation.

Ford is distinguished by another factor. The

determination of competency to be executed required by Ford is one that is most appropriately and most accurately made near the time of a scheduled execution. An assessment of guilt on the other hand is only likely to become less accurate with the passage of time. Not only did the Constitution clearly envision the trial as the procedure by which the guilt of a defendant would be determined, guilt is most accurately determined at that point, near the time of the offense, in the trial proceeding to which the myriad constitutional protections adhere.

Due process clause, likewise, does not require post trial consideration of newly asserted evidence relevant to guilt. The clause has limited operation beyond the specific guarantees of the Constitution and the Bill of Rights that adhere to the criminal procedures by which a defendant is brought to trial and tried. Due process does not secure procedures, the due process clause does not secure procedures that are distinct or independent of the constitutionally designated trial process.

For example, despite the contemporary practice of providing a defendant with an appeal to review the constitutionality of his trial and conviction, the due process clause does not guarantee an appeal. By analogy

it follows that due process does not guarantee a post trial procedure by which a defendant can relitigate guilt, a procedure that is unrelated to the constitutionally designated trial process for determining guilt.

QUESTION: Counsel, could you discuss Johnson v. Mississippi briefly? There the trial proceeding was in all respects correct, but then later New York upsets the conviction and we require the State of Mississippi to afford a post conviction procedure for resentencing. How do you distinguish that case from this one? There in order to prevent the imposition of a sentence that was, of a sentence that was faulty we required that a collateral procedure be followed. Why isn't that support for the petitioner's argument in this case?

MS. GRIFFEY: In that case the invalid conviction was being offered only to, relevant to the sentencing determination. Here we are talking about a guilt determination that they are claiming can be rendered unreliable by newly asserted evidence.

QUESTION: Well, in a sense this case is an a fortiorari case then. If we can set aside sentencing, certainly it follows with even greater force that we could set aside a conviction.

MS. GRIFFEY: Under that analysis, however, any error that accrued to the trial would become an Eighth

Amendment error, and I don't think that that is the analysis that has been employed by this Court. Any piece of evidence, no matter to what aspect of the definition of the crime, that was later demonstrated to be unreliable or whatever would automatically pertain to the sentencing process.

QUESTION: Well, we have said that the Eighth Amendment applies to the guilt determination phase. We require that the jury be instructed on lesser degrees of offenses, for instance.

MS. GRIFFEY: Yes. Beck was based on both an Eighth Amendment and a due process analysis, and the Beck analysis with respect to the Eighth Amendment made it very clear that because the sentencing decision as to guilt or innocence also encompassed the jury's feelings as to the death penalty because of the unique way in which the Alabama statute was structured, Alabama was, under their statute at that time the jury either had to find the defendant guilty and at once find him eligible for the death sentence or find him innocent and acquit him.

And they said that the guilt or innocence determination would be, also reflect the feelings as to the appropriateness of the death penalty and that that would violate the need for reliable and guided discretion as to the exercise of the sentencing determination. So I

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don't think that Beck per se can be cited for the proposition that all guilt/innocence inquiries are relevant to the sentencing determination.

QUESTION: Ms. Griffey, you have made it clear, I think you have made it clear that it's irrelevant to your position whether or not there is any post trial procedure for recognizing newly discovered evidence and irrelevant whether or not there is any executive clemency. On your position would it also be constitutionally irrelevant whether or not some kind of post trial procedure were allowed for the litigation of constitutional errors under some circumstances? In other words could we abolish habeas completely on your theory?

MS. GRIFFEY: It is clear that the state has no obligation as a constitutional matter, although they routinely do, to provide for direct appeal and state collateral review.

QUESTION: Uh-huh. Can we abolish it too? Can we say that Congress would be perfectly free consistent -- well, I suppose that begs the question, but would habeas be, would Federal habeas be irrelevant?

MS. GRIFFEY: I believe that the constitutional minimum, so to speak, would be that you could abolish Federal habeas and that the only avenue of relief to review the constitutionality of a conviction would be a

direct appeal to this Court by writ of error.

Thank you.

QUESTION: Thank you, Ms. Griffey.

Mr. Larkin, we'll hear from you.

ORAL ARGUMENT OF PAUL J. LARKIN, JR.

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE SUPPORTING RESPONDENT

MR. LARKIN: Thank you, Mr. Chief Justice, and may it please the Court:

We believe that the history of the development of Federal Rule 33, which is the rule of criminal procedure dealing with motions for a new trial, is instructive in this regard. It's instructive because the debate that's being conducted today in terms of the due process and Eighth Amendment provisions of the Constitution was the type of debate that was conducted in the legal community nearly 50 years ago that this Court heard and considered before it adopted what is the current version of now Rule 33.

Originally the Federal courts could grant a new trial in accordance with the common law rule. In order to obtain a new trial on the basis of a claim of newly discovered evidence the defendant would have to seek relief during the term of court in which he was originally sentenced. In 1934 this Court modified the common law

rule. In the criminal appeals rules a district court was authorized to award a defendant a new trial on the basis of a newly discovered evidence claim if the defendant sought relief within 60 days of the day that the sentence became final. 4 years later, in 1938, this Court modified the rule to allow a condemned prisoner to file a claim of newly discovered evidence at any time before the sentence was carried out.

At that point, late in the thirties and early in the forties, there was considerable debate in the legal community over the question whether all time limits for such motions should be abolished. The argument in favor of their abolition was that eliminating time periods was necessary to prevent miscarriages of justice. The contrary argument, the argument in favor of the retention of such time periods, was that it was necessary to promote finality. After hearing this debate this Court decided that the arguments in favor of finality outweighed those in favor of avoiding any risk of a miscarriage of justice.

In 1944 this Court adopted what is now known as Rule 33 of the Federal Rules of Criminal Procedures. That rule sets a 2-year time period within which motions seeking a new trial on the basis of newly discovered evidence must be filed. That rule is jurisdictional. And in setting that rule this Court abolished the special

exception that previously had existed for capital cases. The upshot is under today's rules applicable in the Federal system capital cases or non-capital cases are treated alike.

Now, it would be wrong, we think, to assume that today society for the first time --

QUESTION: But there really aren't, the rule didn't apply to very many capital cases when it was adopted, did it?

MR. LARKIN: It applied to cases such as murder, treason, it applied to such cases that you don't ordinarily see, but wrecking a train that results in death. There were capital cases on the books at the time and there are capital cases today. Neither this Court nor Congress nor anyone else has modified this rule --

QUESTION: What's the last death sentence that the Federal Government has imposed?

MR. LARKIN: Imposed?

QUESTION: Yeah.

MR. LARKIN: Well, the last one that was imposed by a jury was imposed I believe either in 1991 or in 1990. There is a capital case now on appeal to the Eleventh Circuit stemming from --

QUESTION: I used the wrong word. When has the last one been carried out, Federal?

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MR. LARKIN: The last one carried out was in the 1960's, but there were death sentences carried out by the Federal Government after this rule went into effect in 1944. Now we think it would be a mistake to say that society today for the first time is concerned about the risk of convicting, imprisoning, or executing an innocent defendant. And it would also be a mistake to conclude that today the balance of interests that might be conducted is so far superior to the balance of interests that was conducted by this Court nearly a half century ago that no time period can be said to be valid.

In fact the contemporary evidence in this regard supports the continued vitality of this Court's judgment. Most states have fixed time periods for the consideration of newly discovered evidence motions. The relevant rules and laws are collected in Appendix A to our brief. Under those laws petitioner could not have obtained relief in the courts of at least 35 states, if not 41. We think this widespread recognition that there should be some time period within which new trial motions based on newly discovered evidence must be brought. Coupled with the fact that the Constitution supplies no objective basis for preferring one time period over another indicates that it is not fundamentally unfair to set a fixed time period for the consideration in court of such motions and thereafter

to channel such motions to the process of executive clemency.

In fact Chief Justice Harlen Fisk Stone made that precise point in 1944 when he transmitted to the Federal rules advisory committee this Court's comments on what ultimately became Federal Rule of Criminal Procedure 33. Chief Justice Stone rhetorically asked 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 appeal should be made to executive clemency alone. We submit that the answer to Chief Justice Stone's question is yes, the same answer this Court gave nearly a half century ago. The procedure he described is the procedure we have historically followed, and that historical procedure is fully consistent with due process.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Larkin.

The case is submitted.

(Whereupon, at 11:54 a.m., the case in the above-entitled matter was submitted.)

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Leonel Torres Herrera, Petitioner v. James A. Collins, Director,

Texas Department of Criminal Justice, Institutional Division

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann-Marie Federico

(REPORTER)