



The New Southern Gothic: Habeas Corpus, AEDPA, and the Nightmare of Proving Actual Innocence

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Abstract

Investigating the demise of the writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), this paper questions the callused lineage of cases upholding Title I of AEDPA. This research contends that states must take up statutory methods, as Texas has, to review defendants' claims of actual innocence, thereby ensuring that the legal system designed under the U.S. Constitution remains fair and just, both in theory and in practice. Using imagery from the southern gothic genre, this paper also reveals that "the death belt" most adequately portrays the reality of the death penalty, as many appeals based on actual innocence originate from this area.

Keywords: southern gothic, actual innocence, habeas corpus

A Fantastic Nightmare

One need not witness war, Ellen Glasgow lamented in 1935, to know "that we live among evils" and "that these evils are of our own making" (p. 4). Almost a hundred years ago, Glasgow critiqued the writings of Erskine Caldwell and William Faulkner, whom she included in what she famously called the "Southern Gothic School" (p. 4). This kind of American literature took naturally to portraying poverty, crime, isolation, and violence in the South, and was adept at presenting macabre tales that distorted the realism Glasgow desired (Glasgow, 1935, p. 4). Warped rural communities, "aimless violence," and "fantastic nightmares" were front and center in these stories, and easily blurred the lines between victim and villain, real and unreal (Glasgow, 1935, p. 4). The distinction between the southern gothic genre and Glasgow's coveted realism is no longer so clear: today, a close examination of capital jurisprudence and the application of the modern death penalty, especially in the South, reveals that the once absurd and illusory southern gothic genre lives on not as grotesque fantasy, but as reality for capital defendants. There remains legal uncertainty for prisoners who wish to raise claims of actual innocence, since many find themselves constricted by AEDPA, the bureaucratic acronym used to refer to the

Antiterrorism and Effective Death Penalty Act of 1996, and an adversarial system that demands finality.

Introducing AEDPA: A More Effective Death Penalty?

Since 1976, most capital defendants with a signed death warrant have been executed by states in the South (fig. 1). Texas, Virginia, Florida, Georgia, Alabama, Louisiana, and Mississippi make up what many journalists and scholars refer to as “the death belt,” and three of these states—Florida, Texas, and Georgia—were the first to revise their death penalty laws after the U.S. Supreme Court imposed a moratorium on capital punishment in 1972 (Dolan, 1985, paras. 6-9; Mikulich, 2015, paras. 9-10; Von Drehle, 2006, p. 27). For five decades, the sputtering

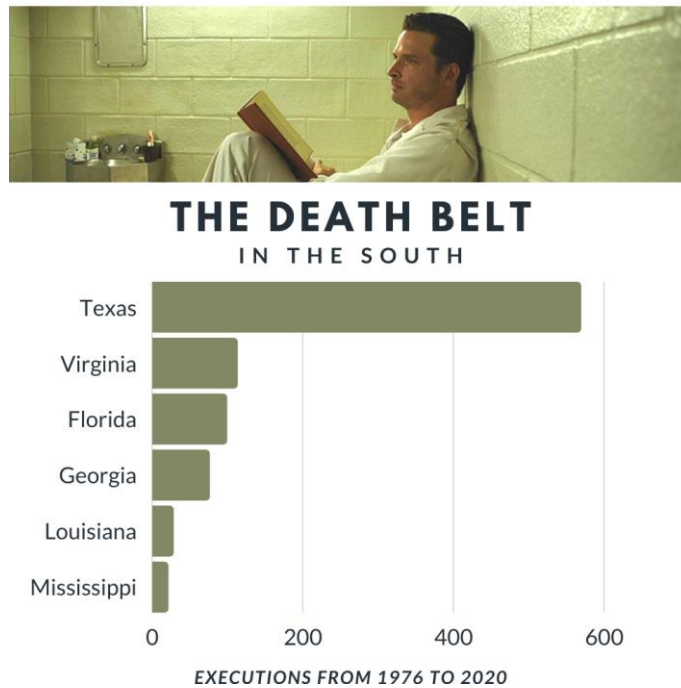


Figure 1. Executions in “the death belt” since 1976 (Death Penalty Information Center, 2020). Aden Young appears as Daniel Holden, the fictional, wrongly accused (death row) protagonist of *Rectify*, above (McKinnon & Gordon, 2013). Graph created by author using imported data.

death machine has adapted to appellate reversal and withstood the test of time to rage on, albeit with less electricity than before. A recent poll assessed that 55 percent of Americans favor the death penalty for convicted murderers, the lowest public approval rate in 20 years; additionally, the most widely used method of execution is now lethal injection instead of the electric chair, which some speculate is to deter Eighth Amendment constitutional claims (Death Penalty Information Center, 2021; Jones, 2020). Despite shifting public opinion, capital punishment has

been prioritized over the rights of defendants and victims and has been protected over the past two decades by legislators and jurists alike (to be clear: the U.S. Supreme Court has never held that the U.S. Constitution forbids execution, but it does heed to the founding document's prohibition on cruel and unusual punishment; thus, many states have elected lethal injection as their primary method of execution). Dissatisfied with the time it was taking the court system to dispose of duly convicted felons, lawmakers lent a helping hand to the machinery of death by passing the Antiterrorism and Effective Death Penalty Act in 1996 (AEDPA). AEDPA is perhaps most dangerous for having navigated the court system so effectively as to develop a line of jurisprudence callused from constitutional attack, and for infecting the legal system with human error. Consequently, AEDPA has placed severe limitations on defendants' access to the writ of habeas corpus in federal court.

AEDPA has been referred to as "one of the greatest legal tragedies" by a tenured member of the federal judiciary (Adelman, 2020, para. 1). Adelman (2020), a federal district judge from Wisconsin, explains that AEDPA has "very little to do with either terrorism or the death penalty" and has been incredibly successful at making it "extremely difficult for a federal court to grant habeas relief to a state prisoner whose constitutional rights [have] been violated" (Adelman, 2020, para. 3). Christina Mathieson, the director of the National Habeas Institute and a staff attorney for the American Bar Association (ABA) Death Penalty Representation Project, contends that AEDPA has three primary goals: (1) to limit the ability of prisoners to present new evidence to federal courts, (2) to condense the time and frequency available for defendants to file federal habeas (which leaves prisoners dependent on state habeas to address constitutional claims), and (3) to constrict the ability of federal courts to grant relief (C. Mathieson, personal communication, February 26, 2021; Mathieson & Konrad, 2021). Most damaging is AEDPA's requirement that federal courts dismiss successive habeas petitions if they raise a claim the defendant has already made, and if the claim was not previously made, to mandatorily dismiss the petition if it is successive unless (1) there is a new Constitutional rule that the U.S. Supreme Court has deemed retroactive, or (2) the petition has new facts demonstrating the defendant's innocence that could not have been discovered earlier with due diligence (fig. 2) (Kemper, 2008, p. 1; Mathieson & Konrad, 2021).

THE LEGAL SYSTEM

GETTING THROUGH THE COURTS



Figure 2. A general breakdown of the habeas corpus process in the state and federal system (Mathieson & Konrad, 2021). Flow chart created by author using information from the National Habeas Institute (NHI).

In *Bell v. Cone* (2002), the U.S. Supreme Court explained that AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications in order to prevent federal habeas [‘retrials’] and to ensure that state-court convictions are given effect to the extent possible under law” (p. 693). Additionally, the Court asserted that federal habeas corpus is not available as a remedy for defendants “just because a state court decision may have been incorrect; instead, a petitioner must show that a state court decision was unreasonable[,] [an ambiguous term that the Court expects its daughter courts to decipher on their own]” (p. 694). AEDPA also mandates that, if a state court provides alternative reasons for denying a prisoner’s request for habeas, the federal court may not grant relief “unless each ground supporting the state court decision is examined and found to be unreasonable under AEDPA” (*Wetzel v. Lambert*, 2012, p. 520). By excepting certain categories of orders entered by the courts of appeals (some of which might have had success under pre-AEDPA habeas law), AEDPA modified the Supreme Court’s statutory jurisdiction and significantly raised the difficulty of petitioners obtaining relief (*Felker v. Turpin*, 1997, p. 666).

As such, the U.S. Supreme Court has had to affirm on numerous occasions that the goal of Congress in drafting AEDPA was to “further principles of comity, finality, and federalism, to encourage exhaustion of state remedies, and to reduce delays in the execution of state and federal criminal sentences—particularly in capital cases” (*Felker v. Turpin*, 1997, p. 660-665; *Kemper*, 2008, p. 10; *Williams v. Taylor*, 2000, p. 363-367). Although the judiciary (and our

communities) has substantive reasons for wanting to part with a case following adjudication, the culture of finality in the legal system that AEDPA stresses has made it incredibly difficult for defendants, especially those who have been wrongfully convicted, to seek post-conviction relief (Hamburg, 2016, p. 187-188). The ill-fated attempt of Leonel Torres Herrera to assert his innocence, which has served as the basis for contemporary challenges to AEDPA, is one such example.

Proving Actual Innocence: *Herrera v. Collins* and Successor Cases

In January of 1982, Leonel Torres Herrera was convicted of the capital murder of police officer Enrique Carrisalez in Texas and sentenced to death (fig. 3). Six months later, Herrera pled guilty to the related capital murder of police officer David Rucker, who had been shot within minutes of Officer Carrisalez along the U.S.-Mexico border in rural Texas. Herrera unsuccessfully challenged the Carrisalez conviction on direct appeal and in two collateral proceedings in the Texas state courts, and in a federal habeas petition (*Herrera v. Collins*, 1993, p. 390-393). A decade after his conviction, Herrera filed a second federal habeas proceeding where he urged that newly discovered evidence demonstrated that he was “actually innocent” of the murders of police officers Carrisalez and Rucker, and that the Eighth Amendment’s prohibition against cruel and unusual punishment and the Fourteenth Amendment’s guarantee of due process expressly forbid his execution (*Herrera v. Collins*, 1993, p. 393-396). Herrera supported his claim by providing affidavits alleging that his dead brother, Raul Herrera, had committed the murders of Carrisalez and Rucker (*Herrera v. Collins*, 1993, p. 393). In 1992, the U.S. Supreme Court granted Herrera a writ of certiorari to answer the following question: “Was Herrera entitled to federal habeas corpus relief under the Eighth and Fourteenth Amendments when his [habeas] petition was based on a claim of actual innocence without an accompanying federal constitutional violation?” (fig. 4) (Oyez, 2021, para. 4).



Figure 3. After the U.S. Supreme Court debated the *Herrera* question, the Orlando Sentinel documented the response of Margaret Griffey, then-assistant attorney general of Texas, to the question presented in *Herrera*. She said, “[i]t’s not unconstitutional to execute someone who raises new claims of innocence without conceding that the convicted killer who brought the complex case is innocent.” But the newspaper also recognized the rebuttal of Talbot “Sandy” D’Alemberte, lawyer for Herrera, who told the Court: “The greatest injustice would be the execution of an innocent person.” He added, in light of the Texas 30-day limit on filing claims of new evidence after a trial ends in conviction, that he believes “Innocence is a value that trumps all time limits” (Cox News Service, 1992, p. A12).

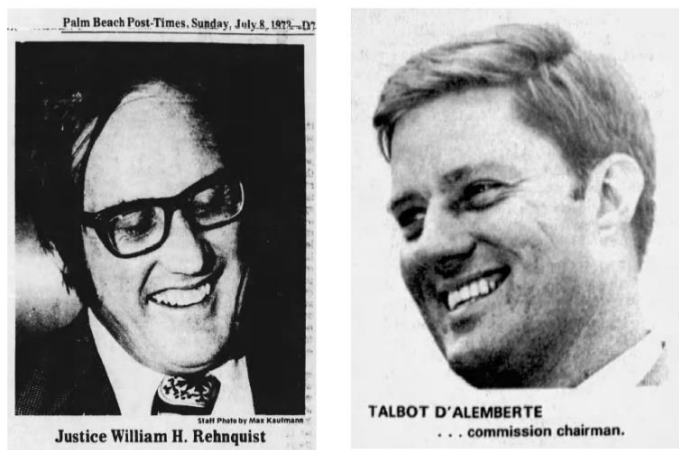


Figure 4. Justice William H. Rehnquist (left) wrote the majority opinion in *Herrera v. Collins*, but Talbot “Sandy” D’Alemberte (right) argued the case in the U.S. Supreme Court (Barnes, 1973, D7; Fiedler, 1977, 4D).

Despite a passionate defense at oral argument from Talbot “Sandy” D’Alemberte on behalf of Herrera, and the unique circumstances of Herrera’s case, the U.S. Supreme Court found that, absent constitutional error, a federal habeas petition was an ineffective way for a defendant to pursue a claim of actual innocence and ruled against Herrera (Hamburg, 2016, p. 190). Chief Justice William H. Rehnquist, writing for the majority of the Court, stated explicitly that a “claim of actual innocence based on newly discovered evidence is not ground for federal habeas relief” (Herrera v. Collins, 1993, p. 393). The Court then urged Herrera to seek clemency via the Governor’s Office in Texas (fig. 5) (Herrera v. Collins, 1993, p. 416). Although a grave loss for Herrera, the outcome of his case strongly “[hinted] at the need for something else,” or a different legal mechanism for proving actual innocence, since there was only a slim margin that his gubernatorial clemency petition could succeed (Hamburg, 2016, p. 190; Herrera v. Collins, 1993, p. 416-419).



Figure 5. Protestors march outside the U.S. Supreme Court to protest the *Herrera* verdict in Washington, D.C. (Dart, 1992, A7).

More than a decade following *Herrera*, in 2009, legal writers opined that the difficulties of granting Troy Davis a new trial were attributable to AEDPA (Lowe, 2007; Whoriskey, 2007). Davis was a Georgia man who, like Herrera, had been convicted of killing a police officer in 1989. AEDPA barred Davis from presenting evidence later on in his case that he could have presented at trial to prove his innocence. Unlike the outcome of *Herrera*, Justice John Paul Stevens, joined by Justices Ruth Bader Ginsburg and Stephen Breyer, argued that Davis’s case was “sufficiently ‘exceptional’” to warrant utilization of the Court’s original habeas jurisdiction”

because “the substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing” (In re Davis, 2009, p. 952). The Court’s decision favoring Davis likely stems from the premise that a court is most likely to discover the truth when it grants sufficient air time to those on both sides of an argument (Caplan, 2015). As Chief Justice John G. Roberts, Jr. once wrote, “secret decisions based on only one side of the story will prove inaccurate more often than those made after hearing from both sides” (Kaley v. United States, 2014, p. 336). Dissenting from the Court’s holding, Justice Antonin Scalia, joined by Justice Clarence Thomas, wrote:

This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is “actually” innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged “actual innocence” is constitutionally cognizable. (In re Davis, 2009, p. 952-955)

Horrifyingly, Justice Scalia was correct to assert that claims of actual innocence are uncognizable by the U.S. Constitution (as amended today). His statement reflected the Court’s earlier holding that sent Leonel Torres Herrera to his death, against Herrera’s proclamations of innocence. Over time, the *Herrera* ruling has only been agonized further by the jurisprudence of the Court upholding provisions of AEDPA. Perhaps Justice Scalia’s dissent is most critical, and noteworthy, for identifying the fragility of a system that has been inherently infected with human error. *Davis* was a rare win offered up by the U.S. Supreme Court in a realm strictly governed by AEDPA. Subsequently, as Von Drehle (2006) aptly identifies, “[e]verything and nothing has changed” about the death penalty (p. 14).

The Texas Solution

On February 24, 2020, Justice Sonia Sotomayor did something unremarkable for a Justice: she denied certiorari (the Supreme Court only agrees to hear about 100-150 of the more than 7,000 cases that it is asked to review each year, making a denial of “cert” more common than an acceptance) in the case of Rodney Reed (fig. 6) (United States Courts, 2021, para. 4). At the same time, however, the reasons she gave for denying certiorari in this specific case made her decision remarkable. Rodney Reed had been convicted of the April 1996 murder of 19-year-old



Figure 6. Arthur Lien, *November Arguments*, 2020.

Stacey Lee Stites in Bastrop County, Texas and sentenced to death. However, Reed “[s]trenuously [maintained] his innocence” and “repeatedly sought habeas relief in Texas state courts over ... two decades” (Reed v. Texas, 2020, p. 2). Justice Sotomayor remarked that Reed’s eighth and ninth habeas applications revealed evidence that could potentially exonerate him of the murder of Stites, including new corroborations of Reed’s innocence by witnesses, the recantation of a key State expert’s testimony, and the necessary reexamination of forensic evidence (Reed v. Texas, 2020, p. 2). However, she concluded that it was necessary to deny Reed’s petition for a writ of certiorari arising from his eighth and ninth state habeas applications because Reed filed another state habeas application—his tenth overall—in the Texas trial court, to which the Texas Court of Criminal Appeals responded favorably by staying Reed’s execution (Reed v. Texas, 2020, p. 2-3). Reed’s tenth habeas petition identified newly discovered evidence (evidence identified since the Texas courts denied his eighth and ninth habeas petitions), namely an alleged prison confession by Jimmy Fennell, a local police officer and Stites’s fiancé at the time of the murder (Reed v. Texas, 2020, p. 2-4). Importantly, Justice Sotomayor reflected on significance of reviewing defendants’ claims of actual innocence, rather than the necessity of dismissing them if brought to the Court incorrectly:

If evidence of actual innocence presented in a habeas applicant’s earlier habeas applications otherwise satisfies the requirements applicable to a substantive innocence claim, that evidence should not, in my view, be cast off merely because the applicant identified it for the first time in an earlier habeas application. (Reed v. Texas, 2020, p. 6)

This was an important revelation from Justice Sotomayor, especially considering AEDPA’s dismissive stance on successive habeas petitions. She went on to analyze Texas’s recent determination that the incarceration and/or execution of “actually innocent” defendants violates the Due Process Clause of the Fourteenth Amendment (Reed v. Texas, 2020, p. 6). For the first time, she said, Texas courts will consider on the merits whether Reed is innocent of murdering

Stites, a novel legal event, and should he be denied relief, he would still be entitled to review by the U.S. Supreme Court (fig. 7) (*Reed v. Texas*, 2020, p. 5). Texas is able to conduct this review, Justice Sotomayor explained, because it has developed a statutory mechanism for defendants to bring successive habeas petitions based on actual innocence (*Reed v. Texas*, 2020, p. 5). Justice Sotomayor concludes:

In my view, there is no escaping the pall of uncertainty over Reed’s conviction. Nor is there any denying the irreversible consequence of setting that uncertainty aside. But I remain hopeful that available state processes will take care to ensure full and fair consideration of Reed’s innocence—and will not allow the most permanent of consequences to weigh on the Nation’s conscience while Reed’s conviction remains so mired in doubt. (*Reed v. Texas*, 2020, p. 7)

It remains to be seen whether additional states will design their own statutory methods for defendants to raise innocence claims as freestanding, substantive bases for habeas relief. What is clear, however, is how Texas has provided defendants with the opportunity to “challenge the jury’s final calculation of the game’s score and assert that he or she is, in fact, completely innocent” (Hamburg, 2016, p. 189). This is something that AEDPA expressly forbids, since it stresses finality, the exhaustion of state remedies, and an effective death for capital defendants.



Figure 7. Arthur Lien, *Empty Bench OT2020*, 2020.

Our Next Steps

In 2021, capital punishment continues to dutifully carry out one function extremely well: it inoculates politicians from charges of weakness or coddling of criminals, as busy governors sign death warrants every year (Von Drehle, 2006, p. 21-25). Although a pithy conclusion, the

success of the death penalty in this way is what led to the development and promulgation of AEDPA, which caused a demise of habeas corpus so intense as to “[transform] over the past two decades [habeas corpus] from a vital guarantor of liberty into an instrument for ratifying the power of state courts to disregard the protections of the Constitution” (Reinhardt, 2015, p. 1219). When capital punishment was reinstated in 1976 following a nationwide moratorium to resolve its constitutional difficulties, Justice Byron White remarked forcefully, “[m]istakes will be made, and discriminations will occur which will be difficult to explain” (Gregg v. Georgia, 1976, p. 428). Today, AEDPA is one such discrimination, and a serious one, that works directly against defendants’ ability to prove actual innocence when facing a jury verdict that got it wrong. Yet, it is remarkable that Texas, the southern state with the highest execution toll, has implemented a novel statutory mechanism that permits defendants to bring successive habeas claims alleging actual innocence. Surely, Leonel Torres Herrera would have availed himself of this kind of legal review had he been given the chance following his defeat at the U.S. Supreme Court in 1992. Since AEDPA’s grotesque habeas constraints force judges to rigidly interpret claims of actual innocence and make irreversible decisions, other states must implement similar measures. A claim of actual innocence heard on the merits serves to “protect the dignity of society itself from the barbarity of exacting mindless vengeance,” or the very thing Glasgow dreaded about the southern gothic genre’s uncanny ability to stupefy readers (Ford v. Wainwright, 1986, p. 400; Glasgow, 1935, p. 4). After all, “[o]nly a puff of smoke separates the fabulous Southern hero of the past from the fabulous Southern monster of the present” (Glasgow, 1935, p. 4).

Acknowledgements

Thank you, Dr. Steven Noll, Ms. Christina Mathieson, Ms. Laura Schaefer, Ms. Emily Olson-Gault, and Ms. Sylvia Krohn for your unwavering support, advice, and legal expertise as I pursued this very ambitious project, and as I learn more about the law every day to make the world a bit more human.

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