The Fallibility of Finality

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INTRODUCTION

"We are not final because we are infallible, but we are infallible only because we are final."[1]

Justice Robert Jackson's famous quote pinpoints the consequences of final judgments in the United States Supreme Court. These consequences are most devastating in the arena of capital punishment, where denial of certiorari or deference to a state is a death sentence. Last year, twenty-seven people were executed after the Court refused to hear further argument in their cases.[2]

When the Court reinstated the death penalty in 1976,[3] it did so with the assumption that further constitutional regulation of the death penalty could ensure that the penalty would be reserved for only the "worst of the worst," those whose moral culpability went beyond that of the "average" murderer. This article revisits that assumption, and argues that the Court's efforts have not only failed to adequately determine the most culpable offenders, but also have failed to ensure reliability of the underlying culpability determination.[4] By refusing to provide a constitutional safeguard against executing innocent defendants, the Court is at least partially responsible for this state of affairs. Furthermore, the preference for procedural finality over factual accuracy in the narrow circumstance of capital punishment implicates the legitimacy of the Court. This ever-present possibility of executing the innocent, we argue, should lead the Court to reconsider the need for, and excessiveness of, capital punishment.

This article will first review the Court's minimal jurisprudence regarding the potential execution of innocent defendants. It will then provide a brief overview of the causes underlying, and data surrounding, wrongful capital convictions. The article will then highlight the Court's own role in

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[*] Michael Admirand and G. Ben Cohen. Ideas articulated in this work are at least in part attributed to the scholarship of Robert J. Smith. Errors are our own.

[1] Brown v. Allen, 344 U.S. 443, 540 (1952) (Jackson, J., concurring in result).

[2] A twenty-eighth person, Daniel Lopez, was executed when he gave up his appeals and volunteered for execution. A full accounting of the Court's denials is attached to this article as Appendix B.

[3] *See generally* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

[4] For an informative discussion of the use of the terms "actual innocence" and "legal innocence," see Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083 (2011).

sanctioning these wrongful convictions, using specific reflective examples. We conclude with perhaps the most recent example of the Court's approach to handling claims from potentially innocent capital defendants—the case of Richard Glossip—which highlights the problems with the Court's approach and demonstrates the necessity of abolition.

I. THE JURISPRUDENCE: *HERRERA V. COLLINS*

In *Herrera v. Collins*, the Court first considered the question of whether potentially innocent persons sentenced to death were legally protected by the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process.[5] Leonel Torres Herrera was convicted of killing a police officer and sentenced to death. After trial, Mr. Herrera appealed his conviction, arguing that the identifications admitted at trial were "unreliable and improperly admitted."[6] In a subsequent habeas petition, Mr. Herrera presented new evidence—two affidavits—that witnesses misidentified him for his (then deceased) brother, Raul Herrera, Sr. When Mr. Herrera's claim of actual innocence reached the Supreme Court, six justices determined that the Constitution did not prohibit his execution. Without actually deciding whether "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional,"[7] the Court stated that "the threshold showing for such an assumed right would *necessarily be extraordinarily high*."[8] The majority rationalized this "extraordinarily high" burden by invoking the apparent need for finality, where "entertaining claims of actual innocence" would prove to be "very disruptive" and create an "enormous burden [of] having to retry cases based on often stale evidence."[9] Preferring the economy of finality to the surety of infallibility, the Court rejected the dissent's suggestion that habeas relief be granted where a petitioner met a "probable innocence" standard,[10] in which a petitioner would be required to show that he was "probably actually innocent" of the capital crime.[11]

Concurring in the denial of relief, Justices Scalia and Thomas would have gone further, suggesting that where a trial proceeded without constitutional error, newly discovered evidence of innocence was irrelevant to the federal Constitution:

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[5] Herrera v. Collins, 506 U.S. 390 (1993).
[6] *Id.* at 395.
[7] *Id.* at 417.
[8] *Id.* (emphasis added).
[9] *Id.*
[10] *Id.* at 403.
[11] *Id.* at 435.

> There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.[12]

Indeed, Justice Scalia derided the Court for addressing the issue, opining,

> I can understand, or at least am accustomed to, the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate.[13]

Adhering to his view that the Court should not concern itself with factual innocence so long as the Constitution's procedural benchmarks had been reached, Justice Scalia assumed that the execution of an innocent person would simply be avoided: "With any luck, we shall avoid ever having to face this *embarrassing question* again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon."[14]

The mounting evidence, however, is that the Court has had no such luck. In the face of a growing number of exonerations, flaws in forensic analysis, and an evolving understanding of the number of errors that arise in capital proceedings—along with a corresponding lack of executive action in a number of instances (Justice Scalia's proposed failsafe)—the Court is now confronted again with significant risk of a wrongful execution. The Court's failure to address this embarrassing question in *Herrera* has produced, at the very least, unsatisfactory finality in several cases where the Court's fallibility results in a death sentence.

II. THE HARM: EVIDENCE OF WRONGFUL CAPITAL CONVICTIONS

A recent comprehensive study by the National Academy of Sciences projected that, since 1973, approximately one out of every twenty-five death sentences involved the conviction of an innocent person.[15] The National Academy of Sciences report found specific flaws in a variety of forensic fields, including arson investigation, bite mark analysis, and hair analysis.[16]

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[12] *Id.* at 427–28 (Scalia, J., concurring).

[13] *Id.* at 428.

[14] *Id.* (emphasis added).

[15] *See* Sam Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 11 PROC. NAT'L ACAD. SCI. 7230 (2014).

[16] *See* NAT'L RESEARCH COUNCIL, NAT'L ACAD. OF SCIENCES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009),

In response to that study, in April 2015, the Justice Department acknowledged that FBI forensic laboratories had misstated forensic matches in hair comparisons in 257 trials, including 35 defendants sentenced to death.[17] Forensic errors were identified in 33 separate capital cases, nine of which resulted in an execution and five of which resulted in the condemned dying on death row.[18] There is a fundamental problem with a system that embraces the finality of death sentences where seemingly objective, scientific, and irrefutable evidence form the basis of a wrongful conviction.

The growing concern over wrongful convictions and potentially wrongful executions has put the Court under scrutiny for its role in affirming death sentences. Justice Breyer, calling for the Court to address the question as to the constitutionality of capital punishment, noted three widely publicized instances of wrongful convictions and death sentences:

> DNA evidence showed that Henry Lee McCollum did not commit the rape and murder for which he had been sentenced to death. Last Term, this Court ordered that Anthony Ray Hinton, who had been convicted of murder, receive further hearings in state court; he was exonerated earlier this year because the forensic evidence used against him was flawed. And when Glenn Ford, also convicted of murder, was exonerated, the prosecutor admitted that even "[a]t the time this case was tried there was evidence that would have cleared Glenn Ford." All three of these men spent 30 years on death row before being exonerated.[19]

These three cases suggest both the fallibility of the criminal justice system and the fallibility of the Court's own processes. In each case, at a time when years of life might have been saved, the Court had denied review over the dissent of justices who had expressed concern over the administration of capital punishment.[20] Indeed, questions concerning Mr. Hinton's and Mr.

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http://www.nap.edu/catalog/12589/strengthening-forensic-science-in-the-united-states-a-path-forward [http://perma.cc/BB52-CTRD].

[17] Press Release, Dep't of Justice, FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review: 26 of 28 FBI Analysts Provided Testimony or Reports with Errors (Apr. 20, 2015), https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review [https://perma.cc/Y9R2-U74D].

[18] *Id.* ("The government identified nearly 3,000 cases in which FBI examiners may have submitted reports or testified in trials using microscopic hair analysis. As of March 2015, the FBI had reviewed approximately 500 cases.").

[19] Glossip v. Gross, 135 S. Ct. 2726, 2757 (2015) (Breyer, J., joined by Ginsburg, J., dissenting) (internal citations omitted).

[20] *See* McCollum v. North Carolina, 512 U.S. 1254, 1254 (1994) (Blackmun, J., dissenting from denial of certiorari); Ford v. Louisiana, 498 U.S. 992, 992 (1990) (Marshall,

Ford's innocence were not unavailable at the time of their original appeals. Both were convicted solely on circumstantial evidence.[21] Mr. Ford presented strong evidence of an alibi, and Mr. Hinton attempted to present—but was not allowed to introduce—evidence of a polygraph that indicated his innocence.[22]

The Court's own miscalculations in assessing which cases warranted review highlights just how fallible its final decisions can be. For instance, Justice Scalia—responding to former Justice Blackmun's declaration that he would "no longer [] tinker with the machinery of death"[23]—highlighted the case of Henry McCollum as one in which a death sentence would be warranted punishment. Mr. McCollum was accused of gang raping an eleven-year-old girl and then suffocating her with her underwear. In response to these gruesome allegations, Justice Scalia exclaimed: "How enviable a quiet death by lethal injection compared with that!"[24] Twenty years after Justice Scalia's remarks, DNA evidence exonerated Mr. McCollum and his co-defendant Leon Brown.[25]

In *House v. Bell*, which went before the Court in 2006, Chief Justice Roberts dismissed the alibi evidence proffered by Mr. House to prove his innocence. Mr. House was accused of raping and murdering a woman in 1985. Part of the evidence used against him were "scratches on his arms and hands" that Mr. House attributed to his girlfriend's cat.[26] Mr. House had claimed to have been staying with his girlfriend during the time of the murder. Mr. House's girlfriend later denied the alibi. In evaluating the strength of Mr. House's innocence claim, Chief Justice Roberts concluded,

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J., dissenting from denial of certiorari); Hinton v. Alabama, 493 U.S. 969, 969 (1989) (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari).

[21] *See* State v. Ford, 489 So. 2d 1250, 1268 (La. 1986) (Calogero, J., dissenting) ("[T]his defendant's conviction rests entirely upon circumstantial evidence. . . . I am not convinced that a rational trier of fact could have found the essential elements of the crime of first degree murder beyond a reasonable doubt, . . . especially considering that since the case is based upon circumstantial evidence every reasonable hypothesis of innocence must be excluded."); *but see* Hinton v. State, 548 So. 2d 547, 558 (Ala. Crim. App. 1998) ("[T]he mere fact that evidence is of a circumstantial nature does not make it deficient.").

[22] *Ford*, 489 So. 2d at 1254 ("The defense was alibi."); *Hinton*, 548 So. 2d at 559 ("The defendant further contends that notwithstanding the current state of the law with respect to the admissibility of polygraph examination results, he should have been permitted to introduce both at the guilt phase and the sentencing phase of his trial the results of his polygraph examination which tended to indicate that he had nothing to do with either of the murders.").

[23] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

[24] *Id.* at 1143 (Scalia, J., concurring).

[25] *See, e.g.*, Lindsey Bever, *After 30 Years in Prison, Two Mentally Challenged Men Exonerated in North Carolina Rape-Murder Case*, WASH. POST (Sept. 3, 2014), http://www.washingtonpost.com/news/morning-mix/wp/2014/09/03/dna-evidence-exonerates-two-north-carolina-men-after-30-years-in-prison/ [http://perma.cc/8573-FFMN].

[26] House v. Bell, 547 U.S. 518, 527 (2006).

"[s]cratches from a cat, indeed."[27] Three years later, DNA tests confirmed what Mr. House had long argued—that he was actually innocent of this crime.[28] Cases that were therefore held up as strong supports for the death penalty have in fact only underscored its inherent flaws.

But if the cases of Henry McCollum and Paul House are unique at all, it is not because members of the Court would deny relief to an innocent defendant; it is because they said anything about it at all. Indeed, the problems surrounding the Court's false infallibility extends far beyond those two cases. The National Registry of Exonerations details 115 death row exonerations since 1989,[29] twenty-five of which have occurred through DNA testing. In at least sixty of those cases, the defendants petitioned the Court to review their case, often multiple times. The Court declined review in each of them at least once. In an accounting of these cases (see Appendix A), twenty-nine times Justices Marshall, Brennan, and/or Blackmun dissented from the denial of certiorari on the grounds that imposition of the death penalty was unconstitutional.[30] To be sure, the question before the Court in many, if not most, of those cases addressed the procedure that led to their conviction rather than the evidence underlying it.[31] Yet that only underscores the problem: no matter how carefully the Court regulates the death penalty—no matter how many procedural protections it imposes upon

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[27] *Id.* at 571 (Roberts, C.J., concurring in the judgment in part and dissenting in part) (dissenting from the majority's decision that Mr. House had met the actual-innocence threshold for pursuing defaulted constitutional claims in federal court).

[28] *See, e.g.*, Robbie Brown, *Tennessee: Exoneration After 22 Years on Death Row*, N.Y. TIMES (May 13, 2009), http://www.nytimes.com/2009/05/13/us/13brfs-EXONERATIONA_BRF.html [http://perma.cc/RAT7-2P5H].

[29] *See* Univ. of Mich. Law Sch., *Exoneration Detail List*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Sentence&FilterValue1=Death [http://perma.cc/8WPP-G9AH].

[30] Justices Marshall and Brennan dissented from decisions upholding a death sentence over one thousand times from 1977 until Justice Marshall's departure from the bench in 1991. During this period, 155 individuals were executed (twenty-one were volunteers), the last of whom was Warren McCleskey. *See* McCleskey v. Bowers, 501 U.S. 1282, 1282 (1991) (denying application for stay and petition for writ of certiorari) ("Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 231 (1976), I would grant the application for stay of execution and the petition for a writ of certiorari and vacate the death sentence in this case." (Marshall, J., dissenting)); *id.* (Blackmun J., dissenting from denial of stay and denial of petition for certiorari); *id.* (Stevens, J., dissenting from the denial of the stay). Justice Blackmun dissented from the denial of certiorari and referred to his views in Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) on 170 occasions over a period of eight months prior to his departure from the bench, involving twenty-three executions. Three of these executions involved volunteers.

[31] The authors of this note do not have access to the petitions filed on behalf of all of these defendants.

lower courts—the system is inherently fallible. And if the Court was not going to go as far as the three dissenting Justices would have in invalidating capital punishment, then surely it should have at least intervened more regularly to correct obviously flawed proceedings.

A sampling of some of the later-overturned cases in which the Court denied review yields significant concerns with its ability—or perhaps its willingness—to safeguard capital defendants' rights to due process and a fair trial. For instance, a defendant by the name of Frank Lee Smith was convicted and sentenced to death in Florida for allegedly raping, sodomizing, and then beating an eight-year-old girl to death.[32] The prosecution's case rested entirely on eyewitness identifications, one of which occurred only after the prosecutor was seen "in the hallway coaching an identification witness by identifying the appellant for the witness."[33] The Florida Supreme Court dismissed Mr. Smith's appeal in a short eleven-page opinion. Over the dissents of Justices Marshall and Brennan, the Court denied review.[34] DNA testing in state post-conviction ultimately exonerated Mr. Smith, but eleven months too late: after fourteen years on death row, but before his exoneration, Mr. Smith died of cancer.[35]

In another case, Anthony Porter was sentenced to death in Illinois for committing a double homicide.[36] In finding Mr. Porter guilty, the death-qualified jury rejected alibi testimony from two witnesses who claimed to have been with Mr. Porter on the night of the homicide.[37] After reaching that verdict, however, one juror disclosed that she knew the mother of one of the victims. The trial judge responded to this by conducting a cursory colloquy into whether the juror was biased against Mr. Porter, ultimately concluding that she was not biased.[38] A sharply divided Illinois Supreme Court nevertheless affirmed his conviction, and the Court subsequently denied review.[39] Mr. Porter remained on death row for another thirteen years before the prosecutor dismissed charges against him due to overwhelming evidence that the murders were committed by someone else.[40]

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[32] Smith v. State, 515 So. 2d 182 (Fla. 1987).

[33] *Id.* at 183.

[34] Smith v. Florida, 485 U.S. 971 (1988).

[35] For more information concerning this case, see *Frank Lee Smith*, NAT'L REG. OF EXONERATIONS (June 2012), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3644 [http://perma.cc/WR9J-KTNM].

[36] People v. Porter, 489 N.E. 2d 1329, 1330 (Ill. 1986).

[37] *Id.* at 1331.

[38] *Id.* at 1333.

[39] Porter v. Illinois, 479 U.S. 898 (1986) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari).

[40] For more information concerning this case, see *Anthony Porter*, NAT'L REG. OF EXONERATIONS (June 2012), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3544 [http://perma.cc/WR9J-KTNM].

And then there is the case of John Thompson, who spent fourteen years on Louisiana's death row—and came within hours of his execution—for a crime he did not commit. On direct appeal, the Louisiana Supreme Court affirmed his conviction and sentence despite what one Justice described as an "extremely close issue" concerning the "trial court's decision to allow the state to challenge a prospective juror for cause on the grounds of his apparent scruples against capital punishment,"[41] and another Justice's concern that the prosecutor had improperly struck jurors because of their race.[42] Over the dissent of Justices Brennan and Marshall, the Court denied review.[43] In time, the Court did review Mr. Thompson's case—when it vacated a monetary judgment awarded to him as compensation for the official misconduct that led to his wrongful conviction and near execution.[44]

In these cases and others, the Court evaded responsibility for a wrongful execution only because other actors (fortunately) intervened. But its silent affirmations in other cases have played a direct and consequential role in at least a few disconcerting executions—those of Troy Davis,[45] Cameron Todd Willingham,[46] Carlos DeLuna,[47] and, most recently, Lester Bower.[48] By prioritizing finality over reliability, the Court acquiesced in the states' efforts to execute individuals who possessed credible claims of innocence

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[41] State v. Thompson, 516 So. 2d 349, 358 (La. 1987) (Calogero, J., concurring).

[42] *Id.* at 359 (Dennis, J., concurring).

[43] Thompson v. Louisiana, 488 U.S. 871 (1988).

[44] Connick v. Thompson, 563 U.S. 51, 71–72 (2007).

[45] The court refused to grant certiorari on a petition from Mr. Davis appealing a decision on his actual innocence claim. Davis v. Humphrey, 132 S. Ct. 69 (2011). "Despite a last-ditch appeal to the United States Supreme Court and calls for clemency from dignitaries like Jimmy Carter and Pope Benedict XVI, Troy Davis was executed in Georgia [on September 21, 2011]." Eyder Peralta, *Troy Davis, Convicted in 1989 Murder of Policeman, Is Executed*, NPR (Sept. 21, 2011), http://www.npr.org/sections/thetwo-way/2011/09/21/140675230/with-a-few-hours-left-before-troy-davis-execution-protests-mount [http://perma.cc/W8U6-3DYV].

[46] Mr. Willingham was executed in Texas even after evidence was presented that his conviction was based on debunked arson science. Jeremy Stahl, *Justice Deferred: What Happens in Texas When You Get a Man Executed on the Basis of Bad Testimony?*, SLATE (Mar. 19, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/03/-cameron_todd_willingham_prosecutor_john_jackson_charges_corrupt_prosecution.html [http://perma.cc/LU6K-4R4E]. The Court denied Mr. Willingham's petition for review, resulting in his execution. *In re* Willingham, 540 U.S. 1173 (2004).

[47] A book has been published with substantial evidence that Mr. DeLuna was wrongly executed due to misidentification. JAMES S. LIEBMAN & THE COLUMBIA DELUNA PROJECT, THE WRONG CARLOS: ANATOMY OF A WRONGFUL CONVICTION (2014). The Court denied Mr. DeLuna's petition for review, resulting in his execution. DeLuna v. Lynaugh, 493 U.S. 900 (1989).

[48] Mr. Bower was on death row for over thirty years, during which time multiple courts refused to allow him to present evidence of his innocence and of prosecutorial misconduct. Jordan Smith, *Doubts Still Plague the 31-Year-Old Lester Bower Case but Texas Is About to Kill Him Anyway*, THE INTERCEPT (June 1, 2015), https://theintercept.com/2015/-06/01/lesterbowertodie/ [https://perma.cc/TAG5-ANT8]. The Court denied Mr. Bower's petition for review, resulting in his execution. *In re* Bower, 135 S. Ct. 2398 (2015).

that surely would have met the *Herrera* dissenters' proposed probable innocence standard for free-standing claims of innocence. In contrast, when Justices Brennan and Marshall dissented from the denial of certiorari in cases like that of Carlos DeLuna,[49] "adhering to [their] views that the death penalty is in all circumstances cruel and unusual punishment,"[50] they held fast to a moral position that rejected the possibility of executing the innocent.

The sixty individuals who were exonerated *after* the Court denied their petitions may not have had enough evidence to affirmatively prove their innocence to a jury—or even to five members of the Court—at the time of filing. But the risk of error was clear. The finality of capital punishment should at least militate towards a recognition of the Court's fallibility—or, perhaps more broadly, of the justice system's.

III. THE OPPORTUNITY: RICHARD GLOSSIP AND THE CASE FOR ABOLITION

The Court was recently presented with the opportunity to recognize and address its own fallibility in Richard Glossip's case. After the Court declared Oklahoma's lethal injection protocol constitutional in Mr. Glossip's case in June 2015,[51] considerable evidence of his innocence emerged. Although no one has ever argued that Mr. Glossip actually murdered the victim, Barry Von Treese, he nevertheless faces execution under the theory that he paid the actual assailant, Justin Sneed, to kill Von Treese. No physical evidence connected Mr. Glossip to the crime, and before implicating Mr. Glossip in the murder-for-hire scheme, Sneed confessed to doing it alone. Sneed's testimony, given in exchange for his own plea bargain for a sentence of life without parole, proved to be the primary evidence against Mr. Glossip at trial. Numerous witnesses have come forward undermining Sneed's credibility. In short, the State's case for death rests on the internally inconsistent testimony of the drug-addicted actual perpetrator of the killing. In their attempts to save Mr. Glossip's life, his attorneys asked the Court to address this question of innocence and what standard a petitioner must meet to create enough doubt to warrant vacating a death sentence. In a short piece published prior to the resolution of that case, we suggested that the court grant certiorari to resolve this question of innocence, or in the alternative, address the question of the constitutionality

[49] *DeLuna*, 493 U.S. 900 (1989).

[50] *Id.* The Justices used this phrase in over 1,000 cases. *See, e.g.*, Boggs v. Muncy, 497 U.S. 1043 (1990); Rault v. Butler, 483 U.S. 1042 (1987); Shriner v. Wainwright, 465 U.S. 1051 (1984); Briley v. Dir. of Dep't of Corr., 461 U.S. 918 (1983); Floyd v. Georgia, 431 U.S. 949 (1977).

[51] *See* Glossip v. Gross, 135 S. Ct. 2726, 2737 (2015).

of capital punishment.[52] The Court rejected the petition and denied the stay one day *after* Mr. Glossip was scheduled to die.[53]

Mr. Glossip's execution did not proceed because the government arrived with the incorrect drugs to proceed with lethal injection. The next day, the Oklahoma Attorney General moved for an indefinite stay of all executions within the state while state and federal officials conducted an investigation into how the mistake occurred. Unexpectedly given more time to live, Mr. Glossip will assuredly pursue further evidence in support of his innocence, and perhaps petition the Court once more on this basis. If past is prologue, however, the Court will once again prioritize finality over reliability, despite the express frustration of some of the Justices.[54] And once again—as was the case for Henry Lee McCollum, Anthony Ray Hinton, Glenn Ford, Troy Davis, Cameron Todd Willingham, Carlos DeLuna, Anthony Porter, Lester Bower, John Thompson, Frank Lee Smith, Henry McCollum, Paul House, Leon Brown, and countless others—fixation on finality will assure the Court's fallibility.

CONCLUSION

With each capital case that the Court allows to proceed, it vouchsafes for the validity of a process. But with each failure, the Court's own legitimacy is called into question. Rather than interposing additional procedural protections,[55] or shirking embarrassing questions and permitting the possibility of wrongful executions, the Court should now consider an alternative route: acknowledge that the advent of forensic science and the limits of certainty countenance that the Court's experiment with the death penalty has failed. If nearly four decades of tinkering has proven anything, it is that there will always be cases with considerable doubt surrounding a

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[52] G. Ben Cohen & Michael Admirand, *The Fallibility of Finality*, HARV. L. & POL'Y REV. BLOG (Sept. 29, 2015), http://harvardlpr.com/2015/09/29/the-fallibility-of-finality/ [http://perma.cc/EH9C-HUC6].

[53] Glossip v. Oklahoma, No. 15-6340, 2015 WL 5724734, at *1 (U.S. Sept. 30, 2015).

[54] *See* Transcript of Oral Argument at 27, Kansas v. Gleason, 135 S. Ct. 2917 (2015) (No. 14-452) (Justice Sotomayor: "What a wonderful system we've created. We give—even when a State court is wrong in convicting somebody, so long as they are reasonably wrong, we uphold them. And when they are wrong on a legal conclusion applying our test, we jump in and reverse them, right?").

[55] A sharply-divided Court recently provided a small window for potentially innocent defendants to present evidence of their innocence in federal habeas review, but even then the Court took pains to limit relief to only the most extreme cases. *See* McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013) ("We caution, however, that tenable actual-innocence gateway pleas are rare: '[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995))). Surely, this does not qualify as a robust safeguard against executing innocent defendants.

convicted defendant's innocence, and that some of those defendants will be exonerated too late. The only way to stop wrongful executions is to stop all executions. Whether it occurs in Mr. Glossip's next petition or one before then, the Court should acknowledge the ever-present existence of doubt in capital cases, and decide that because of its own fallibility, the principle of restraint exceeds the call for retribution.

Appendix A (Exoneree Information)

Last Name	First Name	State	Convicted	Exonerated	SCOTUS Cert Review
McMillian	Walter	AL	1988	1993	None
Padgett	Larry Randal	AL	1992	1997	None
Drinkard	Gary	AL	1995	2001	None
Quick	Wesley	AL	1997	2003	None
Moore	Daniel Wade	AL	2002	2009	None
Hinton	Anthony	AL	1986	2015	Cert denied in *Hinton v. Alabama*, 493 U.S. 969 (1989) (Marshall, J., joined by Brennan, J., dissenting). Remand ordered in *Hinton v. Alabama*, 134 S. Ct. 1081 (2014).
Robison	James Albert	AZ	1977	1993	None
Cruz	Robert	AZ	1981	1995	None
Grannis	David	AZ	1991	1996	None
McCrimmon	Christopher	AZ	1993	1997	None
Krone	Ray	AZ	1992	2002	Cert denied in *Krone v. Arizona*, 527 U.S. 1043 (1999) (following retrial and resentencing to life).
Minnitt	Andre	AZ	1993	2002	None
Prion	Lemuel	AZ	1999	2003	None
Milke	Debra	AZ	1990	2015	Cert denied in *Milke v. Arizona*, 512 U.S. 1227 (1994) (Blackmun, J., dissenting).

Appendix A (Exoneree Information)

Last Name	First Name	State	Convicted	Exonerated	SCOTUS Cert Review
Jones	Troy Lee	CA	1982	1996	None
Morris	Oscar	CA	1983	2000	None
Croy	Patrick	CA	1979	2004	None
Richardson	James Joseph	FL	1968	1989	None
Golden	Andrew	FL	1991	1994	None
Green	Joseph	FL	1993	2000	None
Smith	Frank Lee	FL	1986	2000	Cert denied in *Smith v. Florida*, 485 U.S. 971 (1988) (Marshall, J., joined by Brennan, J., dissenting).
Martinez	Joaquin Jose	FL	1997	2001	None
Melendez	Juan Roberto	FL	1984	2002	Cert denied in *Melendez v. Florida*, 510 U.S. 934 (1993) (off state post-conviction).
Holton	Rudolph	FL	1987	2003	Cert denied in *Holton v. Florida*, 500 U.S. 960 (1991) (Marshall, J., dissenting).
Penalver	Seth	FL	1999	2012	None
Nelson	Gary	GA	1980	1991	Cert denied in *Nelson v. Georgia*, 454 U.S. 882 (1981) (Marshall, J., joined by Brennan, J., dissenting).
Fain	Charles	ID	1983	2001	Cert denied in *Idaho v. Fain*, 493 U.S. 917 (1989) (after Idaho Supreme Court vacated death sentence on direct appeal).

Appendix A (Exoneree Information)

Last Name	First Name	State	Convicted	Exonerated	SCOTUS Cert Review
Paradis	Donald	ID	1981	2001	Cert denied in *Paradis v. Idaho*, 468 U.S. 1220 (1984) (Marshall, J., joined by Brennan, J., dissenting).
Cruz	Rolando	IL	1985	1995	Cert denied in *Illinois v. Hernandez*, 488 U.S. 869 (1998) (after Illinois Supreme Court granted new trial).
Hernandez	Alejandro	IL	1985	1995	Cert denied in *Illinois v. Cruz*, 488 U.S. 869 (1988) (after Illinois Supreme Court granted new trial).
Burrows	Joe	IL	1989	1996	Cert denied in *Burrows v. Illinois*, 506 U.S. 1055 (1993).
Gauger	Gary	IL	1993	1996	None
Jimerson	Verneal	IL	1985	1996	Cert denied in *Jimerson v. Illinois*, 497 U.S. 1031 (1990) (Marshall, J., joined by Brennan, J., dissenting).
Lawson	Carl	IL	1990	1996	None
Williams	Dennis	IL	1978	1996	Cert denied in *Williams v. Illinois*, 506 U.S. 876 (1992).
Jones	Ronald	IL	1989	1999	Cert denied in *Jones v. Illinois*, 511 U.S. 1012 (1994) (Blackmun, J., dissenting).
Porter	Anthony	IL	1983	1999	Cert denied in *Porter v. Illinois*, 479 U.S. 898 (1986) (Marshall, J., joined by Brennan, J., dissenting on juror bias issue).
Smith	Steven	IL	1986	1999	None
Geralds, Jr.	Hubert	IL	1997	2000	None
Hobley	Madison	IL	1990	2003	Cert denied in *Hobley v. Illinois*, 513 U.S. 1015 (1994).
Howard	Stanley	IL	1987	2003	Cert denied in *Howard v. Illinois*, 506 U.S. 875 (1992).

Appendix A (Exoneree Information)

Last Name	First Name	State	Convicted	Exonerated	SCOTUS Cert Review
Orange	Leroy	IL	1985	2003	Cert denied in *Orange v. Illinois*, 488 U.S. 900 (1988) (Marshall, J., joined by Brennan, J., dissenting).
Patterson	Aaron	IL	1989	2003	Cert denied in *Patterson v. Illinois*, 510 U.S. 879 (1993).
Steidl	Gordon	IL	1987	2004	Cert denied in *Steidl v. Illinois*, 502 U.S. 853 (1991).
Fields	Nathson Edgar	IL	1986	2009	Cert denied in *Fields v. Illinois*, 498 U.S. 881 (1990) (Marshall, J., dissenting).
Kitchen	Ronald	IL	1990	2009	Cert denied in *Kitchen v. Illinois*, 513 U.S. 1020 (1994).
Smith	Charles	IN	1983	1991	None
Osborne	Larry	KY	1999	2002	None
Hudson	Larry	LA	1967	1993	Cert dismissed in *Hudson v. Louisiana*, 403 U.S. 949 (1971).
Kyles	Curtis	LA	1984	1998	Cert denied in *Kyles v. Louisiana*, 486 U.S. 1027 (1988) (Marshall, J., joined by Brennan, J., dissenting). New trial ordered in *Kyles v. Whitley*, 514 U.S. 419 (1995).
Cousin	Shareef	LA	1996	1999	None
Graham	Michael	LA	1987	2000	None
Burrell	Albert	LA	1987	2001	Cert denied in *Burrell v. Louisiana*, 498 U.S. 1074 (1991) (Marshall, J., dissenting).
Thompson	John	LA	1985	2003	Cert denied in *Thompson v. Louisiana*, 488 U.S. 871 (1988) (Marshall, J., joined by Brennan, J., dissenting).
Bright	Dan L.	LA	1996	2004	None

Appendix A (Exoneree Information)

Last Name	First Name	State	Convicted	Exonerated	SCOTUS Cert Review
Matthews	Ryan	LA	1999	2004	None
Thibodeaux	Damon	LA	1997	2012	Cert denied in *Thibodeaux v. Louisiana*, 529 U.S. 1112 (2000).
Ford	Glenn	LA	1984	2014	Cert denied in *Ford v. Louisiana*, 498 U.S. 992 (1990) (Marshall, J., dissenting).
Greco	Louis	MA	1968	2001	Cert denied in *Greco v. Massachusetts*, 508 U.S. 925 (1993).
Limone	Peter	MA	1968	2001	Death penalty vacated in *Limone v. Massachusetts*, 408 U.S. 936 (1972) (in light of *Furman*).
Tameleo	Henry	MA	1968	2001	None
Adams	Laurence	MA	1974	2004	None
Bloodsworth	Kirk	MD	1985	1993	None
Dexter, Jr.	Clarence Richard	MO	1991	1999	None
Clemmons	Eric	MO	1987	2000	Cert denied in *Clemmons v. Missouri*, 488 U.S. 948 (1988) (Marshall, J., joined by Brennan, J., dissenting).
Amrine	Joseph	MO	1986	2003	Cert denied in *Amrine v. Missouri*, 486 U.S. 1017 (1988) (Marshall, J., joined by Brennan, J., dissenting).
Griffin	Reginald	MO	1988	2013	None
Butler	Sabrina	MS	1990	1995	None

Appendix A (Exoneree Information)

Last Name	First Name	State	Convicted	Exonerated	SCOTUS Cert Review
Brewer	Kennedy	MS	1995	2008	Cert denied in *Brewer v. Mississippi*, 526 U.S. 1027 (1999).
Manning	Willie	MS	1996	2015	Cert denied in *Manning v. Mississippi*, 526 U.S. 1056 (1999).
Rivera	Alfred	NC	1997	1999	None
Gell	Alan	NC	1998	2004	Cert denied in *Gell v. North Carolina*, 531 U.S. 867 (2000).
Hoffman	Jonathon	NC	1996	2007	Cert denied in *Hoffman v. North Carolina*, 526 U.S. 1053 (1999).
Chapman	Glen Edward	NC	1994	2008	Cert denied in *Chapman v. North Carolina*, 518 U.S. 1023 (1996).
Jones	Levon Junior	NC	1993	2008	Cert denied in *Jones v. North Carolina*, 518 U.S. 1010 (1996).
Brown	Leon	NC	1984	2014	None
McCollum	Henry	NC	1984	2014	Cert denied in *McCollum v. North Carolina*, 512 U.S. 1254 (1994) (Blackmun, J., dissenting).
Miranda	Roberto	NV	1982	1996	Cert denied in *Miranda v. Nevada*, 475 U.S. 1031 (1986) (Marshall, J., joined by Brennan, J., dissenting).
Johnston	Dale	OH	1984	1990	None
Howard	Timothy	OH	1977	2003	None
James	Gary Lamar	OH	1977	2003	None

Appendix A (Exoneree Information)

Last Name	First Name	State	Convicted	Exonerated	SCOTUS Cert Review
Jamison	Derrick	OH	1985	2005	Cert denied in *Jamison v. Ohio*, 498 U.S. 881 (1990) (Marshall, J., dissenting).
D'Ambrosio	Joe	OH	1989	2012	Cert denied in *D'Ambrosio v. Ohio*, 517 U.S. 1172 (1996).
Ajamu	Kwame	OH	1975	2014	None
Bridgeman	Wiley	OH	1975	2014	None
Jackson	Ricky	OH	1975	2014	None
Wilhoit	Gregory	OK	1987	1993	None
Munson	Adolph	OK	1985	1995	Cert denied in *Munson v. Oklahoma*, 488 U.S. 1019 (1989) (Marshall, J., joined by Brennan, J., dissenting).
Miller, Jr.	Robert Lee	OK	1988	1998	None
Williamson	Ronald Keith	OK	1988	1999	Cert denied in *Williamson v. Oklahoma*, 503 U.S. 973 (1992); *Williamson v. Oklahoma*, 511 U.S. 1115 (1994) (Blackmun, J., dissenting).
McCarty	Curtis	OK	1986	2007	Cert denied in *McCarty v. Oklahoma*, 528 U.S. 1009 (1999).
Douglas	Yancy	OK	1995	2009	Cert denied in *Douglas v. Oklahoma*, 525 U.S. 884 (1998).
Powell	Paris	OK	1997	2009	Cert denied in *Powell v. Oklahoma*, 531 U.S. 935 (2000).
Smith	Jay C.	PA	1986	1992	None
Nieves	William	PA	1994	2000	None
Kimbell	Thomas	PA	1998	2002	None

Appendix A (Exoneree Information)

Last Name	First Name	State	Convicted	Exonerated	SCOTUS Cert Review
Yarris	Nicholas	PA	1982	2003	Cert denied in *Yarris v. Pennsylvania*, 491 U.S. 910 (1989) (Marshall, J., joined by Brennan, J., dissenting).
Wilson	Harold C.	PA	1989	2005	Cert denied in *Wilson v. Pennsylvania*, 519 U.S. 951 (1996).
Manning	Warren Douglas	SC	1989	1999	None
McCormick	Michael Lee	TN	1987	2007	Cert denied in *McCormick v. Tennessee*, 494 U.S. 1039 (1990) (Marshall, J., joined by Brennan, J., dissenting).
House	Paul G.	TN	1986	2009	Cert denied in *House v. Tennessee*, 498 U.S. 912 (1990) (Marshall, J., dissenting on *Mills* issue). Hearing ordered in *House v. Bell*, 547 U.S. 518 (2006).
Vann	Gussie	TN	1994	2011	Cert denied in *Vann v. Tennessee*, 526 U.S. 1071 (1999).
Adams	Randall D.	TX	1977	1989	Death sentence reversed in *Adams v. Texas*, 448 U.S. 38 (1980).
Brandley	Clarence	TX	1981	1990	Cert denied in *Texas v. Brandley*, 498 U.S. 817 (1989) (following Brandley's victory in *Ex parte Brandley*, 781 S.W.2d 886 (Tex. Crim. App. 1989).
Deeb	Muneer	TX	1985	1993	Cert denied in *Deeb v. Texas*, 505 U.S. 1223 (1992).
Macias	Federico	TX	1984	1993	Cert denied in *Macias v. Texas*, 484 U.S. 1079 (1988) (Marshall, J, joined by Brennan, J., dissenting).

Appendix A (Exoneree Information)

Last Name	First Name	State	Convicted	Exonerated	SCOTUS Cert Review
Aldape Guerra	Ricardo	TX	1982	1997	Cert denied in *Aldape Guerra v. Texas*, 492 U.S. 925 (1989) (Marshall, J., joined by Brennan, J., dissenting).
Willis	Ernest Ray	TX	1987	2004	Cert denied in *Willis v. Texas*, 498 U.S. 908 (1990) (Marshall, J., dissenting).
Blair	Michael	TX	1994	2008	None
Springsteen	Robert	TX	2001	2009	Cert denied in *Texas v. Springsteen*, 549 U.S. 1253 (2007) (following new trial grant on hearsay issue).
Toney	Michael	TX	1999	2009	Cert denied in *Toney v. Texas*, 537 U.S. 1113 (2003).
Graves	Anthony	TX	1994	2010	Cert denied in *Graves v. Dretke*, 541 U.S. 1057 (2004).
Brown	Alfred	TX	2005	2015	Cert denied in *Brown v. Texas*, 556 U.S. 1211 (2009).
Washington	Earl	VA	1984	2000	Cert denied in *Washington v. Virginia*, 471 U.S. 1111 (1985) (Marshall, J., joined by Brennan, J., dissenting).
Harris	Benjamin	WA	1984	1997	Cert denied in *Harris v. Washington*, 480 U.S. 940 (1987) (Marshall, J., joined by Brennan, J., dissenting).

Appendix B (2015 Executions)

Last Name	First Name	State	SCOTUS Denial
Brannan	Andrew	GA	*Brannan v. Chatman*, 135 S. Ct. 1038 (2015)
Kormondy	Johnny	FL	*Kormondy v. Scott*, 135 S. Ct. 1038 (2015)
Warner	Charles	OK	*Warner v. Gross*, 135 S. Ct. 824 (2015) (Sotomayor, J., joined by Ginsburg, Breyer, Kagan, JJ., dissenting)
Prieto	Arnold	TX	None re stay of execution. Habeas denial in *Prieto v. Quarterman*, 556 U.S. 1209 (2009)
Hill	Warren	GA	*Hill v. Chatman*, 191 L.E.2d 148 (2015) (Breyer, J., joined by Sotomayor, J., dissenting)
Ladd	Robert	TX	*Ladd v. Livingston*, 135 S. Ct. 1197 (2015)
Newbury	Donald	TX	None re stay of execution. Remand ordered in *Newbury v. Stephens*, 133 S. Ct. 2765 (2013), in light of intervening Court decision.
Storey	Walter	MO	*Storey v. Lombardi*, 135 S. Ct. 1198 (2015) (Ginsburg, J., joined by Breyer, Sotomayor, Kagan, JJ., dissenting)
Vasquez	Manuel	TX	None re stay of execution. Habeas denial in *Vasquez v. Stephens*, 134 S. Ct. 387 (2013)
Clayton	Cecil	MO	*Clayton v. Lombardi*, 135 S. Ct. 1697 (2015) (Ginsburg, J., joined by Breyer, Sotomayor, Kagan, JJ., dissenting)
Sprouse	Kent	TX	None re stay of execution. Habeas denial in *Sprouse v. Stephens*, 135 S. Ct. 477 (2014)
Cole	Andre	MO	*Cole v. Griffith*, 135 S. Ct. 1757 (2015)
Garza	Manuel	TX	None re stay of execution. Habeas denial in *Garza v. Stephens*, 135 S. Ct. 1494 (2015)
Charles	Derrick	TX	*Charles v. Stephens*, 135 S. Ct. 2075 (2015)
Bower	Lester	TX	*Bower v. Texas*, 135 S. Ct. 1291 (2015) (Breyer, J., dissenting)
Strong	Richard	MO	*Strong v. Griffith*, 135 S. Ct. 2833 (2015)

Appendix B (2015 Executions)

Last Name	**First Name**	**State**	**SCOTUS Denial**
Russeau	Gregory	TX	None re stay of execution. Habeas denial in *Russeau v. Stephens*, 135 S. Ct. 338 (2014)
Zink	David	MO	*Zink v. Griffith*, 2015 U.S. LEXIS 4536 (2015)
Lopez	Daniel	TX	*Lopez v. Stephens*, 2015 U.S. LEXIS 4612 (2015)
Nunley	Roderick	MO	*In re Nunley*, 2015 U.S. LEXIS 4664 (2015)
Gissendaner	Kelly	GA	*Gissendaner v. Chatman*, 2015 U.S. LEXIS 4674 (2015)
Prieto	Alfredo	VA	*In re Prieto*, 2015 U.S. LEXIS 4690 (2015)
Garcia	Juan	TX	None re stay of execution. Habeas denial in *Garcia v. Stephens*, 135 S. Ct. 1492 (2015)
Escamilla	Licho	TX	*Escamilla v. Stephens*, 136 S. Ct. 66 (2015)
Correll	Jerry	FL	*Correll v. Florida*, 2015 WL 6111441 (2015) (Breyer, J., joined by Sotomayor, J., dissenting)
Holiday	Raphael	TX	*Holiday v. Stephens*, 136 S. Ct. 387 (2015)
Johnson	Marcus	GA	*Johnson v. Chatman*, 136 S. Ct. 532 (2015)
Terrell	Brian Keith	GA	*Terrell v. Chatman*, 136 S. Ct. 613 (2015)