

STEVENS, J., concurring

SUPREME COURT OF THE UNITED STATES

IN RE TROY ANTHONY DAVIS

ON PETITION FOR WRIT OF HABEAS CORPUS

No. 08–1443. Decided August 17, 2009

The motion of NAACP, et al. for leave to file a brief as *amici curiae* is granted. The motion of Bob Barr, et al. for leave to file a brief as *amici curiae* is granted. The petition for a writ of habeas corpus is transferred to the United States District Court for the Southern District of Georgia for hearing and determination. The District Court should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner’s innocence. JUSTICE SOTOMAYOR took no part in the consideration or decision of these motions and this petition.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

JUSTICE SCALIA’s dissent is wrong in two respects. First, he assumes as a matter of fact that petitioner Davis is guilty of the murder of Officer MacPhail. He does this even though seven of the State’s key witnesses have recanted their trial testimony; several individuals have implicated the State’s principal witness as the shooter; and “no court,” state or federal, “has ever conducted a hearing to assess the reliability of the score of [postconviction] affidavits that, if reliable, would satisfy the threshold showing for a truly persuasive demonstration of actual innocence,” 565 F. 3d 810, 827 (CA11 2009) (Barkett, J., dissenting) (internal quotation marks omitted). The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing. Simply put, the case is sufficiently “exceptional” to warrant utilization of this Court’s Rule 20.4(a),

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28 U. S. C. §2241(b), and our original habeas jurisdiction. See *Byrnes v. Walker*, 371 U. S. 937 (1962); *Chaapel v. Cochran*, 369 U. S. 869 (1962).

Second, JUSTICE SCALIA assumes as a matter of law that, “[e]ven if the District Court were to be persuaded by Davis’s affidavits, it would have no power to grant relief” in light of 28 U. S. C. §2254(d)(1). *Post*, at 2. For several reasons, however, this transfer is by no means “a fool’s errand.” *Post*, at 5. The District Court may conclude that §2254(d)(1) does not apply, or does not apply with the same rigidity, to an original habeas petition such as this. See *Felker v. Turpin*, 518 U. S. 651, 663 (1996) (expressly leaving open the question whether and to what extent the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to original petitions). The court may also find it relevant to the AEDPA analysis that Davis is bringing an “actual innocence” claim. See, e.g., *Triestman v. United States*, 124 F. 3d 361, 377–380 (CA2 1997) (discussing “serious” constitutional concerns that would arise if AEDPA were interpreted to bar judicial review of certain actual innocence claims); *Pet. for Writ of Habeas Corpus 20–22* (arguing that Congress intended actual innocence claims to have special status under AEDPA). Even if the court finds that §2254(d)(1) applies in full, it is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence. Alternatively, the court may find in such a case that the statute’s text is satisfied, because decisions of this Court clearly support the proposition that it “would be an atrocious violation of our Constitution and the principles upon which it is based” to execute an innocent person. 565 F. 3d, at 830 (Barkett, J., dissenting); cf. *Teague v. Lane*, 489 U. S. 288, 311–313 (1989) (plurality opinion).

JUSTICE SCALIA would pretermitt all of these unresolved legal questions on the theory that we must treat even the most robust showing of actual innocence identically on

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habeas review to an accusation of minor procedural error. Without briefing or argument, he concludes that Congress chose to foreclose relief and that the Constitution permits this. But imagine a petitioner in Davis's situation who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be put to death nonetheless. The Court correctly refuses to endorse such reasoning.

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JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

Today this Court takes the extraordinary step—one not taken in nearly 50 years—of instructing a district court to adjudicate a state prisoner’s petition for an original writ of habeas corpus. The Court proceeds down this path even though every judicial and executive body that has examined petitioner’s stale claim of innocence has been unpersuaded, and (to make matters worst) even though it would be impossible for the District Court to grant any relief. Far from demonstrating, as this Court’s Rule 20.4(a) requires, “exceptional circumstances” that “warrant the exercise of the Court’s discretionary powers,” petitioner’s claim is a sure loser. Transferring his petition to the District Court is a confusing exercise that can serve no purpose except to delay the State’s execution of its lawful criminal judgment. I respectfully dissent.

Eighteen years ago, after a trial untainted by constitutional defect, a unanimous jury found petitioner Troy Anthony Davis guilty of the murder of Mark Allen MacPhail. The evidence showed that MacPhail, an off-duty police officer, was shot multiple times after responding to the beating of a homeless man in a restaurant parking lot. *Davis v. State*, 263 Ga. 5, 5–6, 426 S. E. 2d 844, 845–846, cert. denied, 510 U. S. 950 (1993). Davis admits that he was present during the beating of the homeless man, but he maintains that it was one of his companions who shot Officer MacPhail. It is this claim of “actual innocence”—the same defense Davis raised at trial

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but now allegedly supported by new corroborating affidavits—that Davis raises as grounds for relief. And (presumably) it is this claim that the Court wants the District Court to adjudicate once the petition is transferred.

Even if the District Court were to be persuaded by Davis's affidavits, it would have no power to grant relief. Federal courts may order the release of convicted state prisoners only in accordance with the restrictions imposed by the Antiterrorism and Effective Death Penalty Act of 1996. See *Felker v. Turpin*, 518 U. S. 651, 662 (1996). Insofar as it applies to the present case, that statute bars the issuance of a writ of habeas corpus “with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U. S. C. §2254(d)(1).

The Georgia Supreme Court rejected petitioner's “actual-innocence” claim on the merits, denying his extraordinary motion for a new trial. Davis can obtain relief only if that determination was contrary to, or an unreasonable application of, “clearly established Federal law, as determined by the Supreme Court of the United States.” It most assuredly was not. 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. See *Herrera v. Collins*, 506 U. S. 390, 400–401, 416–417 (1993); see also *House v. Bell*, 547 U. S. 518, 555 (2006); *District Attorney's Office for Third Judicial Dist. v. Osborne*, *ante*, at 18. A state court cannot possibly have contravened, or even unreasonably applied,

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“clearly established Federal law, as determined by the Supreme Court of the United States,” by rejecting a type of claim that the Supreme Court has not once accepted as valid.

JUSTICE STEVENS says that we need not be deterred by the limitations that Congress has placed on federal courts’ authority to issue the writ, because we cannot rule out the possibility that the District Court might find those limitations unconstitutional as applied to actual-innocence claims. *Ante*, at 2 (concurring opinion). (This is not a possibility that Davis has raised, but one that JUSTICE STEVENS has imagined.) But acknowledging that possibility would make a nullity of §2254(d)(1). There is no sound basis for distinguishing an actual-innocence claim from any other claim that is alleged to have produced a wrongful conviction. If the District Court here can ignore §2254(d)(1) on the theory that otherwise Davis’s actual-innocence claim would (unconstitutionally) go unaddressed, the same possibility would exist for *any* claim going beyond “clearly established Federal law.”

The existence of that possibility is incompatible with the many cases in which we have reversed lower courts for their failure to apply §2254(d)(1), with no consideration of constitutional entitlement. See, *e.g.*, *Knowles v. Mirzayance*, 556 U. S. ___, __ (2009) (slip op., at 9–10); *Wright v. Van Patten*, 552 U. S. 120, __ (2008) (slip op., at 5–6) (*per curiam*); *Carey v. Musladin*, 549 U. S. 70, 76–77 (2006). We have done so because the argument that the Constitution requires federal-court screening of all state convictions for constitutional violations is frivolous. For much of our history, federal habeas review was not available even for those state convictions claimed to be in violation of clearly established federal law. See *Stone v. Powell*, 428 U. S. 465, 474–476 (1976); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 465–466 (1963); L. Yackle,

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Postconviction Remedies §19 (1981). It seems to me improper to grant the extraordinary relief of habeas corpus on the possibility that we have approved—indeed, directed—the disregard of constitutional imperatives in the past. If we have new-found doubts regarding the constitutionality of §2254(d)(1), we should hear Davis’s application and resolve that question (if necessary) ourselves.*

Transferring this case to a court that has no power to grant relief is strange enough. It becomes stranger still when one realizes that the allegedly new evidence we shunt off to be examined by the District Court has already been considered (and rejected) multiple times. Davis’s postconviction “actual-innocence” claim is not new. Most of the evidence on which it is based is almost a decade old. A State Supreme Court, a State Board of Pardons and Paroles, and a Federal Court of Appeals have all considered the evidence Davis now presents and found it lacking. (I do not rely upon the similar conclusion of the Georgia trial court, since unlike the others that court relied substantially upon Georgia evidentiary rules rather than the unpersuasiveness of the evidence Davis brought forward. See App. to Pet. for Writ of Habeas Corpus 57a–63a.)

The Georgia Supreme Court “look[ed] beyond bare legal principles that might otherwise be controlling to the core question of whether a jury presented with Davis’s allegedly-new testimony would probably find him not guilty or give him a sentence other than death.” *Davis v. State*, 283 Ga. 438, 447, 660 S. E. 2d 354, 362 (2008). After analyzing each of Davis’s proffered affidavits and comparing them with the evidence adduced at trial, it concluded that it was not probable that they would produce a different

*JUSTICE STEVENS’ other arguments as to why §2254(d)(1) might be inapplicable—that it does not apply to original petitions filed in this Court (even though its text covers all federal habeas petitions), and that it contains an exception (not to be found in its text) for claims of actual innocence—do not warrant response.

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result. See *id.*, at 440–447, 660 S. E. 2d, at 358–363.

When Davis sought clemency before the Georgia Board of Pardons and Paroles, that tribunal stayed his execution and “spent more than a year studying and considering [his] case.” Brief in Opposition 14–15 (statement of Board of Pardons and Paroles). It “gave Davis’ attorneys an opportunity to present every witness they desired to support their allegation that there is doubt as to Davis’ guilt”; it “heard each of these witnesses and questioned them closely.” *Id.*, at 15. It “studied the voluminous trial transcript, the police investigation report and the initial statements of the witnesses,” and “had certain physical evidence retested and Davis interviewed.” *Ibid.* “After an exhaustive review of all available information regarding the Troy Davis case and after considering all possible reasons for granting clemency, the Board . . . determined that clemency is not warranted.” *Ibid.*

After reviewing the record, the Eleventh Circuit came to a conclusion “wholly consonant with the repeated conclusions of the state courts and the State Board of Pardons and Paroles.” 565 F. 3d 810, 825 (2009). “When we view all of this evidence as a whole, we cannot honestly say that Davis can establish by clear and convincing evidence that a jury would not have found him guilty of Officer MacPhail’s murder.” *Id.*, at 826.

Today, without explanation and without any meaningful guidance, this Court sends the District Court for the Southern District of Georgia on a fool’s errand. That court is directed to consider evidence of actual innocence which has been reviewed and rejected at least three times, and which, even if adequate to persuade the District Court, cannot (as far as anyone knows) form the basis for any relief. I truly do not see how the District Court can discern what is expected of it. If this Court thinks it possible that capital convictions obtained in full compliance with law can never be final, but are always subject to being set

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aside by federal courts for the reason of “actual innocence,” it should set this case on our own docket so that we can (if necessary) resolve that question. Sending it to a district court that “might” be authorized to provide relief, but then again “might” be reversed if it did so, is not a sensible way to proceed.