

'Actual innocence' as a constitutional right (op-ed, The Oregonian, August 28, 2009).
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In 1989, an off-duty police officer was murdered after responding to the beating of a homeless man in a parking lot. Troy Anthony Davis was soon charged with the crime. Davis admitted that he was present at the scene, but claimed it was one of his companions who had shot the officer. He was convicted and sentenced to death. Last week, the U.S. Supreme Court issued a three sentence decision, sending his case back to the lower court with instructions to hear testimony and make a determination on whether newly discovered evidence clearly established Davis' innocence. (Among other things, seven of the nine witnesses implicating Davis in the crime have since recanted their testimony.) Justice Scalia, joined by Justice Thomas, filed a dissent, claiming, correctly, that "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." Justice Stevens' concurring opinion, joined by Justices Ginsburg and Breyer, responded, equally correctly: "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..."

Sixteen years ago, in 1993, the Court was faced with another "actual innocence" claim, in a case also involving a death row inmate convicted of killing two police officers (one of whom was allegedly involved in the drug trade). At the time, the Court disposed of the case without deciding whether a convict who can prove his innocence had a constitutional right not to be executed. The reasoning was rather convoluted: "We may assume," read the opinion, "for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional.... But...the threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold." In other words, said the Court, the claim is rejected whether there is or whether there isn't such a constitutional right. The question of whether the Federal Constitution contains such a right was left for another day.

That day hasn't come yet. And judged by last week's decision, may not come for a while. That short decision did not even mention the Constitution, and a concurring opinion that did raise constitutional concerns was joined by only three of the eight participating judges (Justice Sotomayor did not take part in the case). Still, as mentioned above, only two of those eight staked the position that no such constitutional right exists. As in 1993, the Court seems unwilling to recognize a constitutional right, and equally unwilling to reject it.

It is high time for the Court to take the plunge and recognize a constitutional right to a re-opening of criminal cases where newly discovered evidence can establish innocence. Few constitutional rights are so foundational as this one. The Court appears to fear an overwhelming deluge of "actual innocence" claims; but this fear (which always surfaces

in opposition to new civil liberties) is both unsubstantiated (several states already recognize such a statutory right), and, in any case, is insufficient to deny constitutional recognition to such an obvious matter of justice. The Supreme Court's reluctance to recognize this fundamental right as constitutional is a sad and lingering indication of its recent hostility to expansive civil liberties.

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