

02-1403(L)

02-1405 (Con)

To Be Argued By: SAMUEL R.

GROSS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket Nos. 02-1403(L), 02-1405(Con)

UNITED STATES OF AMERICA

Appellant,

--V.--

HECTOR VEGA, also known as Jimbo; JANET SOTO; MILTON RIVERA;
JOSEPH C. BROWN; JOHNNY RODRIGUEZ, also known as Blaze; SAUL
HERNANDEZ, also known as Twin, also known as Carlos P. Luis; RAUL
HERNANDEZ, also known as “Twin”, also known as Carlos P. Luis;
ROBERT VEVE,

Defendants,

ALAN QUINONES, DIEGO B. RODRIGUEZ,

Defendants-Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES
QUINONES AND RODRIGUEZ

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TABLE OF CONTENTS

STATEMENT OF THE ISSUE PRESENTED 1

Does the Federal Death Penalty Violate the Fifth and Eighth Amendments to the United States Constitution?

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT

THE FEDERAL DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE IT LEADS THE GOVERNMENT TO EXECUTE AN UNACCEPTABLE NUMBER OF INNOCENT DEFENDANTS. 6

INTRODUCTION 6

POINT I

UNDER THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE OF THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, THE CONSTITUTIONALITY OF THE DEATH PENALTY MUST BE DETERMINED AND REDETERMINED BY THE COURTS IN KEEPING WITH EVOLVING STANDARDS OF DECENCY AND CURRENT KNOWLEDGE ABOUT ITS OPERATION. 8

POINT II

NUMEROUS DOCUMENTED EXONERATIONS OF FACTUALLY INNOCENT DEATH ROW INMATES, SOME WHO CAME WITHIN DAYS OF EXECUTION, DEMONSTRATE THAT THE RISK OF EXECUTING INNOCENT DEFENDANTS IS FAR HIGHER THAN ANY COURT HAD ANY REASON TO BELIEVE UNTIL RECENTLY. 16

1. The Extraordinary Number of Recent Death-Row Exonerations has Exposed a Crisis in our System of Capital Adjudication, and Generated a Crisis of Confidence in the Integrity of the System. 16
2. The Conviction of Innocent Defendants is an Especially High Risk in Capital Cases. 27
3. The Risk of Convicting and Executing Innocent Defendants is at Least as Great in Federal Capital Prosecutions as in State Capital Cases. 30

POINT III

AS THE DISTRICT COURT CORRECTLY HELD, THE CONTINUED USE OF THE DEATH PENALTY WILL RESULT IN A CONSTITUTIONALLY INTOLERABLE NUMBER OF EXECUTIONS OF DEFENDANTS WHO ARE ABSOLUTELY INNOCENT. 43

1. The Issue Before the Court has Never Been Addressed by the Supreme Court. 43
2. In the Absence of Controlling Authority, the Lower Courts Must Address the Question in the First Instance. 48

CONCLUSION 54

TABLE OF AUTHORITIES

Cases:	<u>Page No.</u>
<i>Arizona v. Youngblood</i> , 488 U.S. 51 (1988)	19
<i>Atkins v. Virginia</i> , 122 S.Ct. 2242 (2002)	5, <i>et passim</i>
<i>Ballew v. Georgia</i> , 357 U.S. 223 (1978)	50
<i>Beck v. Alabama</i> , 447 U.S. 625 (1980)	9, 12, 44
<i>Bullington v. Missouri</i> , 451 U.S. 430 (1981)	44
<i>C-Suzanne Beauty Salon, LTD v. General Insurance Company of America</i> , 574 F.2d 106 (2d Cir. 1978)	15
<i>Chandler v. United States</i> , 193 F.3d 1297 (11 th Cir. 1999)	41
<i>Chandler v. United States</i> , 218 F.3d 1305 (11 th Cir. 2000)	41
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977)	9, 10, 44
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982)	9, 11
<i>Ford v. Wainwright</i> , 477 U.S. 399 (1986)	9, 11, 46
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	8, <i>et passim</i>
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<i>McCleskey v. Zant</i> , 499 U.S. 467 (1991)	44
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<i>Medina v. California</i> , 505 U.S. 437 (1992)	13, 46
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<i>Paris Adult Theatre I v. Slaton</i> , 413 U.S. 49, 58 n. 8 (1973)	50
<i>Patterson v. New York</i> , 432 U.S. 197 (1977)	13, 46
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989)	10
<i>Proffitt v. Florida</i> , 428 U.S. 153 (1976).	12
<i>Ring v. Arizona</i> , 122 S.Ct. 2428 (2002)	1, 17
<i>Roberts v. Louisiana</i> , 428 U.S. 325 (1976).	12
<i>Rochin v. California</i> 342 U.S. 165 (1952)	46
<i>Sacramento v. Lewis</i> , 523 U.S. 833 (1998)	11
<i>Simmons v. South Carolina</i> , 512 U.S. 154 (1994)	9
<i>Thompson v. Oklahoma</i> , 487 U.S. 815 (1988)	9, 11
<i>Trop v. Dulles</i> , 356 U.S. 86 (1982)	9
<i>Turner v. Murray</i> , 476 U.S. 28 (1986)	44
<i>United States v. Angiano</i> (W.D. MI CR No. 1:97-CR-23)	36

<i>United States v. Chandler</i> , 957 F.Supp. 1505 (N.D. Ala. 1997)	40
<i>United States v. Chanthadara</i> (D. KS CR No. 94-10128-01)	.36
<i>United States v. Coppa</i> , 267 F.3d 132 (2 nd Cir. 2001)	35
<i>United States v. Cosme</i> (D. PR CR No. 99-346 (HL))	36
<i>United States v. Higgs</i> (D. MD CR No. PJM-98-0502)	36
<i>United States v. Quinones</i> , 196 F.Supp.2d 416 (SDNY 2002)	18, 49
<i>United States v. Quinones</i> , 205 F.Supp.2d 256 (SDNY 2002)	2, <i>et passim</i>
<i>United States v. Vargas</i> (W.D. OK CR No. 99-CR-63-ALL)	36
<i>Witherspoon v. Illinois</i> , 391 U.S. 510 (1968)	14
<i>Williams v. New York</i> , 337 U.S. 241 (1949)	13
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<i>Zant v. Stephens</i> , 462 U.S. 862 (1983)	44

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18 U.S.C. §3395(b) 37

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http://www.capdefnet.org/htm_library/Chandler1.htm 38

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<http://www.communication.ilstu.edu/activities/documentary.htm> 22

http://www.deathpenaltyinfo.org/dpicexec.html	42
http://www.deathpenaltyinfo.org/DRowInfo.html#state	42
http://www.deathpenaltyinfo.org/fedprisoners.html	42
http://www.deathpenaltyinfo.org/Innocentlist.html	42
http://www.deathpenaltyinfo.org/innocothers.html	26
http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf	16
http://www.ncjrs.org/pdffiles/dnaevid.pdf	20
http://www.texasdefender.org/study/chapter9.html	21
http://www.washtimes.com/op-ed/20020703-11575352.htm	26
Lexis, news library, rpoll file, accession number 0383393	27

STATEMENT OF THE ISSUE PRESENTED
Does the Federal Death Penalty Violate the Fifth and Eighth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Appellees accept the statement of the case in the Government’s brief,² except to note that the superceding indictment alleges a violation of the 1988 death penalty statute, as well as the 1994 law.

STATEMENT OF THE FACTS

² However, guilty pleas by codefendants to the drug trafficking counts are, obviously, irrelevant to the issue at hand.

Alan Quinones and Diego Rodriguez have pled Not Guilty to the allegations in the indictment, including the murder of Edwin Santiago. They are presumed to be innocent. Contrary to the Government's assertion,³ there is an "actual risk of executing a factually innocent defendant ..." [Government's Brief, GB 38*].⁴

³ Quinones, not Rodriguez, complained below that the Attorney General had rejected a "plea agreement involving a life sentence" and that Attorney General Ashcroft issued a Report admitting that "white defendants superficially fared better" in reaching "a plea agreement" subsequent to "a decision by the Attorney General to seek the death penalty." See "The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review," United States Department of Justice, p. 17 (6/6/01). [JA 240].

Later Rodriguez, but not Quinones who declined to plead guilty to the indictment [JA 655], tried to plead guilty to the pre-*Ring v. Arizona*, 122 S.Ct. 2428 (2001) indictment to avoid facing the death penalty. [JA 636]. Neither hearing involved an admission of guilt of murder by either defendant.

⁴ The Government's reliance on plea negotiations is patently improper, as noted by the District Court. *United States v. Quinones*, 205 F.Supp.2d 256, 263 n.7 (S.D.N.Y. 2002) [*Quinones II*]. Fed. R. Crim. Pro. 11(e)(6). It is also misleading. Defendants face not only the death penalty, but life sentences on related narcotics charges. Under the circumstances, it is perfectly reasonable for them to attempt to resolve all of these cases without the risk of execution, even though they are innocent of murder. In fact, many innocent defendants have pled guilty to avoid execution and later been exonerated. See, e.g., Radelet, Bedau and Putnam, *In Spite of Innocence: Erroneous Convictions In Capital Cases*, (Northeastern University Press 1992), pp. 282, 286-87, 294, 305, 308-09, 318, 326, 328, 331, 333, 336, 338, 342, 350 (1992). Gross, "Lost Lives: Miscarriages of Justice in Capital Cases, 61 *Law & Contemp. Probs.* 125, 142-143 (1998):

The case of John Sosnovske is a good example. In 1990, his girlfriend, Laverne Pavlinac, who apparently was afraid of him and anxious to be rid of him, falsely implicated Sosnovske in the rape-murder of Taunja Bennett. In the process, Ms. Pavlinac became entangled in her own lies, and claimed to have participated in the killing herself. Both were charged with murder. Ms. Pavlinac recanted her confession but was convicted and sentenced to life in prison. Following her

The United States Attorney did not request permission to seek the death penalty. Nevertheless, the Attorney General ordered the local prosecutors to seek the death penalty against both defendants. As in this prosecution, nearly all such cases involve people of color.⁵

The evidence against these defendants appears to consist exclusively of: (1) motive and (2) “co-operator” testimony – three bargained for witnesses. [JA 51].⁶ Thus, this is precisely the type of prosecution which can result in the conviction of an innocent man.

conviction, Mr. Sosnovske, who was facing the death penalty, pled no contest and was also sentenced to life imprisonment. Both were freed in 1995 after another man, Keith Hunter Jespersen, confessed and also pled guilty to the same murder.

See also “Evidence Clears Them but the Law Does Not,” *N.Y. Times*, A17 (11/2/95); Editorial, “Justice Done Finally,” *Portland Oregonian*, C6 (11/28/95).

⁵ Appellees complained below that Attorney General Ashcroft had required a capital trial, without a request for permission to seek the death penalty by the United States Attorney, 11 times total, 9 times against minority defendants. [JA 238]. Now the number is 16, 14 of whom are nonwhite.

http://www.capdefnet.org/fdprc/contents/litigation_guides/race_eth_geo/race_data_2.htm.

⁶ We are unaware of any physical evidence suggesting that appellees killed the deceased.

SUMMARY OF ARGUMENT

The question before the Court is whether the Government may constitutionally continue to use the death penalty, knowing that, in the process, it will execute innocent defendants on a regular basis. This issue has never been addressed by the Supreme Court. Under governing case law, it must be considered both under the Due Process Clause of the Fifth Amendment and under the Cruel and Unusual Punishments Clause of the Eighth Amendment, by reference to evolving standards of decency and current knowledge about the operation of the death penalty in practice.

The District Court, on the basis of an extensive record, found that recent developments – in particular the advent of DNA identification technology, and the extraordinary number of death-row exonerations in the past decade – demonstrate that the number innocent defendants executed is far greater than was generally believed just several years ago. It also found that Federal death penalty prosecutions are no less error-prone than state cases; indeed, the record suggests that they may be more so.

Our understanding of the magnitude of this tragic problem has changed utterly in a matter of years. Nine years ago, in *Herrera v. Collins*, a majority on the Supreme Court stated that the execution of an innocent individual would be “a constitutionally intolerable event,” but the Court considered such an event remote and unlikely. 506 U.S. 390, 419 (1993). Four months ago, in *Atkins v. Virginia*, the Court noted that “in recent years a disturbing number of inmates on death row have been exonerated.” 122 S. Ct. 2242 at 2252, n. 25 (2002). In this new context, the District Court correctly held that to continue to execute, knowing as we now do that in the process we will kill a substantial number of innocent citizens, is just as constitutionally intolerable as to knowingly execute an innocent person.

ARGUMENT

THE FEDERAL DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE IT LEADS THE GOVERNMENT TO EXECUTE AN UNACCEPTABLE NUMBER OF INNOCENT DEFENDANTS.

INTRODUCTION

Imagine the following case:

Ten prisoners are in a prison yard with one guard. The officers on the cat walk high above see nine of them attack the guard with makeshift knives and kill him. One prisoner, however, tries to go to stop the others, but he is restrained by two of the attackers. The officer-witnesses, unfortunately, cannot tell which of the ten it is.

The guard dies of his wounds. All ten prisoners are tried for capital murder. Each of them swears that he is the innocent one. All are convicted and sentenced to death. May the state constitutionally execute all ten?

This is the issue before the Court. We now know – as we never did until the last few years – that a substantial number of those we put to death are innocent, but we cannot distinguish them from the rest. Does this new knowledge change the legal status of the death penalty?

The Government argues, in many ways, that there is nothing new to say about this issue, that nothing has changed – not since 1994, nor 1993, nor 1976, nor 1972, nor 1789. We vehemently disagree. We discuss the factual evidence of these new circumstances in detail in Point II, and the legal conclusions of the District Court in Point III. Initially, however, in Point I, we correct the Government's misleading description of the governing law.

POINT I

UNDER THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE OF THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, THE CONSTITUTIONALITY OF THE DEATH PENALTY MUST BE DETERMINED AND REDETERMINED BY THE COURTS IN KEEPING WITH EVOLVING STANDARDS OF DECENCY AND CURRENT KNOWLEDGE ABOUT ITS OPERATION.

The Government begins its Summary of Argument by saying that: “[t]he constitutionality of the death penalty under the Cruel and Unusual Punishments Clause of the Eighth Amendment has been settled at least since *Gregg v. Georgia*, 428 U.S. 153 (1976).” [GB 14]. This sentence is, in essence, *everything* the Government says about the application of the Eighth Amendment to this case⁷ – and it is deeply misleading. In *Gregg* and its companion cases, the Supreme Court, of course, did hold that the death penalty is not intrinsically unconstitutional, and that three of the five death penalty statutes before the Court contained adequate procedural safeguards to avoid the arbitrary the imposition of death sentences that was condemned in *Furman v. Georgia*, 408 U.S. 238 (1972). But there is another holding in *Gregg* and *Furman* that is more important to the case at hand: That the constitutionality of the death penalty under the Cruel and Unusual Punishments Clause turns on “the evolving standards of decency that mark the progress of a maturing society.” 428 U.S. at 173, quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1982). The Government acknowledges this elsewhere in its brief (as it must), [GB at 35, (citing *Atkins v. Virginia, supra*,)], but ignores it

⁷ It is repeated once almost verbatim, [GB 25]; and repeated again, in substance [GB 31].

in this context. In fact, *Furman* and *Gregg* provide direct authority for the District Court's decision.

Gregg itself has not been revisited, but Court has relied on it repeatedly to examine the use of the death penalty in particular contexts, and declare it unconstitutional. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Coker v. Georgia*, 433 U.S. 584 (1977); *Gardner v. Florida*, 430 U.S. 349 (1977); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Enmund v. Florida*, 458 U.S. 782 (1982); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Thompson v. Oklahoma*, 487 U.S. 815 (1988). Most of these cases deal with problems, broad and narrow, in the imposition of the death penalty. In *Beck v. Alabama*, 447 U.S. 625 (1980), however, the Court held that the Due Process and Cruel and Unusual Punishment Clause, working together, impose special heightened requirements for reliability of the determination of *guilt or innocence* in capital cases – the very issue in this case.

In many of these cases following *Gregg*, the Court applied new information and new arguments to old procedures, and found them wanting. Last term, for example, in *Atkins v. Virginia*, *supra*, the Court reversed its decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), just thirteen years earlier, and held that the execution of mentally retarded defendants is unconstitutional. Needless to say, the precise issue in this case has not been addressed by the Supreme Court: the constitutionality of the use of the death penalty in the face of mounting new evidence that it leads to a substantial number of executions of innocent defendants. But the Court's – contrary to the Government's position – authority to consider that issue under the Eighth Amendment, as well as the Fifth Amendment, is beyond dispute.

Having written the Eighth Amendment out of the case by fiat, the Government argues that the only basis for the District Court’s holding is “substantive due process,”⁸ and then tries to take advantage of the reluctance of the Federal Courts to expand the scope of this concept in other contexts. [GB 30-31]. It is a peculiar and self-defeating exercise, in several respects:

(1) The Government cites substantive due process cases that are remote from the issues at hand, but neglects several others that are directly on point. In *Coker, supra*, the Court held that a defendant may not be executed for the rape of an adult woman; in *Enmund, supra*, it held that a defendant may not be executed for a killing he did not commit or intend; in *Ford, supra*, *Atkins, supra* and *Thompson, supra*, the Court held, respectively, that states could not execute defendants who are insane or retarded, or who were 15 or younger at the time of the crime. These are all *substantive* rights in the same sense that the decision here is a *substantive* decision – they impose absolute prohibitions on state action, regardless of procedure. They are also all due process cases: the authority of the states is limited by the *Due Process Clause* of the Fourteenth Amendment. Of course, in the process of interpreting the substantive content of that Due Process Clause, the Court looks to the Cruel and Unusual Punishments Clause of the Eighth Amendment – which the Government keeps saying has no implications for this case.

⁸ The District Court’s holding can only be described as “substantive due process” because of the remedy the Court chose. While various other remedies were before the Court, (e.g., reducing or eliminating the effects of “death qualification;” extensive discovery before the trial so as to allow investigation; special precautions with notoriously unreliable witnesses, jailhouse informants, “cooperators” and stranger eyewitnesses) the one embodied in the order prohibits the use of the death penalty under any procedure.

(2) The Government quotes from two Fourteenth Amendment cases, *Sacramento v. Lewis*, 523 U. S. 833, 842 (1998) and *Graham v. Connor*, 490 U. S. 386, 395 (1989): “[W]here a particular amendment provides an explicit textual source of constitutional protection against a particular sort of Government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.” True. But the “particular amendment” at issue here is the Eighth Amendment, which the Supreme Court would certainly consider in passing on this issue – but which the Government insists is out of bounds.

(3) In interpreting the meaning of due process in death penalty cases, any Court will necessarily rely on the extensive constitutional death penalty jurisprudence that has been developed under the Eighth Amendment. It is unavoidable, as the Government’s own brief illustrates. In discussing the content of “*procedural due process*” in the context of death penalty prosecutions, the Government [GB 28] relies on *Gardner, supra*, and *Beck, supra*. *Gardner* is a due process case, under the Fourteenth Amendment, *see* White, J., concurring, 430 U.S. at 362, but in the process of interpreting that clause the plurality opinion (which the Government cites) repeatedly relies on Eighth Amendment Cruel and Unusual Punishment cases.⁹ *Beck* not only cites Eighth Amendment death penalty cases,¹⁰ it also relies on *Gardner* itself – including a lengthy discussion in a footnote in which *Gardner*’s implications are explained by reference to *Lockett, supra*, and *Woodson, supra*, two Eighth Amendment cases. *Beck*, 447 U.S. at 638, n. 13.

⁹ See *Gardner, supra*, 430 U.S. at 358, n.7, *citing Furman*; 430 U.S. at 360, n. 11, and accompanying text, *citing Furman*; 430 U.S. at 360, n. 12, and accompanying text, *citing Furman and Proffitt v. Florida*, 428 U.S. 153 (1976).

¹⁰ See *Beck*, 447 U.S. at 638 - 640, *citing Furman, Woodson, supra*, and *Roberts, v. Louisiana*, 428 U.S. 325 (1976).

Why does the Government embark on this misguided attempt to describe a non-existent line between Eighth Amendment and due process death penalty jurisprudence? Apparently in support of its argument that “the relevant standard [for constitutional interpretation] under the Due Process Clause attaches *less* significance to ‘evolving standards’ than does the Eighth Amendment.” [GB 34-35]. The Government cites *Medina v. California*, 505 U.S. 437 (1992) and *Patterson v. New York*, 432 U.S. 197 (1977). These cases do state that “[c]ontemporary practice ...[is] of limited relevance to the due process inquiry...” – *in other contexts*. But once again the Government overlooks direct authority on point. In *Gardner* – one of the *due process cases that the Government cites* – the Court says the exact opposite in the context of death penalty litigation:

Since that sentence [in *Williams v. New York*, 337 U.S. 241 (1949)] was written almost 30 years ago, this Court has acknowledged its obligation to re-examine capital-sentencing procedures against *evolving standards of procedural fairness* in a civilized society.

430 U.S. at 357(footnote omitted; emphasis added).¹¹ In the footnote that follows, the Court cites, without distinction, *Furman* and *Gregg*, both Eighth Amendment cases, and *McGautha v. California*, 402 U.S. 183 (1971) and *Witherspoon v. Illinois*, 391 U.S. 510 (1968), two due process cases.

It is now boilerplate that the Due Process Clause of the Fourteenth Amendment “incorporates” most of the specific provisions of the first eight amendments of the Bill of Rights. Most Supreme Court death penalty cases come

¹¹ As the District Court noted: “[j]ust as it is settled law that the Eighth Amendment’s prohibition of ‘cruel and unusual punishment’ must be interpreted in light of ‘evolving standards of decency,’ *Atkins v. Virginia*...so too it is settled law that the Fifth Amendment’s broad guarantee of ‘due process’ must be interpreted in light of evolving standards of fairness and ordered liberty.... To freeze ‘due process’ in the precise form it took in 1787 would be to freeze it to death.” *Quinones II*, 205 F.Supp.2d at 259-260.

from the state Courts and are reviewed within that framework. By the same token, in a Federal case, the content of the Fifth Amendment's Due Process Clause could be understood by reference to those same specific provisions. But that is not necessary. In this and in every other Federal prosecution those amendments apply directly. It makes little difference whether the relief provided by the District Court is situated under the Due Process Clause of the Fifth Amendment, as interpreted in light of the Eighth Amendment, or under the Eighth Amendment itself.¹² Inevitably, we submit, this Court must review the District Court's order under both provisions.¹³

¹² The Government makes the argument that because the Fifth Amendment specifically refers to capital punishment, it cannot be used as the basis of for a challenge to the constitutionality of the death penalty. [GB 26-27]. Although the Government seems to place great store in this argument, it deserves very little attention because it was squarely rejected by the Supreme Court in *Furman* and *Gregg*. (All of the dissenters in *Furman* joined the opinion of Chief Justice Burger, who wrote that "the Eighth Amendment prohibition cannot fairly be limited to those punishments thought excessively cruel and barbarous at the time of the adoption of the Eighth Amendment." *Id.* at 382 (Burger, C.J., dissenting).) Both *Furman* and *Gregg* were decided under the authority of the Due Process Clause of the Fourteenth Amendment, which, like its Fifth Amendment counterpart, refers explicitly to capital punishment: "[N]or shall any state deprive any person of *life*, liberty or property without due process of law..." If that language were dispositive – as the Government claims – what authority did the Court have to vacate several hundred death sentences in *Furman*? And what cause to debate the constitutionality of the death penalty on other grounds at painful length in both cases? Not surprisingly, in *Herrera, supra*, where the implications of the Due Process Clause for the death penalty are discussed at length, no justice of the Court mentions this issue. Does the Government seriously contend that in this respect the Due Process Clauses of the Fifth and Fourteenth Amendments are fundamentally different?

In addition, there is the embarrassing fact that the text of the Fifth Amendment also refers to another common eighteenth century punishment, deprivation of *limbs*. "Anyone defending the narrow historical approach that the Court unanimously rejected in *Furman*, must also be prepared to defend the

As we have mentioned, the opinion below is the first to address the constitutional implications of the execution of innocent defendants in light of new evidence that this is a problem of crisis proportions. Under the Fifth and Eighth Amendments, the District Court had the authority and the obligation to do so. As we will see below, the District Court reached the correct result.

contemporary use of pillorying, branding, and cropping and nailing of the ears, all of which were practiced in this country during colonial times.” See *Furman*, 408 U.S. at 414 (Powell, J., dissenting). Brennan, *Forward: Neither Victims Nor Executioners*, 8 N. D. Jour. Law, Ethics & Public Policy 1, 5 (1994). And, of course, this bizarre argument is only addressed to the Fifth, not to the Eighth Amendment. [GB 34-35].

¹³ The District Court’s opinions focus primarily on the Due Process Clause. However, to the extent that this might be considered a separate basis for the decision below, this Court, as it well knows, is entitled to affirm on any ground that establishes that the lower Court reached the correct result, whether or not that ground was addressed below. *C-Suzzane Beauty Salon, LTD v. General Insurance Company of America*, 574 F.2d 106, 111 (2d Cir. 1978), citing *Helvering v. Gowran*, 302 U.S. 238, 245 (1973).

POINT II

NUMEROUS DOCUMENTED EXONERATIONS OF FACTUALLY INNOCENT DEATH ROW INMATES, SOME WHO CAME WITHIN DAYS OF EXECUTION, DEMONSTRATE THAT THE RISK OF EXECUTING INNOCENT DEFENDANTS IS FAR HIGHER THAN ANY COURT HAD ANY REASON TO BELIEVE UNTIL RECENTLY.

1. The Extraordinary Number of Recent Death-Row Exonerations has Exposed a Crisis in our System of Capital Adjudication, and Generated a Crisis of Confidence in the Integrity of the System.

A few basic points are beyond dispute: *First*, as Courts¹⁴ and other thoughtful observers¹⁵ have known for centuries, no system of capital punishment can absolutely ensure that innocent defendants will never be executed.¹⁶ *Second*,

¹⁴ Before becoming a judge, Benjamin N. Cardozo argued against the death penalty because, "*there is the ever-present chance of error. The risk is too great to be incurred by fallible mortals – a class large enough unfortunately to include judges, high and low.*" Kaufman, *Cardozo*, (Harvard University Press 1998), p. 395. *See also* Frank & Frank, *Not Guilty* (De Capo Press 1971), Forward by Justice Douglas.

¹⁵ Borchard, *Convicting the Innocent, Errors of Criminal Justice* (DeCapo 1970); Radin, *The Innocents* (1964).

More recently, the Commission on Capital Punishment in Illinois was "*unanimous* in the belief that no system, given human nature and frailties, could ever be devised or constructed that would...guarantee...that no innocent person is ever again sentenced to death."

http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf. Preamble at iii (emphasis added).

¹⁶ In 1838, Patrick Fitzpatrick was "hanged in Canada, across the river from Detroit, in what is present day Windsor, for carnal knowledge of a 9 year old girl. There were at least two possible suspects, but Fitzpatrick was an Irishman and he

the true extent of this problem is virtually, perhaps absolutely unknowable; indeed, it is exceedingly difficult to prove the innocence of a defendant after he has been put to death.¹⁷ *Third*, in the past decade, a mounting pattern of evidence demonstrates unmistakably that the magnitude of the risk, and the likely number of executions of innocent defendants, are both far greater than we once believed. As the Supreme Court noted this past June in *Atkins*, a case on a wholly different issue, “we cannot ignore the fact that in *recent* years a *disturbing* number of inmates on death row have been exonerated.” 122 S. Ct. at 2252, n. 25 (emphasis added)¹⁸ It is this recent evidence that is the basis of the District Court’s ruling.

was elected ...[L]ater, on his deathbed, the actual rapist confessed to the crime.” This belated exoneration contributed to Michigan’s rejection of the death penalty in 1846. Wanger, “Historical Reflections on Michigan’s Abolition of the Death Penalty,” 13 T.M. Cooley Law Review 755, 766 (1996). *See also* Caher, “Troubling Account of a Wrongful Execution,” *New York Law Journal* (5/7/02); Secours, “Is Tennessee Doomed to Repeat the Shame of Wrongful Execution?” *The Tennessean* (2/9/02). [JA 365-369].

¹⁷ We don’t know how many innocents have been executed because there is no forum, no resources and little incentive to demonstrate that the Government has executed an innocent person and because prosecutors block most attempts to do so. The authors of the most extensive extant studies of mistaken convictions in capital cases have written that “our investigations failed to disclose a single case in the twentieth century where a Government official in this country admitted that an execution carried out under his authority, or to his knowledge in his jurisdiction, took the life of an innocent defendant.” Radelet & Bedau, *The Execution of the Innocent*, 61 Law & Contemporary Problems 105, 106 (1998). *See, e.g.*, Green, “DNA Tests Not Likely After an Execution: Va. Opposing Third Request of its Kind,” *Richmond Times-Dispatch*, at A-1 (3/6/01) (describing resistance of state officials to requests for DNA samples and other evidence in police files).

¹⁸ *See also Ring v. Arizona*, 122 S. Ct. at 2447 (Breyer, J. concurring), noting “the continued division of opinion as to whether capital punishment is in all circumstances, as currently administered, ‘cruel and unusual.’ Those who make this claim point, among other things, to the fact that death is not reversible, and to death sentences imposed upon those whose convictions proved unreliable. *See*,

As the District Court notes, starting in the early 1990s the availability of DNA identification technology has exposed fundamental flaws in our system of determining guilt or innocence. *United States v. Quinones*, 196 F.Supp.2d 416, 418, 420 (S.D.N.Y. 2002) [*Quinones I*]. Suddenly, our ability to revisit closed cases and expose errors has uncovered a frightening number of miscarriages of justice,¹⁹ caused by eyewitness misidentifications, false confessions, perjured testimony from jailhouse informants and supposed accomplices and misleading or fake forensic evidence.²⁰ These discoveries mark a turning point in our

e.g., Weinstein, The Nation's Death Penalty Foes Mark a Milestone Crime: Arizona convict freed on DNA tests is said to be the 100th known condemned U.S. prisoner to be exonerated since executions resumed, *Los Angeles Times*, Apr. 10, 2002, p. A16.” In addition, individual Justices have expressed doubt about whether an innocent was about to be executed. *See O’Dell v. Thompson*, 502 U.S. 995 (1991) (Blackmun, Stevens, O’Connor, J. J., respecting the denial of certiorari); *Jacobs v. Scott*, 513 U.S. 1067 (1995) (Stevens, Ginsberg J. J., dissenting from denial of stay of execution).

On July 2, 2001, Justice O'Connor said that there are "serious questions" about whether the death penalty is being fairly administered in the United States. "If statistics are any indication, the system may well be allowing some innocent defendants to be executed." *Minneapolis Star Tribune* (July 3, 2001). State judges have expressed similar concerns. Former death penalty prosecutor and Florida Supreme Court Chief Justice Kogan has said: “There are several cases where I had grave doubts as to the guilt of a particular person [including] ‘two or three’ cases of the 25 that ended in execution.” “Fla. Justice Has 'Grave Doubts' on Guilt of Some Convicts Executed,” *Associated Press* [JA 360].

¹⁹ Consider this: “40% of the post-conviction DNA tests performed by private and public laboratories generate evidence favorable to the inmate claiming innocence.” Scheck, Neufeld and Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make it Right* (Penguin 2001) .

²⁰ Connors, Lundregan, Miller, McEwen, “Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial” (DOJ, June 1996). <http://www.ncjrs.org/pdffiles/dnaevid.pdf> .

understanding of the weaknesses in our system of deciding guilt and condemning criminals.²¹

For obvious reasons, most of the DNA exonerations have occurred in rape

²¹ *Arizona v. Youngblood*, 488 U.S. 51 (1988) is a telling example. Mr. Youngblood complained that the police denied him a fair trial by failing to preserve biological samples from the rape for which he was convicted, samples that might have exonerated him if he were innocent even with the technology then available. The Supreme Court, reversing a ruling in Youngblood's favor by the Arizona Supreme Court, held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. Would the case be viewed the same way today? Consider that Mr. Youngblood himself was exonerated in 2000, using new DNA technology that permits analysis of degraded biological samples, after spending more than 15 years in prison for a crime he did not commit, because the police had damaged physical evidence that would otherwise have cleared him before trial. Whitake, "DNA Frees Inmate Years After Justices Rejected Plea," *The New York Times*, p. A12 (8/11/00).

cases, but a surprising number are concentrated among the tiny proportion of defendants who are also convicted of murder and sentenced to death, in most cases for murders that involve rape. The central factual item that the District Court relied on is the list of defendants who have been released from death row because of evidence that indicates factual innocence that is maintained by the Death Penalty Information Center [DPIC]. The District Court's focused on the exonerations that occurred since the beginning of 1993, a nine-and-one-half year period as of the date of decision. By the Court's own evaluation, the list includes 12 death-row exonerations in that period based on DNA evidence in the past decade, plus another 20 cases of exonerations by other evidence that is equally convincing – a total of 32 or nearly three-and-a-half a year. In addition, the Court notes that there are at least eight other former death row prisoners on the list who might well qualify for inclusion in its deliberately conservative list, *Quinones II* at 265 n.11, for a total of 40 or over four a year. DPIC itself lists 49 death-row exonerations in that period; and an additional 52 at a much slower pace from 1973 through 1993; and yet another one – the fourth so far this year – since the lower Court's decision. And there are more death-row exonerations to come.²²

These numbers, shocking as they are, understate the problem. DPIC lists an additional 13 defendants who were released from death row and who are, in its estimation, “probably innocent;” another five whose sentences have been commuted because their guilt was uncertain; and five who have been executed

²² According to the *Arizona Tribune* (5/18/02), due to a new DNA test, David Hyde has been moved off death row to a local jail awaiting the County Attorney's decision whether to retry him. The same thing happened weeks ago in Mississippi. “Death Row Inmate Wins New Trial. DNA Wins Inmate New Trial,” *Clarion Ledger* (9/6/02) (Kennedy Brewer).

since 1992 despite serious known doubts about their guilt.²³ No doubt some of the prisoners in these categories were in fact guilty; but it is equally clear that some, perhaps most, were innocent. More important, there are other false capital convictions that have not been uncovered – and undoubtedly some executions of innocent defendants – but we have no idea how many.²⁴

Some of the DNA exonerations in non-capital cases are as revealing for our purposes as those on the DPIC list. In September of this year, Eddie Joe Lloyd was released from prison in Detroit, Michigan, one of twelve non-death penalty states. When he was originally sentenced to life imprisonment without the

²³ These individuals are: Roger Coleman, Joseph O’Dell, David Spence, Leo Jones and Gary Graham.

There are other cases of grave doubt, for example: Jesse Tafero whose co-defendant, Sonia Jacobs, was later released, was executed in Florida’s electric chair. *See Jacobs v. Singletary*, 952 F.3d 1282 (11th Cir. 1992).

“I do not think David Spence committed this offense.” Lt. Marvin Horton, supervisor of the Waco Police Department’s investigation into the murders, stated during sworn testimony in 1993. Larry Scott, Waco Chief of Police at the time of the murder investigation testified. “I have really never been convinced [of David Spence’s guilt].” <http://www.texasdefender.org/study/chapter9.html>. Nevertheless, David Spence was executed on April 3, 1997.

²⁴ Extensive documentary evidence was submitted below regarding the case of Gary Graham, who was executed on June 22, 2000. [JA 535-596]. It constitutes a compelling case that he was innocent. A documentary directed by John McHale, entitled: "Unreasonable Doubt: The Joe Amrine Case," strongly suggests that Missouri is about to execute an innocent man. The film may be viewed at: <http://www.communication.ilstu.edu/activities/documentary.htm>. *See* Lindorff, “Too late to stop the hangman?” *Salon* (2/20/02); “A Kansas City man sits on death row, awaiting his execution,” KCTV5 [JA 370]. *See also* Editorial, *Daytona Beach News-Journal*, “Justice expiring: Will Florida kill another innocent man?” (4/23/02) (“Putting an expiration date on justice is more than a mistake”); “Still on Death Row, Despite Mounting Doubts” Bonner, *New York Times* (7/8/02) (Edward Lee Elmore in South Carolina).

possibility of parole for a vicious rape murder – on the basis of an apparently water tight, but utterly false confession – the judge said that he wished he had the power to sentence Lloyd to death. Eighteen years later, after years of tenacious investigation by volunteers from the Innocence Project, the same judge dismissed all charges and released Lloyd, on a motion from the county prosecutor, after DNA tests conclusively proved his innocence.²⁵ But if Lloyd had been sentenced to death he may not have lived to see that day; the average time from death sentence to execution is now about 11_ years. *See* United States Department of Justice, Bureau of Justice Statistics, “Capital Punishment 2000,” (2001), Table 12. How many prisoners in similar straits have been executed in death penalty jurisdictions with little or no attention to their claims of innocence?

One of the most striking things about the death-row exonerations is that so many of them depend on blind luck. We will only mention three. Anthony Porter – whose case is cited by the District Court – came within two days of execution in Illinois in 1998. Fortunately, because his death was postponed for an examination of his mental competence, he was alive at the beginning of the fall semester at Northwestern University, and an undergraduate journalism class took on his case. Within a few months, the students discovered the real killer, who confessed. Porter was released in February 1999, after 17 years on death row. If the wheels of justice had ground just 10% faster, Porter would be dead today, and most likely none of us would have heard of him.²⁶

²⁵ “Death penalty lesson: A man who was seen by a judge as deserving execution is exonerated by DNA evidence....Turns out Mr. Lloyd wasn't guilty at all. He's instead the 110th person nationwide to be freed based on DNA testing.” *Albany Times Union* (9/5/02).

²⁶ See Belluck, "Convict Freed After 16 Years on Death Row," *New York Times*, p. A7 (2/6/99); Armbrust, “Chance and the Exoneration of Anthony Porter,” *Machinery of Death: The Reality of America’s Death Penalty Regime* (Routledge 2002), p. 157.

Ray Krone – whose release last April is also cited by the District Court – was exonerated by DNA. He is the only innocent death row prisoner exonerated by DNA that did not come from semen. As one columnist put it: “Ray Krone owes his freedom to the simple fact that whoever killed Kim Ancona drooled on her.” Cohen, *Washington Post*, A 17 (4/23/02). In addition, of course, it was essential that the police recovered the saliva sample, that it was preserved,²⁷ that it was made available for testing by the state authorities (and they frequently resist²⁸), and that the technology to conduct the test was available. How many Ray Krones have been put to death because DNA is of no value in identifying shooters?

Frank Lee Smith’s case is particularly heartbreaking since he died on death row prior to his DNA exoneration for a crime actually committed by a serial killer. A “DNA test...finally cleared Smith. But it came... only because a detective cleaning his files decided, on a whim, to run tests in another troubling case and found that someone else’s results matched the evidence, not Smith’s.” *Seattle Times* (4/11/02).²⁹

²⁷ In 75% of the cases where the Innocence Project has determined that a DNA test on some piece of biological evidence would be determinative of guilt or innocence, the evidence is reported either lost or destroyed. Testimony, United States Senate Committee on the Judiciary, Protecting the Innocent: Proposals to Reform the Death Penalty, Barry Scheck, Co-founder, The Innocence Project, Benjamin N. Cardozo School of Law (6/18/02). 148 Cong. Rec. S 5674.

²⁸ Scheck, “Some prosecutors still are resisting DNA testing law,” *Dallas News* (9/27/2002).

²⁹ Friedberg, “Judge orders accused killer to stay in psychiatric care,” *Sun-Sentinel* (5/29/02). See the Frontline documentary: “Requiem for Frank Lee Smith.” [Video Exhibit No. 3 below]. So too, inmates serving life sentences were unable to live long enough to be exonerated. Rodricks, “A Delay of Justice Proves to Have Fatal Consequences,” *The Baltimore Sun* (4/12/02). [JA 514]. It follows that executions have come before exoneration.

Many exonerate death-row prisoners came within days,³⁰ hours or even minutes³¹ of execution.³² Others, clearly, were less lucky.

The continual stream of death-row exonerations has profoundly changed the nature of public debate on the death penalty.³³ It has led to moratoria on executions in Illinois and in Maryland, as the Government notes [GB 36*] – unique events in American history. It is responsible for a sharp drop in support

³⁰ Clarence Brandley came within five days of lethal injection before winning a stay of execution, *Seattle Times* (4/11/02), as did Ron Williamson. Radelet, et als., *In Spite of Innocence*, pp. 130-157.

³¹ In 1933, Charles Bernstein was convicted and sentenced to death in the District of Columbia. In 1935, President Roosevelt commuted the sentence to life minutes before Bernstein's scheduled execution. In 1940 Bernstein was released. In 1945 he received an unconditional pardon from President Harry S. Truman. Radelet, et al., *In Spite of Innocence* at 286.

³² Since 1993, the following individuals, subsequently exonerated and released from death row, came close to execution: Andrew Lee Mitchell (days); Donald Paradis (three execution dates); Earl Washington (days); Frederico Macias (days); Eric Clemmons (called his mother to make funeral plans); Lloyd Schlup (hours); Kerry Max Cook (days); Joseph Spaziano (two weeks). Radelet, et als., *In Spite of Innocence*, pp. 130-157; Radelet, Lofquist and Bedau, *Prisoners Released from Death Row Since 1970 Because of Doubts About Their Guilt*, 13 T.M. Cooley L. Rev. 907, 943, 948-51 (1996); *New York Times* (1/24/95, 10/3/00); *Washington Post* (9/24/00, 10/4/00, 2/15/01); *St. Petersburg Times* (7/4/99); *Kansas City Star* (2/27/00); www.deathpenaltyinfo.org/innocothers.html

³³ See, e.g., George F. Will, "Innocent on Death Row," *Washington Post*, (4/6/00), p. A23 (discussing recent death-row exonerations, and reminding fellow conservatives that "Capital punishment ... is a Government program, so skepticism [about its administration] is in order."); Editorial, Death Sentence Faces Powerful Argument, *The Washington Times* (7/3/02) (Judge...Rakoff has written a disturbingly powerful legal opinion....supporters of capital punishment's efficacy and constitutionality which is the adamant position of this page should be alert to the potential power of Judge Rakoff's legal analysis..."). <http://www.washtimes.com/op-ed/20020703-11575352.htm> .

for the death penalty starting in 1996.³⁴ A majority still support the death penalty in theory, but their views on actually conducting executions, given the danger of putting innocent people to death, are another matter.³⁵ In the most recent survey on the issue, the Harris polling organization asked a national sample in May 2001:

Do you think that there should be a temporary moratorium or halt in the death penalty to allow the Government to reduce the chances that an innocent person will be put to death or do you think that there should not be a moratorium because there are already sufficient safeguards to prevent the execution of innocent people?

59% of the respondents said Yes, there should be a moratorium; 33% said No; 8% were unsure.³⁶ Historically, of course, moratoria on executions are frequently preludes to the abolition of capital punishment.³⁷

2. The Conviction of Innocent Defendants is an Especially High Risk in Capital Cases.

_____ It would be comforting to believe that our system is most accurate when it condemns people to die, but the parade of tragedies that have come to light says otherwise. Unfortunately, this problem appears intractable. Miscarriages of

³⁴ See Gross and Ellsworth, "Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century," in *Capital Punishment and the American Future*, Stephen P. Garvey, ed. (Duke University Press 2002), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=264018.

³⁵ "The theoretical argument that the criminal-justice system...is bound to be fallible is no longer theoretical...[w]e now know beyond dispute that the criminal-justice system wrongly sentences people to death. We even know their names...." Editorial, *Arizona Republic* (7/29/02) (changing position on the death penalty).

³⁶ See Lexis, News library, rpoll file, accession number 0383393. In a CNN/USA Today/Gallup Poll, (6/23-25/02), 80% of those polled felt that an innocent person had been executed in the United States *in the last seven years*.

³⁷ This occurred in both England and Canada. Kirchmeier, J., *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 Colorado L. Rev. 1, 84 (2002).

justice are far more common in capital cases than in other felonies because of basic elements in the structure of investigation and adjudication. The essential problem is the extraordinary level of attention that is devoted to homicide cases in general, and to capital homicides in particular, by the public, by prosecutors and by the police.

As one commentator explains:

Police detectives do not have the time to conduct detailed investigations of every reported felony, and in the usual run-of-the-mill case there is little pressure on them to do so. The net result is that in general the felonies that are prosecuted are likely to be those in which the evidence of guilt is strongest.

Homicides are different. First, almost every homicide is reported Second, most homicides known to the police are cleared A study of robbery investigations in Chicago in 1982 - 83 ... provides an excellent illustration: 13% of all robberies reported to the police were solved within two months ... , compared to 57% of robbery-killings. This difference cannot be explained by superior evidence - on the contrary, robbery homicides will usually have weaker evidence, since the victim is dead - but must be due to a systematic difference in the investigation by the police.

... In a typical ordinary homicide - a killing of a friend as a result of a drunken fight - the killer is known from the start. But the police get the hard murders as well as the easy ones, and there is much more pressure to solve these cases than non-homicidal crimes. The relatives of the victim care more, the prosecutor cares more, the public is much more likely to be concerned, and the police themselves care more. Death produces strong reactions - in this context, a desire to punish and to protect... .

For the most part, the pressure to solve homicides produces the intended results... An investigation that would be closed without arrest if it were a mere robbery, may end in a conviction if the robber killed one of his victims. But that same pressure can also produce

mistakes. If the murder cannot be readily solved, the police may be tempted to cut corners, to jump to conclusions, and - if they believe they have the killer - perhaps to manufacture evidence to clinch the case. The danger that the investigators will go too far is magnified to the extent that the killing is brutal and horrifying, and to the extent that it attracts public attention - factors which also increase the likelihood that the murder will be treated as a capital case.³⁸

Homicide investigations, like burglary investigations often start with a handicap because there are no eyewitnesses.

[B]ut the upshot is different. There are very few erroneous burglary convictions based on misidentifications, but because there are also few burglary prosecutions based on non-eyewitness evidence, there are few errors of any sort. There are also comparatively few convictions; the clearance rate for reported burglaries is only thirteen percent. But killers must be pursued, and, in the absence of eyewitness evidence, the police are forced to rely on evidence from other sources: accomplices; jailhouse snitches and other underworld figures; and confessions from the defendants themselves. Not surprisingly, perjury by a prosecution witness is the most common type of evidence that produces erroneous capital convictions, and coerced or otherwise false confessions are the third most common cause.³⁹

³⁸ Gross, *Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 *Buff. L. Rev.* 469, 476-78 (1996).

³⁹ Gross, *Lost Lives*, 61 *L. & Contemp. Prob.* at 137. A telltale sign of the pressure that exists to clear capital cases and to make capital charges stick despite the absence of reliable evidence of guilt is the remarkable extent to which capital prosecutions rely upon testimony by jailhouse informers that the defendant

As a society, we demand answers in murder cases – and especially in capital murder cases – whenever possible. This is an understandable, even a laudable impulse; it’s why so many real killers are brought to justice. At the same time, as we know, the more we insist on answering difficult, sometimes unanswerable questions, the more mistakes we make. A “disturbing number”⁴⁰ of those mistakes have walked off death row alive; an even more disturbing number – whatever it is – have not.

3. The Risk of Convicting and Executing Innocent Defendants is at Least as Great in Federal Capital Prosecutions as in State Capital Cases.

In the face of this body of evidence, the Government argues that the Federal death penalty is far less likely to convict and execute innocent defendants than its state counterparts. [GB 49-58]. This is, according to the Government the “overwhelming flaw” in the District Court’s opinion. [GB 4].

There are differences between state and Federal homicide prosecutions, but they cut in opposing directions. On the one hand, a development the Government points to in arguing against the District Court findings is all but irrelevant. Because so few Federal homicide prosecutions involve rape, the recent availability of DNA evidence to prevent as well as detect errors will have little impact on Federal capital investigations, if any. For the same reason– rather than any special claim to accuracy – there have been no DNA exonerations from the Federal death row.

confessed to the informer. See Armstrong and Mills, "Death Row Justice Derailed," *Chicago Tribune*, p. 1 (11/14/99); "The Inside Informant," *Chicago Tribune*, p. 1 (11/16/99). For a prosecutor's description of the complex and fallible judgments involved in assessing the reliability of the various kinds of evidence on which capital prosecutions may have to be based, see McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 Marq. L. Rev. 649, 662-666 (1996).

⁴⁰ *Atkins*, 122 S. Ct. at 2252.

On the other hand, it is true that Federal capital defendants receive better legal counsel, on average, than capital defendants in some state courts. [GB 50-53]. This might help reduce the number of erroneous convictions. But it is not a panacea. DPIC lists five death row exonerations from Louisiana, the state referred to by the Government as having an “attorney compensation limit as low as \$1000 for [an] entire capital case,” [GB52-53] and three more from Alabama, another state referred to in the same source as among the worst. It also lists three exonerations in California and 13 in Illinois, two states with well-compensated and famously skillful capital defense bars. [GB 52 -53].⁴¹ Good lawyers, like good doctors, can help accident victims, but they can’t always save them.⁴² The traffic system with fewer crashes is much safer than the one with better emergency rooms.⁴³

⁴¹ “California typically spends much more money on capital cases than most states, but the dozens of death sentences reversed since 1987 involved trials marred by the same types of problems found in states known for spending less on capital cases, such as Texas and Alabama....Regardless of the outcome, a capital trial and its appeals typically cost up to \$1 million.” “Death sentence reversals cast doubt on system, Courtroom mistakes put executions on hold,” *San Jose Mercury News* (4/13/02).

⁴² The Government touts the Federal Death Penalty Resource Counsel Project as one of the protections for innocent capital defendants in Federal cases. [GB 53]. Just this month Herman May was released after 13 years in prison in Kentucky, when a DNA test arranged by the Innocence Project demonstrated that he did not commit the rape for which he was imprisoned. *See* Editorial, “Another DNA Release,” *Louisville Courier-Journal* (9/20/02). May was represented in his unsuccessful direct appeal by one of the three attorneys employed by that Project, *see* http://www.capdefnet.org/fdprc/about_us/who_we_are/howeare.htm, who is also one of the appointed attorneys for Quinones.

⁴³ It is worth noting that Federal capital defense attorneys are not all reassuringly skillful. On the contrary, serious error and omission are common. [See the appellate decisions collected in the Addendum to this brief.]

Unfortunately, many Federal capital cases are of the most risky, crash-prone sort. Because Federal criminal prosecutions are more likely to involve extended investigations of on-going criminal enterprises, they depend inordinately on testimony from cooperating accomplices, or supposed accomplices. The Federal Sentencing Guidelines have contributed to this trend, particularly the availability of § 5K1.1 “downward departures” for cooperating defendants. See Yaroshevsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917 (1999).

In this respect, Federal *capital* prosecutions are no different from the rest.⁴⁴ For example, one reason for the heavy reliance on accomplices in Federal Court – as the District Court noted – is that “federal practice, in contrast to that of many states that allow the death penalty, permits conviction on the uncorroborated testimony of an accomplice.” *Quinones* II at 267. It is not surprising, then, that a former United States Attorney for the Eastern District of New York, Loretta Lynch, suggested recently that some murder cases end up in Federal Court precisely because it is easier to rely on accomplice testimony. It seems to happen a lot. At least 69% percent of Federal capital cases that have gone to trial (47 of 68) included testimony by cooperating witnesses who stood to avoid severe punishment to themselves. An additional 21% (14 cases) included testimony from jailhouse informants. Only 10% of Federal capital trials were free of both types of unreliable testimony.⁴⁵

A recent study explored the problems inherent in heavy reliance on cooperating defendants by the United States Attorney’s Office for the Southern

⁴⁴ See Campbell, *Issues of Consistency in the Federal Death Penalty, A Round Table Discussion on the Role of the U.S. Attorney*, 14 Federal Sentencing Reporter [F.S.R.] 52, 53 (2002).

⁴⁵ http://www.capdefnet.org/htm_library/rats.htm

District of New York (S.D.N.Y.) – certainly one of the premier Federal prosecuting offices in the nation.⁴⁶ A former S.D.N.Y. prosecutor explained that “[t]he most troublesome prosecutions are the violent gang cases because they are ‘all based on cooperators.’” Unlike most of the office’s criminal cases, which include at least some element of proactive investigation, “[t]hese are deemed ‘historical cases’ because virtually all of the evidence concerns acts that occurred in the past, often the distant past, for which there is only ‘one rat after another.’”⁴⁷ Another former Federal prosecutor went into greater detail:

In old homicide cases, there are warring groups, no matches on the gun and you are pulling people out of state prison as your witnesses. ... These are cases that the DA's office could not make; that's why we have them. ... They had one trial and now we're debriefing six of these [cooperating defendants].⁴⁸

The interviews in this study plainly show that Federal prosecutions are susceptible to exactly the same pressures that make all capital prosecutions so error-prone, except that the most worrisome cases are more common:

It appears that, particularly in high profile cases, the pressures and mind-set of some prosecutors make it less likely that the Government will carefully examine lies by its cooperators.⁴⁹

And, most disturbing of all:

⁴⁶ Yaroshevsky, *supra*, 68 Fordham L. Rev. 917 (1999).

⁴⁷ *Id.* at 938.

⁴⁸ *Id.* at 961. A former United States Attorney, Zachary Carter (EDNY), stated he was “reluctant to seek the death penalty” in cases involving cooperator testimony because “accomplices...cooperating in exchange for lighter sentences themselves, may perceive an advantage in embellishing their testimony ...” Campbell, *supra*, F.S.R. at 55. *See generally*, Hamblett, “Federal Informant Hit With \$1.3 Million Verdict.” *New York Law Journal* (4/17/02) [JA 525].

⁴⁹ 68 Fordham L. Rev. at 947.

Another concern [of former prosecutors] is the extent to which cases are prosecuted on “thin evidence.” While most Southern District cases have significant evidence against defendants, there are instances where *the Government decides that, on balance, due to a number of factors, most notably the seriousness of the crime, a case should be prosecuted despite the lack of significant evidence.*⁵⁰

The example that follows the quote is a Federal robbery murder trial in which the key prosecution witness – a cooperator – committed perjury in fingering the defendant. To be sure, the former prosecutors who said they were plagued by memories of prosecutions for murder and other heinous crimes with no significant evidence against the defendant, nonetheless made “no suggestion that cases are prosecuted where the Government is uncertain of the defendant's guilt.”⁵¹ Under the circumstances, we can only hope that they are right.

Heavy reliance on accomplices and other cooperating witnesses is only the most conspicuous special danger in Federal capital prosecutions. The Federal Rules of Criminal Procedure provide less discovery to criminal defendants than most states.⁵² As the District Court points out, Federal cases permit juries to rely on circumstantial evidence more readily than many, if not most, states. *Quinones II* at 267.⁵³ And most disturbing of all, in recent years Federal investigative

⁵⁰ *Id.* at 941 -942 (emphasis added).

⁵¹ *Id.* at 942 n. 114.

⁵² *See* 18 U.S.C. §3500; *United States v. Coppa*, 267 F.3d 132 (2nd Cir. 2001) (mandamus relief was warranted where the District Court ordered the Government to disclose all impeachment evidence in advance of trial).

⁵³ Thus it is not surprising that recently, former United States Attorney Michael Dettmer, of the Western District of Michigan described “prematurely ... charging ... a defendant with a Federal death penalty crime based only on circumstantial evidence, to then discover they had the wrong person.” Campbell, 14 F.S.R. at 53. Mr. Dettmer was referring to *United States v. Angiano* (W.D. MI CR No. 1:97-CR-23). *See also United States v. Vargas* (W.D. OK CR NO. 99-

agencies have compiled a frightening record of error⁵⁴, incompetence⁵⁵ and misconduct.⁵⁶ We all wish it were otherwise, but it is hard to credit the Government's claim that fact finding in Federal capital cases is inherently superior to that in state courts.

The Government also points to the "significant safeguards" that govern capital charging in Federal cases, as specified in the United States Attorney's Manual ("USAM") §§ 9-10.010 – 9-10.120, and the procedural protections at trial under 18 U.S.C. §3395(b). [GB 53-58]. Although the Government devotes a great deal of space to this argument, it deserves little attention. The Government refers repeatedly to the function of these provisions in preventing disparities and discrimination in capital prosecutions, ensuring that there is adequate evidence that

CR-63-ALL) and *United States v. Cosme* (D. PR CR No. 99-346 (HL)). [JA 319, 323-324].

⁵⁴ Charles Fain was convicted and sentenced to death for a 1982 murder, rape and kidnapping of a young girl. The F.B.I. performed microscopic hair comparison and determined that the suspect's hairs were similar to Fain's. DNA testing in 2001 proved the opposite. [JA 491].

⁵⁵ "FBI Director Details Blunder on McVeigh Records," *New York Times* (5/17/01).

⁵⁶ "FBI agent says superior altered report, foiling inquiry" *New York Times* (5/24/02); "F.B.I. Faces Inquiry on a False Confession From an Egyptian Student," *New York Times*, (8/6/02); Director Mueller said that "the Hanssen matter, the McVeigh documents, and the Wen Ho Lee case, all brought to light certain problems" within the Bureau; Excerpts from News Conference, *New York Times* (5/30/02); "Secret Court Says F.B.I. Aides Misled Judges in 75 Cases," *New York Times* (8/23/02); "Ex-F.B.I. Agent Sentenced for Helping Mob Leaders," Butterfield, *New York Times* (9/17/02).

Recently, an F.B.I. lab expert, Kathleen Lundy, admitted to perjury in a state murder case. She has also testified in two Federal capital trials. See *United States v. Higgs* (D. MD CR No. PJM-98-0502) and *United States v. Chanthadara* (D. KS CR No. 94-10128-01). "Ragland Case Lie Sparks Call for F.B.I. Review: Expert Admitted to Perjury About Bullet-Lead Tests" *Lexington Herald Leader* (7/20/02).

aggravating factors in sentencing outweigh mitigating factors, and limiting Federal capital prosecutions to cases where Federal interests outweigh state interests. But the Government fails to point to any provision of Federal law that is designed to screen capital prosecutions to guarantee the strength of the evidence of the *defendant's guilt*. There is no such provision. However successful USAM §§ 9-10.010 – 9-10.120 and 18 U.S.C. §3395(b) may be in reducing discrimination and arbitrariness in Federal capital sentencing – and the jury is still out on that question – they do nothing to address the danger of convicting and executing innocent defendants because they were not designed for that purpose.⁵⁷

Finally, the Government argues that there is simply no evidence that any innocent defendants have been sentenced to death in Federal Court since the advent of the first post-*Furman* Federal death penalty statute in 1988. [GB 49-50]. This is an important claim, but it is false.

The first post-*Furman* Federal death penalty case to reach the stage of a petition for clemency was that of David Ronald Chandler. The following is a summary of the description of the case, based on Chandler's 2000 petition for clemency to President Clinton:⁵⁸

David Ronald Chandler was convicted in the United States District Court for the Northern District of Alabama of engaging in a criminal enterprise involving the distribution of marijuana and procuring the

⁵⁷ In fact, Federal capital charges are frequently filed against defendants who are later determined to be factually or legally innocent: 16 defendants were acquitted, seven in cases in which the death penalty was sought and nine in cases in which it was not sought; and against seven defendants charges were dismissed, five before the process of deciding whether to ask for death was completed, two after the death penalty was sought. [JA 317 - 327].

The Government also points to the availability of appeal and post-conviction review in Federal cases, [GB 58], but these features are universal in state systems as well.

⁵⁸ See http://www.capdefnet.org/html_library/Chandler1.htm.

murder of Marlin Shuler in connection with that enterprise. His role in the marijuana enterprise is undisputed, but he consistently denied involvement in Shuler's shooting death. His conviction of that murder, a crime for which he was sentenced to death, rested entirely on the uncorroborated testimony of the admitted killer, Charles Ray Jarrell, Sr.

Jarrell and Shuler had a history of repeated confrontations over Shuler's abuse of his wife, Donna, who is Jarrell's sister, and his mother-in-law, who is Jarrell's mother. Five weeks before the murder, Jarrell attempted to kill Shuler by cocking a loaded pistol against Shuler's head and pulling the trigger. The gun failed to fire. On the day Shuler was killed, he and Jarrell, both severe alcoholics, went to an isolated location near Piedmont, Alabama to drink beer and shoot target practice. During a drunken argument about Shuler's abusiveness, Jarrell fired at Shuler, killing him.

Three months after the murder Jarrell and his son were arrested for marijuana distribution with Chandler. Jarrell was a prime suspect in Shuler's disappearance because of the history of bad blood between the two and Jarrell's previous attempt to kill Shuler. During his interrogation, Jarrell, who was suffering from alcohol withdrawal and the aftereffects of the snakebite coma, was pressed to implicate Chandler in criminal acts. He first denied, but then admitted killing Shuler, claiming that it was an accident. The investigators asked whether Chandler had ever promised Jarrell money to kill Shuler. Jarrell told them that Chandler had once jokingly offered him \$500 to rough up someone who had been making improper sexual advances. Later, he signed a statement which said that the shooting was an accident, but that Chandler had offered him \$500 to kill Shuler. Eventually, Jarrell, who faced the death penalty for killing Shuler, signed a plea agreement in which the Government promised to cap his sentence at 25 years and dismiss felony charges against his son in exchange for testimony that he had killed Shuler for \$500 offered by Chandler – the only evidence connecting Chandler to Shuler's killing.

After trial, Jarrell contacted Chandler's counsel and revealed that his testimony implicating Chandler in the Shuler murder was a lie. At a hearing, Jarrell swore that his shooting of Shuler had nothing to do with Chandler, despite the fact that, in doing so, he jeopardized his

plea bargain and subjected himself to a capital prosecution. The recantation was corroborated, including: (1) the abuse history which gave rise to the feud between Jarrell and Shuler; (2) the prior murder attempt in retaliation for this abuse shortly before the actual murder; and (3) statements from many that Jarrell told them, at or about the time of his trial testimony, that although Chandler had had nothing to do with the Shuler murder, he had no option but to implicate Chandler to save himself and his son.

The Federal Courts refused to grant Chandler a new trial, finding that Jarrell was not a sufficiently reliable witness to prove that he had lied at Chandler's trial. *United States v. Chandler*, 957 F. Supp. 1505 (N.D. Ala. 1997). In other words, because the conviction and death sentence had been based solely upon the word of a man whom the courts found to be too unreliable to be believed once he was no longer a Government witness, Chandler could not prove his innocence to the courts' satisfaction.

We cannot independently vouch for the accuracy of every aspect of this summary, but a few facts are beyond dispute: (1) Chandler was sentenced to death on the basis of the uncorroborated testimony of a supposed accomplice, Jarrell, the admitted actual killer; (2) Jarrell, who was facing the death penalty himself, received a term of 25 years of imprisonment instead; (3) Jarrell later recanted his testimony – the only evidence linking Chandler to the murder – and testified that he had lied at trial; (4) A District Court reviewing these facts found that the Jarrell was not worthy of belief – pointing to factors that applied equally to his original testimony and to his recantation. *See, e.g., Chandler*, 957 F. Supp. at 1516 (“[T]he only coherent explanation for Jarrell's behavior is that Jarrell

acted in his own self-interest at all times after being arrested.”). On that basis, it denied Chandler a new trial and cleared the way for execution.⁵⁹

Given this record, Attorney General Reno recommended that Chandler’s death sentence be commuted to life imprisonment, because of doubts about his guilt, and President Clinton did so on January 20, 2001.⁶⁰ If he had not – or if Jarrell had died in prison, or had not recanted – Chandler rather than Timothy McVeigh would have been the first Federal prisoner executed in recent decades. Instead, Chandler is alive, and, if new evidence proves his innocence, he may become the 110th or 120th death-row exoneration.

There were 26 prisoners on the Federal death row in Terra Haute, Indiana in June of this year, of whom 20 had been there less than five years.⁶¹ There are over 3,700 prisoners on state death rows;⁶² the average stay for those eventually

⁵⁹ In *Chandler v. United States*, 193 F.3d 1297 (11th Cir. 1999), a panel of the Eleventh Circuit reversed his death sentence because of ineffective assistance of counsel. The *en banc* Court disagreed by a 6-5 vote. *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000).

⁶⁰ “At the attorney general’s request, I commuted one death sentence because the defendant’s principal accuser later changed his testimony, casting doubt on the defendant’s guilt.” Clinton, “My Reasons for the Pardons,” *New York Times* (2/18/01). [JA 517]. The District Court also had before it as an exhibit a “60 Minutes,” CBS News segment about Chandler’s innocence claim. [Video Exhibit No. 1].

The fact that Chandler was fortunate enough to submit his clemency petition as President Clinton was leaving office does not suggest that clemency is the answer to this crisis. It means that he is a lucky man. “Executive clemency – the traditional backstop that was said to prevent execution ‘when there is the slightest doubt of guilt’ – has shriveled up in recent years. It is now too uncommon to have a major impact on the danger of executing innocent defendants.” Gross, *Lost Lives*, 61 *Law & Contemp. Probs.* at 135. See Radelet & Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 *U. Rich. L. Rev.* 289 (1993).

⁶¹ See <http://www.deathpenaltyinfo.org/fedprisoners.html>.

⁶² See <http://www.deathpenaltyinfo.org/DRowInfo.html#state>.

exonerated is 8 years.⁶³ There have been 804 post-*Furman* state executions, beginning in 1977,⁶⁴ after an average (in recent years) of nearly eleven and-a-half years on death row.⁶⁵ There have been two post-*Furman* Federal executions, starting in June, 2001, after an average stay on Federal death row of 6 years.⁶⁶ The first Federal prisoner who might have been executed was David Chandler – convicted on the uncorroborated word of the admittedly untrustworthy actual killer, who has since recanted. This is not an enviable record.

⁶³ See <http://www.deathpenaltyinfo.org/Innocentlist.html>.

⁶⁴ See <http://www.deathpenaltyinfo.org/dpicexec.html>.

⁶⁵ See United States Department of Justice, Bureau of Justice Statistics, *Capital Punishment 2000* (2001), Table 12.

⁶⁶ See <http://www.deathpenaltyinfo.org/fedexec.html>.

POINT III

AS THE DISTRICT COURT CORRECTLY HELD, THE CONTINUED USE OF THE DEATH PENALTY WILL RESULT IN A CONSTITUTIONALLY INTOLERABLE NUMBER OF EXECUTIONS OF DEFENDANTS WHO ARE ABSOLUTELY INNOCENT.

1. The Issue Before the Court has Never Been Addressed by the Supreme Court.

The issue before the Court is simply stated:

In the face of mounting evidence that the execution of innocent defendants is an inevitable and regular component of capital punishment, is the continued use of the death penalty constitutional?

Ultimately this question will be answered by the Supreme Court.

The Supreme Court has never directly addressed this issue. The closest it has come is in a footnote in last term's decision in *Atkins v. Virginia*: "we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated." 122 S. Ct. at 2252, n. 25. The Government takes the curious position that this reference – in a case that was decided on other grounds, in which the execution of innocent defendants was a marginal issue at best – means that the Court "implicitly accept[ed] ... the underlying premise that capital punishment is... permissible" even though innocent people will be executed. [GB 44]. This sort of law-making by implication is a creative notion. If such "implications" had the significance the Government claims, it would mean – contrary to law and experience – that in order to flag a future concern, without in the process deciding by "implication" that it has no significance, the Court must reach a holding based on that point the very first time the Court ever mentions it. In *Atkins*, in any event, the majority's meaning on this issue is plain: We're

troubled by a serious emerging problem, and we may have more to say on the subject later.

The general *topic* of the execution of innocent defendants, of course, has surfaced before, in a very different context. The *possibility* that innocent people could be executed was mentioned in *Furman*, but only in the concurrences by Justices Marshall and Brennan. See 408 U.S. at 290, 315. *Furman*, of course, was decided on other grounds; the Court invalidated all existing death penalty statutes as “arbitrary” in a short *per curiam* opinion with five one-justice concurring opinions. In *Gregg*, however – the first case upholding modern “guided discretion” death penalty statutes – the execution of innocent defendants is not mentioned. Nor does it come up in any of the Court’s other many decisions regulating the death penalty under the Eighth Amendment. See e.g., *Lockett, supra*; *Coker, supra*; *Beck, supra*; *Zant v. Stephens*, 462 U.S. 862 (1983); *Bullington v. Missouri*, 451 U.S. 430 (1981); *Turner v. Murray*, 476 U.S. 28 (1986) and *McCleskey v. Zant*, 499 U.S. 467 (1991).

On the other hand, the execution of an allegedly innocent *individual* was before the Court nine years ago, in *Herrera v. Collins, supra*. The Government says that *Herrera* is “almost directly on point....” [GB 36]. It is nothing of the sort. The *area* is the same as that in this case; the *topic* is related; but the *issue* the Court decided is entirely different.

Mr. Herrera claimed that he was factually innocent, and could prove it with evidence that only became available after trial. He argued that the execution of an individual who is known to be innocent violates the Constitution. On his *factual* claim, the Court’s reaction is best summarized in Justice O’Connor’s pivotal concurring opinion: “Petitioner is not innocent, in any sense of the word.” 506 U.S. at 419. More important, Herrera’s factual claim has no necessary relationship to the factual issue addressed by the District Court. The fact that

Herrera was actually guilty hardly means that other truly innocent defendants are not executed with regularity. On the other hand, even if he had proven that he was innocent, that alone would not have demonstrated that the conviction and execution of innocent defendants is a common problem; his could have been the only case in decades.

With respect to the *legal* issues at stake, the distinction is equally clear. In *Herrera*, the Court was not asked to pass on the constitutionality of a system that executes innocent defendants repeatedly, and it had no record of such a systemic problem before it. As a result, its opinion deals solely with the constitutional rights of an individual defendant who claims to be able to prove that he is innocent after he has exhausted all ordinary remedies for direct and collateral review.⁶⁷ *Herrera*, in short, has no direct implications for this case.⁶⁸

Which is not to say that *Herrera* has no implications at all. In her concurring opinion, Justice O'Connor, joined by Justice Kennedy, writes:

I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed – "contrary to contemporary standards of decency," *post*, at 430 (dissenting opinion) (relying on *Ford v. Wainwright*, 477 U.S. 399, 406...(1986)), "shocking to the conscience," *post*, at 430 (relying on *Rochin v. California*, 342 U.S. 165, 172...(1952)), or offensive to a "principle of justice so rooted in

⁶⁷ See, e.g., 506 U.S. at 411 (quoted by the Government, GB 37): "[W]e cannot say that Texas' refusal to entertain petitioner's newly discovered evidence eight years after his conviction transgresses a principle of fundamental fairness...."

⁶⁸ As the District Court noted, *Quinones II* at 263, *Herrera* was a second Federal habeas petition by a state-court defendant. As a result, it raised questions about the scope of Federal habeas corpus review of state court judgments, and the need for deference to state-court decision-making. This Federal capital prosecution involves no such issues.

the traditions and conscience of our people as to be ranked as fundamental," *ante*, at 407-408 (opinion of the Court) (quoting *Medina v. California*, 505 U.S. 437, 445-446...(1992), in turn quoting *Patterson v. New York*, 432 U.S. 197, 202...(1977)) – the execution of a legally and factually innocent person would be a constitutionally intolerable event.

506 U.S. at 419. In other words, according to Justice O'Connor, regardless of how the question is phrased, the execution of innocent defendants is a matter of grave constitutional concern. Given the tenor of the dissent, 506 U.S. at 430 (dissent by Blackmun, J, in which Stevens and Souter, JJ, join), on this issue Justice O'Connor speaks for a majority of the Court.⁶⁹

Ultimately, the Government's position on *Herrera* suffers from the same defect as its position on *Atkins*. Both times the Government ends up arguing an untenable negative implication: that the fact that the justices didn't outlaw the death penalty outright means that they rejected a challenge they never reached. See GB 40 ("Nothing in *Herrera* provides any support for the contention that a mere risk of innocence makes the death penalty unconstitutional.")⁷⁰ and GB 44 (the Court's failure to declare the death penalty per se unconstitutional "implicitly accept[s]" the constitutionality of death penalties that execute innocents.). If any authority is needed to answer this peculiar argument, the history of constitutional death penalty jurisprudence readily supplies it. In 1971, in *McGautha supra*, the Court upheld the death penalty statutes of California and Ohio against challenges

⁶⁹ It's worth noting that in discussing the issue Justice O'Connor cites Due Process and Cruel and Unusual Punishment cases indistinguishably.

⁷⁰ We assume (although the language is not entirely clear) that the Government is addressing the argument that the death penalty *itself* is unconstitutional. If, however, this sentence – like the one that follows – refers to the execution of an *individual*, then it is simply misdirected.

that they violated the Fourteenth Amendment. But that can hardly mean that the Court “implicitly” upheld the constitutionality of the death penalty on other grounds, since a year later, in *Furman*, it struck down those same statutes (and all others) under the Eighth Amendment.

2. In the Absence of Controlling Authority, the Lower Courts Must Address the Question in the First Instance.

_____ When Justice Marshall first raised the issue in *Furman*, in 1973, the danger of executing an innocent defendant seemed merely theoretical. Twenty years later, when *Herrera* was decided in 1993, little had changed. A new study had been published; it was cited by the dissent,⁷¹ but dismissed by the majority with a passing comment: “[W]e note that scholars have taken issue with this study.” 506 U.S. at 415 n.1. The prevailing view on the Court, and in Congress,⁷² reflected the

⁷¹ Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21 (1987); see 506 U.S. at 430 n. 1 (Blackmun, J, dissenting).

⁷² The Government argues that “the Congress that enacted the FDPA *was fully aware of the fact* that enacting a death penalty entailed an unavoidable risk of erroneous executions.” [GB 44-45, emphasis added]. It then devotes several pages to excerpts from Congressional debates. [GB 45- 48]. Even if this claim were true it would have no obvious implications here, since the District Court ruled that an act of Congress violates the Constitution. But it is false. The Government shows, in detail, that the argument that a Federal death penalty would lead to wrongful executions was made by the *opponents of the FDPA* – by the *losing side*. It neglects to point out that these arguments were roundly rejected, as factual claims, by the *winners*. For example, in the House, Representative Hyde, one of the sponsors of the bill, dismissed the danger of executing innocents, as presented by Representative Frank:

Mr. Chairman, in response to the gentleman from Massachusetts, he said it happens, innocent people get convicted. Yes; and they get saved by habeas corpus under current law.

140 Cong. Rec. H 2415, 2416. And in the Senate, Senator Hatch opposed a proposal by Senator Biden on the following ground:

common wisdom in society as a whole: “the possibility that an innocent person might be executed ... seemed remote....” *Quinones I* at 418. In the past decade, however, our understanding of the problem of wrongful executions has undergone a sea change, as the record shows, and the Supreme Court has signaled its concern. *Atkins, supra*, 122 S. Ct. at 2252, n. 25. And yet, while everyone knows that the high court will have the final word, in the meantime the question here remains open and unresolved.

In this situation, the lower courts must address the question as best they can. In doing so they serve two functions: to resolve the issue in the first instance, and to provide well-developed factual records and well-reasoned legal opinions for ultimate Supreme Court review. The District Court has done just that, on both scores. The District Court asked for and received three rounds of legal briefs and extensive documentary submissions from the Defendants and from the Government. While it is sometimes preferable to have an evidentiary hearing at which the evidence that informs an opinion on an issue of law is “subjected to the traditional testing mechanisms of the adversary process,” *see Ballew v. Georgia*, 435 U.S. 223, 246 (1978) (Powell, J, concurring in the judgment), that process is not generally necessary. In other cases, published studies are often considered and

This provision, in an attempt to address *a problem which does not exist -- State executions of innocent people* – creates unprecedented rights to additional Federal review which will increase litigation and delay in death penalty cases.

139 Cong. Rec. S 14940, 14944. (Emphasis added). A fair reading of the legislative history of the FDPA shows that the majorities in both houses did not enact the bill *despite their recognition* that the new Federal death penalty would mean that innocent people are put to death; rather, they rejected that claim *as a matter of fact*. We also submit that these debates would sound very different if they took place again in 2002.

cited by the Supreme Court without introduction into the record or even consideration by the trial court. *E.g., Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 n. 8 (1973).

Based on this record, the District Court made three crucial findings of fact:

(1) *The danger of executing innocent defendants is much greater than we believed just several years ago*: “DNA testing has proved, beyond cavil,...the remarkable degree of fallibility in the basic fact-finding processes on which we rely in criminal cases.” *Quinones II* at 264. And, “[w]hile the DNA evidence alone is sufficient to establish this basic point, the Court ... also relie[s] on the even larger number of death row inmates who have been exonerated over the past decade by investigations that, while inspired by the DNA testing, used more conventional methods.” *Id.* at 265.

(2) *We do not know how to cure the problem*: “For the foreseeable future, traditional trial methods and appellate review will not prevent the conviction of numerous innocent people.” *Id.* at 264. Therefore, if we continue to use the death penalty “[t]he result can only be the foreseeable execution of numerous innocent people.” *Id.* at 265.

(3) *The Federal death penalty is not, in this respect, materially different form state death penalties*: “[T]here is no good reason to believe the Federal system will be any more successful at avoiding mistaken impositions of the death penalty than the error prone state systems already exposed. *Id.* at 267-68.

These findings are well-supported by the record; they are inescapable. The District Court’s legal conclusion inevitably follows. “We now know, not as an abstraction but as a fact, that if we continue to put prisoners to death we will kill “numerous innocent people.” *Quinones II* at 260. A majority of the Supreme Court has stated that the execution of even a single innocent person is “a constitutionally intolerable event.” *Herrera*, 506 U.S. at 419. Surely the knowing

execution of numerous innocent people must be worse. Is this intolerable event sanitized because one or two innocent people are mixed in with five or 10 or 20 guilty ones? Does it matter that we don't know their names and can't interview their mothers? Is it comforting to think that if we continue to kill defendants in cases like David Chandler's only some of them will be truly innocent?

The District Court based its conclusion on the Due Process Clause. It found that to execute a person, given the magnitude of the risk of factual error, is a denial of due process because it "eliminates...any [further] possibility of exoneration." *Quinones II* at 265. Accordingly, it correctly held that the Federal death penalty is unconstitutional.⁷³ This holding can equally be grounded in the

⁷³ The District Court also had various procedural remedies before it: (1) Bar death-qualification of prospective jurors; (2) eliminate penalty-related excusals of potential jurors; (3) empanel separate juries for the guilt/innocence and punishment phases of the trial; (4) order mandatory open-file discovery, subject only to witness safety concerns; (5) reverse the perverse peremptory challenge advantage that now accrues with a request to seek the death penalty (the Government gets four fewer challenges than the defense in a non-capital case, but equal numbers of challenges in a death penalty case) by awarding at least six additional challenges to the defense; (6) award surrebuttal argument (*i.e.*, the last word) to the defense at the guilt phase; (7) institute special enforcement measures where co-operators and jailhouse informants are used at a death penalty trial, with detailed accounting, such as videotaping or recording, of all versions of such witnesses' statements, and conduct pretrial reliability hearings; (8) subject any alleged stranger eyewitness to a pretrial reliability hearing; (9) bar testimony by any witness who has received benefits in return for testimony; (10) award immunity for defense witnesses, as necessary, upon proper request [JA 86]. While these procedures might reduce the risk of the conviction and execution of an innocent defendant, the District Court correctly concluded that only dismissal of the notices of intent to seek the death penalty would provide adequate protection. For the same reason, clemency – the last possible post-conviction remedy, is inherently insufficient. The essence of the problem is that while we know we are executing innocent people with some regularity, we can't identify them by name. Therefore we will not be able to save them through clemency any more than we can at trial.

Eighth Amendment: such a practice is certainly inconsistent with contemporary standards of decency. Under either provision, the basic truth is the same: We now know what we are doing. If we continue to put people to death, we cannot wash our hands and walk away.

CONCLUSION

For the reasons stated, we respectfully request that the order of the District Court be Affirmed.

Respectfully submitted,

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New York, New York

ADDENDUM

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1. *United States v. Chandler*, 996 F.2d 1073, 1086, 1097-98, 1101-02 (11th Cir. 1993) (failure to request jury instructions, failure to object to jury instruction, failure to object to witness being allowed to testify, failure to object to improper testimony; failure to make timely *Batson* objection).
1. *United States v. Garza*, 63 F.3d 1342, 1358, 1374-76 (5th Cir. 1995) (failure to object to Sixth Amendment violation, failure to object to jury instructions, failure to object to jury verdict form);
1. *United States v. Tipton*, 90 F.3d 861, 881, 896 (4th Cir. 1996) (failure to timely object to manner in which government exercised its peremptory strikes, failure to request jury instructions);
1. *United States v. McCullah*, 76 F.3d 1087, 1097-98, 1104-05, 1113 (10th Cir. 1996) (failure to request second counsel, failure to raise issues of lesser included offense and drug quantity, failure to object to new aggravating circumstance);
1. *United States v. Webster*, 162 F.3d 308, 324, 338-39, 345-46, 351, 357 (5th Cir. 1998) (failure to object to jury instructions, failure to object to district court's factual finding on mental retardation; failure to move to suppress co-defendants' testimony, failure to object to fact that government psychiatric expert's testimony exceeded scope of ordered examination; failure to object to district court's dismissal of alternate jurors at the end of the guilt phase; failure to object to district court's authority to order a government psychiatric exam);
1. *United States v. Jones*, 132 F.3d 232, 244-45 (5th Cir. 1998) (failure to object to jury verdict forms; failure to object to jury instructions);
1. *United States v. Hall*, 152 F.3d 381, 402, 404 (5th 1998) (failure to object to allowing jury to view during deliberations videotape depicting walk through park in which victim was killed, and exhumation of her body, failure to request jury instruction);

1. *United States v. McVeigh*, 153 F.3d 1166, 1205-06, 1216-18 (10th Cir. 1998) (failure to object to victim impact testimony, failure to object to death penalty voir dire, failure to object of government's closing argument; failure to object to testimony);
1. *United States v. Davis and Hardy*, 185 F.3d 407, 418 (5th Cir. 1999) (failure to object to prosecutorial misconduct in argument);
1. *United States v. Battle*, 173 F.3d 1343, 1346, 1350 (11th Cir. 1999) (failure to make timely mistrial motion; failure to request a continuance after surprise testimony);
1. *United States v. Johnson*, 223 F.3d 665, 669, 671 (7th Cir. 2000) (failure to object prison warden's testimony; failure to object to dismissal of tardy juror);
1. *United States v. Paul*, 217 F.3d 989, 996, 998, 1003 (8th Cir. 2000) (failure to object to jury instructions, failure to object to government's inconsistent theories of the case, failure to object to prosecutorial misconduct during closing arguments, failure to object to district court's voir dire procedures, failure to object to jurors' dismissal for cause);
1. *United States v. Stitt*, 250 F.3d 878, 882-83 (4th Cir. 2001) (failure to object to instructions);
1. *United States v. Allen and Holder*, 247 F.3d 741, 767, 773, 777-78 (8th Cir. 2001) (failure to object to victim impact testimony, failure to make timely double jeopardy objection, failure to object to prosecutorial misconduct during closing argument, failure to request a continuance after surprise testimony, failure of Holder's attorneys to appeal the fact that grand jury did not indict on mental state and aggravating factors⁷⁴);
1. *United States v. Vialva and Bernard*, 299 F.3d 467 (5th Cir. 2002) (failure to object to victim impact testimony, failure to object to jury verdict forms, failure to object to fact that grand jury did not indict on mental state and aggravating

⁷⁴ Allen's attorneys appealed this issue and received a remand from the United States Supreme Court in light of *Ring v. Arizona*, 122 S.Ct. 2428 (2002). See *Allen v. United States*, 122 S.Ct. 2653 (2002).

factors, failure to object to co-defendant's mitigating evidence, failure to renew motion for severance, failure to move for mistrial after learning of judge's *ex parte* communication with juror).¹