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## Is Saving an Innocent Man a "Fool's Errand"? The Limitations of the Antiterrorism and Effective Death Penalty Act on an Original Writ of Habeas Corpus

Krystal M. Moore  
*University of Dayton*

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### Cover Page Footnote

The author would like to thank Anandhi S. Rajan, Esq. and Ella McCown, Esq. for their confidence and support. The author would also like to thank Professor Staci P. Rucker, Professor Dennis Greene, Dean Lori Shaw, and the Honorable Michael T. Hall for providing invaluable insight and mentorship needed to succeed in the study of law.

# IS SAVING AN INNOCENT MAN A “FOOL’S ERRAND”? THE LIMITATIONS OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT ON AN ORIGINAL WRIT OF HABEAS CORPUS PETITION

Krystal M. Moore<sup>1</sup>

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## I. INTRODUCTION

When a death row prisoner garners support from diverse international public figures,<sup>2</sup> an antique judicial tool is dusted off,<sup>3</sup> and the

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<sup>1</sup> Staff Writer 2009–2010, University of Dayton Law Review. J.D., B.A. in Political Science and English. The author would like to thank Anandhi S. Rajan, Esq. and Ella McCown, Esq. for their confidence and support. The author would also like to thank Professor Staci P. Rucker, Professor Dennis Greene, Dean Lori Shaw, and the Honorable Michael T. Hall for providing invaluable insight and mentorship needed to succeed in the study of law.

<sup>2</sup> Troy Davis has garnered support from a diverse group of public figures including: Pope Benedict XVI; former president, Jimmy Carter; Nobel Peace Prize winner, Desmond Tutu; former presidential candidate, Bob Barr; actress, Susan Sarandon; author of *Dead Man Walking*, Sister Helen Prejean; death penalty supporter and former FBI director, William S. Sessions; and the European Parliament. See Brendan Lowe, *Will Georgia Kill an Innocent Man?*, TIME, (July 13, 2007), <http://www.time.com/time/nation/article/0,8599,1643384,00.html>; see also Brief for Bob Barr et al. as Amici Curiae in Support of Troy Anthony Davis, *In re Davis (Davis V)*, 130 S. Ct. 1 (2009); Anthony Papa, *Susan Sarandon: “Stop the Execution of Troy Davis”*, HUFFINGTON POST, Sept. 21, 2008, [http://www.huffingtonpost.com/anthony-papa/susan-sarandon-stop-the-e\\_b\\_128086.html](http://www.huffingtonpost.com/anthony-papa/susan-sarandon-stop-the-e_b_128086.html); European Parliament Resolution on the Death Penalty: Notably the Case of Troy Davis, EUR. PARL. DOC. (0358) B6–0358 (2008). On July 10, 2008, the European Parliament adopted a resolution that “[a]sks that Troy Davis’ death sentence be commuted and, in view of the abundant evidence which might lead to such commutation, for the relevant courts to grant him a retrial . . . .” European Parliament Resolution of 10 July 2008 on the Death Penalty, Particularly the Case of Troy Davis, EUR. PARL. DOC. (C 294) 19.

Supreme Court produces an opinion during its summer recess,<sup>4</sup> absent four Justices,<sup>5</sup> undoubtedly the events will produce more questions than answers. To that end, the Court did not disappoint because legal blogs went into overdrive searching for answers and meaning in the Court's one paragraph decision. On August 17, 2009, the Supreme Court of the United States, on a petition for a writ of habeas corpus, issued a one paragraph decision in *In re Troy Anthony Davis*, which transferred an original writ of habeas corpus to the district court to hold an evidentiary hearing for a prisoner who had previously petitioned the Eleventh Circuit for a writ of habeas corpus and was denied.<sup>6</sup> The Court's ruling left many questions unanswered, because with little explanation or guidance the Court transferred the writ to the district court, despite the fact that the district court may be precluded from granting relief under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").<sup>7</sup> The Act may restrict the district court from granting relief because it "bars the issuance of a writ of habeas corpus with respect to any claim that was adjudicated on the merits in State court proceedings," unless an exception to the statute is applicable.<sup>8</sup>

Since the enactment of the AEDPA, death row prisoners have been limited to one set of appeals in federal courts, and the federal courts are required to give an extreme amount of deference to a state court's prior rulings when considering a state prisoner's writ of habeas corpus. The problems presented by the Antiterrorism and Effective Death Penalty Act's limitations are twofold. First, the AEDPA forecloses the Court's appellate jurisdiction on writs filed in the lower federal courts, and Title I of the Act—while it does not specifically mention original writs of habeas corpus petitions filed under the Supreme Court's original jurisdiction—gives such extreme deference to a state court's prior rulings. Thus, if the AEDPA were

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<sup>3</sup> The United States Supreme Court took an "extraordinary step—one not taken in nearly 50 years," when it transferred Troy Davis' petition for a writ of habeas corpus to the United States District Court for the Southern District of Georgia and ordered the court to hold an evidentiary hearing to determine whether Davis could clearly show that he was innocent of the crime for which he was convicted. *Davis V*, 130 S. Ct. at 2 (Scalia, J., dissenting). The prior use of the Court's habeas appellate jurisdiction, "made the original writ an 'anachronism.'" *Palmore v. Superior Court of D.C.*, 515 F.2d 1294, 1301 (D.C. Cir. 1975); see also Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153, 206. "Prisoners have been trying for nearly 50 years without success to get the Justices to employ this 'original jurisdiction.'" David Von Drehle, *Davis Ruling Raises New Death-Penalty Questions*, TIME, Aug. 18, 2009, <http://www.time.com/time/nation/article/0,8599,1917118,00.html>.

<sup>4</sup> The United States Supreme Court's term begins, as required by Supreme Court Rule 4.1, on the first Monday in October, and "continue[s] until late June or early July." SUP. CT. R. 4.1; see also *The Court and Its Procedures* (Jan. 31, 2011, 6:53 PM), available at <http://www.supremecourt.gov/about/procedures.pdf>. During the summer, the Court prepares for cases scheduled for fall argument. *Id.*

<sup>5</sup> *Davis V*, 130 S.Ct. at 1–2. Chief Justice Roberts, and Justices Alito, Sotomayor, and Kennedy did not take part in the opinion. *Id.* The concurrence was written by Justice Stevens and joined by Justices Ginsburg and Breyer. *Id.* The dissent was written by Justice Scalia and joined by Justice Thomas. *Id.*

<sup>6</sup> *Id.*; *In re Davis (Davis IV)*, 565 F.3d 810, 827 (11th Cir. 2009).

<sup>7</sup> Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

<sup>8</sup> *Davis V*, 130 S. Ct. at 2 (internal quotation omitted).

to apply to original writs of habeas corpus petitions filed directly in the Supreme Court, as well as writs filed in the lower federal courts, then the Court would, virtually, be stripped of its ability to determine whether a prisoner is in custody, in violation of his constitutional rights. Section 104 of the Act amended 28 U.S.C. § 2254(d)(1) to give such extreme deference to the state courts that even if the Supreme Court were to determine that the prisoner had a meritorious claim the Court would have to conclude that the state court was unreasonable in its decision before the Court could grant relief. Second, the Act may preclude federal courts from hearing actual innocence claims,<sup>9</sup> leading to the confinement and execution of innocent men and offending the Eighth Amendment of the United States Constitution.<sup>10</sup> The first problem presented is the primary focus of this Comment.

The AEDPA’s limitations on federal writs of habeas corpus should not apply to petitions for original writs of habeas corpus filed under the Supreme Court’s original jurisdiction. At the very least, the Act’s limitations should not apply to actual innocence claims. The limitations should not apply to original petitions filed under the Court’s original jurisdiction and actual innocence claims because such limitations would be contrary to Congress’ intent and to the Constitution. This Comment explores the limiting effects of the AEDPA if applied to original petitions for writs of habeas corpus and to actual innocence claims. Section II provides background on original petitions for a writ of habeas corpus and examines the purpose and language of the Antiterrorism and Effective Death Penalty Act of 1996 and 28 U.S.C. § 2254(d)(1). Section II also gives an overview of the Court’s concurring and dissenting opinions in *In re Troy Anthony Davis*.

Finally, Section III examines the issues presented by the AEDPA, specifically amended by 28 U.S.C. § 2254(d)(1), as it relates to original writs of habeas corpus and actual innocence claims. It further focuses on the Court’s prior treatment of the Antiterrorism and Effective Death Penalty Act in different cases and how the Act intersected with writs of habeas corpus prior to the *Davis* case. Section 2254(d)(1) should not apply to original writs or actual innocence claims because it was not Congress’ intent to kill innocent men. In America, preservation of human life is not a fool’s errand.

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<sup>9</sup> *Davis v. Terry (Davis III)*, 465 F.3d 1249, 1251 (11th Cir. 2006). There are “two types of claims pertaining to actual innocence that might be made after trial.” *Id.* The first one is a *Herrera* claim, a “substantive claim of actual innocence,” which claims that the “execution of an innocent person violates the Eighth Amendment, even if [the] conviction was the product of a fair trial.” *Id.* (emphasis in original). The second one is a *Schlup* claim, a “procedural claim,” which asserts that the “conviction of an innocent person is constitutionally impermissible when the conviction was the product of an unfair trial.” *Id.* (emphasis in original).

<sup>10</sup> See U.S. CONST. amend XIII (barring cruel and unusual punishment).

## II. BACKGROUND

Since Congress enacted the Antiterrorism and Effective Death Penalty Act in 1996, the requirement that federal courts must give deference to a state court's prior rulings when reviewing a petition for a writ of habeas corpus under 28 U.S.C. § 2254(d)(1) has never been applied to an original writ of habeas corpus arising under the Supreme Court's original jurisdiction.<sup>11</sup> Since Title I of the Act fails to mention the Court's authority to entertain original writs<sup>12</sup> and the Supreme Court has not granted an original writ in decades,<sup>13</sup> the Court has upheld the constitutionality of the Act,<sup>14</sup> leaving the question open as to whether the Act applies to original writs, and, if so, to what extent.<sup>15</sup> Similarly, the Court has never addressed whether the Act bars actual innocence claims.<sup>16</sup> These questions have led to uncertainty within the courts as to the current state of federal habeas law.<sup>17</sup> This section provides background on the original writ of habeas corpus, explores the purpose of the AEDPA and the language of 28 U.S.C. § 2254(d)(1), and reviews the case that brought these issues to the forefront,

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<sup>11</sup> See *Davis V*, 130 S. Ct. at 2–3 (questioning whether § 2254(d)(1) applies to original writs, and if so, to what extent).

<sup>12</sup> See *Felker v. Turpin*, 518 U.S. 651, 660 (1996) (The Court supported its conclusion that the AEDPA did not repeal its appellate jurisdiction by noting that “[n]o provision of Title I mentions our authority to entertain original habeas [corpus] petitions . . . .”); see also AEDPA, Pub. L. No. 104-132, 110 Stat. 1214, 1217–26.

<sup>13</sup> *Davis V*, 130 S. Ct. at 2 (Scalia, J., dissenting).

<sup>14</sup> See *Felker*, 518 U.S. at 654 (“[T]he operative provisions of the Act do not violate the Suspension Clause of the Constitution, Art. I, § 9.”); see also *id.* at 667 (Souter, Stevens & Breyer, JJ., concurring) (“I have no difficulty with the conclusion that the statute *is not* on its face, or *as applied here*, unconstitutional.”) (emphasis added).

<sup>15</sup> *Davis V*, 130 S. Ct. at 1; see also *Felker*, 518 U.S. at 663.

<sup>16</sup> See *Triestman v. United States*, 124 F.3d 361, 363 (2d Cir. 1997) (considering whether the judicial system afforded relief for a prisoner who has established that he is actually innocent, but the AEDPA appeared to bar relief). The *Triestman* court noted that “serious constitutional questions would arise if a person who can prove his actual innocence on the existing record—and who could not have effectively raised his claim of innocence at an earlier time—had no access to judicial review.” *Id.*; see also *Davis V*, 130 S. Ct. at 3 (Scalia, J., dissenting) (“This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent. Quite to the contrary, *we have repeatedly left that question unresolved*, while expressing considerable doubt that any claim based on alleged ‘actual innocence’ is constitutionally cognizable.”) (second emphasis added).

<sup>17</sup> Courts that have interpreted *Davis V* have given various meanings to the Court's opinions. See *United States v. Cirilo-Munoz*, 582 F.3d 54, 56 (1st Cir. 2009) (Torruella, J., concurring) (“Although Cirilo-Munoz presents no new evidence of actual innocence here, the fact that the Supreme Court is willing to revisit a conviction even older than Cirilo-Munoz's provides some hope that the Supreme Court . . . would revisit Cirilo-Munoz's conviction should he procure new evidence of his actual innocence. In fact, if Justice Scalia's claim is true, then *Davis [V]* leaves open just how ‘new’ the evidence has to be to permit a court to review Cirilo-Munoz's conviction.”) (internal citation omitted); see also *Wright v. Marshall*, No. 98-10507-PBS, 2009 US Dist. LEXIS 105276, at \*2 (D. Mass. Nov. 9, 2009) (Defendant produced evidence that another man admitted that he killed the victim. However, the court noted that “[t]he Supreme Court has not recognized actual innocence as a ground for federal habeas relief.”); *Wilson v. City of Ponchatoula*, 18 So. 3d 1272 (La. 2009) (“A court of law, in order to *protect its own integrity*, has the authority to set aside judgments that are fundamentally flawed.”) (emphasis in original) (citing *Davis V*, 130 S. Ct. at 1-2); *cf.*, *Petty v. Padula*, No. 0:08-2967-RBH, 2009 U.S. Dist. LEXIS 86397, at \*6 (D.S.C. Sept. 21, 2009) (“The United States Supreme Court has not established an exception to the AEDPA one-year statute of limitations based on ‘actual innocence’ in non-capital cases.”) (citing *Davis V*, 130 S. Ct. at 1).

*In re Troy Anthony Davis.*

*A. The Original Writ of Habeas Corpus*

The writ of habeas corpus began as “an auxiliary device,” that produced a prisoner before the court.<sup>18</sup> Today the writ serves as an innocent prisoner’s last attempt to get a conviction overturned.<sup>19</sup> The United States Supreme Court and federal courts have the power to grant a writ of habeas corpus.<sup>20</sup> Therefore, a prisoner may petition for a writ of habeas corpus either by petitioning a federal court or by petitioning the United States Supreme Court directly.<sup>21</sup>

The United States Constitution vests the Supreme Court with original jurisdiction<sup>22</sup> and appellate jurisdiction.<sup>23</sup> The Supreme Court’s original jurisdiction over a petition for writ of habeas corpus that is filed directly with the Court<sup>24</sup> actually falls within its *appellate* jurisdiction.<sup>25</sup> Congress may regulate and make exceptions to the Court’s appellate jurisdiction,<sup>26</sup> however, Congress has never divested the Court of any of its original jurisdiction over original writs for habeas corpus petitions.<sup>27</sup>

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<sup>18</sup> Oaks, *supra* note 3, at 175.

<sup>19</sup> See CHARLES DOYLE, CONG. RESEARCH SERV., RL 33391, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW 1 (2006), (“[T]he last refuge of scoundrels and the last hope of the innocent.”).

<sup>20</sup> 28 U.S.C. § 2241(a) (2006) (corresponds to Judiciary Act of 1789, 1 Stat. 81, ch. 20, § 14).

<sup>21</sup> *Id.*

<sup>22</sup> The Court’s original jurisdiction is limited to the specified cases in Article II, section 2, clause 2 of the United States Constitution. U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have *original* Jurisdiction.”) (emphasis added); see also Oaks, *supra* note 3, at 156 (The Court’s “original jurisdiction [is] limited to the cases specified in Article III, §2, cl. 2 of the Constitution . . .”).

<sup>23</sup> U.S. CONST. art. III, § 2, cl. 2 (“*In all the other Cases* before mentioned, the supreme Court shall have *appellate* Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”) (emphasis added).

<sup>24</sup> A petition for writ of habeas corpus that is filed directly in the Supreme Court is commonly referred to as an original writ of habeas corpus. See Oaks, *supra* note 3, at 155.

<sup>25</sup> Judiciary Act of 1789, ch. 20, 14 Stat. 81–82 (1789) (“That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.”) (emphasis in original); Oaks, *supra* note 3, at 154 (“The so-called ‘original writ of habeas corpus’ is not ‘original’ in the sense that it issues in the exercise of the Court’s original jurisdiction. With [only] a few exceptions . . . the Supreme Court can only issue the writ under its appellate jurisdiction.”) (internal citations omitted); see also *Palmore v. Superior Court of D.C.*, 515 F.2d 1294, 1301 (D.C. Cir. 1975); *Ex parte Bollman & Ex parte Swartwout*, 8 U.S. 75 (1807) (finding that the Court had no common law or inherent authority to grant the writ).

<sup>26</sup> U.S. CONST. art. III, § 2, cl. 2 (“*In all the other Cases* before mentioned, the supreme Court shall have *appellate* Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*”) (emphasis added).

<sup>27</sup> See *Palmore*, 515 F.2d at 1302 n.19 (considering the constitutionality of a statute that would “divest[] the Supreme Court *for the first time* in . . . history of some of its ‘original’ habeas jurisdiction . . .”) (emphasis added).

An original writ of habeas corpus is an extraordinary remedy.<sup>28</sup> If the remedy is granted, then a federal judge may issue a writ of habeas corpus that either overturns a prisoner's conviction, reduces his sentence, or remands his case for retrial or resentencing.<sup>29</sup> In contrast to a writ of certiorari<sup>30</sup> and a writ of error,<sup>31</sup> an original writ of habeas corpus is not a judicial tool that corrects mere errors or irregularities in trial court proceedings that would render the judgment voidable.<sup>32</sup> The Court does not entertain an original writ of habeas corpus where the petition raises factual issues.<sup>33</sup> The Court may, however, exercise its statutory power of transfer and transfer an original writ to a court in the proper jurisdiction to review the factual issues.<sup>34</sup>

The Supreme Court has rarely used its original jurisdiction to grant original writs.<sup>35</sup> The reasons for the Court's rare use of the original writ are twofold. First, Rule 20, which governs the procedures that a prisoner must follow on a petition for an original writ of habeas corpus,<sup>36</sup> requires that a prisoner "must show . . . that *exceptional circumstances* warrant the exercise of the Court's discretionary powers . . . ."<sup>37</sup> The Supreme Court has great latitude to dictate the type of circumstances that constitute exceptional circumstances as required by Rule 20.<sup>38</sup> Second, the Court has rarely exercised its original jurisdiction to grant original writs because of the other "direct avenues of appellate review of criminal convictions" available to the

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<sup>28</sup> See *Bousley v. United States*, 523 U.S. 614, 621 (1998); see also *Goto v. Lane*, 265 U.S. 393, 401–02 (1924) ("The remedy is an extraordinary one, out of the usual course, and involves a collateral attack on the process or judgment constituting the basis of the detention. The instances in which it is granted, when the law has provided another remedy in regular course, are exceptional and usually confined to situations where there is peculiar and pressing need for it or where the process or judgment under which the prisoner is held is wholly void.")

<sup>29</sup> ROGER A. HANSON & HENRY W. K. DAILEY, U.S. DEP'T. OF JUSTICE, NCJ-155504, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS iv (1995).

<sup>30</sup> A writ of certiorari is "[a]n extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review." BLACK'S LAW DICTIONARY 258 (9th ed. 2009).

<sup>31</sup> A writ of error is "[a] writ issued by an appellate court directing a lower court to deliver the record in the case for review." *Id.* at 1749.

<sup>32</sup> See *Oaks*, *supra* note 3, at 192.

<sup>33</sup> *Id.* at 192–93 ("[T]he 'original' writ is suitable only where the petitioner's claim for discharge presents only a legal question.")

<sup>34</sup> 28 U.S.C. § 2241(b) ("The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and *may transfer* the application for hearing and determination to the district court having jurisdiction to entertain it.") (emphasis added); see also *Oaks*, *supra* note 3, at 194 ("In 1948 Congress gave the Court an alternative to denial of petitions involving factual issues by providing that the Supreme Court or any of its Justices or any circuit judge 'may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.'")

<sup>35</sup> SUP. CT. R. 20.4(a) ("This writ is rarely granted."); see also *Palmore v. Superior Court of D.C.*, 515 F.2d 1294, 1301 (D.C. Cir. 1975) ("[T]he Court . . . has granted an original writ *only* three times" in the twentieth century.) (emphasis added).

<sup>36</sup> SUP. CT. R. 20.

<sup>37</sup> SUP. CT. R. 20.1 (emphasis added).

<sup>38</sup> *Id.* ("Issuance by the Court of an extraordinary writ [for habeas corpus] is not a matter of right, but of discretion sparingly exercised."); see also *Palmore*, 515 F.2d at 1301 n.18 ("The exercise of original habeas corpus jurisdiction is extremely discretionary.")

Court.<sup>39</sup> In the past, the Court utilized its authority to review a federal court’s denial of a prisoner’s habeas corpus petition by employing the writ of error or by granting certiorari.<sup>40</sup> While the use of the original writ of habeas corpus to grant relief has been rare throughout the Court’s history,<sup>41</sup> the Court has used its original jurisdiction when Congress foreclosed its other direct avenues, such as appeal or writ of certiorari, to review criminal convictions.<sup>42</sup> In this respect, history has repeated itself. Congress has, again, through its enactment of the AEDPA, foreclosed the Court’s ability to review criminal convictions by certiorari or by appeal.<sup>43</sup>

### *B. The Purpose of the Antiterrorism and Effective Death Penalty Act of 1996*

Federal habeas corpus has been an evolving body of law. Congress has expanded and narrowed the writ repeatedly since it first conferred the powers to grant the writ on the courts. During its first session, Congress enacted the Judiciary Act of 1789, which authorized the Supreme Court, as well as the federal courts, “to grant writs of *habeas corpus* [only] for the purpose of an inquiry into the cause of commitment” of federal prisoners.<sup>44</sup> Congress made its first significant change to the writ in 1867 by enacting the Judiciary Act of 1867, which amended the 1789 Act.<sup>45</sup> The Judiciary Act of 1867 afforded state prisoners, as well as federal prisoners, access to the writ of habeas corpus.<sup>46</sup> Thereafter, in subsequent amendments, Congress

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<sup>39</sup> Oaks, *supra* note 3, at 182.

<sup>40</sup> *Id.* 181–82 (“In 1885 Congress provided an appeal to the Supreme Court from the decisions of lower federal courts on habeas corpus petitions, and in 1891 Congress made the writ of error generally available to review criminal judgments in the federal courts. As the Supreme Court soon observed, these direct avenues of appellate review of criminal convictions left very little occasion for the exercise of the ‘original’ writ.”).

<sup>41</sup> *See supra* note 35.

<sup>42</sup> *See* Oaks, *supra* note 3, at 182.

<sup>43</sup> 28 U.S.C. § 2244(b)(3)(E) (“The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.”) (emphasis added). *Felker* provided the Court with one of its first opportunities to review the AEDPA. *See Felker v. Turpin*, 518 U.S. 651, 661 (1996). In *Felker*, the Court noted that “[t]he Act *does* remove [the Court’s] authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals . . . .” *Id.* (emphasis added).

<sup>44</sup> Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (“And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or [were] committed for trial before some court of the same . . . .”) (emphasis in original); *see also Felker*, 518 U.S. at 659; Doyle, *supra* note 19, at 3 (quoting 1 Stat. 73, 81–82).

<sup>45</sup> *See Felker*, 518 U.S. at 659 (“Congress greatly expanded the scope of the federal habeas corpus in 1867 . . . .”); *see also* Doyle, *supra* note 19, at 4–5.

<sup>46</sup> Judiciary Act of 1867, ch. 28, § 1, 14 Stat. 385, 385–386 (“[I]n addition to the authority already conferred by law, shall have power to grant writs of habeas corpus *in all cases* where any person[s] may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . .”) (emphasis added). However, prisoners were not able to collaterally attack their convictions, unless the sentencing court lacked subject matter jurisdiction. Doyle, *supra* note 19, at 5–6. Thus, even if a state prisoner had a constitutional claim, he “could not be granted federal habeas relief until all possibility of state judicial relief—trial, appellate, and post-conviction—had been exhausted.” *Id.*

narrowed federal habeas law in response to abuses of the writ.<sup>47</sup>

In the early 1940s, “the Court stopped requiring that an alleged constitutional violation void the jurisdiction of the trial court[s] before federal habeas relief could be considered.”<sup>48</sup> In response, federal prisoners abused the writ, which led to complaints from federal judges.<sup>49</sup> Therefore, in 1948, Congress, in direct response to the complaints about the Court’s actions, revised the Judiciary Act of 1867.<sup>50</sup>

In another attempt to remedy prior problems that surrounded the writ, particularly in capital habeas cases, Congress revised the federal habeas law by its enactment of the Antiterrorism and Effective Death Penalty Act of 1996.<sup>51</sup> Similar to the prior revisions of federal habeas law, Congress enacted the AEDPA to curb abuses of the writ by giving deference to state courts.<sup>52</sup> Congress specified three purposes for the Act: “to deter terrorism, provide justice for victims, [and] provide for an effective death penalty . . . .”<sup>53</sup>

The problems that surrounded the writ before the passage of the AEDPA were clear. Existing procedures afforded the incentive and opportunity for delay.<sup>54</sup> For example, “[a] state defendant convicted of a capital offense and sentenced to death could take advantage of three successive procedures to challenge constitutional defects in his or her conviction or sentence.”<sup>55</sup> The prisoner could effectively raise his/her claims on appeal, in state habeas proceedings, and in federal habeas proceedings.<sup>56</sup> Consequently, victims were not able to receive justice, as there were extensive delays between sentencing and execution of sentence.<sup>57</sup>

Additional problems included the fact that state court interpretations or applications of federal law were not binding in subsequent federal habeas proceedings.<sup>58</sup> Federal courts reviewed *de novo* state court decisions on questions of law and mixed questions of law and fact.<sup>59</sup> Complaints of delay and wasted judicial resources marked the debate that led to passage of the AEDPA, with opponents contending that federal judges should decide

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<sup>47</sup> See Doyle, *supra* note 19, at 7.

<sup>48</sup> *Id.* (internal citations omitted).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 10–11.

<sup>52</sup> *Id.* at 14.

<sup>53</sup> AEDPA, Pub. L. No. 104-132, 110 Stat. 1214, 1214.

<sup>54</sup> Doyle, *supra* note 19, at 10–11.

<sup>55</sup> *Id.* at 11.

<sup>56</sup> *Id.* at 10–11.

<sup>57</sup> *Id.* at 11.

<sup>58</sup> See *Williams v. Taylor*, 529 U.S. 362, 400 (O’Connor, J., concurring); see Doyle, *supra* note 19, at 14.

<sup>59</sup> See BRIAN R. MEANS, FEDERAL HABEAS MANUAL: A GUIDE TO FEDERAL HABEAS CORPUS LITIGATION § 3.1 (2010 ed. 2010).

federal law.<sup>60</sup>

The enactment of the AEDPA on April 26, 1996, made two significant changes when it sought to curb abuses of federal habeas law by precluding a prisoner from second or successive petitions for writ of habeas corpus in the federal courts. First, the AEDPA foreclosed the Supreme Court’s authority to review a federal court’s denial of a prisoner’s habeas corpus petition by granting a writ of certiorari,<sup>61</sup> which made the federal courts’ denials final.<sup>62</sup> This change is significant because Congress’ ability to regulate and make exceptions to the Court’s direct avenues of appellate review of criminal convictions, or otherwise termed appellate jurisdiction, has previously made the Court rely on its original jurisdiction over original petitions for writ of habeas corpus to review criminal convictions.<sup>63</sup> The second significant change that resulted from the enactment of the AEDPA was in how federal courts reviewed state court adjudications.<sup>64</sup> Most significantly, the AEDPA amended 28 U.S.C. § 2254 to give more deference to a state court’s prior rulings that limit grants on applications for writ of habeas corpus.<sup>65</sup>

### C. *Statutory Language of 28 U.S.C. § 2254(d)(1)*

Section 104 of the AEDPA amends 28 U.S.C. § 2254(d)<sup>66</sup> by adjusting the weight accorded to prior state court rulings.<sup>67</sup> Specifically, 28 U.S.C. § 2254(d)(1) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .<sup>68</sup>

According to the plain meaning of section 2254(d), a federal court

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<sup>60</sup> See Doyle, *supra* note 19, at 14.

<sup>61</sup> See *supra* note 43 and accompanying text.

<sup>62</sup> See Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171, 176 (2003) (“[T]wo of the most important themes of the Court’s recent habeas jurisprudence [are] federalism and finality. By crafting a standard that will insulate incorrect state court decisions, the Supreme Court has created a new conception of federalism in the habeas context.”).

<sup>63</sup> See Oaks, *supra* note 3, at 182; see also *supra* Part II.A.

<sup>64</sup> MEANS, *supra* note 59, § 3.1; see Jimenez v. Walker, 458 F.3d 130, 141 (2d Cir. 2006).

<sup>65</sup> See Doyle, *supra* note 19, at 14–15.

<sup>66</sup> 28 U.S.C. § 2254(d).

<sup>67</sup> See CHARLES DOYLE, CONG. RESEARCH SERV., 96-499A, ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996: A SUMMARY 6 (1996).

<sup>68</sup> 28 U.S.C. § 2254(d)(1). “[B]oth, ‘contrary to’ and ‘unreasonable application’ must be given separate effect.” Hack, *supra* note 62, at 176.

reviewing a state prisoner's application for a writ of habeas corpus *must* deny relief if the prisoner's claim was adjudicated on the merits in state court proceedings.<sup>69</sup> Indeed, a federal court may not grant relief in accordance with section 2254(d)(1), *unless* the state court's decision was contrary to or was so off the mark that it was an *unreasonable* application of clearly established federal law.<sup>70</sup> Moreover, a court's decision cannot be unreasonable if the law or rule was not a part of the Court's holding.<sup>71</sup> The Court's dicta is insufficient to meet the clearly established law requirement exception under section 2254(d)(1).<sup>72</sup> Thus, federal courts must deny habeas corpus relief for a prisoner if the relief is contingent upon a rule or law that is not clearly established at the time the prisoner's conviction became final.<sup>73</sup>

Second, section 2254(d)(1) requires the state court's prior ruling to be *more than* incorrect. Federal courts may not grant habeas relief based on its "independent interpretation and application of federal law."<sup>74</sup> It is insufficient for a federal court to grant habeas relief, even where a federal court has a "firm conviction that the state court was erroneous."<sup>75</sup> Likewise, even if a federal court concludes that the state court applied clearly established federal law incorrectly, it is insufficient for the federal court to grant relief.<sup>76</sup> The application of the law must be *objectively unreasonable*, regardless of the fact that other jurists have applied the federal law in a manner that is different from the state court's application.<sup>77</sup> An objectively unreasonable application exists where the state court (1) correctly identified the governing legal rule, but (2) applied the rule unreasonably to the facts of the prisoner's case.<sup>78</sup> The language of *unreasonable* application in section

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<sup>69</sup> See 28 U.S.C. § 2254(d)(1).

<sup>70</sup> See *id.*; see also *Impact of Federal Habeas Corpus Limitations on Death Penalty Appeals: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 24 (2009) (statement of Gerald Kogan, C.J. (Retired), Florida Supreme Court) [hereinafter *Capitol Hill Hearing*].

<sup>71</sup> See *Williams v. Taylor*, 529 U.S. 362, 412 (O'Connor, J., concurring) ("[C]learly established Federal law, as determined by the Supreme Court of the United States," refers to "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision."); *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (holding that the state court could not have unreasonably applied clearly established federal law because the Court's cases gave "no clear answer to the question presented, let alone one" in the prisoner's favor).

<sup>72</sup> See *Williams*, 529 U.S. at 412.

<sup>73</sup> *Id.* at 413.

<sup>74</sup> Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After Williams v. Taylor?*, 2001 WIS. L. REV. 1493, 1494 (2001) (internal citation omitted).

<sup>75</sup> *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (quoting *VanTran v. Lindsey*, 212 F.3d 1143, 1153–54 (9th Cir. 2000)) (internal quotations omitted).

<sup>76</sup> See *Williams*, 529 U.S. at 411; see also *Penry v. Johnson*, 532 U.S. 782, 793 (2001) ("[E]ven if the federal habeas court concludes that the state court decision applied clearly established federal law incorrectly, relief is appropriate only if that application is also objectively unreasonable.").

<sup>77</sup> See *Williams*, 529 U.S. at 377–78.

<sup>78</sup> *Id.* at 407–08 (A state court's decision is an unreasonable application of the Court's clearly established precedent if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case . . .").

2254(d)(1) requires the federal courts to give extreme deference to state court decisions.<sup>79</sup>

This heightened deference standard is problematic because it undercuts a federal court’s ability to determine if a state prisoner is in custody, in violation of the Constitution.<sup>80</sup> State courts can prevent federal courts from overturning their decisions by providing less explanation in their opinions.<sup>81</sup> Such actions from state courts preclude federal courts from ever meeting the heightened unreasonable standard required by section 2254(d)(1).<sup>82</sup> Moreover, instead of reducing conflicts between the state and federal courts, section 2254(d)(1) actually exacerbates tension between the state and federal courts.<sup>83</sup> Assuming the state court’s decision is not contrary to clearly established federal law, the federal courts will have to deem the state court’s application of the law so off the mark that it was unreasonable to satisfy the requirements of section 2254(d)(1).<sup>84</sup>

Unanswered questions about the constitutionality of the Act remain. It is still unclear whether section 2254(d)(1) applies to an original petition at all—or in the alternative—with the same rigidity as a successive writ.<sup>85</sup> In addition, it is unclear whether section 2254(d)(1) bars judicial review of

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<sup>79</sup> “The standard [of 28 U.S.C. § 2254(d)] is even more disturbing. It gives extreme deference to State court decisions.” *Capitol Hill Hearing*, *supra* note 70 (statement of Rep. Nadler, Chair, H. Comm. on the Judiciary). Unreasonable is “not equivalent to ‘incorrect.’” Hack, *supra* note 62, at 176.

<sup>80</sup> *Capitol Hill Hearing*, *supra* note 70 (testifying that “§ 2254(d)(1) deprives federal courts of the ability to vindicate constitutional rights.”); *see also* Hack, *supra* note 62, at 177 (exploring avenues of relief that may be available to state prisoners, other than § 2254, in order to avoid the high standards of deference of § 2254(d)).

<sup>81</sup> *Capitol Hill Hearing*, *supra* note 70, at 43 (statement of John H. Blume, Professor of Law, Director, Cornell Death Penalty Project, Cornell University Law School).

<sup>82</sup> *Capitol Hill Hearing*, *supra* note 70, at 45 (statement of Nadler) (clarifying Blume’s point by inquiring, “[t]he less they say the more deference they get because they don’t say enough to hang themselves?”).

<sup>83</sup> *See* Andrea A. Kochan, *The Antiterrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform?*, 52 WASH. U. J. URB. & CONTEMP. L. 399, 399 (1997) (“[T]he poor drafting of the Act exacerbates existing problems and creates a host of new issues to be considered.”); *Capitol Hill Hearing*, *supra* note 70, at 25 (statement of Kogan) (The witness testified that “§2254(d)(1) exacerbates friction between federal courts and state courts.”).

<sup>84</sup> *Capitol Hill Hearing*, *supra* note 70, at 25 (statement of Kogan) (“State courts are used to the idea that their judgments may be effectively upset if federal courts conclude that they have made a mistake.” However, they are “not used to being told that their judgments are so far from the mark as to be unreasonable.”) (emphasis in original); *see also* Doyle, *supra* note 19, at 14–15; *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 520 (2003)); *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003) (“It is not enough that a federal habeas court, in its ‘independent review of the legal question,’ is left with a ‘firm conviction’ that the state court was ‘erroneous.’ We have held precisely the opposite: ‘Under §2254(d)(1)’s “unreasonable application” clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.’ Rather, that application must be objectively unreasonable.” (emphasis added) (internal citations omitted) (quoting *Williams v. Taylor*, 529 U.S. 362, 411 (2000)); *Bell v. Cone*, 535 U.S. 685, 699 (2002); *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002).

<sup>85</sup> *Davis V*, 130 S. Ct. 1 (2009); *see* *Felker v. Turpin*, 518 U.S. 651, 663 (1996) (leaving open the question whether and to what extent the Antiterrorism and Effective Death Penalty Act of 1996 applies to original petitions).

certain actual innocence claims.<sup>86</sup>

*D. In re Troy Anthony Davis*

The United States Supreme Court's recent decision in *Davis* illustrates the unanswered issues surrounding the AEDPA and how, or if, the Act is applicable to original writs or actual innocence claims. By way of background, Troy Davis is a death row inmate.<sup>87</sup> The evidence is undisputed that Davis was present with a friend when Mark MacPhail, an off-duty police officer,<sup>88</sup> was murdered in 1989.<sup>89</sup> Officer MacPhail responded to yells for help from Larry Young, a homeless man who was in a parking lot across from where the officer was working as a security guard.<sup>90</sup> However, the evidence was not so clear on whether Davis or his friend committed the murder.<sup>91</sup> The murder weapon was never found,<sup>92</sup> and Davis' friend went to the police and informed them that Davis had pulled the trigger.<sup>93</sup> This statement began Davis' journey through the criminal justice system.

The Georgia Resource Center (GRC) represented Davis at his trial and throughout most of his criminal proceedings.<sup>94</sup> During Davis' trial, State presented testimony of nine witnesses,<sup>95</sup> which ultimately resulted in Davis' 1991 conviction for the fatal shooting of Officer MacPhail.<sup>96</sup> After his conviction, Davis maintained his innocence.

Throughout the years, Davis has sought to get his conviction overturned at the state level by citing mistaken identity and various procedural defects.<sup>97</sup> Some of the issues maintained on appeal were obviously insufficient, but the issues presented were a desperate attempt to get Davis' conviction overturned. Most notably, the GRC appealed Davis' conviction on jury selection issues, even though Davis is an African American male, whose jury was 58% African American (seven African Americans and five Caucasians).<sup>98</sup> Unsurprisingly, the courts concluded

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<sup>86</sup> See *Triestman v. United States*, 124 F.3d 361, 377–380 (2d Cir. 1997).

<sup>87</sup> *Davis IV*, 565 F.3d 810, 813 (11th Cir. 2009).

<sup>88</sup> *Davis V*, 130 S. Ct. at 2.

<sup>89</sup> *Davis IV*, 565 F.3d at 813.

<sup>90</sup> *Davis V*, 130 S. Ct. at 2.

<sup>91</sup> Petition for Writ of Habeas Corpus, *In re Davis*, No. 08-1443, 2008 U.S. Briefs 1443, 1 (May 19, 2009).

<sup>92</sup> *Id.* at 3.

<sup>93</sup> *Id.*

<sup>94</sup> Lowe, *supra* note 2.

<sup>95</sup> Petition for Writ of Habeas Corpus, *In re Davis*, No. 08-1443, 2008 U.S. Briefs 1443, 5 (May 19, 2009).

<sup>96</sup> *Id.*

<sup>97</sup> *Davis v. State (Davis I)*, 263 Ga. 5 (1993) (Georgia Supreme Court affirmed Davis' conviction); *Davis v. Turpin (Davis II)*, 273 Ga. 244 (2000) (Georgia Supreme Court affirmed the state court's denial of Davis' habeas corpus petition relief); *Davis III*, 465 F.3d 1249 (11th Cir. 2006) (Davis filed his first federal habeas corpus petition on December 14, 2001.).

<sup>98</sup> See *Davis I*, 263 Ga. at 7.

that the jury selection issues were unfounded because the county was 2/3 Caucasian and the majority of the jury was African American.<sup>99</sup>

With nine witnesses testifying for the state, the events that led to the tragic death of Officer MacPhail seemed certain, until seven of State’s key witnesses recanted their testimony.<sup>100</sup> Dorothy Ferrell identified Davis at his trial as the shooter.<sup>101</sup> However, in 2000, she stated in an affidavit that she “saw nothing and testified falsely.”<sup>102</sup> Ms. Ferrell explained that she was on parole and felt compelled to identify Davis.<sup>103</sup> She further explained that the detective only showed her one photograph, a picture of Davis.<sup>104</sup> She claimed to not see anything, as she was standing over 150 feet from the dark parking lot.<sup>105</sup> Ms. Ferrell also admitted that the district attorney promised to help her while she was in jail.<sup>106</sup> Ferrell disclosed her false testimony to a friend, who subsequently called Davis’ trial counsel and reported her perjury.<sup>107</sup> Another witness, Darrell Collins, who was sixteen years old at the time, recanted his testimony in 2002.<sup>108</sup> Collins alleged in his affidavit that police threatened him with jail time; therefore, he testified falsely.<sup>109</sup> Another significant witness who recanted his testimony was Larry Young, the homeless man who called out for help during the altercation.<sup>110</sup> In a 2002 affidavit, Mr. Young stated that he could not remember what the different people were wearing the night of his beating.<sup>111</sup> Mr. Young’s statement explained why he had trouble distinguishing Davis from his friend at Davis’ trial.<sup>112</sup> The other recantations were similar; the witnesses either were pressured by the police or implicated Davis because it was his face on the wanted posters instead of his friend.<sup>113</sup>

Davis’ attorney concedes that the evidence may have been available during his initial appeals; however, at the time of Davis’ post-conviction proceedings, Congress had eliminated \$20 million to post-conviction defender organizations, which directly affected the GRC.<sup>114</sup> Six of the eight

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<sup>99</sup> *See id.*

<sup>100</sup> *See Davis V*, 130 S. Ct. 1, 1–2 (2009). Among the witnesses that recanted their testimony were three eyewitnesses that identified Davis at his trial as Officer MacPhail’s shooter. *Davis IV*, 565 F.3d 810, 815 (11th Cir. 2009).

<sup>101</sup> Petition for Writ of Habeas Corpus, *In re Davis*, No. 08-1443, 2008 U.S. Briefs 1443, 5 (explaining that Ferrell failed to disclose material exculpatory evidence).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 6.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 6–7.

<sup>114</sup> Lowe, *supra* note 2.

attorneys at the GRC left, as well as three of the four investigators.<sup>115</sup> The attorney handling Davis' claim after this had eighty other cases.<sup>116</sup> By her own admission in her affidavit, the focus of the office became to avert disaster.<sup>117</sup> While going through the appeals process of Davis' conviction, she knew that witnesses should have been interviewed; however, the office did not have the resources to do so.<sup>118</sup> Thus, the recantation of testimony and other exculpatory evidence went unheard while Davis' case went through the appeals process.<sup>119</sup>

On December 14, 2001, Davis filed his first habeas petition in the United States District Court for the Southern District of Georgia.<sup>120</sup> Davis alleged that the prosecutor knowingly presented false evidence, that the prosecutor failed to disclose material exculpatory evidence, and that he received ineffective assistance of counsel.<sup>121</sup> The district court denied Davis' habeas corpus petition and the Eleventh Circuit affirmed the district court's denial.<sup>122</sup>

When the witnesses recanted and submitted affidavits, Davis sought to get his conviction overturned with the new evidence.<sup>123</sup> However, Congress' enactment of the AEDPA in 1996 presented new obstacles for Davis. Because Davis filed a habeas corpus petition in 2001,<sup>124</sup> the AEDPA required him to file an application with the Eleventh Circuit seeking authorization to file a second or successive federal habeas petition.<sup>125</sup> This new requirement meant that Davis would not be able to file a second or successive habeas petition in federal district court unless a three-judge panel of a United States Court of Appeals determined that Davis' application relied on facts that could not have been discovered previously through the exercise of due diligence.<sup>126</sup> The new evidence "must be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Davis] guilty of the underlying offense."<sup>127</sup> This filing was the first time that Davis had raised his freestanding actual innocence claim.<sup>128</sup> The Eleventh Circuit concluded that Davis did not meet his burden and denied his application to file a second or

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Davis IV*, 565 F.3d 810, 813 (11th Cir. 2009).

<sup>121</sup> *Id.*

<sup>122</sup> *Davis III*, 465 F.3d 1249, 1250–51, 1256 (11th Cir. 2006).

<sup>123</sup> *See Davis IV*, 565 F.3d at 814.

<sup>124</sup> Davis' first federal habeas petition was filed on December 14, 2001. *Id.* at 813.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 816 (citing 28 U.S.C. § 2244(b)(2)(B)(ii)).

<sup>127</sup> *Id.* at 823 (quoting 28 U.S.C. § 2244(b)(2)(B)(ii)) (internal quotations omitted).

<sup>128</sup> *Id.* at 813.

successive habeas petition.<sup>129</sup> The court reasoned that a showing of actual innocence alone was insufficient and that section 2244(b)(2)(B)(ii) is “an actual innocence plus standard.”<sup>130</sup> The court’s message was that under section 2244(b)(B)(ii) innocence is not enough to satisfy the statute.<sup>131</sup> A constitutional violation must accompany the new evidence.<sup>132</sup>

Next, Davis filed a petition for a writ of habeas corpus directly in the Supreme Court.<sup>133</sup> The NAACP, former prosecutors, and members of the judiciary filed amici curiae briefs in support of Troy Davis’ original writ of habeas corpus petition.<sup>134</sup> The Court took an extraordinary measure;<sup>135</sup> it transferred, instead of denying, the original writ.<sup>136</sup> During the Court’s summer recess,<sup>137</sup> it produced an opinion that was only one paragraph in length.<sup>138</sup> The Court concluded that Davis should be granted an evidentiary hearing and transferred the original writ to the United States District Court for the Southern District of Georgia to determine whether Davis’ affidavits clearly established his innocence.<sup>139</sup> Justice Stevens wrote the concurring opinion<sup>140</sup> and Justice Scalia wrote the dissenting opinion,<sup>141</sup> however, noticeably, four Justices did not take part in the decisions.<sup>142</sup>

Justice Stevens’ concurrence supported the Court’s majority opinion to transfer the writ back to the district court over Justice Scalia’s strong dissent, which called the transfer “a fool’s errand.”<sup>143</sup> First, Justice Stevens noted that Davis’ case satisfied the “exceptional circumstances” requirement of Rule 20 because there was a “substantial risk of putting an innocent man to death,” and that alone was sufficient justification to require the district court to hold an evidentiary hearing.<sup>144</sup> Second, Justice Stevens contended that the district court may be able to grant relief despite the extreme deference required by 28 U.S.C. § 2254(d)(1).<sup>145</sup> Justice Stevens invited the district court to conclude that section 2254(d)(1) either “does not apply” to

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<sup>129</sup> *Id.* at 827.

<sup>130</sup> *Id.* at 823 (internal quotations omitted). The Court explained that in order to accommodate Davis’ freestanding actual innocence claim, the statute would have to be “read to say that the new evidence must ‘be sufficient to establish clear and convincing evidence that, but for the fact that the applicant was actually innocent, no reasonable factfinder would have found the applicant guilty of the underlying offense.’” *Id.*

<sup>131</sup> *Id.* at 824.

<sup>132</sup> *Id.* at 823.

<sup>133</sup> *Davis V*, 130 S. Ct. 1 (2009).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 2.

<sup>136</sup> *Id.* at 1.

<sup>137</sup> SUP. CT. R. 4.1. The Court’s open session begins on the first Monday in October. *Id.*

<sup>138</sup> *Davis V*, 130 S. Ct. at 1.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 1–3 (Stevens, J., concurring).

<sup>141</sup> *Id.* at 2 (Scalia, J., dissenting).

<sup>142</sup> *Id.* at 1.

<sup>143</sup> *Id.* at 4 (Scalia, J., dissenting) (“[T]his Court sends the District Court for the Southern District of Georgia on a *fool’s errand.*”) (emphasis added).

<sup>144</sup> *Id.* at 1 (Stevens, J., concurring).

<sup>145</sup> *Id.* at 1–2.

original writs or does not apply “with the same rigidity.”<sup>146</sup> Alternatively, Justice Stevens urged the district court to conclude that section 2254(d)(1) was unconstitutional because its rigid standards gave such extreme deference to state court decisions that it would bar relief for a death row inmate who has established his innocence.<sup>147</sup>

To the contrary, Justice Scalia argued in his dissent that the language of the AEDPA was plain and clearly precluded the district court from granting relief on the transferred original writ.<sup>148</sup> He further noted that the Court should have ruled on the issue of whether the AEDPA was constitutional when its application barred relief for a prisoner presenting an actual innocence claim.<sup>149</sup> Still, the Court left open the questions of whether the AEDPA applied to original writs and whether the Act applied to actual innocence claims.<sup>150</sup>

### III. ANALYSIS

The AEDPA fails to mention the Court’s authority to entertain original writs<sup>151</sup> as well as an exception for actual innocence claims.<sup>152</sup> These omissions plant the seed of uncertainty in the federal courts and punish potentially innocent men. The federal courts are uncertain as to: (1) whether section 2254(d)(1) precludes it from granting relief on transferred original writs;<sup>153</sup> or (2) whether section 2254(d)(1) employs a procedural bar against prisoners who are sentenced to death, but have evidence that may demonstrate their innocence.<sup>154</sup>

As the following analysis demonstrates, the AEDPA’s limitations on federal writs of habeas corpus should not apply to petitions for original writs of habeas corpus filed under the Supreme Court’s original jurisdiction. At the very least, the AEDPA’s limitations should not apply to actual innocence claims. While Congress may have intentionally and correctly failed to mention any of the Court’s authority to entertain original writs in the AEDPA, Congress erred in its failure to include an exception for actual innocence claims.

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<sup>146</sup> *Id.* at 1.

<sup>147</sup> *Id.* at 1.

<sup>148</sup> *Id.* at 2 (Scalia, J., dissenting) (“Insofar as it applies to the present case, [2254(d)(1)] bars the issuance of a writ of habeas corpus . . .”).

<sup>149</sup> *Id.* at 4.

<sup>150</sup> *See id.* at 2 (Stevens, J., concurring).

<sup>151</sup> *See Felker v. Turpin*, 518 U.S. 651, 660 (1996) (“No provision of Title I mentions our authority to entertain original habeas petitions . . .”).

<sup>152</sup> *Davis V*, 130 S. Ct. at 1.

<sup>153</sup> *See In re Davis (Davis VI)*, No. CV409-130, 2009 U.S. Dist. LEXIS 75894, at \*1–2 (S.D. Ga. Aug. 26, 2009) (ordering the parties to file briefs in order to aid the court in determining whether 2254(d)(1) applies to original writs filed under the Supreme Court’s original jurisdiction).

<sup>154</sup> *See supra* Part II.

### A. Section 2254(d)(1) and the Original Writ

Section 2254(d)(1) forecloses the power of federal courts to remedy wrongful convictions on transferred writs that originated under the Court’s original jurisdiction.<sup>155</sup> Prior to petitioning for federal habeas corpus relief, a state prisoner will likely have had his claim adjudicated on its merits in state court proceedings as in the *Davis* case.<sup>156</sup> Thus, Congress’ attempt to curb abuse of the writ effectively eliminates a remedy, as section 2254(d) precludes federal courts from granting a prisoner’s petition for habeas corpus if a state court adjudicated the claim on its merits in a state court proceeding.<sup>157</sup> Section 2254(d) offers two exceptions,<sup>158</sup> which completely undercut the federal courts’ ability to grant relief even if the state court erred because the statute requires federal courts to deny relief, unless the state court *unreasonably* applied clearly established federal law.<sup>159</sup>

#### 1. The Unreasonable Standard of Section 2254(d)(1)

The unreasonable standard required by section 2254(d)(1) is a rigid standard that bars relief for potentially innocent men.<sup>160</sup> A district court that conducted an evidentiary hearing on a transferred original writ may not grant relief to a prisoner if—in the court’s independent judgment—the state court erroneously or incorrectly applied clearly established federal law.<sup>161</sup> This standard’s extreme deference to state court’s prior rulings sends up red flags, which caught the Court’s attention in *Davis*.<sup>162</sup>

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<sup>155</sup> See *Davis V*, 130 S. Ct. at 2–3 (Scalia, J., dissenting) (asserting that the Court’s transfer of Troy Davis’ original petition for habeas corpus would *serve no purpose* because “[e]ven if the District Court were to be persuaded by Davis’ affidavits, it would have no power to grant relief.”).

<sup>156</sup> The requirement is subject to exception when “it appears that . . . (i) there is an absence of available state corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B); see *Banks v. Dretke*, 540 U.S. 668, 690 (2004); see also *Doyle*, *supra* note 19, at 16 (“The AEDPA preserves the exhaustion requirement . . .”) (internal citation omitted).

<sup>157</sup> See 28 U.S.C. § 2254(d).

<sup>158</sup> See *id.* § 2254(d)(1)–(2). The two exceptions are as follows:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

*Id.*

<sup>159</sup> *Capitol Hill Hearing*, *supra* note 70, at 24 (statement by Kogan).

<sup>160</sup> See *Davis V*, 130 S. Ct. 1 (2009); see also *Capitol Hill Hearing*, *supra* note 70, at 7 (statement of Henry C. “Hank” Johnson, Representative from Ga. and Member, Subcomm. On the Constitution, Civil Rights, and Civil Liberties).

<sup>161</sup> *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 410–13 (2000)). “Under § 2254(d)(1)’s unreasonable application clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.” *Id.* at 75–76 (internal citations and quotations omitted) (quoting *Williams*, 529 U.S. at 411).

<sup>162</sup> See *Davis V*, 130 S. Ct. at 1 (Stevens, J., concurring) (suggesting to the district court that § 2254(d)(1) may be unconstitutional because it is a rigid standard that would bar relief for an innocent man).

In *Davis*, the Court realized that once it transferred the original writ to the district court for an evidentiary hearing, the court could not grant relief, even if persuaded by Davis' affidavits, due to the high deference given to a state court's decision as required by section 2254(d)(1).<sup>163</sup> Justice Scalia asserted in his dissent that by transferring the original writ to the district court, the Court was sending the district court on "a fool's errand"<sup>164</sup> because section 2254(d)(1) made it "impossible for the District Court to grant any relief."<sup>165</sup> To the contrary, Justice Stevens, who authored the concurring opinion, contended that the district court could either deem the section unconstitutional or "may conclude that § 2254(d)(1) does not apply or does not apply with the *same rigidity*, to an original habeas petition such as [Davis' petition]."<sup>166</sup> Justice Stevens' assertions to the district court in *Davis* were far from the Court's prior stance on the unreasonable standard in section 2254(d)(1). In fact, prior to *Davis*, the Court repeatedly applied the unreasonable standard, without questioning its constitutionality.<sup>167</sup>

The Court's avoidance of whether the AEDPA applied to original writs may have called the Act's constitutionality into question.<sup>168</sup> In avoiding the issue which may have rendered the Act unconstitutional, the Court unanimously held that the AEDPA's limitations do not suspend the writ in violation of Article I, Section 9, Clause 2 of the United States Constitution because the Court was still able to entertain original writs.<sup>169</sup> Notwithstanding this holding, Justice Souter, in his concurrence—joined by Justices Stevens and Breyer in *Felker*, does provide that the constitutionality of the AEDPA would come into question if other statutory avenues, other than certiorari, were foreclosed.<sup>170</sup>

## 2. Congressional Intent

Since the AEDPA's enactment, an original writ has become an

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<sup>163</sup> *Id.* (Stevens, J., concurring) (suggesting that if the court found that § 2254(d)(1) applies, then the court could hold that the section was unconstitutional because it barred relief to a death row inmate who established his innocence); *id.* at 4 (Scalia, J., dissenting) ("Sending [the original writ] to a district court that 'might' be authorized to provide relief, but then again 'might' be reversed if it did so, is not a sensible way to proceed.").

<sup>164</sup> *Id.* at 4 (Scalia, J., dissenting).

<sup>165</sup> *Id.* at 2 (Scalia, J., dissenting) (emphasis added).

<sup>166</sup> *Id.* at 1 (emphasis added).

<sup>167</sup> See *Rompilla v. Beard*, 545 U.S. 374, 380–81 (2005); see also *Wiggins v. Smith*, 539 U.S. 510, 520 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003); *Williams v. Taylor*, 529 U.S. 362, 411 (2000); *Woodford v. Visciotti*, 537 U.S. 19, 27 (2003); *Brown v. Payton*, 544 U.S. 133, 141–42 (2005); *Carey v. Musladin*, 549 U.S. 70, 74–77 (2006).

<sup>168</sup> See *Felker v. Turpin*, 518 U.S. 651, 662–63 (1996) ("These restrictions apply without qualification to any 'second or successive habeas corpus application under section 2254.' Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions.") (internal citations omitted).

<sup>169</sup> *Id.* at 654.

<sup>170</sup> *Id.* at 667 (Souter, Stevens, & Breyer, JJ., concurring) ("[I]f it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress' Exception Clause power would be open.").

alternative to petitioning the lowest federal courts for habeas corpus relief in an effort to avoid the rigid standards of section 2254(d)(1).<sup>171</sup> Davis’ case has been the first to test that theory.<sup>172</sup> Despite the lack of precedence on the issue, Justice Stevens’ concurring opinion asserts that Congress may not have intended section 2254(d)(1) to apply to original writs; or if so, not with the same rigidity as other federal writs of habeas corpus.<sup>173</sup>

If Congress intended such an important change in the exercise of the Court’s jurisdiction over original writs, the text of the AEDPA would be clearer. First, since Congress conferred power to the Court to issue original writs in 1789, the Court has never been divested of any of its original habeas authority.<sup>174</sup> Congress does have the authority to regulate the Court’s appellate jurisdiction. However, throughout history, the Court has protected its habeas jurisdiction by construing narrowly Congressional attempts to eliminate its authority.<sup>175</sup> Second, Title I of the AEDPA does not mention the Court’s authority to entertain original habeas petitions.<sup>176</sup> This omission leaves a reader of the Act to infer that section 2254(d)(1) is not applicable to original writs. In *Davis*, Justice Scalia dismissed Justice Stevens’ argument.<sup>177</sup> Justice Scalia asserted that the text of section 2254(d)(1) covers all federal habeas petitions.<sup>178</sup> However, a unanimous Court in *Felker* side-stepped the constitutionality of the Act when it concluded that the Court’s original jurisdiction was not repealed by implication because Title I of the AEDPA *did not* specifically mention the Court’s authority to entertain original writs.<sup>179</sup>

Furthermore, the Act’s purpose makes it clear that Congress intended the Act not to apply to original writs. The purpose of the Act was to remedy prior problems in the federal habeas law.<sup>180</sup> The avenues Congress desired to use to effectuate this purpose are seemingly clear from the language and the intentional omission of the Court’s authority to entertain original writs. Congress amended section 2254(d)(1) to require federal courts to give more deference to a state court’s prior ruling in an effort to curb abuses of the writ and to add finality to the federal habeas

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<sup>171</sup> See Hack, *supra* note 62, at 177 (exploring avenues of relief that may be available to state prisoners, other than § 2254, in order to avoid the high standards of deference of § 2254(d)).

<sup>172</sup> The Supreme Court has not acted on an original writ since Congress enacted the AEDPA. See *supra* Part II.A.

<sup>173</sup> *Davis V*, 130 S. Ct. 1 (2009).

<sup>174</sup> See *Palmore v. Superior Court of D.C.*, 515 F.2d 1294, 1301 (D.C. Cir. 1975) (explaining Congress expanded the Court’s original habeas jurisdiction by allowing the Court to transfer the writ, instead of denying it on factual issues).

<sup>175</sup> *Id.* at 1301; see also *Felker v. Turpin*, 518 U.S. 651, 660–61 (declining to find a repeal of the Court’s original habeas authority by implication); *Ex parte Yerger*, 75 U.S. 85, 106 (1869) (rejecting the suggestion that the Act of 1867 repealed the Court’s habeas authority by implication).

<sup>176</sup> *Felker*, 518 U.S. at 660–61.

<sup>177</sup> *Davis V*, 130 S. Ct. at 3.

<sup>178</sup> *Id.*

<sup>179</sup> *Felker*, 518 U.S. at 660–61.

<sup>180</sup> Doyle, *supra* note 19, at 10–12.

review procedure.<sup>181</sup> Congress sought to reform habeas corpus law, in part, from complaints of abuse of the writ from federal judges.<sup>182</sup> Those complaints, however, never mentioned abuses of the original writ, as it was a less-traveled path and rarely granted. Additionally, the lack of deference was due to a lower federal court's ability to review *de novo* a state court's prior ruling and employ its own independent interpretation of federal law.<sup>183</sup> Congress sought to accomplish finality by placing a new constraint—the unreasonable standard—on a federal habeas court's ability to grant a state prisoner's application for a writ of habeas corpus.<sup>184</sup> In contrast, the Supreme Court continues to have a wide range of discretion in exercising its original habeas corpus jurisdiction.<sup>185</sup> Additionally, it was not Congress' intent to foreclose the power of federal courts to remedy wrongful convictions on transferred original writs. Section 2254(d)(1), which precludes federal courts from providing a remedy on transferred original writs, contradicts the transfer authority Congress gave the Court as an alternative to denying original writs that involved factual issues.

*B. Section 2254(d)(1) Should Not Apply to Actual Innocence Claims*

The Supreme Court issued a one-paragraph opinion that transferred Davis' original writ to the district court.<sup>186</sup> As Justice Scalia acknowledged, the Court's opinion lacked explanation and "meaningful guidance."<sup>187</sup> The opinion cast a cloud of doubt over the constitutionality of section 2254(d)(1) as it pertains to actual innocence claims; however, the Court did not declare the section unconstitutional, and the concurring opinion only offered an invitation for the district court to conclude as much.<sup>188</sup> The Court created more uncertainty on the state of the law and how the lower courts should apply section 2254(d)(1), if the section applies to actual innocence claims at all.<sup>189</sup> If the Court had resolved the question of the constitutionality of section 2254(d)(1), as it pertains to actual innocence claims, then potentially innocent men would not be faced with procedural bars that would continue their imprisonment or death sentences.

Section 2254(d)(1), as enacted by Congress in 1996, does not

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<sup>181</sup> *Id.* at 14–15.

<sup>182</sup> *Id.* at 7.

<sup>183</sup> *Id.* at 11.

<sup>184</sup> *Williams v. Taylor*, 529 U.S. 362, 412 (2000) ("In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.").

<sup>185</sup> SUP. CT. R. 20.1.

<sup>186</sup> *Davis V*, 130 S. Ct. 1 (2009).

<sup>187</sup> *Id.* at 4 (Scalia, J., dissenting).

<sup>188</sup> *Id.* at 1 (Stevens, J., concurring).

<sup>189</sup> *See Hooks v. Branker*, 348 F. App'x 854, 860 (4th Cir. 2009). The *Hooks* court, despite the Supreme Court's decision in *Davis*, affirmatively concluded that "the Supreme Court has never recognized" an actual innocence claim "as a meritorious ground for habeas corpus." *Id.*

contain an exception for claims of actual innocence.<sup>190</sup> Actual innocence claims are not distinguished under section 2254(d)(1) from other claims that allegedly produce a wrongful conviction.<sup>191</sup> Thus, when a state prisoner presents an actual innocence claim and it is rejected on its merits, habeas relief may only be granted if one of the two exceptions to section 2254(d) apply.<sup>192</sup> Section 2254(d)(1) does not mention actual innocence claims.<sup>193</sup> Therefore, a prisoner must show that the state court’s ruling was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court.

A state court’s rejection of a prisoner’s actual innocence claim is not contrary to clearly established federal law.<sup>194</sup> The Supreme Court has never recognized a prisoner’s claim for actual innocence as valid.<sup>195</sup> The Court “has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent.”<sup>196</sup> Thus, a state court cannot contradict or unreasonably apply a law that the Court has never recognized as valid.<sup>197</sup> Therefore, the omission in section 2254(d)(1) of an exception for actual innocence claims leads to absurd results, such as killing a potentially innocent man because his claim may not show that the state court’s ruling was either contrary too or an unreasonable application of clearly established federal law, as determined by the Supreme Court.<sup>198</sup>

This absurd result, which the statute produces, is why section 2254(d)(1) should not apply to actual innocence claims. The Eighth Amendment precludes “cruel and unusual punishment[.] . . .”<sup>199</sup> Prior to *Davis*, the Court never explicitly concluded whether a death-row inmate had a right not to be executed if he was innocent.<sup>200</sup> However, the Second Circuit in *Triestman* cast doubt on the statute’s constitutionality to the extent that it may bar potentially innocent men from presenting evidence that would establish their innocence.<sup>201</sup> Specifically, the *Triestman* court

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<sup>190</sup> See *Davis V*, 130 S. Ct. at 3 (Scalia, J., dissenting); see also *id.* n.\* (“[O]ther arguments as to why § 2254(d)(1) might be inapplicable . . . that it contains an exception (not to be found in its text) for claims of actual innocence—do not warrant a response.”).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 2 (Scalia, J., dissenting).

<sup>193</sup> See 28 U.S.C. § 2254(d)(1)–(2).

<sup>194</sup> *Davis V*, 130 S. Ct. at 3 (Scalia, J., dissenting).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 7.

<sup>197</sup> *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000).

<sup>198</sup> *Capitol Hill Hearing*, *supra* note 70, at 24 (statement of Kogan) (testifying that a possible outcome of *In re Davis* is that “it is entirely possible that a man who has proven that he is *actually innocent* will be denied relief *and put to death*—because the federal courts may be unable to say that a state court decision rejecting his claim was unreasonably wrong at the time the state court acted.”) (emphasis in original).

<sup>199</sup> U.S. CONST. amend VIII.

<sup>200</sup> *Capitol Hill Hearing*, *supra* note 70, at 46 (statement of Blume).

<sup>201</sup> *Triestman v. United States*, 124 F.3d 361, 363 (2d Cir. 1997).

concluded that “serious constitutional questions would arise if a person who can prove his actual innocence on the existing record—and who could not have effectively raised his claim of innocence at an earlier time—had no access to judicial review.”<sup>202</sup> Today, executing an innocent man should be considered cruel and unusual punishment.<sup>203</sup> As *Davis* illustrates, the AEDPA, as it is applied today, should be deemed unconstitutional to the extent that it would allow an innocent American to be executed, because it prevents him from presenting his compelling new evidence that would establish his innocence.<sup>204</sup> The notion of executing innocent men who could prove their innocence, but a statute bars their opportunity to do so, is inhumane.<sup>205</sup> The Court sent a message when it transferred *Davis*’ original writ to the district court in light of noticeable procedural bars that the execution of a potentially innocent man does offend the Constitution.<sup>206</sup> Furthermore, Justice Stevens recognized in his concurring opinion that section 2254(d)(1) is a rigid standard and if it barred relief to a death row inmate who had established his innocence then it should be deemed unconstitutional.<sup>207</sup>

However, the Court sent a clear message to Congress by taking such an extraordinary step in *Davis*’ case.<sup>208</sup> On November 3, 2009, Mr. Henry C. “Hank” Johnson, Jr. introduced House Resolution 3986, a bill to amend Title 28 of the United States Code,<sup>209</sup> to “clarify the availability of Federal habeas corpus relief for a person who is sentenced to death though actually innocent . . . .”<sup>210</sup> H.R. 3986 is commonly referred to as the “Effective

<sup>202</sup> *Id.* at 363.

<sup>203</sup> See *Capitol Hill Hearing*, *supra* note 70, at 46 (statement of Stephen F. Hanlon, Chair, Am. Bar Ass’n Death Penalty Moratorium Project Steering Comm.).

<sup>204</sup> *Id.* (statement of Blume) (stating at a hearing on Bill 3986 that proposes to amend § 2254 that he believes that “*Davis* speaks clearly to the fact that there is now a constitutional right not to be executed while you are innocent. Thus this Committee has and the Congress has the power to pass it and I think also to influence the decision of what is the standard for innocence, which is something this bill takes on.”).

<sup>205</sup> *Id.* at 7 (statement of Johnson) (“As the law stands today, death row inmates can be stranded in a procedural no man’s land, condemned to die, even if there is compelling new evidence and even if their habeas lawyers were ineffective in some way. Imagine that, in America, you can be killed by the state without new evidence of your innocence ever getting a hearing. The status quo is inhumane, unconstitutional, and unacceptable.”).

<sup>206</sup> See *Davis V*, 130 S. Ct. 1, 1 (2009)

<sup>207</sup> *Id.*

<sup>208</sup> See *Capitol Hill Hearing*, *supra* note 70, at 32 (statement of Michael E. O’Hare, Supervisory State’s Attorney, Civil Litigation Bureau, Office of the Chief State’s Attorney, Connecticut).

<sup>209</sup> Effective Death Penalty Appeals Act, H.R. 3986, 111th Cong. (2009). The bill is sponsored by Henry “Hank” Johnson, Jr. (D-GA), and originally cosponsored by Jerrold Nadler (D-NY), John Conyers, Jr. (D-MI), Robert “Bobby” C. Scott (D-VA), Anthony Weiner (D-NY), John Lewis (D-GA), and Sheila Jackson-Lee (D-TX). *Id.* Prior to the Court’s opinion in *Davis*, H.R. 3320 was introduced to eliminate a prisoner’s requirement of making a motion to the court of appeals before filing a second or subsequent petition for habeas corpus when there are newly discovered accounts by credible witnesses who recant prior testimony or establish improper action of state or federal agents. Justice for the Wrongfully Accused Act, H.R. 3320, 111th Cong. (2009). The bill was introduced to amend 28 U.S.C. § 2244(b)(3) and § 2243. *Id.* The bill has a single cosponsor. *Id.* Thus, the fact that this bill was prior to the Court’s ruling, it did not receive as much support as H.R. 3986.

<sup>210</sup> 155 CONG. REC. 12,287 (2009).

Death Penalty Appeals Act.”<sup>211</sup>

H.R. 3986 proposes that section 2254(d) be revised to add a third exception for actual innocence claims.<sup>212</sup> The current proposal eliminates the semicolon and “or” in section one and the period in section two.<sup>213</sup> Additionally, H.R. 3986 proposes that section 2244(b) of the AEDPA be amended to allow prisoners with actual innocence claims to have second or successive habeas corpus applications in the federal courts.<sup>214</sup> If the language of this bill had been implemented in 2009, at the time Davis applied to the Eleventh Circuit for authorization to file a second or successive federal habeas petition, then it is very likely that the court would have come to a different result.<sup>215</sup>

Congress has held hearings on the proposed bill H.R. 3986 to amend section 2254(d)(1).<sup>216</sup> The overall objective of the testimony was to examine the impact of the federal habeas law and the impact on the death penalty.<sup>217</sup> On December 8, 2009, the testimony showed discontent with the state of the federal habeas law and the extreme deference that federal courts must give to state courts’ prior rulings.<sup>218</sup> While the state of the law remains

<sup>211</sup> H.R. 3986.

<sup>212</sup> *Id.* (“(3) resulted in, or left in force, a sentence of death that was imposed without consideration of newly discovered evidence which, in combination with the evidence presented at trial, demonstrates that the applicant is probably not guilty of the underlying offense.”).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* The proposed language to amending 28 U.S.C. § 2244(b) is as follows:

A claim that an applicant was sentenced to death without consideration of newly discovered evidence which, in combination with the evidence presented at trial, could reasonably be expected to demonstrate that the applicant is probably not guilty of the underlying offense may be presented in a second or successive habeas corpus application.

*Id.*

<sup>215</sup> See *Davis IV*, 565 F.3d 810, 823 (2009). The Court explained that in order to accommodate Davis’ freestanding actual innocence claim, the statute would have to be “read to say that the new evidence must ‘be sufficient to establish by clear and convincing evidence that, but for *the fact that the applicant was . . . actually innocent*, no reasonable factfinder would have found the applicant guilty of the underlying offense.’” *Id.* (emphasis in original). The court’s language of how the statute would have to be read in order to grant Davis relief is directly aligned with H.R. 3986. But see *In re Davis (Davis VII)*, No. CV409–130, 2010 U.S. Dist. LEXIS 87340, \*1–2 (Aug. 24, 2010) (recognizing a prisoner’s freestanding actual innocence claim as valid by holding that “executing an innocent person would violate the United States Constitution . . .”).

<sup>216</sup> See, e.g., *Capitol Hill Hearing*, *supra* note 70.

<sup>217</sup> *Id.* at 1.

<sup>218</sup> See, e.g., *id.* at 23–25 (statement of Kogan) (“We cannot as a civilized society tell these people you don’t have any more rights because it is procedurally barred. . . . But still I say that our system must provide all the safeguards that we possibly can in regards to preserving that very, very sacred writ of habeas corpus. And I think that Congress needs to reexamine the situation and come up with a comprehensive law.”); *id.* at 40 (statement of Blume) (The Fifth Circuit agreed that an attorney’s performance was unreasonable and agreed that it was prejudicial, yet “they said they could do nothing because while the State court decision was wrong, it was not so off the mark and thus AEDPA tied their hands. Again, that should not be allowed. If there is a constitutional violation the Federal court should have the power to remedy it. This court should go beyond just the question of innocence, engage in sweeping reform and untie the hands of the Federal courts and allow them to get down to the business of remedying constitutional error.”); *id.* at 44 (statement of Nadler) (“[I]t is now obvious that capital habeas [corpus] . . . now take[s] twice as long as [it] did prior to [the] AEDPA’s enactment.”); *id.* at 45 (statement of Blume) (“I would suggest that 2254(d) be eliminated.”).

in limbo, the Court and Congress run the risk of innocent men dying because of procedural bars that are incorporated in section 2254(d)(1).

#### V. SAVING AN INNOCENT MAN IS NOT A *FOOL'S ERRAND*

Actual innocence is not enough—this is the current state of the federal habeas law under the AEDPA.<sup>219</sup> If a court's error is insufficient to grant habeas relief to an innocent man sentenced to die, then Congress has overstepped its authority and grossly overreached its goal to limit the grant of the writ. Congress erred in omitting an exception for actual innocence claims in the AEDPA. It has become critical to pass H.R. 3986 because innocent men are being denied relief from wrongful convictions. Additionally, it is “an atrocious violation of our Constitution and the principles upon which it is based to execute an innocent person.”<sup>220</sup> Today, the current state of federal habeas law operates to do just that—execute an innocent person.

The *Davis* case illustrates a state prisoner's journey through the legal system; showing how a writ of habeas corpus is an innocent prisoner's last attempt to get a conviction and life imprisonment or death sentence overturned.<sup>221</sup> Justice Scalia characterized the Court as sending the district court on “a fool's errand.”<sup>222</sup> Justice Stevens suggested and referenced legal principles that, unfortunately, do not currently exist in American jurisprudence because he thought that the AEDPA should include an exception for actual innocence claims. So was transferring an original writ to the district court a fool's errand, if section 2254(d)(1) precluded the court from granting relief? No. The Court's decision has operated to save potentially innocent men from irreversible error—death. Thus, Justice Stevens' opinion is brilliant in the fact that it sent a message to Congress, which made them go back to the drawing board and draft legislation that will carve out an exception for actual innocence claims. This will prevent potentially innocent men, like Troy Davis, from being executed because of rigid procedural bars such as those in section 2254(d)(1). Congress did not mention the Court's authority in Title I of the AEDPA because section 2254(d)(1) would foreclose the power of federal courts to remedy wrongful convictions, such as Troy Davis' conviction. Section 2254(d)(1) should not apply to original writs or actual innocence claims because it was not Congress' intent to kill innocent men. In America, preservation of an innocent man's life is not a *fool's errand*.

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<sup>219</sup> *Davis IV*, 565 F.3d at 823 (Section 2244(b)(2) is “an ‘actual innocence plus’ standard.”).

<sup>220</sup> *Davis V*, 130 S. Ct. 1, 1-2 (2009) (Barkett, J., dissenting) (quoting *Davis IV*, 565 F.3d at 830) (internal quotations omitted).

<sup>221</sup> See *Davis V*, 130 S. Ct. at 3-4 (Scalia, J., dissenting).

<sup>222</sup> *Id.* at 4.