U.S. Supreme Court to allow execution of the innocent?

by Anita Gallagher

On Oct. 7, the U.S. Supreme Court heard one hour of oral argument in the monumental case of *Leonel Herrera v. Collins* (State of Texas), which posed the question to the Court: "Does it violate the Eighth and Fourteenth Amendments to execute a person who has been convicted of murder but who is innocent?"

Even worse than its very consideration of such a proposition, the U.S. Supreme Court is expected to rule by July 1993 that it would be legal to execute someone proven innocent after trial, provided that his trial was conducted according to the legal procedures obtaining in his state. It is widely believed that the Court previewed its ultimate decision last February, when Justices Harry Blackmun, John Paul Stevens, Sandra Day O'Connor, and David Souter provided the minimum four votes needed for the Court to take the case. However, they could not muster the fifth vote needed to stay Herrera's execution while the case was heard—a fifth vote that would be needed to win. Fortunately, the Texas Court of Criminal Appeals then stayed Herrera's execution throughout the Supreme Court's proceedings.

Leonel Herrera's attorneys tried to present proof of his innocence which emerged long after Texas's legal time limit for introducing new evidence had expired. Under Texas law, this period extends only 30 days after a defendant is sentenced. Thus, procedure, and running executions on time, is placed above the discovering of truth in the state's law.

At the oral argument on Oct. 7, Justice Anthony Kennedy asked Herrera's attorneys: "Suppose a videotape shows that a man convicted of murder by a jury is really innocent. Would it violate the Constitution to allow the man to be executed?" Texas Assistant Attorney General Margaret P. Griffey promptly answered, "No Your Honor. It would not be a violation of the Constitution, under those circumstances."

The Eighth Amendment prohibits "cruel and unusual punishment." The Fourteenth Amendment states that a person shall not be "deprived of life . . . without due process of law."

Documentation

Petitioner's brief to the U.S. Supreme Court, Talbot D'Alemberte and Mark Olive, Esqs.:

Leonel Herrera, the Petitioner, is innocent of the charge for which he was convicted and sentenced to death. . . . In Part I, Petitioner details how the circumstances and atmosphere of his pre-trial and trial proceedings presented the opportunity for a wrongful conviction and sentence of death. Part II describes the inconclusive evidence of guilt presented by the prosecution at trial. In Part III, Petitioner sets out the post-trial evidence that supports his claim of innocence. It discloses that police involvement in the drug trade in the Rio Grande Valley along the Mexican border led to the death of two police officers. Police knew but kept silent about Petitioner's innocence rather than reveal the unseemly and incriminating police-shared responsibility for these offenses. Furthermore, the actual killer's son witnessed the killings, and has sworn that his father Raul Herrera, not Leonel Herrera, committed them. A former judge and now practicing attorney in the Valley has stated under oath that his former client, Raul Herrera (Leonel's brother), confessed to him that he, not the Petitioner, committed the crimes. This new information is in all detail consistent with the story contained in the trial transcript with respect to how the offense occurred, consistent but for one fact—it was Raul, not Petitioner, who was at the scene.

Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit, by Mark E. Olive, Esq.:

The Court of Appeals accepted as a matter of fact that [Herrera] is indeed innocent of the crimes for which he is scheduled to be executed, and so no evidentiary hearing was necessary to prove his innocence. The Court accepted as a matter of fact that Petitioner could prove his innocence. The Court of Appeals then held that executing a person whom everyone, including the Courts, knows to be innocent did not run afoul of the Constitution.

The rule of law scribed by the lower court in order to vacate the stay of execution is one which, as far as petitioner can tell, has never been embraced by any federal court under current death penalty statutes. According to the lower court, Texas has no procedure available in post-conviction proceedings to prevent the execution of a person convicted in state court but who proves to everyone that he or she is innocent, and *habeas corpus* [post-conviction appeal] provides no mechanism for protecting that person. This is wrong.

If states are perfectly free under the Eighth and Fourteenth Amendments to execute persons who can prove beyond a reasonable doubt their innocence, then this Court should take the responsibility of saying so and then explaining how it is that the death penalty is reliable, reserved for the most deserving, and does not strike like lightning, in conjunction with such a rule.

The importance of vindicating claims of actual innocence has special force in the death penalty context. As Justice [Thurgood] Marshall emphasized in *Ford v. Wainwright* . . . "[i]n capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard

"Life is a right, revenge is not. No death penalty," reads the banner at a demonstration in Washington, D.C. on Oct. 7, the day on which the U.S. Supreme Court heard the case of Leonel Herrera, a man scheduled to be executed for a crime that even the Court of Appeals admits he did not commit.

After a rally at the Supreme Court, demonstrators assembled at the statue of Alfred Pike, the Confederate general and Freemason who was a founder of the Ku Klux Klan; they demanded that the statue be torn down, and dressed it in hood and robes, pending that happy day.

The rally was led by the Rev. James Bevel (second from the speaker's right), running-mate of independent presidential candidate Lyndon H. LaRouche. At the microphone is historian Anton Chaitkin, who unearthed the true story of Pike's role.

of reliability. . . . This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different."

With respect to this claim in Petitioner's case, the constitutional violation *is* that his execution, as an innocent person, would violate the Eighth and Fourteenth Amendments. If it would violate the Constitution to execute someone who was 12 years old at the time of the offense, or someone who was insane at the time of an execution, then, *a fortiori* it would violate the Constitution to execute an innocent person. . . . [emphasis in original]

"Friend of the Court" Brief of U.S. Solicitor General Kenneth P. Starr, in support of Texas:

[Herrera] claims that the Cruel and Unusual Punishments Clause bars his execution because he has a colorable claim of actual innocence. But that Clause only limits the penalty imposed on a convicted defendant. . . . Because Petitioner's claim goes to his conviction rather than his sentence, the Eighth Amendment is inapplicable.

[Herrera] challenges his sentence on the ground that he is innocent of the crime, not on the ground that a specific constitutional provision was violated at his trial. The only constitutional provision that could be relevant to such a claim is the Due Process Clause; the issue therefore ultimately reduces to whether that Clause guarantees Petitioner relief on his claim of newly discovered evidence. In our view, due process does not entitle a prisoner to a judicial remedy for newly discovered evidence. Even if it did, however, a State can fix a reasonable time limit for such motions.

Rather, [Herrera's] claim is that even if the verdict was not infected by constitutional error, or indeed, any *legal* error at all, that verdict is factually inaccurate, as new evidence reveals. Federal courts lack supervisory power over state courts and cannot vacate a state conviction absent a constitutional violation. . . . [T]he review contemplated by [the] *Jackson* [case] is not to determine whether the trier of fact has made the *correct* decision; it only forbids the trier of fact from making an *irrational* decision [emphasis in original].

Petitioner's Brief to the U.S. Supreme Court, by Talbot D'Alemberte and Mark Olive, Esqs.:

The Court of Appeals did not quarrel with Leonel Herrera's evidence that he did not commit the murder for which he was convicted and sentenced to death. The panel held that "Herrera's assertion of 'actual innocence' presents no . . . claim for relief." Petitioner contends that the promises made by the Eighth and Fourteenth Amendments should not be so empty. Nothing is more barbaric . . . than gratuitously to execute an innocent person. This Court should not countenance such an affront to human dignity.