Does Real Innocence Count in Review of Capital Convictions?

by James C. Harrington[*]

I. THE *HERRERA* DECISION

Most Texans probably would find it offensive, if not repulsive, to basic principles of democracy and liberty to execute a person who is actually innocent of the capital offense for which he was convicted. Yet despite this, a strange configuration of federal and Texas statutory and case law seems to compel that very result for convicted persons who come forward after trial with substantial new evidence that they are in fact not guilty. *Herrera v. Collins*,[1] a 1993 United States Supreme Court decision authored by Chief Justice William Rehnquist, held that absent an extraordinary situation the Fourteenth Amendment to the United States Constitution does not guarantee a federal habeas corpus hearing on newly discovered evidence, so that a possibly innocent person could be spared the death penalty.

This leads to several fundamental questions: Is the timing of discovering evidence paramount to the federal constitution even when it means saving one individual's life, but condemning another's? In other words, can a condemned man be denied a habeas corpus hearing based on new evidence acquired a year after his conviction, which he would have been able to present to the trial court before the conviction became final? This problem reduces down to the fundamental concern of whether procedure may trump real innocence.

In *Herrera*, the Rehnquist majority answered affirmatively, despite Justice Harry Blackmun's sharp dissent that this holding came "perilously close to simple murder."[2] In particular, the Court decided that the Fourteenth Amendment Due Process Clause requires only that the initial trial be procedurally fair, so that a subsequent hearing on substantial new evidence of innocence is not mandated by the federal Constitution. Thus, a person who is actually innocent, but convicted in a procedurally correct trial, might face certain execution without offending federal due process requirements. Rehnquist acknowledged in the decision that innocent people are wrongly convicted of capital crimes and sentenced to death, but he and the Court nevertheless held that the traditional remedy for such "miscarriages of justice" lay in state clemency procedures.

II. LIMITATIONS OF TEXAS' REVIEW PROCEDURE

The faith that the *Herrera* majority placed in a historically politically-driven clemency process is nothing short of amazing, especially in view of how the Texas clemency procedure actually works. Texas constitutional and statutory law allows various forms of discretionary clemency for a wrongly convicted person, ranging from temporary reprieves, to commutation of sentences, to outright unconditional pardons. Yet, all such clemency decisions are limited by these same statutory and constitutional requirements.

First, clemency decisions originate as recommendations made by the Texas Board of Pardons and Paroles. They then go to the Governor, who must approve the recommendations if they are to be implemented.[3] Upon receiving a clemency recommendation, the Governor may accept or reject it, or grant something less than what the Board suggests. The Governor may not

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[1] 113 S. Ct. 853 (1993).

[2] 113 S. Ct. at 884 (Blackmun, J., dissenting).

[3] TEX. CONST. art. IV, § 11.

grant any greater clemency that what the Board specifically recommends. Beyond this, the Governor of Texas has little authority to grant any form of unilateral clemency, except a single 30-day reprieve from execution in any given case.[4]

The Texas Court of Criminal Appeals — the highest court for criminal justice in Texas — has further complicated the situation by handing down procedurally harsh decisions to which it has adhered vigorously. In fact, until very recently, its precedent precluded any judicial consideration of a claim of actual innocence based on newly discovered evidence unless the claim was made during the thirty-day period after judgment during which a motion for new trial may be made.[5]

Given this combination of federal and Texas law, the only hope for an individual wrongly sentenced to death who wants to produce evidence of actual innocence more than thirty days after judgment is to rely on the joint magnanimity of the Board of Pardons and Paroles and the Governor — a nearly impossible threshold in the politically-charged atmosphere surrounding capital punishment in Texas. Executions enjoy widespread support in Texas at levels probably even greater than throughout the nation as a whole.[6] Furthermore, politicians, particularly in gubernatorial and attorney general races, are all too eager to stir the bitter waters of the capital punishment issue for electoral gain, often bragging about being a greater advocate of executions than their opponents. Unfortunately, this posturing tends to limit the options of the Attorney General, who represents the State in post-trial habeas corpus procedures, as well as the Governor's willingness to pardon or commute the sentence of a convicted person. In fact, the electorate is so charged on this question that an act of mercy, or justice, might well doom one's political future in the state.

Adding to this problem is the fact that the convicted person often tends to be an unsavory sort with prior convictions. It becomes too difficult for elected officials (including members of the judiciary in Texas) to explain with sufficient clarity for public understanding that one should be executed only for the offense for which convicted, and not simply because one is a "bad apple." Elected judges from trial to appellate levels would rather bow to the winds of public opinion than exercise the check on the system that they are supposed to perform.

How, then, does one prevent the execution of a person sentenced to death who in reality may not be guilty and who has gathered substantial post-trial evidence buttressing a claim of innocence? In the *Herrera* case, the attorney for Raúl Herrera, brother of the convicted Leonel Herrera, claimed that Raúl had confessed before dying that he and not his brother had killed a Department of Public Safety trooper in the Rio Grande Valley. The attorney (a former judge) also produced the testimony of Raúl Herrera's son to support this claim. Yet because of the U.S. Supreme Court's almost callous decision on the matter, Leonel Herrera was executed without a judicial hearing on his claim of innocence based on newly discovered post-trial evidence.

III. THE *GRAHAM* CRIMINAL CASE

The second such case that has emerged out of Texas involves Gary Graham.[7] Several years after he was convicted and sentenced to death for a 1981 Houston shopping center murder,

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[4] *Id.*

[5] *Ex parte* Binder, 660 S.W.2d 103, 106 (Tex. Crim. App. 1983) (en banc); *see also Ex parte* Graham, 853 S.W.2d 564 (Tex. Crim. App. 1993) (en banc).

[6] According to the April 18, 1993 Parade Magazine poll, 87% of the 2,512 people randomly surveyed supported capital punishment. (Mark Clements Research, Inc.).

[7] Graham v. State, 671 S.W.2d 529 (Tex. Crim. App. 1984 (affirming conviction); *Ex parte* Graham, No. 17,568-01 (Tex. Crim. App., Feb. 19, 1988) (unpublished) (denying habeas corpus relief); Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) (en banc) (denying relief), *cert. denied*, 113 S. Ct. 892 (1993). *See also Ex parte* Graham, 853 S.W.2d 564 (Tex. Crim. App. 1993) (denying second habeas corpus application); *Ex*

Graham managed to produce six crime scene witnesses, a trial investigator, and five alibi witnesses to support his claim that he was actually innocent of the murder for which he was to be executed. In addition, a ballistics report was discovered after the trial, in the Harris County District Attorney's office, which conclusively showed that the gun used to murder the victim, Bobby Lambert, was not the weapon found in Graham's possession when he was arrested. Unfortunately for Graham, however, his personal criminal history is wretched.

Probably in large part due to this last fact, the administrative and judicial decisions in Gary Graham's case inexorably led him toward the death chamber. This is so despite all the new evidence on his behalf and despite the fact that, to the best of this author's knowledge, no reported case exists in which an individual was sentenced to death solely on the testimony of a single eyewitness, as was the case in Gary Graham's two-day trial. Concern about this point is especially high due to serious questions regarding the adequacy of this eyewitness testimony because of possible police suggestiveness and the brief time on which it was based (approximately 30 seconds). Furthermore, the competence of Gary Graham's court-appointed representation is also at issue.

Given the limitations on possible federal habeas corpus relief imposed by the *Herrera* decision and the unavailability of state habeas relief based on innocence claims, Gary Graham's basic problem became this: How he could secure a resolution of his claim of actual innocence premised on newly discovered evidence? Under the Texas constitutional and statutory scheme, the Board of Pardons and Paroles should have considered his case and made an appropriate recommendation, if necessary, to the Governor for action thereon. However, in Graham's case the board members refused to conduct a full hearing of any nature to address his claim. Instead, the Board choose to handle the matter by individually receiving facsimile transmissions of the hundreds of pages of material submitted by Graham's attorneys, as well as papers furnished by the Harris County District Attorney, the sentencing judge, and the confining sheriff, all of whom vigorously opposed Graham's attempt to win a reprieve from death.

After the Board members individually reviewed the voluminous faxed material (if indeed they really did), they were polled long-distance on April 28, 1993. The vote was 12-5 against a hearing and 10-7 against a temporary reprieve. The Board took the position that it was not required to grant a hearing and that it could resolve the matter through less formal procedures despite the candid admission in the Board administrator's cover memorandum which stated that the documents raised "considerable doubt regarding [Graham's] guilt."[8]

At this point, Governor Richard's granted the one-time thirty-day reprieve that she is empowered to issue, for the stated purpose of slowing down the execution process so that Graham's claim of actual innocence might be examined in some forum. Later, on June 2, as another execution date approached, the Court of Criminal Appeals stayed the executioner's lethal injection[9] pending resolution of a case in the United States Supreme Court with issues similar to one of those raised by Graham, namely, whether Texas capital sentencing procedures gave adequate mitigating effect to a defendant's youth.[10]

After the United States Supreme Court declined to rule favorably on the mitigation issue that would have affected Graham's appointment with death,[11] another execution date was set, this time for August 17, 1993.

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parte Graham, 853 S.W.2d 565 (Tex. Crim. App. 1993) (staying execution), *cert. denied*, Graham v. Texas, 113 S. Ct. 2431 (1993).

[8] Graham v. Texas Board of Pardons & Paroles, No. 93-08624 (299th Dist. Ct., Travis County, Tex., July 21, 1993), Trial Exhibit.

[9] *Ex parte* Graham, 853 S.W.2d 565 (Tex. Crim. App. 1993) (en banc).

[10] Johnson v. Texas, 113 S. Ct. 892 (1993).

[11] *Id.*

IV. *GRAHAM V. TEXAS BOARD OF PARDONS AND PAROLES*

On July 21, 1993, Graham's attorneys filed a civil suit in Travis County District Court against the Board of Pardons and Paroles, as well as the "super agency" (the Department of Criminal Justice) under which the Board performs its constitutional functions.[12] At the July 27 hearing on a motion for a temporary injunction and writ of mandamus, the Board's administrator, Ms. Rebecca Tinkey, admitted that the Board's procedures were not sufficient to prevent the execution of an innocent person. Indeed, she conceded that a person sentenced to death for whom new exonerating evidence had come to light could be put to death simply because the Board chose not to hear the new claim.[13]

Ms. Tinkey also testified as to the general inadequacy of the current clemency process, including: no communication with the petitioner as to adverse affidavits or information so as to correct factual inaccuracy; no confrontation of witnesses; no joint meeting with the Board to consider, let alone hear, the petition for clemency; no right to counsel or to advocate before the Board; no fact-finding; no assurance that the Board members actually review materials sent to them.[14]

After the hearing, Judge Pete Lowry of the 299th District Court issued a temporary injunction, on August 9, 1993, which restrained the Board from not granting a full evidentiary hearing on Graham's claims of actual innocence and required a formal hearing very similar to that set out in the Administrative Procedure and Texas Register Act[15] and Texas case law.[16] He also provided for a postponement of the execution date if the board declined to have a hearing prior to that time. The judge based his ruling on various provisions of the Texas Bill of Rights and relied solely upon state constitutional law in arriving at his decision, holding that the Texas Constitution accorded Graham rights that the federal one did not. In this, the case was unique in the United States both because no state court had ever addressed a similar situation under its own constitution and because the District Court was moving into a new area of law for Texas civil courts.

The decision in Gary Graham's favor was based on the interpretation of two portions of the Texas Constitution. First, Judge Lowry specifically held that Graham had rights derived from Article I, sections 13 and 19 of the Texas Constitution that together guaranteed him "a day in court" on his claim of actual innocence.[17] Judge Lowry construed this day in court to entail a hearing in front of the Board of Pardons and Paroles that would have all the trappings of due course of law, including an impartial hearing examiner, full evidentiary development, cross-examination, a court reporter, and written findings and recommendations by the examiner for the Board's consideration. The judge further based his decision on a reading of the constitutional section regarding the Board of Pardons and Paroles.[18] In Judge Lowry's view, this language implied a required hearing; otherwise, the Board could not make the informed choice contem-

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[12] Graham, supra note 9.

[13] *Id.* (Statement of Facts).

[14] Indeed, the chair of the Board, Jack Kyle, in private conversations, took the position that claims of innocence were to be sorted out in the courts, not before the Board of Pardons and Paroles.

[15] Tex. Rev. Stat. Ann. art. 6252-13a, § 12 et seq. (Vernon 1993).

[16] *See, e.g., In re* B_ M_ N_, 570 S.W.2d 493, 502 (Tex. Civ. App.—Texarkana 1978, no writ); K.D.B. v. C.B.B., 688 S.W.2d 684, 686-87 (Tex. App.—Tyler 1985, no writ).

[17] *See* TEX. CONST. art. I, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."); TEX. CONST. art. I, § 19 ("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.").

[18] TEX. CONST. art. IV, § 11 ("The Legislature shall by law establish a Board of Pardons and Paroles and shall require it to keep record of its actions and the reasons for its action.").

plated by the constitutional mandate. With this court decision, the Board could not let Graham's appeal just slip through the cracks by its own inaction.

Of note, Gary Graham's attorneys had also argued that allowing someone to be executed without a hearing on a claim of innocence based on newly discovered evidence violated the Texas Bill of Rights provision against cruel or unusual punishment. They urged that the disjunctive state provision ("cruel *or* unusual punishment") granted greater constitutional protection than the conjunctive of the federal counterpart ("cruel *and* unusual punishment").[19] Unfortunately, Judge Lowry declined to address this issue, even though some other states' courts had found such protections surpassing the federal minimum under similar constitutional provisions.[20]

The judge was careful not to interfere with the Board's constitutional prerogative to decide the merits of the case either way. Nor did he interfere with the Governor's discretion. He simply held that Texas due course of law required a full and fair opportunity for a hearing on a substantial claim of innocence based on newly discovered evidence. Despite the shrill alarm of "opening floodgates" emanating from Attorney General Dan Morales, the number of inmates on death row to whom this ruling might apply would only be a handful, since it concerns only new evidence discovered after the end of the thirty-day post-trial period for requesting a new trial.

The temporary injunction issued less than ten days before Graham's previously scheduled execution date, yet the Attorney General chose to appeal to the Austin Third Court of Appeals, rather than allow Gary Graham his hearing. The Attorney General took the position that, by filing the notice of appeal in lieu of posting a bond, the judgment of the trial court was automatically suspended (as indeed is the law in Texas) and that the execution could then proceed. The Attorney General even had Gary Graham physically moved within the prison system to bring him closer to the death chamber.

The court of appeals, however, granted a temporary injunction to restrain the execution and protect its jurisdiction.[21] This injunction was issued over the Attorney General's rather strange argument that the court lacked jurisdiction to grant such an injunction, even though the Attorney General himself had invoked the court's intervention.

After vigorous political posturing in Houston for benefit of the coming election year, the Attorney General then sought writs of mandamus and prohibition in the Court of Criminal Appeals to suspend the intermediate appellate order and allow Graham's execution. On a 5-4 vote, the Court of Criminal Appeals declined to go along with the Attorney General and granted yet another order restraining Gary Graham's execution.[22]

Harris County District Attorney John B. Holmes, an ardent and outspoken death penalty proponent, intervened in both the Third Court of Appeals and the Court of Criminal Appeals cases by way of writs of mandamus and prohibition.[23] Holmes purportedly intervened on the part of the convicting trial judge and himself, arguing that the trial and appellate

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[19] *Compare* TEX. CONST. art. I, § 13 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment imposed.") with U.S. CONST. amend. VIII.

[20] *See, e.g.*, People v. Bullock, 485 N.W.2d 1198 (Mass. 1987); People v. Anderson, 493 P.2d 880 (Cal. 1972) *cert. denied sub nom.* California v. Anderson, 406 U.S. 958 (1972).

[21] Texas Board of Pardons & Paroles v. Graham, No. 03-93-00421-CV (Tex. App.—Austin August 13, 1993).

[22] Texas Board of Pardons & Paroles v. Court of Appeals for 3rd Dist., No. 71,765 (Tex. Crim. App. 1993) (orig. mandamus).

[23] *See* State *ex rel.* Holmes v. Third Court of Appeals, 860 S.W.2d 873 (Tex. Crim. App. 1993) (en banc) (deniying application for writ of mandamus).

courts lacked the jurisdictional and constitutional ability in a civil case to interfere with a death sentence imposed by a criminal court and upheld on appeal.[24]

On September 29, 1993, the Austin Court of Appeals heard oral argument on the case. The Attorney General repeated the same arguments urged earlier: no state constitutional protection guaranteed a full and fair evidentiary hearing in front of the Board and that the Board of Pardons and Paroles had total and absolute discretion in the clemency process, free of interference or guidance by the courts. Ironically, during oral argument, the Assistant Attorney General conceded that the courts could supervise the Board if it did something bizarrely unconstitutional, such as basing its decision on race or sex, although even then the courts would have to depend upon the Board to divulge those improper reasons. Essentially, the Attorney General argued that the Board of Pardons and Paroles was beyond the power of judicial review because the separation of powers doctrine made clemency an exclusively executive prerogative.

The Third Court of Appeals never ruled, however, because in November the Court of Criminal Appeals, sua sponte, revisited the earlier pleadings on which it had ruled in August and decided that it would accept the case for resolution after all. The Court of Criminal Appeals ordered the intermediate court of appeals not to consider the matter further.

In the oral arguments on December 1, 1993, before the en banc Court of Criminal Appeals, the Harris County District Attorney played the major role, consistent with his expansive use of the death penalty. (Harris County alone has a greater population of convicted persons on death row than do most states.)

Gary Grahm then waited more than four months to learn the Court of Criminal Appeals' decision.

V. A NEW HABEAS CORPUS PROCEDURE

On April 20, 1994, the Court of Criminal Appeals handed down its decision in the *Graham* case. While there were a number of concurring and/or dissenting opinions, the majority focused on two points.

First, the court held that an intermediate court of appeals lacks jurisdiction to stay an execution because the Court of Criminal Appeals has exclusive jurisdiction to stay an execution date set by the convicting trial court. As the suit before Judge Lowry was a civil case, the court of appeals could not interfere with the Court of Criminal Appeals' exclusive jurisdiction over capital cases.[25] Thus, the court dissolved the stay of execution granted by the appellate court in Austin.[26]

The court went on to hold, however, that Graham was entitled to be heard on his claim of actual innocence based on newly discovered evidence through the state habeas corpus process.[27] The court "expressly overruled" *Ex parte Binder*,[28] to the extent that it precluded

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[24] Holmes v. Court of Appeals for 3rd District, No. 71-764 (Tex. Crim. App. 1993) (orig. mandamus).

[25] Holmes v. Court of Appeals for 3rd District, No. 71-764, slip. op. at 11-12. (Tex. Crim. App. April 20, 1994).

[26] There was considerable dispute in the concurring and/or dissenting opinions about the appropriateness of granting mandamus and prohibition relief in the cause. In particular, Judge Larry Meyers took the majority to task for interfering with a case that, in any regard, would eventually end up in the Court of Criminal Appeals and over which the court had already assumed jurisdiction by granting the stay of execution. He described the decision as "so far from being a just or prudent exercise of our power to issue extraordinary writs that it slanders the wisdom of those Texans who wanted to confer it upon us little more than a decade ago . . . . Our entire manner has had the appearance of a guerilla raid, when it should instead have been a cooperative effort to construe fundamental aspects of Texas constitutional law." *Id.* at 7 (Meyers, J., dissenting).

[27] TEX. CODE CRIM. PROC. ANN. arts. 11.01, 11.07(2)(3).

[28] 660 S.W.2d 103.

using a post-conviction habeas corpus proceeding for an innocence claim based on newly discovered evidence.[29]

In arriving at this holding, the court ruled it had wrongly decided this point in *Ex parte Binder* because the appellant in that case had not claimed a violation of a state or federal constitutional or statutory right. Thus, because Graham did allege denial of a fundamental or constitutional right, habeas corpus is an appropriate vehicle for his innocence claim.[30] Moreover, the court viewed *Herrera* as having recognized that the execution of an innocent person "would surely constitute a violation of a constitutional or fundamental right."[31] Thus, the court held that the fundamental right at stake in Graham's pleading before the court was derived from the Due Process Clause of the Fourteenth Amendment.[32]

Interestingly, even though the Court of Criminal Appeals decided the case under Fourteenth Amendment analysis, the issue had never been framed in this way by Gary Graham or addressed by the lower courts or the petitioners in the case. The court developed this argument itself, treating "Graham's contentions as claiming his execution would violate the Due Process Clause of the Fourteenth Amendment. . . ."[33]

Unfortunately, in opening up the state habeas corpus process for claims of innocence, the court adopted an "extraordinarily high" threshold showing of innocence that must be met before habeas corpus proceedings would be appropriate.[34] On a claim of actual innocence, the claimant must first show that the newly discovered evidence, if true, would create a doubt as to the efficacy of the verdict, to the extent that it undermines confidence in the verdict and is probable that the verdict would have been different.[35]

Once that threshold has been crossed, the habeas corpus court must afford the applicant an opportunity to present evidence. To obtain habeas corpus relief, however, the applicant has the burden of showing that, based on the newly discovered evidence and the entire record before the jury that convicted the applicant, no rational trier of fact could find proof of guilt beyond a reasonable doubt. This very high standard of proof is expressed in *Herrera*.[36]

Graham's motion for rehearing is currently pending before the Court of Criminal Appeals on the specific point concerning the burden of proof during a habeas corpus hearing, that issue not having been briefed previously or addressed by any of the lower courts or by the parties.

The Court of Criminal Appeals did not address the underlying civil action that gave rise to the stay of execution in the Third Court of Appeals, presumably leaving that action intact for later resolution by the trial court. The court's jurisdiction was invoked only because the intermediate appellate court had granted a stay of execution. Thus, the case before Judge Lowry continues.

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[29] Holmes, *supra* note 23, slip. op. at 15.

[30] *Id.* at 14.

[31] *Id.* at 15, *citing* Graham, 853 S.W.2d at 567 (Maloney, J., concurring and dissenting). *See also* Herrera, 113 S.Ct. at 853, 869 (O'Connor and Kennedy, JJ., concurring), 875 (White, J., concurring), and 876 (Blackmun, Stevens, and Souter, JJ., dissenting).

[32] U.S. Const. amend. XIV. The court noted it had erroneously overruled a similar claim based on the Due Process Clause by Graham in an earlier habeas corpus proceeding. Holmes, *supra* note 23, slip. op. at 18, n.13, *citing* Graham, 853 S.W.2d at 565.

[33] Holmes, *supra* note 23, at 15.

[34] *Id. citing* Herrera, 113 S.Ct. at 869.

[35] *Id.* at 16.

[36] Herrera 113 S.Ct. at 875 (White, J., concurring), *citing* Jackson v. Virginia, 443 U.S. 307, 324 (1979).

VI. CONCLUSION

The *Graham* case provides a crucial victory for people on death row who need to litigate claims of actual innocence based on newly discovered evidence through state habeas corpus proceedings, a procedure not previously available to them. Although the burden of proof in order to obtain relief remains high, it is nevertheless a test that is measured and reviewed by the Court of Criminal Appeals.

The trial court injunction requiring the Board of Pardons and Paroles to hold a hearing was no more than an order stating that the Board members must hold that hearing and thereafter exercise their discretion. But the exercise of such discretion lacks any standard whatsoever. Moreover, the Board's exercise of discretion is not reviewable by a court. Nevertheless, that avenue should still be open to prisoners seeking mercy after exhausting their habeas corpus proceedings. And it should act as a further check on the system to prevent the wrongful execution of an innocent person.

Although the system is still far from foolproof, Gary Graham's case has made it somewhat less likely that innocent people will be executed. Thus, we are now at least a bit closer to respecting Justice Harry Blackmun's admonition that "nothing would be more contrary to contemporary standards of decency . . . than to execute a person who is actually innocent."[37]

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[37] Herrera, 113 S.Ct. at 867 (Blackmun, J., dissenting).