CHAPTER 3
Access to Justice

Joseph Amrine was convicted and sentenced to death for the 1985 murder of Gary Barber, which occurred while both were incarcerated at Jefferson City Correctional Center in Missouri. The only evidence linking him to the crime was the testimony of three other inmates, one of whom a guard at the correctional facility initially identified as the likely perpetrator. A federal district court denied Amrine's petition for habeas relief, finding that he was procedurally barred from raising claims that his trial lawyer was ineffective. Among his claims, Amrine asserted that his attorney failed to raise objections during the jury selection process that resulted in an all-white jury, failed to object to Amrine being kept in shackles during jury selection, inadequately investigated the case and failed to request a jury instruction on the credibility of inmate informants. Despite the fact that all three witnesses against Amrine eventually recanted their trial testimony, the federal district court ruled – and a federal appeals court affirmed – that Amrine had failed to show sufficient evidence of actual innocence to overcome the procedural bars. As a result, no court ever considered his claims of ineffective assistance of counsel.

In 2003, despite the federal court's conclusion that there was insufficient evidence of actual innocence, the Supreme Court of Missouri took the rare and extraordinary step of setting aside Amrine's conviction, based on its conclusion that there was clear and convincing evidence of actual innocence sufficient to undermine confidence in the verdict. Though the court gave the prosecutors leave to retry Amrine, they declined to do so.

Recommendation 11. A state or federal court should entertain a post-conviction claim that a petitioner facing execution was wrongfully convicted or sentenced and should examine any evidence offered to support such a claim.

a) A claim of wrongful conviction or sentence should not be foreclosed, nor should an examination of supporting evidence be denied, on the ground that the claim or the evidence is presented too late. A court should have discretion to dismiss a claim of wrongful conviction or sentence summarily, or to refuse to hear supporting evidence, only if the petitioner is shown to be manipulating the legal process, including by concocting a fallacious claim or offering spurious evidence merely to prolong litigation.

In 2011, the U.S. Supreme Court made clear that "[a]lthough state prisoners sometimes may submit new evidence in federal post-conviction proceedings, [the] statutory scheme is designed to strongly discourage them from doing so."[1] An analysis of cases pending from 2000 through 2006 found that evidentiary hearings occurred in federal post-conviction proceedings in 0.4 percent of noncapital cases and 9.5 percent of capital cases.[2] Newly discovered evidence, if considered at all, nearly always must be presented in state court, not federal court. But state courts, too, often refuse to hear new evidence that supports a death row prisoner's claim, including federal constitutional claims.

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Prior to 1996, a federal habeas court could grant a request for an evidentiary hearing when the applicant alleged material facts that, if true, would entitle the applicant to relief. That sensible rule, adopted by the U.S. Supreme Court in *Townsend v. Sain*,[3] was modified by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which was signed into law in 1996.

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1 *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011).

2 *See* Nancy J. King et al., Final Technical Report: Habeas Litigation in U.S. District Courts 35–36 (2007).

3 372 U.S. 293, 312 (1963).

AEDPA requires that, if a claim was adjudicated on the merits in state court, a federal habeas court generally must limit its review to the state court record.[4] U.S. Supreme Court Justice Sonya Sotomayor, joined by Justices Elena Kagan and Ruth Bader Ginsburg in dissent, has argued that "[s]ome habeas petitioners are unable to develop the factual basis of their claims in state court through no fault of their own," but a majority of the Court rejected her view that federal courts should consider new evidence under such circumstances, even if the evidence would clearly justify issuance of a writ.[5]

Under AEDPA, if a federal habeas petitioner has "failed to develop the factual basis of a claim in State court proceedings," a federal court may not hold an evidentiary hearing on the claim unless the petitioner shows that:

> (A) the claim relies on – (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; *and* (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.[6]

The difficulty of meeting this standard and obtaining an evidentiary hearing in federal court is illustrated by the Ninth Circuit's decision in *Rossum v. Patrick*.[7] In that case, the petitioner was convicted of murdering her husband by poison. The Ninth Circuit initially found that she had made a strong showing that her lawyer's performance was constitutionally deficient, and that the state court's finding to the contrary was unreasonable. The Ninth Circuit remanded the case to the district court for evidentiary hearings focused on the question of whether there was a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different.[8] On rehearing, however, the Ninth Circuit vacated its prior order and denied the petition on the merits, finding that, under the Supreme Court's recent interpretations of AEDPA, it had no authority to grant an evidentiary

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4 *See Cullen*, 131 S. Ct. at 1398. If the state court rejected the claim on the merits, the federal court may grant relief only if the state court's 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; 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." 28 U.S.C. § 2254(d). If these requirements are satisfied (or do not apply), it may be possible to supplement the state court record. *See Cullen, 131 S. Ct.* at 1412 (Breyer, J., concurring in part and dissenting in part).

5 *Id.* at 1413 (Sotomayor, J., dissenting).

6 28 U.S.C. § 2254(e)(2) (2006) (emphasis added).

7 622 F.3d 1262 (9th Cir. 2010), *vacated on reh'g*, 659 F.3d 722 (2011).

8 *See Rossum*, 622 F.3d at 1265.

hearing. Judge Nancy Gertner dissented, finding that, even under AEDPA's highly deferential standard, no "fair-minded" jurist should have denied the request for an evidentiary hearing:

> It cannot be that a federal court is obligated to repeat the state court's error. Without a hearing both sides are disadvantaged. It would be unfair to the government to assume the truthfulness of the expert's untested declaration and order habeas relief. And, it would be equally unfair to Rossum to conclude that she is entitled to no relief in federal court in the face of a strong showing of a constitutional violation which the state court precluded her from developing.[9]

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Some states provide only a short window of time to bring newly discovered evidence before the court. For example, Virginia provides one of the shortest time periods for petitioners to present newly-discovered evidence. Rule 1.1 of the Supreme Court of Virginia, known as the "21 Day Rule," provides, in part, that "[a]ll final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." Under this rule, just 21 days from an order of conviction, if newly discovered evidence has been discovered *and* brought to the court's attention, the trial court loses jurisdiction and has no authority to act on a motion for a new trial. Rule 1.1 makes no special provision for capital cases and can preclude the introduction of newly discovered evidence in federal court.

Virginia has carved out two narrow exceptions to the 21 Day Rule. The first exception, enacted approximately a decade ago, allows a prisoner to file a petition for a writ of actual innocence based on after-discovered biological evidence.[10] A petition for a writ of actual innocence must demonstrate the following:

> (i) The evidence was not known or available at the time the conviction became final or not previously tested because the testing procedure was not available at the Department of Forensic Science at the time;

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9 *Rossum, 659 F.3d* at 724-25 (Gertner, J., dissenting).

10 *See* Va. Code Ann. §§ 19.2-327.1 – 327.6 (2013)

(ii) The chain of custody establishes that the evidence has not been "altered, tampered with, or substituted;"

(iii) "[T]he testing is materially relevant, noncumulative, and necessary and may prove the [convicted person's] actual innocence;"

(iv) "[T]he testing requested involves a scientific method employed by the Department of Forensic Science;" and

(v) The convicted person did "not unreasonably delay the filing of the petition after the evidence or the test for the evidence became available[.]"[11]

Relief is only granted upon a court's finding that no rational trier of fact would have found guilt beyond a reasonable doubt. Consequently, the exception requires a petitioner to meet a much higher standard of proof than that required in a petition for a new trial.

The second exception to Virginia's 21 Day Rule provides an opportunity to file a petition for a writ of actual innocence based on after-discovered non-biological evidence.[12] A petitioner moving for such a writ must allege the following:

(i) the crime for which the petitioner was convicted … was upon a plea of not guilty;

(ii) the petitioner is actually innocent of the crime for which he was convicted … ;

(iii) an exact description of the previously unknown or unavailable evidence supporting the allegation of innocence;

(iv) such evidence was previously unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction became final … ;

(v) the date the previously unknown or unavailable evidence became known or available to the petitioner, and the circumstances under which it was discovered;

11 *Id.*

12 *See id.* § 19.2-327.10 - 327.14.

(vi) the previously unknown or unavailable evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction … ;

(vii) the previously unknown or unavailable evidence is material and, when considered with all of the other evidence in the current record, will prove that no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt; and

(viii) the previously unknown or unavailable evidence is not merely cumulative, corroborative or collateral.[13]

Because the rule requires the petitioner to allege that the conviction "was upon a plea of not guilty," a petition for a writ of actual innocence is not an available mechanism to raise an innocence claim where the defendant pleaded guilty due to lack of resources, to avoid the burdens and stresses of a criminal trial, for a lesser guaranteed penalty or for other reasons.

Turner v. Commonwealth,[14] a non-capital case, is instructive regarding the heavy burden required for the grant of a writ of actual innocence. Judge Petty explained the difference between the standard of proof required for the grant of a motion for a new trial and that required for the grant for a motion for a writ of actual innocence, stating:

> Criminal defendants seeking a new trial need only show that the after-discovered evidence would *likely* lead to a different result upon retrial. In sharp contrast, actual innocence petitioners must produce clear and convincing evidence that proves that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt" in light of the newly-discovered evidence, taken together with the rest of the evidence in the case. In other words, the new evidence must conclusively show that the petitioner's guilt is a factual impossibility.[15]

Similar to the law in Virginia, in order to succeed in establishing a claim of actual innocence in a Missouri habeas proceeding, a petitioner must "make a clear and convincing showing of actual innocence,"[16] a burden of proof that is exceedingly difficult to meet. Though there is no specific rule in Missouri allowing for a new trial based on newly discovered evidence, Rule 91 permits an individual convicted and sentence to death to file a petition for a writ of habeas corpus directly to the Missouri Supreme Court, under very limited circumstances, after state

13 *See id.* § 19.2-327.11.

14 56 Va. App. 391 (Va. Ct. App. 2010) (*en banc*).

15 *Id.* at 445-46 (Petty, J., concurring) (emphasis in original) (citations omitted)

16 *State ex rel. Amrine v. Roper*, 102 S.W.3d. 541, 548 (Mo. *en banc.* 2003).

post-conviction and federal habeas review.[17] In contrast to Missouri, Arizona provides rules allowing for the consideration of untimely filed motions for a new trial in order to consider newly discovered evidence. Pursuant to Arizona Rules of Criminal Procedure 32.1(e), any person convicted of a criminal offense or who pleaded guilty may institute a proceeding for post-conviction relief for newly discovered material facts that probably would have changed the verdict or sentence. Under Rule 32.1(e), newly discovered material facts exist if:

> (1) The newly discovered material facts were discovered after the trial; (2) the defendant exercised due diligence in securing the newly discovered material facts; and (3) the newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.[18]

In addition, Arizona Criminal Procedure Rule 32.2(b) provides that a claim for relief under Rule 32.1(e) shall not be precluded solely for being untimely. However, the court may summarily dismiss the notice of post-conviction relief "[i]f the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated … in a timely manner."[19] Arizona's approach is far superior to that of other states like Virginia and Missouri, although the "due diligence" requirement is unnecessary and unduly harsh in a capital case.

A claim of wrongful conviction or sentence should not be foreclosed, nor should an examination of supporting evidence be denied, on the ground that the claim or the evidence is presented too late.

To prevent the unfair administration of justice, a state or federal court should entertain a post-conviction claim that a petitioner facing execution was wrongfully convicted or sentenced and should examine any evidence offered to support such a claim. A claim of wrongful conviction or sentence should not be foreclosed, nor should an examination of supporting evidence be denied, on the ground that the claim or the evidence is presented too late.

Further, post-conviction relief, and the introduction of evidence to support such relief, should not be limited to claims of "actual innocence," nor should they be limited to certain types

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17 Mo. Sup. Ct. R. Civ. P. 91.02(b).

18 Ariz. Rev. Stat. Ann. R. Crim. P. § 32.1(c) (2000).

19 *Id.* § 32.2(b) (2000).

of later-discovered evidence, such as biological evidence. A court should have discretion to summarily dismiss a claim of wrongful conviction or sentence, or to refuse to hear supporting evidence, only if the petitioner is shown to be manipulating the legal process, for example by concocting a fallacious claim or offering spurious evidence merely to prolong litigation.

On the other hand, a situation in which competent trial counsel made a strategic decision to withhold evidence from the jury because it conflicted with the defendant's theory of the case introduced at trial, even though the evidence may tend to exonerate the accused or mitigate the sentence, would be a scenario in which a court could exercise its discretion not to hear a claim of wrongful conviction or sentence on the grounds of that evidence. A determination of competency of trial counsel would serve as a gatekeeper in such circumstances.

b) A federal court should credit a previous state court decision regarding a claim of wrongful conviction or sentence only if the state court addressed the claim and the evidence supporting it with care and explained its reasoning in an opinion, and then only if nothing has come to light since the state court decision tending to undermine its reliability.

Under section 2254(d) of AEDPA,[20] a federal court may not grant habeas relief 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; 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.[21]

If the state court does not issue a written opinion to explain its reasoning, the federal court will presume (subject to rebuttal) that the federal claim was adjudicated "on the merits"[22] and the habeas petitioner must show there was "no reasonable basis" for the denial of relief.[23] AEDPA's "difficult to meet"[24] and "'highly deferential standard' . . . demands that state-court decisions be given the benefit of the doubt."[25] Under AEDPA, a state court's determination of

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20 28 U.S.C. § 2254(d) (1996).

21 *Id.*

22 *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013).

23 *Harrington v. Richter*, 131 S. Ct. 770, 784 (2010).

24 *Id.* at 786.

25 *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

a factual issue "shall be presumed to be correct" and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."[26]

Prior to passage of AEDPA in 1996, federal courts could review *de novo* questions of federal law and mixed questions of law and fact. The U.S. Supreme Court had rejected the principle of absolute deference to state court decisions in *Brown v. Allen*,[27] finding that a state court judgment of conviction "is not *res judicata*" during federal habeas proceedings with respect to federal constitutional claims,[28] even if the state court has rejected all such claims after a full and fair hearing. *Brown v. Allen* came to be cited for the proposition that a habeas court should review questions of federal law and mixed questions of law and fact "independently," and in several subsequent cases, the Supreme Court applied a *de novo* standard of review with respect to pure and mixed legal questions.[29] In *Townsend v. Sain*,[30] for example, the Supreme Court explained that "[a]lthough the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently."[31]

During this time, when federal courts exercised plenary power to decide pure and mixed questions of federal law, the rate of reversal of state court convictions was high, indicating that state courts were making serious constitutional mistakes. In capital cases between 1976 (when the death penalty moratorium was lifted)[32] and 1991, federal courts found reversible constitutional error in 42 percent of all federally reviewed state judgments.[33] Stated differently, from 1976 through 1991, federal habeas review prevented 149 prisoners from being executed on the basis of constitutionally flawed

The difference between life and death in most of these cases was the availability of independent federal review of just the sort that AEDPA's deference rule now precludes.

26 28 U.S.C. § 2254(e)(1).

27 344 U. S. 443 (1953).

28 *See id*. at 458.

29 *Wright v. West*, 505 U.S. 277, 289 n.6 (1992).

30 372 U. S. 293 (1963).

31 *Id*. at 318; *see also, e.g., Miller v. Fenton*, 474 U. S. 104, 112 (1985).

32 *See Gregg v. Georgia*, 428 U.S. 153 (1976).

33 *See* Brief of Benjamin R. Civiletti, *et al.*, as Amici Curiae at Appendix B, Table I, *Wright v. West*, 505 U.S. 277 (1992) (No. 91-542), (1992 LEXIS).

convictions or death sentences. The difference between life and death in most of these cases was the availability of independent federal review of just the sort that AEDPA's deference rule now precludes. Federal review of serious constitutional claims "serves the important function of . . . preserving for the state prisoner an expeditious federal forum for the vindication of his federally protected rights, if the State has denied redress."[34]

Professor Jim Liebman conducted a detailed study of the Georgia capital cases in which habeas relief was granted between 1976 and 1991, singling out the ones in which a rule of deference would likely have forbidden relief – *i.e.*, cases in which the state courts (1) had the same law and facts before them as the federal courts, and (2) adjudicated the constitutional claim employing appropriate procedures, without any indication of "bad faith" decision-making. The study revealed that a deference rule probably would have precluded relief in 70 percent of the cases (32 out of 46) in which the federal courts, exercising their former power to review federal constitutional claims *de novo*, found reversible error.[35]

Meaningful federal habeas review assures that a state prisoner's federal constitutional claims will be heard in a forum free of undue local influences that sometimes affect elected state judges.

In addition to leaving serious constitutional errors uncorrected, the deference standard increases the number of cases in which such errors occur. By design, plenary federal habeas review deters constitutional violations from being committed or condoned by state courts in the first place.[36] As one state supreme court justice testified before Congress, "the presence of potential federal review is a significant impetus for improving state . . . review processes."[37] Meaningful federal habeas review assures that a state prisoner's federal

34 *Preiser v. Rodriguez*, 411 U.S. 475, 497-98 (1973).

35 *See* Brief of B. Civiletti, *supra* note 33, at Appendix B, Table IV.

36 *Butler v. McKellar*, 494 U.S. 407, 413 (1990) ("'[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.'" (quoting *Teague v. Lane*, 489 U.S. 288, 306 (1989), quoting *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting))).

37 *Subcommittee on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong., 1st Sess. 5 (July 17, 1991) (statement of Christine M. Durham, Justice, Utah Supreme Court); *see also* Robert J. Sheran, Chief Justice, Minnesota Supreme Court, *State Courts and Federalism in the 1980's: Comment*, 22 Wm. & Mary L. Rev. 789, 790 (1981) (increases in federal habeas are "most frequently" prompted by the "failure or . . . refusal by state courts to fulfill the obligation . . . to enforce and respect federal law"); Letter from Judge Bruce R. Thompson to Senator Sam Ervin (Sept. 27, 1972) (discussed in Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners -- Reform or Revocation?*, 61 Geo. L.J. 1221, 1251-52, n.204 (1973)); Hon. Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 24 (1956).

constitutional claims will be heard in a forum free of undue local influences that sometimes affect elected state judges.[38] As Rosemary Barkett, a justice of the Florida Supreme Court and a judge on the U.S. Court of Appeals for the Eleventh Circuit, told Congress:

> Tying the hands of the federal courts in these matters of life and death may serve the interests of finality of judgment, but it . . . ignores the realities of problems in the state courts where overburdened, elected judges are responsible for maintaining a system to satisfy the needs and immediate desires of the public. Federal judges are protected by life tenure, whereas state judges are not.[39]

Furthermore, as one commentator has observed, AEDPA's current procedural framework, which offers extraordinary deference to state court decision-making, offers a "windfall" to the state court that offers little or no explanation for its decision:

> When a state court fails to explain why it rejected an inmate's constitutional claims, a federal habeas court cannot meaningfully determine whether that decision was 'contrary to' or involved 'an unreasonable application of' Supreme Court precedent. For all the federal court knows, the state court did not identify or consider the relevant Supreme Court decisions. If AEDPA's purpose was to give the state courts the benefit of the doubt if and when they make a good faith effort to identify and apply the correct constitutional doctrine articulated by the Supreme Court, then it does not seem unreasonable to require that the state court articulate why it rejected a particular claim. If it fails to explain such, then the federal court should not be constrained by [AEDPA]'s limitation on federal relief, and the issue should be reviewed de novo.[40]

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[38] The importance of federal court determination of federal constitutional issues free of local influences on state judges has been recognized. *See*, *e.g.*, 1 Farrand, The Records of the Federal Convention of 1787, at 124-25 (1911) (James Madison); The Federalist No. 81, at 522-23 (A. Hamilton) (Random House, 1937); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 377, 386-87, 415-19 (1821); Cong. Globe, 42nd Cong., 1st Sess. 460 (1871) (Rep. Coburn) ("The United States courts are further above mere local influence than the county courts; their judges can act with more independence . . . ; their sympathies are not so nearly identified with those of the vicinage; . . . they will be able to rise above prejudices or bad passions . . . more easily. . . . We believe that we can trust our United States courts, and we propose to do so."); Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 272 (1985) (tracing the Court's development since 1930s of independent review of "mixed" questions "to respond to the perceived dangers of distorted . . . law application in the state courts").

[39] *Subcommittee on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong., 1st Sess. 8-9 (May 22, 1991) (statement of Rosemary Barkett); *see also* Prepared Statement of Justice Christine M. Durham, *supra* note 37, at 3 (there is "a structural vulnerability in the state court systems to community and special interest pressures [that] are sometimes antithetical to federal constitutional guarantees") (emphasis in original); *Hearings on S. 88, S. 1757, and S. 1760 before the S. Judiciary Committee*, 101st Cong., 1st and 2d Sess. 378 (1990) (statement of James L. Robertson, Justice, Mississippi Supreme Court).

[40] John H. Blume, *AEDPA: The "Hype" and the "Bite"* 91 Cornell L. Rev. 259, 293-294 (2006).

The Committee recommends that a federal court credit a previous state court decision regarding a claim of wrongful conviction or sentence only if the state court addressed the claim and the evidence supporting it with care and explained its reasoning in an opinion, and then only if nothing has come to light since the state court decision tending to undermine its reliability. Finality is important; however, it is simply unconscionable, particularly in a capital case, to enforce an unlawful conviction or sentence when the evidence of a constitutional violation has become available. As one practitioner explained:

> The public needs to understand not only that errors will take place, but also that the laws passed in recent years that rush along and often prevent merit rulings in capital appeals and post-conviction proceedings – most notably [AEDPA] – significantly undercut the courts' ability to correct such errors before they become fatal to erroneously convicted defendants. Even before such legislation was enacted, our legal system needed additional – not fewer – judicial protections against such fatal mistakes. But instead, these laws often put courts in a position in which they are incapacitated from providing relief when they know that the Constitution has been violated in what is not harmless error – much as if one's doctor were prohibited by law from using the best care that he is capable of providing.[41]

[41] Ronald Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 Conn. L. Rev. 733, 737 (2001) (internal citations omitted).