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People v. Bermudez: Is a Freestanding Claim of Actual, Factual Innocence a Ground for Reversal under the New York State Constitution?

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The greatest crime of all in a civilized society is an unjust conviction. It is truly a scandal which reflects unfavorably on all participants in the criminal justice system.¹

Introduction

“No New York appellate court has addressed the question of whether a defendant may bring a free standing claim of actual innocence under [the New York] State Constitution.”² In 2003, in People v. Cole, the trial court found that “the incarceration of a guiltless person violates” a defendant's due process rights afforded under Article I, Section 6, of the New York Constitution and “the cruel and inhuman treatment clause” under Article I, Section 5.³ Since Cole, two other trial courts in New York have similarly held that a defendant may bring a freestanding claim of actual innocence.⁴ Nevertheless, the appellate courts in New York have refused to address the issue of actual innocence, sidestepping the issue on at least one occasion.⁵ In that the lower court decisions are not binding, the appellate courts in New York are forcing trial courts to determine on a case-by-case basis whether the incarceration of an innocent person, one of the greatest injustices in our system, is unconstitutional. The New York Court of Appeals

³ 765 N.Y.S.2d 477, 485 (N.Y. Sup. Ct. Kings County 2003); see also Aileen R. Kavanagh, Note, People v. Cole: Is the Incarceration of an “Actually Innocent” Person Constitutional?, 19 TOURO L. REV. 475 (2003). Kavanagh provides a thorough discussion of the case law on actual innocence leading up to the trial court’s decision in People v. Cole. Id. Kavanagh’s note was published before the trial court rendered its decision following an evidentiary hearing and before the trial court established the “degree of proof [ ] required for a showing of actual innocence.” Id. at 493-94. This note looks to (1) update Kavanagh’s discussion with more recent case law and (2) compel the New York State Court of Appeals to welcome, and subsequently uphold, a freestanding claim of actual innocence as a ground for reversal in New York State. That said, Kavanagh’s contribution to this note is invaluable.
should welcome the opportunity to hear whether actual innocence is a ground to vacate a
judgment. Further, the Court should follow the precedent of the lower courts and hold that a
freestanding claim of actual, factual innocence is a ground for reversal under the New York State
Constitution because the imprisonment of an innocent person violates a defendant’s due process
rights and right to be free from cruel and unusual punishment.⁶

Part I of the Note provides both a summary of the available post-trial relief in New York
State and the factual and procedural background of People v. Bermudez, the most recent actual
innocence claim decided in New York.⁷ Part II addresses the United State Supreme Court’s
position on actual innocence claims, which is fundamental to the New York State trial courts’
position on actual innocence. Part III discusses both the New York State trial courts’ handling of
actual innocence claims and the failure of the appellate courts in New York to address the
constitutionality of incarcerating an innocent person. Part IV proposes that the trial courts were
correct in finding that actual innocence is in fact a ground for reversal under the New York State
Constitution. Finally, the paper concludes that the New York State Court of Appeals or the New
York legislature must remedy the injustice caused by the incarceration of the factually innocent.

I. Background

A. Available Post-Trial Relief in New York State

Before addressing the merit of a freestanding claim of actual innocence in New York, a
word about both the availability and insufficiency of post-trial relief for a defendant alleging
actual innocence in New York is necessary. Under New York State law, “[a] lower court has no
inherent power to set aside a guilty verdict, but is limited to those grounds enumerated by statute

⁶ Bermudez, supra note 2; Wheeler-Whichard, 884 N.Y.S.2d at 313; Cole, 765 N.Y.S.2d at 485.
and their statutory criteria." New York provides several channels that enable a defendant to obtain post-trial relief, including a motion to set aside the verdict, direct appeal, a petition for writ of error coram nobis, a petition for state habeas corpus relief, a motion to set aside a judgment, a petition for federal habeas corpus relief, and a petition for executive clemency.

After the verdict and before sentencing, a defendant may file a CPL 330 motion to set aside the verdict. There are three grounds for setting aside a verdict: (1) an issue during trial would constitute reversible error on appeal, (2) improper conduct by a juror and (3) newly discovered evidence. A defendant claiming actual innocence based on newly discovered evidence faces strict statutory requirements, which he must prove by a preponderance of the evidence. A common problem arising in actual innocence claims is that a defendant’s new evidence may not fulfill the strict statutory requirements of newly discovered evidence. For example, often evidence could have been discovered at trial with due diligence, but counsel failed to discover the evidence.

A defendant can also challenge his conviction on direct appeal. However, a newly discovered evidence claim establishing actual innocence is not normally cognizable on direct appeal because an appeal by definition addresses error of law occurring at the trial level.

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8 Cole, 765 N.Y.S.2d 477, 480.
11 Id. Section 330.30(3) provides in part:
   At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:
   (3) That new evidence has been discovered since the trial which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that such evidence had been received at the trial the verdict would have been more favorable to the defendant.
Further, “[t]he power to vacate judgment upon the ground of newly discovered evidence and
grant a new trial rests within the discretion of the [trial] court.”

In addition, convictions are reviewable through petitions for writs of error coram nobis
and petitions for state habeas corpus relief. However, the legislature revised the criminal
procedure law to combine all collateral attacks on convictions:

[M]otions to vacate judgment (CPL 440.10) and to set aside sentence (CPL
440.20) are intended to “embrace” all previous collateral attacks on convictions
and sentences, including both habeas corpus and coram nobis, and cover all
contentions which may be raised under the old remedies to collaterally attack a
conviction or sentence.

State habeas corpus and coram nobis petitions are still available, but the preferred avenue for
post-judgment relief is by moving to vacate a judgment pursuant to CPL 440.10:

[T]he Supreme Court of the county where a convicted defendant is imprisoned
still has jurisdiction to entertain a writ of habeas corpus on grounds covered by
article 440. However, where an inmate seeks to challenge his conviction or
sentence, he now should be expected to bring a motion under art. 440 of the CPL
in the court of his conviction, instead of proceeding via a writ of habeas corpus.

If a defendant does proceed by petitioning for a writ of habeas corpus where a 440 motion would
suffice, the writ should be dismissed without prejudice “or transferred to the court of conviction
to be treated as article 440 motions.” Thus, state habeas corpus is only appropriate where there
is no other remedy available for the defendant.

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County 1971) (internal citations omitted); N.Y. Crim. Proc. Law § 440.10 (Consol. 2009) (motion to vacate
judgment); N.Y. Crim. Proc. Law § 440.20 (Consol. 2009) (motion to set aside sentence; by defendant). Sections
440.10(1)(b), (c), (e), (f), & (h) cover contentions traditionally raised under coram nobis; sections 440.10(1)(a), (d), & (h)
cover contentions raised under state habeas corpus petitions. CPL § 440.10 (Commission Staff Notes).
16 Anderson, 325 N.Y.S.2d at 832.
17 Id. at 835, 836 (holding that “dismissing a habeas corpus writ on the grounds that another remedy is more
appropriate is certainly not unconstitutional.”).
18 Id. at 833. Cases not covered under CPL 440, in which habeas corpus is the only available remedy for the
defendant, include, but are not limited to, “those of prisoners awaiting trial or sentence, persons in civil custody of
all sorts, or inmates claiming that correctional or parole authorities have denied them their rights.” Id. at 832. On
the other hand, all contentions previously raised in coram nobis petitions appear to be covered by CPL §§
440.10(1)(b), (c), (e), (f), & (h). See CPL § 440.10 (Commission Staff Notes).
The primary method to collaterally attack a conviction is by moving to vacate a judgment under CPL 440.\textsuperscript{19} In addition to covering the contentions traditionally raised in state habeas corpus and coram nobis petitions, a defendant may raise several other contentions pursuant to CPL 440, including, but not limited to, newly discovered evidence,\textsuperscript{20} post-conviction Brady violations,\textsuperscript{21} and a petition for federal habeas corpus relief.\textsuperscript{22} Further, a defendant can move to vacate the judgment where “[t]he judgment was obtained in violation of a right of the defendant under the constitution of [New York] state or of the United States.”\textsuperscript{23}

Finally, a defendant can challenge his conviction by petitioning for executive clemency.\textsuperscript{24}

An executive pardon could be granted based on actual innocence. Nevertheless, the pardon is

\textsuperscript{19} CPL § 440.10.
\textsuperscript{20} Id. Section 440.10(1)(g) provides:
At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
\hspace{1cm} (g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.\textsuperscript{21}
\textsuperscript{21} Id. Section 440.10(1)(c) provides:
At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
\hspace{1cm} (c) Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false.[
\textsuperscript{22} CPL §§ 440.10(1)(a), (d), & (h). In Herrera v. Collins, the United States Supreme Court severely limited a defendant’s ability to petition for federal habeas relief on the ground of actual innocence. 506 U.S. 390, 400-01 (1993). To obtain relief in federal court, a petitioner must establish pursuant to 28 U.S.C. § 2254 that his or her incarceration violates federal law. 28 U.S.C. § 2254 (1996); see Symposium, The Death Penalty and the Question of Actual Innocence: Is It Constitutional to Execute Someone Who is Innocent (and if It isn’t, How Can It be Stopped Following House v. Bell)?, 42 TULSA L. REV. 277, 280-81 (2006).
\textsuperscript{23} CPL § 440.10(h). Section 440.10(h) provides:
At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
\hspace{1cm} (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.
\textsuperscript{24} Cole, 765 N.Y.S.2d at 482. The Cole court stated that “[b]oth the United States Constitution (art. II, § 2 [1]) and the New York State Constitution (art. IV, § 4) accord the chief executive officer of government the right to grant clemency or a pardon to a convicted person.” Id.
inadequate because it is arbitrary: “there is nothing compelling the governor to grant a pardon to an actually innocent defendant.” As a result, the issuance of an executive pardons may be more determinative of political concerns than the search for truth. The procedural inadequacies of the available methods of post-trial relief for an actually innocent defendant necessitate New York State recognizing a freestanding claim of actual innocence.

B. People v. Bermudez: Factual and Procedural Background

On November 9, 2009, in People v. Bermudez, the trial court held that the defendant, Fernando Bermudez, established his “actual innocence.” Bermudez had been convicted for the murder of Raymond Blount on February 6, 1992, following a fatal shooting outside of a nightclub on August 4, 1991. On the evening of the shooting, Blount had been involved in a physical altercation at a nightclub with Efraim Lopez. Several hours after the altercation, Lopez “pointed Mr. Blount out to a man he was walking with,” known as Wool Lou, who subsequently shot and killed Blount.

Mr. Bermudez was arrested two days after the shooting. The prosecution claimed that Mr. Bermudez “was the shooter, a [local] drug dealer known as Wool Lou.” “The defendant has always maintained that he was not Wool Lou; that he did not know Efraim Lopez; that he was not at the [nightclub] on the night of the crime or at any other time; and that he did not shoot

25 Id. at 483; see Herrera, 506 U.S. 439-40 (Blackmun, J., dissenting) (“. . . The possibility of executive clemency is not sufficient to satisfy the requirements of the Eight and Fourteenth Amendments. . . . The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal.”)
28 Bermudez, supra note 2.
29 Id.
30 Id.
31 Id.
32 Id.
Mr. Blount.” The only evidence against the defendant was Lopez’s self-serving testimony and suspicious “identification testimony” by “[f]our friends of the victim,” each who recanted their testimony following the trial. Lopez identified Bermudez as Wool Lou, claimed that Bermudez and Lopez had a longtime relationship, and implicated Bermudez for the shooting. Bermudez was convicted based solely on the identification testimony. The prosecution did not introduce any physical evidence linking Bermudez to the shooting.

Following the verdict and prior to the sentencing, Bermudez’s private investigators learned that Bermudez was not “Wool Lou,” and that in fact, Wool Lou was Luis Muñoz, a man facially resembling Bermudez. Unfortunately, the defense investigators were unable to locate Muñoz, who changed his name and fled south following the shooting. The investigators also learned that Muñoz and Lopez were close acquaintances. Bermudez filed a CPL 330 motion to set aside the verdict on the grounds of newly discovered evidence, which was denied without a hearing. Bermudez was sentenced to twenty-three years to life in prison.

Bermudez filed two CPL 440 motions with the trial court, both of which were denied without an evidentiary hearing. Leave to appeal from the denial of the motions was granted, and this appeal was consolidated with Bermudez’s direct appeal. On appeal, the Appellate Division, First Department, affirmed Bermudez’s conviction, and leave to appeal to the New

33 Id.
34 Bermudez, supra note 2. “Efraim Lopez testified at trial under a cooperation agreement in which he was not charged with any crime relating to [the] incident.” Id.
35 Id.
36 Id.
37 Id.
38 Id.; Mem. of Def., supra note 1, at 7.
39 Bermudez, supra note 2; Mem. of Def., supra note 1, at 7.
40 Mem. of Def., supra note 1, at 7.
41 Bermudez, supra note 2; N.Y. Crim. Proc. Law § 330.30 (Consol. 2009) (grounds for motion to set aside verdict).
42 Bermudez, supra note 2.
43 Id.; CPL § 440.10 (Consol. 2009) (motion to vacate judgment).
44 Bermudez, supra note 2.
York State Court of Appeals was denied. Bermudez filed two more CPL 440 motions with the trial court, which were subsequently denied without an evidentiary hearing. Bermudez then filed a petition for a writ of habeas corpus in federal court and was subsequently granted his first evidentiary hearing.

During the federal habeas hearing, the magistrate judge “credited the testimony of the four eyewitnesses [indicating] that they had collaborated in selecting the defendant’s picture, a procedure conducive to irreparable misidentification.” The testimony demonstrated that the detective placed the four eyewitnesses in a room where they jointly reviewed the array of photograph and jointly determined that Bermudez “looked like the shooter.” The eyewitnesses identified Bermudez in a lineup following this collaboration. Further, all four witnesses and Lopez recanted their previous identification of Bermudez as the shooter. Despite finding that the identification procedure was unduly suggestive, the District Court denied Bermudez’s writ of habeas corpus, and the Second Circuit Court of Appeals affirmed.

Following the hearing, Bermudez filed another CPL 440 motion in the trial court alleging that he is entitled to a reversal of his conviction under CPL 440.10(1)(h) because: (1) Bermudez is actually innocent and the incarceration of an innocent person violates the New York State Constitution, Article I, Sections 5 and 6; (2) the unduly suggestive lineup procedures

45 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 Bermudez, supra note 2.
51 Id.
52 Id. “Relying on federal law, which, unlike [New York] state law, allows the finding of an independent source to be based upon a review of the trial testimony, Magistrate Fox found an independent source existed for the four in-court identifications.” Id.
54 N.Y. CONST. art. I, § 5 (Consol. 2009) provides: “Excessive bails shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.”; N.Y.
violated Bermudez’s due process rights; (3) Bermudez was deprived of the effective assistance of counsel, thus violating his due process protections; and (4) the prosecution violated Bermudez’s due process rights by failing to disclose exculpatory evidence pertaining to the witnesses’ collaboration over the identification. In its response to Bermudez’s motion, the prosecution acknowledged that Bermudez is not “Wool Lou,” and that Lopez, the prosecution’s key witness, committed perjury at trial. In addition, subsequent to the motion, the prosecution did locate Luis Muñoz, who admitted that he was “Wool Lou” and that he knew Lopez for several years prior to the shooting, but denied having anything to do with the shooting.

The trial court granted Bermudez an evidentiary hearing, pursuant to his CPL 440 motion, to determine four issues. First, the court noted that the federal magistrate’s finding that the lineup was unduly suggestive would require a reversal of the conviction under New York state law. In particular, an identification that is the tainted fruit of a joint effort is inadmissible. Further, the court found that the witness’ testimony from the federal habeas hearing constituted newly discovered evidence. Accordingly, the court held that Bermudez was entitled to an evidentiary hearing under CPL 440.10(1)(g) and (h) to determine “whether

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56 Bermudez, supra note 2.
57 Id.
58 Id. The court addressed the issues in the following order: (1) unduly suggestive lineup, (2) newly discovered evidence, (3) actual, factual innocence, (4) discovery violations. For the purpose of this paper, the freestanding claim of actual innocence will be addressed last.
59 Id. (citing People v. Burts, 574 N.E.2d 1024, 1024 (N.Y. 1991)). In Burts, the court held that “the joint photo identification by [multiple] victims at police headquarters was the product of impermissibly suggestive procedures.” 574 N.E.2d at 1024.
60 Bermudez, supra note 2.
61 Id.
undue suggestiveness occurred during the identification procedures[,] . . . [and] “whether any unduly suggestive procedures violated defendant’s rights under the New York Constitution.” 62

Second, the court granted Bermudez an evidentiary hearing to determine whether the newly discovered evidence relating to Mr. Muñoz warranted vacating Bermudez’s conviction. 63 Even though Muñoz denied having anything to do with the shooting, he admitted that he was “Wool Lou” and that he knew Lopez for several years prior to the shooting. 64 The fact that Muñoz knew Lopez was significant because Lopez, “the People’s only trial witness who testified to having known the shooter prior to the night of the crime, is now conceded by the People to have committed perjury throughout his trial testimony.” 65 Furthermore, the People’s investigation revealed that Muñoz lived in New York at the time of the shooting, thus discrediting his alibi. 66

The court laid out the six requirements, established in People v. Salemi, to determine the sufficiency of newly discovered evidence pursuant to CPL 440.10(1)(g):

In order to constitute newly discovered evidence, the evidence must: (1) have been discovered after trial; (2) it must have been undiscoverable before or during the trial by the exercise of due diligence; (3) it must be material to the issue; (4) it must not be cumulative; (5) it must not merely impeach or contradict the trial evidence; and (6) it must be of such a nature to probably change the result if a new trial was granted. 67

The court held that the evidence adduced in both Bermudez’s memorandum and the People’s response is sufficient to warrant an evidentiary hearing to determine if the newly discovered evidence satisfies the Salemi requirements. 68 The court noted that the defendant has the burden

62 Id.; N.Y. Crim. Proc. Law §§ 440.10(g) & (h) (Consol. 2009) (motions to vacate judgment).
63 Bermudez, supra note 2.
64 Id.
65 Id.
66 Id.
67 Id. (citing People v. Salemi, 128 N.E.2d 377, 381 (N.Y. 1955)).
68 Bermudez, supra note 2; see Mem. of Def., supra note 1, at 3-8.
of showing by a preponderance of the evidence that the evidence put forth satisfies these requirements.\textsuperscript{69}

In addition to its findings based on the unduly suggestive lineup and newly discovered evidence, the trial court granted Bermudez an evidentiary hearing, pursuant to CPL 440.10(1)(c), to determine whether the People knew prior to sentencing that Lopez’s testimony was perjured.\textsuperscript{70} If the People had in its possession prior to sentencing exculpatory evidence which was material to defendant’s innocence, the People should have turned that evidence over to defendant upon request from defendant.\textsuperscript{71} Failing to disclose exculpatory evidence violates defendant’s due process rights. The defendant has the burden of establishing two requirements to satisfy “a post-conviction \textit{Brady} claim”: (1) “the material was not known to the defense,” and (2) “the material was never disclosed to him/her.”\textsuperscript{72}

Finally, the court held that Bermudez is entitled to an evidentiary hearing based on his freestanding claim of actual innocence, because “the incarceration of a defendant who is actual [sic] innocent violates the due process clause of our State Constitution.”\textsuperscript{73} Accordingly, “a freestanding claim of actual innocence may be raised pursuant to CPL 440.10(1)(h).”\textsuperscript{74}

\textsuperscript{69}Bermudez, supra note 2.; N.Y. Crim. Proc. Law § 440.30 (Consol. 2009) (motions to vacate judgment and set aside sentence; procedure). Section 440.30(6) provides: “At such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.”

\textsuperscript{70}Bermudez, supra note 2; CPL § 440.10(1)(c) (Consol. 2009) (motion to vacate judgment).


\textsuperscript{72}Cole, 765 N.Y.S.2d at 481. There is a dual standard of review depending on the specificity of defendant’s request. \textit{Id.} (quoting People v. Vilardi, 555 N.E.2d 915, 920 (N.Y. 1990)). If the defendant made a specific request for a piece of evidence, the standard is “whether there is a reasonable probability that the failure to disclose the item affected the verdict.” \textit{Id.} On the other hand, if the defendant made a general request, a stricter standard is applied to determine whether there is a “reasonable probability” the failure to disclose affected the verdict. \textit{Id.} In Bermudez, the court did not address the standard it would apply at the evidentiary hearing; however, based on the facts presented by the court, it appears that the defendant gave a general request for exculpatory information, so the court will apply the looser “reasonable probability standard.” See Bermudez, supra note 2.

\textsuperscript{73}Bermudez, supra note 2.

\textsuperscript{74}\textit{Id.}
II. The United States Supreme Court’s Analysis of Actual Innocence

In establishing that a freestanding claim of actual innocence is cognizable in New York, the trial court in *Bermudez* began its analysis with the United States Supreme Court’s position on actual innocence.\(^{75}\) The Supreme Court initially addressed the issue in *Herrera v. Collins* and *Schlup v. Delo*, both of which severely limited the availability of federal habeas relief to defendant’s presenting a freestanding claim of actual innocence.\(^{76}\) However, the Supreme Court has not yet determined whether a freestanding claim of actual innocence warrants a reversal under the federal constitution.\(^{77}\)

In *Herrera*, the defendant, Leonel Torres Herrera, was convicted of capital murder and sentenced to death for fatally shooting two police officers.\(^{78}\) The evidence presented at trial against Herrera was overwhelming, including an identification by one of the police officer’s partners and a declaration made by one of the wounded officer’s in the hospital.\(^{79}\) After exhausting his direct appeals and collateral remedies in Texas state courts, and following the denial of his first petition for federal habeas relief, Herrera filed a second federal habeas petition, alleging actual innocence based on newly discovered evidence.\(^{80}\) Along with his petition, Herrera included four affidavits implicating his deceased brother, Raul, as the shooter and

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\(^{75}\) Id. The court limits its discussion to *Herrera v. Collins*, 506 U.S. 390 (1993) and *Schlup v. Delo*, 513 U.S. 298 (1995). Id. For the purpose of this note, I will not limit the discussion to these cases.  
\(^{76}\) Kavanagh, supra note 3 at 481; *Herrera*, 506 U.S. at 398-417; *Schlup*, 513 U.S. at 315-16, 324.  
\(^{78}\) *Herrera*, 506 U.S. at 393-94.  
\(^{79}\) Id. at 394. The identification testimony was corroborated by testimony linking Herrera to the car observed at the scene of the shootings, forensic evidence, Herrera’s social security card found at one of the scenes, and a letter written by Herrera implicating himself in the shooting. *Id.* at 394-95.  
\(^{80}\) Id. at 395-96.
exculpating himself.\footnote{Id. at 396. Three affidavits, given by Raul’s cellmate, attorney, and friend, claimed that at some time prior to his death, Raul admitted to shooting the officers, and the other affidavit, given by Raul’s son, alleged that he witnessed Raul shoot the officers. \textit{Id.} at 396-97.} Herrera argued that because he was innocent of the murders, his execution would violate the Fifth and Fourteenth Amendments of the United States Constitution.\footnote{Id.; U.S. CONST. amend. VIII & XIV.} Following the dismissal of Herrera’s constitutional claims, the United States Supreme Court granted certiorari to hear his freestanding innocence claim.\footnote{\textit{Herrera}, 506 U.S. at 393.} The Supreme Court affirmed the judgment denying Herrera’s petition for habeas corpus.\footnote{Id. at 419.} The Court held that “[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”\footnote{Id. at 400.} Thus, “[a]lthough a claim of actual innocence could provide a gateway into federal court for otherwise procedurally barred constitutional claims, it was held insufficient, in and of itself, for a state prisoner to obtain federal habeas corpus relief.”\footnote{\textit{Bermudez}, supra note 2 (citing \textit{Herrera}, 506 U.S. at 404).} The Court reasoned that a freestanding innocence claim is not a procedurally barred constitutional claim.\footnote{Id. at 404.} Further, federal habeas relief is intended to ensure that incarceration is not grounded on procedural defects that violate the constitution, not to correct factual errors.\footnote{Id. at 411.} The court found that this rule, commonly referred to as the fundamental miscarriage of justice exception, did not apply to Herrera because he did not allege a procedural error along with his freestanding innocence claim.\footnote{Id. at 411.}

In addition, the Court rejected Herrera’s procedural due process argument.\footnote{Id. at 400.} The Court reasoned that Texas’ refusal to recognize Herrera’s newly discovered evidence claim, which
Herrera filed after the statutory period for the motion, did not violate fundamental fairness. 91

The Court indicated that actual innocence claims should be addressed by petitioning for executive clemency, which “has provided the ‘fails safe’ in our criminal justice system.” 92 This assertion suggests “that state courts were the better forum to raise claims of actual innocence.” 93 Accordingly, the Supreme Court “refused to hold that it is improper for a state to incarcerate an innocent person, provided that the state provides for a possibility of a pardon based upon the person being innocent.” 94

The Court then stated that federal habeas relief may be available in very limited situations:

We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of “actual innocence” made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. 95

The Court assumed that in such a case, the burden of proof would be exceptionally high. 96

However, this assumption is mere dictum, so the Court never firmly established whether federal habeas relief would be available for a defendant claiming actual innocence. 97 Further, the Court stated that Herrera’s showing “falls far short of any such threshold.” 98 In her concurring opinion, Justice O’Connor concluded, rather than assumed, that it is “a fundamental legal principle that

91 Id.
92 Id. at 415, 417.
93 Bermudez, supra note 2; see Herrera, 506 U.S. at 407-08.
94 People v. Cole, 765 N.Y.S.2d 477, 484 (N.Y. 2003) (citing Herrera, 506 U.S. at 411-12, 415-17). The Supreme Court did not explicitly state that executive clemency must be available. However, due to its lengthy discussion on executive clemency and its determination that in the absence of executive clemency, federal habeas relief may be available, “[v]irtually every United States Court of Appeals has held that refusal by the United States Supreme Court to hold that a claim of actual innocence is grounds for relief means that there exists no constitutional prohibition against leaving an innocent person in jail if that state provides for a pardon based upon innocence.” Cole, 765 N.Y.S.2d at 484 (emphasis added) (internal citations omitted).
95 Herrera, 506 U.S. at 417.
96 Id.
97 Id. at 430 (Blackmun, J., dissenting).
98 Id. at 417 (majority opinion).
executing the innocent is inconsistent with the Constitution.” Justice O’Connor, agreeing with the majority, also concluded that if federal habeas relief is available in limited situations, it would not be available to Herrera because both (1) the evidence put forth by Herrera would not meet this extraordinarily high threshold and (2) Texas provides for a pardon based on innocence. In his dissent, Justice Blackmun contended that executing a person who is actually innocent violates the Eight Amendment. Justice Blackmun recognized that punishment is excessive and unconstitutional if it is “nothing more than the ‘purposeless and needless imposition of pain and suffering’ . . . .” Accordingly, “[e]xecuting an innocent person epitomizes ‘the purposeless and needless imposition of pain and suffering.’” Justice Blackmun suggested, but did not conclude, that incarcerating a person who is actually innocent also violates the Eight Amendment. Furthermore, Justice Blackmun concluded that executing an innocent person violates the Due Process Clause of the Fourteenth Amendment. Finally, Justice Blackmun rejected the majority’s contention that executive clemency is an appropriate remedy for actual innocence claims, since pardons are arbitrary and unreviewable.

The Supreme Court revisited the actual innocence issue two years later, in Schlup v. Delo, to determine the appropriate standard to overcome a procedurally bared constitutional claim when a defendant who has been sentenced to death raises an actual innocence claim. In Schlup, the defendant, Lloyd E. Schlup, Jr., was charged along with two other inmates for his

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99 Id. at 419 (O’Connor, J., concurring).
100 Id. at 427; Id. at 417-18 (majority opinion).
101 Herrera, 506 U.S. at 431 (Blackmun, J., dissenting).
102 Id. (quoting Coker v. Georgia, 433 U.S. 584, 592 (U.S. 1977) (plurality opinion)).
103 Id. at 431-32 (quoting Coker, 433 U.S. at 592).
104 Id. at 432, n.2.
105 Id. at 435.
106 Id. at 439-40.
participation in the murder of a fellow inmate in prison.\footnote{108} Despite ample evidence demonstrating that Schlup could not have been involved in the murder, Schlup was convicted of first degree murder and sentenced to death based solely on the eyewitness identification of two guards.\footnote{109} After exhausting his state appeals and collateral remedies, and following the denial of his first federal habeas petition, Schlup filed a second habeas petition alleging that he was actually innocent, that his trial counsel was ineffective for failing to interview witnesses who could corroborate his alibi defense, and that the government committed \textit{Brady} violations.\footnote{110} The District Court denied the petition on the ground that Schlup’s showing of actual innocence did not meet the clear and convincing evidence standard.\footnote{111} The Court of Appeal affirmed and the Supreme Court granted certiorari.\footnote{112} The Supreme Court, finding that the clear and convincing standard is the incorrect standard, held that a defendant sentenced to death raising an actual innocence claim, in order to overcome a procedurally barred constitutional claim, “must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.”\footnote{113}

The Supreme Court draws two important distinctions between \textit{Schlup} and \textit{Herrera}.\footnote{114} First, the Court noted that Schlup’s actual innocence claim is not freestanding because Schlup’s claim relies heavily on the alleged ineffective assistance of counsel and \textit{Brady} violations.\footnote{115} In other words, Herrera’s actual innocence claim is substantive, whereas Schlup’s actual innocence

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  \item \footnote{108}{\textit{Id.} at 301-02.}
  \item \footnote{109}{\textit{Id.} at 302.}
  \item \footnote{110}{\textit{Id.} at 307. Schlup’s ineffective assistance of counsel claim was procedurally barred because he failed to raise it on direct appeal. \textit{Id.} at 307, n.15.}
  \item \footnote{111}{\textit{Id.} at 301. The District Court applied the standard applied in \textit{Sawyer v. Whitley}, which requires that “the petitioner [] show ‘by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner’ guilty.” \textit{Id.} (quoting Sawyer v. Whitley, 505 U.S. 333, 336 (1992)).}
  \item \footnote{112}{\textit{Id.}}
  \item \footnote{113}{\textit{Schlup}, 513 U.S. at 326-27. This standard is referred to as the \textit{Carrier} “probably resulted” standard. \textit{See} Murray v. Carrier, 477 U.S. 478, 496 (1986).}
  \item \footnote{114}{\textit{Schlup}, 513 U.S. at 313-17.}
  \item \footnote{115}{\textit{Id.} at 315.}
\end{itemize}
claim is procedural. The Court stated that “Schlup’s claim of innocence is thus ‘not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.’” Second, the court determined that unlike Herrera’s innocence claim, which is based on an “error free” trial, Schlup’s innocence claim is the fruit of “constitutional error at trial.” Accordingly, Schlup is entitled to a lower standard of review.

Despite reaffirming that an actual innocence claim provides a gateway for a defendant to bypass procedurally barred claims, the Supreme Court declined to reach Schlup’s freestanding claim of actual innocence. However, the Court suggested that in the absence of procedural defects at trial, a defendant could petition for federal habeas relief in extremely limited situations: “If there was no question about the fairness of the criminal trial, a Herrera-type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish Schlup’s innocence.” This situation would only arise where the state failed to provide a pardon based on actual innocence.

Three years later, following the Oklahoma City bombing, Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) “to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes.” Congress passed AEDPA to curb abuse of the writ of habeas corpus and to prevent unnecessary or costly...
For both state and federal prisoners, the AEDPA “restricted the availability of the writ,” which “sharply restricts the previous right of a prisoner to challenge his or her conviction.”

Further, the act imposed a “more stringent ‘gatekeeping provision,’ which sharply limits prisoner’s right to bring second or successive habeas corpus petitions.” Despite providing a more strict standard than Schlup, the Supreme Court has not held that the AEDPA replaced the Schlup gateway standard. Further, the act also limited the discretionary authority of federal court to hear habeas petitions. Since the passing of the AEDPA, district courts have consistently misinterpreted the act, which Congress enacted “to stop the unfounded abusive delays in capital cases that tend to undermine our criminal justice system.”

According to one of the drafters of the act, the House Judiciary Committee did not intend for the act to restrict prisoners raising actual innocence from obtaining federal habeas relief.

In 2006, thirteen years after Schlup, in House v. Bell, the Supreme Court granted certiorari to address Paul Gregory House’s gateway claim under Schlup and freestanding innocence claim under Herrera. The District Court denied House’s federal habeas petition, on the ground that House did not meet the “more likely than not” standard established in Schlup. The Court of Appeals for the Sixth Circuit affirmed and the Supreme Court subsequently

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125 Stahlkopf, supra note 134 at 1117.
127 The Death Penalty and the Question of Actual Innocence, supra note 2 at 284, n.35; see Schlup v. Delo, 513 U.S. 298, 326-27 (1993). Schlup requires a preponderance of the evidence standard, whereas AEDPA proposes a clear and convincing evidence standard. The Death Penalty and the Question of Actual Innocence, supra note 2 at 284, n.35; see Schlup, 513 U.S. at 326-27.
128 Stahlkopf, supra note 134 at 1117, n.14.
129 Barr, supra note 135. As a member of the House Judiciary Committee, Bob Barr helped write the AEDPA. Id. See also Stahlkopf, supra note 134 at 1117.
130 Barr, supra note 135.
132 Id. at 535-36; see Schlup, 513 U.S. at 326-27.
reversed, holding that House satisfied the gateway standard and that House could proceed with his procedurally barred constitutional claims.\textsuperscript{133}

Nevertheless, the Supreme Court once again declined to address the freestanding innocence claim left open in \textit{Herrera} and \textit{Schlup}.\textsuperscript{134} However, the Court did state that if a freestanding claim of actual innocence was cognizable under \textit{Herrera}, House had not met the burden \textit{Herrera} would require.\textsuperscript{135} Further, the Court concluded that the showing of innocence required for a freestanding claim of actual innocence would necessarily be higher than the standard articulated in \textit{Schlup}, and thus would be higher than “more likely than not.”\textsuperscript{136}

Recently, in \textit{District Attorney’s Office for the Third Judicial District v. Osborne}, the Supreme Court once again declined to address whether a freestanding claim of actual innocence is cognizable under the federal constitution.\textsuperscript{137} The Court assumed that such a right would exist, but did not decide whether it does exists, because Osborne did not petition for federal habeas relief, which would be the appropriate avenue for an innocence claim.\textsuperscript{138} Further, the Court indicated that the standard would be high for a freestanding innocence claim.\textsuperscript{139} In his dissenting opinion, Stevens argued that “an individual’s interest in his physical liberty is one of constitutional significance,” suggesting that incarcerating an actually innocent person does violate a person’s substantive due process rights.\textsuperscript{140}

\textsuperscript{133} \textit{House}, 547 U.S. at 536, 555. In addressing House’s claim, the Supreme Court determined that the standard provided under the AEDPA was inapplicable in this case, and therefore, the less restrictive \textit{Schlup} standard was appropriate. \textit{Id.} at 539.

\textsuperscript{134} \textit{Id.} at 554-55.

\textsuperscript{135} \textit{Id.} at 555; see \textit{Herrera}, 506 U.S. at 417.

\textsuperscript{136} \textit{House}, 547 U.S. at 555; see \textit{Schlup}, 513 U.S. at 326-27.

\textsuperscript{137} 129 S. Ct. 2308, 2321 (2009).

\textsuperscript{138} \textit{Id.} at 2321-22. Osborne, alleging that he had a right under the United States Constitution to have access to evidence from trial so he could perform DNA testing, brought his action under the Federal Civil Rights Statute. \textit{Osborne}, 129 S. Ct. at 2312, 2315; 42 U.S.C. § 1983 (1996) (civil action for deprivation of rights).

\textsuperscript{139} \textit{Osborne}, 129 S. Ct. at 2321.

\textsuperscript{140} \textit{Id.} at 2338 (Stevens, J., dissenting).
Two months after deciding *Osborne*, the Supreme Court decided *In Re Troy Anthony Davis*, where for the first time the Supreme Court recognized a freestanding claim of actual innocence.\(^{141}\) Troy was sentenced to death for the fatal shooting of an off-duty police officer.\(^{142}\) After exhausting all available remedies, Troy petitioned the United States Supreme Court for a writ of habeas corpus.\(^{143}\) The Supreme Court, in its very brief opinion that provided no rationale, transferred the case to the District Court to conduct an evidentiary hearing on whether evidence that could not have been adduced at trial clearly demonstrates Davis’ innocence.\(^{144}\) Lacking any explanation for the holding, the Court’s holding presumably relied on the Court’s assumption in *Herrera* “that in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief . . . .”\(^{145}\)

Justice Stevens’ concurrence does shed some light on the Court’s decision.\(^{146}\) Justice Stevens commented that “[t]he substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing.”\(^{147}\) Further, Justice Stevens, in agreement with Justice Blackmun’s dissent in *Herrera*, rejected Justice Scalia’s assumption that a hearing should be denied because the petitioner is “legally” guilty, despite ample evidence demonstrating that the petitioner is “factually” innocent.\(^{148}\) In addition, Justice Stevens laid out several reasons why the District Court may conclude that it has authority to hear

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\(^{141}\) 130 S. Ct. 1, 1 (U.S. 2009).
\(^{142}\) Barr, supra note 135.
\(^{143}\) *Davis*, 130 S. Ct. at 1.
\(^{144}\) Id.
\(^{146}\) See *Davis*, 130 S. Ct. at 1-2 (Stevens, J., concurring).
\(^{147}\) Id. at 1.
\(^{148}\) See id.; *Herrera*, 506 U.S. at 436 (Blackmun, J., dissenting).
the actual innocence claim in light of the AEDPA. First, the lower court may conclude that the AEDPA does not apply to original habeas petitions to the Supreme Court that are transferred to lower courts. Second, the AEDPA might not apply to actual innocence claims. This rationale is in discord with the lower courts’ interpretation of the act, but is in accord with the legislative intent of the act. Finally, even if the AEDPA does apply, “it is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence.” Justice Stevens proclaimed that the Supreme Court “refuses” to put a person to death who proved, “beyond any scintilla of doubt, that he is an innocent man.”

Justice Scalia’s dissenting opinion rejected Davis’ innocence claim because it is procedurally barred by the AEDPA. In addition, Justice Scalia criticized Justice Stevens’ contention that the execution of an innocent person is unconstitutional, arguing that the Supreme Court has never accepted this claim:

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.

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149 *Davis*, 130 S. Ct. at 2 (Stevens, J., concurring); *see* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1214 (1996) (amending 28 U.S.C. §§ 2241-2255 and adding 28 U.S.C. §§ 2261-2266 (Supp. 1996)). Through its amendments to 28 U.S.C. § 2254(d)(1), the AEDPA limited a federal court’s ability to provide relief for state prisoners petitioning for federal habeas relief. Section 2254(d)(1) provides: 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; 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.

150 *Davis*, 130 S. Ct. at 2 (Stevens, J., concurring).
151 *Id.*
152 Barr, supra note 135. Barr, one of the drafter’s of AEDPA, argued that “nothing in the statute should have left the courts with the impression that they were barred from hearing claims of actual innocence like Troy Davis’s.” *Id.*
153 *Davis*, 130 S. Ct. at 2 (Stevens, J., concurring).
154 *Id.*
155 *Id.* at 2-3 (Scalia, J., dissenting). Justice Stevens, in contrast, concluded that the District Court should decide on remand whether Davis’ innocence claim is procedurally barred by the AEDPA. *Id.* at 1-2 (Stevens, J., concurring).
156 *Id.* at 3 (Scalia, J., dissenting).
Further, Scalia stated that if a capital conviction could be overturned based on actual innocence, the Supreme Court should determine the merits of the claim, rather than remanding the case to the District Court. That said, following *Davis*, the Supreme Court has still failed to address whether a freestanding claim of actual innocence is cognizable under the Constitution; instead, the Court remanded the case to the District Court to make this determination. However, by remanding the case, the Court indicated that a freestanding innocence claim may be cognizable.

Thus, without establishing binding precedent, the Supreme Court has routinely found that “a freestanding claim of actual innocence [is] not a ground for federal habeas relief so long as the defendant’s trial was free from federal constitutional error and the state conviction provided some means to apply for executive clemency on a claim of actual innocence.” Thus, where there is no procedurally barred constitutional claim attached to the actual innocence claim, “and where the [s]tate provides a clemency process, there is no relief for a claim of actual innocence under the United States Constitution.” In New York State, a defendant may petition for executive clemency so “a defendant may not raise a freestanding claim of actual innocence under federal law.”

### III. New York State’s Analysis of a Freestanding Claim of Actual Innocence

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157 *Id.* at 4.
158 *Id.* at 1 (majority opinion); *In re* Troy Anthony Davis, No. CV409-130, 2009 U.S. Dist. LEXIS 75894, at *3 (S.D. Ga. Aug. 26, 2009). The Supreme Court failed to address the cognosibility of the freestanding innocence claim, so even if the District Court recognizes Davis’ freestanding innocence claim, it is still subject to reversal on appeal. See *Davis*, 130 S. Ct. at 4 (Scalia, J., dissenting).
160 Kavanagh, *supra* note 3 at 486.
161 *Bermudez, supra* note 2. However, if executive clemency is not a legitimate “state avenue” to obtain executive clemency, as suggested by Justice Blackmun in his dissent in *Herrera*, then Bermudez’s claim would be cognizable under federal law. See *Herrera*, 506 U.S. at 439-40 (Blackmun, J., dissenting).
After determining that Bermudez’s freestanding claim of actual innocence is not
cognizable under federal law, the trial court addressed New York State’s position on freestanding
innocence claims.\textsuperscript{162} The trial court observed that no New York appellate court has addressed
freestanding innocence claims.\textsuperscript{163} However, two trial courts have held that a freestanding
innocence claim is cognizable under New York state law.\textsuperscript{164}

A New York State trial court first addressed a freestanding claim of actual innocence in
\emph{People v. Cole}.\textsuperscript{165} Valance Cole was arrested for fatally shooting a man.\textsuperscript{166} At trial, the
prosecution relied solely on two eyewitness identifications.\textsuperscript{167} Cole’s defense included both an
eyewitness exculpating Cole and an alibi witness.\textsuperscript{168} Cole was subsequently convicted of
manslaughter in the first degree and lesser charges related to the shooting.\textsuperscript{169} Fifteen years after
the conviction, Cole moved pursuant to CPL 440 to vacate his judgment based on newly
discovered evidence.\textsuperscript{170} The trial court granted an evidentiary hearing and ordered that the
hearing also address \emph{Brady} violations and a freestanding claim of actual innocence pursuant to
CPL 440.\textsuperscript{171} At the hearing, Cole presented four eyewitnesses, all with extensive criminal

\textsuperscript{162} Bermudez, supra note 2. In his federal habeas petition, Bermudez did not raise a freestanding innocence claim, but instead raised an actual innocence claim in conjunction with severally procedurally barred constitutional claims under Schlup. \textit{Id.}; see Schlup, 513 U.S. at 315. Bermudez’s federal habeas petition was denied under federal law that is inapplicable in New York. Bermudez, supra note 2. Thus, “[w]here the New York State court to come to the same factual conclusions as [the federal habeas court], New York law, unlike federal law, would require a reversal of the conviction . . . .” \textit{Id.}\textsuperscript{163} Bermudez, supra note 2.\textsuperscript{164} People v. Wheeler-Whichard, 884 N.Y.S.2d 304, 313 (N.Y. Sup. Ct. Kings County 2009); People v. Cole, 765 N.Y.S.2d 477, 485 (N.Y. Sup. Ct. Kings County 2003).\textsuperscript{165} \textit{Id.}\textsuperscript{166} at 478.\textsuperscript{167} \textit{Id.} at 479.\textsuperscript{168} \textit{Id.} at 470.\textsuperscript{169} \textit{Id.}\textsuperscript{170} \textit{Id.}; N.Y. Crim. Proc. Law § 440.10(1)(g) (Consol. 2009) (motion to vacate judgment based on newly discovered evidence).\textsuperscript{171} Cole, 765 N.Y.S.2d at 479. The court noted that even though Cole did not explicitly raise the \emph{Brady} and freestanding innocence claims, they were implicitly raised in his 440 motion. \textit{Id.} at n.3.
histories, who testified that Cole was not the shooter, and Cole presented tapes made by one of the eyewitnesses at trial, who has since deceased, recanting his testimony.172

The trial court found that Cole did not establish by a preponderance of the evidence that he could not have discovered the four eyewitnesses before the trial by the exercise of due diligence, so the court denied the part of the motion regarding newly discovered evidence.173 Further, the court found that Cole did not prove by a preponderance of the evidence that the People failed to turn over exculpatory evidence, so the court denied the part of the motion regarding the alleged Brady violations.174 Finally, the court addressed the issue of whether the incarceration of an innocent person violated the New York State Constitution, stating that if the question is answered in the affirmative, then the judgment must be vacated pursuant to CPL 440.10(1)(h).175

The trial court noted that “[t]he New York State Constitution grants an accused greater rights than those provided in the Federal Constitution.”176 Further, the court stated that guaranteeing that the innocent are acquitted is fundamental to the state Constitution.177 The court held that “the conviction of and/or punishment imposed upon an innocent person violates the New York State Constitution.”178 The court listed two independent state constitutional violations: (1) “the conviction or incarceration of a guiltless person violates elemental fairness, deprives that person of freedom of movement and freedom from punishment and thus runs afoul of the Due Process Clause of the State Constitution,” and (2) “punishing an actually innocent

172 Id. at 479.
173 Id. at 480. In other words, Cole did not satisfy the Salemi requirements for newly discovered evidence. See id.; People v. Salemi, 128 N.E.2d 377, 381 (N.Y. 1955).
175 Cole, 765 N.Y.S.2d at 482; CPL § 440.10(1)(h).
176 Cole, 765 N.Y.S.2d at 484 (internal citations omitted).
177 Id. at 485.
178 Id.
person is disproportionate to the crime (or lack of crime) committed and violates the cruel and inhuman treatment clause.”

Finally, the court determined that these constitutional violations should be addressed under CPL 440(1)(h), which provides for the vacating of a judgment obtained in violation of a defendant’s constitutional rights.

The court then addressed the appropriate standard of proof for a defendant presenting a freestanding innocence claim. The court balanced three interests in determining the standard: (1) the government’s interest in the finality of judgment, (2) society’s interest in not incarcerating an innocent person, and (3) a wrongfully convicted person’s interest in attaining liberty. Adding to these three interests the fact that the appellant already had an opportunity to prove his innocence, the court found that “a movant making a free-standing claim of innocence must establish by clear and convincing evidence . . . that no reasonable juror could convict the defendant of the crimes for which the petitioner was found guilty.”

Further, evidence that would be inadmissible at trial should be permitted at the evidentiary hearing. Finally, the court found that under this standard, the appropriate remedy is to vacate the defendant’s conviction and dismiss the indictment, rather than to grant a new trial, because the defendant has already proved that no reasonable juror could convict. Despite its groundbreaking finding that a freestanding innocence claim is cognizable, the court held that Cole did not prove by clear and convincing evidence that no reasonable juror could convict.

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179 Id. (emphasis in original); N.Y. CONST. art. I, §§ 5, 6 (Consol. 2009).
180 Cole, 765 N.Y.S.2d at 484; CPL § 440.10(1)(h).
181 Id., 765 N.Y.S.2d at 485-86.
182 Id. at 486. The court adopted Blackmun’s view that “there should be an exception to the concept of finality when a prisoner can make a colorable claim of actual innocence.” Herrera v. Collins, 506 U.S. 390, 438 (1993) (Blackmun, J., dissenting).
183 Cole, 765 N.Y.S.2d at 486. The “clear and convincing” standard is presumably lower than the “extraordinarily high” standard suggested by the Supreme Court. See Herrera, 506 U.S. at 417 (majority opinion).
184 Id., 765 N.Y.S.2d at 486.
185 Id.
convincing evidence that no reasonable juror could convict.\textsuperscript{186} The New York Appellate Division denied Cole’s application for leave to appeal.\textsuperscript{187}

Four years later, in \textit{People v. Tankleff}, Martin Tankleff raised a freestanding claim of actual innocence on appeal, but the Appellate Division, Second Department, declined to address the issue, holding that newly discovered evidence warranted reversal of the conviction.\textsuperscript{188} The following year, in \textit{People v. Bellamy}, a trial court in Queens County heard a freestanding innocence claim, but the trial failed to reach the innocence claim after vacating the judgment on Kareem Bellamy’s \textit{Brady}, \textit{Rosario}, and newly discovered evidence claims.\textsuperscript{189} Recently, in \textit{People v. Wheeler-Whichard}, a trial court in Kings County vacated a judgment on the ground that Jonathan Wheeler-Whichard was actually, factually innocent.\textsuperscript{190}

Wheeler-Whichard was convicted of second-degree murder and related offenses.\textsuperscript{191} At trial, the prosecution’s case relied on two eyewitness identifications.\textsuperscript{192} Wheeler-Whichard filed a CPL 440 motion to vacate his judgment on four separate claims: (1) ineffective assistance of trial counsel, (2) actual innocence, (3) newly discovered evidence, and (4) \textit{Brady} violations.\textsuperscript{193}

\textsuperscript{186} \textit{Id.} at 487. The court stated, for purposes of appellate review, that Cole is “probably innocent,” which the court defined as “more likely than not approximating 55%.” \textit{Id.} The court made this determination so that if the appellate court reviewed the case and determined that a more lenient standard would be appropriate, it would not be necessary to remand the case, \textit{Id.}

\textsuperscript{187} \textit{Id.} at 487. The court stated, for purposes of appellate review, that Cole is “probably innocent,” which the court defined as “more likely than not approximating 55%.” \textit{Id.} The court made this determination so that if the appellate court reviewed the case and determined that a more lenient standard would be appropriate, it would not be necessary to remand the case, \textit{Id.}

\textsuperscript{188} \textit{Cole v. Walsh}, No. 05-CV-736, 2009 U.S. Dist. LEXIS 90128, at *12 (E.D.N.Y. Sept. 25, 2009). Cole subsequently petitioned for federal habeas relief solely on the ground of actual innocence. \textit{Id.} at *12-13. The District Court denied the petition on the ground that a freestanding claim of actual innocence is probably not cognizable under federal law. \textit{Id.} at *18. However, assuming a freestanding innocence claim is a federal right, the District Court held that Cole could not meet the lower standard under \textit{Schlup}, which is lower than the hypothetical standard in \textit{Herrera}. \textit{Id.} at *20; see \textit{Schlup v. Delo}, 513 U.S. 298, 326-27 (1993); \textit{Herrera}, 506 U.S. at 417.

\textsuperscript{189} \textit{848 N.Y.S.2d} at 286, 303 (N.Y. App. Div. 2d Dep’t 1994).


\textsuperscript{191} \textit{884 N.Y.S.2d} 304, 313 (N.Y. Sup. Ct. Kings County 2009).

\textsuperscript{192} \textit{Id.} at 305.

\textsuperscript{193} \textit{Id.} at 305; \textit{N.Y. Crim. Proc. Law § 440.10} (Consol. 2009) (motion to vacate judgment). At the 440 hearing, the court only rules on the freestanding innocence claim, but it discussed the other claims. \textit{Wheeler-Whichard}, 884 N.Y.S.2d at 306.
introduced demonstrating that the other eyewitness recanted her testimony before she died.\textsuperscript{194}

Further, defendant presented four alibi witnesses and two other witnesses corroborating the alibi.\textsuperscript{195} The court also considered the ineffectiveness of Wheeler-Whichard’s trial counsel and deficiencies of the prosecution.\textsuperscript{196} The trial court ruled that actual innocence is a ground for reversal under CPL 440.10(1)(h) and that the applicable standard is clear and convincing evidence.\textsuperscript{197} Moreover, the court held that Wheeler-Whichard met this threshold and vacated his convictions and dismissed the indictment on the ground of actual innocence and ineffective assistance of counsel.\textsuperscript{198} The judge concluded: “[I]t would be abhorrent to my sense of justice and fair play to do other than to vacate defendant’s convictions on both grounds and to declare that he is innocent of this horrible murder, and to ensure that he does not continue to serve any more time in prison . . . .”\textsuperscript{199}

The trial court in Bermudez, following Cole, Wheeler-Whichard, and the rationale underlying Blackmun’s dissent in Herrera, held that a freestanding claim of actual innocence is cognizable because the incarceration of an innocent person violates the due process clause of the New York State Constitution.\textsuperscript{200} Further, the court held that a freestanding claim must be raised

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\item \textsuperscript{194} Wheeler-Whichard, 884 N.Y.S.2d at 306, n.7, 307.
\item \textsuperscript{195} Id. at 307-08.
\item \textsuperscript{196} Id. at 309-13. Prior to the hearing, the court held that Wheeler-Whichard’s trial counsel was ineffective, but reserved judgment on the other claims for the hearing. Id. at 305. The deficiencies in the People’s case did not constitute prosecutorial misconduct or Brady violations, but the court considered them as evidence that weakened Wheeler-Whichard’s conviction and helped demonstrate his innocence. Id. at 310-13. Judge McKay wrote: I have no doubt that the trial Assistant District Attorney believed in her case against defendant and pursued the prosecution as a formidable advocate of the People. My criticism is that the prosecutor too readily embraced the case handed to her by the police and the witnesses and ignored strikingly inconsistent prior statements and other leads that called into serious question the merits of the prosecution’s case. The District Attorney’s responsibility was much greater than advocating for the People and seeking a conviction; it was first to do justice.
\item \textsuperscript{197} Id. at 311.
\item \textsuperscript{198} Id. at 313 (internal citations and footnotes omitted).
\item \textsuperscript{199} Id. at 313-14.
\item \textsuperscript{200} Bermudez, supra note 2; see Wheeler-Whichard, 884 N.Y.S.2d at 313; People v. Cole, 765 N.Y.S.2d 477, 485 (N.Y. Sup. Ct. Kings County 2003); Herrera v. Collins, 506 U.S. 390, 432, n.2 (1993) (Blackmun, J., dissenting) (“It also may violate the Eighth Amendment to imprison someone who is actually innocent.”).
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pursuant to CPL 440.10(1)(h). Finally, the court found that Bermudez’s showing justified an evidentiary hearing, and the court subsequently ordered a hearing on the freestanding innocence claim.

The court offered three reasons for granting the hearing on the freestanding innocence claim. First, all five of the eyewitnesses recanted their trial testimony. Even though the federal habeas court did not credit their recantations, the trial court wanted to make its own credibility determination. Second, the federal habeas court determined that “the four stranger-on-stranger identifications stemmed from an unduly tainted identification procedure.” Once again, the trial court wanted to make its own credibility determination. Finally, the prosecution’s investigation, which proved that Wool Lou is Luis Muñoz, not Fernando Bermudez, corroborated Efraim Lopez’s recantation.

On November 12, 2009, the Bermudez court held that Fernando Bermudez demonstrated by clear and convincing evidence that he was actually innocent of the murder, and subsequently vacated Bermudez’s conviction and dismissed the underlying indictment with prejudice. In reaching this holding, Judge Cataldo considered the impermissibly suggestive lineup, the witnesses’ recantation, Lopez’s perjury at trial, the evidence establishing that Muñoz was the perpetrator, and the absence of evidence linking Bermudez to the shooting. Judge Cataldo concluded that “to ignore a claim of actual innocence would be ‘fundamentally unfair’ as a

201 Bermudez, supra note 2; N.Y. Crim. Proc. Law § 440.10(1)(h) (Consol. 2009) (motion to vacate judgment).
202 Bermudez, supra note 2.
203 Id.
204 Id.
205 Id.
206 Id.
207 Id.
209 Id. at *63-107.
On November 20, 2009, Bermudez breathed free air for the first time in eighteen years.

IV. A Freestanding Claim of Actual Innocence Is a Ground for Reversal under the New York State Constitution

“The United States Supreme Court has refused to hold that it is improper for a state to incarcerate an innocent person, provided that the state provides for a possibility of a pardon based upon the person being innocent.” In *Herrera*, the Supreme Court limited the availability of federal habeas relief for a defendant raising a freestanding claim of actual innocence where the trial was free from constitutional error and the state provided an avenue for executive clemency. However, the Court assumed that in a capital case a persuasive demonstration of actual innocence would render the execution of the defendant unconstitutional, but the showing would be “extraordinarily high.” Following *Schlup*, the Supreme Court recognized that a showing of actual innocence by a preponderance of the evidence would provide a gateway for a defendant to overcome procedurally barred constitutional claims. Nevertheless, a freestanding claim of actual innocence “was held insufficient, in and of itself, for a state prisoner to obtain federal habeas corpus relief.” Recently, in *Davis*, the Supreme Court acknowledge that in capital cases, a defendant raising a freestanding innocence claim may be able to obtain federal habeas relief. Nevertheless, by remanding the case to the District Court to determine whether the freestanding innocence claim was cognizable, the Supreme Court once again left the door

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210 Id. at *62 (citing Herrera v. Collins, 506 U.S. 390, 435-37 (1993) (Blackmun, J., dissenting)).
213 *Herrera*, 506 U.S. at 400.
214 Id. at 417.
216 Bermudez, supra note 2; Schlup, 513 U.S. at 315.
open regarding actual innocence claims. However, the Court’s holding illustrated a new flexibility in the once unwavering notion of finality of judgment.

Until the Supreme Court definitively holds that a defendant may petition for habeas relief on the ground of actual innocence, a defendant in New York cannot raise a freestanding innocence claim under federal law because New York allows a defendant to petition for executive clemency. However, executive clemency is an inadequate remedy for an actually innocent defendant for several reasons. First, “[t]here is nothing compelling the governor to grant a pardon to an actually innocent defendant.” Second, pardons are subject to political considerations, which are often arbitrary and unrelated to securing a defendant’s liberty. Finally, pardons are inadequate because they are unreviewable. Thus, it is necessary for New York to establish an objective channel, separate from political considerations, for an actually innocent defendant to secure their freedom. Other available remedies, such as a motion to dismiss based on newly discovered evidence, are also insufficient due to the strict statutory requirements, which a person claiming actual innocence generally cannot meet.

In Cole, Wheeler-Whichard, and Bermudez, New York trial courts held that the incarceration of an innocent person violates the due process clause of the New York State Constitution. Accordingly, a freestanding claim of actual innocence is cognizable pursuant to CPL 440.10(1)(h) where a defendant can prove his innocence by clear and convincing

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218 See Davis, 130 S. Ct. at 1.
219 Bermudez, supra note 2.
221 Id.
223 Cole, 765 N.Y.S.2d at 485; People v. Wheeler-Whichard, 884 N.Y.S.2d 304, 313 (N.Y. Sup. Ct. Kings County 2009); Bermudez, supra note 2; N.Y. CONST. art. I, § 6 (Consol. 2009). In Cole, the court held the incarceration of an innocent person also violates the cruel and unusual punishment clause. 765 N.Y.S.2d at 485; N.Y. CONST. art. I, § 5 (Consol. 2009).
Nevertheless, the decisions of the trial courts are not binding, and because no appellate court has addressed this issue, the constitutionality of incarcerating an innocent person remains unanswered. The trial courts’ decisions demonstrate the need for the New York State Court of Appeals to address whether the incarceration of an innocent person violates the New York State Constitution. The Court should not require trial courts to determine on a case-by-case basis the constitutionality of denying an innocent person their freedom.

In determining the constitutionality of incarcerating an actually innocent defendant, the New York State Court of Appeals should follow the trial courts’ holding in Cole, Wheeler-Whichard, and Bermudez, and Justice Blackmun’s dissent in Herrera. First, incarcerating an actually innocent person violates the cruel and inhumane treatment clause of the New York State Constitution, which “prohibits punishing a person disproportionately to the crime committed.” Stripping an actually innocent defendant of their liberty in unquestionably “disproportionate to the crime (or lack of crime) committed and violates the cruel and inhumane treatment clause.” Further, following Justice Blackmun’s reasoning in his dissenting opinion in Herrera, incarcerating an innocent person is excessive and unconstitutional because it is “nothing more than the ‘purposeless and needless imposition of pain and suffering’ . . . .” Bearing in mind that the New York State Constitution offers defendants broader protections than the Federal Constitution, the Court of Appeals should find that stripping an actually innocent defendant “epitomizes the ‘purposeless and needless imposition of pain and suffering. . . .’”

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228 See Herrera, 506 U.S. at 431 (Blackmun, J., dissenting) (quoting Coker v. Georgia, 433 U.S. 584, 592 (U.S. 1977) (plurality opinion)).
229 See id.; Cole, 765 N.Y.S.2d at 484 (internal citations omitted).
In addition, the New York Court of Appeals should hold that the incarceration of an actually innocent person violates the Due Process Clause of the New York State Constitution.\textsuperscript{230}

Due process mandates that “the government grant elemental fairness to the accused.”\textsuperscript{231} Denying an actually innocent person a channel to secure their liberty exemplifies the government’s failure to grant elemental fairness. Further, the incarceration of an innocent person violates due process by “depriv[ing] that person of freedom of movement and freedom from punishment.”\textsuperscript{232} Justice Blackmun provided a similar rationale in his dissenting opinion in \textit{Herrera}, concluding that “[e]xecution of the innocent is equally offensive to the Due Process Clause of the Fourteenth Amendment” because it (1) “shocks the conscience”\textsuperscript{233} and (2) violates a defendant’s “freedom from all substantial arbitrary impositions and purposeless restraints.”\textsuperscript{234} Incarcerating a guiltless person, similarly to executing an innocent person, shocks the conscience and violates a defendant’s freedom from purposeless restraints. Once again bearing in mind that the New York State Constitution offers defendants broader protections than the Federal Constitution, the Court of Appeals should hold that incarcerating an actually innocent person violates due process because it violates elemental fairness and imposes purposeless restraints on a person’s freedom of movement.

There are two fundamental arguments suggesting that actual innocence should not be recognized as a ground for reversal. These arguments mirror the majority and concurring opinions in \textit{Herrera}. Because there is no New York case law rejecting a freestanding innocence claim, a closer look at the \textit{Herrera} arguments will prove useful in compelling the New York

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\item N.Y. CONST. art. I, § 6 (Consol. 2009).
\item \textit{Cole}, 765 N.Y.S.2d at 485 (quoting People v. Vilardi, 555 N.E.2d 915, 920 (N.Y. 1990)).
\item \textit{Cole}, 765 N.Y.S.2d at 485.
\item See \textit{Herrera}, 506 U.S. at 435 (Blackmun, J., dissenting) (quoting Rochin v. California, 342 U.S. 165, 172 (1952)).
\item See \textit{Herrera}, 506 U.S. at 435 (Blackmun, J., dissenting) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 848 (1992) (opinion dissenting from dismissal on jurisdictional grounds)).
\end{enumerate}
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Court of Appeals to recognize a freestanding innocence claim. First, the majority and the concurrence argued that the petitioner is not legally or factually innocent, so the issue is not whether the execution of an actually innocent person in unconstitutional.\textsuperscript{235} Framing this issue in this light would “put the cart before the horse.”\textsuperscript{236} Instead, the issue is whether due process requires that a legally guilty person is entitled to judicial review of his freestanding innocence claim.\textsuperscript{237} In this light, the majority analyzed Herrera’s claim in terms of procedural, rather than substantive, due process.\textsuperscript{238} The dissent, on the other hand, found that executing an innocent person is a substantive due process issue.\textsuperscript{239} The dissent stated that the majority’s reasoning, which deprives a petitioner of substantive due process solely because petitioner was already found guilty, is “fatuous.”\textsuperscript{240} Instead, the dissent reasoned that “substantive due process prevents the government from engaging in conduct that shocks the conscience” and that executing someone who is actually innocent shocks the conscience more than any other government action.\textsuperscript{241} Oddly, when the Court revisits actual innocence a couple years later, the court explicitly states that Herrera’s claim was substantive.\textsuperscript{242}

The dissent’s reasoning is correct in two regards. First, a defendant does not lose his substantive due process rights when he is found guilty. Second, the majority’s framing of the issue – whether due process requires that a legally guilty person is entitled to judicial review of his freestanding innocence claim – is both “fatuous” and inconsequential.\textsuperscript{243} Denying someone

\textsuperscript{235} Herrera, 506 U.S. at 408, n.6 (majority opinion); Id. at 419 (O’Connor, J., concurring).
\textsuperscript{236} Id. at 408, n.6 (majority opinion).
\textsuperscript{237} Id.; Id. at 420 (O’Connor, J., concurring); see also In Re Troy Anthony Davis, 130 S. Ct. 1, 3 (Scalia, J., dissenting).
\textsuperscript{238} Herrera, 50 U.S. at 408, n.6 (majority opinion).
\textsuperscript{239} Id. at 435 (Blackmun, J., dissenting).
\textsuperscript{240} Id. at n.5.
\textsuperscript{241} Id. at 435-36.
\textsuperscript{242} Schlup v. Delo, 513 U.S. 298, 314 (1993) (“In Herrera, the petitioner advanced his claim of innocence to support a novel substantive claim . . . .”).
\textsuperscript{243} Herrera, 506 U.S. at 435, n.5 (Blackmun, J., dissenting).
judicial review who is factually innocent on the ground that they are legally guilty necessarily
shocks the conscience. Thus, regardless of how one frames the issue, depriving an innocent
person of their freedom violates substantive due process.

Further, the majority and concurring opinions in Herrera suggested that the government’s
interest in finality of judgment outweighs a defendant’s interest in additional litigation. The
government does have a legitimate interest in the finality of judgment because it would be
inefficient to let litigation drag on endlessly. This would economically cripple the courts, delay
the healing process for victims and their families, and hinder the rehabilitation process for the
defendants. The New York State Court of Appeals has concluded that “public policy seems to
demand that there be an end to litigation.” However, a government’s interest in the finality of
a conviction cannot outweigh an actually innocent person’s interest in securing their freedom.
Justice Blackmun proposed a more appropriate balancing test, which weighs finality of judgment
against an actually innocent person securing his or her freedom. Justice Blackmun’s
concluding remarks illustrate why the scale must weigh in favor of the petitioner: “Just as an
execution without adequate safeguards is unacceptable, so too is an execution when the
condemned prisoner can prove that he is innocent. The execution of a person who can show that
he is innocent comes perilously close to simple murder.”

Moreover, the trial courts’ decisions in Cole, Wheeler-Whichard, and Bermudez, applying
similar reasoning to the dissent in Herrera, illustrate the movement in New York State toward
recognizing a freestanding claim of actual innocence as a ground for reversal. Inherent in this

244 Id. at 401, 417 (majority opinion); Id. at 426 (O’Connor, J., concurring).
247 Id. at 446.
movement is the contention that you cannot execute or imprison a person who can prove their innocence in order to preserve the doctrine of finality of judgment.249 To do otherwise would come “perilously close to murder” or kidnapping.250 This doctrine has been eroded by the wave of DNA cases that demonstrate that even in perfect trials, free from procedural defects, our system does incarcerate, and occasionally execute, innocent people.251 Accordingly, in weighing the importance of finality with a defendant’s interest in liberty and protection from cruel and unusual punishment, we must error on the side of avoiding the greatest crime of all: an unjust conviction.252

In addition to judicial remedies, the New York legislature should amend CPL 440 to explicitly include actual innocence.253 The New York State Senate recently proposed the Actual Innocence Justice Act of 2009, which would amend the criminal procedure law to include CPL 440.10(i).254 This amendment, if passed, would allow a defendant to move, pursuant to CPL 440.10(i), to vacate their judgment where a defendant can “conclusively establish” that he or she did not commit the crime.255 However, the burden of proof may be too high; instead; the clear and convincing evidence standard proposed in Cole and adopted by the courts in Wheeler-Whichard and Bermudez may be more appropriate, because it takes into account the government’s interest in the finality of a judgment, society’s interest in not incarcerating an

249 See Herrera, 506 U.S. at 446 (Blackmun, J., dissenting).
250 Id.
251 As of the date of this note, there have been 245 post-conviction DNA exonerations in the United States. Innocence Project, Fact Sheet, http://www.innocenceproject.org/Content/351.php.
255 Id.
innocent person, and an innocent person’s interest in securing their freedom. In fact, the prosecution in Wheeler-Whichard agreed that the clear and convincing evidence standard is the appropriate burden of proof. Furthermore, the appropriate remedy in freestanding innocence claims must be dismissal, not a new trial, because the “court has [already] determined by clear and convincing evidence that no reasonable juror could convict the defendant of the charged crime. . . .”

V. Conclusion

Judge Cataldo’s decision in Bermudez demonstrates the need for the New York State Court of Appeals to address whether the incarceration of an innocent person violates the New York State Constitution. The inadequacy of the available remedies in New York for an actually innocent defendant, including executive clemency and newly discovered evidence motions, should compel the Court to address the constitutionality freestanding innocence claims. The Court should not require trial courts to determine on a case-by-case basis the constitutionality of incarcerating an innocent person. Further, the Court should follow the precedent of the lower courts and the dissent in Herrera and hold that a freestanding claim of actual innocence is a ground for reversal under the New York State Constitution because the imprisonment of an innocent person violates a defendant’s due process rights and right to be free from cruel and unusual punishment. Alternatively, the New York State legislature should amend the criminal procedure law to include a freestanding innocence claim.

257 Wheeler-Whichard, 884 N.Y.S.2d at 313, n.42.
258 Cole, 765 N.Y.S.2d at 487.