



2000

## Available Post-Trial Relief After a State Criminal Conviction When Newly Discovered Evidence Establishes "Actual Innocence"

Josephine Linker Hart

Guilford M. Dudley

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Josephine Linker Hart and Guilford M. Dudley, *Available Post-Trial Relief After a State Criminal Conviction When Newly Discovered Evidence Establishes "Actual Innocence"*, 22 U. ARK. LITTLE ROCK L. REV. 629 (2000).

Available at: <https://lawrepository.ualr.edu/lawreview/vol22/iss4/1>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact [mmserfass@ualr.edu](mailto:mmserfass@ualr.edu).

# AVAILABLE POST-TRIAL RELIEF AFTER A STATE CRIMINAL CONVICTION WHEN NEWLY DISCOVERED EVIDENCE ESTABLISHES “ACTUAL INNOCENCE”

*Judge Josephine Linker Hart\**  
*Guilford M. Dudley\*\**

## I. INTRODUCTION TO A “PARADE OF HORRIBLES”

One can hypothesize a “parade of horrors” in which a person stands convicted of a capital crime, and after exhausting post-conviction remedies, is executed, only to have the results of a DNA test incontrovertibly establish the deceased’s innocence. For another egregious example, assume the State proves through seemingly indisputable evidence that the defendant committed murder, and yet, subsequently, the “victim” reappears or perhaps a murder conviction is based on eyewitness identification or a confession, but, after trial, a videotape is discovered showing another person committing the crime. We need not, however, dwell purely in the hypothetical. Nationwide, eighty-five death-row inmates (or more than one percent of the approximately 6000 men and women sentenced to death since the United States Supreme Court reinstated the death penalty in 1976) have been released from prison after their convictions were “overturned by evidence of innocence.”<sup>1</sup> In that same period, 610 people have been executed; thus, approximately one innocent person is sentenced to death for every seven executed.<sup>2</sup> A former Florida Supreme Court Chief Justice, who previously had been both a prosecutor and homicide detective, was quoted as saying there was “no question” that Florida had executed persons who were not guilty of the crime for which they were condemned.<sup>3</sup>

Undoubtedly, most Arkansans believe that a rational society would not acquiesce to a system of laws permitting incarceration or execution

---

\* Judge, Arkansas Court of Appeals; LL.B. 1971, University of Arkansas School of Law. The authors thank Clint Miller, Deputy Public Defender, Sixth Judicial District of the State of Arkansas, for his editorial and substantive recommendations.

\*\* Law Clerk to the Honorable Josephine Linker Hart; J.D. 1986, University of Arkansas School of Law.

1. Alan Burlow, *The Wrong Man*, ATLANTIC MONTHLY, Nov. 1999, at 68; see also BARRY SCHECK ET AL., ACTUAL INNOCENCE xvii (2000); 146 CONG. REC. S198 (daily ed. Feb. 1, 2000) (statement of Sen. Leahy).

2. See 146 CONG. REC. S198 (daily ed. Feb. 1, 2000) (statement of Sen. Leahy); see also SCHECK ET AL., *supra* note 1, at 218 (collecting similar statistics). Innocent persons served an average of seven and one-half years on death row. See 146 CONG. REC. S198 (daily ed. Feb. 1, 2000) (statement of Sen. Leahy).

3. See 146 CONG. REC. S198 (daily ed. Feb. 1, 2000) (statement of Sen. Leahy).

of innocent persons, and they are unlikely to accept the proposition that our jurisprudence provides no remedy for innocent persons wrongfully imprisoned. However, in Arkansas, a person with newly discovered, incontrovertible proof of actual innocence, discovered post-trial, has limited judicial recourse. If this new evidence is not presented to the courts within a very short time, that person will be unable to secure his release.<sup>4</sup>

For the purposes of this article, a claim of "actual innocence" is a claim of factual innocence; that is, the defendant did not commit the crime for which he was convicted.<sup>5</sup> Actual innocence may be established by exculpatory evidence that cannot be reconciled with a conviction.<sup>6</sup> For instance, actual innocence may be established by the offender providing a corroborated confession which does not implicate the defendant as an accomplice.<sup>7</sup> Also, it may be established by physical evidence that exculpates the defendant.<sup>8</sup> For example, the availability of new scientific tests, such as DNA testing,<sup>9</sup> could establish that a person was innocent of rape and murder.<sup>10</sup>

One such case is that of Ronald Jones,<sup>11</sup> upon whom the circuit court of Cook County, Illinois, imposed the death penalty after a jury found him guilty of murder and aggravated criminal sexual assault.<sup>12</sup>

---

4. This commentator lists Arkansas as one of the few states that "do not provide review for bare innocence claims made by death-sentenced prisoners several years after trial." See Michael J. Muskat, Note, *Substantive Justice and State Interests in the Aftermath of Herrera v. Collins: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Post-conviction Remedies*, 75 TEX. L. REV. 131, 159 n.123 (1996).

5. See Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims After Herrera v. Collins*, 71 TEMP. L. REV. 489, 489 n.1 (1998).

6. See J. Thomas Sullivan, "Reforming" Federal Habeas Corpus: *The Cost to Federalism: The Burden for Defense Counsel; and the Loss of Innocence*, 61 UMKC L. REV. 291, 321 (1992).

7. See *id.*

8. See *id.*

9. The Arkansas Supreme Court discusses at length the history of DNA testing in *Prater v. State*, 307 Ark. 180, 191-96, 820 S.W.2d 429, 434-37 (1991). However, the method described in *Prater*, restriction fragment length polymorphism (RFLP), has been supplanted by a more sensitive test, polymerase chain reaction (PCR). See NATIONAL COMMISSION ON THE FUTURE OF DNA EVIDENCE, POST-CONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS xiv-xv, 1, 28 (1999); SCHECK ET AL., *supra* note 1, at 35-40.

10. Citing a Justice Department report, this writer notes that 2,012 primary suspects in 8,048 rape and rape-and-murder cases referred to the FBI from 1988 to mid-1995 were exonerated by DNA evidence. See Burlow, *supra* note 1, at 74.

11. See *People v. Jones*, 620 N.E.2d 325 (Ill. 1993), *cert. denied*, 511 U.S. 1012 (1994).

12. See *id.* at 328.

The Illinois Supreme Court affirmed his conviction and sentence,<sup>13</sup> approving the trial court's admission of questionable modus operandi evidence<sup>14</sup> and Jones's confession.<sup>15</sup> At trial, Jones denied any involvement and asserted that his confession had been coerced by the police.<sup>16</sup> Subsequently, the development of sophisticated scientific testing allowed authorities to analyze the DNA in the small amount of sperm that had been collected from the victim.<sup>17</sup> The Illinois Supreme Court reversed a lower court and permitted additional testing. As a result, Ronald Jones was released from his death sentence on May 17, 1999, because the DNA test results from the sperm sample established that it was not his semen.<sup>18</sup>

Ronald Jones became the twelfth inmate released from Illinois's death row in a twelve-year period.<sup>19</sup> At the time, Jones was the sixty-fourth person in the nation to be exonerated by DNA evidence after conviction.<sup>20</sup> On January 31, 2000, Illinois Governor George H. Ryan declared a moratorium on executions and announced that he would appoint a commission to review the Illinois capital-punishment system.<sup>21</sup> Governor Ryan noted that since the reinstatement of the death penalty in Illinois in 1977, twelve death-row inmates had been executed while thirteen had been exonerated.<sup>22</sup> In contrast, the Arkansas Supreme Court recently denied a request for DNA testing,<sup>23</sup> and Arkansas Governor Mike Huckabee stated that there would not be a similar moratorium on executions in Arkansas.<sup>24</sup>

---

13. *See id.* at 339.

14. *See id.* at 330-31.

15. *See id.* at 332.

16. *See id.* at 329.

17. *See* Steve Mills & Ken Armstrong, *Yet Another Death Row Inmate Cleared*, CHI. TRIB., May 18, 1999, at 1.

18. *See id.*; SCHECK ET AL., *supra* note 1, at 220.

19. *See* Mills & Armstrong, *supra* note 17, at 1.

20. *See* Mills & Armstrong, *supra* note 17, at 1; SCHECK ET AL., *supra* note 1, at xv.

21. *See* Press Releases (visited Feb. 20, 2000) <<http://www.state.il.us/gov/press/00/Jan/morath.htm>>.

22. *See id.*

23. *See* *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999). The Arkansas Supreme Court denied relief even though Pitts had unsuccessfully filed two clemency petitions. *See id.* at 584 n.1, 986 S.W.2d at 410 n.1.

24. *See* *Huckabee Defends Process Leading to State's Executions*, ARK. DEM. GAZ., Feb. 26, 2000, at 12A. The article further noted that Arkansas has executed twenty-one men since the United States Supreme Court reinstated the death penalty in 1976. *See id.* Ten were executed during the current administration, seven during Jim Guy Tucker's administration, and four during Bill Clinton's administration. *See id.* According to the article, Governor Huckabee also commuted a sentence to life imprisonment the day before the execution of one man, Bobby Fretwell, was scheduled to occur. *See id.*

In Arkansas, the means to obtain post-trial relief after a criminal conviction include a motion for new trial, direct appeal, a petition for state habeas corpus relief, a petition for relief from an illegal sentence, a petition for relief under Rule 37 of the Arkansas Rules of Criminal Procedure, a petition for writ of error coram nobis, a petition for federal habeas corpus relief, and clemency petitions to the executive branch. This article evaluates the extent to which Arkansas's post-trial procedures allow prisoners to present to circuit courts newly discovered evidence of actual innocence and obtain relief from a death sentence or a sentence of imprisonment. This article concludes that either because the nature of the relief provided by these procedures is limited, or because of the brief time frame within which one must petition for relief, all post-trial procedures provide little opportunity for a prisoner to establish his or her actual innocence through newly discovered evidence. This article also suggests possible reforms to enable prisoners to prove that newly discovered evidence establishes their actual innocence.

## II. AVAILABLE RELIEF

### A. Motions for New Trial

Newly discovered evidence is the least-favored ground for the granting of a new-trial motion. To prevail on a motion for new trial, the movant must show that the new evidence would have changed the outcome of his case and that he used due diligence in trying to discover the evidence before trial.<sup>25</sup> Denial of a new-trial motion is reversed only for an abuse of discretion.<sup>26</sup> A claim of newly discovered evidence must be addressed to the trial court in a motion for new trial made within the time to file a notice of appeal.<sup>27</sup> This period is thirty days.<sup>28</sup> Thus, but

---

25. See *Misskelley v. State*, 323 Ark. 449, 478, 915 S.W.2d 702, 717 (1996), *cert. denied*, 519 U.S. 898 (1996).

26. See *id.*, 915 S.W.2d at 717.

27. See ARK. R. CRIM. P. 33.3 (Michie 2000). The rule provides that “[a] person convicted of either a felony or misdemeanor may file a motion for new trial, a motion in arrest of judgment, or any other application for relief, but all motions or applications must be filed prior to the time fixed to file a notice of appeal.” *Id.*

28. See ARK. R. APP. P.—CRIM. 2 (Michie 2000). The rule provides in part:

(a) *Notice of appeal.* Within thirty (30) days from

(1) the date of entry of a judgment, or

(2) the date of entry of an order denying a post-trial motion under Ark. R. Crim. P. 33.3, or

(3) the date a post-trial motion under Ark. R. Crim. P. 33.3 is deemed denied

for a fortuitous finding of newly discovered evidence within thirty days after entry of judgment, a person's claim of actual innocence would most likely be untimely.<sup>29</sup>

## B. Direct Appeal

A defendant cannot argue on direct appeal that newly discovered evidence establishes his actual innocence.<sup>30</sup> A challenge to the sufficiency of the evidence provides a means to allege that the State failed to place substantial evidence of one or more elements of the charged offense before the factfinder.<sup>31</sup> In *Walker v. State*,<sup>32</sup> the Arkansas

---

pursuant to subsection (b)(1) of this rule; or  
(4) the date of entry of an order denying a petition for post-conviction relief under Ark. R. Crim. P. 37, the person desiring to appeal the judgment or order or both shall file with the trial court a notice of appeal identifying the parties taking the appeal and the judgment or order or both being appealed.

*Id.*

29. Thirty-three states require that claims of innocence based on new evidence be brought within six months of the final appeal. See SCHECK ET AL., *supra* note 1, at 218. Just seven states permit the motion to be made at any time. See *id.*

30. See *Wilson v. State*, 277 Ark. 43, 50, 639 S.W.2d 43, 49 (1993).

31. Rule 33.1 of the Arkansas Rules of Criminal Procedure, adopted April 8, 1999, provides:

(a) In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. A motion for directed verdict shall state the specific grounds therefor.

(b) In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of the evidence. The motion for dismissal shall state the specific grounds therefor. If the defendant moved for dismissal at the conclusion of the prosecution's evidence, then the motion must be renewed at the close of all of the evidence.

(c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. A renewal at the close of all of the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal. If for any reason a motion or a renewed motion at the close of all of the evidence for directed verdict or for dismissal is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence.

ARK. R. CRIM. P. 33.1 (Michie 2000).

32. 314 Ark. 628, 864 S.W.2d 230 (1993).

Supreme Court clearly established its position to challenges based on new evidence, stating that:

As a final point, we emphasize once more that we will not remand a case in order for an appellant to garner more information to bolster his posture on appeal. Unlike some of our sister states, in Arkansas we entertain only one appeal from a final judgment or order which completely disposes of all issues involving all parties. It is incumbent upon the appellant to present a case before the trial court which fully and completely develops all issues.<sup>33</sup>

### C. Petition for State Writ of Habeas Corpus

Another avenue of post-trial relief is the petition for a state writ of habeas corpus. One recent Arkansas Supreme Court decision discusses the writ in detail.<sup>34</sup> As noted in that opinion, the Arkansas Constitution provides that “[t]he privilege of the writ of habeas corpus shall not be suspended, except by the General Assembly, in case of rebellion, insurrection or invasion, when the public safety may require it.”<sup>35</sup> There is a statutory procedure to follow to obtain habeas corpus relief.<sup>36</sup> The court has recognized that the writ of habeas corpus is appropriate when a person is detained without lawful authority.<sup>37</sup> However, the court narrowly interpreted the scope of habeas corpus relief, permitting issuance of a writ of habeas corpus only if the commitment was invalid on its face or the committing court lacked jurisdiction.<sup>38</sup> In determining whether the denial of a writ of habeas corpus was proper, the court will look for invalidity only on the face of the commitment order.<sup>39</sup> Proof of actual innocence would neither establish that a commitment was invalid on its face nor show that the committing court lacked jurisdiction, and, therefore, would not be addressed in state habeas corpus proceedings.<sup>40</sup>

---

33. See *id.* at 633, 864 S.W.2d at 233 (internal citation omitted).

34. See *Renshaw v. Norris*, 337 Ark. 494, 497-99, 989 S.W.2d 515, 517-18 (1999).

35. See *id.* at 497, 989 S.W.2d at 517; ARK. CONST. art. II, § 11.

36. See ARK. CODE ANN. § 16-112-101 to -123 (Michie 1987 & Supp. 2000).

37. See *Renshaw*, 337 Ark. at 497, 989 S.W.2d at 517.

38. See *id.* at 498, 989 S.W.2d at 517.

39. See *Cleveland v. Frazier*, 338 Ark. 581, 587, 999 S.W.2d 188, 191-92 (1999). As an example, a judgment of conviction and order of commitment is facially invalid when the judge lacks color of authority to execute the judgment and order. See *Waddle v. Sargent*, 313 Ark. 539, 855 S.W.2d 919 (1993).

40. See James W. Gallman & James D. Storey, Comment, *Relief by Federal Habeas Corpus from Arkansas Conviction Challenged As Unconstitutional*, 2 ARK. L. REV. 424, 428-29 (1948).

#### D. Petition for Relief from an Illegal Sentence

According to Arkansas Code Annotated section 16-90-111,<sup>41</sup> petitioners may have an illegal sentence corrected at any time and may have a sentence imposed in an illegal manner corrected within ninety days after the sentence is imposed or within sixty days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal.<sup>42</sup> The Arkansas Supreme Court, however, has concluded that this statute conflicts with its court rules, and that consequently, the petitioner must raise all grounds for post-conviction relief from a circuit court imposed sentence pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure.<sup>43</sup> Thus, section 16-90-111 provides no relief to prisoners claiming actual innocence.<sup>44</sup>

#### E. Petition for Rule 37 Relief

While Rule 37 relief includes a claim that either trial or appellate counsel was ineffective, the scope of Rule 37.1 is much broader, including claims that the sentence was imposed in violation of the Constitution and laws of the United States or of Arkansas, that the court imposing the sentence was without jurisdiction to do so, that the sentence was in excess of the maximum sentence authorized by law, or that the sentence is otherwise subject to collateral attack.<sup>45</sup> Thus, Rule

---

41. ARK. CODE ANN. §16-90-111 (Michie Supp. 2000).

42. *See id.* Arkansas Code Annotated section 16-90-111 provides as follows:

(a) Any circuit court, upon receipt of a petition by the aggrieved party for relief and after the notice of the relief has been served on the prosecuting attorney, may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided in this section for the reduction of sentence.

(b)(1) The court may reduce a sentence within ninety (90) days after the sentence is imposed or within sixty (60) days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal.

(2) The court may also reduce a sentence upon revocation of probation as provided by law.

*Id.*

43. *See Taylor v. State*, 324 Ark. 532, 922 S.W.2d 710 (1996).

44. The statute may still be used to modify illegal conditions of probation. *See Reeves v. State*, 339 Ark. 304, 310, 5 S.W.3d 41, 44 (1999).

45. *See ARK. R. CRIM. P. 37.1.* Arkansas Rule of Criminal Procedure 37.1 provides in part:

A petitioner in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:

(a) that the sentence was imposed in violation of the Constitution and laws



37 manifests the petitioner's constitutional, statutory, and other rights to subject a sentence to collateral attack.<sup>46</sup> While Rule 37 does not provide a method for the review of "mere error" occurring at trial or serve as a substitute for direct appeal, "errors that are so fundamental as to render the judgment of conviction void and subject to collateral attack" may be raised in Rule 37 proceedings.<sup>47</sup> The Arkansas Supreme Court recently stated that post-conviction proceedings under this rule are intended to "avoid" unjust imprisonments and enable the courts to correct a "manifest" injustice.<sup>48</sup> However, the time limits within which to pursue relief are short.<sup>49</sup>

of the United States or this state; or

(b) that the court imposing the sentence was without jurisdiction to do so; or

(c) that the sentence was in excess of the maximum sentence authorized by law; or

(d) that the sentence is otherwise subject to collateral attack; may file a verified petition in the court which imposed the sentence, praying that the sentence be vacated or corrected.

*Id.*

46. See *Cigainero v. State*, 321 Ark. 533, 534, 906 S.W.2d 282, 283 (1995); see also *Chisum v. State*, 274 Ark. 332, 333, 625 S.W.2d 448, 449 (1981).

47. See *Sasser v. State*, 338 Ark. 375, 383-84, 993 S.W.2d 901, 906 (1999); see also *Kennedy v. State*, 338 Ark. 125, 129, 991 S.W.2d 606, 608 (1999); *Collins v. State*, 324 Ark. 322, 326, 920 S.W.2d 846, 848 (1996).

48. See *Bohanan v. State*, 336 Ark. 367, 369, 985 S.W.2d 708, 709 (1999).

49. See ARK. R. CRIM. P. 37.2. Arkansas Rule of Criminal Procedure 37.2 provides in part:

(a) If the conviction in the original case was appealed to the Supreme Court or Court of Appeals, then no proceedings under this rule shall be entertained by the circuit court while the appeal is pending.

(b) All grounds for relief available to a petitioner under this rule must be raised in his or her original petition unless the petition was denied without prejudice. Any ground not so raised or any ground finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence, or in any other proceedings that the petitioner may have taken to secure relief from his or her conviction or sentence, may not be the basis for a subsequent petition. All grounds for post-conviction relief from a sentence imposed by a circuit court, including claims that a sentence is illegal or was illegally imposed, must be raised in a petition under this rule.

(c) If a conviction was obtained on a plea of guilty, or the petitioner was found guilty at trial and did not appeal the judgment of conviction, a petition claiming relief under this rule must be filed in the appropriate circuit court within ninety (90) days of the date of entry of judgment. If the judgment was not entered of record within ten (10) days of the date sentence was pronounced, a petition under this rule must be filed within ninety (90) days of the date sentence was pronounced.

If an appeal was taken of the judgment of conviction, a petition claiming relief under this rule must be filed in the circuit court within sixty (60) days of the date the mandate was issued by the appellate court. In the event an

But again, Rule 37 does not provide for direct attacks upon judgments in criminal cases.<sup>50</sup> A motion seeking a new trial on the basis of newly discovered evidence is a direct attack on the judgment, not a collateral attack.<sup>51</sup> Thus, the Court has concluded that under Rule 37 newly discovered evidence is not a proper basis for relief.<sup>52</sup>

One case in particular drives this point home. Danny Sanders was convicted of aggravated robbery and rape after two victims, Roger and Bonita Hughes, provided the only evidence against him.<sup>53</sup> Both identified Sanders at trial as one of four men involved.<sup>54</sup> Sanders's convictions were affirmed on appeal.<sup>55</sup> Subsequently, Sanders sought post-conviction relief pursuant to Rule 37.<sup>56</sup> In the Rule 37 proceeding, Sanders provided an affidavit from Roger Hughes asserting that Sanders was not one of the four men involved, despite Hughes's testimony to the contrary at trial.<sup>57</sup> Hughes's affidavit further provided that Bonita Hughes had stated that Sanders was not the individual who sexually assaulted her.<sup>58</sup> Sanders also provided an affidavit of Jackie Don Britt in which Britt stated that he, and not Sanders, was the person who sexually assaulted Bonita Hughes.<sup>59</sup> Britt also identified the four individuals who robbed the Hugheses and repeatedly asserted that Sanders was not involved.<sup>60</sup> A verified statement taken from Britt confirmed the information in the affidavit and provided a detailed account of the actions of the four men on the night in question.<sup>61</sup> A report of a polygraph examiner provided by Sanders stated that Sanders answered truthfully when he denied being at the Hugheses campsite and

---

appeal was dismissed, the petition must be filed in the appropriate circuit court within sixty (60) days of the date the appeal was dismissed. If the appellate court affirms the conviction but reverses the sentence, the petition must be filed within sixty (60) days of a mandate following an appeal taken after resentencing. If no appeal is taken after resentencing, then the petition must be filed with the appropriate circuit court within ninety (90) days of the entry of the judgment.

*Id.*

50. *See Cigainero*, 321 Ark. at 534, 906 S.W.2d at 283.

51. *See id.* at 535, 906 S.W.2d at 283-84.

52. *See id.*, 906 S.W.2d at 284.

53. *See Sanders v. State*, 291 Ark. 200, 201, 723 S.W.2d 370, 370-71 (1987).

54. *See id.*, 723 S.W.2d at 371.

55. *See id.*, 723 S.W.2d at 370.

56. *See id.*, 723 S.W.2d at 370.

57. *See id.*, 723 S.W.2d at 371.

58. *See id.*, 723 S.W.2d at 371.

59. *See Sanders*, 291 Ark. at 201, 723 S.W.2d at 371.

60. *See id.*, 723 S.W.2d at 371.

61. *See id.*, 723 S.W.2d at 371.

sexually abusing Bonita Hughes.<sup>62</sup> Additionally, Sanders provided a report of an investigator concerning interviews with various people who established an alibi for Sanders.<sup>63</sup> Finally, Sanders outlined the physical discrepancies between himself and the person Bonita Hughes described as her assailant.<sup>64</sup> The Arkansas Supreme Court noted the credibility of the supporting evidence but nevertheless denied the petition, concluding that it constituted a direct attack on a judgment for which Rule 37 was not intended.<sup>65</sup> The court further stated:

While we must deny the petition for the reasons stated, we are constrained to express our belief that the petition presents a meritorious case for reopening, that Danny Sanders's conviction was the result of mistaken identification. For that reason we regard the matter as an appropriate appeal for clemency and we commend it to the executive branch as facially worthy of serious consideration.<sup>66</sup>

On January 14, 1988, then-Governor Bill Clinton commuted Sanders's sentence to time served.<sup>67</sup> Although the Court concluded that, in essence, Sanders was actually innocent, he was not relieved of his felony conviction.

#### F. Petition for Writ of Error Coram Nobis

According to the Arkansas Supreme Court, the writ of error coram nobis is a "legal procedure to fill a gap in the legal system—to provide relief that was not available at trial because a fact exists which was not known at that time and relief is not available on appeal because it is not in the record."<sup>68</sup> The court has further stated that "[t]he writ is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature."<sup>69</sup> Yet, despite this assertion, the court has limited the scope of the writ of error coram nobis. Newly discovered evidence is not in itself a basis for issuance of a writ.<sup>70</sup> The writ is available to address errors in four categories: insanity at the time

---

62. *See id.* at 202, 723 S.W.2d at 371.

63. *See id.* at 201, 723 S.W.2d at 371.

64. *See id.*, 723 S.W.2d at 371.

65. *See Sanders*, 291 Ark. at 201, 723 S.W.2d at 371.

66. *See id.* at 203, 723 S.W.2d at 372.

67. State of Arkansas Executive Department Proclamation (Jan. 14, 1988) (on file with authors).

68. *See Penn v. State*, 282 Ark. 571, 573-74, 670 S.W.2d 426, 428 (1984).

69. *See Brown v. State*, 330 Ark. 627, 630, 955 S.W.2d 901, 902 (1997).

70. *See Pitts v. State*, 336 Ark. 580, 582, 986 S.W.2d 407, 409 (1999).

of trial, a coerced guilty plea, material evidence withheld by the prosecutor, or a third-party confession to the crime made between conviction and direct appeal.<sup>71</sup> The court justified the limitation of the writ regarding newly discovered evidence in the form of a third-party confession as follows:

[T]he questions of fact which invariably accompany an allegation of a third-party confession demand prompt scrutiny. The mere fact that another person has confessed to a crime cannot, alone, be grounds for relief for such confessions are not uncommon and must be approached with some skepticism. The trial court must carefully scrutinize the complete circumstances surrounding the confession and all the available evidence. Assessing the merits of the third-party confession requires that all of the evidence be available and unimpaired by the passage of time so that the trial court's examination can be exhaustive and decisive. Our requirement that such a claim be raised before affirmance serves to limit such claims to the time frame in which it is most likely that the trial court can determine with certainty whether the writ should issue. Assertions of a third-party confession after a judgment is affirmed may be addressed to the executive branch in a clemency proceeding.<sup>72</sup>

The court also discussed the limits of the writ of error coram nobis in a capital murder case where the petitioner sought leave to proceed in circuit court because DNA analysis, which was unavailable at his trial in 1979, was now available to test a hair sample the State introduced into evidence.<sup>73</sup> The petitioner contended that the results of the DNA test would refute the State's expert witness testimony that hair found on the victim was like his hair.<sup>74</sup> The court stated:

Where there was no fundamental error at the time of trial, newly discovered evidence is not a cause to issue a writ of error *coram nobis*. The mere fact that over time a scientific test may have been developed which did not exist at the time of a petitioner's trial is not in itself cause to issue the writ because the development in scientific testing cannot establish a fundamental error made at trial. A petitioner who contends that newly developed scientific testing can exonerate him should submit the allegation to the executive branch in a clemency proceeding.<sup>75</sup>

---

71. See *id.* at 583, 986 S.W.2d at 409.

72. See *Brown*, 330 Ark. at 632, 955 S.W.2d at 902-03.

73. See *Pitts*, 336 Ark. at 583, 986 S.W.2d at 409.

74. See *id.*, 986 S.W.2d at 409.

75. See *id.* at 584, 986 S.W.2d at 409-10 (internal citation omitted).

This reasoning is suspect. Even though advances in scientific testing cannot establish a fundamental error, the results of a new scientific test can do so. The court's reasoning makes sense only if the imprisonment of innocent persons is not a "fundamental error."<sup>76</sup>

Nevertheless, the writ of error coram nobis provides a narrow window of relief for petitioners who claim that newly discovered evidence in the form of a third-party confession has established their actual innocence.<sup>77</sup> The writ can also serve as a powerful tool in the area of prosecutorial misconduct.<sup>78</sup>

### G. Petition for Federal Habeas Corpus Relief

The opportunity for a state prisoner to obtain review of a claim of actual innocence is also limited in federal court. The United States Supreme Court has held that claims of actual innocence based on newly discovered evidence do not state a ground for federal habeas corpus relief without an independent constitutional violation occurring in the course of the underlying state criminal proceedings.<sup>79</sup> This conclusion, the Court stated, "is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."<sup>80</sup> The Court further stated, "Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence."<sup>81</sup> The Supreme Court, however, held out a slim possibility of relief for state prisoners sentenced to death, stating as follows:

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. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous

---

76. See NATIONAL COMMISSION ON THE FUTURE OF DNA EVIDENCE, POST-CONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 9-10 (1999). It should be noted that unlike third-party confessions, the probative value of DNA evidence does not diminish over time. See *id.*

77. See Gallman & Storey, *supra* note 40, at 427-28.

78. See *Larimore v. State*, 327 Ark. 271, 281, 938 S.W.2d 818, 822-23 (1997).

79. See *Herrera v. Collins*, 506 U.S. 390, 400-01 (1993).

80. See *id.* at 400.

81. See *id.* at 401.

burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.<sup>82</sup>

Thus, if a state prisoner's claim of actual innocence does not satisfy these requirements, he or she is without a remedy in federal court.<sup>83</sup>

#### H. Executive Clemency

A prisoner may also petition for clemency, a power vested in the governor.<sup>84</sup> Clemency, however, has been described as arbitrary, lacking both systematic rules and appellate review, and subject to the whims of the governor's personal preferences and the political pressures borne by him. Furthermore, the governor is likely without the funding necessary to properly investigate a clemency petition.<sup>85</sup> It is noteworthy that one previous Arkansas governor who was a firm opponent of the death penalty commuted the sentences of fifteen men on death row only at the end of his term in office.<sup>86</sup> Given the political pressures to which a governor may be subject, it is doubtful that executive clemency can save all prisoners who are actually innocent.<sup>87</sup>

---

82. *See id.* at 417.

83. *See id.* United States Senator Leahy of Vermont noted that the United States Supreme Court "could not even make up its mind whether the execution of an innocent person would be unconstitutional." 146 CONG. REC. S199 (daily ed. Feb. 1, 2000) (statement of Sen. Leahy). Further, it should be noted that under the Anti-Terrorism and Effective Death Penalty Act of 1996, a person sentenced to death under state law must bring his habeas petition within six months of the state court's affirmation of his conviction and sentence on appeal. *See* 28 U.S.C. §2263(a) (Supp. 1997). For cases in which the person did not receive a death sentence, there is a one-year limitation. *See* Marcia Coyle, *Law: Innocent Dead Men Walking? New Habeas Law Would Have Sealed the Fate of Some Inmates Later Found Not Guilty*, NAT'L L.J., May 20, 1996, at A1, A20. The time limitations are tolled during the pendency of petitions for state post-conviction relief. *See* 28 U.S.C. § 2244(d)(2), 2263(b)(2) (West. Supp. 1999); *see also* SCHECK ET AL., *supra* note 1, at 218-19; 28 U.S.C. § 2244(d)(1), 2263(a) (Supp. 1999).

84. *See* ARK. CONST. art. VI, § 18.

85. *See* Henry Pietrkowski, Note, *The Diffusion of Due Process in Capital Cases of Actual Innocence After Herrera*, 70 CHI.-KENT L. REV. 1391, 1426-30 (1995).

86. *See* Winthrop Rockefeller, *Executive Clemency and the Death Penalty*, 21 CATH. U. L. REV. 94 (1971) (editor's note).

87. According to the Arkansas Governor's Office, in 1997, 556 applications were denied and 30 were granted. In 1998, 763 applications were denied and 24 were granted. This information is on file with the authors.

### III. VARIETIES OF REFORM

#### A. Legislative Reform

If executive clemency does not provide adequate redress for prisoners with post-trial claims of actual innocence, then an appropriate remedy to vindicate such claims must be developed. One possible solution is state legislative reform. However, without some powerful constituency to press for legislative change, it is doubtful that any such measure would be brought before the Arkansas General Assembly, let alone be enacted. For forty years, warnings of this gap in our criminal justice system have been unavailing.<sup>88</sup>

Reform, however, may come at the federal level with regard to claims of actual innocence based on new DNA testing. On February 10, 2000, United States Senator Patrick Leahy of Vermont introduced the Innocence Protection Act of 2000,<sup>89</sup> which would prohibit states from denying an inmate's request for DNA testing of biological material that could produce new exculpatory evidence or from denying an inmate a meaningful opportunity to prove their innocence using the results of DNA testing.<sup>90</sup> The bill further allows inmates to enforce these provisions through declaratory or injunctive relief.<sup>91</sup> In addition, the bill requires that before the State may receive federal grants for DNA-related programs, it must create procedures by which biological materials are preserved and DNA testing is made available to its inmates.<sup>92</sup> Whether this bill will survive to be enacted into law remains to be seen.

#### B. Expansion of Existing Extraordinary Writs

Another possible solution is to expand the scope of the state writs of error coram nobis and habeas corpus to permit the circuit courts to hear actual-innocence claims. It is apparent, however, that the Arkansas Supreme Court has declined to expand the scope of these writs despite

---

88. See John H. Haley, Comment, *Coram Nobis and the Convicted Innocent*, 9 ARK. L. REV. 118, 128 (1955); See also Gallman & Storey, *supra* note 40, at 431-32.

89. See S. 2073, 106th Cong. (2000).

90. See *id.* § 104(a)(1) - (b).

91. See *id.* § 104(c).

92. See *id.* § 103.

warnings that Arkansas criminal procedure provides no remedy to prevent the execution or continued imprisonment of innocent persons.<sup>93</sup>

### C. Relief Through State Constitutional Provisions

Possibly, a prisoner might seek relief based on a state constitutional provision. For instance, one might pursue an untimely motion for new trial, arguing that based on *Herrera*, such time limitations, as applied to actual-innocence claims, violate the state (or even federal) constitution.<sup>94</sup> It is unlikely, however, that state constitutional arguments grounded in due process<sup>95</sup> or claims of cruel and unusual punishment<sup>96</sup> would persuade the Arkansas Supreme Court to grant relief, given the United States Supreme Court's apparent rejection of arguments based on these grounds in *Herrera*.<sup>97</sup> Also, it is unlikely that the Arkansas Supreme Court would interpret state constitutional provisions more broadly than its identical or nearly identical federal counterparts.<sup>98</sup> Nevertheless, *Herrera* suggests that habeas corpus relief is available when there is a truly persuasive post-trial demonstration of actual innocence and no state avenue open to process such a claim. This suggestion implies that some constitutional provision mandates the hearing of post-conviction claims of actual innocence.<sup>99</sup> It is noteworthy that seven members of the United States Supreme Court were amenable to the possibility that a

---

93. See Haley, *supra* note 88, at 128-29; see also Gallman & Storey, *supra* note 40, at 431-32.

94. See NATIONAL COMMISSION ON THE FUTURE OF DNA EVIDENCE, NATIONAL INSTITUTE OF JUSTICE, POST-CONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 16 (Sept. 1999) (citing Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943, 1012-15 (1994)).

95. See ARK. CONST. art. II, § 8.

96. See *id.* § 9.

97. See *Herrera*, 506 U.S. at 405-11; see also Anderson, *supra* note 5, at 493.

98. See *Wilson v. City of Pine Bluff*, 278 Ark. 65, 66, 643 S.W.2d 569, 569-70 (1982) ("When the language of the federal and state constitution is identical, as in the instance of the confrontation clause, the due process clause, and several others, and there is no reason for us to construe our constitution other than in the same way as the federal constitution has been construed, we take the view that the case presents a federal question, not a state one . . ."); see also *Smith v. State*, 340 Ark. 116, 119-20, 8 S.W.3d 534, 536 (2000) (interpreting the confrontation clause in the state and federal constitutions to provide identical rights); *Kellar v. Fayetteville Police Dep't*, 339 Ark. 274, 279, 5 S.W.3d 402, 405 (1999) (interpreting the ex post facto clause in state and federal constitutions identically).

99. See *Pietrkowski*, *supra* note 85, at 1421. See also Berger, *supra* note 94, at 1012-14.



claim of actual innocence could merit judicial relief in death cases.<sup>100</sup> Thus, interpretation of our state constitution may reveal a constitutional requirement for hearing claims of actual innocence in circuit court.

There are other provisions in our constitution which might permit prisoners to bring claims of actual innocence.<sup>101</sup> For instance, the Arkansas Constitution provides that “[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person . . . .”<sup>102</sup> The broad wording of this provision might enable a prisoner with a claim of actual innocence to petition for relief in circuit court.

#### D. Promulgation of Rules by the Arkansas Supreme Court

The Arkansas Supreme Court could promulgate court rules governing claims of actual innocence. The court’s rule-making powers derive from the state constitution, which specifically grants the court the power to “make rules regulating the practice of law . . . .”<sup>103</sup> The court has previously promulgated rules governing post-conviction procedures. It did so in 1965, after the United States Supreme Court held that the states must provide some avenue of post-conviction relief for prisoners.<sup>104</sup> If, as at least suggested by *Herrera*, the opportunity to assert a claim of actual innocence is constitutionally mandated, the court should promulgate rules permitting such claims to be heard.

Any such procedure must address several considerations. First, the court must determine the level of proof that will establish a claim of actual innocence.<sup>105</sup> Possible standards include proof beyond a reasonable doubt,<sup>106</sup> clear and convincing evidence,<sup>107</sup> and proof that the

---

100. See Berger, *supra* note 94, at 1008; See also Muskat, *supra* note 4, at 143.

101. See ARK. CONST. art. II.

102. See *id.* § 13.

103. See *id.* amend. 28.

104. See Jack A. McNulty, Comment, *Post-Conviction Relief in Arkansas*, 24 ARK. L. REV. 57, 65-66 (1970).

105. See Phaedra Tanner, Note, *Herrera v. Collins: Assuming the Constitution Prohibits the Execution of an Innocent Person, Is the Needle Worth the Search?*, 1994 UTAH L. REV. 1283, 1315-17 (1994) (identifying the various standards); See also Muskat, *supra* note 4, at 177-79 (identifying the various standards).

106. See *Herrera*, 506 U.S. at 429 (White, J., concurring); See Anderson, *supra* note 5, at 510-14 (discussing Texas state law); See also Muskat, *supra* note 4, at 180-85 (advocating this standard but modifying Justice White’s formulation).

107. See Pietrkowski, *supra* note 85, at 1438-40 (advocating adoption of this standard); See also Anderson, *supra* note 5, at 506-10 (discussing Connecticut state law).

petitioner is probably innocent or probably would not be found guilty.<sup>108</sup> Second, the court must decide whether the petitioner must sustain a burden of pleading or production in an application for an evidentiary hearing before actually receiving a hearing.<sup>109</sup> Third, the court must determine whether such an initial application should be reviewed either by the trial court or by the supreme court itself, which would then determine whether an evidentiary hearing would be held. Fourth, the court must decide whether the petitioner's claim is subject to a time limitation<sup>110</sup> and whether he must exercise some sort of diligence<sup>111</sup> or lack of actual knowledge in discovering the evidence.<sup>112</sup> Fifth, the court must decide whether relief must be granted to petitioners who are guilty of capital murder but could establish that they were not qualified for the death penalty.<sup>113</sup> Finally, the court must set forth procedures for retaining DNA evidence, providing the petitioner with access to it for testing, and determining who will test the DNA and pay for the testing.<sup>114</sup>

#### IV. A SOMBER CONCLUSION

There is no remedy in the Arkansas criminal court system which permits prisoners to make claims of actual innocence based on newly discovered evidence if such a claim falls outside the narrow limitations of existing remedies. The federal writ of habeas corpus may or may not provide a remedy for such claims. Executive clemency is an inadequate

---

108. See *Herrera*, 506 U.S. at 442 (Blackmun, J., concurring); See also *Muskat*, *supra* note 4, at 179, n. 214. See also *Anderson*, *supra* note 5, at 501-04 (discussing Illinois state law).

109. See Tara L. Swafford, Note, *Responding to Herrera v. Collins: Ensuring That Innocents Are Not Executed*, 45 CASE W. RES. L. REV. 603, 628-29 (1995) (suggesting that the petitioner should bear the burden of proof and that in his application for an evidentiary hearing the facts be viewed in the light most favorable to him with that presumption disappearing once the application for an evidentiary hearing is granted); See also *Muskat*, *supra* note 4, at 172-76 (recommending a similar bifurcation).

110. See *Berger*, *supra* note 94, at 1017-18.

111. See *Pietrkowski*, *supra* note 85, at 1440; See also *Anderson*, *supra* note 5, at 516-18; See also *Berger*, *supra* note 94, at 1018-19.

112. See *Swafford*, *supra* note 109, at 629.

113. See *Swafford*, *supra* note 109, at 629-30.

114. See S. 2073, 106th Cong. § 102 (2000); See also NATIONAL COMMISSION ON THE FUTURE OF DNA EVIDENCE, POST-CONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 10 (Sept. 1999) (noting that New York (N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney Supp. 1999-2000)) and Illinois (725 ILL. COMP. STAT. 5/116-3 (West Supp. 1999)) have statutes specifically authorizing post-conviction DNA testing). Illinois, with fourteen, and New York, with seven, also have the most exonerations based on DNA evidence. See also *SHECK ET AL.*, *supra* note 1, at 262.

remedy. Given the likelihood that the legislature will not act in this area, the Arkansas Supreme Court should provide prisoners who are actually innocent the opportunity to establish their innocence. Otherwise, in time, Arkansas will accept a shocking injustice: innocent persons will serve sentences of imprisonment or be put to death despite the discovery of new evidence that could prove their innocence. And so long as the innocent are imprisoned or executed, the guilty are at large, safe in the knowledge that others are serving their sentences.