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# *amnesty international*

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## UNITED STATES OF AMERICA

### @The case of Leonel Herrera

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Leonel Herrera is scheduled to be executed in Texas on 12 May 1993. Convicted in 1982 of the murder of two police officers, Leonel Herrera's lawyers in 1992 presented newly discovered evidence alleging his innocence. The United States (US) Supreme Court dismissed his appeal in January 1993. In this key ruling the Court held that the evidence that Herrera presented in support of his claim of actual innocence did not entitle him to federal habeas relief and severely restricted the possibility that a prisoner sentenced to death in a state court could ever raise such a claim based on newly discovered evidence after the expiration of state time limits for raising such claims. A summary of the case, and Amnesty International's concerns regarding the Supreme Court ruling in the case, cited as Herrera v Collins, is given below.

Leonel Herrera, currently 45, was convicted and sentenced to death in January 1982 for the murder of police officer Enrique Carrisalez in September 1981. The officer had been fatally shot by the driver of a speeding car which he had tried to stop. Moments earlier, another police officer was found shot dead on the same stretch of road. Herrera was arrested days later and charged with both murders. After being sentenced to death for Carrisalez' murder, he pled guilty at a separate trial in July 1982 to the murder of the other officer. According to his present attorneys, Herrera was severely beaten after his arrest and had to be hospitalized. The case against him at trial included evidence that the car he used was involved in both crimes, plus eye-witness identification made by another police officer and Carrisalez before he died, nine days after being shot.

However, in February 1992, Leonel Herrera's appeal lawyers presented new evidence alleging that his brother Raúl Herrera Sr - who died in 1984 - had committed both murders. This was presented in the form of sworn affidavits from several people, including a former cell-mate and a former attorney of Raúl Herrera's, who both said that Raúl had told them that he had carried out the killings. In February 1992, Raul Herrera's son, Raúl Jr, also signed an affidavit stating that he had been in the car when the killings

had taken place and had witnessed his father kill the officers. It was also alleged that the killings were related to drug trafficking, and that police had threatened Raúl Sr not to reveal the truth behind them. This new evidence was discovered too late to be presented in the Texas courts, as Texas law requires a new trial motion based on newly discovered evidence to be made within 30 days of sentence. Although most states set a time limit for the presentation of newly discovered evidence after trial, the limit of one month set under Texas law is more restrictive than in many other US states and in the federal system.

Leonel Herrera lodged a petition alleging that he was innocent of the murders and that his execution would therefore violate the US Constitution. Although two execution dates were set, in February 1992 and in April 1992, stays were granted to allow the US Supreme Court to rule on the issue. On 25 January 1993, by a majority of 6 votes to 3, the Supreme Court denied Herrera's appeal. The ruling held that there was no constitutional right to federal relief based on newly discovered evidence of actual innocence, when the defendant's original trial had been free from procedural error. Chief Justice Rehnquist, delivering the opinion of the Court, wrote that "[t]he trial is the paramount event for determining the defendant's guilt or innocence"; that "Federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution, not to correct errors of fact" and that "a claim of 'actual innocence' is not in itself a constitutional claim". The Court also held that the refusal of Texas to consider newly discovered evidence presented years after trial did not transgress a principle of fundamental fairness, noting that only nine states had no limits for the filing of such motions.

The majority opinion assumed, however, "for the sake of argument in deciding this case", that "in a capital case a truly persuasive post-trial demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional" and warrant federal relief if no state avenue was open to the defendant. However, it found that because of the very disruptive effect that entertaining such claims would have on the judicial process and the need for finality in cases, "the threshold showing for such an assumed right would necessarily be extraordinarily high". The Court found the affidavits presented in Herrera's case were insufficiently credible to meet the standard required, citing discrepancies between the new testimony and the evidence presented at trial.

The majority opinion also held that "Executive clemency has provided the 'fail safe' in our criminal justice system", and is the "historic remedy for preventing miscarriages of justice where judicial process has been exhausted".

In a strongly worded dissent, Justice Blackmun, joined in part by Justices Stevens and Souter, said that the protection of the Eighth Amendment (prohibiting cruel and unusual punishment) did not end once a defendant had been validly convicted and sentenced, and that "The execution of a person who can show that he is innocent comes perilously close to simple murder". While accepting that the standard for meeting a post-conviction innocence claim must be high, Blackmun criticized the Court for deciding that Herrera had not made a sufficiently persuasive case, when there had been no examination of the substance of the new evidence. Justice Blackmun noted that the US District Court had earlier remanded the case for a further hearing in the state court (a decision that was overturned on appeal) and "clearly did not think that petitioner's evidence

was so insubstantial that it could be dismissed without any hearing at all". Rather than dismiss Herrera's claim in the first instance, Blackmun said that he would remand the case for further proceedings in the federal District Court. On the question of executive clemency, the dissenting opinion stated that "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."

### **Amnesty International concern**

Amnesty International is disturbed by the ruling in Herrera v Collins that a claim of actual innocence is not itself grounds for federal review even in a case involving the death penalty. The Court appears no longer willing to concede that death as a punishment is different from imprisonment and requires greater safeguards at all stages. The Court in its ruling placed great faith in the fairness of Herrera's trial. This faith may be misplaced. Ample evidence in other cases (see *United States of America, the Death Penalty*, AMR 51/01/87) suggests that court-appointed attorneys called on to represent capital defendants do not always make a thorough pretrial investigation. In case after case, new evidence has come to light only after a prisoner's conviction and death sentence have been affirmed on appeal and the case is placed in the hands of more experienced appellate counsel.

The ruling also reduces still further the possibility of federal review of state capital convictions. In past rulings, the Court has stated that successive habeas petitions will not be considered, even with procedural error, **unless** accompanied by an innocence claim. Now, in this ruling, the Court has stated that claims of innocence cannot be considered without being accompanied by procedural error unless the defendant made "a truly persuasive demonstration of `actual innocence'" and there was "no state avenue to process such a claim". The Court appears to have gone out of its way to block any late constitutional claims in capital cases from being considered in the federal courts.

Although the majority opinion stated "for the sake of argument in deciding this case" that a "truly persuasive" demonstration of innocence after trial would render the execution of a defendant unconstitutional, where there "was no state avenue to process such a claim", Amnesty International is concerned that it rejected out of hand the claims made in Herrera's case. In a letter to the Texas Board of Pardons and Paroles, Amnesty International said:

"We agree ... with the dissenting opinion and the US District Court that the affidavits presented in this case, by three unrelated sources, warrant further review. Amnesty International believes that it would be contrary to justice to allow this execution to go ahead without there having been an examination by any court of the merits of Herrera's innocence claim.

Our concern is reinforced by the knowledge that there have been many cases over the years in the USA and elsewhere in which prisoners convicted on what appeared to be valid evidence at trial were later able to demonstrate their innocence. It would be unconscionable in Leonel Herrera's case to carry out the death sentence while this issue remains unresolved."

Amnesty International is concerned, based on the application of this standard in Herrera's case, that this standard may pose an insuperable obstacle to claims by prisoners under sentence of death asking for review of their claims by prisoners under sentence of death asking for review of their cases on similar ground in the future.

Amnesty International is also deeply concerned by the Court's reliance on the process of executive clemency as the traditional safeguard in cases involving a possible miscarriage of justice where the judicial process has been exhausted. Since the death penalty was reinstated in the 1970s, the Texas Board of Pardons and Paroles has never recommended clemency in a capital case, despite strong grounds being presented in a number of cases. Texas has also carried out more executions than in any other state in recent years. The evidence suggests that executive clemency is a dead letter in Texas, with the Board of Pardons and Paroles simply rubber-stamping the judicial decisions of the courts, without examination of other factors that might justify reducing a death sentence to imprisonment on humanitarian or other grounds.

Despite concern that Texas has failed to provide any meaningful clemency process in capital cases, this remains the only avenue open to Leonel Herrera at the present time. Amnesty International is therefore appealing to both the Board of Pardons and Paroles and the State Governor Ann Richards to intervene to prevent his execution, citing the US Supreme Court ruling in Herrera v Collins that executive clemency is the traditional "fail safe" in the US justice system.

**KEYWORDS:** DEATH SENTENCE1 / TRIALS1 / DRUG TRAFFICKING / POLICE / TORTURE/ILL-TREATMENT

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