essential elements of the crime beyond a reasonable doubt." [195] This same standard for reviewing alleged errors of state law, the Court determined, should be used by a federal *habeas* court to weigh a claim that a generally valid aggravating factor is unconstitutional *as applied* to the defendant.[196] In addition, the Court has held that, absent an independent constitutional violation, *habeas corpus* relief for prisoners who assert innocence based on newly discovered evidence should generally be denied.[197] In *In re Troy Anthony Davis*,[198] however, the Court found a death-row convict with a claim of actual innocence to be entitled to a District Court determination of his *habeas* petition.[199]

Third, a different harmless error rule is applied when constitutional errors are alleged in *habeas* proceedings. The *Chapman v. California* [200] rule applicable on direct appeal, requiring the state to prove beyond a reasonable doubt that a constitutional error is harmless, is inappropriate for *habeas* review, the Court concluded, given the "secondary and limited" role of federal *habeas* proceedings.[201] The appropriate test is that previously used only for nonconstitutional errors: "whether the error has substantial and injurious effect or influence in determining the jury's verdict." [202] Further, the "substantial and injurious effect standard" is to be applied in

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[195] Lewis v. Jeffers, 497 U.S. 764, 781 (1990) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[196] Lewis v. Jeffers, 497 U.S. 764, 780–84 (1990). The lower court erred, therefore, in conducting a comparative review to determine whether application in the defendant's case was consistent with other applications.

[197] Herrera v. Collins, 506 U.S. 390 (1993) (holding that a petitioner would have to meet an "extraordinarily high" threshold of proof of innocence to warrant federal *habeas* relief). *Accord*, House v. Bell, 547 U.S. 518, 554–55 (2006) (defendant failed to meet *Herrera* standard but nevertheless put forward enough evidence of innocence to meet the less onerous standard of Schlup v. Delo, 513 U.S. 298 (1995), which "held that prisoners asserting innocence as a gateway to [*habeas* relief for claims forfeited under state law] must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" Id. at 2076–2077, quoting Schlup v. Delo, 513 U.S. at 327.) The Court here distinguished "freestanding" claims under *Herrera* from "gateway" claims under *Schlup*, the difference apparently being that success on a freestanding claim results in the overturning of a conviction, whereas success on a gateway claim results in a remand to the trial court to hear the claim. *See also* Article III, *Habeas Corpus*: Scope of the Writ.

[198] 557 U.S. ___, No. 08–1443 (2009).

[199] Justice Stevens, in a concurring opinion joined by Justices Ginsburg and Breyer, "refuse[d] to endorse" Justice Scalia's reasoning (in a dissent joined by Justice Thomas) that would read the Constitution to permit the execution of a convict "who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man."

[200] 386 U.S. 18 (1967).

[201] Brecht v. Abrahamson, 507 U.S. 619, 633 (1993).

[202] Brecht v. Abrahamson, 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). *Brecht* was a non-capital case, but the rule was subsequently applied in a capital case. Calderon v. Coleman, 525 U.S. 141 (1998) (per