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Innocence of Death: A Habeas Petitioner's Last Chance

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I. INTRODUCTION

In the past decade the United States Supreme Court has reinterpreted the scope of the writ of habeas corpus.¹ As a result, prior to reaching the substantive merits of a habeas petition, federal courts must

1. A writ of habeas corpus is a form of collateral attack that permits a prisoner to challenge a conviction on constitutional grounds in federal court. The writ does not relate to the prisoner's guilt or innocence, but questions whether the prisoner's liberty is restrained in violation of the federal Constitution. See 28 U.S.C. § 2254 (1988) (creating habeas relief for state court convictions); 28 U.S.C. § 2255 (1988) (creating habeas relief for federal court convictions).

The writ of federal habeas corpus . . . is the principal exception to the general rule that state prisoners have no meaningful access to a federal forum for the litigation of federal constitutional claims. The writ authorizes lower federal courts to examine state court judgments collaterally. A state prisoner must first file a petition raising the constitutional errors that allegedly tainted the state processes leading to his or her conviction and sentence before "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241 (1988). In actuality the great weight of habeas practice is before the federal district courts, an arrangement that channels the bulk of federal examination of constitutional errors in state criminal processes into those courts. See generally PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 50-56 (3d ed. 1988). Upon the filing of a petition, the district court must, in a great many instances, hold an evidentiary hearing on the claims, if they are substantial. 28 U.S.C. § 2254(d) (1988). After disposition of the petition in the district court, either the petitioner or the state is entitled to appeal to the federal circuit court. 28 U.S.C. § 2253 (1988).

employ several doctrines that test whether the petitioner complied with state and federal procedures for raising the claim at trial, on appeal, or on collateral review. This Comment focuses on the Court's redefinition of the abuse of the writ doctrine, which narrows a habeas petitioner's opportunity to have his claims reviewed on their merits.² The Court recently reached its most limiting definition of abuse of the writ in *Sawyer v. Whitley*.³ *Sawyer* deals with abuse of the writ in the context of innocence of death. That is, the petitioner does not argue that he is innocent of the crime; rather, he argues that he is innocent of the death penalty itself.

In 1991, the Fifth Circuit Court of Appeals upheld on collateral review the death sentence of Robert Wayne Sawyer for the murder of his house guest.⁴ The case went to the United States Supreme Court, where the Court delineated the circumstances that preclude federal court review of a second or later habeas petition that raises grounds for relief not raised in a prior petition because it is an "abuse of the writ."⁵ The Court held that unless the petitioner shows he is actually innocent of his death sentence, a federal court may not reach the merits of the claim in a subsequent, abusive petition.⁶ The Court explained that "to show 'actual innocence' one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."⁷ Under this standard, as long as the sentencer finds at least one statutory aggravating factor, the petitioner is eligible for the death penalty and

Julia E. Boaz, Note, *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts*, 95 YALE L.J. 349, 349 n.1 (1985) (some citations omitted, others updated).

2. "No other single issue . . . has occupied so much of the Court's time or generated so many opinions during the last two decades [as capital punishment]." J. Mark Lane, "Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence, 26 LOY. L.A. L. REV. 327, 329 n.15 (1993). To remain manageable and understandable, this Comment focuses narrowly on the abuse of the writ doctrine. Therefore, a complete discussion of the many other doctrines the United States Supreme Court has used to narrow substantive review of habeas petitions in capital cases, including, for example, harmless error and retroactivity, is beyond the scope of this Comment.

3. 112 S. Ct. 2514 (1992).

4. *Sawyer v. Whitley*, 945 F.2d 812, 825 (5th Cir. 1991). The State of Louisiana executed Robert Wayne Sawyer by lethal injection on March 5, 1993. He was the 194th person executed since the United States Supreme Court reinstated the death penalty in 1976. *Death Row, U.S.A.*, (NAACP Legal Def. Fund & Educ. Fund, Inc., New York, N.Y.), Spring 1993, at 1, 8; see *infra* text accompanying notes 9-14. Currently, thirty-six states authorize the death penalty. *Death Row, U.S.A.*, *supra*, at 1. For a listing of those states, see *infra* notes 73, 77.

5. *Sawyer*, 112 S. Ct. at 2518.

6. *Id.* at 2517. This same standard applies to successive and procedurally defaulted claims. *Id.*

7. *Id.* at 2517. Actual innocence in the penalty phase is synonymous with innocence of death. Compare Justice Rehnquist's use of "actually innocent" with Justice Stevens's use of "innocent of death." *Id.* at 2517, 2531.

therefore ineligible for federal court review of his claim.⁸

Sawyer is the latest in a series of Supreme Court cases interpreting death penalty jurisprudence. Before 1972, many states authorized the death penalty for any defendant found guilty of murder.⁹ Sentencing authorities or juries had unfettered discretion to impose the death penalty.¹⁰ In 1972, the Supreme Court held in *Furman v. Georgia*¹¹ that unguided sentencing in imposing the death penalty violated the Constitution.

Later cases, however, allowed and encouraged "guided discretion" in the sentencing process.¹² In *Gregg v. Georgia*,¹³ the Court held that imposition of the death penalty did not violate the Constitution if at least one statutory aggravating circumstance existed.¹⁴ Further, in two 1983 cases, *Barclay v. Florida*¹⁵ and *Zant v. Stephens*,¹⁶ the Court found no constitutional defect in allowing a sentencing authority to consider non-statutory aggravating circumstances after it finds at least one statutory aggravating factor.¹⁷ Thus, the difference in death sentences pre-

8. A typical state death penalty statute bifurcates the guilt determination and sentencing proceeding. See Robert Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 309. First, the jury finds the defendant guilty or not guilty; this portion of the trial is called the guilt phase. If the jury finds the defendant guilty, the court holds a second proceeding to sentence the defendant; this portion of the trial is called the penalty phase. In the penalty phase, the sentencing authority looks at statutorily established aggravating factors to decide whether the death sentence is an appropriate punishment for this defendant. See generally Weisberg, *supra*. Twenty-seven states that authorize the death penalty provide for jury sentencing in the penalty phase. Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. Rev. 1, 14 n.49 (1980). A minority of states, however, permit the judge to be the sentencing authority or to override an advisory jury's recommendation. Gillers, *supra*, at 14. Typical statutory aggravating factors include the following: the victim was a peace officer, or under the age of twelve; the defendant committed the murder during the performance of an enumerated felony; or the defendant committed the murder for money. See *infra* notes 73, 77; Gillers, *supra*, at 13 n.48.

9. *Johnson v. Singletary*, 938 F.2d 1166, 1179 (11th Cir. 1991), *cert. denied*, 113 S. Ct. 361 (1992); Weisberg, *supra* note 8, at 309 n.14.

10. *Johnson*, 938 F.2d at 1179; Weisberg, *supra* note 8, at 309.

11. 408 U.S. 238 (1972).

12. *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that the Constitution requires states to give a sentencing authority discretion to consider both statutory and non-statutory mitigating factors); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (holding mandatory death penalty statute unconstitutional); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding mandatory death penalty statute unconstitutional); *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding guided discretion statute that includes, *inter alia*, future dangerousness as an aggravating circumstance); *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding guided discretion statute requiring establishment of specific aggravating circumstances followed by a balancing of aggravating and mitigating circumstances); *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding guided discretion statute requiring establishment of specific aggravating circumstances).

13. 428 U.S. 153 (1976).

14. *Id.* at 206. For an explanation of statutory aggravating factors, see *supra* note 8.

15. 463 U.S. 939 (1983).

16. 462 U.S. 862 (1983).

17. *Barclay*, 463 U.S. at 957; *Stephens*, 462 U.S. at 876 n.14, 878.

Furman and post-*Barclay* is that *Barclay* grants a sentencing authority the same discretion struck down in *Furman*, provided it first finds at least one statutory aggravating factor.¹⁸ In addition, the Court has mandated that the sentencing authority be allowed to consider relevant mitigating evidence, both statutory and nonstatutory.¹⁹ Accordingly, "when the prosecution has proved that the defendant committed aggravated murder, the sentencing authority has very broad discretion to sentence the defendant either to life imprisonment or the death penalty."²⁰ Once the sentencing authority imposes the death sentence and the defendant exhausts his direct appeals in state court, the defendant likely will petition a federal court for a writ of habeas corpus. At that time, various procedural bars may come into play.

Part II of this Comment explains what makes a claim abusive. Part III explains how the two exceptions to the doctrinal bar against abusive claims arose and what they have come to mean. These exceptions are cause and prejudice and actual innocence. Actual innocence may be further divided into actual innocence of the underlying crime and actual innocence of the death penalty. Innocence of death, as is used later in this Comment, refers only to actual innocence of the death penalty. Part IV discusses the split between the Circuit Courts of Appeals over the interpretation of innocence of death and lays out both the test the Supreme Court rejected in *Sawyer v. Whitley* and the test the Supreme Court explicitly approved. Part V analyzes *Sawyer*, first discussing the factual and procedural background. Part V then dissects the majority and both concurring opinions, discussing the standard of proof adopted by each, the factors demonstrating guilt or innocence that each opinion is willing to consider, and the policy considerations driving the decisions. Finally, Part VI advocates a return to the fundamental miscarriage of justice exception apart from the factual inquiry into actual innocence of the death penalty.

II. ABUSE OF THE WRIT

The doctrine of abuse of the writ applies when a petitioner presents a claim for the first time in a second or subsequent petition for a writ of

18. For a detailed discussion of the United States Supreme Court's "legal doctrine-making" in capital cases, see Weisberg, *supra* note 8, at 306 (describing the "art of legal doctrine-making [as being] in a state of nervous breakdown."). For a concise discussion of this movement in the law of death penalty cases, see Johnson v. Singletary, 938 F.2d 1166, 1179-81 (11th Cir. 1991), *cert denied*, 113 S. Ct. 361 (1992).

19. Hitchcock v. Dugger, 481 U.S. 393, 394 (1987); Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978).

20. Johnson, 938 F.2d at 1181. See *infra* notes 73-76 and accompanying text.

habeas corpus.²¹ In *Sanders v. United States*,²² the Court clarified the abuse of the writ doctrine, which Congress then codified in 28 U.S.C. § 2254 Rule 9(b):

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, *if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.*²³

Abusive claims hinder finality in criminal proceedings because petitioners bring claims in a piecemeal fashion. To combat this, the abuse of the writ doctrine requires petitioners to include all of their claims in a single habeas petition in the federal district court.²⁴ The doctrine bars review of claims omitted both by deliberate choice and by inexcusable neglect.²⁵ Nevertheless, even though a prisoner files a petition with an abusive claim, the federal court may review this claim on the merits if the petitioner shows cause for the omission and prejudice from the alleged error²⁶ or actual innocence of either the crime or the penalty.²⁷

III. EXCEPTIONS TO THE ABUSE OF THE WRIT DOCTRINE

Three types of claims require the petitioner to show either cause

21. *McCleskey v. Zant*, 111 S. Ct. 1454, 1457 (1991).

When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's.

Id. at 1470.

22. 373 U.S. 1, 11-19 (1963). In *Sanders*, the Court clarified the abuse of the writ doctrine that had begun to emerge in *Wong Doo v. United States*, 265 U.S. 239 (1924) and *Price v. Johnston*, 334 U.S. 266, 287-93 (1948).

23. 28 U.S.C. § 2254 Rule 9(b) (1988) (emphasis added).

24. See *McCleskey*, 111 S. Ct. at 1469 (noting that "[p]erpetual disrespect for the finality of convictions disparages the entire criminal justice system"); *Woodard v. Hutchins*, 464 U.S. 377, 380 (1984) (stating that "[a] pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion—only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate—even in capital cases—this type of abuse of the writ of habeas corpus."); *Sanders*, 373 U.S. at 18 (holding that whether the claims were "deliberately withheld" or "deliberately abandoned," the petitioner "may be deemed to have waived his right to a hearing on a second application presenting the withheld [or abandoned] ground. . . . Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless, piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay."). A new claim in a subsequent petition should not be entertained if the judge finds the failure to raise it earlier "inexcusable." 28 U.S.C. § 2254 Rule 9 advisory committee's note.

25. *McCleskey*, 111 S. Ct. at 1468.

26. *Id.* at 1470 (applying cause and prejudice standard of *Wainwright v. Sykes*, 433 U.S. 72 (1977)).

27. *Sawyer v. Whitley*, 112 S. Ct. 2514, 2517 (1992).

and prejudice or actual innocence before the federal court can reach the merits of the claim: (a) *successive claims* raising grounds identical to those heard and decided on the merits in a previous petition, (b) claims not previously raised which constitute an *abuse of the writ*, or (c) *procedurally defaulted claims* in which the petitioner failed to follow applicable state procedural rules in raising the claims.²⁸

A. Cause and Prejudice

When the petitioner's claim is successive, abusive, or procedurally defaulted, the federal court first determines whether the petitioner satisfies the cause and prejudice exception. Because this exception took form in state procedural default cases, explaining its growth and implications requires briefly discussing the state procedural default doctrine.²⁹

The state procedural default doctrine impels petitioners to seek relief in accordance with state procedures before bringing the claim to federal court.³⁰ This doctrine reflects concerns similar to those behind the abuse of the writ doctrine:³¹ federal collateral review strains scarce federal judicial resources and shifts resources away from primary dispute resolution.³² Accordingly, in *McCleskey v. Zant* the Court concluded "from the unity of the structure and purpose [between state

28. *Id.* at 2518.

29. The cause and prejudice exception originated in *Davis v. United States*, 411 U.S. 233 (1973). In *Davis*, a federal prisoner collaterally attacked his sentence under 28 U.S.C. § 2255. *Id.* at 235-36. The Supreme Court held that Federal Rule of Criminal Procedure 12(b)(2), which applies to federal defendants, barred habeas relief because Davis had procedurally defaulted his claim of an unconstitutional grand jury selection by not raising it before trial and by not showing cause for the default as Rule 12(b)(2) required. *Id.* at 242. The Court in *Davis* further required the defendant to show that he had been actually prejudiced by the constitutional violation he alleged. *Id.* at 244-45.

The Supreme Court next applied the cause and prejudice standard to a Louisiana defendant who collaterally attacked his sentence under 28 U.S.C. § 2254. *Francis v. Henderson*, 425 U.S. 536, 538 (1976). Similar to *Davis*, the defendant in *Francis* sought to show that members of his race had been unconstitutionally excluded from his grand jury. Although the Louisiana statute examined in *Francis* did not permit the defendant to show cause for his failure to raise the claim prior to trial, the Court still applied the cause and prejudice exception. *Id.* at 537-38. Again, just as the Court in *Davis* had done, the *Francis* Court found no showing that the defendant had been actually prejudiced. *Id.* at 542.

30. See, e.g., *Presnell v. Kemp*, 835 F.2d 1567, 1578-79 (11th Cir. 1988) (citing *Ex parte Royall*, 117 U.S. 241 (1886)), *cert. denied*, 488 U.S. 1050 (1989).

31. *McCleskey v. Zant*, 111 S. Ct. 1454, 1469-70 (1991).

Both doctrines impose on petitioners a burden of reasonable compliance with procedures designed to discourage baseless claims and to keep the system open for valid ones; both recognize the law's interest in finality; and both invoke equitable principles to define the court's discretion to excuse pleading and procedural requirements for petitioners who could not comply with them in the exercise of reasonable care and diligence.

Id.

32. *Id.* at 1469 (noting that federal collateral review "places a heavy burden on scarce federal

procedural default and abuse of the writ] that the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts.”³³ Therefore, the federal courts must first attempt to establish the existence of cause *and* prejudice to excuse either a state procedural default or, in the case of an abuse of the writ, neglect or omission.³⁴

In *Wainwright v. Sykes*,³⁵ the Court first extended the cause and prejudice exception to federal writs of habeas corpus. *Sykes* left the precise definition of cause and prejudice to be resolved in future cases.³⁶ Later, the Court determined that cause, though still not precisely defined, requires a petitioner to show that some external impediment prevented his counsel from devising or advancing the defaulted claim.³⁷ In addition, prejudice denotes a reasonable probability that the constitutional defect altered the result of the petitioner’s trial.³⁸ Nonetheless, inability to prove cause or prejudice does not end the inquiry. “[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is *actually innocent*, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.”³⁹ The federal court first looks for cause and prejudice. Only in the absence of one of these prongs must the court inquire into the petitioner’s actual innocence.

B. Actual Innocence

The Supreme Court first considered the concept of actual innocence

judicial resources, and threatens the capacity of the system to resolve primary disputes.”) (citation omitted).

33. *Id.* at 1470.

34. *Id.* (citing *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977)).

35. 433 U.S. 72 (1977).

36. *Id.* at 87. The Court did, however, reject the standard set forth in dicta in *Fay v. Noia*, 372 U.S. 391 (1962), “which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention.” *Id.* at 87-88.

37. *Murray v. Carrier*, 477 U.S. 478, 492 (1986) (stating that the cause and prejudice exception “ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the [defaulted] claim”).

38. See *Smith v. Murray*, 477 U.S. 527, 538-39 (1986) (stating that the alleged error must undermine the accuracy of the guilt or sentencing determination to constitute prejudice); *United States v. Frady*, 456 U.S. 152, 167-72 (1982) (holding that petitioner must show that the errors at his trial “worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” In *Frady*, the Court found no substantial likelihood that but for the error, petitioner would have been convicted of a lesser crime.).

39. *Carrier*, 477 U.S. at 496 (emphasis added). The Court further stated that “[i]n appropriate cases,” the principles of comity and finality that inform the concepts of cause and prejudice “must yield to the imperative of correcting a fundamentally unjust incarceration.” *Id.* at 495 (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). In *Frady*, the Court stated that a petitioner may be granted relief if, in collaterally attacking his conviction, the petitioner offered affirmative evidence indicating he was wrongly convicted of a crime of which he was innocent. *Frady*, 456 U.S. at 171.

in *Murray v. Carrier*.⁴⁰ Clifford Carrier had been convicted of rape and abduction.⁴¹ After the conviction, Carrier's attorney filed an appeal that neglected to address the trial court's refusal to allow defense counsel to examine statements made by the victim.⁴² Upon the state court's dismissal, Carrier filed a *pro se* petition for writ of habeas corpus in federal court. He argued that his state procedural default resulted from his attorney's mistaken omission and thus should not bar review of his claim.⁴³ Justice O'Connor, writing for the majority, first affirmed the Court's confidence that, for the most part, persons suffering a fundamental miscarriage of justice will be able to show both cause and prejudice.⁴⁴ O'Connor then noted that if a petitioner could not show cause and prejudice, proof of his probable actual innocence would suffice to permit habeas review.⁴⁵

In *Smith v. Murray*,⁴⁶ a case of state procedural default, the Supreme Court imported into the penalty phase of capital punishment cases the actual innocence standard that had originated as dictum in *Carrier*.⁴⁷ The Court acknowledged "that the concept of 'actual' as opposed to 'legal' innocence does not translate easily into the context of an alleged error at the sentencing phase of a [capital] trial."⁴⁸ In denying the petitioner relief, the Court reaffirmed that the actual innocence standard seeks to avoid fundamental miscarriages of justice. The Court explained that where "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones . . . , refusal to consider the defaulted claim on federal habeas [does not] carr[y] with it the risk of a manifest miscarriage of justice."⁴⁹ In short, the Court translated actual innocence into factual innocence. Thus, the Court no longer asks whether a petitioner's constitutional rights were violated to his prejudice; instead, it asks whether the alleged constitutional violation "undermined the *accuracy* of the guilt or sentencing

40. 477 U.S. 478 (1986).

41. *Id.* at 482.

42. *Id.*

43. *Id.* at 483.

44. *Id.* at 495-96 (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)).

45. *Id.* at 496 (stating that "in an extraordinary case, where a constitutional violation has *probably* resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.") (emphasis added).

46. 477 U.S. 527 (1986).

47. *Id.* at 537. The defendant in *Smith v. Murray* had procedurally defaulted his claim by failing to press it before the Virginia Supreme Court on direct appeal. *Id.* at 529.

48. *Id.* at 537.

49. *Id.* at 538.

determination.”⁵⁰ Moreover, the Court equated the concept of “miscarriage of justice,” which properly is a procedural question concerned with protection of constitutional rights, with the concept of “actual innocence,” which is a fact-based inquiry into the petitioner’s guilt or innocence.⁵¹ The two concepts, however, are distinct. Actual innocence is only a subset of the larger category of potential abuses constituting fundamental miscarriages of justice.

Because the Supreme Court now equates actual innocence with fundamental miscarriages of justice,⁵² the Court no longer finds a fundamental miscarriage of justice in the admission of prejudicial evidence that is both probative and reliable. That is, as long as the result achieved is “proper,” it is irrelevant whether the procedure was improper. The Court affirmed this position in *Dugger v. Adams*,⁵³ *McCleskey*,⁵⁴ and *Sawyer*.⁵⁵ The Court has eviscerated a procedural safeguard by reducing it to a factual inquiry; this approach, however, has only engendered more confusion.

Innocent of death is a paradox. Innocent *means* guiltless. It is illogical to concede that a person is guilty of a capital crime and yet conclude that he is innocent of the penalty authorized for that crime. Although a petitioner who maintains he is innocent of the death penalty asks for the same relief as one who claims he suffered a fundamental miscarriage of justice, the argument is distinct. The petitioner arguing his innocence of death does not argue (and is not permitted to argue) that because of a procedural error he deserves a second chance at sentencing. In effect, he argues that because the sentencing process was tainted, he is untainted. Because the process was unfair, he—though confessedly guilty of the crime—is innocent of the penalty. Because the Supreme

50. *Sawyer v. Whitley*, 112 S. Ct. 2514, 2526 (1992) (Blackmun, J., concurring) (quoting *Smith v. Murray*, 477 U.S. at 539).

51. *Id.* at 2526 (citation omitted).

52. Indeed, Justice Rehnquist treats the phrases “miscarriage of justice” and “actual innocence” as synonymous. *Id.* at 2518-19.

53. 489 U.S. 401 (1989).

Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is “actually innocent” of the sentence he or she received. [To hold otherwise] would turn the case in which an error results in a fundamental miscarriage of justice, the “extraordinary case,” into an all too ordinary one.

Id. at 410 n.6 (citations omitted).

54. *McCleskey v. Zant*, 111 S. Ct. 1454 (1991). The Court noted that the Constitutional violation, if one existed, “resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination. . . . [Therefore, petitioner] cannot demonstrate that the alleged [constitutional] violation caused the conviction of an innocent person.” *Id.* at 1474-75 (citation omitted).

55. *Sawyer v. Whitley*, 112 S. Ct. 2515, 2519.

Court has allowed petitioners to argue that they are simultaneously guilty and innocent, the lower federal courts predictably have diverged in their interpretations of what it means to be innocent of death.

IV. SPLIT AMONG THE COURTS OF APPEALS

The courts of appeals split regarding what innocent of the death penalty actually means.⁵⁶ The Eighth and Ninth Circuits developed a balancing test to determine whether the sentencer more probably than not would have sentenced the defendant to life imprisonment instead of death.⁵⁷ By contrast, the Fifth and Eleventh Circuits construed actual innocence to denote ineligibility for the death penalty.⁵⁸ The distinction between the two approaches may be characterized as follows: the Eighth and Ninth Circuits ask whether the petitioner *would* not have been sentenced to death absent the alleged constitutional error; the Fifth and Eleventh Circuits ask whether the petitioner *could* not have been sentenced to death.⁵⁹ The Supreme Court in *Sawyer* explicitly espoused the eligibility approach of the Fifth and Eleventh Circuits.

In *Deutscher v. Whitley*,⁶⁰ the Ninth Circuit articulated the test later rejected by the Supreme Court:⁶¹ to establish his innocence of death, a defendant must establish that constitutional error substantially undermined the accuracy of the capital sentencing determination.⁶² That is, the error in question must have been of such magnitude that it is "more probable than not that, but for the constitutional error, the sentence of death would not have been imposed."⁶³ The Eighth Circuit adopted a similar test.

In *Smith v. Armontrout*,⁶⁴ the Eighth Circuit required a determination that the constitutional error probably caused the sentencing authority to sentence the defendant to death when it otherwise would have

56. Various Supreme Court Justices use the phrases "actually innocent of the death penalty" and "innocent of death" interchangeably. See *supra* note 7. To avoid confusion, this Comment uses the phrase "innocent of death."

57. See *Deutscher v. Whitley*, 946 F.2d 1443, 1446 (9th Cir. 1991), *cert. denied sub nom. Deutscher v. Hatcher*, 113 S. Ct. 374 (1992); *Stokes v. Armontrout*, 893 F.2d 152, 156 (8th Cir. 1989); *Smith v. Armontrout*, 888 F.2d 530, 545 (8th Cir. 1989).

58. *Sawyer v. Whitley*, 945 F.2d 812, 820 (5th Cir. 1991), *aff'd*, 112 S. Ct. 2514 (1992); *Johnson v. Singletary*, 938 F.2d 1166, 1183 (11th Cir. 1991), *cert. denied*, 113 S. Ct. 361 (1992).

59. See *Deutscher*, 946 F.2d at 1444-45.

60. 946 F.2d 1443 (9th Cir. 1991), *cert. denied sub nom. Deutscher v. Hatcher*, 113 S. Ct. 374 (1992).

61. Even Justice Stevens rejected the Ninth Circuit's approach in favor of one more restrictive. See *Sawyer*, 112 S. Ct. at 2538 (Stevens, J., concurring).

62. *Deutscher*, 946 F.2d at 1446.

63. *Id.*

64. 888 F.2d 530 (8th Cir. 1989).

sentenced him to life imprisonment.⁶⁵ Under this approach, if a reasonable juror probably would have found that the mitigating factors outweighed the aggravating factors, then the petitioner may have suffered a fundamental miscarriage of justice and would be entitled to federal court review of his claims. The Eighth and Ninth Circuits's approach focused more on avoidance of miscarriages of justice than on the defendant's actual innocence; these circuits emphasized correct procedure instead of factual innocence.

The Fifth and Eleventh Circuits use a more restrictive approach. In construing actual innocence of the death penalty, or innocence of death, the Fifth Circuit asks whether the sentencer has established the necessary facts required by state or federal law to impose the death penalty.⁶⁶ The Fifth Circuit looks only to the presence of statutory aggravating factors, giving no consideration to mitigators of any kind.⁶⁷ If one statutory aggravating factor⁶⁸ exists, then the petitioner is eligible for the

65. *Id.* at 545 (holding that "[i]n the penalty-phase context, this exception [actual innocence] will be available if the federal constitutional error alleged probably resulted in a verdict of death against one whom the jury would otherwise have sentenced to life imprisonment.").

66. *Sawyer v. Whitley*, 945 F.2d 812, 820 (5th Cir. 1991), *aff'd*, 112 S. Ct. 2514 (1992).

67. Although the federal court reviewing an abusive claim may ignore the mitigators, the original sentencer must be allowed to consider them. *See Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); *see also supra* text accompanying note 19.

68. Aggravating circumstances under the Louisiana law applied to *Sawyer* include:

(1) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, first degree robbery, or simple robbery. (2) The victim was a fireman or peace officer engaged in his lawful duties. (3) The offender has been previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping. (4) The offender knowingly created a risk of death or great bodily harm to more than one person. (5) The offender offered or has been offered or has given or received anything of value for the commission of the offense. (6) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony. (7) The offense was committed in an especially heinous, atrocious or cruel manner [i.e., the victim was subjected to "serious physical abuse . . . before death." *State v. Sonnier*, 402 So. 2d 650, 659 (La. 1981)]. (8) The victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant. (9) The victim was a correctional officer or any employee of the Department of Public Safety and Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense. (10) The victim was under the age of twelve years. (11) The offender was engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance

LA. CODE CRIM. PROC. ANN. art. 905.4 (West 1992).

death penalty; this eligibility forecloses federal review of the abusive habeas petition.

Similarly, the Eleventh Circuit in *Johnson v. Singletary*⁶⁹ set out an eligibility-based test to determine innocence of death. The Eleventh Circuit held that

a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates *all* of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body *could not* have found *any* aggravating factors and thus the petitioner was ineligible for the death penalty. In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is *ineligible* for the death penalty.⁷⁰

The Supreme Court adopted this eligibility approach in *Sawyer*.⁷¹ The Court held that the petitioner must show that "but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."⁷² This eligibility test is difficult to rationalize as a constitutional safeguard because, in fifteen of the states that have a death penalty, guilt of the underlying crime seemingly satisfies at least one statutory aggravating factor.⁷³

69. 938 F.2d 1166 (11th Cir. 1991), *cert. denied*, 113 S. Ct. 361 (1992).

70. *Id.* at 1183. The *Deutscher* court criticized this test, charging that it "offends the Constitution and fails to comport with Supreme Court precedent." *Deutscher v. Whitley*, 946 F.2d 1443, 1445 (9th Cir. 1991).

71. *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992).

72. *Id.* at 2517.

73. The fifteen states to which this applies are Alabama, Arkansas, Delaware, Florida, Idaho, Louisiana, Maryland, Mississippi, New Hampshire, Ohio, Texas, Utah, Virginia, Washington, and Wyoming. See ALA. CODE §§ 13A-5-39, 13A-5-40, 13A-5-47, 13A-5-49 (1982); ARK. CODE ANN. §§ 5-4-604, 5-10-101 (Michie 1987); DEL. CODE ANN. tit. 11, §§ 636, 4209 (1979); FLA. STAT. chs. 775.082, 782.04, 921.141, 921.142 (1992); IDAHO CODE §§ 18-4003, 18-4004, 19-2515 (1992); LA. REV. STAT. ANN. § 30 (West 1992); LA. CODE CRIM. PROC. ANN. art. 905.4 (West 1992); MD. ANN. CODE art. 27, § 407-10, 412-13 (1987); MISS. CODE ANN. §§ 97-3-19, 99-19-101 (1992); N.H. REV. STAT. ANN. §§ 630:1, 630:1-a, 630:5 (1992); OHIO REV. CODE ANN. §§ 2903.01, 2929.04 (Anderson 1993); TEX. PENAL CODE ANN. §§ 12.31, 19.02, 19.03 (West 1993); TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1993); UTAH CODE ANN. §§ 76-3-206, 76-3-207, 76-5-202, 76-5-203 (1992); VA. CODE ANN. §§ 18.2-31, 19.2-264.2, 19.2-264.4 (Michie 1990); WASH. REV. CODE ANN. §§ 9A.32.030, 9A.32.040, 10.95.020, 10.95.030, 10.95.060, 10.95.070 (West 1990); WYO. STAT. §§ 6-2-101, 6-2-102 (1992).

The Texas and Virginia statutes differ slightly from the statutes of the other states in that they define capital murder as a distinct crime. See TEX. PENAL CODE ANN. § 19.03 (WEST 1993); VA. CODE ANN. § 18.2-31 (Michie 1990). In Texas, to impose the death sentence, the sentencer must affirm that it considers the defendant a future threat to society. TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1993). In Virginia, the sentencer must affirm that it considers the defendant a future threat to society, or that it considers the crime to have been performed in an outrageously or wantonly vile, horrible or inhuman manner in that it involved torture, depravity of mind, or aggravated battery to the victim. VA. CODE ANN. § 19.2-264.2 (Michie 1990). As the State of

More important, these states alone performed 75.49%⁷⁴ of the executions since the Supreme Court reinstated the death penalty in *Gregg v. Georgia*.⁷⁵ Thus, once a jury in one of these fifteen states convicts the defendant of a crime for which it can impose the death penalty, a federal court cannot review the defendant's claims of constitutional error in an abusive petition.⁷⁶

This test effectively collapses the distinction between actual innocence of *the crime* and actual innocence of *the death penalty* because in three-quarters of the cases that end in capital punishment, once the jury has found the petitioner guilty of the underlying capital crime, at least one statutory aggravating factor is automatically present.⁷⁷ Accordingly,

Texas successfully argued in *Selva v. Collins*, 972 F.2d 101, 103 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993), any person convicted of capital murder under the statute is eligible for the death penalty because the statute informs the jury's discretion without narrowing the class of defendants eligible for the death penalty.

74. For a breakdown of the number and percentage of total executions performed by each state since 1976, see *Death Row, U.S.A.*, *supra* note 4, at 9.

75. 428 U.S. 153 (1976); see *supra* text accompanying notes 12-20.

76. The United States Supreme Court has held that the Eighth Amendment is not violated when the statutory aggravating factors duplicate the elements of a crime. *Lowenfield v. Phelps*, 484 U.S. 231, 233 (1988). More recently, the Tennessee Supreme Court held that the Eighth Amendment requires a showing of distinct aggravating factors in addition to factors that duplicate elements of the underlying crime when that crime is felony murder. *State v. Middlebrooks*, 840 S.W.2d 317, 323 (Tenn. 1992). The United States Supreme Court has granted certiorari in *Tennessee v. Middlebrooks*, 113 S. Ct. 1840 (1993).

77. For example, "a supported verdict of guilty of first degree murder in the guilt phase of the trial automatically fulfills the threshold requirement of a finding of at least one statutory aggravating circumstances [sic], thereby authorizing the jury to consider imposing the death penalty." *State v. Sawyer*, 422 So. 2d 95, 101 n.12 (La. 1982), *vacated in light of new authority, sub nom. Sawyer v. Louisiana*, 463 U.S. 1223 (1983), *sentence reaff'd in Sawyer v. State*, 422 So. 2d 1138 (La. 1983), *cert. denied sub nom. Sawyer v. Louisiana*, 466 U.S. 931 (1984) (construing LA. REV. STAT. ANN. § 14:30 and LA. CODE CRIM. PROC. ANN. art. 905.4). Compare the statutory schemes listed in *supra* note 73 with those in the following states, twenty-one of which have the death penalty: Alaska Stat. § 12.55.125 (1992) (no death penalty); ARIZ. REV. STAT. ANN. §§ 13-703, 13-1105 (1993); CAL. PENAL CODE §§ 189, 190.2 (West Supp. 1993); COLO. REV. STAT. ANN. §§ 16-11-103, 18-3-102 (West 1980 & Supp. 1993); CONN. GEN. STAT. ANN. §§ 53a-46a, 53a-54b (West 1985 & Supp. 1993); D.C. CODE ANN. §§ 22-2401, 22-2404 (1989) (no death penalty); GA. CODE ANN. §§ 26-1101, 27-2534.1 (Harrison 1988); HAW. REV. STAT. § 707-701 (1988) (no death penalty); ILL. ANN. COMP. STAT. ch. 720, para. 51 9-1 (Smith-Hurd 1993); IND. CODE ANN. §§ 35-42-1-1, 35-50-2-9 (West 1992); IOWA CODE ANN. §§ 707.2, 902.1 (West 1993) (no death penalty); KAN. STAT. ANN. §§ 62-2401 to 62-2405 (1983) (repealed death penalty statute); KY. REV. STAT. ANN. §§ 507.020, 532.025 (Michie/Bobbs-Merrill 1990); ME. REV. STAT. ANN. tit. 17-A, §§ 201, 1251 (West 1983 & Supp. 1992) (no death penalty); MASS. GEN. LAWS ANN. ch. 265, §§ 1, 2 (West 1990) and ch. 279, §§ 68, 69 (West Supp. 1993); MICH. STAT. ANN. § 28.548 (Callaghan 1990) (no death penalty); MINN. STAT. ANN. § 609.185 (West Supp. 1993) (no death penalty); MO. ANN. STAT. §§ 565.020, 565.032 (Vernon Supp. 1993); MONT. CODE ANN. §§ 45-5-102, 46-18-303, 46-18-304, 46-18-305 (1991); NEB. REV. STAT. §§ 28-302, 28-303, 29-2520, 29-2522, 29-2523 (1989); NEV. REV. STAT. ANN. §§ 200.030, 200.033, 200.035 (Michie 1992); N.J. STAT. ANN. §§ 2C:11-3 (West Supp. 1993); N.M. STAT. ANN. §§ 30-2-1, 31-20A-2, 31-20A-4, 31-20A-5, 31-20A-6 (Michie 1984); N.Y. PENAL LAW §§ 60.06, 125.27 (McKinney 1992) (death penalty statute, § 60.06, found unconstitutional in *People v. Smith*, 468

the petitioner is not innocent of death and the federal courts may decline review on the merits.⁷⁸ Therefore, a petitioner may be innocent of death and receive review of an abusive habeas petition only if he is actually innocent of the underlying offense.⁷⁹

V. *SAWYER V. WHITLEY*

In *Sawyer*, the jury sentenced Robert Wayne Sawyer to death after convicting him of the first degree murder of Frances Arwood, a young woman staying in his home to care for the children of Sawyer's live-in girlfriend.⁸⁰ Sawyer and an accomplice battered, attempted to drown, scalded, and burned the victim, leaving her to die.⁸¹

At trial, the prosecution introduced evidence that Sawyer earlier had pleaded guilty to involuntary manslaughter in the death of a four-year-old child entrusted to his care; the child had died from a severe blow to the head.⁸² That crime did not relate to the murder of Frances

N.E.2d 879 (N.Y. 1984)); N.C. GEN. STAT. §§ 14-17, 15A-2000 (1986); N.D. CENT. CODE §§ 12.1-16-01, 12.1-32-01 (1985) (no death penalty); OKLA. STAT. ANN. tit. 21, §§ 691, 701.7, 701.9, 701.10, 701.12 (West 1992); OR. REV. STAT. §§ 163.095, 163.105, 163.115, 163.150 (1991); PA. CONS. STAT. ANN. tit. 18, §§ 1102, 2501, 2502 (1983 & Supp. 1992) and tit. 42, § 9711 (1992); R.I. GEN. LAWS §§ 11-23-1, 11-23-2 (1992) (no death penalty); S.C. CODE ANN. §§ 16-3-10, 16-3-20 (Law. Co-op. 1992); S.D. CODIFIED LAWS ANN. §§ 22-6-1, 22-16-4, 23A-27A-1 (Supp. 1992); TENN. CODE ANN. §§ 39-11-117, 39-13-202, 39-13-204 (1991); VT. STAT. ANN. tit. 13, §§ 2301, 2303 (Supp. 1992) (no death penalty); W.VA. CODE §§ 61-2-1, 61-11-2 (1992) (no death penalty); WIS. STAT. ANN. §§ 939.50, 940.01 (West Supp. 1992).

The above states that authorize the death penalty, with the exception of Connecticut, define murder generally and the statutory aggravating factors specifically. Some of these states, in addition to defining murder generally, have a specific felony murder provision with a similar aggravating factor; however, none of them have an aggravating factor that corresponds to the general definition of murder. Accordingly, in these states, a supported verdict of guilty of murder (a first degree felony) does not *automatically* fulfill the threshold requirement of a finding of at least one statutory aggravating circumstance, as it does in those states listed *supra* note 73. Although Connecticut does define murder specifically with similar aggravating circumstances, it has no automatic upgrade because the existence of any mitigating factor precludes a sentence of death.

78. Again, this analysis applies only to those states listed *supra* note 73.

79. This analysis assumes that the percentage of total executions performed by these states will stay fairly constant.

80. *State v. Sawyer*, 422 So. 2d 95, 97 (La. 1982).

81. *Id.* at 98. Sawyer and an accomplice beat Frances Arwood with their fists, kicked her, and dragged her by the hair into the bathroom. *Id.* There she was forcibly submerged in the bathtub and scalded with boiling water before being dragged unconscious into the living room where she was beaten with a belt and kicked repeatedly. *Id.* The accomplice raped Frances Arwood once and possibly twice before Sawyer doused her with lighter fluid and set her on fire. *Id.* at 98 nn.3-4. They left her unconscious in the living room for several hours before visiting relatives discovered her and called the police. *Id.* at 98. She died several weeks later, never having regained consciousness. *See id.* at 97. Sawyer's girlfriend and her two small children witnessed the attack because Sawyer prevented them from leaving by locking the door and keeping the key. *Id.* at 97-98.

82. *Id.* at 100.

Arwood.

During the penalty phase of the trial, Sawyer's jury found three statutory aggravating circumstances: (1) Sawyer was engaged in the commission of an aggravated arson; (2) the offense was committed in an especially heinous, atrocious, or cruel manner; and (3) Sawyer previously had been convicted of an unrelated murder [the involuntary manslaughter].⁸³ The jury found no mitigating circumstances.⁸⁴ The Louisiana Supreme Court affirmed Sawyer's death sentence on October 18, 1982.⁸⁵

In 1986, Sawyer filed his first federal habeas petition; each of his eighteen claims was denied on the merits.⁸⁶ The habeas petition under consideration in *Sawyer v. Whitley*⁸⁷ was Sawyer's second. In this petition, he advanced two claims before the federal courts. First, Sawyer maintained and presented affidavits stating that it was his accomplice, not he, who burned the victim.⁸⁸ Sawyer further asserted that the police violated his due process rights by failing to produce this exculpatory evidence.⁸⁹ Second, Sawyer argued that his trial counsel was ineffective because he had failed to introduce records of Sawyer's treatment in two

83. *Sawyer*, 422 So. 2d at 101. See *supra* note 68 for Louisiana's statutory aggravating factors. On review, the Supreme Court of Louisiana held that the evidence did not support the third aggravating circumstance because involuntary manslaughter is not murder. *Id.*

84. At the penalty phase, Sawyer testified that he had been intoxicated at the time of the murder and claimed the defense of "toxic psychosis." *Id.* at 99. Sawyer's sister testified that Sawyer had suffered a deprived and violent childhood, that he loved and cared for her children, and that as a teenager Sawyer had undergone shock therapy while confined to a mental hospital. *Sawyer v. Whitley*, 112 S. Ct. 2514, 2517 (1992); *State v. Sawyer*, 422 So. 2d 95, 100 (La. 1982). Examples of a mitigating circumstance include lack of significant history of prior criminal activity, the defendant's age, and the defendant's minimal participation in the crime. See, e.g., FLA. STAT. § 921.141(6) (Supp. 1992); LA. CODE CRIM. PROC. ANN. art. 905.5 (West 1992).

85. *Sawyer*, 422 So. 2d at 106.

86. See *Sawyer v. Butler*, 848 F.2d 582, 586 (5th Cir. 1988), *aff'd on reh'g en banc*, 881 F.2d 1273 (5th Cir. 1989).

87. *Sawyer v. Whitley*, 112 S. Ct. 2514, 2518 (1992).

88. Much of the evidence [contained in the affidavits Sawyer presented to support his abusive claim] goes to the credibility of [Sawyer's girlfriend], suggesting e.g., that contrary to her testimony at trial she knew [Sawyer's accomplice] prior to the day of the murder; that she was drinking the day before the murder; and that she testified under a grant of immunity from the prosecutor. . . . The final bit of evidence petitioner alleges was unconstitutionally kept from the jury due to a *Brady* violation was a statement made by [the girlfriend's] then 4-year-old son, Wayne, to a police officer the day after the murder [to the effect that it was the accomplice who had set Frances Arwood on fire and that] "Daddy [Sawyer] tried to help the lady" and that the "other man" had pushed Sawyer back into a chair.

Sawyer, 112 S. Ct. at 2524.

89. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Accordingly, Sawyer asserted a *Brady* violation because the police officer withheld the child's statement exculpating Sawyer. See *supra* note 88.

mental health institutions.⁹⁰

The Fifth Circuit Court of Appeals held that Sawyer's failure to assert the due process claim in his first petition constituted an abuse of the writ for which he had not shown cause under the *McCleskey* test.⁹¹ The Fifth Circuit further held that the ineffective assistance claim was successive because it had been rejected on the merits in Sawyer's first petition and that he failed to show cause for not bringing all evidence in support of this claim in the first petition.⁹² Because Sawyer did not contest these findings on certiorari, the United States Supreme Court dispensed with the cause and prejudice standard and moved to actual innocence.⁹³ The Court questioned whether Sawyer had shown by clear and convincing evidence that, but for the constitutional error, he would have been ineligible for (was actually innocent of) the death penalty.⁹⁴

A. *The Majority Opinion by Justice Rehnquist*

1. THE STANDARD OF PROOF

The clear and convincing evidence standard is a heightened standard of proof, falling somewhere between greater weight of the evidence and beyond a reasonable doubt.⁹⁵ It is used to prove medical facts in cases of civil commitment,⁹⁶ to prove actual malice in libel suits brought by public officials,⁹⁷ and in cases of deportation⁹⁸ and naturalization.⁹⁹ The *Sawyer* majority concluded, without explanation, that it must apply this standard.¹⁰⁰

90. *Sawyer*, 112 S. Ct. at 2523.

91. *Sawyer v. Whitley*, 945 F.2d 812, 824 (5th Cir. 1991), *aff'd*, 112 S. Ct. 2514 (1992). Sawyer could not show cause for the omission because the State did not impede his access to the information and therefore did not frustrate his ability to raise the claim in his initial petition. *Id.*

92. *Id.* at 823. For a description of the difference between successive and abusive claims, see *supra* text accompanying note 28.

93. *Sawyer v. Whitley*, 112 S. Ct. 2514, 2523 (1992).

94. *Id.* at 2523. The innocent of death exception applies to both the abusive claim under *McCleskey v. Zant*, 112 S. Ct. 1454 (1991), and the successive claim under *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) (applying the fundamental miscarriage of justice exception to successive petitions). The Supreme Court now equates this fundamental miscarriage of justice exception with actual innocence of the death penalty. See *supra* text accompanying notes 46-51.

95. BLACK'S LAW DICTIONARY 251 (6th ed. 1990).

96. *Addington v. Texas*, 441 U.S. 418, 431-33 (1979).

97. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964).

98. *Woodby v. I.N.S.*, 385 U.S. 276, 285-86 (1966).

99. *Schneiderman v. United States*, 320 U.S. 118, 125 (1943).

100. *Sawyer v. Whitley*, 112 S. Ct. 2514, 2523 (1992). ("Therefore, we must determine if petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under Louisiana law.").

2. THE FACTORS THE FEDERAL COURTS MAY CONSIDER

In *Sawyer*, the majority held that in determining actual innocence a federal court could consider only aggravating factors.¹⁰¹ This holding vitiates Sawyer's claim that exclusion of the mitigating evidence showing that it was not he who burned the victim presented the sentencer with a "factually inaccurate sentencing profile."¹⁰² The Court concluded that considering mitigating factors would relegate actual innocence to actual prejudice, allowing petitioners to evade the cause prong of the cause and prejudice exception.¹⁰³ Yet, if the Court's concern is one of actual innocence, why is it relevant whether cause for the omission existed? The Court answers this question with a statement of policy:

If federal habeas review of capital sentences is to be at all rational, petitioner must show something more in order for a court to reach the merits of his claims on a successive [or abusive] habeas petition than he would have had to show to obtain relief on his first habeas petition.¹⁰⁴

Moreover, the Court points to the difficulty a federal court would face in assessing how jurors would have reacted to additional showings of mitigating factors, an inquiry that would expand what is supposed to be a narrow exception to the principle of finality.¹⁰⁵

In effect, to allow the federal courts to consider the mitigating fac-

101. *Id.* at 2522.

102. *Id.* at 2521. This evidence also would tend to prove the absence of aggravated arson as an aggravating circumstance. Sawyer also argued that inclusion of the involuntary manslaughter as an aggravating circumstance contributed to this "factually inaccurate sentencing profile," which may have prejudiced the jury. *See supra* note 83. The United States Supreme Court and the Louisiana Supreme Court each found that at least two valid aggravating circumstances existed, making Sawyer eligible for the death penalty. The two aggravating factors present were that the defendant was engaged in the commission of aggravated arson and that the murder was committed in an especially cruel, atrocious, and heinous manner. *Id.* at 2523; *State v. Sawyer*, 422 So. 2d 95, 101 (La. 1982).

The United States Supreme Court found that in view of all the other evidence in the record the affidavit submitted with Sawyer's abusive, second petition "does not show that no rational juror would find that petitioner committed both of the aggravating circumstances found by the jury." *Sawyer*, 112 S. Ct. at 2524. Moreover, "even crediting the information in the hearsay affidavit, it cannot be said that no reasonable juror would have found, in light of all the evidence, that petitioner was guilty of the aggravated arson for his participation under the Louisiana law of principals." *Id.*

103. *Id.* at 2522 n.13.

104. *Id.* at 2522.

105. A federal district judge confronted with a claim of actual innocence may with relative ease determine whether a submission . . . consists of credible, noncumulative and admissible evidence negating [a necessary] element of [the crime]. But it is a far more difficult task to assess how jurors would have reacted to additional showings of mitigating factors, particularly considering the breadth of those factors that a jury . . . must be allowed to consider.

Id.

tors would force them to weigh evidence as if they were the original triers of fact. The eligibility standard, conversely, is objective and efficient.¹⁰⁶ It clarifies innocence of death—an irrational concept that is impossible to apply—by eviscerating it. The *Sawyer* Court conditions actual innocence of the death penalty on a finding of actual innocence of the underlying crime (or, as the Court states it, ineligibility for the death sentence). The Court finds the innocent of the death penalty exception sensible because the new eligibility standard allows a petitioner who cannot show he is innocent of the capital crime to show an absence of aggravating circumstances or some other condition of eligibility.¹⁰⁷ Yet, as discussed above, absent actual innocence of the crime, a petitioner is eligible for the death penalty and therefore not innocent of death as the *Sawyer* Court defines it.¹⁰⁸ The two are inextricably yoked. It is, therefore, difficult to make sense of the innocent of death exception.

B. Justice Blackmun's Concurring Opinion

The difficulty in finding sensible meaning in the innocent of death exception may result from the Court's incorporation of the fundamental miscarriage of justice exception into the actual innocence exception. These concepts are not equal. As Justice Blackmun emphasizes in his concurrence, the fundamental miscarriage of justice exception focuses on the preservation of constitutional rights, while the actual innocence exception is a fact-based inquiry into the petitioner's innocence or guilt of the underlying crime.¹⁰⁹ Blackmun accuses the Court of being "undaunted by its own illogic"¹¹⁰ when it extended the actual innocence analysis to the sentencing phase, thereby replacing the fundamental miscarriage of justice exception and switching the inquiry from one of

106. Justice Rehnquist stresses that for the innocence of death concept to be "workable, it must be subject to determination by relatively objective standards." *Id.* at 2520. See also *infra* note 146.

107. *Sawyer*, 112 S. Ct. at 2522. "Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing [sic] that there was no aggravating circumstance or that some other condition of eligibility had not been met." *Id.*

108. Seventy-five percent of the persons executed since 1976 would have been automatically foreclosed from federal court review of an abusive writ under *Sawyer*. See *supra* notes 73-76 and accompanying text.

109. *Sawyer*, 112 S. Ct. at 2526 (Blackmun, J., concurring). Blackmun further iterates that "the concern of a federal court in reviewing the validity of a conviction and death sentence on a writ of habeas corpus is 'solely the question whether [the petitioner's] constitutional rights have been preserved.'" *Id.* at 2525-26 (quoting Justice Holmes in *Moore v. Dempsey*, 261 U.S. 86, 88 (1923)).

110. *Sawyer*, 112 S. Ct. at 2526 (Blackmun, J., concurring). As Blackmun discusses, the Court in *Smith v. Murray*, 477 U.S. 527 (1986), extended the concept to the penalty phase in capital cases. See *supra* text accompanying notes 46-51.

proper procedure to one of proper result. Most important, Blackmun writes, contrary to what the focus on innocence assumes, accuracy and reliability of the verdict are not the only values federal habeas review seeks to protect.¹¹¹ According to Blackmun, "[t]he Court's ongoing struggle to give meaning to 'innocence of death' simply reflects the inappropriateness of the inquiry."¹¹²

Blackmun further argues that the Court suffers a skewed value system that is more concerned with judicial economy, expediency, and finality than with justice and human life.¹¹³ Blackmun closes his opinion by reproaching the Court for its self-imposed constraints on federal court review of constitutional claims by capital defendants; he charges that this constraint "undermines the very legitimacy of capital punishment itself."¹¹⁴ Nonetheless, despite these admonishments, Blackmun concurs. He has chosen result over procedure. In a footnote, however, Blackmun explains that despite his disagreement with the prevailing state of the innocent of death exception, he has and does attempt to faithfully apply it.¹¹⁵

111. *Sawyer*, 112 S. Ct. at 2527 (Blackmun, J., concurring) ("the focus on innocence assumes, erroneously, that the only value worth protecting through federal habeas review is the accuracy and reliability of the guilt determination.").

112. *Id.* at 2528.

113. *Id.* at 2529 (stating that the Court's having permitted McCleskey "to be executed without ever hearing the merits of his claims starkly reveals the Court's skewed value system, in which finality of judgment, conservation of state resources, and expediency of executions seem to receive greater solicitude than justice and human life.").

114. *Id.* at 2530. Blackmun writes that in reviewing the state of the Court's capital case decisions, he is "left to wonder how the ever-shrinking authority of the federal courts to reach and redress constitutional errors affects the legitimacy of the death penalty itself." *Id.* at 2529-30.

115. Notwithstanding my view that the Court has erred in narrowing the concept of a "fundamental miscarriage of justice" to cases of "actual innocence," I have attempted faithfully to apply the "actual innocence" standard in prior cases . . . I therefore join Justice Stevens's analysis of the "actual innocence" standard and his application of that standard to the facts of this case.

Id. at 2528 n.2 (citations omitted).

In addition, Blackmun joined in Justice Stevens's concurring opinion as well. Presumably, Blackmun believes, as does Stevens, that even were the standard that Stevens proposes adopted, the result in the case would be the same. Blackmun wrote a separate opinion to express his "ever-growing skepticism that, with each new decision from this Court constricting the ability of the federal courts to remedy constitutional errors, the death penalty really can be imposed fairly and in accordance with the requirements of the Eighth Amendment [banning cruel and unusual punishment]." *Id.* at 2525.

On February 22, 1994, Justice Blackmun, believing no death penalty can be constitutionally imposed under the current death penalty scheme, announced that he will no longer apply death penalty jurisprudence:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored — indeed, I have struggled — along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has

C. Justice Stevens's Concurring Opinion

Justice Stevens's concurrence, joined by Justices O'Connor and Blackmun, takes a different approach. Stevens notes and challenges as error the movement from fundamental miscarriage of justice to actual innocence.¹¹⁶ More important, however, Stevens sets this error aside and focuses his analysis on the impropriety of both the "clear and convincing evidence" and "eligibility for the death penalty" standards advocated by the majority.¹¹⁷

1. THE STANDARD OF PROOF

In attacking the majority's use of the clear and convincing standard, Justice Stevens tracks the development of the actual innocence exception from *Carrier* until the present and concludes that the Court has "consistently required a defendant to show that the alleged constitutional error has *more likely than not* [as opposed to clearly and convincingly] created a fundamental miscarriage of justice."¹¹⁸ Stevens argues that this "more likely than not/probably resulted" standard is both familiar to courts and objective, shows proper respect for finality in criminal proceedings, is consistent with the standard courts use to assess motions for new trial based on newly discovered evidence, and is in tune with the policy underlying the manifest miscarriage of justice exception.¹¹⁹ He

been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.

Callins v. Collins, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from denial of certiorari) (citations omitted); see also *id.* at 1130 n.2, 1138.

116. Stevens finds fault with the Court's decision, when "[c]harged with averting manifest miscarriages of justice[,] . . . [to] instead narrowly recast[] its duty as redressing cases of 'actual innocence.'" *Sawyer*, 112 S. Ct. at 2531 (Stevens, J., concurring).

117. *Id.* "[U]nder a proper interpretation of the *Carrier* analysis, the Court's definition of 'innocence of death' is plainly wrong because it disregards well-settled law—both the law of habeas corpus and the law of capital punishment." *Id.* Stevens cites a number of cases he says use the "more likely than not/probably resulted" standard of proof. See generally *Coleman v. Thompson*, 111 S. Ct. 2546 (1991); *Teague v. Lane*, 489 U.S. 288, 313 (1989); *Dugger v. Adams*, 489 U.S. 401, 412 (1989); *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

118. *Sawyer*, 112 S. Ct. at 2531 (Stevens, J., concurring).

119. *Id.* at 2531-32.

Federal courts have long applied the "clearly erroneous" standard pursuant to Rule 52 of the Federal Rules of Civil Procedure and have done so "in civil contempt actions, condemnation proceedings, copyright appeals, . . . forfeiture actions for illegal activity" [and to review] nonguilt findings of fact made in criminal cases pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure.

asserts that this standard is similar to yet stricter than the "reasonable probability" standard courts use to determine whether a petitioner meets the prejudice prong of the cause and prejudice test.¹²⁰ Thus, Stevens argues, this heightened level of proof appropriately confines federal court review to the exceptional case in which the defendant can meet this stricter standard of proof without imposing the "severe burden" of the clear and convincing standard on the capital defendant.¹²¹ Stevens strikes the balance somewhere between reasonable probability, which is more lenient, and clear and convincing, which is more stringent.

In support of his argument, Stevens cites the dual functions of a standard of proof: (1) to allocate the risk of error between the litigants and (2) to indicate to the trier of fact the relative importance society attaches to the ultimate decision.¹²² Stevens contends that the heightened standard of proof that the majority imposes furthers neither of these considerations.¹²³ First, he concludes, nothing supports the majority's requirement that a federal court be virtually certain the sentencing authority could not have sentenced the defendant to death "before *merely entertaining* his claim."¹²⁴ Stevens points out that the innocence of death exception determines only whether a federal court will reach the merits of an abusive claim, not whether it will stay or vacate the death sentence; thus, the state's interest in finality does not warrant the majority's clear and convincing standard.¹²⁵ Second, Stevens argues that the clear and convincing standard restricts federal review far more than the "plain error" standard most states use to review defaulted claims in capital cases.¹²⁶ Because an abusive writ raises issues never before raised on a habeas petition in federal court, the clear and convincing standard—by making it harder to get review in the federal courts—creates the anomaly of possibly leaving ultimate protection of federal constitutional rights to state courts. The courts best suited to interpret the Constitution may never hear these claims.

Next, Stevens attacks the majority's "perverse double standard"¹²⁷ requiring a non-capital defendant to show that constitutional error proba-

Id. at 2536, 2536 n.3 (citations omitted).

120. *Id.* at 2532.

121. *Id.* at 2532-33.

122. *Id.* at 2532 (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

123. Sawyer, 112 S. Ct. at 2532 (Stevens, J., concurring).

124. *Id.*

125. *Id.* at 2533. Stevens further argues that the clear and convincing standard unjustifiably causes the risk of error to fall severely on the capital defendant, attaches greater importance to protecting a defendant's sentence than to determining whether it is appropriate, and fails to recognize that accuracy is needed in capital cases more than anywhere else. *Id.*

126. *Id.*

127. *Id.*

bly resulted in a miscarriage of justice under *Carrier* while requiring a capital defendant to present clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty under *Sawyer*.¹²⁸ More likely, however, rather than confining *Sawyer* to its capital defendant facts, the federal courts will relegate all defendants to the clear and convincing evidence standard. Accordingly, Stevens's concern on this issue may be more imagined than real.

Finally, Stevens discusses the standard of proof he would employ: To be innocent of the death sentence, a defendant must prove the sentencer clearly erred in sentencing the defendant to death.¹²⁹ This standard requires a "definite and firm conviction that a mistake has been committed."¹³⁰ Stevens advocates this standard because it recognizes both the aggravation and mitigation aspects of capital-punishment case decisions:

It recognizes that in the extraordinary case, constitutional error may have precluded consideration of mitigating circumstances so substantial as to warrant a court's review of a defaulted, successive, or abusive claim. It also recognizes that, again in the extraordinary case, constitutional error may have inaccurately demonstrated aggravating circumstances so substantial as to warrant review of a defendant's claims.¹³¹

The majority, however, accuses Stevens of wrenching the clearly erroneous standard out of its context in Federal Rule of Civil Procedure 52(a), where it applies to findings of fact made at bench trials, but not

128. *Id.*

129. *Id.* at 2536. "[A] defendant is 'innocent of the death sentence' only if his capital sentence is *clearly erroneous*." Stevens lists the following examples of when a capital sentence would be clearly erroneous:

If, taking into account all of the available evidence, the sentencer lacked the legal authority to impose such a sentence because, under state law, the defendant was not eligible for the death penalty. Similarly, in the case of a "jury override," a death sentence is clearly erroneous if, taking into account all of the evidence, the evidentiary prerequisites for that override (as established by state law) were not met. A death sentence is also clearly erroneous under a "balancing regime" if, in view of all of the evidence, mitigating circumstances so far outweighed aggravating circumstances that no reasonable sentencer would have imposed the death penalty. Such a case might arise if constitutional error either precluded the defendant from demonstrating that aggravating circumstances did not obtain or precluded the sentencer's consideration of important mitigating evidence.

Id. (citations omitted).

130. *Id.* (quoting *United States v. United States Gypsum*, 333 U.S. 364, 395 (1948)). "The standard is stringent: if the sentence is 'plausible in light of the record viewed in its entirety' it is not clearly erroneous 'even though [the court is] convinced that had it been sitting as the [sentencer], it would have weighed the evidence differently.'" *Sawyer*, 112 S. Ct. at 2537 (Stevens, J., concurring) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)).

131. *Sawyer*, 112 S. Ct. at 2536.

jury trials.¹³² The majority further argues that a finding is clearly erroneous when the reviewing court is "left with the definite and firm conviction that a mistake has been committed,"¹³³ not when "no reasonable sentencer could have imposed the death penalty," as Stevens suggests.¹³⁴ One would suspect, however, that just as Justice Stevens argues, a reviewing court would be left with a definite and firm conviction that a mistake had been committed by a sentencer that sentences a defendant to death when no reasonable sentencer could have imposed that penalty. Stevens opines that, because the clearly erroneous standard is the core of the innocence of death exception,¹³⁵ a defendant is actually innocent of a clearly erroneous death sentence.

2. THE FACTORS THE FEDERAL COURTS MAY CONSIDER

Stevens criticizes the Court's decision, first, because it considers only evidence concerning aggravating factors and second, because it requires a petitioner to refute his eligibility for the death penalty.¹³⁶ Stevens argues that such a narrow definition of innocent of death ignores the rare case in which, even though the sentencing authority could sentence a petitioner to death, such a sentence would be a fundamental miscarriage of justice.¹³⁷ In effect, Stevens attempts to return the inquiry to one of justice and fairness rather than innocence. "Fundamental fairness is more than accuracy at trial; justice is more than guilt or innocence."¹³⁸

a. The Majority's Refusal to Look at Mitigating Evidence

Stevens criticizes the majority's refusal to look at mitigating evidence by citing two "bedrock principles" of capital-punishment case

132. *Id.* at 2522 n.14.

133. *Id.* (quoting *United States Gypsum*, 333 U.S. at 395 (1948) and reaffirmed in *Anderson*, 470 U.S. at 573 (1985)).

134. Justice Rehnquist writes that the "no reasonable sentencer" standard traditionally is used for review of jury verdicts. *Sawyer*, 112 S. Ct. at 2522 n.14.

135. *Id.* at 2537 (Stevens, J., concurring). Justice Stevens declares that:

Just as a defendant who presses a defaulted, successive, or abusive claim and who cannot show cause must demonstrate that it is more likely than not that he is actually innocent of the offense, so a capital defendant who presses such a claim and cannot show cause must demonstrate that it is more likely than not that his death sentence was clearly erroneous.

Id.

136. *Id.* at 2533.

137. "This narrow definition of 'innocence of the death sentence' fails to recognize that, in rare cases, even though a defendant is eligible for the death penalty, such a sentence may nonetheless constitute a fundamental miscarriage of justice." *Id.* Stevens draws particular attention to the majority's refusal to look at mitigating factors. He quotes *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987), for the proposition that "'in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence.'" *Sawyer*, 112 S. Ct. at 2533.

138. *Sawyer*, 112 S. Ct. at 2530 (Stevens, J., concurring).

law: first, narrowing the class of persons eligible for the death penalty and second, broadening the scope of considered evidence.¹³⁹ The majority, he charges, respects only the first requirement while implicitly repudiating the second.¹⁴⁰ This repudiation conflicts with the theory underlying capital-punishment jurisprudence: The non-arbitrariness of the death penalty rests on individualized sentencing determinations.¹⁴¹ Stevens analogizes the majority's definition of innocent of death to the mandatory death penalty statute that the Court invalidated in *Roberts v. Louisiana*¹⁴² because it looked only to the presence of aggravating factors without questioning the appropriateness of the death sentence for the individual defendant.¹⁴³

Stevens argues that it is arbitrary to require the federal courts to determine whether a reasonable juror would have found that statutory aggravating circumstances existed, while refusing to let them consider how a reasonable juror might have assessed mitigating evidence.¹⁴⁴ Stevens maintains that both inquiries require the federal courts to reconsider and anticipate a sentencer's decision. He argues that the same reasons for barring consideration of mitigating circumstances apply to consideration of aggravating factors as well.¹⁴⁵

139. *Id.* at 2534.

140. "[T]he Court implicitly repudiates the [second] requirement that the sentencer be allowed to consider all relevant mitigating evidence, a constitutive element of our Eighth Amendment jurisprudence." *Id.*

141. *Id.*

142. 428 U.S. 325 (1976). See *supra* note 12 and accompanying text.

143. The Court's definition of "innocence of the death sentence" is like the statutory scheme in *Roberts*: it focuses solely on whether the defendant is in a class eligible for the death penalty and disregards the equally important question of whether "death is the appropriate punishment in [the defendant's] specific case."

Sawyer, 112 S. Ct. at 2535 (alteration in original) (internal quotations omitted).

144. *Id.* at 2535 n.2; see also *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (stating that "[t]he power to be lenient [also] is the power to discriminate."). In a more recent Supreme Court case, *Graham v. Collins*, 113 S. Ct. 892 (1993), Justice Thomas admonished that permitting sentencing authorities to cite mitigating circumstances to avoid imposing the death sentence returns the danger of discriminatory sentencing. "To withhold the death penalty out of sympathy for a defendant who is a member of a favored group [the mentally ill] is no different from a decision to impose the penalty on the basis of negative bias. . . ." *Id.* at 912. Justice Thomas's words echo those of John Hart Ely, Stanford Law School Professor of Law:

It is by *reducing*, hardly by increasing, the discretion of juries, and thus to some extent removing the buffers that ensure that people like us will never be executed, that we move to protect those who are not so insulated from the sort of "unusual" enforcement regime it is the point of the Eighth Amendment to preclude (and in the process to provide political safeguards against excessive penalties).

JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 174 (1980).

145. [Consideration of both aggravating and mitigating circumstances] require[s] the federal courts to reconsider and anticipate a sentencer's decision: by the Court's own standard federal courts must determine whether a "reasonable juror would have found" certain facts. Thus, the Court's reason for barring federal courts from

Stevens's assessment, however, is faulty. The majority's inquiry is one of fact.¹⁴⁶ Either the jury found that one of the statutory aggravating factors existed, moving the defendant into the class of defendants eligible for the death penalty, or it did not. The reviewing federal court must ask a very clear either/or question. As noted above,¹⁴⁷ the inquiry is entirely objective and quite efficient; introducing mitigating factors into this analysis would skew its precision. The court would have to determine not merely whether mitigating factors existed, but also how much weight they should be given. This in turn would compel the court to consider the weight it must give aggravating factors (both statutory and nonstatutory)¹⁴⁸ and to balance the two. The standard that Stevens advocates would require a reviewing federal court to function in much the same capacity as the state sentencing authority. The reviewing court would have to decide roughly whether the aggravating circumstances outweigh the mitigating circumstances enough to support the death sentence. Accordingly, Stevens correctly argues that mitigating factors should be considered to preserve the constitutionality of capital-punishment jurisprudence; however, he incorrectly suggests that there is "no . . . difference between consideration of [statutory] aggravating and mitigating circumstances."¹⁴⁹

b. The Majority's Requirement That the Defendant Prove He Is Ineligible for the Death Penalty

Stevens also takes exception with the majority's narrow focus on

considering mitigating circumstances applies equally to the standard that *it* endorses. Its exclusion of mitigating evidence from consideration is therefore wholly arbitrary.

Sawyer, 112 S. Ct. at 2535 n.2.

146. Of course, the question whether a capital defendant is guilty of one of the statutory aggravating circumstances is not an objective question of fact, but rather a subjective determination to be made by the jury. For example, the jury was not bound to find that Sawyer had committed aggravated arson. Nonetheless, once the jury determined that he had, the question became one of fact for the reviewing court. In *Sawyer*, the question is not "*should* the jury have found the defendant guilty of aggravated arson?" Rather, it is "*did* the jury find the defendant guilty of aggravated arson?" As long as the alleged constitutional error does not implicate at least one statutory aggravating factor found by the sentencing authority, the inquiry ends. Only when the petitioner alleges constitutional error as to each statutory aggravating factor found by the sentencing authority must the reviewing court go further, evaluating the proffered evidence in light of all other evidence in the record, to determine whether absent the constitutional error no rational juror would have found any statutory aggravating factor to exist. See *supra* note 8.

147. See *supra* text accompanying notes 106-07.

148. See *supra* notes 13-18 and accompanying text.

149. *Sawyer*, 112 S. Ct. at 2535 n.2. The factors differ because the reviewing court does not evaluate the aggravating circumstances. It merely looks to see whether the sentencer found that they are present or would have found they are present. See *supra* note 146. The reviewing court, however, cannot rely on the mere presence of mitigating factors. If the reviewing court considers both aggravating and mitigating factors, it has no choice but to weigh them.

eligibility.¹⁵⁰ He argues that the majority's "all-or-nothing" standard is unduly harsh. It fails to provide for cases in which the sentencer could impose the death penalty, but to do so would constitute a manifest miscarriage of justice.¹⁵¹ Stevens emphasizes that when a sentencing authority chooses between imprisonment and the death sentence, it must look to the underlying facts *and* use reasoned moral judgment.¹⁵² By limiting the inquiry to the factual presence of statutory aggravating factors, the majority's focus on eligibility ignores the need for, and use of, this reasoned moral judgment.

Finally, Stevens applies his standard to the facts of *Sawyer*. After conceding that Sawyer failed to show cause for not asserting his due process claim in the first petition and that Sawyer is not actually innocent of the underlying offense, Stevens concludes that the new evidence does not demonstrate that the sentencer more likely than not clearly erred when it sentenced Sawyer to death.¹⁵³ Moreover, Stevens acknowledges that even when courts have applied standards less restrictive than his, they rarely have found a defendant innocent of death and reached the merits of an abusive claim.¹⁵⁴ Stevens insists that "the importance of making just decisions in the few cases that would fit within this narrow exception" far outweighs any increased difficulty between applying the clearly erroneous test and the eligibility test.¹⁵⁵ If this standard prevents even one defendant from being put to death in violation of his constitutional rights, the time the federal court takes to review the claim indeed is "well spent."¹⁵⁶

D. *The Lower Court Applications of Sawyer v. Whitley*

To date, four circuit courts of appeals and two district courts have relied on *Sawyer* to bar review of abusive, successive, or procedurally defaulted claims.¹⁵⁷ Once again, the appellate courts have split over

150. *Sawyer*, 112 S. Ct. at 2535.

151. *Id.*

152. *Id.* See also Weisberg, *supra* note 8, at 308:

The state's decision to kill is so serious, and the cost of error so high, that we feel impelled to discipline the human power of the death sentence with rational legal rules. Yet a judge or jury's decision to kill is an intensely moral, subjective matter that seems to defy the designers of general formulas for legal decision.

See generally ELY, *supra* note 144, at 173-77.

153. *Sawyer*, 112 S. Ct. at 2537-38.

154. *Id.* at 2538 (citing *Deutscher v. Whitley*, 946 F.2d 1443, 1446 (9th Cir. 1991); *Stokes v. Armontrout*, 893 F.2d 152, 156 (8th Cir. 1989); *Smith v. Armontrout*, 888 F.2d 530, 545 (8th Cir. 1989)).

155. *Sawyer*, 112 S. Ct. at 2538.

156. *Id.* (quoting *Gardner v. Florida*, 430 U.S. 349, 360 (1977)).

157. *Clark v. Lewis*, 1 F.3d 814 (9th Cir. 1993); *Johnson v. Singletary*, 991 F.2d 663 (11th Cir.), *cert. denied*, 113 S. Ct. 2049 (1993); *Deutscher v. Whitley*, 991 F.2d 605 (9th Cir. 1993);

what it means to be actually innocent of the death penalty. In *Deutscher v. Whitley*,¹⁵⁸ the Ninth Circuit recently concluded that constitutional error related to mitigating evidence may be considered under *Sawyer*.¹⁵⁹ The Ninth Circuit held that mitigating evidence withheld from the jury because of counsel's incompetence could be considered in an inquiry into innocence of the death penalty.¹⁶⁰ The court reached this result because, under the applicable Nevada statutes, the death penalty could not be imposed unless the jury found at least one aggravating circumstance and further found that no mitigating circumstances outweighed the aggravating circumstance it had found.¹⁶¹ The Ninth Circuit refused to reach the merits of Deutscher's claim, however, because he had failed to show by clear and convincing evidence that but for the excluded evidence, no reasonable juror would have found him eligible for the death penalty.¹⁶²

In *Johnson v. Singletary*,¹⁶³ the Eleventh Circuit, citing *Sawyer*, refused to consider mitigating evidence under Florida's statutory scheme, which requires the original sentencer to weigh aggravating factors against mitigating factors.¹⁶⁴ The Fourth¹⁶⁵ and Fifth Circuits,¹⁶⁶ and two district courts,¹⁶⁷ also have refused to reweigh statutory aggravating and mitigating factors where at least one statutory aggravating factor remains.

VI. CONCLUSION

It appears that the Justices do not dispute the necessary demise of the innocence of death concept. The Court agrees that it is irrational,

Montoya v. Collins, 988 F.2d 11 (5th Cir. 1993); Stamper v. Wright, No. 93-4000, 1993 WL 12492 (4th Cir. Jan. 19), *cert. denied*, 113 S. Ct. 1069 (1993); *Selvage v. Collins*, 972 F.2d 101 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993); *Singleton v. Thigpen*, 806 F. Supp. 936 (S.D. Ala. 1992); *Jones v. Murray*, 802 F. Supp. 1412 (E.D. Va.), *aff'd*, 976 F.2d 169 (4th Cir.), *cert. denied*, 113 S. Ct. 27 (1992).

158. 991 F.2d 605 (9th Cir. 1993).

159. *Id.* at 607. The court in *Deutscher* held that "*Sawyer* requires the consideration of mitigating evidence in those states . . . that require balancing of mitigating factors against aggravating factors." *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 608. The Ninth Circuit further stated that "[w]ere this Deutscher's first petition for a writ of habeas corpus, we would be required to grant his petition. Unfortunately for Deutscher, this is his second petition." *Id.* (citations omitted).

163. 991 F.2d 663 (11th Cir. 1993).

164. *Id.* at 666-67.

165. *Stamper v. Wright*, 985 F.2d 553 (4th Cir. 1993).

166. *Montoya v. Collins*, 988 F.2d 11, 13 (5th Cir. 1993); *Selvage v. Collins*, 972 F.2d 101, 103 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993).

167. *Singleton v. Thigpen*, 806 F. Supp. 936, 944-45 (S.D. Ala. 1992); *Jones v. Murray*, 802 F. Supp. 1412, 1417-19 (E.D. Va.), *aff'd*, 976 F.2d 169 (4th Cir.), *cert. denied*, 113 S. Ct. 27 (1992).

illogical, and unworkable. The Court disagrees, however, over what should replace the concept. The Rehnquist majority collapses actual innocence of the death sentence into actual innocence of the underlying crime by forcing a defendant to prove by clear and convincing evidence that he was ineligible for the death penalty. This approach is workable because it is entirely objective. In addition, it rationally reassigns the aura of blamelessness to the term innocent. If the defendant is guilty of any statutory aggravating factor, then he is not innocent of death. Unfortunately, however, Rehnquist's approach reaches too far. While collapsing actual innocence of the crime and the penalty, the majority crushed the fundamental miscarriage of justice exception as well, leaving nothing in its stead. The majority foreclosed review of abusive claims by a petitioner who cannot demonstrate by clear and convincing evidence that he is actually innocent of the underlying crime.¹⁶⁸

Blackmun, Stevens, and O'Connor seek to revive the fundamental miscarriage of justice exception.¹⁶⁹ Stevens persuasively argues that a death sentence imposed in clear error, even though the defendant is not actually innocent of the crime, is a fundamental miscarriage of justice to be remedied by federal review.¹⁷⁰ Blackmun reminds us that habeas purports to protect individual rights, not simply to ensure accuracy of the guilt or innocence determination.¹⁷¹ The concurrences correctly distinguish fundamental miscarriage of justice from actual innocence, procedural protection from factual inquiry.

The breakdown of the innocence of death exception should not be the breakdown of the fundamental miscarriage of justice exception. Instead, it should spur the Court once again to ask whether the violation of a petitioner's constitutional rights constitutes a fundamental miscarriage of justice—which should be the final, narrow protection for capital defendants who bring abusive petitions.

DEBORAH J. GANDER

168. This result occurs in those states that have performed three-quarters of the executions since 1976. See text accompanying *supra* note 73-75.

169. See *Sawyer v. Whitley*, 112 S. Ct. 2514, 2525, 2530 (1992).

170. *Id.* at 2530-31.

171. *Id.* at 2527-28.