Habeas Corpus and Actual Innocence of the Death Sentence after Sawyer v. Whitley: Another Nail into the Coffin of State Capital Defendants

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NOTES

HABEAS CORPUS AND ACTUAL INNOCENCE OF THE DEATH SENTENCE AFTER SAWYER v WHITLEY: ANOTHER NAIL INTO THE COFFIN OF STATE CAPITAL DEFENDANTS

INTRODUCTION

For over a century,1 the federal writ of habeas corpus has provided the most important means2 by which state prisoners could challenge, through collateral attack,3 the constitutionality of either their conviction or their sentence.4 While the writ prevents state

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1. In 1867, federal habeas corpus relief became available to “any person restrained of his or her liberty in violation of the constitution [sic].” YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 1517 (1990) (citing the current version of the 1867 Act which is found in 28 U.S.C. §§ 2241-55 (1988)). Prior to that time, the remedy was limited to persons held in custody by the federal government. Id. at 1517. For a different perspective on the evolution of the federal writ of habeas corpus, see OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS v-vi (1988) [hereinafter REPORT] (stressing the distinction between the “constitutional” and the “statutory” writs of habeas corpus).

2. Ronald J. Tabak & J. Mark Lane, Judicial Activism and Legislative “Reform” of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals, 55 ALB. L. REV. 1, 4 (1991). The right is guaranteed by the Constitution and was extended to the states by Congress after the civil war. Id.

3. DONALD E. WILKES, JR., FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF § 1-4 (1983). A conviction or sentence imposed by a state court may be “directly” or “collaterally” attacked with a goal of granting, respectively, a direct or collateral remedy. Id. Direct remedies include both “trial remedies,” which are available within the convicting court itself, and “appellate remedies,” which are available within the appellate court upon direct review of the trial proceedings. Id. Generally, a conviction or a sentence can be open to direct attack, and thus eligible for direct relief, if the conviction or sentence results from the commission of a nonharmless legal error. Id. Collateral (or postconviction) remedies, however, are not available until the direct remedy proceedings have been completed and usually are available only where there has been egregious, e.g. constitutional, error. Id. 1-5. While there are different types of collateral remedies, this note will focus on federal habeas corpus.

4. Tabak & Lane, supra note 2, at 4; see also REPORT, supra note 1, at 1 (noting
courts from violating the established constitutional rights of all prisoners, it is particularly necessary to safeguard the interests of capital defendants. Specifically, habeas corpus is designed to act as a "safety valve" for capital defendants who allege that they are either innocent of the crime charged or innocent of the sentence received. In other words, "innocence," within the capital context, can encompass more than mere factual innocence of the crime; it can include defendants who are "innocent" in terms of the sentence or who do not deserve to die. Therefore, claims of innocence in habeas corpus apply to both the defendant who has not committed the crime charged and the defendant who has been inappropriately sentenced to death.

The use of the writ of habeas corpus, however, has been a source of continuing controversy and within the past decade has culminated in the radical transformation, and weakening, of the once Great Writ. This controversy revolves around two key issues: (1) the number of habeas petitions that a state prisoner may

that "a state prisoner who has exhausted his avenues of appeal in the state court system may continue to litigate the validity of his conviction or sentence by applying for habeas corpus in a federal district court".

5. See Bruce S. Ledewitz, Habeas Corpus as a Safety Valve for Innocence, 18 REV. OF L. & SOC. CHANGE 415, 415 (1990-91).

6. Id.

7. But see Herrera v. Collins, 113 S. Ct. 853, 860-61 (1993) (holding that newly discovered evidence which shows the petitioner did not commit capital murder was not a ground for habeas corpus relief); see also New Evidence is Not Enough, High Court Rules, CLEVELAND PLAIN DEALER, Jan. 26, 1993, at 7A (asserting that after Herrera, "inmates convicted in state courts almost always are barred from contesting guilt in federal habeas corpus proceedings"). By contrast, this note examines the propriety of sentences on federal habeas corpus.

8. Ledewitz, supra note 5, at 415-16.

9. See Bruce S. Ledewitz, Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence, 24 CRIM. L. BULL. 379, 423 (1988) (noting that "[t]he prisoner who argues innocence at sentencing is a murderer. But he does not deserve to die").

10. Ledewitz, supra note 5, at 415-16 (stating that habeas corpus "provides the opportunity for the defendant who is either innocent of the crime charged or of the sentence received, to obtain relief").

11. IRA P. ROBBINS, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 42 (1990) (noting that the controversy involves the states' interest in "preserving domestic order versus the preeminence of the federal government in [protecting] national interests").

12. Ledewitz, supra note 5, at 415 (noting "a series of United States Supreme Court decisions has restricted access by state prisoners to the Great Writ"); see also REPORT, supra note 1, at 1 (arguing that "the contemporary [statutory] 'writ of habeas corpus' is not the Great Writ of the Constitution and the common law").
raise;\textsuperscript{13} and (2) the \textit{timing or promptness} of those petitions.\textsuperscript{14} The current battle over these issues echoes the 200-year-old debate between proponents of individual constitutional rights and advocates of state sovereignty.\textsuperscript{15} However, the balance of power between these two poles of thought now has tipped in favor of state sovereignty as the Rehnquist Court has twisted this once straightforward constitutional remedy into a morass of procedural barriers which state prisoners must overcome to have \textit{procedurally defaulted}\textsuperscript{16} or \textit{repeated}\textsuperscript{17} petitions entertained before a federal court.\textsuperscript{18} Notably, these procedural hurdles are even more problematic for capital defendants who are likely to be burdened with sub-standard counsel throughout the judicial process.\textsuperscript{19} Despite this burden, if a capital

\textsuperscript{13} See, \textit{e.g.}, Brown v. Allen, 344 U.S. 443, 536 (1953) (Jackson, J., concurring) (complaining that modern federal habeas corpus has resulted in "floods of stale, frivolous and repetitive petitions [which] inundate the docket of the lower courts and swell our own"); \textit{see also} REPORT, supra note 1, at 33-38 (commenting that by 1987, the federal system was overwhelmed with over 9,500 habeas applications, many of which were repetitive or delayed). Accordingly, "federal habeas corpus jurisdiction provides an avenue for obstruction and delay [that] states are powerless to address." \textit{Id.} at 37. \textit{But see} Donald P. Lay, \textit{Modern Administrative Proposals for Federal Habeas: The Rights of Prisoners Preserved}, 21 DePaul L. Rev. 701, 710 (1972) ("We would not send two astronauts to the moon without providing them with at least three or four back-up systems. Should we send [scores of persons] to prison with even less reserves?").

\textsuperscript{14} Lay, supra note 13, at 707-08 (asserting that "[n]othing 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") (citation omitted).

\textsuperscript{15} See \textit{infra} notes 45-57 and accompanying text (outlining these competing arguments); \textit{see also} ROBBINS, supra note 11, at 42 (discussing 200-year-old state and federal conflicts concerning constitutional law and criminal defendants).

\textsuperscript{16} See \textit{infra} note 29 (defining procedurally defaulted petitions).

\textsuperscript{17} See \textit{infra} note 30 (providing two examples of repeated petitions).

\textsuperscript{18} Tabak & Lane, supra note 2, at 5.

\textsuperscript{19} In recent years, the court [sic] has made no secret of its hostility to state prisoners asking federal courts to review their convictions on "writs of habeas corpus." The current court [sic] has focused on the "heavy burden" it places on "scarce judicial resources" and on the states' interest in finality of criminal proceedings. Accordingly, the Court has created a maze of rules to limit the availability of the writ.


\textsuperscript{189} See \textit{infra} notes 189-94 and accompanying text (surveying the lack of requirements for appointment as counsel in capital cases and the lack of adequate compensation for capital case defense attorneys). \textit{See generally} ROBBINS, note 11, at 49-76 (providing detailed analysis of the problems associated with representation of capital defendants). The review of petitions that are delayed or incomplete because of the errors of counsel may be further hindered because there is no right to effective assistance of counsel in habeas cases, since there is no Sixth Amendment right to counsel in collateral proceedings. See, \textit{e.g.}, Coleman v. Thompson, 111 S. Ct. 2546, 2568 (1991) (barring the habeas claim of a
defendant fails to abide by every procedural rule, the merits of his constitutional claim cannot be heard by a federal court absent extraordinary justification.  

A federal court may review violations of federal law alleged in petitions which do not comply with state, and now federal, procedural rules under two circumstances. Noncompliance may be excused only if (1) the petitioner shows cause and prejudice; or if (2) the petitioner is a victim of a fundamental miscarriage of justice, because he is either actually innocent of the crime charged or of the sentence received. While the boundaries of cause and prejudice have been examined extensively, the boundaries of actual innocence have not and remain somewhat ambiguous.

This Note will explore the narrow confines of both actual innocence and the fundamental miscarriage of justice exception for federal review of procedurally defaulted or repeated habeas
corpus petitions in capital cases in the wake of the Supreme Court's decision in Sawyer v. Whitley. 31 Specifically, this Note will examine how the Sawyer v. Whitley eligibility standard for actual innocence of the sentence, 32 as applied to constitutional errors in the production and evaluation of probative mitigation evidence during the penalty phase of a capital trial, violates both the principles of habeas corpus and individualized sentencing determinations. 33

In addition, this Note posits that the eligibility standard for actual innocence of the death sentence offends state capital sentencing schemes in differing ways. 34 This assertion is based on statutory variations regarding the evaluation of aggravating and mitigating circumstances before determining whether a death sentence is appropriate. 35 Here, the question is not whether a defendant is eligible to receive the death penalty but whether it can properly be applied to him. 36 In particular, an eligibility standard for actual innocence distorts the capital sentencing process in states which require the sentencer to weigh 37 (as opposed to merely consider) 38 the balance between aggravating and mitigating evidence before determining whether a defendant, whose sentencing hearing was infected with critical mitigation errors, deserves the punishment of death. 39 In sum, this Note argues that newly produced mitigat-

32. See infra part II (defining the eligibility standard as requiring a habeas prisoner to show but for the constitutional error at his sentencing hearing, no reasonable jury would have found him eligible for the death penalty); see also Smith v. Murray, 477 U.S. 527, 537-38 (1986) (importing the concept of actual sentencing innocence into habeas corpus terminology).
33. See infra notes 121-35 and accompanying text (explaining the two components of the sentencing phase and the differences of these phases).
34. See infra part V (examining variations in state capital sentencing schemes).
35. See infra notes 169-84 and accompanying text (dividing jurisdictions into "weighing" or "considering" states).
36. See infra notes 127-32 and accompanying text (describing the process by which the sentencer examines "individualized considerations" to determine if a particular defendant deserves to die).
37. See infra notes 170-74 and accompanying text (noting that "weighing" states can impose the death sentence where the defendant is convicted of a capital crime, at least one aggravating circumstance is present, and the gravity of the aggravating circumstances outweighs those circumstances which mitigate against the death penalty).
38. See infra notes 180-82 and accompanying text (defining such "consideration" as involving the presence of a capital crime, at least one statutory aggravating circumstance, and consideration of any statutory mitigating circumstances).
39. See infra part V
ing evidence should satisfy a showing of actual sentencing innocence so as to permit federal review of defaulted, successive or abusive habeas corpus petitions under the miscarriage of justice exception.40

Part I traces the nature and scope of habeas corpus relief in the constitutional system. Part II defines the role of the fundamental miscarriage of justice and actual innocence exception in capital habeas corpus petitions. Part III compares conflicting standards used by federal courts to judge actual innocence. Part IV outlines the Sawyer v. Whitley eligibility standard for actual innocence of the death sentence. Part V assesses the impact of the eligibility standard on varying state sentencing schemes and asks whether an accurate death sentence can be established in the face of mitigation errors. Part VI outlines a standard of actual innocence which recognizes differences in state sentencing schemes but predicts a bleak future for actually innocent capital defendants.

I. THE NATURE AND SCOPE OF HABEAS CORPUS RELIEF IN THE CONSTITUTIONAL SYSTEM

A. The Basic Requirements

To be eligible to petition a federal court for a writ of habeas corpus, based on constitutional error either at trial or sentencing, state prisoners must first exhaust all available state judicial remedies.41 This means that before a federal court reaches the merits of a constitutional claim, the petitioner must carry his claim through three distinct judicial processes: first, trial and direct appeal;42 second, state postconviction review;43 and third, federal

40. See infra part VI.
41. 28 U.S.C. § 2254(b) (1988) (requiring that a petitioner who seeks habeas corpus relief first exhaust all state court remedies before applying to a federal court for relief); see also Murray v. Carrier, 477 U.S. 478, 489 (1986) (stating “the exhaustion doctrine is ‘principally designed to protect the state courts’ role in the enforcement of federal law and prevent disruption of state judicial proceedings’” (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982))); KAMISAR ET AL., supra note 1, at 1518 (noting that the exhaustion requirement is part of the “equitable nature” of habeas corpus).
42. Tabak & Lane, supra note 2, at 8 (outlining what constitutes exhausting state court remedies).
43. Id.
habeas corpus review

B. The Controversy

The use of the "great writ of liberty" has become enormously controversial since the Supreme Court expanded federal habeas corpus jurisdiction in 1963. Critics of habeas corpus contend that the writ, when used "improperly," impedes finality in state court judgments. Thus, the writ violates federalism-based principles of state sovereignty. For example, it is contended that there is "nothing more subversive to a state judge's sense of responsibility than an indiscriminate acceptance of the fact that all the shots will be called by someone else" through the "automatic collateral relitigation model" of habeas corpus.

If certiorari is denied following the inmate's direct appeal, collateral attack is the only means of challenging the legality of the conviction or punishment. Id. at 9-10 (citations omitted).


45. Erwin Chemerinsky, Federal Jurisdiction § 15.1, at 678 (1989) (attributing this title to the fact that "habeas corpus protects individuals against arbitrary and wrongful imprisonment").

46. Fay v. Noia, 373 U.S. 391, 401-02 (1963) (acknowledging the broad power to grant a writ of habeas corpus for "whatever society deems to be intolerable restraints"); see also Robbins, supra note 12, at 41 (discussing expansion of habeas corpus jurisdiction after Fay).

47. Robbins, supra note 11, at 41 (stating that "[s]ome members of the state judiciary view federal habeas corpus review of state court criminal convictions as an affront to their sovereignty").

48. Id.

49. Id. (first alteration in original) (citations omitted); see also Kamisar et al., supra note 1, at 1530 (evaluating the extent to which federal habeas corpus review has "strangled the institutional relationship between federal courts and state courts and diminished the 'sense of responsibility of state judges'"). But see American Bar Association Policy Recommendations on Death Penalty Habeas Corpus, ABA CRIM. JUSTICE SECTION (1990), reprinted in Robbins, supra note 11, at 20. ([M]any state supreme court judges and justices either feel no resentment when federal courts address the merits of state death-row inmates' claims or actually invite federal consideration. Often they express relief that the state court does not have the final say.").

50. Chemerinsky, supra note 45, § 15.1, at 680 (quoting Professor Paul Bator and
On the other hand, proponents of habeas corpus emphasize that collateral review is needed to correct erroneous state court judgments or proceedings.\textsuperscript{51} For the over 2,500 prisoners currently on death row,\textsuperscript{52} 99.5\% of whom are indigent and unable to afford private counsel,\textsuperscript{53} the remedy is especially important as constitutional errors are common in state death penalty litigation.\textsuperscript{54} In addition, defenders of the writ argue that habeas corpus and its "judicial redundancy,"\textsuperscript{55} not only corrects constitutional error,\textsuperscript{56} but also increases the legitimacy of convictions and sentences without consuming a large amount of federal court resources.\textsuperscript{57}

\textbf{C. The Rehnquist Era Court's Response}

To a large extent, the critics of habeas corpus have won the battle as the Court has constructed numerous procedural rules designed to prevent state prisoners from gaining access to federal courts.\textsuperscript{58} In particular, the Rehnquist Court has made it more difficult to mount \textit{procedurally defaulted}\textsuperscript{59} or \textit{repetitive}\textsuperscript{60} habeas chal-
lenges to state court errors. By requiring prisoners seeking habe- 
as relief to raise all potential constitutional claims in their first 
petition, the Rehnquist Court has blocked three types of allegedly 
"improper" habeas petitions: (1) defaulted petitions; (2) successive 
petitions; and (3) abusive petitions.

1. Bars to Defaulted Petitions

A critical inquiry in modern federal habeas review of state 
criminal proceedings is whether the petitioner complied with state 
rules of procedure in raising his constitutional claim. When a 
petitioner has not complied with these procedural rules, the petition 
is considered procedurally flawed. In other words, procedural 
default results when a federal court refuses to reach the merits of a 
constitutional claim because the claim was not raised properly 
within the state system on direct appeal or on postconviction re-
view. However, prior to 1977, the Supreme Court maintained 
that a federal court had the power to consider a state prisoner's 
federal constitutional claim, notwithstanding his procedural default, 
if the prisoner had not "deliberately bypassed" the state forum as 
part of his litigation strategy.

In 1977, the Supreme Court, in Wainwright v. Sykes, began

60. Repeated petitions contain claims raised unsuccessfully in the first petition (successive petitions) or claims that should have been raised in the first petition but were not (abusive petitions). See RULES GOVERNING § 2254 CASES IN THE UNITED STATES DIST. COURTS Rule 9(b) (codified following 28 U.S.C. § 2254 (1988)); see also Kuhlmann v. Wilson, 477 U.S. 436, 444 n.6 (1986) (noting the cause and prejudice standard has been extended to repeated petitions); Tabak & Lane, supra note 2, at 23-28 (providing a general description of successive petitions and their importance in death penalty cases).

61. Ledewitz, supra note 9, at 379.

62. See supra notes 29-30 (defining these terms).

63. See ROBBINS, supra note 11, at 76 (emphasizing the importance of following state procedural rules as these rules can "foreclose later consideration of matters that were not properly raised at trial").

64. Id.

65. Ledewitz, supra note 5, at 418 (giving the failure to raise a claim in a timely fashion as an example of procedural default).

66. ROBBINS, supra note 11, at 76 (discussing state procedural bars to habeas corpus petitions).

67. Fay v. Noia, 372 U.S. 391, 434, 438 (1963) (establishing the notion that federal courts have the power to consider a state prisoner's federal constitutional claim and defining the deliberate bypass exception to this rule); see also ROBBINS, supra note 11, at 76 (discussing the deliberate bypass exception to the federal court's ability to hear a habeas corpus claim "notwithstanding his failure to raise the claim properly" within the state court).

68. 433 U.S. 72, 86-87 (1977) (rejecting a habeas corpus claim alleging that a confes-
the modern trend toward the rigid, and perhaps unyielding, enforcement of state procedural rules based on notions of federalism, comity and finality. The Wainwright Court held that the merits of a procedurally defaulted claim could be heard by a federal court only if the petitioner could demonstrate both cause for his failure to comply with the state procedural rules and actual prejudice resulting therefrom. This stricter standard signaled the Court's decision to defer to state procedural requirements over an individual's constitutional claims.

2. Other Bars to Defaulted, Successive and Abusive Petitions

Modern habeas review has also been transformed by the Rules Governing Habeas Corpus which commit the decision to deny access to a federal forum to the sound discretion of the federal court. Recognizing that prisoners often raise defaulted or repetitive constitutional claims (since neither a statute of limitations nor res judicata applies to habeas proceedings), the Rules have enabled the courts to summarily dismiss petitions that appear to take advantage of the system or cause some prejudice to the state. As
a result, Rule 9 has been extensively utilized to bar defaulted, successive and abusive petitions from the federal system.\footnote{Id. at 489.}

Rule 9 has been supplemented by the Supreme Court's decision in \textit{McCleskey v. Zant}\footnote{McCleskey v. Zant, 499 U.S. 467, 493 (1991) (holding that federal courts may not hear successive habeas claims raising new issues unless the petitioner had cause for the delay and was actually prejudiced therefrom).} which extended the cause and prejudice standard from the context of procedurally defaulted claims\footnote{Id. at 490 (quoting Rule 9(b) on successive or abusive petitions and noting this Rule, along with Rule 9(a), was designed to allow courts "to dismiss summarily those petitions that constitute an abuse or misuse of the system").} to the context of successive or abusive petitions.\footnote{McCleskey, 499 U.S. at 494 (asserting "[t]he cause and prejudice analysis we have adopted for cases of procedural default applies to an abuse of the writ inquiry").} As a consequence, the Rehnquist Court has succeeded in "erecting '[its own] maze of procedural requirements and booby traps' for prisoners seeking [delayed or repetitive] habeas corpus relief."\footnote{But see Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1718, 1721 (1992) (utilizing the cause and prejudice standard, rather than the deliberate bypass standard and granting a manslaughter defendant an evidentiary hearing on his habeas petition to show cause for his failure to develop a record in the state proceedings and prejudice therefrom; petitioner was a Cuban immigrant who spoke little English and who received no explanation from an interpreter on the mens rea requirement for manslaughter).}
II. THE ROLE OF FUNDAMENTAL MISCARRIAGE OF JUSTICE AND ACTUAL INNOCENCE IN CAPITAL HABEAS CORPUS PETITIONS

Where a defendant raises a defaulted, successive or abusive petition and cannot establish cause or prejudice for failing to comply with state or federal habeas rules, is he completely denied access to the federal system in order to present the merits of his constitutional claim? The answer is no. Even if the petitioner cannot meet this standard, the court is obligated to make one more inquiry before dismissing the petition. The court must ask whether the defendant is a victim of a fundamental miscarriage of justice.81 If so, the court should accept the otherwise defaulted, successive or abusive petition to review the delayed or repetitive constitutional claim.82

A. The Origins of Miscarriage of Justice and Actual Innocence

What, then, precisely constitutes a miscarriage of justice? According to traditional habeas jurisprudence, a fundamental miscarriage of justice occurs whenever a conviction or a sentence is secured in violation of federal constitutional law.83 However, in 1986, the Supreme Court turned away from this traditional understanding of habeas corpus when it attempted to clarify the precise contours of the miscarriage of justice standard as applied to delayed or repetitive petitions.84 In a trio of habeas decisions that year, Kuhlmann v. Wilson,85 Murray v. Carrier86 and Smith v.

81. Ledewitz, supra note 9, at 391 (noting a "failure to show cause is not the end of the habeas corpus inquiry even where there is procedural default").
82. Ledewitz, supra note 9, at 403 n.114. The petitioner is not required to argue that he has been a victim of a fundamental miscarriage of justice; rather the court has an obligation to prevent a miscarriage of justice from taking place. Id. at 403.
83. See 28 U.S.C. § 2254(a) (1988) (stating federal courts "shall entertain an application for a writ of habeas corpus" from state prisoners who charge that they are "in custody in violation of the Constitution or laws or treaties of the United States"); see also Sawyer v. Whitley, 112 S. Ct. 2514, 2525-26 (1992) (Blackmun, J., concurring) (citing Moore v. Dempsey, 261 U.S. 86, 88 (1923) for the proposition that the "concern of a federal court in reviewing the validity of a conviction and death sentence on writ of habeas corpus is 'solely the question of whether [the petitioner's] constitutional rights have been preserved'").
84. See ROBBINS, supra note 11, at 85 (describing the Court's focus as a shift from constitutional to non-constitutional concerns).
85. 477 U.S. 436, 454 (1986) (defining the "ends of justice" standard which determines whether federal habeas corpus review should be granted "to effectuate the clear intent of Congress that successive federal habeas review should be granted only in rare cases").
86. 477 U.S. 478 (1986); see infra notes 91-95 and accompanying text (defining the actual innocence standard).
Murray, the Rehnquist Court demonstrated its increasing preoccupation with the issue of innocence in habeas corpus cases. In doing so, the Court abandoned its long-standing concern with constitutional errors for nonconstitutional inquiries relating to the petitioner's guilt or innocence. Essentially, the trio signaled the Rehnquist Court's new commitment to making the issue of innocence the primary inquiry in any habeas claim based on a fundamental miscarriage of justice.

More important, for the purposes of the present inquiry, is Murray v. Carrier which brought the concept of actual innocence into habeas corpus terminology. In Carrier, the Court refused to entertain a procedurally defaulted petition because the petitioner could not establish cause for the default. Nevertheless, the Court recognized its independent responsibility to correct a fundamentally unjust incarceration of an innocent defendant despite a failure to show cause.

"[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." We remain confident that, for the most part, "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." But we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually

87. 477 U.S. 527 (1986); see infra notes 96-105 and accompanying text (noting Smith moved the concept of actual innocence into the sentencing context).
88. See Robbins, supra note 11, at 85.
89. See Sawyer v. Whitley, 112 S. Ct. 2514, 2526 (1992) (Blackmun, J., concurring) (The Court has "shifted the focus of federal habeas review of procedurally defaulted, successive, or abusive claims away from the preservation of constitutional rights to a fact-based inquiry into the petitioner's innocence or guilt"); see also Robbins, supra note 11, at 85 (noting that while "the guilt/innocence determination traditionally has been the prerogative of the states[, t]he task of the federal courts has been to preserve the integrity of national law").
90. Ledewitz, supra note 9, at 381 (asserting "[i]mprisonment of the actually innocent defendant represents for most of the Justices the definitive 'miscarriage of justice'”). But see Herrera v. Collins, 113 S. Ct. 853, 860 (1993) (holding that new evidence of a petitioner's innocence of a crime does not constitute a constitutional violation which can support federal habeas review).
92. Id. at 489. The petitioner claimed that "he had been denied due process of law by the prosecution's withholding of the victim's statements." Id. at 482.
innocent, a federal habeas court may grant the writ even in the absence of a showing for the procedural default.\(^{93}\)

Additionally, the concern for the habeas petitioner who is actually innocent of the crime charged is not limited to the context of procedural default; the actual innocence inquiry extends to successive and abusive habeas petitions as well.\(^{94}\) This extension ensures that the jurisprudence of innocence in habeas corpus covers all constitutional claims “improperly” brought before a federal court.

Furthermore, while the conviction of an innocent person may be the archetypal case of actual innocence, the concept also targets miscarriages of justice in other contexts. Specifically, claims of actual innocence reach an alleged constitutional error at the sentencing determination.\(^{95}\) For the purposes of this Note, such error will be examined in the capital sentencing context.

This complete coverage of trial and sentencing errors is the result of the third innocence case of 1986, \textit{Smith v. Murray},\(^{96}\) which carried the actual innocence inquiry into the sentencing context.\(^{97}\) However, the \textit{Smith} Court did recognize the difficulty in making this move from legal to actual innocence for “innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense.”\(^{98}\) Nevertheless, the Court held that a defendant could be actually innocent of a death sentence, thus establishing a new innocence consideration in capital habeas corpus cases.\(^{99}\)


\(^{94}\) \textit{See} \textit{Kuhlmann v. Wilson}, 477 U.S. 436, 454 (1986) (holding that the miscarriage of justice exception would allow successive claims to be heard if the petitioner “establish[es] that under the probative evidence he has a colorable claim of factual innocence”) (emphasis added). The standard has been defined as:

[\text{A}] fair probability that, in light of all evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of fact would have entertained a reasonable doubt of his guilt.


\(^{95}\) \textit{Ledewitz, supra} note 9, at 381, 398-99.

\(^{96}\) 477 U.S. 527 (1986).

\(^{97}\) \textit{Id.} at 536-38 (ignoring error in a capital case involving the admission of psychiatric testimony at sentencing allegedly obtained in violation of defendant's privilege against self-incrimination under both the Fifth and Fourteenth Amendments).

\(^{98}\) \textit{Id.} at 537.

\(^{99}\) \textit{Id.}, \textit{see} \textit{Ledewitz, supra} note 9, at 398-403 (developing the concept of sentencing
HABEAS CORPUS AND ACTUAL INNOCENCE

B. Actual Innocence in Capital Sentencing

Drawing on Smith, a tentative definition of actual innocence in capital sentencing can be formulated. According to the Smith Court, actual sentencing innocence requires a constitutional error which either "precluded the development of true facts [or] resulted in the admission of false ones." Essentially, either type of error must have undermined the accuracy of the sentencing determination by perverting the jury's deliberations concerning the ultimate question of whether the petitioner deserves to live or die.

The question then arises as to what type of constitutional error undermines the Smith accuracy standard in the capital sentencing context. In making this determination, it must be recalled that the actual innocence exception for defaulted, successive or abusive claims is available only under exceptional circumstances. Therefore, the type of error to which the standard applies initially is limited. Following the 1992 decision in Sawyer v. Whitley, this range of targetable constitutional error has been circumscribed even further.

1. Accuracy-Related Errors upon Which Capital Sentencing Innocence May Be Based

The Smith decision offers two clear examples of capital sentencing innocence: (1) a situation where the alleged constitutional error "resulted in the admission of false [information]"; and (2) a situation where the error "precluded the development of true facts." The present discussion will focus on the second ground.
for sentencing innocence under the Smith standard.

The category of error which would seem to most clearly "preclude[] the development of true facts" are errors which affect the production, and thus evaluation, of mitigating evidence at the sentencing stage of a capital trial—the site of the ultimate life/death decision. For a myriad of reasons, however, the case of mitigation is often plagued by problems which may preclude the full development of probative mitigating evidence, encouraging precisely the type of error that the Smith standard targets.

A problem commonly encountered in this area is the discovery of mitigating evidence that should have, but was not, presented at the original sentencing hearing because of counsel's neglect. In fact, “[i]t is not unusual for an attorney confronting a death penalty case at the collateral stage to see little or no mitigating evidence in the record.” However, unless the initial failure to present adequate mitigating evaluate constitutes constitutional error, as in the case where there is ineffective assistance of counsel, the attor-

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108. 477 U.S. at 538.
109. See Black's Law Dictionary 1002 (6th ed. 1990) (defining mitigating circumstances as those that “do not constitute justification or excuse for the offense in question, but which may be considered as extenuating or reducing the degree of moral culpability”); see also Ledewitz, supra note 9, at 416 (providing examples of mitigating evidence including: substantial drug and alcohol abuse; history of severe abuse as a child; social, educational or economic deprivations; and brain damage or other intellectual impairments).
110. Ledewitz, supra note 9, at 404 (noting that the unavailability of mitigating evidence is a category that "most clearly satisfies the innocence standard").
111. See infra notes 189-94 and accompanying text (discussing the inadequate representation by counsel in death penalty cases); see also Ledewitz, supra note 9, at 416 (listing the factors which undermine the development of a full mitigation case including overworked or inexperienced defense counsel and the difficulty of obtaining mitigation evidence).
112. See Friendly, supra note 94, at 159 n.87 (noting “that there exists evidence of material facts, not heretofore presented and heard, which require vacation of the conviction or sentence in the interest of justice”); see also Ledewitz, supra note 9, at 414-16 (discussing the merits of Friendly’s “after-discovered” mitigating evidence standard for habeas review).
113. Ledewitz, supra note 9, at 417; see also Justice Thurgood Marshall, Remarks on the Death Penalty at the Second Circuit Judicial Conference (Sept. 6, 1985), in 109 F.R.D. 443, 444 (1985), and in 86 Colum. L. Rev. 1, 2 (1986) (with slight modification) (“The federal reporters are filled with stories of counsel who presented no evidence in mitigation of their client’s sentences, simply because they did not know what to offer or how to offer it, or had not read the state sentencing statute.”).
114. See Marshall, supra note 113, in 109 F.R.D. at 445, and in 86 Colum. L. Rev. at 3 (asserting “many capital defendants find that errors by their lawyers preclude presenta-
ney must argue that the unearthed mitigating evidence supports a claim of sentencing innocence that can be heard in a defaulted or repetitive habeas petition. After the decision in *Sawyer v. Whiteley*, the attorney left in such position may only regret, as opposed to effectively contest on habeas, the failure to present adequate mitigating evidence.

However, the failure to find or present substantial mitigating evidence is especially problematic in capital cases for fundamental Eighth Amendment considerations are raised. Specifically, the question arises whether the petitioner received the *individualized* sentencing determination mandated by the Constitution. Therefore, it is useful to briefly review the parameters of the modern system of capital punishment in order to appreciate fully the impact of mitigation errors on claims of capital sentencing innocence.

### 2. Mitigation Evidence and Individualized Capital Sentencing

Since 1976, the capital trial has been split into two distinct parts: (1) the guilt-determination phase; and (2) the sentencing phase. At the sentencing phase, "the most visible by-product of the modern era of capital punishment," the life/death decision again divides into two separate, constitutionally-based subparts: (1) the "guided discretion" stage where the class of defen-
dants who are "eligible" for death is defined; and (2) the "individ-
ualized consideration" stage where the sentencer considers the
specific circumstances of the defendant and the crime (or miti-
gating evidence) before deciding whether the defendant deserves to
die.\textsuperscript{122} By dividing the death sentencing decision into two stages,
a court may then treat aggravating and mitigating factors separately
since they address distinct aspects of the decision-making pro-
t122. Sundby, \textit{supra} note 118, at 1148. The Supreme Court adopted this two-stage pro-
a Georgia statute which defined the class of defendants who are eligible for the death
Carolina's mandatory death sentence statute was unconstitutional because it ignored indi-
vidual circumstances); \textit{Lockett v. Ohio}, 438 U.S. 586, 604-05 (1978) (finding the Ohio
death penalty statute was unconstitutional because it did not permit the sentencer to con-
sider all relevant mitigating factors). \textit{But see Walton v. Arizona}, 497 U.S. 639, 656
(1990) (Scalia, J., concurring in part) (calling for the abandonment of the \textit{Woodson-Lockett}
principle of individualized consideration since it conflicts with the principle of guided
discretion).
123. Sundby, \textit{supra} note 118, at 1164; \textit{see also} \textit{White, supra} note 119, at 73 (stating
"[a]lthough the precise issues to be determined in the penalty trial vary from jurisdiction
to jurisdiction, under nearly all of the current death penalty statutes 'the judge or jury
finds and considers certain aggravating and mitigating facts about the defendant's crime or
character and then sentences him to either execution or life imprisonment'") (quoting
124. \textit{See}, \textit{e.g.}, \textit{Ark. Code Ann.} \S\ 5-4-604 (Michie Supp. 1992). Under the Arkansas
Code, aggravating circumstances can include: (1) a capital murder committed by a person
imprisoned because of a felony conviction; (2) a capital murder committed by a felon
who had escaped imprisonment; (3) a previous violent crime; (4) a great risk of death to
a person other than the victim; (5) a capital murder committed to avoid arrest; (6) a
capital murder committed for pecuniary gain; (7) a capital murder committed to disrupt
the lawful exercise of any government or political function; and (8) a capital murder com-
mited in an especially cruel or depraved manner. \textit{Id.}
125. \textit{See} Sundby, \textit{supra} note 118, at 1154 (noting "[t]he aggravating circumstances used
in death penalty statutes became quite uniform among the states adopting capital punish-
ment schemes").
126. \textit{White, supra} note 119, at 75.
eligible for the death penalty, his task becomes more complicated, and, perhaps, more freewheeling.\textsuperscript{127} At this stage, the sentencer proceeds to the more delicate and nebulous question\textsuperscript{128} of whether the particular defendant should live or die; that is, even if the defendant is eligible to receive the death penalty, \textit{should} it be applied to him? This discretionary decision can be made only after the sentencer has considered \textit{all} mitigating evidence concerning the defendant and the crime.\textsuperscript{129} Although state statutes outline the mitigating circumstances that a sentencer may consider,\textsuperscript{130} the statutory lists are not exhaustive.\textsuperscript{131} A sentencer may exercise independent judgment in determining whether other evidence should be treated as a mitigating circumstance.\textsuperscript{132}

In sum, the issues to be decided at the “death eligibility” stage and the “death deserving” stage are critically different.\textsuperscript{133} These differences warrant the separate examination of error at either stage.

\textsuperscript{127} See Walton v. Arizona, 497 U.S. 639, 657-69 (1990) (Scalia, J., concurring in part) (stressing the constitutional difficulties caused by the unchanneled discretion of the sentencer during the consideration of mitigating evidence).
\textsuperscript{128} White, supra note 119, at 75 (noting this question is more complex because juries must make value judgments, weigh evidence and use their independent judgment as to what mitigating circumstance may be important).
\textsuperscript{129} See Lockett v. Ohio, 438 U.S. 586, 604 (1978) (asserting that “the sentencer, in all but the rarest kind of capital case, [can] not be precluded from considering as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”) (second and third emphasis added).
\textsuperscript{130} Statutory mitigating circumstances primarily focus on the nature and circumstances of the offense, as well as the history, character and background of the particular offender. See, e.g., Ohio Rev. Code Ann. § 2929.04(B) (Anderson 1993). These circumstances can include: (1) whether the victim of the capital murder induced or facilitated the offense; (2) whether the capital murder was coerced or provoked; (3) whether the offender was mentally incapacitated at the time of the capital murder; (4) the age of the offender; (5) the prior criminal history of the offender; and (6) the degree of the offender’s participation in the offense if he was not the principal offender. Id. at (B)(1)-(6).
\textsuperscript{131} Robbins, supra note 11, at 75.
\textsuperscript{132} Lockett, 438 U.S. at 606 n.15 (permitting additional mitigating circumstances to be used where a Florida statute contained no limiting language in the list of mitigating circumstances). State statutes support such broad sentencing discretion. See, e.g., Ohio Rev. Stat. Ann. § 2929.04(B)(7) (Anderson 1993) (noting that the sentencing authority may consider and weigh “[a]ny other [mitigating] factors that are relevant to the issue of whether the offender should be sentenced to death”); see also Fred Strasser, Complex, Subtle Questions in Two-Part Capital Trials, Nat’l L.J., June 11, 1990, at 13 (pointing out that defense attorneys must “try to humanize the defendant through [any mitigating evidence such as] character witnesses who tell [the defendant’s] life story[,] psychological testimony describing an abused, violent childhood or very low IQ [and] medical testimony describing brain damage”).
\textsuperscript{133} Robbins, supra note 11, at 75.
when a habeas claim of actual sentencing innocence is reviewed. However, the decision in Sawyer v. Whitley seems to undermine both the foundation of the second capital sentencing stage as well as the continued utility of sentencing innocence claims on habeas corpus. In fact, the decision marks a significant turn from past precedent and the constitutionally-consistent sentencing innocence standards of a number of federal circuit courts.

III. PRE-SAWYER INTERPRETATIONS CONCERNING THE STANDARD FOR SENTENCING INNOCENCE

Prior to Sawyer v. Whitley, a number of federal circuit courts had split on the actual innocence test for habeas review of errors at the sentencing phase of a capital case. Some courts have taken a "constitutionally-consistent"3\textsuperscript{136} approach, while others have taken a "constitutionally-repugnant" approach.\textsuperscript{137} It was this divergence in standards which ultimately provided the Rehnquist Court with yet another opportunity, in the form of Sawyer v. Whitley, to further restrict the availability of habeas corpus.\textsuperscript{138}

Before Sawyer, the Eighth and Ninth Circuits had established a standard of actual sentencing innocence for capital cases which was consistent with the 1986 decision in Smith v. Murray; that is, their innocence formula focused on whether death was an appropriate punishment for the individual petitioner involved. Under this "accuracy-based" approach, a fundamental miscarriage of justice would occur "[w]here [the] constitutional violation more probably than not resulted in a capital sentence for one who should not have been sentenced to death."\textsuperscript{139} In other words, the error proba-

\begin{itemize}
\item \textsuperscript{134} See infra parts IV and V
\item \textsuperscript{135} See infra parts III and IV
\item \textsuperscript{136} See infra notes 139-41 and accompanying text (discussing the "accuracy-based" approach of the Eighth and Ninth Circuits which focuses on whether the constitutional violation probably resulted in an inappropriate sentence of death).
\item \textsuperscript{137} See infra notes 143-45 and accompanying text (discussing the eligibility standard followed by the Fifth and Eleventh Circuits which focuses on whether the constitutional violation resulted in a sentence of death for which the defendant was ineligible.).
\item \textsuperscript{138} See Linda Greenhouse, Push to Limit Habeas Corpus Petitions Continues, 138 Chi. Daily L. Bull., May 6, 1992, at 1 (noting that "[the Rehnquist Court] has reached out to add habeas corpus cases to its docket, and has made clear in this as in no other area its displeasure with the way the modern law has developed").
\item \textsuperscript{139} Deutscher v. Whitley, 946 F.2d 1443, 1444 (9th Cir. 1991) (emphasis added); see also Smith v. Murray, 477 U.S. 527, 537-39 (1986) (establishing a formula to test whether, due to identified errors in the process of his conviction, the defendant is innocent of the sentence imposed); Stokes v. Armontrout, 893 F.2d 152, 156 (8th Cir. 1990) (dismiss-
bly resulted in a death sentence when only a sentence of life imprisonment was appropriate. Such errors would include the failure to present true facts, such as substantial mitigating evidence.

By comparison, the Fifth and Eleventh Circuits pronounced a sentencing innocence standard which offended both Eighth Amendment capital punishment principles and established Supreme Court precedent. Under this standard a failure to present true mitigating facts could not serve as the basis for a claim of sentencing innocence. Rather, the alleged error must have tainted all of the aggravating circumstances found by the sentencing body, resulting in a sentence for which the defendant was ineligible by virtue of his conduct. Accordingly, a fact-based error which could have affected the sentencing outcome is insufficient to gain federal habeas review, because:

Even if the guilty defendant can demonstrate that a constitutional error led to a factual inaccuracy—which in turn prejudiced the outcome of the sentencing body’s deliberative process—the defendant is not innocent of the sentence.
imposed.

[Rather, to establish sentencing innocence,] 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.  

It is this constitutionally-repugnant eligibility standard for sentencing innocence which the Rehnquist Court adopted in *Sawyer v. Whitley*.

**IV Resolution of the Split?: Sawyer v. Whitley**

*Sawyer v. Whitley* forced the United States Supreme Court to define, or at least attempt to define, the requisite standard for actual sentencing innocence where capital defendants assert that a fundamental miscarriage of justice will occur in the absence of federal consideration of their defaulted or repeated habeas claims. Although the decision was intended to resolve the sentencing innocence dispute among the circuits, it, in fact, raised serious questions about the Eighth Amendment principles upon which our modern capital punishment jurisprudence is based. Specifically, the eligibility for the death penalty standard established ignores the second fundamental tenet of capital punishment: *individualized* sentencing determinations which play a critical role in state capital sentencing schemes.

In *Sawyer*, the defendant claimed in his second habeas petition to have been wrongfully sentenced to death. However, he was

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145. *Id.* Originally the Fifth Circuit did not use the term "eligibility" itself when describing its actual innocence test, instead referring to the jury’s "authority to impose the death penalty." *Sawyer v. Whitley*, 945 F.2d 812, 820 (5th Cir. 1991), *aff’d*, 112 S. Ct. 2514 (1992).

146. 112 S. Ct. 2514 (1992). The defendant in *Sawyer* was convicted of first-degree murder. His capital sentence was supported by the finding of two statutory aggravating factors: (1) the murder was committed while the defendant was engaged in the commission of aggravated arson, and (2) the crime was perpetrated in an "especially cruel, atrocious and heinous manner." *Id.* at 2517 n.2.

147. *See infra* part V

148. Specifically, he argued that the alleged failure of the police to produce exculpatory evidence violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). *Sawyer*, 112 S. Ct. at 2524. In addition, he reasserted ineffective assistance of counsel based on his trial counsel’s failure to introduce mental health records as mitigation evidence at the sentencing stage. *Id.*
unable to show cause either for failing to raise certain claims in his first petition, or for repeating his ineffective assistance of counsel claim, previously raised in his original habeas request. Although Sawyer failed to meet the "cause and prejudice" requirement for federal review of his abusive and successive claims on the merits, the Court proceeded to consider whether ignoring his claims would effect a fundamental miscarriage of justice.

The Sawyer court prefaced its attempt to hone the contours of actual innocence in the capital punishment setting by noting the complex and elusive nature of the concept. Given this difficulty, the Court analyzed three possible definitions of actual sentencing innocence before selecting its preferred standard:

1. The strictest definition would be to limit any showing [of actual innocence] to the elements of the crime which the State has made a capital offense. The showing would have to negate an essential element of that offense.

2. The most lenient definition would allow the showing of "actual innocence" to extend not only to the elements of the crime, but also to the existence of aggravating factors, and to mitigating evidence which bore, not on the defendant's eligibility to receive the death penalty, but only on the ultimate discretionary decision between the death penalty and life imprisonment.

3. The intermediate approach would require that a showing of "actual innocence" focus on those elements which render a defendant eligible for the death penalty

149. Because this claim was available when he submitted his original habeas petition, it was considered an abuse of writ. Sawyer, 112 S. Ct. at 2523.

150. This redundancy was categorized as a successive claim. Id.

151. See Wainwright v. Sykes, 433 U.S. 72 (1977) (refusing relief to a defendant who deliberately by-passed the orderly procedures of the state courts). The Sawyer court explained that without a showing of cause and prejudice:

[A] court may not reach the merits of: (a) successive claims which raise grounds identical to grounds heard and decided on the merits in a previous petition; (b) new 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.

112 S. Ct. at 2518 (citations omitted).

152. Sawyer, 112 S. Ct. at 2518.

153. See id. at 2520 (recognizing that the difficulty lies in the phase "innocent of death" itself, which is an unnatural usage of the words).
[under the applicable state law], and not on additional mitigating evidence which was prevented from being introduced as a result of a claimed constitutional error. 154

The Court rejected the first definition as too narrow because it restricted a showing of actual innocence to the guilt-determining phase, contrary to its sanctioned application to the sentencing context in Smith v. Murray. 155 The "most lenient" definition 156 was also rejected because it equated a demonstration of prejudicial error with a showing of actual innocence. The Court argued that this equation was insufficient for reaching the merits of an abusive or successive claim. 157 Instead, the Rehnquist Court adopted what it considered to be the "middle ground," 158 the eligibility standard of the Fifth and Eleventh Circuits. In reality, instead of ratifying a moderate approach, the Court pronounced an extremely stringent sentencing innocence standard, one which the petitioner in Sawyer could not satisfy.

Under this new, purportedly "middle ground" approach, the death-sentenced habeas petitioner must show "by clear and convincing evidence" 159 that but for a constitutional error, no reason-

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154. Id. at 2521-23 (emphasis added); see also Selvage v. Collins, 972 F.2d 101, 102-03 (5th Cir. 1992) (reviewing the three possible definitions of actual innocence articulated by Justice Rehnquist in Sawyer).

155. Sawyer, 112 S. Ct. at 2521.

156. In Sawyer, the Petitioner advanced this standard, given the failure of his trial counsel to present at his sentencing hearing critical mitigating evidence including: records of four mental health hospitalizations, school records and reports of neurological and psychiatric evaluations. Brief for Petitioner at 9-16, Sawyer (No. 91-6382). This evidence would have raised doubts as to Mr. Sawyer’s moral culpability for his crime by revealing his mental disabilities. Id. His attorney on appeal commented that "Sawyer had a lot of mitigation including evidence of incredible child abuse, mental retardation and organic brain damage, but his trial counsel completely failed to investigate exactly who Sawyer was [for purposes of his individualized sentencing determination]." Telephone Interview with Nick Trenocosta, Co-counsel for Robert Sawyer (Oct. 5, 1992).

157. Sawyer v. Whitley, 112 S. Ct. at 2522. The Court reasoned that:

If a showing of actual innocence were reduced to actual prejudice, it would allow the evasion of the cause and prejudice standard which we have held also acts as an "exception" to a defaulted, abusive or successive claim. In practical terms a petitioner would no longer have to show cause

"Id. at n.13. Furthermore, "[i]f federal habeas review of capital sentences is to be at all rational, [the] petitioner must show something more in order for a court to reach the merits of his claims on a successive habeas petition than he would have had to show to obtain relief on his first" Id. at 2522.

158. Id.

159. It is unclear why the Court required clear and convincing evidence to establish sentencing innocence. In previous actual innocence decisions, the Court had acknowledged...
able juror would have found the petitioner eligible for the death penalty under the applicable state law. To satisfy this standard, the majority would have required the petitioner in Sawyer to show a constitutional error negating an aggravating circumstance which had made him legally eligible for the death penalty under Louisiana law. Since errors resulting from the presentation or evaluation of mitigation evidence would not alter this "death eligibility" determination, the Sawyer standard prevents actual innocence habeas relief on this ground.

To focus on death eligibility is misleading, as well as constitutionally repugnant. The term "eligibility" itself implies that eligibility is the sole criterion in imposing a capital sentence. However, the Supreme Court has repeatedly held that legal eligibility for death is not sufficient to justify its imposition. Instead, once the

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160. Sawyer, 112 S. Ct. at 2517 (emphasis added). Subsequent cases have inferred from Sawyer the Court's position on how a petitioner can prove ineligibility for death. See Selvage v. Collins, 972 F.2d 101, 103 (5th Cir. 1992) (noting that "[a]ctual innocence [requires] that a jury could not have found one or more essential narrowing factors [that] render [the] defendant eligible to have the death penalty imposed."); see also Shaw v. Delo, 971 F.2d 181, 186 (8th Cir. 1992) ("The petitioner can satisfy this eligibility standard by showing innocence of the crime itself, by showing no aggravating circumstance existed, or by showing some other condition of eligibility was not met.").

161. Louisiana law requires a finding of at least one aggravating factor before a defendant can be subjected to the death penalty. LA. CODE CRIM. PROC. ANN. art. 905.3 (West Supp. 1993) ("A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed.").

162. Sawyer v. Whitley, 112 S. Ct. at 2523. It is difficult to reconcile the Sawyer Court's decision, which ignored errors stemming from mitigation evidence, with the seemingly contradictory actual innocence standard espoused in Smith v. Murray, 477 U.S. 527 (1985). The Court in Smith specifically rejected a sentencing innocence standard which would ignore errors in the presentation of mitigating evidence. See id. at 538 (employing a standard which targeted "constitutional error[s] [that either] precluded the development of true facts [or resulted in the admission of false ones].").

163. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (finding unconstitutional a state sentencing scheme which failed "to allow for the particularized consideration of the character and record of each convicted defendant"); California v. Brown,
sentencer has decided whether a defendant is eligible for the death penalty, the sentencer must then decide "[if] the defendant should fall out of the death penalty pool." This decision can be made only after all mitigating evidence has been considered.

By turning its back on established precedent, the Sawyer eligibility standard disregards the central role played by mitigating evidence in individualized capital sentencing proceedings. This defiance of "a constitutive element of our Eighth Amendment jurisprudence" moots attempts by the states to define the precise contours of their capital punishment statutes.

V THE ELIGIBILITY IMPACT ON VARYING STATE SENTENCING SCHEMES: QUESTIONS RAISED

While creating a sentencing innocence standard based on a habeas petitioner’s objective or legal eligibility for death, the Sawyer court did cursorily acknowledge the constitutional premise behind individualized considerations once death eligibility has been established. However, the Court failed to consider the differing role individualized considerations play in different state capital sentencing schemes. These schemes not only outline whether a defendant can receive the death penalty, in terms of the objective eligibility for the sentence, but they also define whether the penalty can or will be imposed, because of the subjective appropriateness of the sentence. These state statutes illustrate that the Sawyer v. Whitley eligibility standard for sentencing innocence is misguided, or at least, too narrowly drawn.

479 U.S. 538, 541 (1987) (acknowledging that individual evaluation of mitigating evidence is a ‘constitutionally indispensable part of the process of inflicting the penalty of death’” (quoting Woodson, 428 U.S. at 304)).

164. Sundby, supra note 118, at 1163.
165. Id.
166. In Justice Stevens’ words, by focusing exclusively on death eligibility and ignoring the question of whether death is the appropriate punishment based on mitigating evidence, "the Court today respects only one of the two bedrock principles of capital-punishment jurisprudence” Sawyer, 112 S. Ct. at 2534 (Stevens, J., concurring in judgment).
167. Id. (referring to the sentencers’ consideration of all relevant mitigating evidence).
168. Sawyer, 112 S. Ct. at 2520-21 (acknowledging that the defendant must be permitted to introduce mitigating evidence pertaining to his character and background once eligibility for the death penalty has been established to the satisfaction of the jury).
A. Death Eligibility and the Role of Aggravating and Mitigating Evidence in State Capital Sentencing Schemes

The determination of whether a defendant convicted of a capital offense can or should be sentenced to death depends on how a state, under its particular sentencing statute, evaluates aggravating and mitigating evidence. The method of evaluation, however, differs markedly from state to state. Basically, capital sentencing schemes can be divided into two categories: (1) schemes which weigh the balance between aggravating and mitigating evidence, and (2) schemes which do not weigh this balance but instead require the consideration of both types of evidence before the ultimate life or death decision is made. For the purposes of the present discussion, states using the first scheme will be referred to as the “weighing states” and states using second scheme will be referred to as the “non-weighing states”

1. The Weighing States

In weighing states, the question of whether the death penalty can or will be imposed is determined by the following statutory formula: (1) conviction of a capital crime; (2) the finding of at least one aggravating circumstance; and (3) weighing of the mitigating circumstances against the aggravating circumstances. If factors (1) and (2) are present and the gravity of the aggravating circumstances outweighs those circumstances arguing for a lesser sentence, then the death penalty can, and in some states

169. See generally Joshua N. Sondheimer, Note, A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing, 41 HASTINGS L.J. 409 (1990) (providing a brief description of the current death penalty statutes in United States); WHITE, supra note 119, at 73 (recognizing that the “precise issues to be determined in the penalty trial vary from jurisdiction to jurisdiction”).

170. See ALA. CODE § 13A-5-47(e) (1982) (“In deciding upon the sentence, the [sentencing body] shall determine whether the aggravating circumstances outweigh the mitigating circumstances ”); CAL. PENAL CODE § 190.3(k) (West 1988) (stating that the sentencing body should consider “any other circumstance which extenuates the gravity of the crime”); N.J. STAT. ANN. § 2C:11-3(c)(3) (West Supp. 1993) (“If any aggravating factor is found to exist, the sentencing body must also determine whether it outweighs beyond a reasonable doubt any one or more mitigating factors.”); OHIO REV. CODE ANN. § 2929.03(D)(2) (Anderson 1993) (the sentencing body “shall determine whether the aggravating circumstances outweigh the mitigating factors present in the case.”); TENN. CODE ANN. § 39-13-204(f) (1991) (requiring the sentencer to find that the state has proven aggravating circumstances sufficient to outweigh mitigating circumstances).

171. These permissive sentencing statutes concern so-called “advisory verdicts or sentences” given by the initial sentencing authority. See, e.g., ALA. CODE § 13A-5-47(e) (1982) (“While the jury’s recommendation concerning sentence shall be given consideration, it is
In analyzing the Sawyer v. Whitley sentencing innocence standard, it is the third element which is most significant.

At the capital sentencing stage in weighing states, statutes require a balancing of aggravating and mitigating evidence. Therefore, theoretically, a death sentence cannot be imposed until the requisite weighing process has been performed, and the balance has tipped away from the mitigating evidence and towards the aggravating evidence.

However, by requiring a defendant to show that he was not eligible for the death penalty, Sawyer v. Whitley bars consideration of claims of sentencing innocence which possibly concern the accuracy of the balance between mitigating and aggravating factors. This preclusion is demonstrated by the Court's explicit rejection of a sentencing innocence definition that would extend beyond consideration of the elements of the crime and statutory aggravating circumstances to the existence of additional mitigating evidence.

However, errors regarding the existence of mitigating evidence conceivably could distort the weighing process, thus calling into question the propriety of a death sentence.

Furthermore, by limiting its review to a defendant's eligibility...
for the death penalty, the Court disregards both the purposes underlying the state weighing requirements and the Eighth Amendment principle of individualized sentencing in capital cases. These statutory weighing provisions acknowledge that the process of weighing does not consist merely of "tallying" aggravating and mitigating factors for some type of numerical comparison; rather, the process is designed to determine whether the proper sentence, in light of all circumstances pertaining to the individual case, is life imprisonment or death. Therefore, the accuracy of the weighing process relies on the consideration of all evidence, both aggravating and mitigating, which could bear on the application of the death penalty to a particular individual.

In sum, if critical mitigating evidence is not heard by the sentencing body, then the weighing process will likely be skewed in favor of the aggravating circumstances. This imbalance could

177. Ala. Code §13 A-5-48 (1982); see also Mass. Gen. Laws Ann. ch. 279, § 68 (West Supp. 1993) (requiring the weighing process to be more than "mere tallying", to include an overall consideration of the individual case). State case law supports such statutory provisions regarding the weighing process:

In [the death penalty] context, the word 'weighing' is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale', or the arbitrary assignment of 'weights' to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.


178. Further complicating the issue of actual innocence and the proper application of the death penalty in weighing states are statutory provisions which control a sentencing authority through unanimity and standard of proof requirements. See, e.g., Ohio Rev. Code Ann. § 2929.03(D)(2) (Anderson 1993) (requiring the jury to "unanimously find[]", by proof beyond a reasonable doubt that the death penalty is appropriate). The likelihood that the omission of critical mitigating evidence would alter the jury's ultimate sentencing determination increases under either of these heightened standards. Still, the Court's new standard bars defaulted or repetitive claims which raise such issues.

179. A number of courts have voiced this concern, anticipating that the weighing process will be infected by the inclusion of invalid or unconstitutional aggravating factors into the process. See, e.g., Sochor v. Florida, 112 S. Ct. 2114, 2119 (1992) ("In a weighing State there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence."); see also Stranger v. Black, 112 S. Ct. 1130, 1339 (1992) ("[A]n invalid aggravating factor used in the weighing process creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be."). Therefore, it
result in an inappropriate sentence of death, resulting in the fundamental miscarriage of justice which habeas corpus review is designed to prevent. Consequently, the Sawyer v. Whitley standard should not be applied in weighing states to claims of errors in the presentation and evaluation of mitigation evidence because such errors would obstruct the statutory weighing process and result in inappropriate death sentences.

2. The Non-Weighing States

Application of the eligibility standard to non-weighing states also presents a number of statutory problems, raising constitutional concerns similar to those identified in weighing states.

In non-weighing states, whether the death penalty can or will be imposed is generally a function of the following statutory three-step formula, requiring: (1) conviction of a capital crime; (2) the finding of at least one statutory aggravating circumstance; and (3) consideration of any statutory mitigating circumstance. Although these statutes do not require that the sentencer weigh the aggravating and mitigating circumstances, they do require that the sentencer consider any mitigation evidence relevant to the ultimate life or death decision before determining the appropriate sentence.

Again, Sawyer v. Whitley thwarts this third statutory element. Although the term “consideration” is less instructive to the sentencer, nevertheless, it still constitutes a statutory mandate under the non-weighing sentencing schemes. This mandate is not lim-

180. The sentencing scheme involved in Sawyer was such a non-weighing variety. See LA. CODE CRIM. PROC. ANN., art. 905.3 (West Supp. 1993) (“A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed.”) (emphasis added); accord GA. CODE ANN. § 17-10-30(b) (1990) (“In all cases of offenses for which the death penalty may be authorized, the judge shall consider, any mitigating or aggravating circumstances otherwise authorized by law”) (emphasis added); KY. REV. STAT. ANN. § 532.025(2) (Baldwin Supp. 1992) (same); S.C. CODE ANN. §16-3-20(C) (Law. Co-op. Supp. 1992) (same).

181. Sondheimer, supra note 169, at 410; See, e.g., ILL. ANN. STAT. ch. 720, para. 5/9-1(c) (Smith-Hurd Supp. 1993) (“The court [or jury] shall consider, any aggravating and any mitigating factors which are relevant to the imposition of the death penalty.”) (emphasis added).

182. See KY. REV. STAT. ANN. § 532.025(2) (Baldwin Supp. 1992) (stating that the
HABEAS CORPUS AND ACTUAL INNOCENCE

oted to the threshold Eighth Amendment inquiry of whether a defendant can, or is eligible to receive a penalty of death; rather, it addresses the ultimate question of whether he deserves to die. As with the capital statutes of weighing states it is this mandate which the Sawyer sentencing innocence standard ignores.

In both weighing and non-weighing sentencing schemes, the finding of statutory aggravating circumstances is but a preliminary step to the final decision: Is death the appropriate sentence for the particular defendant involved? The Sawyer majority's focus on eligibility wrongly suggests that any defendant who is eligible to receive the death penalty is also deserving of its imposition.183 This misconstrues the relationship between aggravating circumstances and the appropriateness of a death sentence.

An accurate sentence can be determined only if the sentencer is provided a complete profile of the defendant's circumstances. As the defendant argued in Sawyer, "[o]nly after [the] presentation of mitigating evidence can a jury properly assess an offender's moral culpability and determine whether one who is eligible to die is also deserving of execution."184 Any error resulting in the omission of substantial mitigating evidence would result in an incomplete, and therefore inaccurate, sentencing profile. Nevertheless, the Sawyer standard precludes review of a defaulted or repetitive habeas petition when that petition is based on such a distorted sentencing profile. Therefore, in either a weighing or non-weighing state, that eligibility standard fails to protect a defendant who is actually innocent of his sentence from a miscarriage of justice.

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183. The [majority's] definition of 'innocence of the death sentence' is like the [mandatory death-sentence regime invalidated 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.'"

184. Brief for Petitioner at 33, Sawyer (No. 91-6382).
B. Death Eligibility, State Capital Sentencing Schemes and Sentencing Errors: A Return to the Difficult Case of Mitigation

An inquiry into the extent of capital sentencing errors illustrates how the eligibility standard ignores mistakes which distort state capital sentencing schemes. As previously discussed, presentation of mitigating evidence at the penalty phase of a capital trial is extremely difficult. The task is impeded further by the flawed penalty process which sometimes prevents full presentation of all relevant mitigating evidence, without which an accurate sentencing profile cannot be developed. The following discussion surveys the scope and consequences of these mitigation-related errors to underscore the problems presented by an eligibility standard for sentencing innocence.

The omission of probative mitigation evidence in death penalty cases, which often can be traced to mistakes by the defendant's counsel, cannot be corrected unless they are considered constitutionally egregious. These frequent mistakes reflect the abysmal quality of legal representation afforded to defendants at all stages of the capital trial. Poor representation at the sentencing stage is even more problematic than at the guilt-determination stage because of the complex and subtle questions presented by the various aggravating and mitigating circumstances. These issues underscore the need for competent counsel at the sentencing phase.

Numerous studies have documented variables that affect the quality of counsel at the sentencing stage, particularly where indigent representation is involved, including: lack of experience or training, inadequate or non-existent standards for ap-
HABEAS CORPUS AND ACTUAL INNOCENCE

pointment, unrealistic statutory compensation caps, and the lack of attorneys willing to accept death penalty cases. These factors undermine the quality of representation and result in the propagation of mitigation-related errors. Therefore, it seems perilous for the Court to limit opportunities to correct mitigation-related errors when it has not taken appropriate steps to foreclose their occurrence.

In sum, the probability and frequency of errors, which undermine the presentation and evaluation of mitigating evidence at the sentencing phase, cast doubt on the effectiveness of state capital sentencing schemes. These mistakes skew the balancing of aggravating and mitigating factors in weighing states and inhibit full consideration of these counteracting factors in non-weighing states. The eligibility standard for sentencing innocence outlined in Sawyer (criminal law experience for an attorney to be appointed counsel in death penalty cases). However, despite the statutory minimum, this requirement is disregarded frequently by trial judges and violations are viewed on appeal as harmless error. Id. at 2.

191. See id. at 4 (noting that Florida, Mississippi and Texas lack any statewide standards for the appointment of counsel in death penalty cases).

192. But see GUIDELINES, supra note 188, at Guideline 5.1 (proposing minimum levels of expertise for attorneys representing capital defendants at trial, on appeal, and during postconviction review). These eligibility standards reflect seven quality control criteria to be used in the selection of counsel: (1) license to practice in the jurisdiction; (2) experience in criminal defense; (3) experience in felony practice including murder and other capital crimes defenses; (4) experience with the procedure of the criminal courts of the requisite jurisdiction; (5) familiarity with the type of evidence utilized in the requisite court system; (6) continuous training in capital litigation; and (7) demonstrated commitment to quality representation. Id.

193. See id., ROBBINS, supra note 11, at 61-62 (noting that many states pay virtually nothing for defense representation in capital cases); Fred Strasser, $1,000 Fee Cap Makes Death Row’s ‘Justice’ A Bargain for the State, NAT’L L. J., June 11, 1990, at 5 (discussing Mississippi’s statutory fee limit on defense representation in capital cases which, in some cases, amounted to less than five dollars an hour); GUIDELINES, supra note 188, Guideline 10.1, cmt. (criticizing 1985 Virginia compensation scheme under which counsel, in some cases, were paid an average wage of $1 an hour). The ABA has responded to the problem of “token” compensation for capital counsel by proposing to require a reasonable hourly rate of compensation, full reimbursement for incidental expenses, and periodic billing payments during the course of representation. Id. In addition, state courts have increasingly been forced to address statutory fee caps. See, e.g., Arnold v. Kemp, 813 S.W. 2d 770, 775 (Ark. 1991) (noting that a statutory fee cap imposed on court-appointed attorney was excessive, constituting a “taking” of property by providing only token compensation of $1,000).

194. See Linda Williams, Death-Row Inmates Often Lack Help for Appeals, But Few Lawyers Want to Do Distasteful Work, WALL ST. J., August 27, 1987 § 2, at 48 (noting that “in a nation with a glut of lawyers, there is a severe shortage of those willing to take capital-crime cases”, a shortage the author attributes to political considerations and the lack of financial incentives); see also ROBBINS, supra note 11, at 62-64 (discussing the impact of compensation limits on the availability of defense counsel).
v. Whitley fails to remedy either sentencing distortion.

VI. POST-SAWYER IMPLICATIONS FOR ACTUAL SENTENCING INNOCENCE: A BLEAK FUTURE

Although a constitutionally-consistent standard for capital sentencing innocence does exist—permitting federal habeas review of defaulted, successive or abusive claims when those claims are based on mitigation-related errors which probably resulted in an inappropriate sentencing outcome195—the Sawyer v. Whitley eligibility standard has already been embraced, and even extended, by a number of federal district and circuit courts.196 Despite the Eighth Amendment implications of the eligibility standard, a number of courts do seem willing to use that standard to foreclose one of the last remaining routes available to a capital defendant seeking federal habeas review.

Significantly, some federal court and circuit courts have extended the eligibility standard to errors unrelated to the mitigation phase.197 The Sawyer eligibility standard has been extended beyond sentencing innocence claims to encompass claims arising from the guilt-determination context.198 In fact, some significant extensions of

195. See Murray v. Carrier, 477 U.S. 478, 496 (1986) (stating that given “a constitutional violation [which] 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); Smith v. Murray, 477 U.S. 527 (1986) (same); see also Sawyer v. Whitley, 112 S. Ct. 2514, 2531-33 (1992) (Stevens, J., concurring in judgment) (noting that the Court has frequently confirmed this standard).
196. See Blair v. Armontrout, 976 F.2d 1130, 1135, 1140 (8th Cir. 1992) (applying Sawyer eligibility standard to reject successive habeas claims which were based on defense counsel errors and abusive claims based on improper prosecutorial peremptory challenges), cert. denied, 113 S. Ct. 2357 (1993); see also Jones v. Murray, 976 F.2d 169 (4th Cir.) (employing Sawyer standard to refuse review of a successive claim that a state aggravating factor was unconstitutional because even assuming such statutory unconstitutionality, the petitioner would not be able to prove by clear and convincing evidence that no reasonable juror would find him eligible for the death penalty), cert. denied, 113 S. Ct. 1301 (1993). For examples of extensions of the Sawyer standard, see infra notes 197-98.
198. See id. at 651 ("Although the new [eligibility] standard required by Sawyer was
the Sawyer test have occurred in circuits which once criticized its narrow scope.\textsuperscript{199}

Thus, a survey of post-Sawyer actual innocence cases reveals that the eligibility standard has rapidly infiltrated the federal jurisprudential system without being challenged for its potential impact on state capital sentencing schemes. Therefore, any error which affects the accuracy of a defendant’s sentencing profile, by distorting either the weighing or considering of aggravating and mitigating circumstances, will likely go without remedy. If the post-Sawyer cases are any indication of what the future holds for defaulted or repetitive habeas petitions, then future claims of actual sentencing innocence face dismal prospects for success.

\textbf{CONCLUSION}

The death eligibility standard pronounced in Sawyer v. Whitley has effectively closed one of the last remaining routes through which capital defendants can obtain federal review of defaulted or repetitive habeas corpus petitions based on claims of actual innocence of the sentence. The standard fails to address the critical inquiry in any sentencing innocence claim: Would the petitioner have been sentenced to death if constitutional error had not undermined the accuracy of his individualized sentencing profile? In other words, is the penalty of death \textit{appropriate} in the particular case?

In framing the issue of sentencing innocence in terms of a petitioner’s “death eligibility”, the Supreme Court has, in effect, answered the wrong question. Under traditional capital punishment jurisprudence, the focus is not on whether the defendant is eligible to receive the penalty of death, but whether the penalty should be imposed on him. This concern is most pressing precisely when constitutional errors inhibit the full presentation and evaluation of mitigating evidence during the sentencing hearing of a capital trial.

\textsuperscript{199} See, e.g., McCoy, 969 F.2d at 651 (discussing cases drawn from circuits which had once refused to employ death eligibility as the standard for actual sentencing innocence).
Therefore, it begs the question to limit the innocence inquiry to errors affecting a petitioner’s eligibility for death as opposed to errors affecting the subjective appropriateness of the sentence. The *Sawyer v. Whitley* eligibility standard not only disregards this fundamental constitutional distinction but also disregards variations in state capital sentencing schemes which are designed to refine the life or death decision-making process.

By asking the wrong question, the Rehnquist Court has, in the form of the *Sawyer v. Whitley* eligibility standard, provided the wrong answer to the confusion over actual innocence of the sentence. By asking the wrong question, the Rehnquist Court has ignored constitutional errors which distort the appropriate sentencing outcome. By asking the wrong question, the Rehnquist Court has won another battle in its war against habeas corpus thus driving another nail into the coffin of state capital defendants.

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