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Sawyer v. Whitley: Stretching the Boundaries of a Constitutional Death Penalty

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SAWYER v. WHITLEY:* STRETCHING THE BOUNDARIES OF A CONSTITUTIONAL DEATH PENALTY

INTRODUCTION

In 1992, thirty-one convicted murderers were put to death.[1] This represented the highest number of executions in one year since the constitutionality of the death penalty was reaffirmed by the Supreme Court in 1976.[2] As a result of this high number of executions, attention has again focused on this country's unique stance on capital punishment.[3] These twenty-seven cases, and the over 2600 others pending at every level of the judiciary nationwide, underscore the need for an appellate process for death-row inmates that will both safeguard constitutional principles in capital cases and ensure that the death penalty is imposed in a manner consistent with these principles.

The appeals process of a death-row inmate is most often an exceedingly long process, one that on average takes eight years but can take as long as fourteen years.[4] After imposition

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* 112 S. Ct. 2514 (1992).

[1] Jack Greenberg, *Death Row, U.S.A.*, N.Y. TIMES, June 2, 1993, at A19.

[2] *See* Gregg v. Georgia, 428 U.S. 153 (1976).

[3] "Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction." Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

> When it comes to the use of capital punishment, the United States stands alone in the practice. In countries outside the United States, capital punishment in the 1990s is usually associated with underdevelopment or lack of democracy, usually both. The death penalty no longer exists in any European Community country. Most of the nations of the former Soviet bloc have abolished it, and the rest are considering doing so. Of the 2086 executions that Amnesty International tracked in 1991, 1859 took place in two countries: China and Iran.

Hendrik Hertzberg, *Premeditated Execution*, TIME, May 18, 1992, at 49.

[4] David A. Kaplan, *Hung on a Technicality*, NEWSWEEK, Apr. 6, 1992, at 56. According to Chief Justice William Rehnquist, the delay in execution caused by capital appeals "not only lessen[s] the deterrent effect of the threat of capital pun-

of a death sentence, an automatic appeal of the conviction and sentence to the state appellate system occurs, followed by a petition for a writ of *certiorari* filed in the United States Supreme Court.[5] If no relief is granted at this point, the capital defendant seeks relief through state collateral proceedings, which are pursued to the state's highest court if necessary, followed by petitions for federal habeas corpus relief in the district courts and upward to the Supreme Court.[6] In addition, it

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ishment [but also] undermin[es] the integrity of the entire criminal justice system." Coleman v. Balkcom, 451 U.S. 949, 959 (1991). The reasons for delays in capital cases are complex and much in dispute. One commentator has noted that the complexity of death penalty cases generates more issues on which to appeal, which inevitably "stretch[es] the process even further." Michael Hintze, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After Furman*, 24 COLUM. HUM. RTS. L. REV. 395 (1993). Hintze adds that "[t]he inherent incentive in death penalty cases to employ tactics of delay adds to this problem . . . the attorney is attempting to save or at least prolong, the life of the client." *Id.* at 411-12; *see also* Irwin P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1 (1990) (ADA Task Force on Death Penalty Habeas Corpus reports that delays in habeas corpus procedure are due to the fact that the accused was not represented by competent counsel).

[5] States that impose the death penalty usually use a bifurcated proceeding, with one trial to determine the guilt of the defendant and a second, separate proceeding to determine if the statutory requirements for a sentence of death are met. This usually includes a finding of murder with special circumstances, such as aggravated murder, murder of a police officer or murder while lying in wait. *See* Gregg v. Georgia, 428 U.S. 153 (1978).

[6] State capital defendants apply for a federal writ of habeas corpus under the provisions of 28 U.S.C. § 2254. The statute provides in part:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C § 2254(a) (1992).

As open-ended as the statute may seem, there are certain procedural barriers that may prevent a capital defendant who applies for habeas relief from prevailing: custody and exhaustion of state appeals. First, the subject matter jurisdiction of the habeas courts is limited explicitly to petitions from applicants who allege that they are "in custody" in violation of federal law. *See* Preiser v. Rodriguez, 411 U.S. 475, 484 (1973) ("It is clear . . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody and that the traditional function of the writ is to secure release from illegal custody."). According to Professor Yackle, "this is no mere artificial prerequisite to a habeas action, designed to restrict access to those most in need of judicial attention. It is part and parcel of what habeas corpus is, what it means, or, at least, what it has been and meant traditionally." Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 999 (1985). Professor Yackle added that, "the link between the writ and

is often the case that as the date of execution draws nearer, the defendant makes emergency last-minute appeals to both state and federal courts in an attempt to stay the execution.[7]

For many years, various members of the Supreme Court have been vocal in their displeasure with the long capital appeals process. As a result, the Court has taken an active role in attempting to remedy what Chief Justice Rehnquist has called a "stalemate in the administration of federal constitutional law."[8] The complaints of these Justices have centered around the dangers of repetitive access to habeas corpus.[9] It is

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restraints on liberty has never been severed." *Id.* at n.26.

Second, a state prisoner is not able to obtain habeas corpus relief from a federal court unless the remedies available to the petitioner in the state courts have been exhausted. Section 2254(b) of title 28 provides in part that "[a]n application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State . . . ." *See also* 28 U.S.C. § 2254(c) (1992) (exhaustion doctrine requires that petitioners must present their claims to any state appellate court to which an appeal lies as a matter of right).

As enunciated in Rose v. Lundy, 455 U.S. 509, 518 (1981), exhaustion is grounded in principles of comity and reflects a desire to "protect the state courts' role in the enforcement of federal law." *See also* Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (exhaustion merely an accommodation of the federal system designed to give the state an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights); Roberts v. LaVallee, 389 U.S. 40, 42-43 (1967) (petitioner not required to seek further state review of a claim that was fairly identified and presented in state court but ignored or avoided upon review); Leroy v. Marshall, 757 F.2d 94 (6th Cir.) (exhaustion requirement still satisfied even if the highest state court exercises discretion not to review the case), *cert. denied*, 474 U.S. 831 (1985).

[7] *See* Vasquez v. Harris, 112 S. Ct. 1713 (1992). In *Harris*, Justice Stevens expressed his impatience with the case by stating that "[n]o further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court." *Id.*; *see also* Charles M. Sevilla & Michael Lawrence, *Thoughts on the Cause of the Present Discontents: The Death Penalty Case of Robert Alton Harris*, 40 UCLA L. REV. 345 (1992); Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225 (1992).

[8] Coleman v. Balkcom, 451 U.S. 949, 957 (1981) (Rehnquist, J., dissenting); *see also* 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 (1991).

[9] Spalding v. Aiken, 460 U.S. 1093, 1096 (1983) ("Claims presented by way of habeas corpus petitions many years after conviction impose especially heavy burdens on the prison system, on society, and on the administration of justice."); *see also* Schneckloth v. Bustomonte, 412 U.S. 218 (1973) (no effective judicial system can afford to concede the continuing theoretical possibility that there is error in

now the majority's position that the writ undermines both the principles of federalism and finality, and exacts heavy costs by allowing repetitive federal intrusion into what should be a state concern.[10] Even though the federal system recognizes the power of the states to administer their own criminal laws, the Court has pointed out that "the power of a State to pass laws means little if the State cannot enforce them."[11] Chief Justice Rehnquist has gone so far as to speculate that a potential murderer knows that even if he receives a death penalty, it is unlikely that it will ever be imposed.[12] Guided by its opinion that "the existence of the death penalty in this country is virtually an illusion,"[13] and with the "integrity of the entire criminal justice system" at stake,[14] the Rehnquist Court has embarked on a campaign to ensure that the death penalty is enforced after it is handed down.[15]

One significant area in which the Court has been success-

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every trial and that every incarceration is unfounded). *But see* Coleman v. Thompson, 111 S. Ct. 2546, 2574 (1991) (Blackmun, J., dissenting) ("The majority seems most concerned with the financial burdens that a retrial places on the states. Of course, if the initial trial conformed to the mandate of the constitution, not even the most probing federal review would necessitate a retrial.").

[10] McCleskey v. Zant, 111 S. Ct. 1454, 1469 (1991) ("[P]erpetual disrespect for the finality of convictions disparages the entire criminal justice system."). Justice Kennedy explained in *McCleskey* that "the writ strikes at finality. One of the law's very objects is the finality of its judgments, '[and] without finality, the criminal law is deprived of much of its deterrent effect.'" *Id.* at 1468 (quoting Teague v. Lane, 489 U.S. 288, 309 (1989)). The Court added that "re-examination of state convictions on federal habeas frustrates the state's sovereign power to punish offenders." *Id.* (quoting Murray v. Carrier, 477 U.S. 478, 487 (1986)); *see also Coleman*, 111 S. Ct. at 2564 (1991) (Court recognizing the important interest in finality served by state procedural rules and the significant harm to the states that results from the failure of federal courts to respect them).

[11] *McCleskey*, 111 S. Ct. at 1469.

[12] Estelle v. Jurek, 450 U.S. 1014, 1021 (1981). ("If he litigates the case long enough, the odds favor his finding some court which will accept a legal theory previously rejected.") (Rehnquist, J., dissenting).

[13] Coleman v. Balkcom, 451 U.S. 949, 957-58 (1981) (Rehnquist, J., dissenting).

[14] *Id.* at 959.

[15] In *Estelle*, 450 U.S. at 1014, then-Justice Rehnquist explained that Gregg v. Georgia, 428 U.S. 153 (1976) "squarely rejected the notion that 'standards of decency' rendered the death penalty unconstitutional . . . . [I]t is now evident that a large proportion of American society continues to regard [death] as an appropriate and necessary criminal sanction." *Id.* The *Estelle* Court held that when a conviction is overturned because of a "procedural nicety," the death penalty ceases to become an effective deterrent and frustrates the state's interest in having its laws carried out. *Id.* at 1021.

ful in its attempts to streamline the capital appeals process has been its restriction of the avenues by which a death row inmate may bring a second or successive petition for habeas corpus.[16] For nearly three decades the Court was guided by

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[16] 28 U.S.C. § 2244 governs successive petitions from state prisoners. The Court has also been active in restricting the rights of capital defendants in other areas. In 1989 the Supreme Court ruled in Teague v. Lane, 489 U.S. 288 (1989), that new rules of criminal procedure do not apply retroactively to cases which have become final on direct review at the time the new rule was decided. In making its decision, the *Teague* Court placed a heavy emphasis on finality concerns. The Court explained that applying new rules to cases on collateral review forces the states constantly to spend time and money in order "to keep in prison defendants whose trials and appeals conformed to . . . constitutional standards" when they were originally convicted. *Id.* at 310; *see also* Engle v. Isaac, 456 U.S. 107, 128 n.33 (1981) (state courts are frustrated when they faithfully apply existing constitutional law only to have a new constitutional rule promulgated in its place). To prevent this situation, the *Teague* Court adopted the retroactivity doctrine favored by Justice Harlan two decades earlier, which provided that new rules, subject to two narrow exceptions, should not be applied retroactively on collateral review. *Teague*, 489 U.S. at 310; *see also* Mackey v. United States, 401 U.S. 667, 691 (1971) ("No one . . . is benefitted by a judgment that a man shall tentatively go to jail today, but tomorrow and everyday thereafter his continued incarceration shall be subject to fresh litigation.").

The retroactivity doctrine of *Teague* was extended to capital proceedings in Penry v. Lynaugh, 492 U.S. 302 (1989). Because of the Court's perception that capital habeas petitioners would take advantage of any new rule to delay implementation of their sentences, the Court held that the finality concerns expressed in *Teague* could be applied in the capital sentencing context. *Id.* at 314; *see also* Steven M. Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357, 398 (1991) (any state finality interest in the capital sentencing context is less compelling because, even if successful, a habeas petitioner, though perhaps able to avoid the execution, will nevertheless face a life sentence).

Justice O'Connor wrote in *Penry* that "a new rule placing a certain class of individuals beyond the state's power to punish by death is analogous to a new rule placing certain conduct beyond the state's power to punish at all." *Penry*, 492 U.S. at 330. The possibility exists, therefore, that "a person may be killed although she has a sound constitutional claim that would have barred her execution had this Court only announced the constitutional rule before her conviction and sentence became final." *Id.* at 341 (Brennan, J., concurring in part and dissenting in part). Justice Brennan added that "it is intolerable that the difference between life and death should turn on such a fortuity as timing, and beyond my comprehension that a majority of this Court will so blithely allow a state to take a human life." *Id.*

In Murray v. Giarratano, 492 U.S. 1 (1989), the Court extended its view that capital and non-capital crimes may be treated similarly when it held that an indigent death row inmate does not have a constitutional right to appointed counsel when seeking state post-conviction relief. The Court, in an opinion by Chief Justice Rehnquist, explained that the procedures of the Eighth Amendment applied at the

the principle that "the government is always to be accountable to the judiciary for a man's imprisonment" and, therefore, access to the courts on habeas must not be thus impeded.[17] In *Sawyer v. Whitley*,[18] however, the Supreme Court eschewed this liberal tradition of review and held that in order for a petitioner to bring a successive,[19] abusive,[20] or defaulted[21] federal habeas claim, the "ends of justice" will only be met if the petitioner makes a showing of "actual innocence."[22] Such a

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trial stage are enough to "assure reliability of the process by which the death penalty is imposed." *Id.* at 10. Rejecting the notion that "death is different," and on the premise that the same standard of review applies in federal habeas for capital and non-capital cases, the majority refused to acknowledge that either the Eighth Amendment or the Due Process Clause required yet another distinction between the rights of capital and non-capital defendants. *Id.*

The *Murray* dissent relied heavily on the differences between capital and non-capital cases to conclude that the appointment of counsel is required for an indigent capital defendant pursuing state post-conviction relief. *Id.* at 15 (Stevens, J., dissenting). Justice Stevens emphasized that the "unique nature of the death penalty not only necessitates additional protection during pretrial, guilt and sentencing phases, but also enhances the importance of the appellate process." *Id.* at 22. Because of the complexity of capital litigation, it will often be the case that a federal habeas petitioner, acting without counsel at the state level, will not comply with that state's procedural rules, resulting in the real possibility that subsequent—and perhaps meritorious—claims will be procedurally barred. This petitioner would then be precluded from raising the claim at the federal level because of the exhaustion doctrine, thereby further limiting the capital petitioner's access to federal habeas review. *See supra* note 6 (discussing exhaustion doctrine).

[17] Sanders v. United States, 373 U.S. 1, 8 (1963).

[18] 112 S. Ct. 2514 (1992).

[19] A court may not reach the merits of successive claims that raise grounds identical to grounds heard and decided on the merits in a previous petition. *See* Kuhlmann v. Wilson, 477 U.S. 436 (1986).

[20] *See* McCleskey v. Zant, 499 U.S. 467 (1991) (when a prisoner files a second subsquent habeas petition, the government bears the burden of pleading abuse of the writ); *see also infra* note 115 (discussing abuse of the writ).

[21] *See* Murray v. Carrier, 477 U.S. 478, 479 (1986) ("existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rules.").

[22] The "actual innocence" standard has been defined as:

> [T]he prisoner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due respect 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 facts would have entertained a reasonable doubt of his guilt.

Kuhlmann, 477 U.S. at 455 n.17 (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160

showing requires the petitioner to demonstrate by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.[23]

This Comment will show that *Sawyer* established a standard of review for successive or defaulted federal habeas corpus petitions that failed to recognize key principles of constitutional law with regard to the death penalty, while at the same time dangerously limiting the role that federal courts are to play in the habeas review process. As a result, the Supreme Court has turned a blind eye toward the plight of death row inmates by entrusting the protection of their constitutional rights to state trial systems ill-equipped for this responsibility. Without adequate federal review, the door is opened wider to the possibility that an individual will be executed in violation of the federal Constitution or, in extreme cases, executed although innocent of the crime or undeserving of the death sentence.

Part I of the Comment provides the background of *Sawyer* and then takes a closer look at the anatomy of the majority's decision, as well as the separate concurrences of Justices Blackmun and Stevens. Part II briefly reviews the principles that underlie the constitutionality of the death penalty, and

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(1970)); *see also infra* notes 36-59 and accompanying text.

The "ends of justice" exception (sometimes known as the miscarriage of justice exception) is actually an exception to an exception. Normally, a habeas petitioner must show "cause and prejudice" before a court will address the merits of a successive, abusive or defaulted claim. Wainwright v. Sykes, 433 U.S. 72 (1977); *see also infra* notes 19-21. Even absent a showing of "cause and prejudice," however, a habeas petitioner may have the repetitive claim decided on the merits if the failure to hear the claims would constitute a "miscarriage of justice." This exception allows for a prisoner's second or successive federal habeas petition to be heard even though the first or prior petitions were denied. 28 U.S.C § 2244(a) (1992) states:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, *and the judge or court is satisfied that the ends of justice will not be served by such inquiry.*

Id. (emphasis added).

[23] Sawyer v. Whitley, 112 S. Ct. 2514, 2517 (1992).

illustrates how the *Sawyer* decision fails to reflect these principles. Finally, Part III argues that the practical result of *Sawyer* is to place the life of the typical death-row inmate in the hands of an underpaid, inexperienced attorney, whose mistakes, thanks to *Sawyer*, will now rarely be corrected by federal habeas review.

I. THE PROCEDURAL HISTORY OF *SAWYER V. WHITLEY* AND THE SUPREME COURT DECISION

A. *Background*

In 1980 Robert Wayne Sawyer, along with an accomplice, was convicted of first-degree murder and sentenced to death.[24] At the penalty phase of the trial, the jury recommended the death penalty for Sawyer after finding three of the required statutory aggravating factors.[25] On direct appeal to the Supreme Court of Louisiana, Sawyer's conviction and sentence were affirmed.[26] The court found that there was sufficient evidence to conclude Sawyer was engaged in aggravated arson and determined that one aggravating circumstance is sufficient to place a defendant in the class of offenders who can be sentenced to death. The United States Supreme Court vacated the conviction and remanded the case for reconsideration.[27] The

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[24] State v. Sawyer, 422 So. 2d 95 (La. 1982). Sawyer and his accomplice returned home after a night of drinking. An argument then ensued between Sawyer and his live-in girlfriend, Frances Arwood. According to the Court, Sawyer proceeded to attack Arwood, beat her with fists, kicked her repeatedly, submerged her in the bathtub, and poured scalding water on her before dragging her back into the living room, pouring lighter fluid on her body and igniting it. *Id.* at 97-98. Arwood went into a coma and died of her injuries two months later. *Id.*

[25] During the sentencing trial, the jury considered evidence proffered by Sawyer of his unhappy childhood and then found three statutory aggravating factors: (1) Sawyer was engaged in the commission of aggravated arson; (2) the offense was committed in an especially cruel, atrocious, and heinous manner; and (3) Sawyer previously had been convicted of an unrelated murder. *Id.* at 100.

[26] *Id.* at 101. "[Louisiana law] only requires that the jury find the existence of one aggravating circumstance in order to consider recommending a sentence of death." *Id.* The court added that "[w]e are convinced, on review of the record, that the jury's recommendation was not reached arbitrarily . . . ." *Id.* at 106.

[27] Sawyer v. Louisiana, 463 U.S. 1223 (1983). The United States remanded the case for reconsideration in light of Zant v. Stephens, 462 U.S. 862 (1983). In *Zant*, the Supreme Court affirmed the constitutionality of a Georgia sentencing statute, finding that the invalidity of several aggravating circumstances found by the jury

Louisiana Supreme Court again affirmed the conviction.[28]

Following his failure to secure relief in the automatic direct appeals process, Sawyer's first petition for state postconviction relief was denied.[29] Since this petition constituted exhaustion of state remedies, Sawyer then filed his first petition for federal habeas corpus. Sawyer raised eighteen claims, all of which were denied on the merits.[30] The Supreme Court granted review of the denial of the petition and affirmed the Fifth Circuit's decision.[31] Sawyer then filed a second peti-

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did not impair the death sentence. *Id.*

[28] Sawyer v. State, 442 So. 2d 1136 (La. 1983), *cert. denied*, 466 U.S. 931 (1984). Upon reconsideration, the court ruled that "[o]nce a single aggravating circumstance is found . . . the finding of additional aggravating circumstances are therefore unnecessary to advance the case to consideration of whether the death penalty will in fact be imposed." 442 So. 2d at 1138-39.

[29] Louisiana *ex rel.* Sawyer v. Maggio, 479 So. 2d 360, *reconsid. denied*, 480 So. 2d 313 (La. 1985). Prior to this disposition, the Supreme Court of Louisiana twice remanded the case back to the trial court for hearings on Sawyer's claim of ineffective assistance of counsel. *See* Louisiana *ex rel.* Sawyer v. Maggio, 450 So. 2d 355 (La. 1984); Louisiana *ex rel.* Sawyer v. Maggio, 468 So. 2d 545 (La. 1985); *see also* Brian L. McDermott, Comment, *Defending the Defenseless:* Murray v. Giarratano *and the Right to Counsel in Capital Post Conviction Proceedings*, 75 IOWA L. REV. 1305, 1307-09 (1990) (arguing that in *Murray*, the Supreme Court should have used a balancing test to protect the rights of capital defendants). Alice McGill, Comment, Murray v. Giarratano: *Right to Counsel in Post Conviction Proceedings in Death Penalty Cases*, 18 HASTINGS CONST. L.Q. 210, 218 (1990) (explaining the importance of state postconviction relief).

[30] Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988), *aff'd on reh'g*, 881 F.2d 1273 (5th Cir. 1989) (en banc). In his appeal to the Fifth Circuit, Sawyer raised three challenges to his confinement and sentence. First, Sawyer argued that he was accorded ineffective assistance by his "inexperienced appointed counsel, who was not lawfully qualified to represent a capital defendant," thereby violating the Sixth Amendment. 848 F.2d at 587. Second, Sawyer contended that the counsel provided for him was so inadequate as to violate his constitutional due process and equal protection rights. *Id.* Finally, Sawyer argued that certain improper remarks by the prosecutor in closing arguments at the sentencing phase erroneously misled the jury as to its role in the death penalty determination and, therefore, violated the Eighth Amendment. *Id.*

[31] Sawyer v. Smith, 497 U.S. 227 (1990). In his first federal habeas petition, Sawyer claimed *inter alia* that the prosecutor's closing argument during the sentencing phase diminished the jury's sense of responsibility for the capital sentencing decision, which Sawyer argued was a violation of the rule established in Caldwell v. Mississippi, 472 U.S. 320 (1985). In *Caldwell*, the Court found that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that responsibility for determining the appropriateness of defendant's death rests elsewhere.

Sawyer, however, was denied the use of the *Caldwell* rule because of the Supreme Court's decision in Teague v. Lane, 489 U.S. 288 (1989). *Teague*, which

tion for federal habeas corpus, raising an issue already pleaded in his prior petition, as well as issues never before brought to any court's attention. The district court issued a stay of execution and held an evidentiary hearing, after which Sawyer's petition was again denied.[32] The Fifth Circuit issued a certificate of probable cause, granted Sawyer a stay of execution, and reviewed the merits of the second petition.[33] In affirming the judgment of the district court, the Fifth Circuit established a test for determining when successive and abusive petitions qualify for the actual innocence exception, and ruled that Sawyer had failed to show actual innocence.[34] The Supreme

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was decided while Sawyer's petition was pending, stated that a new rule of constitutional law established after a petitioner's conviction has become final may not be used to attack the conviction on federal habeas corpus unless the rule (1) places an entire category of primary conduct beyond the reach of criminal law, or (2) applies a new watershed rule of criminal procedure that enhances accuracy and is necessary to the fundamental fairness of the criminal proceeding. *See also* Penry v. Lynaugh, 492 U.S. 302 (1989) (applying *Teague* to capital defendants). Therefore, the Court in *Sawyer* ruled that the principle of *Caldwell* could not be applied to Sawyer's claim because *Caldwell* announced a new rule of constitutional law, barring its application retroactively to Sawyer's claim.

[32] Sawyer v. Whitley, 772 F. Supp. 297, 308 (E.D. La. 1991). In its decision, the district court noted that "[i]n the interest that the validity of his conviction be finally resolved," Sawyer was permitted to amend the second petition three times. *Id.* at 299. The court then went on to hold that Sawyer failed to show that the ends of justice would be served by reaching the merits of the claims already raised and decided in the first petition. *Id.* at 304. In addition, the court ruled that some claims that had been omitted from the first petition were barred due to abuse of the writ. *Id.* at 304-05. Finally, the court denied Sawyer's claim that electrocution in Louisiana's electric chair would constitute cruel and unusual punishment. *Id.* at 308.

[33] Sawyer v. Whitley, 945 F.2d 812 (5th Cir. 1991).

[34] Sawyer presented "one successive claim and two abusive claims in [the] second habeas petition." *Id.* at 814. First, the court dismissed Sawyer's claim of ineffective assistance of counsel as successive. *Id.* at 823. The court ruled that since this claim was one that had previously been decided on the merits, the claim could only be entertained if Sawyer demonstrated "actual innocence," defined as "a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under Louisiana and federal law for the imposition of the death penalty." *Id.* at 823; *see* Kuhlmann v. Wilson, 477 U.S. 436 (1986) (first consideration by the Supreme Court of actual innocence as a requirement for hearing successive federal habeas petitions).

In his second claim, Sawyer contended that he was incompetent to stand trial. 945 F.2d at 823. "Because Sawyer raise[d] this claim for the first time in his second petition," the court could consider it only if Sawyer had not abused the writ. *Id*; *see infra* note 115 (for discussion of abuse of the writ). The court dismissed the claim, because "Sawyer faile[d] to show cause for not raising this claim

Court, for the third time in nine years, decided to review the case of Robert Wayne Sawyer.[35]

B. *The Supreme Court Decision*

1. The Majority

In *Sawyer v. Whitley*[36] the Supreme Court held that Sawyer had failed to show that he was actually innocent since his claim on appeal did not relate to his guilt or innocence of the underlying offense or to the aggravating factors that made him eligible for the death penalty under the Louisiana statute.[37] The Court elaborated further on the "ends of justice" threshold for deciding successive petitions by providing a precise definition of what constitutes "actual innocence" in the context of a capital case. In an opinion written by Chief Justice Rehnquist, the Court held that "to show actual innocence, one must show

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in his first petition," and therefore the claim constituted abuse of the writ. 945 F.2d at 824.

In his third claim, Sawyer alleged that the State hid exculpatory evidence in violation of his Sixth, Eighth and Fourteenth Amendment rights. *Id.* The court dismissed this claim as abuse of the writ as well, since "the state did not prevent Sawyer from having access to the materials on which he now bases his claim," and Sawyer failed to "show that he could not have obtained, by reasonable means, a sufficient basis to allege a claim in the first petition." *Id.* The court added that the additional evidence presented by Sawyer did not establish "actual innocence" to merit review of the claim. *Id.* at 825.

[35] Sawyer v. Whitley, 112 S. Ct. 434 (1991).

[36] 112 S. Ct. 2514 (1992).

[37] *Id.* at 2524-25. Sawyer advanced two different evidentiary claims in his second habeas petition, both stemming from evidence that was not considered by the jury that convicted and sentenced him. The first claim concerned affidavits that Sawyer claims were exculpatory; Sawyer asserted that the police failed to produce this evidence in violation of his due process rights. *Id.* The Court ruled that the evidence allegedly withheld was nothing more than latter-day evidence brought forward to impeach a prosecution witness, and that this evidence, in light of all the evidence in the record, did not show that no rational juror could find the existence of aggravating circumstances. *Id.*

Sawyer's second claim was that medical records from his stays at two different mental health institutions when he was a teenager were not introduced at the sentencing phase of the trial due to ineffective assistance of counsel. *Id.* The Court ruled that this psychological evidence did not relate either to Sawyer's guilt or innocence of the crime, since he did not allege that his mental condition was such that he could not form criminal intent, or to the aggravating factors found by the jury, since it could not be said that a reasonable juror would not have found Sawyer eligible for the death penalty if the evidence had been presented. *Id.* at 2525.

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."[38] In so holding, the Court acknowledged that to provide a meaning for actual innocence within the framework of a capital case is a difficult task because the Court had to "construct an analog to the simpler situation represented by the case of a non-capital defendant."[39]

In *Sawyer* the Court was guided by the principle that the actual innocence exception is a narrow one and, therefore, would operate better if determined by objective standards.[40] Chief Justice Rehnquist first explained that an individual becomes eligible for the death penalty when "the various narrowing factors which limit the class of offenders upon which the sentencer is authorized to impose the death penalty" are found by the jury.[41] When statutory eligibility is established, however, "the emphasis shifts from narrowing the class of eligible defendants by objective factors to individualized consideration of a particular defendant."[42] According to the Court, therefore, "[c]onsideration of aggravating factors together with mitigating factors, in various combinations and methods dependent upon state law, results in the jury's or judge's ultimate decision as to what penalty shall be imposed."[43] In other words, any definition of "actual innocence" put forth by the *Sawyer* Court had to reflect both the objective factors that make the petitioner eligible for the death penalty and the subjective factors that prevent a death sentence from being

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[38] *Id.* at 2517.

[39] *Id.* at 2519-20.

[40] *Id.* at 2520.

[41] *Id.* The reason for having to make a finding of these "narrowing factors" is that "Eighth Amendment jurisprudence has required those states imposing capital punishment to adopt procedural safeguards protecting against arbitrary and capricious impositions of the death sentence." *Id.* Thus, capital punishment statutes define first-degree murder "as something more than intentional killing. In addition, after a defendant is found guilty in Louisiana of capital murder, the jury must also find at the sentencing phase beyond a reasonable doubt at least one of a list of statutory aggravating factors before it may recommend that the death penalty be imposed." *Id.*

[42] *Id.* at 2520-21. At this stage of the proceedings "the defendant must be permitted to introduce a wide variety of mitigating evidence pertaining to his character and background." *Id.* (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

[43] *Id.* at 2521.

imposed in an arbitrary manner.

Under this conceptual framework, the Court analyzed three possible ways actual innocence might be defined. First, the majority rejected as too narrow a definition of actual innocence that would have limited the exception only to a demonstration by the defendant that he is innocent of the capital offense itself.[44] This definition, the Court reasoned, ran contrary to an earlier statement by the Court that the concept of "actual innocence" could be applied to mean "innocent" of the death penalty.[45] The Court concluded that this statement "suggested a more expansive meaning to the term of 'actual innocence' in a capital case than simply innocence of the capital offense itself."[46]

The Court also rejected a more expansive view of actual innocence that would have allowed the defendant to make a showing of three separate factors: (1) innocence of the elements of the crime itself; (2) innocence of the statutory aggravating circumstances; and (3) additional mitigating evidence that would not concern the defendant's eligibility to receive the death penalty, but would only influence the determination by the jury that death, and not life imprisonment, is the appropriate penalty.[47] Under this broad definition the key inquiry is whether "there is a fair probability that the admission of false evidence, or the preclusion of true mitigating evidence [caused by a constitutional error] resulted in a sentence of death," or in other words, "whether due to constitutional error the sentencer was presented with a 'factually inaccurate sentencing profile'" of Sawyer.[48] The Court agreed with Sawyer that the inquiry should extend to the existence of aggravating circumstances, but rejected Sawyer's contention that "the showing should extend beyond these elements of the capital sentence to the

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[44] In other words, "[t]he showing would have to negate an essential element of that offense." *Id.* at 2521.

[45] Smith v. Murray, 477 U.S. 527, 537 (1986). The Court in *Murray* held that actual innocence "does not translate easily into the context of the sentencing phase, but nonetheless its application would not be a "miscarriage of justice." *Murray*, 477 U.S. at 537-38; *see* Stephen P. Gurvey, *Death-Innocence and the Law of Habeas Corpus*, 56 ALB. L. REV. 225 (1992) (explanation of what it means to be innocent of the death penalty).

[46] *Sawyer*, 112 S. Ct. at 2521.

[47] *Id.* at 2521. This is the standard that Sawyer sought to impose.

[48] *Id.*

existence of additional mitigating evidence."[49] The Court was concerned that if this broad standard were adopted, the inquiry into actual innocence would cease to be a narrow exception to the denial of a habeas petition, and would harm the interest in finality that must be afforded such judgments.[50]

The majority settled on a third definition. It held that the Fifth Circuit, in taking the middle ground between these two standards, applied the proper test for finding "actual innocence" by requiring Sawyer "to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty."[51] The majority agreed with the court of appeals that additional mitigating evidence is not significant when determining actual innocence, but that the inquiry must instead focus on the statutory elements which render a defendant eligible for the death penalty.[52] The standard adopted by the Court, therefore, "hones in on the objective factors or conditions which must be shown to exist before a defendant is eligible to have the death penalty imposed."[53]

After formulating the required showing for "actual innocence," the Court held that Sawyer failed to show that he was

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[49] *Id.* at 2522.

[50] *Id.* The Court was also troubled with this standard because an extension of the required showing to mitigating evidence "would mean that actual innocence amounts to little more than what is already required to show prejudice, a necessary showing for habeas relief for many constitutional errors." *Id.* The Court added, "[i]f 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 habeas petition than he would have had to show to obtain relief on his first habeas petition." *Id.*

[51] *Id.* at 2523 (quoting *Sawyer*, 945 F.2d at 820). The Court also recognized that the Eleventh Circuit adopted a similar "eligibility test" in Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991). The *Johnson* court found 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.

Id. at 1183.

[52] *Sawyer*, 112 S. Ct. at 2523.

[53] *Id.*

actually innocent of the death penalty. Sawyer had advanced two different claims in his petition to the Supreme Court, both stemming from evidence that was not considered by the jury that convicted and sentenced him.[54] First, Sawyer claimed that medical records from his stays at two different mental health institutions were not introduced due to ineffective assistance of counsel. The Court held, however, that this evidence did not relate to Sawyer's guilt or innocence of the crime,[55] nor did it relate to any of the aggravating factors found by the jury.[56] The Court also rejected Sawyer's second claim that statements allegedly kept from the jury, possibly in violation of *Brady v. Maryland*,[57] showed that Sawyer was "actually innocent" of the death penalty.[58] The Court reasoned that even if the jury had examined these statements, there was no showing that a rational juror would not have found at least one of the aggravating factors that made Sawyer eligible for the death penalty.[59]

2. Justice Blackmun's Concurrence

In a concurring opinion Justice Blackmun expressed his severe displeasure with the standard of review for habeas cor-

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[54] *Id.*

[55] *Id.* at 2524 n.16. Sawyer did not allege that his mental condition prevented him from forming criminal intent.

[56] *Id.* at 2524. The jury found two aggravating factors in this case: (1) the murder was committed in the course of an aggravated arson, and (2) the murder was especially cruel, atrocious or heinous. The Court added that "it cannot be said that a reasonable juror would not have found both of the aggravating factors which make Pettimer [Sawyer] eligible for the death penalty." *Id.*

[57] 373 U.S. 83 (1963) (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).

[58] *Sawyer*, 112 S. Ct. at 2524. This evidence consisted mainly of a series of affidavits Sawyer claimed were exculpatory witness statements that would have cast doubt as to his eligibility for a death sentence. Sawyer maintained that one affidavit would have challenged the credibility of a prosecution witness and that another statement might have negated the jury's finding of aggravated arson. *Id.* at 2537.

[59] *Id.* at 2524. In addition, the Court discredited an affidavit of a four-year-old boy that Sawyer claimed proved that his accomplice actually set fire to the victim, since a finding of only one aggravating factor is necessary, and since the evidence showed that the murder was "especially cruel, atrocious and heinous." *Id.*

pus adjudication adopted by the majority.[60] "I believe that the Court today adopts an unduly cramped view of actual innocence," wrote Justice Blackmun, expressing "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."[61] Justice Blackmun acknowledged that "[t]he Court repeatedly has recognized that principles of fundamental fairness underlie the writ of habeas corpus,"[62] but stated that the majority's decision caused him to "wonder what is left of that premise underlying [his] acceptance of the death penalty."[63]

Justice Blackmun criticized the Court for moving away from the "traditional teachings" by shifting the core of federal habeas review "toward a fact-based inquiry into the petitioner's innocence or guilt" instead of focusing on the "preservation of [an individual's] constitutional rights."[64] First, Justice Blackmun stated that the focus on actual innocence runs contrary to "Congress' grant of habeas corpus jurisdiction."[65]

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[60] *Sawyer*, 112 S. Ct. at 2525 (Blackmun, J., concurring).

[61] *Id.* at 2525. Justice Blackmun did not address the specifics of the majority's decision, but wrote only to "reemphasize [his] opposition to an implicit premise underlying the Court's decision: that the only 'fundamental miscarriage of justice' in a capital proceeding that warrants redress is one where the petitioner can make out a claim of 'actual innocence.'" *Id.*

[62] *Id.*

[63] *Id.* at 2529. Justice Blackmun acknowledged that his ability to uphold the constitutionality of the death penalty, despite being morally opposed to the punishment, "has always rested on an understanding that certain procedural safeguards, chief among them the federal judiciary's power to reach and correct claims of constitutional error on federal habeas review, would ensure that death sentences are fairly imposed." *Id.*

[64] *Id.* at 2526. Justice Blackmun cited Justice Holmes's explanation in Moore v. Dempsey, 261 U.S. 86, 88 (1923), 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.'" 112 S. Ct. at 2525-26. Justice Blackmun added that the inquiry established by the majority is "[n]owhere . . . more misguided than in a case where a defendant alleges a constitutional error in the sentencing phase of a capital trial [and] . . . the Court's ongoing struggle to give meaning to 'innocence of death' simply reflects the inappropriateness of the inquiry." *Id.* at 2528; *see also* Smith v. Murray, 477 U.S. 527, 537 (1986) ("Actual innocence does not translate easily into the context of an alleged error at the sentencing phase of a capital trial.").

[65] *Id.* at 2527. "The jurisdictional grant [28 U.S.C. § 2254(a)] contains no support for the Court's decision to narrow the reviewing authority and obligation of

More troubling to Justice Blackmun, however, was the erroneous assumption by the Court that "the only value worth protecting through federal habeas review is the accuracy and reliability of the guilt determination."[66] He concluded with a warning that "the more the Court constrains the federal courts' power to reach the constitutional claims of those sentenced to death, the more the Court undermines the very legitimacy of capital punishment itself."[67]

3. Justice Stevens's Concurrence

Justice Stevens argued that the Court's holding was "plainly wrong because it disregard[ed the] well-settled law [of both] habeas corpus and capital punishment."[68] First, he explained that the "'clear and convincing evidence' standard" adopted by the majority "depart[ed] from a line of decisions defining the 'actual innocence' exception."[69] According to Justice Stevens, the Court in past cases had "consistently required a defendant to show that the alleged constitutional error *has more likely than not* created a fundamental miscarriage of justice."[70] He saw no reason to reject this well-established and

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the federal courts to claims of factual innocence." *Id.*

Justice Blackmun also expressed a concern about the proper role of federal courts because "the actual innocence standard requires a federal reviewing court, unnaturally, to function in much the same capacity as a state trier of fact," i.e., "to make a rough decision on the question of guilt or innocence." *Id.* at 2527.

[66] *Id.* He stressed that "[t]he accusatorial system of justice adopted by the Founders affords a defendant certain process-based protections that do not have accuracy of truth finding as their primary goal." *Id.* at 2528. Among the protections noted by Justice Blackmun are the "right against compelled self-incrimination," the "right to be tried by an impartial judge," and the "right against the imposition of an arbitrary and capricious sentence." *Id.* He concluded that "[t]hese protections . . . are debased, and indeed, rendered largely irrelevant, in a system that values the accuracy of the guilt determination above individual rights." *Id.*

[67] *Id.* at 2530. Justice Blackmun advocated a return to "the federal courts' central and traditional function on habeas review," which is evaluating claims of constitutional error. *Id.* at 2528. Only then "can the Court ensure that the ends of justice are served and that fundamental miscarriages of justice do not go unremedied." *Id.*

[68] *Id.* at 2531. Justices Blackmun and O'Connor joined in Justice Stevens's opinion.

[69] *Id.*

[70] *Id.* (emphasis added). He drew this conclusion from the Court's decisions in Murray v. Carrier, 477 U.S. 478, 496 (1986) (in those cases in which a "constitutional violation *has probably* resulted in the conviction of one who is actually inno-

well-functioning standard and disagreed with the majority's imposition of such a severe burden on the capital defendant.[71] Justice Stevens concluded that the Court had created a "perverse double standard" by imposing a more stringent standard of evidence in determining whether there has been a miscarriage of justice in a capital case than in a non-capital case. He argued that the standard instead should allow the capital defendant to "show that he is probably—that is, more likely than not—innocent of the death sentence."[72]

Justice Stevens also criticized the majority for limiting the consideration of evidence to aggravating factors and not extending the showing to mitigating factors. He stated that the majority's decision is a "startling anomaly" against the "backdrop of well-settled" capital punishment jurisprudence, and that "the Court's impoverished vision of capital sentencing is at odds with both the doctrine and theory developed in our many decisions concerning capital punishment."[73] He thus advocated extending such an evidentiary showing to additional mitigating factors.

Justice Stevens concluded that for the purposes of habeas

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cent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default") (emphasis added) and Smith v. Murray, 477 U.S. 527 (1986) (the Court repeated the *Carrier* standard and applied it in a capital sentencing proceeding). *See also* Dugger v. Adams, 489 U.S. 401, 412 n.6 (1988) (the Court stated the controlling standard as whether "an individual defendant probably is actually innocent of the sentence received.").

[71] 112 S. Ct. at 2532.

[72] *Id.* at 2533. Justice Stevens explained that the double standard was created because a "defendant raising defaulted claims in a non-capital case must [only] show that constitutional error *'probably resulted'* in a miscarriage of justice, [while] a capital defendant must present *'clear and convincing evidence'* that no reasonable juror would find him eligible for the death penalty." *Id.*

[73] *Id.* at 2534. Justice Stevens explained that the constitutional requirements emphasized in Gregg v. Georgia, 428 U.S. 153, 188 (1976)—that "the death penalty [may not] be imposed under sentencing procedures that creat[e] a substantial risk that [the death penalty] would be inflicted in an arbitrary and capricious manner"—yielded two general principles: (1) a sentencing scheme must narrow the class of persons eligible for the death penalty, *see, e.g.*, Zant v. Stephens, 462 U.S. 862 (1983); and (2) the sentencer must not be precluded from considering as a mitigating factor "any aspect of defendant's character . . . that the defendant proffers as a basis for a sentence less than death." *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 604 (1978). Given this framework, Justice Stevens concluded that "the Court implicitly repudiates the requirement that the sentencer be required to consider all relevant mitigating evidence," and that this may lead to a non-individualized determination of a proper sentence. *Sawyer*, 112 S. Ct. at 2533-35.

review, a "clearly erroneous" standard should be utilized when determining whether or not a capital defendant is "innocent of the death sentence."[74] Nonetheless, like the majority, he did not think that Sawyer demonstrated that "it was more likely than not that his death sentence was clearly erroneous" and was not persuaded that the evidence Sawyer presented in support of his claim would have changed the jury's determination.[75]

II. *SAWYER* AND THE PERVERSION OF RELIABILITY

A. *The Bedrock Principles of the Death Penalty*

Since the Supreme Court's decision in *Furman v. Georgia*,[76] capital punishment jurisprudence has been anchored on the principle of heightened reliability of the process at both the trial and the penalty stages of capital proceedings.[77] In *Furman* the Court, emphasizing the uniqueness of death as a punishment, struck down all state capital punishment statutes as unconstitutional under the Eighth Amendment.[78] The Court was concerned that the Georgia statute, and others like it, resulted in an arbitrary, if not "wanton and freakish," imposition of death as a punishment.[79] Justice Brennan explained

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[74] *Id.* at 2536. Justice Stevens added that "[a] death sentence is 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." *Id.*

[75] *Id.* at 2538.

[76] 408 U.S. 238 (1972).

[77] Johnson v. Mississippi, 486 U.S. 578 (1988) (allowing a death sentence to stand when based in part on a vacated conviction from another state violates the Eighth Amendment); Sumner v. Shuman, 483 U.S. 66 (1986) (statute that mandates the death penalty for a prison inmate who is convicted of murder while serving a life sentence without possibility of parole violates the Eighth and Fourteenth Amendments); Beck v. Alabama, 447 U.S. 625 (1980) (a jury in a capital case must be permitted to consider a verdict of guilt of a lesser included non-capital offense where the evidence would support such a verdict); Lockett v. Ohio, 438 U.S. 586 (1978) (to meet constitutional requirements, state must not preclude consideration of mitigating evidence during the penalty trial); Woodson v. North Carolina, 428 U.S. 280 (1976) (North Carolina's mandatory death sentence statute violates the Eighth and Fourteenth Amendments); Gregg v. Georgia, 428 U.S. 153 (1976) (bifurcated capital trials result in heightened reliability).

[78] 408 U.S. at 239.

[79] *Id.* at 310 (Stevens, J., concurring). "I simply conclude that the Eighth and

in his concurrence that "[w]hen a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied," and that to dispel this inference "would indeed require a clear showing of non-arbitrary infliction."[80] The Court, however, stopped short in *Furman* of declaring capital punishment *per se* unconstitutional, thus leaving open the possibility that a state death penalty statute would be upheld if such a statute was drafted to prevent an arbitrary and capricious imposition of death.[81]

Four years later in *Gregg v. Georgia*[82] the Supreme Court explained that the concerns of *Furman* "can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance."[83] The Court then went on to hold that the amended Georgia statute, which called for, *inter alia*, a bifurcated capital proceeding, allayed the concerns of the *Furman* Court.[84] By requiring the jury to consider the specific circumstances of the crime and criminal

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Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." *Id.* Justice White, in his concurrence, added that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring).

[80] 408 U.S. at 293 (Brennan, J., concurring). In dissent, however, Chief Justice Burger replied that "[t]his claim of arbitrariness is not only lacking in empirical support, but also it manifestly fails to establish that the death penalty is cruel and unusual." *Id.* at 399.

[81] Justices Brennan and Marshall advocated that the death penalty be declared unconstitutional *per se*: "Death is truly an awesome punishment. The calculated killing of a human being by the state involves, by its very nature, a denial of the executed person's humanity." *Id.* at 290 (Brennan, J., concurring). Justice Marshall wrote that "[i]n striking down capital punishment . . . [w]e achieve a major milestone in the long road up from barbarism and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment." *Id.* at 371.

[82] 428 U.S. 153 (1976).

[83] *Id.* at 188.

[84] *Id.* In the bifurcated proceeding, the guilt phase of the capital trial proceeds in the same manner as a non-capital trial. Then, if the defendant is found guilty, another "trial" is held on the issue of the sentence to be imposed. The Court explained that the Georgia statute narrowed the class of murderers subject to capital punishment by specifying ten aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a defendant may be sentenced to death. *Id.* at 196-97.

before sentencing, the state's procedure prevented the imposition of death based on the arbitrary whim of the jury.[85]

As a result of the standards set forth in *Gregg*, "heightened reliability at both phases of a capital trial is now firmly established as a requirement for the imposition of a sentence of death and has served as the foundation for the construction of rules applicable only in capital trials."[86] In numerous decisions in the wake of *Gregg* the Supreme Court has reasoned that a procedure designed to reflect a heightened awareness of due process is more likely to result in a reliable and, therefore, constitutional death sentence.[87] For example, the Court has stated that the capital defendant should be given the opportunity to supply the sentencer with any mitigating evidence relating to the defendant's character or record that might justify a sentence less than death.[88] The Supreme Court has also held that the jury in a capital trial must be permitted to consider a verdict of guilt of a lesser included non-capital offense where the evidence might support such a verdict.[89] Addition-

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[85] *Id.* at 197. "[T]he [jury] discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application." *Id.* at 197-98. *See also* McGill, *supra* note 29, at 217 ("Two principles that are inherent in reliability and required by eighth amendment jurisprudence are 'individualized sentencing' and 'guided sentencing discretion.'").

[86] George Wesley Sherrell, Jr., Note, *Successive Chances for Life:* Kuhlmann v. Wilson, *Federal Habeas Corpus, and the Capital Petitioner*, 64 N.Y.U. L. REV. 455, 478 (1989).

[87] *See* McGill, *supra* note 29, at 216-17. "The imposition of death mandates reliability in the capital convicting and sentencing procedures." *Id*; *see also* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (because death is qualitatively different from life imprisonment, there is a need for reliability in the determination that death is the appropriate sentence).

[88] Lockett v. Ohio, 438 U.S. 586, 604 (1978). The *Lockett* Court stated:

> Given that the imposition of death . . . is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases.

Id. at 605; *see also* Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987) (unanimous Court invalidated a death sentence because "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances").

[89] Beck v. Alabama, 447 U.S. 625, 637 (1980):

> [W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the 'third option' of convicting on a lesser included of-

ally, the Court has held that it is unconstitutional to rest a death sentence on a verdict made by a sentencing jury that was led to believe that the responsibility for determining the appropriateness of the defendant's death rests with another body for later review.[90] It thus appears that reliability of the trial and sentencing procedures is the cornerstone of death penalty jurisprudence; if reliability is eroded, the constitutional principles upon which the death penalty is based will likewise collapse.

B. *Flaws With the* Sawyer *"Actual Innocence" Definition*

According to the majority's decision in *Sawyer*, any definition of actual innocence must reflect both the objective factors that make the petitioner eligible for the death penalty and the subjective factors that prevent a death sentence from being imposed in an arbitrary manner.[91] This statement accurately reflects the operation of the constitutional principles as previously enunciated by the Supreme Court.[92] It therefore appears that the *Sawyer* majority properly outlined its task at the start of its opinion: to stay within the constitutional bounds of the death penalty, both objective and subjective factors must be considered in any definition of "actual innocence." The end result, however, was that the Court failed to accomplish what it had recognized as its proper task. The definition of "actual innocence" finally settled upon by the majority in *Sawyer* does not reflect the constitutional mandate for heightened reliability during capital proceedings for two reasons. First, the majority's definition does not allow the capital petitioner to introduce mitigating evidence in an "actual innocence" inquiry. Second, the majority improperly narrowed the focus of the "actual innocence" determination to include only the *eligibility* of the petitioner for the death sentence.

The *Sawyer* Court improperly limited the scope of actual innocence by not allowing the petitioner to show mitigating

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fense would seem inevitably to enhance the risk of an unwarranted conviction; [such a risk cannot be tolerated in a case in which the defendant's life is at stake].

[90] Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985).

[91] *Sawyer*, 112 S. Ct. at 2520-21.

[92] *See supra* notes 76-90 and accompanying text.

evidence in support of his claim.[93] One of the cornerstones of the constitutional imposition of the death penalty is the assurance "that a capital sentence is the product of individualized and reasoned moral decisionmaking."[94] To this end, the Supreme Court previously expressed in *Lockett v. Ohio*[95] that "the sentencer . . . [must] 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."[96] The Supreme Court actually has gone so far as to classify the consideration of mitigating evidence "constitutionally indispensable" to the process of inflicting the death penalty.[97] Thus, the sentence imposed should reflect a reasoned, *moral* response to the defendant's background, character, and crime.[98]

By ignoring the principle of *Lockett*, the Supreme Court's "impoverished vision of capital sentencing" in *Sawyer* contradicts much of past capital punishment adjudication.[99] In *Sawyer* the Court has diluted the notion of heightened reliability in capital proceedings. Where the decision in *Lockett* was seen as necessary to ensure compliance with the constitutional standards set forth in *Gregg v. Georgia*,[100] the majority's decision in *Sawyer* to forego the use of mitigating evidence upon review of a successive or repetitive petition is a clear signal that heightened reliability is not as significant a factor at this later point in the proceedings.

Reliability has also been undercut due to the majority's

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[93] 112 S. Ct. at 2521.

[94] *Id.* at 2534. "The nonarbitrariness—and therefore the constitutionality—of the death penalty rests on individualized sentencing determinations." *Id.*

[95] 438 U.S. 588 (1978).

[96] *Id.* at 604 (emphasis omitted). Justice Stevens added that "[w]e have reiterated and applied this principle in more than a dozen cases over the last 14 years." *Sawyer*, 112 S. Ct. at 2534.

[97] Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

[98] *See* California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J.) ("*Lockett* . . . reflects the belief that punishment should be directly related to the personal culpability of the criminal defendant."); *see also* Zant v. Stephens, 462 U.S. 862, 879 (1983) ("[W]hat is important is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.").

[99] *Sawyer*, 112 S. Ct. at 2534 (Stevens, J., concurring).

[100] *See supra* note 82-83 and accompanying text.

determination that the focus of the inquiry into "actual innocence" must be narrowed to include only *eligibility* of the petitioner for the sentence imposed.[101] In other words, upon review of a successive or repetitive petition, the federal reviewing court will only examine whether or not the death penalty was properly given to this particular petitioner with no further review of whether or not the jury's conclusion that the petitioner now before the court is the correctly condemned person. In light of the many concerns expressed in *Furman* and *Gregg* about wanton and arbitrary imposition of the death penalty, it seems perverse to become firmly settled on executing a particular individual without conducting a full analysis, especially when serious doubts are raised—even if in a successive or repetitive petition.

Indeed the *Gregg* Court noted that meaningful appellate review in capital cases "serves as a check against the random or arbitrary imposition of the death penalty."[102] More recently, however, the Court has stated that a more scrutinizing standard of review is not required in federal habeas corpus proceedings just because a death sentence has been imposed.[103] The implication, therefore, is that the procedural safeguards at the trial stage mandated by the post-*Furman* line of cases are sufficient to assure heightened reliability of the trial and sentencing process.[104] This would certainly explain the *Sawyer* majority's decision to take as presumptively valid the prior determination that the correct individual has been chosen for execution and, therefore, to limit any review of the circumstances surrounding such a determination.[105]

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[101] 112 S. Ct. at 2523.

[102] 428 U.S. at 195.

[103] Murray v. Giarratano, 492 U.S. 1, 9 (1989).

[104] *Giarratano*, 492 U.S. at 10.

[105] In *Murray*, Justice O'Connor wrote that a "post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment." *Id.* at 13 (O'Connor, J., concurring). Similarly, the Court in Barefoot v. Estelle, 463 U.S. 880 (1983) noted that: "The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay execution indefinitely." *Id.* at 887; *see also* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1 (1990) (discussing intentional delay and time limitations with regard to federal writs of habeas corpus).

Of course, at some point the litigation must come to an end. Indeed, the *Kuhlmann* decision, where the "actual innocence" standard was first articulated, relied on the concept that even prisoners whose guilt is conceded or plain have an interest in ensuring that litigation will eventually end, so that conviction will become a certainty, and that they can focus their attention towards rehabilitation and restoration to a useful place in the community.[106] Capital petitioners, however, have no such interest. They will never be returned to the community; even if granted habeas relief, they neverteless will spend the rest of their lives in prison and at best they will get a new trial. Capital petitioners have nothing to lose by repeatedly attacking their sentences and convictions.

Nevertheless, the Court has stated that ideally, direct appeal is the primary avenue for review of convictions and sentences, including those in capital cases; following this direct review the interests of finality and legality attach to the proceedings.[107] Justice Stevens, however, has criticized this supposition and pointed out in *Murray v. Giarratano*[108] that there is significant evidence that in capital cases, "direct review does not sufficiently safeguard against miscarriages of justice to warrant this presumption of finality" in the proceedings.[109] Since it has been established that meaningful appellate review is necessary to satisfy the heightened reliability standards of the death penalty, it appears that by not allowing the capital petitioner to question the established presumption that he is the one to be executed, the *Sawyer* Court has ignored the significance that attaches to such review in a capital case. As a result, by narrowing the focus of "actual innocence" to only the eligibility of the specific petitioner to receive the death penalty, reliability of the proceedings does not stand up to the lofty standards previously established by the Supreme Court.

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[106] Kuhlmann v. Wilson, 477 U.S. 436 (1986).

[107] *Barefoot*, 463 U.S. at 887 (1982).

[108] 492 U.S. 1 (1989).

[109] *Id.* at 23. According to Justice Stevens, "federal habeas courts granted relief in only .25% to 7% of non-capital cases in recent years, [while,] in striking contrast, the success rate in capital cases ranged from 60% to 70%." *Id.* at 23-24 (Stevens, J., dissenting). He concluded that meaningful appellate review in a capital case extends beyond direct review. *Id.*

C. Sawyer *and the Shrinking Role of the Federal Judiciary*

Not infrequently, a defendant will try more than once to gain federal habeas corpus relief.[110] Thus, the Supreme Court in *Sanders v. United States*[111] developed its earliest guidelines for lower federal courts to follow when confronted with successive habeas corpus petitions from state prisoners. Taking the view that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged," the Court concluded that "[t]he inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ."[112] Specifically, the *Sanders* Court held that when a successive petition is based on grounds previously heard and determined, controlling weight may be given to a denial of a prior application for federal habeas relief only if: (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application; (2) the prior determination was on the merits; and (3) the ends of justice would not be served by reaching the merits of the subsequent application.[113] Thus, the Court held to its past refusal to interject res judicata concerns into habeas law, and outlined a permissive, as opposed to mandatory, standard for dismissal of successive applications which raise grounds previously heard and determined.[114] Moreover, when the successive application for federal habeas relief is based upon allegations not raised or adjudicated in prior applications, the courts must give "full consideration" to the merits of subsequent applications provided that the petitioner has not abused the writ.[115]

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[110] Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9, 16 (1990). "[N]eedless to say, [death-row inmates have] the greatest incentives to pursue their claims as long as possible. They are the ones who most clearly perceived that mere protraction of their litigation, even without great hope of ultimate success, was beneficial." *Id.*

[111] 373 U.S. 1 (1963).

[112] *Sanders*, 373 U.S. at 8 (emphasis omitted).

[113] *Id.* at 15.

[114] Sherrell, *supra* note 86, at 455 (arguing that the *Sanders* decision emphasized judicial discretion and guaranteed the constitutionality of a petitioner's incarceration above notions of finality).

[115] *Sanders*, 373 U.S. at 17. An early example of abuse of the writ is Wong Doo v. United States, 265 U.S. 239 (1924), where the petitioner, in his first applica-

The Supreme Court in *Sanders* also clarified the meaning of 28 U.S.C. section 2244.[116] According to Justice Brennan, this statute was "not intended to change the law [concerning successive petitions] as judicially evolved."[117] The spirit of habeas corpus was, therefore, to remain undisturbed by the codification of the rules for adjudicating successive petitions. Thus section 2244 retained the principle of sound judicial discretion

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tion, tendered two grounds of relief but offered no proof for the second ground. When the first petition was denied, he filed a second application relying only on that second ground. *Id.* In denying relief, the Court stated:

> The petitioner had full opportunity to offer proof of [the second ground] at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of habeas corpus.

Id. at 241. The principle of "abuse of the writ" was subsequently codified in 28 U.S.C. § 2244(b), which states in part:

> When . . . a person in custody . . . has been denied . . . release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application . . . need not be entertained . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

28 U.S.C. § 2244(b) (1982); *see also* John B. Morris, *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 YALE L.J. 371, 375 (1985) ("[F]ederal court must reach the merits of a new claim unless the court concludes that the claim was deliberately withheld or abandoned, or unless the petitioner exhibited inexcusable neglect in failing to assert the claim earlier.") (emphasis omitted).

[116] 373 U.S. at 11-14.

[117] *Id.* at 11. The Supreme Court first addressed the issue of successive petitions in Salinger v. Loisel, 265 U.S. 224 (1924). It held that common law res judicata principles do not apply to the denial of habeas corpus relief. *Id.* at 230. Taking an equitable approach, the Court maintained that successive petitions should be reviewed on a case-by-case basis guided by sound judicial discretion. *Id.* at 230-31. An example of this early equitable approach is Price v. Johnston, 334 U.S. 266 (1948), where the Court held that a petitioner's fourth application for federal habeas relief should not be denied since he had a good reason for failing to assert his claim earlier. *Id.* at 286. In so doing, the Court suggested that successive petitions should be permitted if for some justifiable reason the petitioner failed to assert his right previously. *Id.* at 289-91.

Justice Brennan also noted that the Reviser's Note to § 2244 disclaimed any intention to have the statute change the interpretation given the past case law. *Sanders*, 373 U.S. at 11. In addition, there was language in the original bill that would have injected res judicata into federal habeas corpus, but this language was deliberately left out of the final version of the statute. *Id.*

in reviewing a successive habeas petition.[118] According to section 2244(a), the judge is permitted, although not compelled, to decline to entertain a successive application, but "only if he is satisfied that the ends of justice will not be served by such an inquiry."[119] Lastly, the Court noted that section 2244 dealt only with the problem of successive habeas petitions based on grounds previously heard and decided; it did not address the issue of a second or successive application containing a ground not yet presented.[120]

In addition to clarifying the successive petition statute and providing lower federal courts with some guidance on how to rule on successive applications, the Court discussed the "ends of justice" exception to the denial of a petitioner's successive application.[121] Justice Brennan stressed that the burden is "on the applicant to show that . . . the ends of justice would be served by the redetermination of the ground" previously rejected on the merits.[122] The Court provided two examples of when the "ends of justice" might require a successive petition to be heard, but emphasized that this was not to be an exhaustive list of the situations when the "ends of justice" might require a new determination of a successive petition.[123] More importantly, Justice Brennan added, "the test is 'ends of justice,' and cannot be too finely particularized."[124] Therefore, the Court explicitly left open-ended its explanation of the "ends of justice," probably in the hope that lower court judges would use their sound discretion in determining when to entertain a successive petition that was previously denied.

Some years later, however, a plurality of the Court, unhappy with the guidelines for review established in *Sanders*,

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[118] *Id.* at 12.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 16-17.

[122] *Id.* at 17.

[123] *Id.* Justice Brennan stated that "if factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not full and fair." *See also* Townsend v. Sain, 372 U.S. 293 (1963). Another example is that "if purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application." *Sanders*, 373 U.S. at 17.

[124] *Id.*

held in *Kuhlmann v. Wilson*[125] that successive petitions for habeas relief may be entertained and, thus, the "ends of justice" will be met, only if the petitioner supplements his constitutional claim with a colorable showing of "factual innocence."[126] In so holding, Justice Powell considered the limited circumstances in which the interests of the prisoner in relitigating constitutional claims previously rejected on the merits would outweigh the interests served by according finality to the prior judgment.[127] This balancing test consisted of examining the prisoner's "vital interest" in having another chance to attack the constitutionality of his incarceration against the State's interest of finality in its criminal justice system.[128]

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[125] 477 U.S. 436 (1986) (opinion written by Powell, J., and joined by Burger, C.J., Rehnquist, J., and O'Connor, J.) The Court expressly outlined its task as one of providing a definition of the "ends of justice" consistent with legislative intent and the history of habeas corpus. *Id.* at 451-52.

[126] *Id.* at 454. As Justice Powell noted, the factual innocence standard was advocated by Judge Friendly. *Id.* Judge Henry J. Friendly argued that "a requirement that the prisoner come forward with a colorable showing of innocence identifies those habeas petitioners who are justified in again seeking relief from their incarceration." *Id.* (citing Friendly, *Is Innocence Irrelevant?, Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970)).

[127] *Kuhlmann*, 447 U.S. at 452. In justifying the need for a balancing test, Justice Powell noted that "the Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error," but instead, "the Court has performed its statutory task through a sensitive weighing of the interests implicated by federal habeas corpus adjudication of constitutional claims determined adversely to the prisoner by the state courts." *Id.* at 447-48.

[128] *Id.* at 452. The plurality acknowledged that the prisoner "retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated. That interest does not extend, however, to prisoners whose guilt is conceded or plain." *Id.* Indeed, "the guilty prisoner himself has 'an interest in insuring that there will at some point be the certainty that comes with an end to litigation.'" *Id.* (quoting Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting)).

The plurality, however, came down very strongly on the side of the State's interest. The "[a]vailability of unlimited federal collateral review to guilty defendants frustrates the State's legitimate interest in deterring crime, since the deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks." *Id.* at 452-53. In addition, finality serves the state's goal of rehabilitating those who commit crimes because finality allows the convicted defendant to realize that he is "justly subject to sanction." *Id.* at 453. "Finality also serves the State's legitimate punitive interests. When a prisoner is freed on a successive petition, often many years after his crime, the State may be unable successfully to retry him." *Id.* In a footnote, the Court stated that "[f]inality serves other goals important to our system of criminal justice and to

By adopting the "factual innocence" standard, Justice Powell stated that the Court was reflecting congressional intent only to grant successive habeas review in rare cases.[129] This conclusion, however, has come under criticism. One commentator has noted that "[n]either of the fundamental principles behind the *Sanders* standard—liberal access to habeas corpus and wide discretion for federal trial judges—were retained in *Kuhlmann*."[130] The Court, therefore, adopted far too stringent a standard in *Kuhlmann*, because the requirement of a colorable showing of factual innocence "presents capital petitioners seeking successive habeas review with a virtual insurmountable barrier to further review of their convictions."[131]

The *Sawyer* Court has even further—and inappropriate-

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federalism," including judicial economy, greater sanctity in state court judgements, and preservation by the states of the role as the enforcer of the criminal law. *Id.* at 453-54, n.16.

In McCleskey v. Zant, 111 S.Ct. 1454, 1469 (1991), the Court wrote that "[f]inality has special importance in the context of a federal attack on a state conviction." Some justices, however, have criticized basing any limitation of habeas corpus on concerns of federalism. Justice Blackmun has stated that "ours . . . is a federal republic, conceived on the principle of a supreme federal power and constituted first and foremost of citizens, not of sovereign states," while criticizing the Court for proceeding as though the states and federal government were co-equal when limiting access to habeas relief. Coleman v. Thompson, 111 S. Ct. 2546, 2570 (1991) (Blackmun, J., dissenting). Since federal habeas review of state court judgments does not invade the individual state's sovereignty, the exercise by federal courts of habeas corpus review exemplifies the full expression of federalism. *Id.* This is so because such review is "not a case of a lower court sitting in judgment on a higher court," but is instead intended to protect individual citizens from unconstitutional action by placing the federal courts between the states and the people, as guardians of the people's federal rights. *Id.* (quoting Brown v. Allen, 344 U.S. 443, 510 (1953)).

[129] *Kuhlmann*, 477 U.S. at 454. Earlier in his opinion, Justice Powell stated that "[t]he legislative history demonstrates that Congress intended the 1966 amendments, including those to § 2244(b), to introduce 'a greater degree of finality of judgements in habeas corpus proceedings.'" *Id.* at 450 (quoting S. REP. NO. 1797, 89th Cong., 2d Sess. 2 (1966)). Justice Powell, after citing various congressional records, added that "[i]t is clear that Congress intended for district courts . . . to give preclusive effect to a judgement denying on the merits a habeas petition alleging grounds identical in substance to those raised in the subsequent petition." *Id.* at 451.

[130] Sherrell, *supra* note 114, at 475 ("The court in *Kuhlmann* stripped federal judges of their discretionary powers by requiring a showing of factual innocence before granting relief," because before this decision, "district court judges had the freedom to consider the unique circumstances of each case, such as those of a capital cases.").

[131] *Id.*

ly—shifted the focus of habeas corpus review by placing the entire inquiry on actual innocence. However, as Justice Brennan noted in his *Kuhlmann* dissent, "[W]e have stated expressly that on habeas review 'what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved.'"[132] Indeed, the constitutional protection a criminal defendant receives should not depend on guilt or innocence.[133] Since "[f]undamental fairness is more than accuracy at trial [and] justice is more than guilt or innocence,"[134] the *Sawyer* Court's focus on a capital petitioner's innocence in habeas review ignores the importance of the need for stringent constitutional safeguards when death is at issue.

It is not just the focus of review that the *Sawyer* Court has changed, but the manner in which courts must approach successive petitions. In *Sanders v. United States*,[135] it was left to the "sound discretion of the federal trial judges" to decide whether the acceptance of a successive habeas petition would serve the ends of justice.[136] Thus, the *Sanders* Court outlined a permissive standard for dismissal of successive applications.[137] Indeed, it appears that Justice Brennan, in stating that the "ends of justice cannot be too finely particularized,"[138] left the definition of the ends of justice open-ended in the hope that lower court judges would use their sound discretion in determining when to entertain a successive petition.

Sawyer, however, effectively eliminated judicial discretion by announcing to lower federal courts that they may only determine that the ends of justice would not be served by dismissing the petition if the petitioner can demonstrate by "clear and convincing evidence that but for a constitutional error no

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[132] 477 U.S. at 466 (Brennan, J., dissenting) (quoting Moore v. Dempsey, 261 U.S. 86, 87-88 (1923)).

[133] Kimmelman v. Morrison, 477 U.S. 365, 380 (1986) ("[T]he constitutional rights of criminal defendants are granted to the innocent and the guilty alike.").

[134] *Sawyer*, 112 S. Ct. at 2530 (Stevens, J., concurring).

[135] 373 U.S. 1 (1963).

[136] *Id.* at 18.

[137] *See* Sherrell, *supra* note 114, at 460 (arguing that *Sanders* emphasized judicial discretion and guaranteed the constitutionality of a petitioner's incarceration above notions of finality).

[138] *Sanders*, 373 U.S. at 17.

reasonable juror would have found [him] . . . eligible for the death penalty."[139] Therefore, lower federal courts, which are obligated to apply the *Sawyer* test instead of relying on their own discretion, must effectively disregard *Sanders* as constitutional precedent, and with it any concern for a capital defendant's constitutional rights.

III. THE PRACTICAL RESULT OF *SAWYER*: THE AMPLIFICATION OF PROBLEMS AT THE TRIAL LEVEL

The narrow definition of "actual innocence" proffered by the *Sawyer* Court, as well as the majority's repudiation of traditional liberal review of successive federal habeas petitions, both serve to place further importance on the trial and state review procedures of a capital case. This development is alarming. Capital defendants, an overwhelming number of whom are indigent, must often rely on court-appointed attorneys. These attorneys are usually both inexperienced and undercompensated, leading to error-filled trials which ultimately cause capital defendants to file more habeas petitions raising claims of ineffective assistance of counsel. The Supreme Court, however, cannot solve the growing problem of multiple petitions by cutting off the top of the tree in the hopes of making the tree shorter: this is what the *Sawyer* decision accomplished by narrowing federal review. Instead, the Court must seek a remedy for the failures it perceives in the capital process by attacking the problems at the root of the tree; that is, poor legal representation at the trial stage.

Virtually all prisoners on death row get "slapdash representation" from court-appointed counsel at trial and at the direct appeal stage.[140] Indeed, the quality of defense counsel in a capital case, while being a crucial factor, is somewhat arbitrary and beyond the power of the typical capital defendant

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[139] *Sawyer*, 112 S. Ct. at 2517; *see also* K. Daniel, Sawyer v. Whitley: *The Deadly Game of Procedures in Death Penalty Rules*, 61 U.M.K.C. L. REV. 599 (1993) (noting that the federal courts are following *Sawyer's* mandate).

[140] Stuart Taylor, Jr., *Devaluing Liberty*, MANHATTAN LAW., July-Aug. 1991, at 15, 20; *see also* Debra Cassens Moss, *Death, Habeas, and Good Lawyers*, A.B.A. J., Dec. 1992, at 82 ("[P]oor people and minorities are often represented by court-appointed lawyers who are inexperienced, who do not object, and who do not prove up the facts.").

to control.[141] Capital litigation is extremely complex; it is the rare court-appointed attorney who is skilled in all its intricacies.[142] In fact, it is difficult for even a trained lawyer to handle a capital case effectively.[143]

It is painfully obvious that the competency of counsel can sometimes mean the difference between life and death.[144] For example, David E. Riggins was scheduled to be executed by lethal injection in Nevada for a brutal stabbing murder in 1987.[145] The Supreme Court, however, reversed his death sentence on the grounds that Riggins was medicated against his will at the trial.[146] Interestingly, Riggins was not represented on appeal by court-appointed counsel, but was represented on a *pro bono* basis by the powerful New York City law firm Paul, Weiss, Rifkind, Wharton & Garrison.[147] As a re-

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[141] Ronald Taback, *Death Penalty Fails Under Cost-Benefit Analysis*, MANHATTAN LAW., July-Aug. 1990, at 17.

[142] Richard Lacayo, *You Don't Always Get Perry Mason*, TIME, June 1, 1992, at 38, 39. Chief Justice Harold G. Clarke of the Georgia Supreme Court has noted that "this is a highly specialized area of the law." *Id.* "Even a good criminal lawyer may not have had much, if any, experience in capital cases." *Id.*; *see also* Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 296 (1991) (contending that "death penalty cases invariably involve 'extraordinary circumstances and unusual representation,'" and as a result death penalty litigation has become highly specialized; few attorneys have even a surface familiarity with seemingly innumerable refinements put on *Gregg* and its progeny) (quoting White v. Board of Comm'rs, 537 So. 2d 1376, 1380 (Fla. 1989)).

[143] Murray v. Giarratano, 492 U.S. 1, 28 (1982) (Stevens, J., dissenting).

[144] Stephen Bright, the Director of the Southern Center for Human Rights, has commented that "[i]f ever it has been true that having a high-priced lawyer is outcome determinative of your case, that is true today." Moss, *supra* note 135, at 83. Other experts have noted that many notorious murderers who might be perceived as deserving of capital punishment nevertheless escape it. *See* Paduano & Smith, *supra* note 142, at 287. This group includes Wayne Williams, the Atlanta Child Murderer. *Id.* Paduano and Smith point out that when Williams faced the highly-publicized trial, "he did so with well-respected lawyers at his side, who, for a significant period of time, devoted their entire practices to his representation." *Id.* at 288. Paduano and Smith concluded that the high quality of legal representation in notorious cases disproportionally results in sentences other than death. *Id.* at 288. There are no empirical studies linking the effort made by quality trial counsel to the sentences received, however, due to the difficulty of making such a study. *Id.* at 288-89 n.22.

[145] *See* Daniel Wise, *Death Penalty Appeal Won by Paul Weiss*, N.Y. L.J., June 5, 1992, at 1.

[146] *Id.* at 2.

[147] *Id.* at 1.

sult, the defense was able to line up world-class experts in both death penalty and mental health law while committing eight months and $125,000 worth of free legal work to the case.[148] Paul Weiss has been very successful in handling capital cases: only one of their sixteen death row clients has been executed.[149]

Even the most competent counsel often cannot save a capital defendant who received woefully inadequate representation at the trial level.[150] The highly publicized case of Roger Keith Coleman vividly illustrates this point.[151] Coleman was convicted in 1982 of murdering his sister-in-law.[152] At his trial, Coleman was represented by two court-appointed attorneys, one who was only two years out of law school and had previously tried only one other murder case, and the other was similary unqualified.[153] Not surprisingly, Coleman's representation was cursory at best.[154] The attorneys did little or no investigative work. Neither attorney ever retraced Coleman's steps on the night of the murder or went inside the victim's or Coleman's house, nor did they fully investigate the alibi de-

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[148] *Id.*

[149] *Id.* at 2.

[150] *See* J. Thomas Sullivan, *A Practical Guide to Recent Developments in Federal Habeas Corpus for Practicing Attorneys*, 25 ARIZ. ST. L.J. 317 (1993) ("To properly preserve the criminal defendant's ultimate option of filing for federal review, defense counsel must be cognizant of the procedural context in which claims of federal violations must be presented at each stage in the litigation.").

[151] *See* Marcia Chambers, *Sua Sponte*, NAT'L L.J., Apr. 20, 1992, at 15; Stephen Chapman, *Speaking Up: Punishment Can Hasten Injustice*, CHI. TRIB., Apr. 26, 1992, at 3; David A. Kaplan & Bob Cohn, *Hung on a Technicality*, NEWSWEEK, Apr. 6, 1992, at 56; David G. Savage, *Virginian Nears Execution Despite Doubt About Guilt*, L.A. TIMES, May 13, 1992, at A1; Smolowe, *supra* note 2 at 40; John Tucker, *Dead End: Roger Coleman vs. William Rehnquist*, NEW REPUBLIC, May 4, 1992, at 21.

[152] The Virginia Supreme Court affirmed both the conviction and sentence. *See* Coleman v. Commonwealth, 307 S.E.2d 864 (Va. 1983).

[153] Jill Smolowe, *Must This Man Die?*, TIME, May 18, 1992, at 43. Additionally, Coleman's young lawyer had actually told the judge at the start of the proceedings that he would "prefer not to" handle the case. *Id.*

[154] For example, Coleman's counsel failed to appear at the hearing on a motion to change the venue of the proceedings. *See* Chambers, *supra* note 151, at 16. As a result, the inflammatory nature of the case led to "strong community sentiment" against Coleman. *Id.* at 15. Another writer noted that "[t]he courthouse should have had a big top," as people held up signs proclaiming "Time For Another Hanging" as they lined up for seats in the gallery. Kaplan & Cohn, *supra* note 151, at 56.

fense or probe the police and sheriff reports.[155] Coleman's appellate counsel—Philip Horton and Kathleen Behan of Arnold & Porter in Washington, D.C.—contended that the trial lawyers "failed to formulate any plan or strategy, or to interview or subpoena any mitigation witnesses" before the penalty phase of the proceedings.[156] "Had counsel prepared," they added, "they could have found numerous witnesses who would have testified to Mr. Coleman's good character, employment, [and] education record," such as his family, friends, and coworkers.[157] Moreover, in the long period between his conviction and eventual execution, the tangled "web of evidence" that led to Coleman's conviction began to unravel.[158]

Unfortunately, no court ever heard any of the evidence that might have exonerated Coleman. Coleman's appointed attorneys had filed a notice of appeal to the state court's denial of state habeas relief three days late, and the Virginia Supreme Court dismissed the action for relief.[159] Upon his appeal to the federal courts by way of habeas corpus, the district court concluded that by virtue of the Virginia Supreme Court's dismissal of the appeal from his state habeas petition, Coleman's claims were procedurally defaulted.[160] The Fourth Circuit affirmed.[161] It stated that the Virginia Supreme Court's decision rested on independent and adequate state grounds and, as a result, federal review of the claims was

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[155] *See* Chambers, *supra* note 151, at 15-17. Coleman appeared to have a solid alibi of his whereabouts at the time of the murder, but the prosecution was able to discredit enough of the testimony to secure a conviction. *Id.* The State was able to open up a 30-minute gap in Coleman's story, arguing that within that gap, "Coleman parked his truck, waded across a creek, climbed a hill the length of three football fields, raped . . . [the victim] twice, slit her throat, [and] then escaped unseen." *See* Smolowe, *supra* note 153, at 42. Coleman's defense attorneys never offered to explain why Coleman's clothes worn at the time of the murder were not covered with blood given the gory nature of the crime. *Id.* at 44. Additionally, his attorneys did not measure the water marks on Coleman's pants to see if they matched the height of the creek. Nor did they investigate evidence at the crime scene that suggested an outdoor struggle had ensued, even though Coleman's appearance evinced no signs of such a struggle. *Id.*

[156] Chambers, *supra* note 151, at 17.

[157] *Id.*

[158] Tucker, *supra* note 151, at 24.

[159] Coleman v. Thompson, 895 F.2d 139, 142 (4th Cir. 1990), *aff'd*, 111 S. Ct. 2546 (1991).

[160] Coleman, 895 F.2d at 142.

[161] *Id.* at 147.

barred due to the state procedural default.[162] The Supreme Court affirmed, holding that counsel's failure to file timely notice of appeal in state court precluded federal habeas review.[163] Ultimately, the Supreme Court, *per curiam*, denied Coleman's final attempt to stay the execution.[164] Thus, the mistakes made by Coleman's trial attorneys, even if inadvertent, snowballed as the case wore on. Coleman was eventually executed without a full hearing on new evidence uncovered by subsequent investigation.[165]

The blame in cases such as *Coleman*, however, must not fall totally on the attorneys themselves. These attorneys face many burdens in capital cases which their counterparts in non-capital cases do not necessarily face. First, the many protections designed to minimize the unfairness of a capital trial pose "unique obstacles for defense counsel."[166] Second, "more important issues often arise in capital cases than in non-capital cases" because rare statutory and constitutional rights come into play in the capital process.[167] Also not to be overlooked is the "very human burden" that an attorney in a capital case must bear.[168] The attorney in a capital case is not only faced with the most serious penalty imposed by law, but often must also face hostile publicity: just as the accused is vilified, so too may be counsel for representing this individual.[169]

The most discouraging burden a court-appointed capital attorney faces is the fee restrictions, which place woefully inadequate ceilings on the resources available to the attorney in the struggle to provide an effective defense. Capital cases are difficult enough, but are made nearly impossible by the

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[162] *Id.* at 143-44.

[163] Coleman v. Thompson, 111 S. Ct. 2546, 2553-68 (1991).

[164] Coleman v. Thompson, 112 S. Ct. 1845 (1992) (per curiam).

[165] Dissenting from the final denial of a stay of execution, Justice Blackmun wrote that "Coleman has now produced substantial evidence that he may be innocent of the crime for which he was sentenced to die." *Id.* (Blackmun, J., dissenting).

[166] *See* Paduano & Smith, *supra* note 142, at 291 ("[T]hese protections create nightmarish procedural and substantive obstacles for even the most experienced trial lawyer."). *Id.* at 291.

[167] *Id.* at 295-97.

[168] *Id.* at 299.

[169] *Id.* at 295, 299.

fact that "for his troubles counsel is paid a fee by the state that is in all instances a substantial discount from his stated rate, and, in most cases, absurdly and unfairly low."[170] The current mean compensation in the four states that have carried out the most executions since 1976—Texas, Florida, Louisiana, and Georgia—hovers around $2000 per case.[171] One attorney, commenting on the $1000 fee cap in her state, said, "I burn up $1000 worth of work in the first week on a capital case," and noted that she will probably spend 1000 hours on her present case, which amounts to "well over $100,000 of my time."[172]

The low fees paid to appointed counsel have a negative affect on the adequacy of the representation given to capital defendants. By not paying counsel adequate rates, "capital defendants are deprived of the most vigorous defense available, [a defense] to which they are constitutionally and morally entitled."[173] The state has a compelling interest that a capital defendant "at the trial level be given a realistic and meaningful opportunity to assert and enjoy all rights secured to him by the [c]onstitution and laws."[174] The low fee caps, however, make it very difficult for states to secure counsel for a capital defendant and the state must therefore settle for a less experienced attorney.[175] As a result, some states recently have reformed their fee arrangements.[176] Others have argued that the low dollar limits favored by state statutes should be set aside by courts under their inherent judicial authority.[177] It is abundantly apparent that if the quality of representation of capital defendants at the trial level does not improve, these individuals will have little hope of relief at the federal level because the narrow standards of review established by decisions such as *Sawyer* turn a blind eye toward the problems deeply rooted

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[170] *Id.* at 291-92; *see also* Lacayo, *supra* note 142, at 38. (in Georgia, for example, a private attorney may make upwards of $75 an hour, while court-appointed lawyers are paid about $30 an hour).

[171] Paduano & Smith, *supra* note 142, at 347 (emphasis omitted).

[172] Moss, *supra* note 135, at 85.

[173] Paduano & Smith, *supra* note 142, at 347.

[174] *Id.* at 325 (quoting Read v. State, 430 So. 2d 832, 841 (Miss. 1983)).

[175] *See* Moss, *supra* note 140, at 84.

[176] *Id.* at 85. In Mississippi, appointed lawyers are given $25 an hour overhead on top of the $1000 fee, while in Alabama, the $1000 fee cap is doubled in capital cases. *Id.*

[177] Paduano & Smith, *supra* note 142, at 347.

in the capital process.

CONCLUSION

The environment in which *Sawyer v. Whitley* was decided was punctuated by judicial activism resulting from the modern Court's hostility towards current administration of the death penalty. As the most recent incident in this continuing trend, *Sawyer* was a departure from the liberal standards of review established by earlier habeas cases and, more importantly, has pushed habeas corpus to the edge of the precipice on which the constitutionality of the death penalty is now balanced. A majority of the Court viewed the *Sawyer* decision as a remedy for the harm caused to the administration of justice by widespread availability of habeas corpus review to capital defendants. Instead of saving the integrity of the criminal justice system, however, *Sawyer* has opened the door wider to the possibility that an individual will be executed in violation of his constitutional rights.

The standard of review for successive, defaulted and abusive federal habeas petitions established by the *Sawyer* Court does not guard the federal rights of capital petitioners, but instead narrowly defines the circumstances in which a federal court can exercise its discretion to hear such claims. In so doing, the Court has restricted the opportunities in which federal courts are permitted to act as a buffer between the people and the state when a possible constitutional violation has occurred. In the absence of any effective federal review, a majority of the inmates sitting on death row today have slim hopes of having their judgments or sentences reviewed no matter how far their trials may have strayed from the principle of reliability that makes the death penalty constitutional.

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