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# Innocent of a Capital Crime: Parallels Between Innocence of a Crime and Innocence of the Death Penalty

Linda Carter
*Pacific McGeorge School of Law*



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# INNOCENT OF A CAPITAL CRIME: PARALLELS BETWEEN INNOCENCE OF A CRIME AND INNOCENCE OF THE DEATH PENALTY

Ellen Kreitzberg*

Linda Carter**

## I. INTRODUCTION

The death penalty continues to be a controversial topic in the United States today. Public debate ranges from the fundamental question of whether the death penalty is ever justified for a serious crime,[1] the legitimacy of lethal injection as a method of execution,[2] and, more recently, the likelihood of executing an innocent person. The modern death penalty statutes were enacted following *Furman v. Georgia*[3] in 1972. At that time, the Supreme Court struck down existing death penalty statutes finding that they were unconstitutional. Although there was no single, majority opinion, the "middle" of the Court found that the procedures involved in the existing death penalty statutes created a

* Professor of Law, Santa Clara University Law School. I would like to thank Santa Clara students Seth Gottlieb and Spencer Chen for their excellent research assistance.

** Professor of Law, University of the Pacific, McGeorge School of Law. I would like to acknowledge the excellent research assistance of McGeorge students Andrew McClelland, Ben Eilenberg, and Jennifer Alesio.

1. Linda Carter & Ellen Kreitzberg, *Understanding Capital Punishment Law* 7–16 (Lexis 2004). The book discusses the arguments for and against the death penalty. Initially, the analysis begins with the Eighth Amendment prohibition of "cruel and unusual punishment." The debate turns to penological purposes, such as deterrence and retribution. The remainder of the discussion focuses on equality, fairness, and politics, such as the fairness of the system and financial cost of executions. *See also* Richard Dieter, *Twenty Years of Capital Punishment: A Re-evaluation*, http://www.deathpenaltyinfo.org/article.php?did=543&scid=45 (June 1996) (discussing racial discrimination, inequality of the capital punishment system, deterrence, financial costs, and risk of executing the innocent and international developments).

2. *See e.g. LaGrand v. Stewart*, 173 F.3d 1144 (9th Cir. 1999); *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999); Henry Weinstein & Maura Dolan, *Judge Concludes Hearings on Lethal Injection*, L.A. Times, http://www.topix.net/content/trb/051482471639324089142834261343405935613 7 (Sept. 30, 2006) (U.S. district court judge conducted a four-day hearing to consider whether California's lethal injection execution method is unconstitutional because it amounts to cruel and unusual punishment); *see generally Lambright v. Lewis*, 932 F. Supp. 1547 (D. Ariz. 1996), *rev'd on other grounds sub nom. Lambright v. Stewart*, 167 F.3d 477 (9th Cir. 1999); *State v. Webb*, 750 A.2d 448 (Conn. 2000) (upholding lethal injection as constitutional).

3. 408 U.S. 238 (1972) (per curiam). The U.S. Supreme Court found the Georgia capital punishment statute unconstitutional, essentially striking down forty state death penalty statutes and invalidating six hundred death sentences. States responded with new death penalty statutes and procedures to avoid the arbitrary and capricious imposition of the death penalty. Five new state statutes went before the U.S. Supreme Court in 1976 and the Court upheld three out of five statutes. *Gregg v. Ga.*, 428 U.S. 153 (1976) (upheld); *Proffitt v. Fla.*, 428 U.S. 242 (1976) (upheld); *Jurek v. Tex.*, 428 U.S. 262 (1976) (upheld); *Woodson v. N.C.*, 428 U.S. 280 (1976) (invalidated); *Roberts v. La.*, 428 U.S. 325 (1976) (invalidated).

substantial risk that the death penalty would be imposed in an arbitrary and capricious manner.

In the years following, a complex system of laws, statutes, and procedures were enacted in an effort to satisfy the Court's concerns. These procedures were also designed to ensure, if not guarantee, that those who were convicted and sentenced to death were in fact guilty.[4] In 1976,[5] however, there was little discussion about whether the death penalty would be used to execute an innocent person.[6] At that time, courts were concerned about whether the death penalty served a legitimate penological purpose and whether inappropriate factors such as bias, discretion, geographical inequities, inadequate defense counsel, or race would play a role in the decision of who would live and who would die.

Today, those same concerns exist. However, the question of innocence now looms large in the debate. We now know that innocent people have been convicted and sentenced to death.[7] As one prominent legal scholar notes, "[w]e do in fact convict innocent people and do so in numbers, if not percentages, that should make us uncomfortable."[8] Those who had earlier supported the death penalty began to express concern about the execution of an innocent person.[9] Even Supreme Court Justices have spoken publicly about the reality that innocent people are sentenced to death.[10]

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4. *See Herrera v. Collins*, 506 U.S. 390, 420 (1993) (O'Connor, J., concurring) ("Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent.").

5. *Id.*

6. *See* Richard Rosen, *Innocence and Death*, 82 N.C. L. Rev. 61, 62–63 (2003) ("O'Connor's blithe confidence in the efficacy of our procedural protections in capital cases [as discussed in *Herrera*] was not challenged by any of the other Justices writing in that case, nor did her statement subject her to widespread criticism.").

7. From 1973 through September 17, 2006, 123 people had been released from death row on grounds directly related to innocence. Death Penalty Info. Ctr., *Innocence and the Death Penalty*, http://www.deathpenaltyinfo.org/article.php?did=412&scid=6 (accessed Sept. 17, 2006); *see* Rosen, *supra* n. 6, at 78–79 (noting that exculpations have come from DNA testing, confessions of actual parties to the crimes, new evidence, and the discrediting of prosecutorial evidence.).

8. *Id.* at 64.

9. Vincent F. Callahan, Jr., *Virginia Needs a Moratorium on the Death Penalty*, http://www.deathpenaltyinfo.org/article.php?scid=17&did=322 (Jan. 31, 2002) (Callahan, a representative of the 34th House of Delegates at the time of the article writes, "In the past, I have been a strong advocate of the death penalty. . . . [H]owever, I have now become one of those who believe we must take another look at the death penalty." He further states, "[n]ew scientific evidence, such as DNA testing, has revolutionized all areas of crime detection, criminal prosecution and criminal defense."); Jeff Flock, *"Blanket Commutation" Empties Illinois Death Row*, http://www.cnn.com/2003/LAW/01/11/ illinois.death.row/ (Jan. 13, 2003) (After thirteen inmates were exonerated, the outgoing governor, George Ryan, commuted all death sentences, stating "[o]ur capital system is haunted by the demon of error: error in determining guilt and error in determining who among the guilty deserves to die."); Gustav Niebuhr, *Tucker Case May Split Evangelical Christians*, N.Y. Times A20 (Feb. 4, 1998) (noting that a national broadcast of one death row defendant's Christian faith transformation sparked a national debate among Christian evangelicals about "where justice should end and mercy begin."); George Will, *Innocent on Death Row*, Wash. Post A23 (Apr. 6, 2000) (noting that Oklahoma almost put to death an innocent man on death row stating, "[c]onservatives, especially, should draw this lesson from the book: Capital punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order.").

10. *Atkins v. Va.*, 536 U.S. 304, 320 n. 25 (2002) (Justice Stevens voices concern that "in recent years a disturbing number of inmates on death row have been exonerated."); *O'Connor Questions Death Penalty*, N.Y. Times A9 (July 4, 2001) (In a speech to the Minnesota Women Lawyers Association, Justice O'Connor states, "if statistics are any indication, the system may well be allowing some innocent defendants to be executed."); *Justice: "Serious Flaws" in Death Penalty*, http://www.cnn.com/2005/LAW/08/07/death.penalty/index.html (Aug. 7, 2005) (Justice Stevens stated that "DNA evidence has shown that a substantial number of death

The public discussion of innocence has focused on a person who claims factual innocence of the crime charged. In capital cases, the crime is usually murder in the first degree.[11] An individual claims that he or she is not the person who committed the murder. From a legal perspective, innocence of the crime charged requires a showing that the government has failed to prove all elements of the crime.

A second concept of innocence in capital cases is "innocence of the death penalty" or "innocence of death."[12] The Supreme Court adopted this phrase to refer to those defendants who are not eligible for a sentence of death because the state is unable to prove the basic *eligibility* criteria for imposing a sentence of death.[13] When a defendant is innocent of the death penalty, the government has failed to factually prove a constitutionally mandated factor that places the defendant in the pool of persons who may be sentenced to death.[14]

It is easy to understand both the meaning and importance of not executing a person innocent of the underlying crime. Public awareness and concern of factual innocence of the crime gained momentum once DNA evidence provided the basis for a number of exonerations, including some from death row.[15] The public image of innocence is a man or woman who walks out of prison after years of wrongful incarceration.

Perhaps less dramatic but still constitutionally significant is the concept of innocence of the death penalty. There is no compelling public image for these men and women. A defendant innocent of the death penalty may still be guilty of the underlying crime of murder and therefore unlikely to garner public attention or sympathy. However, in such cases, an aggravating circumstance is entirely lacking and a defendant should not be among the pool of persons to whom the death penalty should apply. An example of an aggravating circumstance is a murder that is committed in the course of a rape. It is the added element of rape that places the defendant in the pool of death-eligible individuals. If the defendant killed the victim, but is factually innocent of raping the victim and rape is the only aggravating factor in the case, the death penalty cannot constitutionally be imposed. The defendant is "innocent of the death penalty" or innocent of the death-eligibility element. Although deserving of punishment, this individual should not be executed. He also should be afforded access to federal courts

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sentences have been imposed erroneously. . . . [I]t indicates that there must be serious flaws in our administration of criminal justice.").

11. *See* Carter & Kreitzberg, *supra* n. 1, at 85–93 (discussing nonmurder crime statutes making defendants eligible for death, such as child rape and federal espionage).

12. *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992).

13. *Id.* ("[I]nnocent of the death penalty [means] allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met." (internal quotation marks and footnote omitted)).

14. *See* Cal. Pen. Code § 190.2(a) (1999) (providing that the penalty is death or a life sentence without parole for a defendant found guilty of first degree murder along with a finding of special circumstances, such as evidence that the perpetrator was a major participant in the crime and acted with reckless disregard for human life; the murder was especially heinous, manifesting exceptional depravity; or the victim was a police officer). In all capital cases, these eligibility criteria include proof of at least one valid aggravating circumstance. Aggravating circumstances add an element based on the nature of the crime or the status of the victim. For example, typical aggravating circumstances include murders in the first degree committed in the course of serious felonies, such as rape, robbery, kidnapping, or arson; murders in the first degree committed with torture or double homicides; and murders in the first degree of a judge, prosecutor, witness, or juror. *See id.*

15. From 1973 through September 17, 2006, DNA played a substantial factor in establishing the innocence of fourteen people released from death row. Death Penalty Info. Ctr., *supra* n. 7.

equal to that of a person innocent of murder for reviewing claims related to innocence.

All questions of innocence of a crime are, at least initially, decided at trial. Culpability for the base crime, such as murder in the first degree, is decided during the guilt/innocence phase of a trial. In most jurisdictions, questions of innocence of the death penalty, or the existence of aggravating circumstances, are determined during a penalty phase. In some jurisdictions, the existence of an aggravating circumstance is decided during the guilt phase.[16]

There is overall agreement that the "trial is the 'main event'" where the question of innocence should be fully litigated.[17] In an effort to ensure a fair and reliable result at trial, the courts and the legislatures have established numerous procedural safeguards.[18] But sometimes a jury makes a mistake or just gets it wrong; a person who is factually innocent of murder is convicted of the crime or one who is factually innocent of the aggravating circumstance is found eligible for the death penalty.

What remedy is available to a person who is wrongfully found to be eligible for the death penalty? That is the question this article seeks to explore. The answer to the question is largely dependent on the availability of federal habeas corpus proceedings.[19]

The current habeas statutory provisions and judicial decisions from the last thirty years reflect particular concern with claims of innocence.[20] Despite the growing trend toward restricting access to federal court review, courts and legislatures continued to carve out exceptions based upon a sufficient showing of "innocence." The current habeas statute provides for relief from certain bars to habeas hearings upon a showing of innocence of the underlying offense.[21] Judicial decisions have carved a miscarriage-of-justice exception to habeas hearings upon a showing of "actual innocence" that includes innocence of the crime and innocence of the death penalty.[22]

We must begin, therefore, with an understanding of innocence. We will compare innocence of a crime with innocence of the death penalty and demonstrate how a claim of innocence under either definition must be afforded the same deference in obtaining access to federal court. This may arise under two distinct scenarios. First, a court may rule that a petitioner has failed to comply with a state procedural rule and his claims are now barred from federal court. These "procedurally defaulted" claims may still be

16. *Jurek*, 428 U.S. at 262–63.

17. *McFarland v. Scott*, 512 U.S. 849, 859 (1994) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)) ("A criminal trial is the 'main event' at which a defendant's rights are to be determined, and the Great Writ is an extraordinary remedy that should not be employed to 'relitigate state trials.'"); *see Holmes v. S.C.*, 547 U.S. 1727, 1728 (2006) (quoting *Crane v. Ky.*, 476 U.S. 683, 690 (1986)) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'").

18. *Herrera*, 506 U.S. at 410–17 (explaining the current mechanisms serving as protections for avoiding the execution of an innocent person).

19. Another post-conviction remedy is clemency. Clemency, however, is not a judicial proceeding and is reposed almost exclusively in the executive branch. Carter & Kreitzberg, *supra* n. 1, at 257. It is a process without standards, procedures, or effective review. Given the nature of clemency, it is a rare remedy for persons wrongfully convicted of a crime and even rarer for a person claiming a wrongful finding of an aggravating circumstance. As a result, we do not spend time discussing clemency in this article because, in reality, it is not a consistent or reliable remedy. *Id.* at 256–64.

20. *See id.* at 239; *see also Schlup v. Delo*, 513 U.S. 298 (1995); *Sawyer*, 505 U.S. at 366–67.

21. 28 U.S.C. §§ 2244(b)(2)(B), 2254(e)(2)(B) (2000).

22. *Sawyer*, 505 U.S. at 345.

heard in federal court when a petitioner raises a claim of actual innocence. We argue that these claims of innocence shold include claims of innocent of the death penalty. Second, we examine the changes in habeas corpus that were made in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[23] Although this legislation dramatically restricted a petitioner's ability to present claims, the bill did retain an exception for a petitioner who makes a sufficient showing of innocence. Because there is no explicit definition of innocence in the legislation, the question of whether the statute includes a claim of innocence of the death penalty within its purview has not yet been clearly determined. In this article we conclude that both claims of innocence of the crime and innocence of the death penalty should be included within the definition of innocence in AEDPA.

This analysis begins with an examination of the Court's Eighth Amendment jurisprudence and how this impacts the procedures that are required in a capital trial. Then we will present a brief review of habeas corpus law and the barriers that have been imposed to restrict federal court review of claims. We will explain how AEDPA modified the ability of a petitioner to get evidentiary hearings and imposed restrictions on the filling of second or successive petitions. Then, we will look at circumstances in which claims of innocence may be raised in a petition for habeas corpus.[24] Finally, we will compare the standards for review when claims of innocence are standing alone as the primary constitutional claim with claims of innocence that are coupled with other constitutional violations at trial to see how it impacts a petitioner's ability to prove innocence.

## II. EIGHTH AMENDMENT JURISPRUDENCE AND THE CONSTITUTIONALITY OF THE DEATH PENALTY

The 1970s and early 1980s mark the beginning of modern death penalty jurisprudence. In 1972, in *Furman v. Georgia*, the Court examined several existing death penalty statutes.[25] The Court observed that, in recent years, although large numbers of defendants were technically eligible for the death penalty, it was neither sought by the prosecutors nor imposed by juries. The Court was concerned that the death penalty was being imposed in an arbitrary, or even racially discriminatory, manner, striking unpredictably and destroying the confidence that the death penalty was reserved for the worst of the worst.[26] This concern led the Court to strike down almost all

23. Pub. L. No. 104-132, 110 Stat. 1215 (1996).

24. After a conviction at trial, a defendant may pursue a direct appeal to the appellate courts. This review, however, is not designed to examine questions of guilt or innocence but rather to look at the errors that the trial court may have made regarding admissibility of evidence, jury instructions, and perhaps the sufficiency of the evidence presented. *Herrera*, 506 U.S. at 402 (noting the "[i]nquiry does not focus on whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a rational decision to convict or acquit" (emphasis omitted)); *People v. Bolden*, 58 P.3d 931, 955 (Cal. 2002) (stating that appellate courts review "'the entire records in the light most favorable to the prosecution'" and the standard is whether "'a rational trier of fact could find the defendant guilty beyond a reasonable doubt'" (quoting *People v. Kipp*, 33 P. 3d 450 (Cal. 2001))); *Owens v. State*, 611 A.2d 1043, 1046 (Md. Spec. App. 1992) (noting that courts will not overturn a verdict if the jury's finding of guilt is "rational").

25. 408 U.S. 238.

26. *See* Carol Steiker & Jordan Steiker, *Defending Categorical Exemptions to the Death Penalty: Reflections on the ABA's Resolutions Concerning the Execution of Juveniles and Persons with Mental*

existing state statutes, finding that the procedures involved in existing death penalty statutes created a substantial risk that the death penalty would be imposed in an arbitrary and capricious manner.[27] The Court held that if states wanted to impose sentences of death, they needed more structure and consistency in the manner in which the sentences of death were decided. It was the unbridled discretion given to juries that made the existing death sentences unconstitutional.

The states responded by passing new death penalty statutes almost immediately. By 1976, there were more than 450 sentences of death around the country, and the Supreme Court was ready to review the new statutes. Five cases went to the Supreme Court that year. The Court struck down two statutes that imposed a mandatory death sentence on defendants convicted of capital murder.[28] Three of the statutes were upheld because the Court found that those statutes adequately addressed the constitutional defects that *Furman* found to be fatal.[29]

In reviewing the new statutes, the Court identified two distinct but critical aspects of a constitutional death penalty statute: (1) the discretion of the jury must be sufficiently directed and guided to ensure that the decision is not made in an arbitrary and capricious manner and (2) there must be an individualized determination of the sentence that considers both the crime as well as the character and background of the offender. It was in the penalty phase of the trial that new procedures were put into place to meet these constitutional requirements.

This structure provided the basis for the Court's Eighth Amendment jurisprudence: to determine whether a state statute adequately narrows the class of individuals eligible for a sentence of death and adequately allows for individualized consideration of the defendant.[30] States have adopted different methods for narrowing the class of death-eligible defendants.[31] In most statutes, this narrowing occurs through the use of a list of enumerated aggravating circumstances.[32] During the penalty trial, a jury must determine the existence of these aggravating circumstances beyond a reasonable doubt for a

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*Retardation*, 61 L. & Contemp. Prob. 89, 98 (1998).

27. There was no majority opinion in *Furman* with each Justice writing his own opinion. Justices Brennan and Marshall held that the death penalty was unconstitutional under all circumstances. *Furman*, 408 U.S. at 257, 305 (Brennan, J., concurring); *id.*, at 314, 371 (Marshall, J., concurring). Justices Douglas, Stewart, and White—in the middle of the Court—found that the procedures involved in the existing capital punishment statutes created a substantial risk that the death penalty would be imposed in an arbitrary and capricious manner. *Id.* at 240, 256–57 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

28. *Woodson*, 428 U.S. at 286, 305; *Roberts*, 428 U.S. at 329, 336.

29. *Gregg*, 428 U.S. at 207; *Profitt*, 428 U.S. at 253, 259; *Jurek*, 428 U.S. at 276.

30. *Walton v. Ariz.*, 497 U.S. 639, 661 (1990) (Scalia, J., concurring in part and concurring in the judgment) (describing an irreconcilable tension between the dual constitutional requirements of guided discretion and individualized consideration); Richard Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. Rev. 1103, 1113–15 (1990) (discussing the Court's reliance on these procedural protections to realize its Eighth Amendment goals).

31. Eligibility for the death penalty must be distinguished from selection for the death penalty. Eligibility establishes when the government has demonstrated that this defendant falls within a pool of persons for whom the death penalty is an option. This is usually accomplished by the finding of an aggravating circumstance. Once a person is eligible for the death penalty, then the jury (or judge) may weigh the various aggravating and mitigating circumstances to decide whether the death penalty should be imposed on this defendant for this crime. Carter & Kreitzberg, *supra* n. 1, at 5154.

32. Some state statutes provide the equivalent of aggravating circumstances as part of the definition of a capital crime. *E.g.* La. Stat. Ann. § 14:30 (1997); Tex. Penal Code § 19.03 (2003).

defendant to be considered for a sentence of death. The individualized consideration is met through the admission of mitigating evidence and the ultimate selection decision of death or life.[33] While the selection decision is afforded broad latitude and discretion, the first two decisions are guided by specific elements or eligibility criteria that must be proved by the government. Most importantly, there is no "capital crime," meaning that the death penalty is not a punishment option absent a jury finding that at least one of the aggravating circumstances is present.[34]

## III. THE CAPITAL TRIAL

A capital trial is really two distinct trials: the guilt/innocence phase and the penalty phase.[35] The first phase decides the question of guilt or innocence, and the second phase decides the question of the appropriate sentence. The second phase begins only if the jury or judge has found the defendant guilty in the first phase.[36]

A penalty phase resembles the guilt/innocence phase in many respects. The lawyers give opening statements, call witnesses, introduce exhibits, and make closing arguments. Just like the guilt/innocence phase, the judge instructs the jury at the conclusion on how to proceed during deliberations.[37] Many of the same constitutional protections apply in both the guilt/innocence phase and penalty phase. For example, a defendant has a Fifth Amendment privilege against compelled testimony, a Sixth Amendment right to counsel and to present a defense, and a Fourteenth Amendment right to due process and equal protection.[38]

There are three decision points for the jury or judge if the defendant waives the right to a jury. First, the fact finder makes a determination that the base crime was committed. This is ordinarily murder in the first degree and always is decided in the guilt/innocence phase.

The second decision is whether the defendant is "death eligible." This determination usually occurs in the penalty phase, but in some states, it is part of the

33. *E.g.* Cal. Penal Code § 190.3 (2006) ("If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, . . . the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including . . . the defendant's character, background, history, mental condition and physical condition.").

34. *E.g. id.* at § 190.2.

35. The Supreme Court has never explicitly held that a bifurcated proceeding is constitutionally required. However, after the *Furman* Court found the existing death penalty statutes unconstitutional, state legislatures responded by enacting new death penalty statutes, each of which created a bifurcated system with a separate proceeding for the penalty determination. When the Supreme Court reviewed Georgia's statute in *Gregg*, it acknowledged that the bifurcated procedure was one of the safeguards that helped ensure that the death penalty would not be imposed in a wholly arbitrary, capricious, or freakish manner. 428 U.S. at 162–63, 206-07. Review *supra* note 3 and accompanying text.

36. *Tuilaepa v. Cal.*, 512 U.S. 967, 971 (1994) ("Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decision-making process: the eligibility decision and the selection decision."); Carter & Kreitzberg, *supra* n. 1, at 52–54.

37. *E.g.* Cal. Penal Code § 190.3 (providing that the proceedings during the penalty phase include evidence "as to any matter relevant to aggravation, mitigation, and sentence" and arguments made by counsel).

38. *See Ring v. Ariz.*, 536 U.S. 584, 609 (2002) (holding that a defendant has a Sixth Amendment right to have a jury determine the existence or nonexistence of the aggravating circumstances that make a case eligible for a sentence of death).

guilt/innocence phase. A jury must determine that the government has proven at least one aggravating circumstance in the case. The eligibility criteria—usually in the form of aggravating circumstances—act as a filter to determine those cases for which the death penalty is a permissible sentencing option.[39] Aggravating circumstances are the means to distinguish one murder as worse than others and, therefore, eligible for a sentence of death. A conviction of murder in the first degree is not sufficient for the imposition of the death penalty. Without a finding of an aggravating circumstance, there is no possibility of imposing death as a punishment.[40]

The Supreme Court has held that aggravating circumstances in a death penalty statute are the functional equivalent of the elements of the crime in the guilt/innocence trial.[41] As a result, every defendant has a Sixth Amendment right to have a jury determine whether the statutory aggravating circumstances have been proven.[42] Aggravating circumstances are viewed as elements of a crime due to the function they perform in a capital trial. In the context of the guilt/innocence phase of a trial, the Court has held that if proof of a fact is necessary to increase the possible punishment, then that fact is the equivalent of an element of the crime.[43] The prosecution must prove these facts beyond a reasonable doubt, and a defendant has a right to a jury determination of these facts.

Aggravating circumstances perform this same function in the penalty determination of a capital case. An aggravating circumstance must be proven in order to increase the possible punishment for murder from the usual punishment to the death penalty.[44] For example, in California, murder in the first degree is punishable by twenty-five years to life. If additionally, an aggravating circumstance —called a special circumstance in California—is proven, the defendant becomes eligible for one of only two possible punishments: life without the possibility of parole or death.[45] Thus, a defendant convicted simply of murder is not eligible for and cannot be sentenced to death. If, however, a defendant convicted of murder is also convicted of an aggravating circumstance, such as a murder with torture, a murder in the course of a rape, or a murder in the course of a double homicide, the defendant then falls within the pool of persons for whom death is a possible punishment.[46] The jury must find that the defendant committed the torture, rape, or double homicide beyond a reasonable doubt in the same manner that they deliberated and found the elements of murder in the first degree beyond a reasonable doubt.[47]

The third decision is whether the death penalty should be imposed on the

39. The Supreme Court has held that a death penalty statute must, in some meaningful way, narrow the class of cases eligible for death. In so doing, each statute must identify those characteristics it believes makes certain murders worse than others. *Gregg*, 428 U.S. at 206–07.

40. *E.g.* Cal. Penal Code § 190.2(a).

41. *Ring*, 536 U.S. at 609 (stating that "[b]ecause Arizona's enumerated aggravating factors operate as the 'functional equivalent of an element of a greater offense' the Sixth Amendment requires that they be found by a jury" (quoting *Apprendi v. N.J.*, 530 U.S. 466, 494 n. 19 (2000))).

42. *Id.*

43. *Ring*, 536 U.S. at 585; *Apprendi*, 530 U.S. at 494 n. 19.

44. *Apprendi*, 530 U.S. at 494 n. 19.

45. Cal. Penal Code § 190.2(a).

46. *Id.* at § 190.2(a)(2), (a)(17)(C), (a)(18).

47. *See Ring*, 536 U.S. at 609.

defendant. This is called "death selection."[48] In many ways, the death selection decision is the heart of the penalty phase of the trial. While the eligibility decision asks whether this defendant is in the class of defendants on whom a sentence of death may, in fact, be imposed, the death selection determination asks whether this eligible defendant should receive a sentence of death. The Eighth Amendment requires that the selection decision include consideration not only of the circumstances of the crime but also the background and characteristics of the individual defendant.[49] This is presented through mitigating evidence. The mitigation stage is an opportunity for a defendant to provide reasons why the defendant should not be sentenced to death. Mitigating factors may include the role played by the defendant in the crime, an abusive childhood, a mental disorder, or any information that allows for an individualized consideration of a defendant.[50]

The fact finder could make a mistake at any of the three decision points. First, the defendant might not have committed the murder. Second, the defendant might not have committed the aggravating circumstance—for example, the murder was not committed in the course of a rape or the murder was not a double homicide. Third, the defendant might not be deserving of death under the formula used by the state—for example, aggravating circumstances do not outweigh mitigating circumstances. The third decision of death selection is more of a value judgment than a factual determination. In contrast, the first two decisions—whether defendant committed the murder and whether an aggravating circumstance exists—are factual determinations. With the factual determinations, a fact finder may make a mistake; a factually innocent person may be found guilty or a person who is innocent of the aggravating circumstance may be found to be within the class of persons eligible for death. In the latter instance, the defendant is, in essence, innocent of a "capital crime."

Once the trial is over, what can an innocent person do?[51] Does a defendant's ability to raise a claim of innocence at that point differ depending on whether he is innocent of the crime or innocent of the aggravating circumstance? The Court has repeatedly emphasized that the trial is the "main event."[52] Ironically, at the same time the Court promulgated procedures to ensure reliability of a capital trial, it also began a

48. There are really two separate and distinct determinations that must precede any sentence of death: "an eligibility decision and [a] selection decision." *Tuilaepa*, 512 U.S. at 917. The eligibility decision is based on whether this defendant is in the class of defendants on whom a sentence of death may, in fact, be imposed. *Id.* at 971–72. The selection determination is based on whether this eligible defendant should receive a sentence of death based upon consideration of not only the circumstances of the crime but also the background and characteristics of the individual defendant. *Id.* Although the Supreme Court and other courts did not initially frame these two distinct decisions, later case law began to articulate the two distinct determinations as part of the discussion. *Id.* at 971 ("Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decision-making process: the eligibility decision and the selection decision.").

49. *Id.* at 272.

50. Carter & Kreitzberg, *supra* n. 1, at 137.

51. Rosen, *supra* n. 6, at 107 (suggesting that if we are unable or unwilling to structure our criminal justice system to ensure that we do not execute innocents, the death penalty must be found unconstitutional and stating "[t]he innocence of any specific defendant is not the issue. If we cannot identify all of the innocents we execute, then the only way we can protect those innocents is to examine the capital punishment system as a whole to determine whether the imperfections in the system undermine the constitutionality of the punishment.").

52. Review *supra* note 17 and accompanying text.

campaign to limit the ability of a defendant to get postconviction review.

## IV. WHAT IS INNOCENCE?

### *A. Innocence of a Crime and Innocence of the Death Penalty*

Innocence of the crime in a capital context refers to the underlying murder conviction. Innocence of the death penalty has come to mean innocence of death eligibility. The primary focus of death eligibility has been on aggravating circumstances. Without an aggravating circumstance, there is no capital offense that would render the defendant death eligible because the underlying murder, standing alone, is not a capital crime. This means that innocence of death eligibility should be treated as innocence of the underlying murder. However, innocence of the death penalty results in a reduction of punishment rather than freedom, as in the case of innocence of the crime.

In the unique process of death penalty cases, death eligibility is comparable to elements of a crime because it defines a "capital crime."[53] The United States Supreme Court has recognized that death eligibility functions in a comparable manner to an element of a crime. In *Sawyer v. Whitley*, the Court held that "actual innocence" included innocence of circumstances or conditions that make a defendant death eligible.[54] Writing for the majority, Chief Justice Rehnquist explained that death eligibility should be treated the same as the elements of the crime:

> Insofar as petitioner's standard would include not merely the elements of the crime itself, but the existence of aggravating circumstances, it broadens the extent of the inquiry but not the type of inquiry. Both the elements of the crime and statutory aggravating circumstances in Louisiana are used to narrow the class of defendants eligible for the death penalty. And proof or disproof of aggravating circumstances, like proof of the elements of the crime, is confined by the statutory definitions to a relatively obvious class of relevant evidence.[55]

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53. The eligibility test was applied by the Fifth and Eleventh Circuit Courts of Appeal. *Sawyer*, 505 U.S. at 346 (quoting *Sawyer v. Whitley*, 945 F.2d 812, 820 (1991) ("'[W]e must require the petitioner 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.'"); *Johnson v. Singletary*, 938 F.2d 1166, 1183 (11th Cir. 1991) ("Thus, a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates *all* of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body *could not* have found *any* aggravating factors and thus the petitioner was ineligible for the death penalty. In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is *ineligible* for the death penalty." (emphasis in original)).

54. *Sawyer*, 505 U.S. at 347. In his concurring opinion, Justice Stevens argued for a broader definition of innocent of the death penalty. He reasoned that the constitutional application of the death penalty requires a jury to consider all mitigating evidence in making its decision as to whether this defendant should be selected for death. In a rare case, he posited, one may be innocent of the death penalty from either the degree or amount of mitigating evidence that was available but not presented to the jury. Finally, he notes with irony that although the Court espouses a "death is different" attitude, it then requires the same objective criteria for both its guilt and penalty assessment of innocence. *Id.* at 360–76 (Stevens, Blackmun & O'Connor, JJ., concurring).

55. *Id.* at 344–45 (majority). Although beyond the scope of this article, the language from *Sawyer* supports the argument that the absence of conditions of eligibility, such as the necessary *mens rea* for a felony-murder accomplice or the status of being mentally retarded, should also be a basis for claiming a miscarriage of justice or as support for a freestanding claim of innocence. *Id.* at 344–45. Chief Justice Rehnquist suggested that innocence of the death penalty included conditions of eligibility other than aggravating circumstances. Writing

The Court confirmed its view of aggravating circumstances as the equivalent of elements of a crime in *Ring v. Arizona*.[56] The holding in *Ring*—that there is a constitutional right to a jury determination on the existence of aggravating circumstances—was based on the recognition that aggravating circumstances function in the same manner as elements of a crime.[57] In each case, the element or aggravating circumstance is necessary in order to increase the possible punishment allowable.

Supreme Court jurisprudence requires a death penalty statute to narrow the class of perpetrators who are ultimately death eligible. Without that narrowing function, a death penalty scheme is unconstitutional.[58] The aggravating circumstance performs this narrowing function and is indispensable to the constitutionality of imposing a death sentence. Because the aggravating circumstances are equivalent to elements of a crime, they are in essence part of the "offense" of a capital crime. There is no crime without an *actus reus* and a *mens rea*. Similarly, there is no capital offense without a finding of at least one aggravating circumstance. Furthermore, procedures for finding the existence of an aggravating circumstance are the same as for an element of a crime.[59] In the guilt/innocence phase or the penalty phase, the state must prove beyond a reasonable doubt that the aggravating circumstance exists or occurred.

When an element of the crime is lacking, a defendant is not guilty. Similarly, if an aggravating circumstance is entirely lacking, there is no death eligibility and a defendant is "not guilty" of death. Death eligibility, in turn, transforms a noncapital crime into a capital crime. It is, thus, more accurate to speak of *innocence of a capital crime or offense* rather than to speak of death ineligibility.[60] Nevertheless, because courts use the term innocent of the death penalty, we will use that term interchangeably with the more precise terms of "innocence of a capital crime" and "innocence of death eligibility."[61]

Although it is logical to think of death ineligibility in broader terms than aggravating circumstances, courts have been reluctant to extend the idea of innocence of the death penalty to other death eligibility issues. One other area where an innocence of the death penalty claim has been recognized is when a defendant argues that he did not exhibit the requisite mental state or degree of culpable conduct constitutionally required to be eligible for the death penalty. Often referred to as the *Tison* factors, the Supreme Court held that the nonkiller in a felony murder must exhibit (1) major participation in the felony and (2) a reckless indifference to human life.[62]

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for the majority, he explained "[s]ensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met." *Id.* at 345.

56. 536 U.S. at 609.

57. *Id.*

58. Review *supra* note 3 and accompanying text.

59. *E.g.* Cal. Penal Code § 190.2(a) (requiring a finding of a special circumstance to be eligible for death).

60. The term "capital crime or offense" also captures the reasoning of the Court in considering aggravating circumstances equivalent to an element that turns murder into capital murder or a noncapital crime into a capital crime.

61. *Commw. v. Wheeler*, 541 A.2d 730, 736 (Pa. 1988) (holding that a defendant's prior felony conviction was not sufficient to constitute a "'significant history of felony convictions'" and that this "lone aggravating circumstance found by the jury" could not stand, remanding the case for imposition of a life sentence).

62. *Tison v. Ariz.*, 481 U.S. 137, 158 (1987). Although the Court did not grant relief, finding that there was sufficient evidence of reckless indifference introduced at trial, the Court recognized a failure of the *Tison* factors as giving rise to a claim of innocent of the death penalty. *See Fairchild v. Norris*, 21 F.3d 799, 802–805

Lower courts have refused to extend the eligibility definition to other contexts. In 2004, the Supreme Court found that it was unconstitutional for a person who is mentally retarded to be sentenced to death.[63] Following this decision, defendants argued in postconviction that because they were mentally retarded, they were innocent of the death penalty and should be permitted to introduce evidence of their innocence in a habeas corpus proceeding. Although the Supreme Court has not reviewed this question, lower courts have consistently rejected this argument.[64] Courts have found that the absence of mental retardation is *not* an eligibility factor for the death penalty.[65] These courts posit that the absence of mental retardation is not an element of the death penalty in the same way that sanity is not an element of a crime.[66] In both cases, the government does not have the burden of proof on the issue. In the latter case, the government need not prove beyond a reasonable doubt that the defendant is sane and in the former case the government need not prove that a defendant is *not* mentally retarded. Rather, the burden is on the defense to demonstrate that a defendant should be excluded from a sentence of death either because he is insane or mentally retarded.[67] Consequently, courts have distinguished the issue of whether a defendant is mentally retarded—and therefore not eligible for the death penalty—from a failure by the government to prove an aggravating circumstance (which also renders a defendant ineligible for the death penalty).

Courts have additionally declined to extend the definition of innocent of the death

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(8th Cir. 1994) (discussing Supreme Court jurisprudence regarding culpability of a nonkiller involved in a felony murder).

63. *Atkins*, 536 U.S. at 321. The Court had previously held that execution of the mentally retarded did not violate the Eighth Amendment's prohibition on cruel and unusual punishment in *Penry v. Linaugh*, 492 U.S. 302, 335 (1989). However, the *Atkins* Court noted that, since the *Penry* decision, a national consensus had developed against execution of the mentally disabled. *Atkins*, 536 U.S. at 321. As evidence of this consensus, the Court cited the large number of states which had enacted prohibitions on such executions, the absence of states reinstating such executions since the *Penry* decision, and the rarity of such executions even in states which allowed them. *Id.* at 314–16. The Court also discussed certain deficiencies in mentally retarded persons in the areas of information processing, communication, abstract and logical reasoning, impulse control, and understanding of others and how these deficiencies act to lower the moral culpability of such offenders. *Id.* at 318–23.

64. *E.g. Walker v. True*, 399 F.3d 315, 326 (4th Cir. 2005) (holding that "[t]he state does not have a corollary duty to prove that a defendant is 'not retarded' in order to be entitled to the death penalty"); *In Re Johnson*, 334 F.3d 403, 404–05 (2003) (5th Cir. 2003) (holding the defendant's evidence of his mental retardation made him innocent of the death penalty and that the absence of mental retardation is not an element of the sentence any more than sanity is an element of an offense; holding that neither *Apprendi* nor *Ring* render the absence of mental retardation the functional equivalent of an element of capital murder); *Walton v. Johnson*, 269 F. Supp. 2d 692, 698 (W.D. Va. 2003) (holding that the Virginia statute governing mental retardation in death penalty cases did not treat lack of mental retardation as an element of the offense and specifically placed the burden on the defendant to prove mental retardation by a preponderance of the evidence); *Head v. Hill*, 587 S.E.2d 613, 622–23 (Ga. 2003) (overturning the habeas court's decision to grant a new trial on the issue of defendant's mental retardation); *State v. Flores*, 93 P.3d 1264, 1267 (N.M. 2004) (stating "[w]e do not believe the absence of mental retardation is an element of a capital offense for purposes of analysis under *Ring*"); *but see Simpson v. Dretke*, 2006 U.S. Lexis 21873, **6–9 (E.D. Tex. Mar. 27, 2006) (agreeing that mental retardation might provide a basis for a claim of "innocent of the death penalty" but denying relief because the petitioner failed to raise his claim in state court and had the opportunity to present this evidence in a clemency proceeding); *State v. Jiminez*, 880 A.2d 468, 483–89 (N.J. 2005) (deciding the matter on the basis of state constitutional grounds and applying the principles of *Apprendi*, *Ring*, *Blakely*, and *Booker* to cases of mental retardation making it the functional equivalent of an element of the offense).

65. *E.g. Walker*, 399 F.3d at 326; *Johnson*, 334 F.3d at 404–05.

66. *E.g. Walker*, 399 F.3d at 326.

67. For example, the Virginia statute does not treat lack of mental retardation as an element of the offense and the burden is on the defense to prove mental retardation by a preponderance of the evidence. *Johnson*, 334 F.3d at 403; *Walton*, 269 F. Supp. 2d at 692.

penalty to include a claim that compelling new mitigating evidence has been discovered that was not considered by the jury at trial.[68] Because mitigating evidence only comes into play after a jury finds a defendant eligible for death, the courts reason that this evidence does not affect a jury's finding of whether a defendant is *eligible* for the death penalty.[69] Because the failure to consider critical mitigating evidence affects the selection decision, not the eligibility decision, arguments that the defendant is innocent of the death selection decision have been rejected. As explained in the next section, the difference between death eligibility and death selection has caused confusion when courts attempt to apply innocence exceptions to habeas rules. This confusion has undermined the significance of the absence of proof of an aggravating circumstance.

### *B. Habeas Corpus: Claims of Innocence as a Gateway to Habeas*

In the United States today, habeas corpus proceedings occur in both state and federal courts. A habeas proceeding is not a direct appeal from the conviction or sentence for the crime. Instead, it is a postconviction proceeding that allows for limited challenges to the continued detention of the individual.[70] Although state habeas proceedings are generally less restricted than federal habeas proceedings, most of the habeas corpus jurisprudence has come from federal cases.[71] Thus, postconviction claims of innocence are most likely the subject of federal habeas petitions.

A federal habeas petition is a civil action brought by a state or federal inmate.[72] Because most capital cases begin as state prosecutions, we will focus on federal habeas actions that challenge a state conviction and sentence. In federal habeas proceedings, a petitioner is limited to raising claims that are based on constitutional violations, violations of federal law, or violations of a treaty provision.[73] A petitioner is not

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68. *Sawyer*, 505 U.S. at 368 (Stevens, Blackmun & O'Connor, JJ., concurring) (taking exception to the Court's failure to include newly discovered mitigating evidence as a basis for innocence of the death penalty). Stevens argued that in restricting the definition in that way, the Court

> respects only one of the two bedrock principles of capital-punishment jurisprudence. As such, the Court's impoverished version of capital sentencing is at odds with both the doctrine and the theory developed in our many decisions concerning capital punishment.
>
> First, the Court implicitly repudiates the requirement that the sentencer be allowed to consider all relevant mitigating evidence . . . .
>
> [T]he Court's holding also clashes with the theory underlying our capital-punishment jurisprudence. The non-arbitrariness—and therefore the constitutionality—of the death penalty rests on individualized sentencing determinations.

*Id.* (emphasis omitted).

69. *Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003); *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003); *Johnson*, 334 F.3d at 403.

70. As one scholar described it, "[I]n theory, a federal habeas corpus petition is an independent civil suit, in which the prisoner asks only that a federal court determine the validity of his current detention. In substance, a habeas action constitutes a collateral challenge to the prisoner's treatment in state court." Larry W. Yackle, *The American Bar Association and Federal Habeas Corpus*, 61 L.& Contemp. Probs. 171, 172 (1998).

71. Carter & Kreitzberg, *supra* n. 1, at 197–213.

72. *See Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting) ("*[H]abeas corpus* cuts through all forms and goes to the very tissues of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.").

73. The most common constitutional claim raised is ineffective assistance of counsel in violation of the Sixth Amendment. Another typical constitutional claim is the failure of the prosecution to turn over

permitted to raise evidentiary or procedural issues.

Over the years, concerns with finality and comity led Congress and the Court to restrict access to habeas corpus proceedings.[74] Critics of habeas proceedings complained about the length of time cases were litigated in the courts, especially in death penalty cases. The courts and the legislatures criticized capital defendants for filing multiple or successive petitions, arguing that these were merely efforts to delay executions rather than to review meritorious claims.[75] Other criticisms focused on habeas litigation as an intrusion by the federal courts into the decisions of state courts. As a result, more and more restrictions began to appear that limited the scope of habeas review and the ability to file habeas petitions. Three of those limitations are relevant to claims of innocence.

First, claims may be "procedurally defaulted." In order to restrict petitioners from bypassing state courts, there is a requirement that the petitioner "exhaust" state remedies before bringing a claim in federal court.[76] If a petitioner fails to properly raise a claim in state court, he may now be precluded from raising that claim because it would violate a state procedural rule. The most common example is the time limits that states impose within which claims must be filed. A claim that fails to comply with a state procedural rule is now procedurally defaulted, and a petitioner may not file that claim in his federal

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exculpatory evidence to the defense (a *Brady* claim). *See Brady v. Md.*, 373 U.S. 83 (1963); *see e.g. Sawyer*, 505 U.S. at 347.

74. *E.g. id.* at 341 n. 7. After noting that it is a common occurrence for federal judges to be overwhelmed with last minute "successive or abusive habeas petitions," the Court stated

> We of course do not in the least condone, but instead condemn, any efforts on the part of habeas petitioners to delay their filings until the last minute with a view to obtaining a stay because the district court will lack time to give them the necessary consideration before the scheduled execution. A court may resolve against such a petitioner doubts and uncertainties as to the sufficiency of his submission.

*Id.*; *see* Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y. L. Rev. 699, 712–15 (2002). This attitude of the Court was not always the case. Bryan Stevenson observed that

> [t]he Supreme Court's capital punishment decisions of the 1970's . . . signal[ed] a readiness on the part of the federal judiciary to protect death row prisoners from arbitrary or unfair imposition of the death penalty. . . . [The Court warned] that heightened standards of review and appellate scrutiny would be constitutionally required in capital case. . . . Consequently, by the late 1970's and 1980's capital litigation was not considered "final" until all available state and federal postconviction review had been completed. The new prototype for capital litigation was a nine-step process that almost always included petitions for a writ of habeas corpus in federal court.

*Id.* at 716–17.

75. *E.g. Sawyer*, 505 U.S. at 341 n. 7. ( "While we recognize [the filling of a successive or abuse habeas petition a few days before a scheduled execution] as a fact on the basis of our own experience with applications for stays of execution in capital cases, we regard it as a regrettable fact. We of course do not in the least condone, but instead condemn, any efforts on the part of habeas petitioners to delay their filings until the last minute with a view to obtaining a stay because the district court will lack time to give them the necessary consideration before the scheduled execution."); *but see Barbour v. Haley*, 410 F. Supp. 2d 1120, 1135–36 (M.D. Ala. 2006) "[I]t is not hyperbole to view this case as undergirded by anguish, the anguish of death penalty lawyers who believe the death penalty system as broken. . . . [A]nguish . . . founded on logic. It is a practical logic which is founded also on the belief that in the face of the limitations periods and other hurdles imposed on collateral review petitions, there are not enough lawyers willing or able to undertake representation of [defendants in a capital case] at a point where full review and investigation of a case already once lost can be mounted.").

76. 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus on 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.").

habeas petition. Because of this restriction, many legitimate constitutional claims are thus barred from review in any court, state or federal.[77]

While procedural default is a judicially constructed concept, the second and third limitations on habeas petitions are statutory. The second restriction prohibits a petitioner from filing a second or successive habeas corpus petition. Congress passed this restriction in an effort to foster finality and conserve judicial resources. Under the habeas corpus statute, a petitioner is required to bring all available claims in a single, first habeas corpus petition. The limitations on second and successive petitions encourage petitioners to identify all issues within a short time frame and within one court action because an attempt to raise an issue in a later petition is likely to be barred.

The third limitation restricts the ability of a petitioner to be granted an evidentiary hearing. These hearings in federal court are used to present evidence that was never presented at trial or which supports claims raised in the habeas petition. For example, if a petitioner claims that his trial attorney was ineffective, evidence may be presented at a hearing to demonstrate counsel's failures investigating or presenting the case at trial. In many cases, without an evidentiary hearing to develop the facts, a petitioner cannot demonstrate to the court that a constitutional error has occurred.

Prior to 1996, neither the successive petition restriction nor the evidentiary hearing limitation included any explicit exception based on innocence. In response to the possible unfairness of precluding claims, successive petitions, and evidentiary hearings, the Supreme Court developed two exceptions to these rules. The first allowed the claims of a petitioner to be heard if the petitioner could show "cause and prejudice" for the lapse.[78] The second exception allowed a claim to be heard if a "miscarriage of justice" would result if the case did not proceed.[79]

It is this second exception, the miscarriage of justice exception, that is important in our discussion of innocence cases. Essentially equating miscarriage of justice with actual innocence,[80] the Court held that this narrow exception would allow otherwise

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77. *E.g. Coleman v. Thompson*, 501 U.S. 722 (1991) (barring petitioner's federal habeas claim on the grounds of his failure to file notice of state court appeal within Virginia's statutory thirty-day deadline); *Aparicio v. Artuz*, 269 F.3d 78 (2d Cir. 2001) (holding that an appellant's ineffective counsel claim was procedurally defaulted by his failure to raise it at the state court level); *Aliwoli v. Gilmore*, 127 F.3d 632 (7th Cir. 1997) (refusing to consider appellant's claim of improper rebuttal statements by prosecutor at trial and holding that because petitioner did not preserve the issue for appeal, the claim was procedurally defaulted at the state court level).

78. *Wainwright v. Sykes*, 433 U.S. 72, 87–91 (1997) (extending the bar of "federal habeas review absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver" to a waived objection to the admission of a confession at trial) (citing *Francis v. Henderson*, 425 U.S. 536 (1976)). As one scholar observed, "[o]n the procedural side, the Court has foreclosed relief with narrow exceptions, to state prisoners who have failed to preserve their claims in state court, lost on the merits of the claims in prior federal petitions, or failed to raise issues that could have been raised in prior filings." Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. Rev. 303, 303–304, nn. 1–3 (1993) (citing *Wainwright*, 433 U.S. at 72 (petitioner's failure to comply with a state contemporaneous objection rule at trial must meet the cause and prejudice standard); *Coleman v. Thompson*, 501 U.S. 722 (1991) (applying *Sykes* to petitioner's failure, because of attorney error, to file a timely appeal); *Murray v. Carrier*, 477 U.S. 478 (1986) (applying *Sykes*' cause and prejudice standard to a petitioner's failure, because of attorney error, to raise a particular claim in his state court appeal); *Sawyer*, 505 U.S. at 333 (noting cause and prejudice standard applies to claims identical to claims heard and decided on merits in a previous petition); *McClesky v. Zant*, 499 U.S. 467 (1991) (applying cause and prejudice standard to failure to raise new claims not presented in prior proceeding)).

79. *Sykes*, 433 U.S. at 91; *see Steiker*, *supra* n. 78.

80. *Stokes v. Armontrout*, 893 F.2d 152, 156 (8th Cir. 1989) (extending the miscarriage of justice exception

barred claims to be heard where an adequate showing of actual innocence was made by a defendant.[81] Despite the limitations on habeas review, there continued to be support for the ability of a defendant to litigate claims of innocence.[82] If a petitioner could demonstrate a required probability of actual innocence, the Court lifted the restrictions to hearing the claim, regardless of whether it was precluded as a second or successive petition, precluded as a request for an evidentiary hearing, or procedurally defaulted under the state rules. The standard set by the Court for demonstrating innocence varied depending on whether a petitioner claimed that he was innocent of the crime or innocent of the death penalty, but the availability of the exception did not vary.

In *Schlup v. Delo*,[83] the petitioner argued that he was entitled to have his procedurally barred claims heard because he was factually innocent of the crime. He claimed that he was not the person who committed the murder. Schlup argued that his evidence of innocence provided a "gateway" through which he could pass and have his other constitutional claims reviewed on their merits. The Court agreed and held that he needed to show that it was *more likely than not* that no reasonable juror would have found him guilty beyond a reasonable doubt.[84]

In *Sawyer v. Whitley*,[85] the Court found innocence of the death penalty to be the functional equivalent to innocence of the crime. However, the Court required a defendant to meet a higher threshold to demonstrate a miscarriage of justice for these claims. Sawyer was convicted of first-degree murder and sentenced to death. He filed his first federal habeas petition, raising numerous claims of error at trial all of which were denied by the court on the merits. Sawyer then filed a second petition. The court refused to hear most of the claims raised in his second petition, holding that they were barred as either abusive[86] or successive.[87] Sawyer argued that the Court should hear his

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where federal constitutional error probably resulted in a verdict of death against one whom the jury would otherwise have sentenced to life in prison); *Deutscher v. Whitley*, 946 F.2d 1443, 1446 (9th Cir. 1991) (holding that a miscarriage of justice requires a defendant to show that a "constitutional error substantially undermined the accuracy of the sentencing determination . . . [and] that, but for the constitutional error, the sentence of death would not have been imposed").

81. Steiker, *supra* n. 78, at 338 (stating "injustice occurs if an innocent person remains in jail when the 'hook' of a federal claim could provide the occasion for his release").

82. *E.g. McCleskey*, 499 U.S. at 467 (extending the cause and prejudice exception to cases concerning "abuse of the writ through inexcusable negligence" in order to avoid fundamental miscarriages of justice and ensure that the ends of justice will be served); *Kuhlman v. Wilson*, 477 U.S. 436, 454 (1986) (providing that in successive petitions, a habeas action that raises the same ground already raised and rejected in a prior petition, could be heard if it includes a "colorable showing of factual innocence."); Rosen, *supra* n. 6, at 77 n. 56 (quoting *Herrera* where Chief Justice Rehnquist announced that "in a capital case a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim." (*Herrera*, 506 U.S. at 417 (internal quotation marks omitted))). Compare this federal standard with Missouri's standard that allowed it to review a freestanding claim of actual innocence in death penalty cases under the authority of Mo. Rev. Stat. § 565.035.3 (1984). *Amrine v. Rober*, 102 S.W.3d 541 (Mo. 2003); *but see* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1971) (arguing that "with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence").

83. 513 U.S. 298.

84. *Id.* at 321 (emphasis added). Schlup was tried and convicted of murdering a fellow inmate and was sentenced to death. He claimed that he was actually innocent of the crime, and that the state unconstitutionally failed to disclose certain exculpatory evidence at his trial. *Id.* at 301–13.

85. 505 U.S. at 341.

86. *See id.* at 338 ("[N]ew claims, not previously raised, . . . constitute an *abuse of the writ*." (citing

claims because he was innocent of the death penalty[88] and therefore he fell within the miscarriage of justice exception. The Court held that a defendant claiming that he is innocent of the death penalty must show by *clear and convincing evidence* that there was "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."[89]

The status of the *Sawyer* and *Schlup* standards was thrown into question when Congress amended the habeas statute in 1996 with passage of AEDPA.[90] This legislation was the product of some forty years of debate on the issue of reform of habeas corpus. It was designed to streamline the process of habeas corpus review through a number of procedural reforms, including redefining the standard of review for state cases,[91] imposing a statute of limitations on the filing of habeas petitions,[92] limiting the filing of second and successive petitions,[93] and restricting the availability of evidentiary hearings for habeas petitioners.[94]

Although AEDPA did not include any provisions that directly affected procedural default, there were amendments to the existing statutory provisions on the ability of a court to grant evidentiary hearings or to hear claims raised in a second or successive habeas petition. The AEDPA amendments included an "innocence proviso" as an exception to the general rules prohibiting second or successive petitions or the granting of an evidentiary hearing where the petitioner failed to develop the factual basis for the claim in state court. The exception for second or successive petitions requires a two-part showing:

> (A) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (B) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by *clear and convincing evidence* that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the *underlying offense*.[95]

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*McClesky*, 499 U.S. 467)).

87. *Sawyer v. Whitley*, 772 F. Supp. 297 (E.D. La. 1991).

88. *Sawyer*, 505 U.S. at 335. In a second federal habeas petition, Sawyer claimed a *Brady* violation, arguing the police failed to turn over exculpatory evidence that undermined the credibility of a prosecution witness as well as a statement by a child witness that Sawyer had attempted to prevent an accomplice from setting fire to the victim. *Id.* at 349.

89. *Id.* at 346 (quoting *Sawyer*, 945 F.2d at 820).

90. 110 Stat. 1214.

91. 110 Stat. 1219 (amending 28 U.S.C. § 2254(d) to provide that no relief may be granted from a state decision unless the decision is "contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States; or . . . based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.").

92. 110 Stat. 1217 (adding to 28 U.S.C. §2244 a one-year statute of limitations for a writ of habeas corpus).

93. 28 U.S.C. §2244(d)(1).

94. 28 U.S.C. §2254(e)(2).

95. 110 Stat. 1221 (emphasis added). The innocence proviso for evidentiary hearings is similar but not identical. It provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the Court shall not hold an evidentiary hearing . . . unless: . . . (A) the claim relies on . . . a factual predicate that could not have been previously discovered through the exercise of due diligence; and

There are two aspects to the AEDPA provisions that impacted the review of claims of innocence. First, AEDPA still did not address how claims of innocence impact the ability of a court to hear an otherwise procedurally defaulted claim. Second, AEDPA raised the threshold showing required to hear a second or successive petition from a preponderance of the evidence to clear and convincing evidence. These changes raised several legal issues and questions.

One of the important questions was whether the *Schlup* preponderance standard still existed for the miscarriage of justice exception to procedural default. This question was answered in the Court's recent decision in *House v. Bell*.[96] The Court granted House habeas relief under the standard set out in *Schlup*. The Court acknowledged that the habeas statute has no provision for claims barred by procedural default. Consequently, the Court held *Schlup*, and not AEDPA, applied. Because House's petition was his first federal habeas petition of a defaulted claim, AEDPA did not apply. The Court recognized its responsibility to review all the evidence, old and new, incriminating and exculpatory, without regard to admissibility.[97] The Court then re-articulated the standard in *Schlup* by "removing the double negative" stating that a petitioner must show that it was more likely than not any reasonable juror would have reasonable doubt.[98]

In *House*, the government argued that the language of the AEDPA amendments increased the standard for all innocence claims to clear and convincing evidence. They posited that AEDPA had raised the standard for evidentiary hearings and successive petitions and that this higher standard should apply in cases of procedural default as well. The Court rejected this argument, finding that the *Schlup* preponderance standard still remained for the nonstatutory issue of procedural default in a first petition. As Justice Kennedy, writing for the majority, noted in *House*, "[neither the successive petition nor the evidentiary hearing provision of AEDPA] addresses the type of petition at issue here—a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence."[99] Using the reasoning of the Court in the *House* case, *Sawyer* should still govern claims of a miscarriage of justice to overcome procedural default when innocence of the death penalty is the basis of the claim. Exceptions to procedural default—whether innocence of the crime or innocence of the death penalty—are simply not covered in the habeas statute. Case law must continue to provide the governing standards.

Continuing to apply *Sawyer* to innocence of the death penalty claims does not create the same controversy as applying *Schlup* to claims of innocence of the crime because *Sawyer* requires the same clear and convincing standard of proof as in the

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(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(b)(2). For our discussion, it is important to note that the proviso includes both a standard of "clear and convincing evidence" and the phrase "underlying offense," the same as the proviso for successive petitions. *Id.*

96. 126 S. Ct. 2064 (2006).

97. *Id.* at 2077 (quoting *Schlup*, 513 U.S. at 327–28).

98. *Id.*

99. *Id.* at 2078.

amended habeas statutes. Consequently, the tests as set out in *Sawyer* and *Schlup* should continue to govern when a showing of innocence can overcome a procedural default barrier and is allowed to be heard.

The more difficult issue is whether AEDPA's amended language of innocence of the underlying offense still includes a claim of innocence of the death penalty as an exception to the bars on successive petitions or gaining an evidentiary hearing. Specifically, the question is: does the underlying offense allow the filing of a successive petition or the granting of an evidentiary hearing only to one who is innocent of murder or does it also include one who is innocent of the aggravating circumstance?

There is little evidence that the changes in the language dealing with successive petitions and evidentiary hearings were intended to preclude a claim of innocence of the death penalty. The language in AEDPA requiring a showing of innocence of the underlying offense occurs in the statutory provisions that pertain to both noncapital and capital cases. In noncapital cases, there is, of course, no innocence of death eligibility or capital crime to consider. Thus, the generic language would be appropriate where the vast majority of habeas cases are noncapital and claims of innocence would refer to innocence of the underlying crime.

AEDPA also includes what has been referred to as "opt-in" provisions for capital cases. The opt-in sections provide a whole separate set of rules, restrictions, and tests for those states that qualify as an opt-in state.[100] An examination of the opt-in provisions also provides no direct evidence of a legislative intent to exclude a claim of innocent of the death penalty from the definition of innocence. These provisions do not directly address limitations for the review of successive petitions or the granting of an evidentiary hearing. Instead, the opt-in provisions refer back to the general habeas provisions on this issue.

For example, title 28 U.S.C. § 2262 provides for the granting of stays under certain circumstances. One basis for a stay is to meet the standards of the general habeas provision, § 2244b, which includes an innocent of the underlying offense provision. Section 2266 of the capital opt-in provisions uses the terms "ends of justice" and "miscarriage of justice" from *Schlup* and *Sawyer* as part of the reasoning for permitting delays in rendering decisions in capital habeas cases. Thus, if anything, the opt-in provisions appear to be re-enforcing the pre-AEDPA terminology and concepts that include innocent of the death penalty.

The legislative history of the opt-in provisions is inconclusive at best. An earlier draft that addressed the circumstances under which a stay of execution may be obtained limited its application to a showing of innocence of the underlying offense. In the final bill, however, this restriction was deleted. The commentary by the Committee on Government Reform and Oversight Findings indicates an understanding that underlying offense in the proposed limitation on stays excluded death eligibility.[101] The fact that

100. 28 U.S.C. §§ 2261–2266 (2000) (For states to "opt in" for expedited habeas review, they must have the U.S. Attorney General certify that the state has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state postconviction proceedings brought by indigent prisoners who have been sentenced to death. The statute also establishes time and tolling requirements on habeas petitions.).

101. H.R. Rpt. No. 104-23 at 16–17 (1995) (stating "[u]nder proposed 28 U.S.C. 2257(c), the notion of cause

this language was struck from the provision supports the interpretation that Congress did not intend to eliminate the notion of innocence of death eligibility from the habeas calculation.[102] Additionally, the Committee's analysis refers to underlying offense as the same definition of actual innocence used by the Supreme Court in *Sawyer*. *Sawyer*'s definition of actual innocence, of course, included innocent of the death penalty or death eligibility. All in all, the legislative history leaves one without a satisfactory answer on the meaning of underlying offense.

The ambiguity in the meaning of underlying offense is also reflected in conflicting judicial decisions. The Ninth Circuit Court of Appeals held that the phrase underlying offense includes the concept of death eligibility when deciding whether to allow review of a successive petition.[103] In *Thompson v. Calderon*,[104] the petitioner argued that he was innocent of rape, which was the only aggravating circumstance —called a special circumstance in California—that made the murder a death-eligible crime.[105] Based upon his evidence of innocence, Thompson argued he should be permitted to file a successive habeas petition.[106] The court agreed.[107] It articulated three reasons to support its finding that underlying offense included death eligibility. First, it appeared that Congress had adopted the standard the Supreme Court set out in *Sawyer* that included death eligibility as a form of actual innocence.[108] Second, the change in language to the phrase underlying offense likely reflected the fact that the successive petition provision applies to noncapital and capital cases.[109] Third, beeause death eligibility is necessary to have a capital murder, Thompson was in essence claiming innocence of the "conviction of the 'underlying offense' of capital murder."[110]

The Eleventh Circuit Court of Appeals adopted a different view and interpreted underlying offense to exclude death eligibility.[111] In the case of *In re Medina*, the court found that the petitioner's challenge of death ineligibility, the invalidity of both aggravating circumstances in his case, did not fit within the meaning of the underlying offense.[112]

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for failing to raise a claim earlier is spelled out in standard fashion as connoting state action in violation of federal law or the unavailability of the legal or factual basis of the claim at the time of earlier proceedings. The restriction of the class of claims that may be raised in paragraph (3) of subsection (c) is based on the definition of 'actual innocence' suggested by the Supreme Court's decision in *Sawyer v. Whitley*. 505 U.S. 333 (1992). Only claims impugning the reliability of the petitioner's conviction for thc underlying offense under the specified standard could be raised. In light of the requirement that a claim must relate to the underlying offense for which the capital sentence was imposed, proposed 28 U.S.C. 2257(c) bars raising at this stage claims that go only to the validity of the capital sentence and claims that go only to the petitioner's eligibility for a capital sentence.").

102. One could argue that the Committee's understanding of "underlying offense" indicates that underlying offense in the general habeas provisions excludes death eligibility. However, the Committee was unclear, confused, or simply failed to understand the state of the case law.

103. *Thompson*, 151 F.3d 918, 924 (9th Cir. 1998).

104. *Id.*

105. *Id.* at 920.

106. *Id.*

107. *Id.* at 921, 924.

108. *Thompson*, 151 F.3d at 923–24.

109. *Id.* at 924.

110. *Id.* at 923–24.

111. *In re Medina*, 109 F.3d 1556 (11th Cir. 1997).

112. *Id.* at 1566.

There are other cases that appear to find that innocence of the death penalty is not included in underlying offense. These cases are cited by courts and commentators as examples of judicial decisions that underlying offense does not include innocence of the death penalty. In most of the cases, however, the issue is death selection and not "death eligibility." Death selection has never been included in the meaning of actual innocence, even under *Sawyer*. Because these cases do not in fact involve innocence of death eligibility, they add to the confusion and inconclusiveness of judicial determinations of the meaning of underlying offense.[113] In the case of *In re Provenzano*,[114] the petitioner claimed both to have discovered new mitigating evidence and that four out of five aggravating circumstances alleged in his case were invalid.[115] The court denied leave to file a successive petition because these were "sentencing stage" claims.[116] Similarly, in the case of *In re Jones*,[117] a case in which the petitioner was claiming that the electric chair was cruel and unusual punishment, the Eleventh Circuit found this to be a sentencing stage claim and not related to the underlying offense.[118] In *Burris v. Parke*,[119] the Seventh Circuit Court of Appeals found the defendant's claim that additional mitigating evidence would have changed the sentence did not qualify as one affecting the underlying offense in the innocence exception to the restriction on evidentiary hearings.[120] In each of these cases, the claim related to death selection or imposition and not to a death eligibility issue.

The issue remains unsettled in academic literature. Two highly regarded authorities on habeas corpus suggest that because Congress passed AEDPA using almost the identical language as *Sawyer*, any interpretation of the AEDPA language should be consistent with that in *Sawyer*. Therefore, underlying offense is better construed as encompassing death ineligibility.[121]

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113. *See Wright v. Angelone*, 151 F.3d 151 (4th Cir. 1998). The Fourth Circuit Court of Appeals has also indicated in dictum that it would consider "underlying offense" to exclude innocence of the death penalty. Similar to the misconception in the other circuits, the Fourth Circuit made this comment in a case involving a claim that mitigating evidence had not been presented. Again, this is not a claim of death ineligibility. The Fourth Circuit further failed to recognize that there might well be a difference between exceptions to the judicial doctrine of procedural default, which would use *Sawyer*, and exceptions to the statutory limits on evidentiary proceedings and successive petitions. *Id.* at 164 n. 8.

114. 215 F.3d 1233 (11th Cir. 2000).

115. *Id.* at 1235–37.

116. *Id.* at 1237.

117. 137 F.3d 1271 (11th Cir. 1998).

118. *Id.* at 1274.

119. 116 F.3d 256 (7th Cir. 1997); *see also Hope v. U.S.*, 108 F.3d 119 (7th Cir. 1997). In *Hope*, the defendant was convicted of a firearm charge with a sentence enhancement for prior convictions; he challenged the enhancement. The court found that Hope could not maintain a successive petition because the sentence enhancement did not qualify as relating to the "underlying offense." *Id.* at 120.

120. *Id.* at 258–60.

121. *See* Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 20.2b, 914 (5th ed., LexisNexis 2005) ("Because the provision verbally replicates the Supreme Court's *Sawyer* standard, and because *Sawyer* established that standard in the process of defining the phrase 'innocence of the death penalty,' the provision arguably is meant to encompass ineligibility for the death penalty."); Stevenson, *supra* n. 74, at 739–40. Stevenson further points out that the better interpretation, as a matter of statutory construction principles, is to presume that Congress meant the words to mean the same as they do in *Sawyer*. *Id.*; *but see* Caro S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. Crim. L. & Criminology 587, 611 (2005) (describing, in reference to the AEDPA provision on second or successive petitions, that Congress created an innocence exception that excludes ineligibility of the death penalty).

Even if the language of the statute itself were read to preclude an innocence of death eligibility claim, a judicially managed equitable consideration would be appropriate. The judicially developed miscarriage of justice exception is intended to operate in tandem with the statute. This purpose would seem to remain equally strong post-AEDPA. In *Schlup*, the Supreme Court observed that it had "repeatedly noted the interplay between statutory language and judicially managed equitable considerations in the development of habeas corpus jurisprudence."[122] They acknowledged that the 1966 amendments to the habeas statute had deleted language that referred to general "ends of justice" concerns.[123] Nevertheless, the Court had found that a successive petition must be heard to prevent a miscarriage of justice.[124]

The same reasoning and policy that support a miscarriage of justice exception to restrictive habeas rules also support continuing to recognize innocence of a capital crime as falling within that exception. In *House*, the Court reaffirmed that the miscarriage of justice exception was an appropriate balance of "'the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case.'"[125] This balance is upheld, in large part, because the miscarriage of justice exception is applied infrequently and only in the most meritorious cases.[126] The Court recognizes that to allow a conviction and sentence of an innocent person to stand is a manifest injustice. At the same time, the Court continues to honor the need for finality, respect for state court decisions, and conservation of federal judicial resources.

### *C. Habeas Corpus: Claims of Innocence as a Freestanding Claim*

While most of the habeas cases focus on innocence as a gateway to a hearing on a constitutional claim, such as ineffective assistance of counsel, defendants have also filed habeas petitions with freestanding claims of innocence. This means that the petitioner does not challenge any procedures that took place at trial but rather simply claims that despite a constitutional trial he or she is innocent of the crime. A freestanding claim of innocence argues that the execution of an innocent person is unconstitutional and should be heard in a habeas proceeding.

It may be a surprise to some that this question is a matter of debate, discussion, and disagreement even among the members of the Supreme Court. And yet, twice in thirteen years, the Supreme Court was directly asked to decide whether it was unconstitutional to execute an innocent person and both times failed to give a direct answer. First in 1993, in *Herrera v. Collins*,[127] and again in 2006, in *House v. Bell*,[128] the Court ultimately avoided a decision directly on this issue. Both times, however, several justices did

122. 513 U.S. at 319 n. 35.

123. *Id.* at 320.

124. *Id.* at 318–26.

125. 126 S. Ct. at 2076 (quoting *Schlup*, 513 U.S. at 324).

126. *Id.* at 2077 (emphasizing that "the *Schlup* standard is demanding and permits review only in the 'extraordinary' case" (citing *Schlup*, 513 U.S. at 327)).

127. 506 U.S. 390. In *Herrera*, the question was whether the newly discovered evidence of innocence without an underlying constitutional violation was grounds for federal habeas relief.

128. 126 S. Ct. 206.

express their views on how this question should be answered.

In *Herrera*, Chief Justice Rehnquist, writing for the majority, "assumed" without deciding that, in a capital case, the execution of an innocent person would be unconstitutional.[129] However, a majority of the Court held that the evidence of innocence presented by Herrera fell far short of a "truly persuasive showing of innocence" which was needed for the Court to review his claim.[130] Six of the Justices nonetheless expressed the view that executing an innocent person is unconstitutional.[131] Justices Scalia and Thomas were equally emphatic that the Constitution does not and cannot protect a defendant from this possibility.[132]

At the time *Herrera* was decided, there had been only forty-eight exonerations from death row and none had been as a result of DNA evidence.[133] In 2006, the landscape changed dramatically. During the thirteen years between *Herrera* and *House*, there had been seventy-five death row exonerations,[134] fourteen on the basis of DNA. In nondeath penalty cases, DNA exonerations numbered one hundred ninety-four.[135]

By 2006, the execution of an innocent person was a reality the Court could no longer ignore. The *House* case presented to the Court the question of whether it was unconstitutional to execute an innocent person.[136] House argued that he was innocent of the crime for which he was convicted and sentenced to death. He presented to the Court new evidence to support his innocence. This included DNA evidence that positively excluded House as the source of semen stains found on the victim's clothing. Blood

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129. *Herrera*, 506 U.S. at 417 ("We may assume, for the sake of argument in deciding this case that in a capital case a truly persuasive showing of 'actual innocence' made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality . . . and the enormous burden that having to retry cases . . . would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.").

130. *Id.* Herrera was executed by the state of Texas on May 12, 1993. Death Penalty Info. Ctr., *Execution Database*, http://www.deathpenaltyinfo.org/executions.php (accessed Jan. 15, 2007).

131. Justice O'Connor wrote, "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution." *Herrera*, 506 U.S. at 419 (O'Connor & White, JJ., concurring). Justice White wrote, "I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution [of a defendant]." *Id.* at 429 (White, J., concurring). Justice Blackmun wrote, "[n]othing could be more contrary to contemporary standards of decency or more shocking to the conscience than to execute a person who is actually innocent." *Id.* at 430 (Blackmun, Stevens & Souter, JJ., dissenting). The dissent concluded that it violated both the Eighth Amendment as well as the Due Process Clause of the Fourteenth Amendment and ultimately concluded that "[t]he execution of a person who can show he that is innocent comes perilously close to simple murder." *Herrera*, 506 U.S. at 446.

132. *Id.* at 428. Justice Scalia wrote,

> I can understand, or at least am accustomed to, the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received . . . all of the process that our society has traditionally deemed adequate.

*Id.* (Scalia & Thomas, JJ., concurring) (footnote omitted). More recently, in *Kansas v. Marsh*, Justice Scalia dismissed the notion of executing an innocent person as virtually impossible stating "[o]ne cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly . . . But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum." 126 S. Ct. 2516, 2539 (2006) (Scalia, J., concurring).

133. Death Penalty Info. Ctr., *The Innocence List*, http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 (accessed Jan. 28, 2007).

134. *Id.*

135. Innocence Project, *Know the Cases*, http://www.innocenceproject.org/know (accessed Jan. 31, 2007).

136. *House*, 126 S. Ct. at 2086.

stains found on House's jeans belonging to the victim was identified as coming from the sample tube of blood collected during the autopsy and not from the victim during the altercation—the presence of a preserving enzyme was found in the blood and three-fourths of the tube from the autopsy was empty—and there was evidence that the husband had a motive to kill his wife, including evidence of prior abusive behavior toward her, recent threats to get rid of her, and a confession to two of his friends that he had murdered her.[137]

House asked that the Court articulate a standard for evaluating a defendant's claim of innocence. Once again the Court declined. It assumed, as it had in *Herrera*, that a claim of innocence was possible but that House had not presented enough proof to satisfy such a claim.[138] Because House barely met the *Schlup* gateway standard, the Court found that he would not meet a *Herrera* freestanding claim standard.[139]

A freestanding claim of actual innocence is based on the assumption that the trial was constitutionally adequate. Therefore, the evidence of innocence must be so strong that it alone undermines the reliability of the conviction, thereby making the execution unjust and unconstitutional. Because the standard is so difficult to meet, there are few cases in which the issue has been raised.[140]

As with gateway claims, freestanding claims of innocence also raise the question of whether it is unconstitutional to execute a person who is innocent of the death penalty or innocent of the aggravating circumstances. This is a far more difficult question than with the gateway claims since the Court has still not ruled whether it is constitutional to execute a person who is innocent of the underlying murder. However, the parallels of innocence of the crime and innocence of the aggravating circumstances are identical to the parallels in the gateway context. Assuming it is unconstitutional to execute a person who is innocent of the murder, it should also be unconstitutional to execute a person who is not eligible for the death penalty.

Whatever hurdles may be imposed on raising innocence as a freestanding claim, it would be illogical not to recognize the execution of an innocent person as a violation of the Eighth Amendment. The constitutional issue does not go away because the defendant had an error-free trial. A strong precedent here is the Court's holding that it is

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137. *Id.* at 2078–86. The Court distinguishes the different manner in which the issue might arise. If House had either requested an evidentiary hearing or was filing a second or successive habeas petition, the case would have to be decided under AEDPA which provides for review only upon a showing of clear and convincing evidence that but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under applicable state law. *See* 28 U.S.C. §§ 2244(b)(2)(B)(ii), 2254(e)(2) (providing different standards for successive petitions and evidentiary hearings).

138. *House*, 126 S. Ct. at 2087. The Court stated "[w]e decline to resolve this issue. We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it." *Id.*

139. *Id.* ("The sequence of the Court's decision in *Herrera* and *Schlup*—first leaving unresolved the status of freestanding claims and then establishing the gateway standard—implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*. It follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera*.").

140. *E.g. In re Byrd*, 269 F.3d 561 (6th Cir. 2001). Byrd claimed, in his second habeas petition that he was innocent of the death penalty based upon an affidavit of his co-defendant, Brewer, who alleged that he, not Byrd, fatally stabbed the victim in the case. *Id.* at 565. The court dismisses the claim because Byrd was unable to satisfy that "'extraordinarily high'" threshold showing required under *Herrera*, and the information Byrd presented was not newly discovered evidence. Rather, Byrd was on notice of this information as early as the filling of his first habeas petition, making this case the "quintessential abuse of the writ." *Id.* at 565, 572.

unconstitutional to execute a person who is insane at the time of execution. Such an individual may well have had an error-free trial. The concern is with the status of the individual prior to the execution. Similarly, an individual who is innocent of murder or innocent of capital murder is in a category of persons whom the state should not constitutionally be entitled to execute. The defendants in these categories should be able to raise the constitutional issue in federal habeas, even if it is necessary to meet an exacting standard such as a "truly persuasive" showing. The courts are adept at finding a balance between respect for finality and the constitutional concerns, and the high threshold standard prevents erosion of those principles.[141]

## V. CONCLUSION

The legal issues in capital cases are highly complicated, whether at the pretrial stage, the dual trial stages, or the mandatory appeals and, most certainly, in federal habeas corpus proceedings. We should not, however, allow the complexity to mask the simplicity of the issue of innocence of a capital crime. The capital nature of the crime occurs when the element of an aggravating circumstance is proven beyond a reasonable doubt. The same Sixth Amendment right to a jury verdict exists for this element of a capital crime. Innocence of this capital crime is the same as innocence of murder, the prerequisite crime for most capital offenses. The status and function of aggravating circumstances as an element of a capital crime, in turn, necessitates applying the same rules for gateway and freestanding claims of innocence that are applied in noncapital cases.

If a petitioner is innocent of an aggravating circumstance, he should be allowed to pass through the gateway to overcome any procedural default, successive bar, or restriction on an evidentiary hearing. The petitioner should also be permitted to raise a freestanding claim of innocence of the death penalty under the same premise as *Herrera* and *House*: that it is unconstitutional to execute an innocent person. The Court has consistently warned that "death is different"[142] and suggested that heightened standards of review should apply in capital cases. Nowhere is this more critical than in questions of innocence.

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141. For an example of the difficulty of prevailing on an innocence of the death penalty claim, review *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994). Jacobs was sentenced to death for the murder of Etta Urdiales. *Id.* at 1322. At his trial, he testified that his sister had killed the victim and that, although he was present, he did not know that she had a gun. *Id.* At his sister's trial, the state changed its position and claimed that Jacobs was telling the truth and that Jacobs neither did the killing nor knew his sister had a gun. *Id.* at 1322-23. The state called Jacobs to testify at his sister's trial. *Id.* at 1323. In his postconviction appeal, Jacobs argued that he was not guilty of capital murder because under Texas law he had to either intentionally cause the death of the victim or anticipate that the death would result. *Jacobs*, 31 F.3d at 1324; Tex. Penal Code Ann. §§ 19.02(a), 19.03(a) (2003). Jacobs argued that the government's concession to that effect in his sister's trial was "newly discovered evidence" that entitled him to relief in habeas corpus. *Jacobs*, 31 F.3d at 1324. The court did not dispute that his claim raised an issue of innocence of the death penalty. Nonetheless, the court denied Jacobs relief, finding that he failed to satisfy the "extraordinarily high" showing required for a freestanding claim of innocence." *Id.* Jacobs was executed on January 4, 1995. Death Penalty Info. Ctr., *Execution Database*, http://www.deathpenaltyinfo.org/executions.php (accessed Jan. 15, 2007).

142. 428 U.S. at 305 ("The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."); *see Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (recognizing that the Court's "'duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case'" (citations omitted) (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987))).