SUPREME COURT OF THE UNITED STATES

No. 91–6382

ROBERT WAYNE SAWYER, PETITIONER *v.* JOHN WHITLEY, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 22, 1992]

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, concurring in the judgment.

Only 10 years ago, the Court reemphasized that "[t]he writ of habeas corpus indisputably holds an honored position in our jurisprudence. Tracing its roots deep into English common law, it claims a place in Art. I of our Constitution. Today, as in prior centuries, the writ is a bulwark against convictions that violate `fundamental fairness.' *Wainwright* v. *Sykes*, 433 U. S. [72,] 97 [(1972)] (STEVENS, J., concurring)." *Engle* v. *Isaac*, 456 U. S. 107, 126 (1982). It is this centrality of "fundamental fairness" that has led the Court to hold that habeas review of a defaulted, successive, or abusive claim is available, even absent a showing of cause, if failure to consider the claim would result in a fundamental miscarriage of justice. See *Sanders* v. *United States*, 373 U. S. 1, 17–18 (1963); *Engle*, 456 U. S., at 135.

In *Murray* v. *Carrier*, 477 U. S. 478, 495, 496 (1986), the Court ruled that the concept of "fundamental miscarriage of justice" applies to those cases in which the defendant
was "probably . . . actually innocent." The Court held that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Id.*, at 496. Having equated the "ends of justice" with "actual innocence," the Court is now confronted with the task of giving meaning to "actual innocence" in the

context of a capital sentencing proceeding–hence the phrase “innocence of death.”

While the conviction of an innocent person may be the archetypal case of a manifest miscarriage of justice, it is not the only case. There is no reason why "actual innocence" must be both an animating *and the limiting* principle of the work of federal courts in furthering the "ends of justice." As Judge Friendly emphasized, there are contexts in which, irrespective of guilt or innocence, constitutional errors violate fundamental fairness. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 151–154 (1970). Fundamental fairness is more than accuracy at trial; justice is more than guilt or innocence.

Nowhere is this more true than in capital sentencing proceedings. Because the death penalty is qualitatively and morally different from any other penalty, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures." *Smith* v. *Murray*, 477 U. S. 527, 545–546 (1986) (STEVENS, J., dissenting). Accordingly, the ends of justice dictate that "[w]hen a condemned prisoner raises a substantial, colorable Eighth Amendment violation, there is a special obligation . . . to consider whether the prisoner's claim would render his sentencing proceeding fundamentally unfair." *Id.*, at 546.

Thus the Court's first and most basic error today is that it asks the wrong question. Charged with averting manifest miscarriages of justice, the Court instead narrowly recasts its duty as redressing cases of "actual innocence." This error aside, under a proper interpretation of the *Carrier* analysis, the Court's definition of "innocence of death" is plainly wrong because it disregards well-settled law—both the law of habeas corpus and the law of capital punishment.

The Court today holds that, absent a showing of

cause,
a federal court may not review a capital defendant's defaulted, successive, or abusive claims unless the defendant

> "show[s] by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty." *Ante*, at 1.

This definition of "innocence of the death sentence" deviates from our established jurisprudence in two ways. First, the "clear and convincing evidence" standard departs from a line of decisions defining the "actual innocence" exception to the cause-and-prejudice requirement. Second, and more fundamentally, the Court's focus on *eligibility* for the death penalty conflicts with the very structure of the constitutional law of capital punishment.

As noted above, in *Murray* v. *Carrier*, the Court held that in those cases in which ``a constitutional violation has *probably* resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." 477 U. S., at 496 (emphasis supplied). The Court has since frequently confirmed this standard. See, *e.g.*, *Coleman* v. *Thompson*, 501 U. S. ___, ___ (1991); *Dugger* v. *Adams*, 489 U. S. 401, 412, n. 6 (1989); *Teague* v. *Lane*, 489 U. S. 288, 313 (1989). In subsequent decisions, both those involving "innocence of the offense" and those involving "innocence of the death sentence," the Court has employed the same standard of proof. For example, in *Smith* v. *Murray*, 477 U. S. 527 (1986), the Court repeated the *Carrier* standard and applied it in a capital sentencing proceeding. The Court ruled that Smith's claim did not present "the risk of a manifest miscarriage of justice" as it was "devoid of any substantial claim that the alleged error undermined the accuracy of

the guilt or sentencing determination." *Id.*, at 538–539. Similarly, in *Dugger* v. *Adams*, a case involving "innocence of the death sentence," the Court stated the controlling standard as whether an "individual defendant *probably* is `actually innocent' of the sentence he or she received." 489 U. S., at 412, n. 6 (emphasis supplied). In sum, in construing both "innocence of the offense" and "innocence of the death sentence," we have consistently required a defendant to show that the alleged constitutional error has *more likely than not* created a fundamental miscarriage of justice.

As we noted in another context, "[t]his outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence." *Strickland* v. *Washington*, 466 U. S. 668, 693–694 (1984).

Equally significant, this "probably resulted" standard is well calibrated to the manifest miscarriage of justice exception. Not only does the standard respect the competing demands of finality and fundamental fairness, it also fits squarely within our habeas jurisprudence. In general, a federal court may entertain a defaulted, successive, or abusive claim if a prisoner demonstrates cause and prejudice. See generally *McCleskey* v. *Zant*, 499 U. S. ___, ___ (1991). To show "prejudice," a defendant must demonstrate "a reasonable probability that, but for [the alleged] erro[r], the result of the proceeding would have been different." *Strickland*, 466 U. S., at 694; see also *United States* v. *Bagley*, 473 U. S. 667, 682, 685 (1985). The "miscarriage of justice" exception to this general rule requires a more substantial showing: The defendant must not simply

demonstrate a *reasonable probability* of a different result, he must show that the alleged error *more likely than not* created a manifest miscarriage of justice. This regime makes logical sense. If a defendant cannot show cause and can only show a "reasonable probability" of a different outcome, a federal court should not hear his defaulted, successive, or abusive claim. Only in the "exceptional case" in which a defendant can show that the alleged constitutional error "probably resulted" in the conviction (or sentencing) of one innocent of the offense (or the death sentence) should the court hear the defendant's claim.

The Court today repudiates this established standard of proof and replaces it with a requirement that a defendant "show by *clear and convincing evidence* that . . . no reasonable juror would have found [him] eligible for the death penalty." *Ante*, at 1 (emphasis supplied). I see no reason to reject the established and well-functioning "probably resulted" standard and impose such a severe burden on the capital defendant. Although we have frequently recognized the State's strong interest in finality, we have never suggested that that interest is sufficient to outweigh the individual's claim to innocence. To the contrary, the "actual innocence" exception itself manifests our recognition that the criminal justice system occasionally errs and that, when it does, finality must yield to justice.

"The function of a standard of proof . . . is to `instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'. . . The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington* v. *Texas,* 441 U. S. 418, 423 (1979) (citation omitted). Neither of these considerations supports the heightened standard of

proof the Court imposes today.

First, there is no basis for requiring a federal court to be virtually certain that the defendant is actually ineligible for the death penalty, before *merely entertaining* his claim. We have required a showing by clear and convincing evidence in several contexts: For example, the medical facts underlying a civil commitment must be established by this standard, *Addington* v. *Texas*, *supra*, as must "actual malice" in a libel suit brought by a public official. *New York Times Co*. v. *Sullivan*, 376 U. S. 254, 279–280 (1964); see also *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242 (1986). And we have required a related showing in cases involving deportation, *Woodby* v. *INS*, 385 U. S. 276, 285–286 (1966), and denaturalization, *Schneiderman* v. *United States*, 320 U. S. 118, 125 (1943). In each of these contexts, the interests of the nonmoving party were truly substantial: personal liberty in *Addington*, freedom of expression in *New York Times*, residence in *Woodby*, and citizenship in *Schneiderman*. In my opinion, the State's interest in finality in a capital prosecution is not nearly as great as any of these interests. Indeed, it is important to remember that "innocence of the death sentence" is not a standard for staying or vacating a death sentence, but merely a standard for determining whether or not a court should reach the merits of a defaulted claim. The State's interest in "finality" in this context certainly does not warrant a "clear and convincing" evidentiary standard.

Nor is there any justification for allocating the risk of error to fall so severely upon the capital defendant or attaching greater importance to the initial sentence than to the issue of whether that sentence is appropriate. The States themselves have declined to attach such weight to capital sentences: most States provide plain-error review for defaulted claims in capital cases. See *Smith* v. *Murray*, 477 U. S., at 548–550, n. 20 (collecting authorities). In this regard,

the Court's requirement that "innocence of death" must be demonstrated by "clear and convincing evidence" fails to respect the uniqueness of death penalty decisions: Nowhere is the need for accuracy greater than when the State exercises its ultimate authority and takes the life of one of its citizens.

Indeed, the Court's ruling creates a perverse double standard. While a defendant raising defaulted claims in a non-capital case must show that constitutional error "probably resulted" in a miscarriage of justice, a capital defendant must present "clear and convincing evidence" that no reasonable juror would find him eligible for the death penalty. It is heartlessly perverse to impose a more stringent standard of proof to avoid a miscarriage of justice in a capital case than in a noncapital case.

In sum, I see no reason to depart from settled law, which clearly requires a defendant pressing a defaulted, successive, or abusive claim to show that a failure to hear his claim will "probably result" in a fundamental miscarriage of justice. In my opinion, a corresponding standard governs a defaulted, successive, or abusive challenge to a capital sentence: The defendant must show that he is probably—that is, more likely than not—"innocent of the death sentence."

The Court recognizes that the proper definition of "innocence of the death sentence" must involve a reweighing of the evidence and must focus on the sentencer's likely evaluation of that evidence. Thus, the Court directs federal courts to look to whether a "reasonable juror *would* have found the petitioner eligible for the death penalty." *Ante*, at 1 (emphasis added). Nevertheless, the Court inexplicably limits this inquiry in two ways. First, the Court holds that courts should consider *only* evidence concerning aggravating factors. As demonstrated below, this

limitation is wholly without foundation and neglects the central role of mitigating evidence in capital sentencing proceedings. Second, the Court requires a petitioner to refute his *eligibility* for the death penalty. This narrow definition of "innocence of the death sentence" fails to recognize that, in rare cases, even though a defendant is eligible for the death penalty, such a sentence may nonetheless constitute a fundamental miscarriage of justice.

It is well established that, "in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." *Hitchcock* v. *Dugger*, 481 U. S. 393, 394 (1987) (internal quotations and citations omitted). Yet in ascribing a narrow, eligibility-based meaning to "innocence of the death sentence" the Court neglects this rudimentary principle.

As the Court recognizes, a single general directive animates and informs our capital-punishment jurisprudence: "the death penalty [may not] be imposed under sentencing procedures that creat[e] a substantial risk that [the death penalty] would be inflicted in an arbitrary and capricious manner." *Gregg* v. *Georgia*, 428 U. S. 153, 188 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). As applied and developed over the years, this constitutional requirement has yielded two central principles. First, a sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty." *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983). Second, the sentencer must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (opinion of Burger, C. J.) (emphasis in original). Although these principles—one narrowing the relevant class, the other broadening the scope of considered evidence—

seemingly point in opposite directions, in fact both serve the same end: ensuring that a capital sentence is the product of individualized and reasoned moral decisionmaking.

Against this backdrop of well-settled law, the Court's ruling is a startling anomaly. The Court holds that "innocence of the death sentence" concerns only "those elements which render a defendant *eligible* for the death penalty, and *not . . . additional mitigating evidence* which [constitutional error precluded] from being introduced." *Ante*, at 13 (emphasis added). Stated bluntly, the Court today respects only one of the two bedrock principles of capital-punishment jurisprudence. As such, the Court's impoverished vision 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, a constitutive element of our Eighth Amendment jurisprudence. We have reiterated and applied this principle in more than a dozen cases over the last 14 years. For example, in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), we overturned a capital sentence because the sentencer refused to consider certain mitigating evidence. Similarly, in *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), we ruled that a State cannot preclude consideration of evidence of postincarceration, pretrial good behavior. And in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), we held that Texas' death penalty scheme impermissibly restricted the jury's consideration of the defendant's mental retardation as mitigating evidence.[1]

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[1]See also *Boyde* v. *California*, 494 U. S. 370 (1990); *McKoy* v. *North Carolina*, 494 U. S. 433 (1990); *Franklin* v. *Lynaugh*, 487 U. S. 164 (1988); *Mills* v. *Maryland*, 486 U. S. 367 (1988); *Hitchcock* v. *Dugger*,

Moreover, the Court's holding also clashes with the *theory* underlying our capital-punishment jurisprudence. The nonarbitrariness—and therefore the constitutionality—of the death penalty rests on *individualized* sentencing determinations. See generally *California* v. *Brown*, 479 U. S. 538, 544–546 (1987) (O'CONNOR, J., concurring). This is the difference between the guided-discretion regime upheld in *Gregg* v. *Georgia* and the mandatory death-sentence regime invalidated in *Roberts* v. *Louisiana*, 428 U. S. 325 (1976). The *Roberts* scheme was constitutionally infirm because it left no room for individualized moral judgments, because it failed to provide the sentencer with a "meaningful opportunity [to] conside[r the] mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." *Id.*, at 333–334 (opinion of Stewart, Powell, and STEVENS, JJ.). The Court's definition of "innocence of the death sentence" is like the statutory scheme in *Roberts*: it focuses solely on whether the defendant is in a class eligible for the death penalty and disregards the equally important question of whether "`death is the appropriate punishment in [the defendant's] specific case.'" *Zant* v. *Stephens*, 462 U. S., at 885 (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976)).[2]

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481 U. S. 393 (1987); *Bell* v. *Ohio*, 438 U. S. 637 (1978).

[2]The Court rejects the argument that federal courts should also consider *mitigating* evidence because consideration of such evidence involves the "far more difficult task [of] assess[ing] how jurors would have reacted to additional showings." *Ante*, at 11. I see no such difference between consideration of aggravating and mitigating circumstances; both require the federal courts to reconsider and anticipate a sentencer's decision: by the Court's own standard

The Court's definition of "innocent of the death sentence" is flawed in a second, related, way. The Court's analysis not only neglects errors that preclude a sentencer's consideration of mitigating factors; it also focuses too narrowly on *eligibility*. The Court requires a defendant to call into question *all* of the aggravating factors found by the sentencer and thereby show himself ineligible for the death penalty.

Contrary to the Court's suggestion, however, there may be cases in which, although the defendant remains eligible for the death penalty, imposition of a death sentence would constitute a manifest miscarriage of justice. If, for example, the sentencer, in assigning a sentence of death, relied heavily on a finding that the defendant severely tortured the victim, but later it is discovered that another person was responsible for the torture, the elimination of the aggravating circumstance will, in some cases, indicate that the death sentence was a miscarriage of justice. By imposing an "all-or-nothing" eligibility test, the Court's definition of "innocent of the death sentence" fails to acknowledge this important possibility.

In sum, the Court's "innocent of the death sentence" standard is flawed both in its failure to consider constitutional errors implicating mitigating factors, and in its unduly harsh requirement that a defendant's eligibility for the death penalty be disproved.

In my opinion, the "innocence of the death

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federal courts must determine whether a "reasonable juror would have found" certain facts. Thus, the Court's reason for barring federal courts from considering mitigating circumstances applies equally to the standard that *it* endorses. Its exclusion of mitigating evidence from consideration is therefore wholly arbitrary.

sentence" standard must take into account several factors. First, such a standard must reflect *both* of the basic principles of our capital-punishment jurisprudence. The standard must recognize both the need to define narrowly the class of "death-eligible" defendants and the need to define broadly the scope of mitigating evidence permitted the capital sentencer. Second, the "innocence of the death sentence" standard should also recognize the distinctive character of the capital-sentencing decision. While the question of innocence or guilt of the offense is essentially a question of fact, the choice between life imprisonment and capital punishment is both a question of underlying fact and a matter of reasoned moral judgment. Thus, there may be some situations in which, although the defendant remains technically "eligible" for the death sentence, nonetheless, in light of all of the evidence, that sentence constitutes a manifest miscarriage of justice. Finally, the "innocence of the death sentence" standard must also respect the "profound importance of finality in criminal proceedings," *Strickland* v. *Washington*, 466 U. S., at 693–694, and the "heavy burden" that successive habeas petitions place "on scarce federal judicial resources." *McCleskey* v. *Zant*, 499 U. S., at ___.

These requirements are best met by a standard that provides that a defendant is "innocent of the death sentence" only if his capital sentence is *clearly erroneous.* This standard encompasses several types of error. A death sentence is clearly erroneous if, taking into account all of the available evidence, the sentencer lacked the legal authority to impose such a sentence because, under state law, the defendant was not eligible for the death penalty. Similarly, in the case of a "jury override," a death sentence is clearly erroneous if, taking into account all of the evidence, the evidentiary prerequisites for that override (as established by state law) were not met.

See, *e.g.*, *Johnson* v. *Singletary*, 938 F. 2d 1166, 1194–1195 (CA11 1991) (Tjoflat, C. J., concurring in part and dissenting in part) (concluding that the sentencing "judge, as a matter of law, could not have sentenced the petitioner to death" because there was insufficient evidence to meet the jury-override standard established in *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975)). A death sentence is also clearly erroneous under a "balancing" regime if, in view of all of the evidence, mitigating circumstances so far outweighed aggravating circumstances that no reasonable sentencer would have imposed the death penalty. Cf. *Jackson* v. *Virginia*, 443 U. S. 307, 316–318 (1979). Such a case might arise if constitutional error either precluded the defendant from demonstrating that aggravating circumstances did not obtain or precluded the sentencer's consideration of important mitigating evidence.

Unlike the standard suggested by the Court, this standard acknowledges both the "aggravation" and "mitigation" aspects of capital-punishment law. It recognizes that, in the extraordinary case, constitutional error may have precluded consideration of mitigating circumstances so substantial as to warrant a court's review of a defaulted, successive, or abusive claim. It also recognizes that, again in the extraordinary case, constitutional error may have inaccurately demonstrated aggravating circumstances so substantial as to warrant review of a defendant's claims.

Moreover, the "clearly erroneous" standard is duly protective of the State's legitimate interests in finality and respectful of the systemic and institutional costs of successive habeas litigation. The standard is stringent: if the sentence "is plausible in light of the record viewed in its entirety" it is not clearly erroneous "even though [the court is] convinced that had it been sitting as the [sentencer], it would have weighed the evidence differently." *Anderson* v.

Bessemer City, 470 U. S. 564, 574 (1985). At the same time, "clearly erroneous" review allows a federal court to entertain a defaulted claim in the rare case in which the "court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948).

Finally, the clearly erroneous standard is workable. As was true of the cause-and-prejudice standard adopted in *McCleskey* v. *Zant*, the clear-error standard is "[w]ell-defined in the case law [and] familiar to federal courts. . . . The standard is an objective one, and can be applied in a manner that comports with the threshold nature of the abuse of the writ inquiry." 499 U. S., at ___. Federal courts have long applied the "clearly erroneous" standard pursuant to Rule 52 of the Federal Rules of Civil Procedure and have done so "in civil contempt actions, condemnation proceedings, copyright appeals, [and] forfeiture actions for illegal activity." 1 S. Childress & M. Davis, Standards of Review §2.3 at 29–30 (1986) (citing cases).[3] This workability supports the application of the clearly erroneous standard to the "innocence of the death sentence" inquiry.

In my opinion, then, the "clearly erroneous" standard is the core of the "innocence of the death sentence" exception. Just as a defendant who presses a defaulted, successive, or abusive claim and who cannot show cause must demonstrate that it is more likely than not that he is actually innocent of the offense, so a capital defendant who presses such a claim and cannot show cause must demonstrate that

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[3]Courts have also reviewed nonguilt findings of fact made in criminal cases pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure under this standard. See 2 S. Childress & M. Davis, Standards of Review §10.3 at 73–76 (1986) (citing cases).

it is more likely than not that his death sentence was clearly erroneous. Absent such a showing, a federal court may not reach the merits of the defendant's defaulted, successive, or abusive claim.

It remains to apply this standard to the case at hand. As the majority indicates, Sawyer alleges two constitutional errors. First, he contends that the State withheld certain exculpatory evidence, in violation of Sawyer's due process rights as recognized in *Brady* v. *Maryland*, 373 U. S. 83 (1963). Second, Sawyer argues that his trial counsel's failure to uncover and present records from Sawyer's earlier treatments in psychiatric institutions deprived him of effective assistance of counsel as guaranteed by the Sixth Amendment.

As Sawyer failed to assert his *Brady* claim in an earlier habeas petition and as he cannot show cause for that failure, the court may only reach the merits of that "abusive" claim if Sawyer demonstrates that he is probably actually innocent of the offense or that it is more likely than not that his death sentence was clearly erroneous. As Sawyer's ineffective-assistance claim was considered and rejected in an earlier habeas proceeding, the court may only review that "successive" claim upon a similar showing. Upon a review of the record in its entirety, I conclude that Sawyer has failed to make such a showing.

Sawyer points to two pieces of exculpatory evidence allegedly withheld by the State. First, he offers the affidavit of a woman (Diane Thibodeaux) who, on occasion, took care of the small child who witnessed the crime. That account appears to conflict with contemporaneous police reports. While police records indicate that the child implicated Sawyer in the cruel burning of the victim, Thibodeaux avers that the child stated to her that Sawyer's codefendant, Charles Lane, set the victim afire. Second, he offers other affidavits casting doubt on

the credibility of
Cindy Shano, the State's principal witness. Sawyer emphasizes that Shano testified under a grant of immunity and highlights inaccuracies in her trial testimony. Finally, as part of his Sixth Amendment claim, Sawyer also offers medical records documenting brain damage and retarded mental development.

Viewed as a whole, the record does not demonstrate that failure to reach the merits of Sawyer's claims would constitute a fundamental miscarriage of justice. First, in view of the other evidence in the record, the Thibodeaux affidavit and questions concerning Shano's testimony do not establish that Sawyer is "probably . . . actually innocent" of the crime of first-degree murder. At most, Thibodeaux's hearsay statements cast slight doubt on the facts underlying the burning of the victim. Similarly, although the challenges to Shano's testimony raise questions, these affidavits do not demonstrate that Sawyer probably did not commit first-degree murder. Thus, Sawyer has not met the standard "actual innocence" exception.

Second, the affidavits and the new medical records do not convince me that Sawyer's death sentence is clearly erroneous. The jury found two statutory aggravating factors—that the murder was committed in the course of an aggravated arson, and that the murder was especially heinous, atrocious, and cruel. *State* v. *Sawyer*, 422 So. 2d 95, 100 (La. 1982). As suggested above, the Thibodeaux affidavit does not show that it is "more likely than not" that Sawyer did not commit aggravated arson. Moreover, Sawyer offers no evidence to undermine the jury's finding that the murder was especially heinous, atrocious, and cruel. In addition, assuming that the new medical evidence would support a finding of a statutory mitigating factor (diminished capacity due

to mental disease or defect),[4] I cannot say that it would be clear error for a sentencer faced with the two unrefuted aggravating circumstances and that single mitigating circumstance to sentence Sawyer to death.

In sum, in my opinion Sawyer has failed to demonstrate that it is more likely than not that his death sentence was clearly erroneous. Accordingly, I conclude that the court below was correct in declining to reach the merits of Sawyer's successive and abusive claims.

The Court rejects an "innocence of death" standard that recognizes constitutional errors affecting *mitigating* evidence because such a standard "would so broaden the inquiry as to make it anything but a `narrow' exception to the principle of finality." *Ante*, at 11. As the foregoing analysis indicates, however, the Court's concerns are unfounded. Indeed, even when federal courts have applied a less restrictive standard than the standard I propose, those courts have rarely found "innocence of death" and reached the merits of a defaulted, successive, or abusive claim. See *Deutscher* v. *Whitley*, 946 F. 2d 1443 (CA9 1991); *Stokes* v. *Armontrout*, 893 F. 2d 152, 156 (CA8 1989); *Smith* v. *Armontrout,* 888 F. 2d 530, 545 (CA8 1989).

Similarly, I do not share the Court's concern that a standard broader than the eligibility standard creates "a far more difficult task" for federal courts. *Ante*, at 11. As noted above, both the "probably resulted"

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[4]See La. Code Crim. Proc. Ann., Art. 905.5(e) (West 1984) (defining "mitigating circumstances" to include the fact that "the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect" at the time of the offense).

standard and the "clearly erroneous" standard have long been applied by federal courts in a variety of contexts. Moreover, to the extent that the clearly erroneous standard is more difficult to apply than the Court's "eligibility" test, I believe that that cost is far outweighed by the importance of making just decisions in the few cases that fit within this narrow exception. To my mind, any added administrative burden is surely justified by the overriding interest in minimizing the risk of error in implementing the sovereign's decision to take the life of one of its citizens. As we observed in *Gardner* v. *Florida*, 430 U. S. 349, 360 (1977), "if the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death."