HABEAS CORPUS AS A SAFETY VALVE FOR INNOCENCE

BRUCE LEDEWITZ*

INTRODUCTION

In recent years, a series of United States Supreme Court decisions has restricted access by state prisoners to the Great Writ.[1] As Professor Steve Goldstein explains,[2] one important reason for these restrictions is the view of the majority of the Justices that the primary purpose of habeas corpus is to deter state judges from ignoring established constitutional rights. Nevertheless, for some of the Justices, an additional purpose of habeas corpus is to provide a "safety valve" for innocent defendants and for those defendants inappropriately sentenced to death. Habeas corpus, in other words, provides

* Professor of Law, Duquesne University School of Law. The author recently served as Secretary of the National Coalition to Abolish the Death Penalty.

I support fully the policy of the *Review of Law & Social Change* with regard to the use of female pronouns as the universal reference. Such use exposes the unconscious sexism of common English usage. In the context of death penalty habeas corpus, however, I depart from the *Review's* usual policy because the prisoners involved in death penalty litigation are 98% male. Not only would the use of a female pronoun for such prisoners be misleading, it would have the unintended effect of minimizing the extent to which current death penalty practice partakes of sexist assumptions.

1. "[T]hat great writ" was the phrase used by Chief Justice Marshall to describe the writ of habeas corpus issued "to examine into the cause of commitment." *Ex Parte* Bollman, 8 U.S. (4 Cranch) 75, 95-100 (1807). For a general overview of these cases and limits, see W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 27 (1984).

2. Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357 (1990-91).

the opportunity for the defendant who is either innocent of the crime charged or of the sentence received, to obtain relief from an erroneous state court judgment. The view of habeas corpus as a safety valve for the innocent defendant explains why restrictions imposed by the Court in the areas of successive petitions and procedural default contain exceptions for the innocent defendant.

With the decision in *Teague v. Lane*[3] and the cases following *Teague*, state prisoners on death row face an important new barrier to raising federal claims in habeas corpus. With two exceptions, *Teague* barred state prisoners from raising claims based on new law and claims that were established after the prisoner's conviction became final in habeas corpus proceedings.

This paper explores whether *Teague* and its exceptions continue to protect the innocent defendant as do the rules pertaining to abuse of the writ and procedural default, and, assuming they do, what the parameters of the innocence protection are. The first part of the paper recounts the growth of the jurisprudence of innocence in habeas corpus and examines *Teague* against that backdrop. The second part of the paper examines innocence itself, particularly in the context of death penalty sentencing. What does it mean to be "innocent" and how does a prisoner in habeas corpus make the required showing? For purposes of death penalty litigation, the apparent agreement among the Justices that a prisoner can be "innocent" of a death sentence in a way that is analogous to innocence of the underlying offense is crucially important.

I.
TEAGUE V. LANE AND THE ROLE OF INNOCENCE IN HABEAS CORPUS

A. The Growth of the Jurisprudence of Innocence in Habeas Corpus

Teague v. Lane is not the first important restriction on the full scope of the writ of habeas corpus.[4] The possible application of *Teague* to the innocent defendant cannot be understood without reference to these other cases.

I have elsewhere tried to outline the role of innocence in recent Supreme Court habeas corpus cases.[5] I will here only recapitulate this analysis briefly.

At least some of the Justices have adopted the view that, along with the various restrictions on the availability of relief to state prisoners in habeas

3. 489 U.S. 288 (1989). Justice O'Connor's opinion in *Teague* was only for a plurality of the Court. Her opinion has since been applied, however, by a majority of the Court. *See* Butler v. McKellar, 110 S. Ct. 1212 (1990); Saffle v. Parks, 110 S. Ct. 1257 (1990); Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

4. Strictly speaking, *Teague* simply established a general approach for retroactivity analysis. Even before *Teague*, refusal to apply certain decisions retroactively prevented decisions from being applied in cases that were already final. *See, e.g.*, Allen v. Hardy, 478 U.S. 255 (1986) (the rule of Batson v. Kentucky, 476 U.S. 79 (1986), would not be applied retroactively to cases on collateral review). But *Teague* tightened retroactivity and precluded almost all new law development from being applied in claims under habeas corpus appeals.

5. Ledewitz, *Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence*, 24 CRIM. L. BULL. 379 (1988).

corpus, there must also be "a kind of 'safety valve' for the 'extraordinary case' " of the "factual[ly] innocen[t]" defendant.[6] The notion of the use of habeas corpus as a safety valve originated in a context somewhat similar to the retroactivity issue in *Teague*.

By the time *Brown v. Allen*[7] was decided in 1953, habeas corpus had achieved the status of a general post-conviction remedy for the violation of constitutional rights. Professor James Liebman argues in his paper,[8] as he has elsewhere,[9] that the full scope of the Great Writ after *Brown* was not an expansion, but rather was consistent with the history of habeas corpus. That issue is not central to this paper. Whatever the original scope of habeas corpus, after *Brown* the Court would not have described protection of the innocent as a key purpose.

During this period, habeas corpus protected the constitutional rights of the guilty as well as the innocent.[10] Indeed, the absence of innocence as a determinant of habeas relief was the major criticism of habeas corpus in the 1970 Ernst Freund lecture at the University of Chicago by Judge Henry Friendly[11] — the lecture that later became the intellectual foundation of the Court's change of direction in habeas corpus.

The Court first manifested interest in the relationship between innocence claims and habeas relief in *Stone v. Powell*,[12] which barred most state exclusionary rule claims from being considered in federal habeas corpus litigation. The state prisoner will not be granted habeas relief on the ground that illegally

6. Harris v. Reed, 489 U.S. 255, 271 (1989) (Rehnquist, C.J., O'Connor, J., and Scalia, J., concurring). There may, of course, be other Justices who agree with this perspective though they were not part of Justice O'Connor's concurring opinion.

7. 344 U.S. 443 (1953). *Brown* held that all federal constitutional claims raised by state prisoners were cognizable in federal habeas corpus. It is not clear, however, whether *Brown* established this approach or simply recognized a completed development.

8. Liebman, *More than "Slightly Retro:" The Supreme Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. LAW & SOC. CHANGE (1990-91) (forthcoming).

9. J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 6-12 (1988).

10. The concept of "innocence" in the context of habeas corpus review is not entirely clear. A defendant might be innocent in the sense that he was not the person who committed the alleged act. Or, an innocent defendant might be one who has a valid defense, whether or not evidence supporting that defense was introduced at his trial. Or, an innocent defendant might be one whose guilt is insufficiently supported by evidence discovered lawfully. Obviously these difficulties are compounded when the concept of innocence is transplanted to the context of death penalty sentencing. Nevertheless, the Court utilizes "innocence" to describe certain convictions and sentences that, in justice, should be overturned. I have previously attempted to delineate the contours of innocence as that term is used by the Court. *See* Ledewitz, *supra* note 5. In Part II of this Article, I attempt to define the term innocence further, in both the conviction and sentencing contexts, and to set forth how a showing of innocence might be made.

11. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

12. 428 U.S. 465 (1976). Justice Powell, joined by Justice Rehnquist and Chief Justice Burger, had earlier voiced an even broader commitment to the jurisprudence of innocence in a concurring opinion in Schneckloth v. Bustamonte, 412 U.S. 218, 250-75 (1973). Justice Blackmun, while stating that he agreed with "nearly all" of Justice Powell's opinion in *Bustamonte*, "refrain[ed] from joining it at [that] time." *Id.* at 249.

seized evidence was introduced at trial if there had been "an opportunity for full and fair litigation of a Fourth Amendment claim" in the state courts.[13] Justice Powell's majority opinion in *Stone* discussed innocence in the context of the costs of the exclusionary rule, rather than in the context of habeas corpus.[14] Nevertheless, even discussion of the importance of the "truthfinding process"[15] in a habeas corpus case represented a change in emphasis in the Court.[16]

This emphasis on discovery of truth eventually led to formal recognition that innocence should be an exception to otherwise vigorous procedural bars. This trend is most visible in the cases dealing with procedural default.

Procedural default refers to the consequences of a state court's refusal to consider the merits of a federal constitutional claim, because the claim was not raised by proper procedures in state court. A common form of procedural default is the failure to raise a claim in a timely fashion.[17] In general, the consequence of procedural default is that the federal court will not consider the merits of the procedurally defaulted habeas corpus claim.[18]

---

13. *Stone*, 428 U.S. at 482.

14. The exclusionary rule was seen by some of the Justices as obscuring the truth by preventing the admission of illegally obtained, but reliable evidence. "Our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally." *Id.* at 495 n.13 (emphasis in original). "The ultimate question of guilt or innocence should be the central concern in a criminal proceeding." *Id.*

15. *Id.* at 482; *see also id.* at 490 ("Application of the [exclusionary] rule thus deflects the truthfinding process and often frees the guilty.").

16. The Court stated that, "[r]esort to habeas corpus, especially for purposes other than to assure that no innocent person suffer an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government." *Id.* at 491 n.31. The Court manifested a commitment to the protection of the innocent and stated further that the provision of "broad habeas corpus relief" is necessary as "an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." *Id.* Some commentators do not view *Stone* as the beginning of an innocence reorientation on the Court. *See* Boyte, *Federal Habeas Corpus After Stone v. Powell: A Remedy Only for the Arguably Innocent?*, 11 U. RICH. L. REV. 291, 297-306 (1977); Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 450-59 (1980). *But see* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1086 (1977). It may be that all of these differing analyses of *Stone* are correct. It is perhaps true that the Court in *Stone* did not go as far as some of the Justices, particularly Justice Powell, would have liked toward a jurisprudence of innocence in habeas corpus. The addition of new Justices since *Stone* may have created more support for an innocence approach. Or, more fundamentally, Professor Seidman may be correct that the Court remains torn between a concern with state *procedures* for determining innocence and actual results in particular cases. Seidman, *supra* at 456-59. The safety valve image may represent just such an accommodation: goals other than identifying guilt and innocence are to be sought generally, but relief is also to be granted in particular instances of unjust conviction and punishment.

17. For example, in Wainwright v. Sykes, 433 U.S. 72 (1977), the failure of trial counsel to object contemporaneously to the admission of the defendant's statements barred his claim under Miranda v. Arizona, 384 U.S. 436 (1966), in the state courts, and, because of the procedural default rule, in habeas corpus as well.

18. This refusal to consider the defaulted claim is, to a certain extent, a matter of discretion. The Court has not formally repudiated the holding in Fay v. Noia, 372 U.S. 391, 426-28 (1963), that procedural default does not deprive the federal habeas court of "power" to adjudicate the defaulted claim. While apparently not jurisdictional, however, the bar of procedural

The Court was never unaware of the harsh and potentially unjust results that could follow from a strict application of procedural default. In *Francis v. Henderson*,[19] Justice Stewart suggested that a failure to challenge the composition of a grand jury in a state case could be excused, and the merits reached, only upon a showing of "cause" for the defendant's failure to comply with state procedures and "actual prejudice" resulting from this failure.[20] One year later, in *Wainwright v. Sykes*,[21] Justice Rehnquist argued in favor of procedural default as a general bar to habeas relief (not only in cases where the alleged failure to comply had to do with an objection to the composition of a grand jury) in part because the "cause-and-prejudice" exception to the bar, which remained available, would prevent a "miscarriage of justice."

> The "cause-and-prejudice" exception of the *Francis* rule will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice.[22]

Justice Rehnquist did not explicitly define cause and prejudice in *Sykes*, but did note that the new standard for excusing procedural default represented a narrower inquiry than the knowing and deliberate waiver standard associated with *Fay v. Noia*.[23]

In *Sykes*, the structure of the procedural bar was that the default—in that case a failure to object to the admission of an inculpatory statement—bars consideration of the claimed error on the merits in habeas corpus absent some explanation[24] for the failure to comply with state procedures, plus a showing of prejudice. Justice Rehnquist did not view the punishing of a defendant, despite a possibly valid contention that the state court's action was unconstitutional error, as itself a miscarriage of justice. Apparently, the unexcused failure to comply with procedural requirements renders such a conviction "just" despite the possible error.

Later decisions revealed an unacknowledged disagreement between Justice Rehnquist and O'Connor regarding the meaning of "miscarriage of justice." In *Engle v. Isaac*,[25] Justice O'Connor reconsidered the role of "cause" in rejecting the argument that a plain error test, requiring no showing of cause or prejudice, was necessary to avoid miscarriages of justice in cases where

default seems to be absolute where it applies. *See* Ledewitz, *supra* note 5, at 386 n.38 (distinguishing direct from habeas corpus review of procedural default).

19. 425 U.S. 536 (1976).

20. *Id.* at 542.

21. 433 U.S. 72 (1977).

22. *Id.* at 90-91.

23. *Id.* at 87 (citing Fay v. Noia, 372 U.S. 391 (1963) (case states "the classic definition of waiver which is 'an intentional relinquishment of a known right or privilege' ")).

24. In finding no "cause" in *Sykes*, Justice Rehnquist observed, "[r]espondent has advanced no explanation whatever for his failure to object at trial." *Id.* at 91.

25. 456 U.S. 107 (1982).

procedural default barred consideration of possibly meritorious constitutional claims. She found the concept of "cause," sufficiently flexible to assure a just outcome:

> [A] plain-error standard is unnecessary to correct miscarriages of justice. The terms "cause" and "actual prejudice" are not rigid concepts; they take their meaning from the principles of comity and finality discussed above. In appropriate cases those principles must yield to the imperative of correcting a fundamentally unjust incarceration. Since we are confident that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard, [citation omitted], we decline to adopt the more vague inquiry suggested by the words "plain error."[26]

This approach to "cause" is awkward.[27] Under *Sykes*, it appears that if there is no cause or excuse for the default, there will be no miscarriage of justice in failing to consider the claim on the merits. Conversely, according to *Isaac*, if there is a "fundamentally unjust incarceration," a term given no content in the opinion, "cause" apparently will be found, one way or another.[28]

Four years after *Isaac*, in *Murray v. Carrier*,[29] Justice O'Connor abandoned her flexible notion of cause, limiting it to the narrow confines of excuses for procedural default, without reference to any other considerations of justice. But unlike the opinion in *Sykes*, Justice O'Connor addressed in *Carrier* the concern alluded to in *Isaac* that the Court must correct fundamentally unjust incarcerations despite a failure to show cause. Justice O'Connor resolved the tension by creating a separate inquiry into the possible presence of a miscarriage of justice and by giving content to that term.

> [A]s we . . . noted in *Engle* [*v. Issac*], "[i]n appropriate cases" the principles of comity and finality that inform the concepts of cause and prejudice "must yield to the imperative of correcting a fundamentally unjust incarceration." We remain confident that, for the most part, "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." But we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.[30]

---

26. *Id.* at 135.

27. *See* Ledewitz, *supra* note 5, at 391 n.63.

28. The defendants in *Isaac* argued "that their prejudice was so great that it should permit relief even in the absence of cause." 456 U.S. at 134 n.43. Justice O'Connor rejected this formulation in *Isaac*, but accepted something very much like it in Murray v. Carrier, 477 U.S. 478 (1986). *See infra* text accompanying notes 29-31.

29. 477 U.S. 478 (1986).

30. *Id.* at 495-96 (citations omitted).

Carrier thus imported "actual innocence" into habeas corpus terminology, as Judge Friendly had urged the Court to do years before in his famous law review article on that subject.[31] *Carrier* made it clear that what worried at least some of the Justices was that a prisoner actually innocent of his crime might be punished despite the presence of error in his case, merely because of a failure to comply with state procedural rules. The Court promised to prevent this result.

The Court's concern for the innocent defendant barred by procedural hurdles from having his claim of error considered on the merits in habeas corpus was not limited to the procedural default context. The same day that *Carrier* was decided, Justice Powell, speaking for four of the five-vote majority in *Carrier*, extended the protection for the innocent defendant formulated in *Carrier* to the context of successive habeas corpus petitions. The issue in *Kuhlmann v. Wilson*[32] concerned a determination of when the "ends of justice" justified relief which would otherwise be denied because of a successive petition or other abuse of the writ.[33] The defendant had earlier filed a petition challenging the statement of a jailhouse informant as violative of the sixth

31. Friendly, *supra* note 11. Justice O'Connor cited the article only in a quotation in *Carrier*, 477 U.S. at 491 (quoting Reed v. Ross, 468 U.S. 1, 10-11 (1984)). She did cite Judge Friendly directly in Smith v. Murray, 477 U.S. 527, 539 (1986), decided the same day, on a related issue of procedural default.

32. 477 U.S. 436 (1986). Justice White, the fifth vote in *Carrier*, joined Justice Powell's alternative holding, which rejected the underlying merits of the claim of error. Justice Blackmun also joined the majority on that issue.

After this Article was written, the United States Supreme Court adopted the cause and prejudice test from the context of procedural default as the standard by which to judge allegations of "abuse of the writ." McCleskey v. Zant, 111 S.Ct. 1454 (1991). The *McCleskey* opinion also adopted a miscarriage of justice exception to abuse of the writ as "an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." *Id.* at 1471 (quoting Stone v. Powell, 428 U.S. at 492-93). The contour of the miscarriage of justice exception seems to conform to the Kuhlmann v. Wilson formula of "entertain[ing] successive petitions when a petitioner supplements a constitutional claim with a 'colorable showing of factual innocence.'" *Id.* (quoting Kuhlmann v. Wilson, 477 U.S. at 454). McCleskey himself did not qualify for the miscarriage of justice exception because the alleged Massiah v. United States, 377 U.S. 201 (1964), error "resulted in the admission of truthful inculpatory evidence which did not affect the reliability of the guilt determination." *Id.* at 1474. In short, the *McCleskey* opinion is yet one more example, along with the opinion cited in the text, of the Justices' creation of exceptions to harsh procedural barriers for the benefit of the innocent habeas corpus petitioner. Reading Teague v. Lane, 489 U.S. 288 (1989), as providing a similar exception for innocence, as I argue in Part I, C, *infra*, should be done, is all the more reasonable in light of *McCleskey*.

33. Justice Powell distinguished between successive petitions and abuse of the writ. Kuhlmann v. Wilson at 445 n.6 ("A 'successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition . . . . [W]here a prisoner files a petition raising grounds that were available but not relied upon in a prior petition or engages in other conduct that 'disentitles him to the relief he seeks,' the federal court may dismiss the subsequent petition on the ground that the prisoner has abused the writ."). *Wilson* raises the issue of successive petitions, but the themes of the plurality opinion are applicable to abuse of the writ issues generally. Chief Justice Burger's concurring opinion, for example, did not distinguish between the two situations. *Id.* at 461.

amendment under *Massiah v. United States*.[34] The defendant lost that claim but then filed a new petition challenging the same statement in light of the then-recent case of *United States v. Henry*,[35] which had "applied the *Massiah* test to suppress statements made to a paid jailhouse informant."[36]

Ultimately, a five-justice majority held that Wilson was not entitled to relief on the merits. But the importance of the case for the role of innocence in habeas corpus lay in the portion of the opinion not joined by Justice White. In amending the habeas corpus statute in 1966,[37] Congress had removed the "ends of justice" language that served as the basis of the rule established in *Sanders v. United States*,[38] that successive petitions or other abuse of the writ should be considered on the merits if "the ends of justice" require it.[39] The State of New York argued, therefore, that successive habeas corpus petitions should never be considered on the merits. Without the statutory foundation, the ends of justice should not be considered at all.

Justice Powell's plurality opinion rejected this view. Justice Powell found first that there was sufficient "permissive language" remaining in the statute to allow federal courts to continue to consider otherwise barred petitions if the ends of justice require it.[40] The plurality also gave content to the circumstances in which that would be so. Justice Powell, citing Judge Friendly's article,[41] wrote that the ends of justice require consideration of a successive petition "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."[42]

Since the two cases were decided the same day, Justice Powell's opinion was reinforced by the innocence exception outlined in *Carrier*,[43] as Justice O'Connor's opinion was supported by the language in *Wilson*.[44] This alone would justify speaking of a jurisprudence of innocence for habeas corpus.

But even more revealing of the commitment of the Justices to protecting the innocent defendant is the intellectual difficulty they sustained in writing these opinions. Justice O'Connor had to abandon the exclusivity of the cause and prejudice formula created out of nothing and against sharp criticism in

34. 377 U.S. 201 (1964).

35. 447 U.S. 264 (1980).

36. This was Justice Powell's reading of *Henry* in Kuhlmann v. Wilson, 477 U.S. at 442 (Powell, J., concurring).

37. *See* 28 U.S.C. § 2244 (1988).

38. 373 U.S. 1 (1963).

39. *Wilson*, 477 U.S. at 448-52. The amendment divided section 2244 into separate subsections. The intent of Congress could be fairly gleaned because section 2244(a), governing federal prisoners, retained the "ends of justice" language while section 2244(b), governing state prisoners, did not.

40. *Id.* at 451.

41. *Id.* at 454.

42. *Id.* The phrase "factual innocence" in *Wilson* and the phrase "actually innocent" used by the Court in Murray v. Carrier, *see supra* text at note 30, are treated by the Justices as interchangeable.

43. *See supra* notes 29-31 and accompanying text.

44. *Wilson*, 477 U.S. at 478.

Davis v. United States,[45] *Francis v. Henderson*,[46] and *Wainwright v. Sykes*.[47] Further, Justice O'Connor, in supplementing the cause and prejudice standard, was admitting that the approach in *Engle v. Isaac* was wrong. Justice Rehnquist, who joined both *Carrier* and *Wilson*, had to accept the plain repudiation of *Sykes'* exclusive reliance on cause and prejudice in affording protection to the innocent defendant. Yet these Justices were willing to create special protection for the innocent defendant. For Justice Powell, resuscitating the "ends of justice" inquiry meant ignoring what seemed to be a clear legislative intention to prohibit just the sort of equitable approach the *Wilson* plurality upheld. Even though Justice Powell insisted that a showing of innocence could only be made in a "rare case[ ],"[48] he could hardly deny that he had put back into the habeas statute precisely the formula Congress had removed.[49]

Because innocence of the underlying offense is an unusual, though by no means unheard of, showing for a prisoner to make, *Carrier* and *Wilson* were not of practical importance for most state prisoners. The cases did represent, however, an important doctrinal shift.

The potential practical significance of the third "innocence" case decided that day was much greater. *Smith v. Murray*[50] raised the issue of procedural default but, unlike *Murray v. Carrier*, concerned an alleged error at the sentencing phase, rather than the guilt determining stage, of a capital trial. In *Smith*, the five-Justice *Carrier* majority found no cause to excuse the procedural default.[51] Having found no cause, the opinion could have ended without considering the actual innocence issue raised in *Carrier*. Obviously, an error at sentencing does not necessarily imply that the defendant is actually innocent of the underlying offense. Nevertheless, Justice O'Connor's opinion repeated the *Carrier* formula, which required a separate inquiry for innocence in the event that a procedural bar is to be imposed.[52] Thus, the majority in

45. 411 U.S. 233 (1973).

46. 425 U.S. 536 (1976).

47. 433 U.S. 72 (1977). In *Davis*, procedural default was premised on non-compliance with a Federal Rule of Criminal Procedure; in *Francis*, this was extended to state prisoners even though the rule did not apply, so that federal and state prisoners would be treated similarly; in *Sykes*, procedural default was extended to all habeas corpus cases even though neither the Rule nor the comparison applied.

48. *Wilson*, 477 U.S. at 454. Justice Powell borrowed this phrase from the Advisory Committee Notes. *Id.* at 451 (citing RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS 9(B) advisory committee's note).

49. Furthermore, as Justice Powell acknowledged, Congress removed the ends of justice language *only* for state prisoners. This was an even clearer indication that Congress had acted with purpose. *See supra* text accompanying notes 37-39.

50. 477 U.S. 527 (1986).

51. *Id.* at 537. The cause alleged was that a two year-old Virginia Supreme Court decision had rejected the claim. *See id.* at 540 (Stevens, Marshall, Blackmun, and Brennan, JJ., dissenting). Justice O'Connor "expressly rejected this conception of cause" since appellate counsel "consciously elected not to pursue [an Estelle v. Smith, 451 U.S. 454 (1981)] claim before the Supreme Court of Virginia[,]" supposing the challenge to be futile in that forum. *Id.* at 534.

52. Justice O'Connor stated:

Smith applied the concept of "actual innocence" to sentencing. The opinion did "acknowledge that the concept of 'actual,' as distinct from 'legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense."[53] Nevertheless, the Court held in *Smith*, and has since repeated in *Dugger v. Adams*,[54] that a prisoner can be "actually innocent" of a death sentence.[55] That repetition is significant because in *Adams*, Justices Scalia and Kennedy joined the three remaining Justices who had made up the *Smith v. Murray* and *Murray v. Carrier* majorities. *Smith* thus raised an important new innocence consideration in capital habeas corpus cases.

Given Justice White's very cautious tone in *Adams*, as well as the failure to find innocence of the sentence in both *Smith* and *Adams*, it would appear that the showing of innocence required of a death-sentenced prisoner must be difficult to satisfy. I will return in Part II to the question of what innocence in sentencing means and how it might be shown. The immediate question is whether the new restrictions on habeas corpus created in *Teague v. Lane* also include special protection for the innocent defendant.

B. Teague v. Lane*'s New Approach to Retroactivity and Its Exceptions*

Teague v. Lane[56] presents death row prisoners with a new obstacle in attempts to challenge sentences of death and convictions of capital murder.[57] Justice O'Connor's opinion for the four-Justice plurality in *Teague*[58] held that petitioners in federal habeas corpus will not be allowed to claim the benefit of a "new rule." Subject to two exceptions, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before

---

> We conclude, therefore, that petitioner has not carried his burden of showing cause for noncompliance with Virginia's rules of procedure. That determination, however, does not end our inquiry. As we noted in *Engle* and reaffirmed in *Carrier*, " '[i]n appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " Accordingly, "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 537 (citation omitted).

53. *Id.*

54. 109 S. Ct. 1211 (1989).

55. *Id.* at 1217 n.6 ("[W]e do not undertake here to define what it means to be 'actually innocent' of a death sentence.").

56. 489 U.S. 288 (1989).

57. Although by its terms the *Teague* plurality did not address the issue of death penalty sentencing error, 489 U.S. at 314 n.3, *Teague* was subsequently extended to sentencing issues in Penry v. Lynaugh, 109 S. Ct. 2934, 2944 (1989). *See also* Butler v. McKellar, 110 S. Ct. 1212 (1990) (Arizona v. Roberson, 486 U.S. 675 (1988), created a new rule not available to death row petitioners in habeas corpus); Saffle v. Parks, 110 S. Ct. 1257 (1990) (proposed requirement that sentencing jury be allowed to base sentencing decision in a capital case on "sympathy" would represent new rule not available in habeas corpus).

58. Chief Justice Rehnquist and Justices Scalia and Kennedy joined Parts IV and V of Justice O'Connor's opinion, in which she redefined the content and method of retroactivity for purposes of federal habeas corpus.

the new rules are announced."[59]

Teague is premised in part on retroactivity and in part on fairness.[60] In terms of retroactivity, Justice O'Connor "adopt[ed] Justice Harlan's view of retroactivity for cases on collateral review."[61] Justice Harlan's view was that, subject to two exceptions, cases announcing new constitutional rules should not apply on collateral review. In order to promote fairness, the plurality announced that henceforth, the Court would "simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated."[62] The purpose of this approach was to avoid "the harm caused by the failure to treat similarly situated defendants alike."[63] The retroactivity of the proposed new rule or of the holding of the recently decided case will be considered as a threshold matter in the habeas corpus opinion.[64] If a defendant's claim is based on a proposed new rule that would not be applied retroactively, the Court's consideration of the merits will cease. In such a situation the Court need not decide whether the proposed rule should be enunciated since the defendant would not gain the benefit of its application in any event.[65]

Teague's exceptions to the general approach of non-retroactivity were originally proposed by Justice Harlan. The first of the two exceptions borrowed by Justice O'Connor is that a new rule that "places 'certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe,' "[66] is to be applied on collateral review. This exception, while not typically applicable in death penalty cases, will be important when the claim is that the eighth amendment bars the execution of certain categories of persons.[67]

The second *Teague* exception consists of an amalgamation of retroactivity approaches taken by Justice Harlan in *Mackey v. United States*[68] and *Desist*

59. 489 U.S. at 310.

60. As Professor Goldstein argues, the fundamental explanation for *Teague* is the plurality's view of the nature of the writ of habeas corpus. Goldstein, *supra* note 2, at 368.

61. *Teague*, 489 U.S. at 310.

62. *Id.* at 316.

63. *Id.* at 315.

64. *See* Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989) ("[u]nder *Teague*, we address the retroactivity issue as a threshold matter").

65. Saffle v. Parks, 110 S. Ct. 1257 (1990), illustrates dramatically the application of the threshold approach: the proposed rule that an anti-sympathy jury instruction violates the eighth amendment was not considered on the merits, because such a holding would not be applied retroactively. In a case like Butler v. McKellar, 110 S. Ct. 1212 (1990), in which the prisoner sought application of Arizona v. Roberson, 486 U.S. 675 (1988), the effect of *Teague*, while still preclusive, does not leave the substance of the law undecided.

66. *Teague*, 489 U.S. at 290 (quoting Justice Harlan's separate opinion in Mackey v. United States, 401 U.S. 667, 692 (1971)).

67. *See Penry*, 109 S. Ct. at 2952-53 (proposed holding that the eighth amendment prohibits execution of mentally retarded persons would, if adopted, apply retroactively under the first *Teague* exception).

68. 401 U.S. 667, 675 (1971) (separate opinion of Harlan, J.).

v. United States.[69] In *Desist*, Justice Harlan argued that "all 'new' constitutional rules which significantly improve the pre-existing factfinding procedures are to be retroactively applied on habeas."[70] But according to Justice O'Connor, two years later in *Mackey*, Justice Harlan urged instead that "a new rule should be applied retroactively if it requires the observance of those procedures that . . . are 'implicit in the concept of ordered liberty.' "[71] In constructing this second exception to non-retroactivity, Justice O'Connor combined "the accuracy element of the *Desist* version . . . with the *Mackey* requirement that the procedure at issue must implicate the fundamental fairness of the trial."[72] She limited the scope of the second exception "to those new procedures without which the likelihood of an accurate conviction is seriously diminished."[73]

C. *Does* Teague *Protect the Innocent Defendant?*

Based on certain Justices' commitments to the protection of the innocent defendant, and based on the sources upon which Justice O'Connor relied in *Teague*, the Court will likely interpret *Teague*'s second exception, or create a new exception to non-retroactivity in habeas corpus, to provide needed relief for the innocent defendant, whether that defendant is innocent of committing the underlying offense or of a capital sentence.[74] In making this prediction, I do not suppose that *Teague*'s second exception applies *only* to an innocent defendant. Clearly, Justice O'Connor was making an exception for a *category* of new rules of criminal procedure that nullify old rules or procedures that "undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction."[75] If a defendant claims that his error fits into this category, his claim for new law will be heard in habeas corpus whether or not he could himself be described as innocent. The issue, for example, in *Sawyer v. Butler*,[76] was whether a violation of *Caldwell v. Mississippi*[77] is the sort of accuracy undermining violation Justice O'Connor envisioned. If it is, a particular defendant need not make any special, personal showing of innocence in order to fit his claim within the

69. 394 U.S. 244, 256 (1969) (Harlan, J., dissenting).

70. *Id.* at 262.

71. Teague v. Lane, 489 U.S. 288, 306 (1989) (quoting Justice Harlan's separate opinion in *Mackey*, 401 U.S. at 693, which was, itself, quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

72. *Id.* at 312.

73. *Id.* at 313.

74. *See supra* note 10.

75. 489 U.S. at 315.

76. 881 F.2d 1273 (5th Cir. 1989), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990). After this article was written, the Court decided that a *Caldwell* violation was a new law claim and did not fit within the second exception to *Teague*. Sawyer v. Smith, 110 S. Ct. 2822 (1990). The Court did not address any innocence issue. For further discussion of *Sawyer*, see *infra* note 167 and accompanying text.

77. 472 U.S. 320 (1985) (in capital sentencing, remarks by prosecutor that misinform jury as to the role of appellate review violate the eighth amendment).

second exception. Similarly, a claim that double jeopardy, as currently interpreted, would bar a trial or sentencing hearing altogether, might also be used to attack "the fundamental fairness" of a conviction and thus could fit within the second exception whether or not the defendant could argue his innocence convincingly.[78]

But what if a defendant's claim does not fit in any obvious way within *Teague*'s second exception?[79] If such a defendant could make a "colorable showing of factual innocence,"[80] would the second exception nevertheless apply? In other words, can an innocent defendant always raise a claim of new law in a habeas corpus petition?

The formulation of the second exception in *Teague* and the recent discussions of it in *Butler v. McKellar*[81] and *Saffle v. Parks*[82] appear to suggest that an innocent defendant has no such special protection. After all, if a defendant need not be innocent to gain the benefit of the second exception, why would innocence be relevant when the exception does not clearly apply? Chief Justice Rehnquist's opinion in *Butler* supports a reading of the second exception as concerning only categories of rules. The *Butler* opinion held that because a violation of *Arizona v. Roberson*,[83] which "bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation,"[84] "would not seriously diminish the likelihood of obtaining an accurate determination [of guilt],"[85] such a violation does not come within *Teague*'s second exception. There was no suggestion in *Butler* of a separate inquiry into the evidence of guilt in the defendant's own case. In *Parks*, Justice Kennedy refused to consider the merits of a defendant's proposed holding which would bar an instruction to a sentencing jury "to avoid any influence of sympathy."[86] Justice Kennedy found that such a holding would represent a "new rule" under *Teague* and would not come under either exception.[87] The second exception did not apply because "[t]he objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an

78. *See* Harris v. Vasquez, 913 F.2d 606 (9th Cir. 1990) (Noonan, J.) (claim of denial of psychiatric assistance under Ake v. Oklahoma, 470 U.S. 68 (1985), fits within *Teague*'s second exception).

79. This is a plausible scenario in light of Justice O'Connor's suggestion in *Teague* that the second exception is "unlikely . . . [to have] many . . . components," 489 U.S. at 313, and Justice Kennedy's observation for the majority in Saffle v. Parks, 110 S. Ct. 1257, 1264 (1990), that Gideon v. Wainwright, 372 U.S. 335 (1963), "illustrate[s] the type of rule coming within the exception."

80. Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (opinion of Powell, J.).

81. 110 S. Ct. 1212 (1990).

82. 110 S. Ct. 1257 (1990).

83. 486 U.S. 675 (1988).

84. 110 S. Ct. at 1216.

85. *Id.* at 1218.

86. *Parks*, 110 S. Ct. at 1258.

87. *See id.* at 1259.

emotional chord in a juror."[88] Again, in *Parks*, as in *Teague* and *Butler*, there was no inquiry into the culpability of the particular defendant before the Court.

While none of these cases expands *Teague*'s second exception for the benefit of an innocent defendant, the Court was not called upon to do so in any of the three. In *Teague* and *Butler*, the claims of error — "that the sixth amendment's fair cross section requirement [should apply] to the petit jury"[89] and failure to apply *Arizona v. Roberson*[90] to suppress the defendant's statements — did not themselves suggest the defendant's innocence nor, apparently, did any other aspect of the cases. Even in *Parks*, in which the defendant raised questions regarding the sentencing instructions given to the jury concerning its evaluation of mitigating evidence, neither the majority nor the dissent understood the defendant to argue that he was "innocent" of his sentence.[91] According to Justice Brennan's dissent, what the defendant, Parks, argued "is that his jury could have interpreted the anti-sympathy instruction as barring consideration of mitigating evidence."[92] The argument that an alleged error "could have" affected a sentence of death is sufficient to overcome a harmless error standard, but undoubtedly is not sufficient to make a colorable showing of factual innocence of a sentence.[93]

The fact that *Teague*'s second exception does not appear to encompass protection of the innocent defendant, either by its plain meaning or by its current interpretation, need not, however, confine its future development. In the context of procedural default, the cause and prejudice exception, which, like *Teague*, bars consideration of the merits of a federal claim, also did not immediately provide special protection for the innocent defendant.[94] Yet, in *Engle v. Isaac*,[95] Justice O'Connor described cause and prejudice as sufficiently flexible to be applicable to just such a defendant. The continuing evolution of the procedural default exception eventually led the Court in *Murray v. Car-*

88. *Id.* at 1264. *Parks* illustrates how difficult it is to distinguish threshold retroactivity from a decision on the merits when the proposed holding has never before been considered. This language from *Parks* certainly sounds like a decision on the merits denying the claim — but one without benefit of full and serious consideration because the decision was not formally on the merits.

89. Teague v. Lane, 489 U.S. 288, 299 (1989). This was not the only claim at issue in *Teague*.

90. 486 U.S. 675 (1988).

91. *Parks*, 110 S. Ct. at 1265. For the doctrinal origin of the concept of "innocence" of a capital sentence, see *supra* notes 50-55 and accompanying text. For a discussion of what it may mean for a defendant to make a showing of "innocence" for purposes of a capital sentence, see *infra*, Part II.

92. *Parks*, 110 S. Ct. at 1265 (emphasis omitted).

93. For discussion of the possible standard in the factual innocence context, see *infra* text accompanying notes 117-25.

94. *See* Wainwright v. Sykes, 433 U.S. 72 (1977). For discussion of the expansion of protection for the innocent defendant in the context of procedural default, see *supra* text accompanying notes 17-31.

95. 456 U.S. 107, 135 (1982).

rier[96] and *Smith v. Murray*[97] to view innocence as an exception separate from cause and prejudice.

The *Teague* rule may evolve in a manner similar to the rules of procedural default. In fact, the Fifth Circuit sitting en banc, in *Sawyer v. Butler*,[98] has already drawn a parallel between the innocence based exception in cases of procedural default and *Teague*'s second exception. Though misapplying the procedural default rule,[99] the *Sawyer* court suggested that the two doctrines should be read together.[100] Under this reading, a defendant could benefit from *Teague*'s second exception either by its direct application, that is, by the claim of the right sort of rule, or by a showing of factual innocence.

The connection between factual innocence and *Teague* suggested by the Fifth Circuit may be predicated on the commitment to the safety-valve purpose of habeas corpus evident in Justice O'Connor's opinion in *Teague*. In discussing *Teague*'s second exception, Justice O'Connor refers to "the relevance of the likely accuracy of convictions in determining the available scope of habeas review."[101] Justice O'Connor then cites *Kuhlmann v. Wilson*, *Murray v. Carrier*, and *Stone v. Powell*,[102] characterizing each of them as considering the "innocent" defendant.[103] Thus, her discussion of the second exception

---

96. 477 U.S. 478, 496 (1986).

97. 477 U.S. 527, 537 (1986).

98. 881 F.2d 1273 (5th Cir. 1989), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

99. *See infra* text accompanying notes 168-69.

100. 881 F.2d at 1293 ("[s]imilar concerns underlie both the procedural default doctrine and the *Teague* doctrine prohibiting reliance upon new rules"). Judge Higginbotham thus made a connection between innocence in the context of procedural default and innocence in the context of *Teague*'s second exception. He assumed that a defendant permitted to raise a procedurally defaulted claim because of innocence might also raise that claim retroactively under *Teague*, and vice versa. *Id.* at 1288-89. This assumption is consistent with the view that habeas corpus must provide a safety valve for innocence. The safety valve does not exhaust *Teague*'s second exception, but is a part of it. After this Article was written, the United States Supreme Court affirmed the Fifth Circuit. Sawyer v. Smith, 110 S. Ct. 2822 (1990). Justice Kennedy's majority opinion also seemed to link the procedural default exception and *Teague*'s exceptions, *see id.* at 2831, thus supporting the suggestion that *Teague* will be interpreted to protect the innocent defendant. For further discussion of *Sawyer*, see *infra* notes 167-69 and accompanying text.

101. 489 U.S. 288, 313 (1989).

102. *Id.*

103. The section in *Teague* is as follows:

> Moreover, since *Mackey* was decided, our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review. *See, e.g.*, Kuhlmann v. Wilson, 477 U.S. at 454 (plurality opinion) (a successive habeas petition may be entertained only if the defendant makes a "colorable claim of factual innocence" (citation omitted)); Murray v. Carrier, 477 U.S. at 496 ("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" (citation omitted)); Stone v. Powell, 428 U.S. at 491-492, n.31 (removing Fourth Amendment claims from the scope of federal habeas review if the State has provided a full and fair opportunity for litigation creates no danger of denying a "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty" (citation omitted)).

Id.

suggests that it might also protect an innocent defendant.

The role of innocence in habeas corpus is one reason that Justice O'Connor cannot accept fully Justice Harlan's views on retroactivity. Justice O'Connor's discussion in this part of the opinion rejects Justice Harlan's conclusion in *Mackey* that "it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged."[104] For Justice O'Connor, protecting the innocent is part of the purpose of habeas corpus. And since the protection of the innocent is a purpose of the writ, it is reasonable to suppose that Justice O'Connor will apply *Teague* so as to protect the innocent defendant, as well as to define certain fundamental rules of criminal procedure that must be applied in a given case.

But the major reason to suppose that *Teague* either does now, or will grow to, protect the innocent defendant is simply that such protection is needed in this context, just as it was needed in the contexts of successive petitions, abuse of the writ, and procedural default. From the point of view of federal habeas corpus as a safety valve, not only should the innocent defendant not be incarcerated or executed — that is patently obvious — but it is a responsibility of the federal courts to see that this does not occur. Prohibiting the application of a new law claim that would free a prisoner who should never have been punished at all, or, at least, not punished with the death penalty, would represent an abdication of the responsibility that *Smith v. Murray*, *Murray v. Carrier*, and *Kuhlmann v. Wilson* promised to undertake.

Teague can and should accommodate the commitment to protecting the innocent embodied in these cases. Beyond reasons of precedent, protection of the innocent defendant is not inconsistent with the fundamental purpose of *Teague*'s non-retroactivity goal: providing the criminal justice system with finality and treating similarly situated defendants alike.

In Justice O'Connor's view, non-retroactivity as a general principle serves the purpose of finality.[105] But the opinions voicing concern about innocence have held firmly that finality must yield to innocence. In *Engle v. Isaac*, Justice O'Connor wrote for the Court that finality and comity, "must yield to the imperative of correcting a fundamentally unjust incarceration."[106] In *Carrier*, the fundamentally unjust incarceration to which finality "must yield" is further defined as the "conviction of one who is actually innocent."[107] In *Smith*, the Court transferred the concept of innocence, albeit not "easily," to the "context of an alleged error at the sentencing phase of a trial on a capital offense."[108] These interrelated holdings are premised on discounting finality

104. *Id.* at 312 (quoting Mackey v. United States, 401 U.S. 667, 694 (1971) (separate opinion of Harlan, J.)).

105. "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 309.

106. 456 U.S. 107, 135 (1982).

107. Murray v. Carrier, 477 U.S. 478, 495-96 (1986).

108. *Id.* at 537.

for the sake of the innocent defendant. Justice Powell's opinion in *Wilson* barring most successive petitions also rests on discounting the general need for finality in the context of the innocent defendant.[109] In these cases, the Court has stated that the criminal justice system's pervasive commitment to finality yields to the prisoner's overriding interest in obtaining release "if he is innocent."[110] Protecting the innocent defendant thus provides a justification the Court has already accepted for overcoming the need for finality.

Teague did more than recognize a general rule of non-retroactivity in habeas corpus. The other purpose promoted by Justice O'Connor's opinion in *Teague* is assuring fairness in the treatment of habeas corpus defendants. To promote that goal, it prohibited the announcement of most new rules. That is, a habeas petitioner no longer will be permitted to raise a claim of new law and gain the benefit of that change to reverse his own conviction or sentence unless future habeas petitioners would also be permitted to rely on the change in the law.[111] The reason for this approach is "the inequity resulting from the uneven application of new rules to similarly situated defendants."[112] In Justice O'Connor's view, "the harm caused [by such an inequity] cannot be exaggerated."[113]

Protecting the innocent defendant is fundamentally fair because innocent and guilty defendants are not "similarly situated." In fact, justice requires that the guilty and the innocent not be treated in the same way. Accordingly, Justice Powell urged in *Wilson* that the innocent defendant be permitted to file a successive petition when a guilty defendant would not be allowed to do so.[114] Similarly, allowing an innocent defendant to rely on a procedurally barred claim, while forbidding a guilty defendant from doing so, does not undermine fairness.[115] In sum, allowing an innocent defendant to raise a new law claim even though the claim would not be applicable retroactively to a habeas corpus petition unaccompanied by a showing of innocence does not undermine *Teague*'s dual rationales of finality and fairness.

This understanding of *Teague* — that the innocent defendant may still raise new law claims in habeas corpus — leads to an issue that has arisen in the contexts of procedural default and abuse of the writ. What does it mean to

109. *Id.* at 452-54.

110. *Id.* at 452.

111. As Justice Brennan explained in his dissent, if the merits of a claim are adjudicated in one case, and the non-retroactivity of the claim is decided only in a later case, an unspecified number of habeas corpus petitioners gain relief before the non-retroactivity decision closes the habeas corpus door. If the merits and non-retroactivity issues are decided in the same case, that one lucky defendant, and perhaps others whose cases are not yet final, are the only habeas corpus petitioners who ever gain relief on the merits. *Teague*, 489 U.S. at 337-40 & n.7.

112. *Id.* at 316.

113. *Id.* at 315.

114. Kuhlmann v. Wilson, 477 U.S. 436, 452-54 (1986) ("the 'ends of justice' require federal courts to entertain such petitions only where the prisoner supplements his constitutional claims with a colorable showing of factual innocence").

115. *See* Smith v. Murray, 477 U.S. 527, 537 (1986).

be innocent, especially of a death penalty sentence, and how is such a showing of innocence to be made?

II.
WHEN IS A DEFENDANT INNOCENT OF CONVICTION OR SENTENCE AND HOW IS INNOCENCE SHOWN?

Assuming that the innocent defendant can receive the benefit of new law under *Teague* without quite satisfying the second exception as currently formulated,[116] the questions to be answered are: who is an innocent defendant for this purpose and how does a defendant show innocence. These questions are also relevant to avoiding a finding of procedural default and/or abuse of the writ. The meaning and method of innocence will be examined, first in the context of innocence of the underlying offense, and then in the context of innocence of the sentence.

A. Innocence of the Offense

The classic case of innocence of the underlying offense concerns the defendant who simply has not committed the crime. The issue of innocence may also arise regarding the degree of guilt. Thus, a defendant may claim innocence by arguing that he is guilty only of a lesser degree of a crime.[117]

To overturn a conviction, a defendant must usually show that a claimed error was not harmless,[118] and in the case of some errors must show prejudice.[119] What more must a defendant show for purposes of innocence? In *Wilson*, Justice Powell's plurality opinion utilized the concept of innocence while defining the "ends of justice" exception to the general rule that successive habeas petitions represent an abuse of the writ.[120] In discussing the showing that a defendant must make to come within the ends of justice exception, Justice Powell relied on the standard for reversals in habeas corpus developed

116. *See supra* notes 79-88 and accompanying text.

117. *Cf.* United States v. Frady, 456 U.S. 152, 171 (1982) (failure of defendant to present colorable evidence "that would reduce . . . crime from murder to manslaughter" represents failure to prove "he had been convicted wrongly of a crime of which he was innocent").

118. State convictions will survive challenge in federal habeas corpus "when the alleged constitutional error is harmless beyond a reasonable doubt." Wainwright v. Sykes, 433 U.S. 72, 97 (1977) (White, J., concurring in the judgment). The burden of proof in these matters, however, is supposed to be on the State — unlike the prejudice test in *Sykes* itself.

119. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 687 (1984) (a claim of ineffective assistance of counsel requires, inter alia, a showing of "deficient performance [that] prejudiced the defense"). In Kimmelman v. Morrison, 477 U.S. 365, 387 (1986), Justice Brennan quoted from *Strickland*'s description of the prejudice test: "a reasonable probability that, absent [Morrison's attorney's] errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* (quoting *Strickland*, 466 U.S. at 695); *see also* United States v. Bagley, 473 U.S. 667, 682 (1985) (nondisclosure of evidence by prosecution warrants reversal "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"). Although this standard appeared in the plurality portion of an opinion by Justice Blackmun, it was expressly approved by a majority of the Court. *Id.* at 685 (White, J., concurring).

120. Kuhlmann v. Wilson, 477 U.S. 436, 452-54 (1986).

in Judge Friendly's 1970 law review article.[121]

> As Judge Friendly explained, a prisoner does not make a colorable showing of innocence "by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained." Rather, the prisoner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt." Thus, the question whether the prisoner can make the requisite showing must be determined by reference to *all* probative evidence of guilt or innocence.[122]

This formulation for a showing of innocence differs from a showing of prejudice in that the defendant must take into account all of the probative evidence, even evidence that should never have been admitted in the first place, because it was illegally obtained.[123] Obviously, this is, and is meant to be, a difficult showing to make.

On the other hand, Judge Friendly's standard of proof for the innocence showing is not daunting. It requires not that the defendant really *be* innocent, but only that the "trier of the facts would have entertained a reasonable doubt" of his guilt.[124] The likelihood of such an outcome need not be shown to a near certainty, but only to a "fair probability." In *Wilson* itself, innocence could not be established because the Court of Appeals found that the evidence of guilt "was nearly overwhelming."[125]

B. Innocence of the Sentence

As explained above, the United States Supreme Court has held that a defendant can be "innocent" of a capital sentence in a sense analogous to a defendant's innocence of an underlying offense, and that such innocence of the

---

121. Friendly, *supra* note 11.

122. 477 U.S. at 454-55 n.17 (emphasis in original) (citations omitted).

123. It may not be accurate to describe the *Wilson* standard as distinguishing between prejudice and innocence, at least insofar as then Chief Justice Burger and Justices Rehnquist and Powell interpreted it. They joined Justice Powell's concurrence in Kimmelman v. Morrison, 477 U.S. 365, 396 (1986), to the effect that, at least in the context of an ineffective assistance of counsel claim, "the admission of illegally seized but reliable evidence [does not amount to] prejudice." Obviously, this view is closely related to the *Wilson* formula of "*all* probative evidence."

124. Friendly, *supra* note 11, at 160.

125. 477 U.S. at 455 (quoting Wilson v. Henderson, 742 F.2d 741, 742 (2d Cir. 1984)). Though not explicitly mentioned by Justice Powell, it should also be noted that, under *Kuhlmann v. Wilson*'s formulation of what constitutes "all probative evidence," the evidence which the defendant sought to exclude — statements to a jailhouse informant — added to the proof of guilt. *Id.* at 439-40.

sentence triggers important procedural protections.[126] The Court has not yet defined how such innocence of sentencing is to be identified. In *Smith v. Murray*, Justice O'Connor held that the concept of innocence can be applied at the sentencing phase, but admitted that innocence "does not translate easily" into the sentencing context.[127]

One way to identify the showing required for establishing sentencing innocence would be to modify Justice Powell's test for the "ends of justice" exception to the ban on successive habeas corpus petitions.[128] If Justice Powell's formulation in *Kuhlmann v. Wilson* were applied to sentencing error, the test for sentencing innocence would properly ask whether given all the probative evidence, including that which was illegally obtained and/or wrongly excluded, there is a fair probability the trier of fact would have arrived at a decision other than death. The latter modification of *Wilson* (asking whether the trier of fact would have arrived at a decision other than death as opposed to asking whether he would have entertained a reasonable doubt) is necessary because, unlike guilt determinations, the role of the sentencer in death penalty cases is not defined the same way in every state. In some states there is an overall standard of proof for the ultimate decision for life or death; in other states there is not. In some states, non-unanimity leads to a life sentence; in others to a new sentencing hearing.

The *Wilson/Smith* formula may not prove easy for lower courts to apply. For example, Justice Powell's formulation is entirely inconsistent with the innocence standard for abuse of the writ proposed by Judge Hill of the Court of Appeals for the Eleventh Circuit in his dissent in *Moore v. Kemp*.[129] Judge Hill suggested that to be innocent of a death sentence means there would be no finding of "any statutory aggravating circumstance."[130] But the *Wilson* formula of "entertain[ing] a reasonable doubt" is not limited to the elements of the offense — if statutory aggravation is considered analogous to that concept — but includes consideration of all affirmative defenses.[131] That is, the showing of a fair probability of innocence could be based on *any* ground on which a factfinder probably would render a different decision, including defenses. After all, at the guilt/innocence stage of the trial, presentation of an affirmative defense could lead to "the reasonable doubt" upon which Justice Powell relies. Thus, if mitigation is thought of as a defense, the factfinder's reaction to mitigation must also be considered when determining innocence of the sentence.

Judge Cox's plurality opinion on remand for the en banc Eleventh Circuit

126. *See supra* notes 50-55 and accompanying text.

127. Smith v. Murray, 477 U.S. 527, 537 (1986).

128. *Wilson*, 477 U.S. at 452-54; *see also supra* notes 114-15 and accompanying text.

129. 824 F.2d 847 (11th Cir. 1987), *vacated and remanded sub nom.* Zant v. Moore, 489 U.S. 836 (1989).

130. *Id.* at 878 (dissenting opinion).

131. *Wilson*, 477 U.S. at 454-55 n.17.

in *Moore v. Zant*[132] appears to repeat Judge Hill's questionable formulation. In *Zant*, the defendant raised a *Gardner v. Florida*[133] claim challenging the accuracy of information in a presentence report. Judge Cox stated that the defendant failed to demonstrate that his sentence would not have been the same even if he had prevailed on his argument regarding the report's accuracy.[134] This part of the analysis fits within Justice Powell's *Wilson* formulation. Judge Cox however, went further and held that the defendant failed to establish innocence because he showed only that non-statutory aggravating evidence was inaccurate.[135] Because, "[u]nder Georgia law,"[136] the presence of a valid statutory aggravating circumstance would legally justify a death sentence, excluding inaccurate non-statutory aggravating evidence cannot — apparently as a matter of law — result in a colorable showing of factual innocence.

Judge Cox's approach — like that of Judge Hill earlier — represents a misunderstanding of the jurisprudence of innocence in habeas corpus. Justice Powell and Judge Friendly were not concerned with innocence as a matter of law, but innocence as a matter of fact. The very formulation of the question, whether "the trier of fact would have entertained a reasonable doubt of . . . guilt," seems to imply that there could still be enough evidence in the record to uphold a verdict of guilt as a matter of law.[137] The defendant should not have to allege a legal insufficiency, but need only show that if all the probative evidence were considered there would be a fair probability that the jury — which could go either way — would go his way. Conversely, Judge Cox seems to require a showing by the defendant that the case would never even reach the trier of fact, because evidence would not be sufficient to convict (or return a death sentence). The mere analysis of the "elements of the crime"[138] or the legal insufficiency of the evidence is not what *Wilson* is about, whether at the guilt or sentencing stage.[139]

---

132. 885 F.2d 1497 (11th Cir. 1989). *Zant v. Moore* had been remanded "for further consideration in light of Teague v. Lane." 489 U.S. 836 (1989).

133. 430 U.S. 349, 362 (1977) (death penalty may not be based on information not disclosed to the defendant).

134. 885 F.2d at 1513.

135. Judge Cox held, alternatively, that the *Gardner* claim was meritless. *Id.* A further difficulty in Judge Cox's test is that too high a burden is placed on the defendant. Justice Powell only required a showing of a "fair probability."

136. *Id.* (citing Jones v. State, 243 Ga. 820, 830, 256 S.E.2d 907, 914 (1979)).

137. *Wilson*, 477 U.S. at 454, n.17.

138. Moore v. Zant, 885 F.2d 1497 (11th Cir. 1989).

139. After this Article was completed, the Eleventh Circuit, in Johnson v. Dugger, 911 F.2d 440 (11th Cir. 1990), held that, for purposes of excusing procedural default in the capital sentencing context, "actual innocence," *id.* at 467, could be proven by a showing "that as a result of the alleged constitutional error, the sentencing body's deliberative process was affected to such a degree that its ultimate conclusions are probably *factually* in error." *Id.* at 468 (emphasis in original). The majority specifically disagreed with Judge Hill's dissent and "decline[d] to hold . . . that a petitioner *must establish* that the constitutional error implicates *all of the existing aggravating factors* before a federal court should entertain a procedurally defaulted constitutional claim." *Id.* at 469 (emphasis in original). The position the majority rejected is the

Footnote six in *Dugger v. Adams* gives some insight as to how a defendant can prove sentencing innocence.[140] In *Adams*, Justice White's majority opinion held that the defendant was procedurally barred from raising a *Caldwell v. Mississippi*[141] claim. In footnote six, Justice White considered the innocence issue — whether "we should overlook his procedural default because failing to do so would result in a 'fundamental miscarriage of justice.' "[142] Justice White cautiously reaffirmed that a showing of innocence would override a procedural default, even in relation to capital sentencing, but held that a sufficient showing of innocence of the sentence had not been made in this case.

> Respondent also argues that we should overlook his procedural default because failing to do so would result in a "fundamental miscarriage of justice." We disagree. In *Murray v. Carrier*, this Court stated that "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." We made clear, however, that such a case would be an "extraordinary" one, and have since recognized the difficulty of translating the concept of "actual" innocence from the guilt phase to the sentencing phase of a capital trial. We do not undertake here to define what it means to be "actually innocent" of a death sentence. But it is clear to us that the fact that the trial judge in this case found an equal number of aggravating and mitigating circumstances is not sufficient to show that an alleged error in instructing the jury on sentencing resulted in a fundamental miscarriage of justice.[143]

This portion of footnote six demonstrates that the mere presence of both aggravation and mitigation in a case is not by itself sufficient to show innocence of the sentence. Further, Justice White continues in footnote six to state that the mere presence of a *Caldwell* error does not prove innocence and criticized the dissent's approach to innocence.

> The dissent "assumes *arguendo*" that a fundamental miscarriage of justice results whenever "there is a substantial claim that the constitutional violation undermined the accuracy of the sentencing decision." According to the dissent, since "the very essence of a *Caldwell* claim is that the accuracy of the sentencing determination has been unconstitutionally undermined," the standard for showing

---

one that Judge Hill adopted in *Moore v. Kemp*, which is criticized above. *See supra* notes 130-31 and accompanying text.

140. 489 U.S. 401, 410 n.6 (1989).

141. 472 U.S. 320 (1985) (in capital sentencing, remarks by prosecutor that misinform jury as to the role of appellate review violate the eighth amendment).

142. 489 U.S. 401, 410 n.6 (1989) (citing Murray v. Carrier, 477 U.S. 478, 496 (1986), Smith v. Murray, 477 U.S. 527, 537 (1986)).

143. *Id.* (citations omitted).

> a fundamental miscarriage of justice necessarily is satisfied. We reject this overbroad view. Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the "extraordinary case," into an all too ordinary one.[144]

Justice White does not seem to object to the dissent's formulation of when a fundamental miscarriage of justice occurs: "whenever 'there is a substantial claim the constitutional violation undermined the accuracy of the sentencing decision.' "[145] His objection appears to be to the dissent's assumption that, by its nature a *Caldwell* error "necessarily", indeed, automatically, makes out a showing of innocence of a death sentence. Justice White even seems to concede that a *Caldwell* error is the kind of error that "might" lead to a death sentence for a defendant who would not have received death without the error and perhaps does not deserve it, but he insists that the defendant must show that this in fact occurred in his case.

Justice White's formulation of sentencing innocence is close to *Kuhlmann v. Wilson*'s requirement that the petitioner show that there is a fair probability that the trier of fact "would have entertained a reasonable doubt." In deciding whether to grant habeas relief, it was irrelevant to Judge Friendly — and Justice Powell relying on Judge Friendly — whether the category of claimed error was one that "might" convict an innocent defendant. Judge Friendly wanted the defendant to show that this is what occurred in his case.

The problem is, other than demonstrating that there was mitigation in the record, as in *Dugger v. Adams*, how can a defendant make the required showing? Justice White is silent on this point. It may be that the majority in *Adams* was unmoved by the mitigation present in the record. In any event, defense attorneys in death penalty cases have a clear task in future habeas corpus cases. Counsel must develop a methodology that the Justices concerned about sentencing innocence can accept.

In developing such a methodology, the showing of substantial mitigation — whether of record or not[146] — is the obvious first step. This is because

144. *Id.* (citations omitted).

145. *Id.*

146. Of course, some alleged errors by their nature result in exclusions of mitigation, for example, violations of Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, 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"). In such cases the court must consider evidence of mitigation the sentencing jury did not hear. This is what Justice O'Connor presumably meant in Smith v. Murray, 477 U.S. 527 (1986), in describing errors that "preclude[ ] the development of true facts." *Id.* at 538. But in view of the emphasis on " 'actual,' as distinct from 'legal,' innocence" in *Smith*, *id.* at 537, and the other cases, supplementing the record with additional mitigating evidence

Justice White was not arguing that the existence of an "equal number of aggravating and mitigating circumstances" in *Adams*[147] was irrelevant to innocence, but only that it was "not sufficient" by itself to show that "an individual defendant probably is 'actually innocent' of the sentence he or she received."[148]

One possible course for the habeas corpus petitioner in attempting to show probable innocence is to ask the federal court to weigh for itself all the currently available probative aggravating and mitigating evidence. In *Adams* this would have meant reconsideration of the evidence bearing on the sentence, without the unreliable influence of the alleged misinstruction concerning the responsibility of the jury. The Court in *Adams* demonstrated no inclination to undertake such reweighing in the discussion in footnote six. But in a recent case, *Clemons v. Mississippi*,[149] Justice White held for a five-Justice majority that a state appellate court may independently reweigh mitigating and aggravating evidence when a sentencing jury imposing death has relied on an invalid aggravating circumstance in finding that the aggravating evidence outweighs the mitigating evidence.

Clemons is an important addition to the habeas corpus jurisprudence that develops the notion of sentencing innocence. Clemons, the defendant, argued that an appellate court would be "unable to fully consider and give effect to the mitigating evidence presented by defendants at the sentencing phase in a

---

should always be done in cases in which consideration of the merits of claims is in some way procedurally barred. In his article, Judge Friendly specifically approved as an addition to grounds for collateral relief "that there exists evidence of material facts, not theretofore presented and heard, which require vacation of the conviction or sentence in the interests of justice." Friendly, *supra* note 11, at 159 n.87. Obviously, "material facts" such as mental illness, retardation, mental, social or sexual abuse, and drug addiction might well exist in a death penalty case even though the trial attorney failed to uncover them. These facts might be sufficiently compelling to raise a fair probability that the trier of fact would have arrived at a decision other than death if they had been introduced. That these material facts were not considered would mean that the "interests of justice" were not served and might require reversal of the sentence, just as such a showing established the "ends of justice" for Justice Powell in *Wilson* justifying consideration of a successive habeas corpus petition despite procedural bar. Judge Friendly would have limited the facts to be considered in an innocence claim to those facts "which could not have been presented in the exercise of due diligence." Friendly, *supra* note 11, at 159 n.87. This restriction, which will be discussed below, is not warranted. But even if that standard were adopted, due diligence is as yet undefined and might mean something like the "deliberate bypass" approach of Fay v. Noia, 372 U.S. 391 (1963). *See supra* note 23. Counsel should therefore supplement the record, in an attempt to show innocence at the sentencing phase, and let the courts decide what they will consider.

147. 489 U.S. at 410 n.6.

148. *Id.*

149. 110 S. Ct. 1441 (1990). In *Clemons*, the Mississippi State Supreme Court affirmed a sentence of death based on two aggravating circumstances. The court seemed to have found one of the two aggravating circumstances in the case unconstitutional as applied, but affirmed the sentence of death anyway. On review, the United States Supreme Court held that an appellate court may reweigh aggravating and mitigating evidence provided it gives each defendant the individualized treatment that would result from full consideration of all mitigating and aggravating factors. It was not clear the Mississippi State Supreme Court had done so, thus the Court vacated the sentence.

capital case."[150] Justice White was firm in his belief that appellate courts could do so; he stated that these courts will give "careful appellate weighing of aggravating against mitigating circumstances;"[151] the defendant will receive "individualized and reliable sentencing"[152] — and apparently envisions that the appellate courts will give the same sort of consideration to the defendant that he would receive from the jury.[153] Using Justice White's language, defense attorneys will be in a position to force state appellate courts to give full individualized treatment to each defendant, rather than deciding that there is still enough aggravating evidence in the record to sustain a sentence of death. In *Clemons*, Justice White is requiring a full and independent weighing of the evidence.

Similarly, the habeas corpus petitioner, in light of *Clemons*, may ask a federal court for an independent weighing of all the currently available probative evidence concerning the proper sentence. Of course, unlike *Clemons*, the standard for innocence in *Wilson* is only a "fair probability" that the sentencer would arrive at a different outcome,[154] not an actual determination by the court of what the proper sentence is. But in determining that probability, the defendant may ask the federal court, in light of *Clemons*, for an independent evaluation of the evidence. This Justice White apparently did not do in *Dugger v. Adams*. But *Clemons* may help force the issue in the next case heard by a federal court.

There are other methods available to a defendant to show a fair probability of a sentence other than death. The defendant might make a detailed study of the sorts of aggravating and mitigating evidence that lead sentencing juries to return life or death sentences in a particular jurisdiction. It may be that judges do not appreciate how difficult it is in some instances for prosecutors to convince sentencing juries to return sentences of death, even in highly aggravated cases. Here, the argument to the federal court would differ from that made in proportionality review in the state courts in that the process of proportionality review tends to affirm death sentences already imposed *unless* they are demonstrably disproportionate given the evidence introduced at the trial.[155] In habeas innocence review, the federal court will be reviewing evidence where, in a sense, there is no prior sentence to uphold. That is, the prior sentence of death was not based on all the currently available, probative evidence. Either there will be new mitigating evidence, or unreliable evidence of aggravation will be excluded, or — as in a *Caldwell* error[156] — the "instruc-

150. *Id.* at 1448.

151. *Id.*

152. *Id.*

153. That is why Justice White refers to the "defendant's circumstances, his background, and the crime." *Id.* This is the formula used in Lockett v. Ohio, 438 U.S. 586 (1978), to which the defendant is always entitled at capital sentencing.

154. *See supra* text accompanying note 122.

155. *See* Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 823-25, 842-44 (1986).

156. This was the error alleged in Dugger v. Adams, 489 U.S. 401, 407 (1989).

tions" will now be corrected. The judges in a habeas corpus case, therefore, will not be looking to uphold or reverse a sentence already given but will be predicting what a jury probably would do if they were to consider the evidence anew. The burden of persuasion is, of course, on the defendant claiming sentencing innocence, but his burden is no heavier than a fair probability.

Another route open to the defendant, aside from arguing for an independent review of the evidence and presenting studies comparing results reached by other juries, is to show that the sentencing jury in his own case, or some number of jurors, had been close to returning a life sentence. If that were the case, a defendant could plausibly maintain that a change in the evidence — eliminating unreliable aggravation, supplementing probative mitigation, or reforming sentencing instructions — would probably have led to a different result. Perhaps the jury sent back a question that suggested a split on the death sentence. Or, perhaps, the jury reported itself deadlocked or took an unusually long time to decide the sentence. This sort of showing can only be evaluated case by case.

The most direct evidence of how the jury evaluated the aggravating and mitigating evidence in a capital case is to ask them, and then to file affidavits supplementing the habeas corpus petition. Such after the fact interviews raise issues beyond the scope of this paper. Courts traditionally are quite reluctant to allow juror testimony to impeach jury deliberations.[157] But juror testimony in habeas innocence review is not designed to *impeach* the sentence, only to gauge the probable impact of the new evidentiary context.[158] It is difficult to justify the argument that a defendant required to prove sentencing innocence should be barred from producing what might be the most convincing evidence of the sentencer's view of the appropriateness of the death penalty and the weight given by the sentencer to the aggravating and mitigating evidence.[159]

C. The Types of Error An Innocent Defendant May Raise

Habeas corpus allows an innocent defendant to raise claims that would otherwise be considered an abuse of the writ, claims that would otherwise be procedurally barred, and, on my reading of *Teague*'s second exception, new

157. "By the beginning of this century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict. . . . Exceptions to the common-law rule were recognized only in situations in which an 'extraneous influence' . . . was alleged to have affected the jury." Tanner v. United States, 483 U.S. 107, 117 (1987) (citation omitted). In *Tanner*, the Court held that an evidentiary hearing on alleged drug and alcohol use by jurors during an earlier criminal trial was barred by FED. R. EVID. 606(b) (1988), which prohibits impeachment of the verdict with juror testimony as to the effect of anything upon the jury's mind or emotions.

158. The defendant innocent of the sentence does not allege that the sentencing jury did anything improper, given what they had before them and how they were instructed. The allegation is that the outcome probably would be different without the error that occurred.

159. *See, e.g.*, Dobbs v. Zant, 720 F. Supp. 1566, 1574 (N.D. Ga. 1989) (evidence of jurors' racial discrimination during jury deliberations may be admissible in habeas corpus proceedings despite the general ban on post-verdict testimony by jurors under FED. R. EVID. 606(b) (1988)).

law claims. The next question is whether there are limits on the substantive content of the claims the innocent defendant may raise.

The seemingly obvious response to this question is that the defendant may raise only an error that somehow interfered either with his ability to defend himself or with the factfinder's ability fairly to judge the evidence at either the guilt or sentencing stages. This approach would limit the defendant to claimed errors that undermine the accuracy of sentencing or guilt determinations.[160]

Case law does support limiting innocent defendants to raising claims of error related to accuracy.[161] Justice O'Connor assumed in *Smith v. Murray* that procedural default, absent cause and prejudice, would bar consideration of errors "unrelated to innocence."[162] Similarly, in *Teague*, Justice O'Connor limited the second exception to "those new procedures without which the likelihood of an accurate conviction is seriously diminished."[163]

Even within such a limitation, capital defendants who can make a colorable showing of factual innocence would be able to raise many of the sorts of errors which commonly occur in capital trials. With the exception of attempted defense exclusions of probative evidence, as in *Smith*, and challenges to the criminal justice system itself,[164] most constitutional errors do undermine the reliability of the decision making process.[165]

160. In Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989), Justice White was not objecting to that characterization of allowable error but was insisting on an actually inaccurate sentence in the particular case. *See supra* text accompanying notes 147-48.

161. Of course it may be objected that "accuracy" has no meaning within legal method without regard to the rules of evidence and procedure that define what may be considered in arriving at the conclusion at issue. This is a serious objection, which the Court has yet really to consider. Nevertheless, Justice O'Connor, and presumably the plurality in *Teague v. Lane*, relied on "accuracy" as a defining category. 489 U.S. at 312.

162. Smith v. Murray, 477 U.S. 527, 539 (1986). Justice O'Connor so viewed the error in *Smith v. Murray* itself — a violation of Estelle v. Smith, 451 U.S. 454 (1981), which requires the usual fifth amendment warnings and protections in the context of a psychiatric interview for capital sentencing purposes. Justice O'Connor characterized the situation in *Smith v. Murray* as one in which "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." 477 U.S. at 538.

163. 489 U.S. 288, 313 (1989).

164. *Cf.* Rose v. Mitchell, 443 U.S. 545 (1979) (challenge to racial discrimination in grand jury selection cognizable in habeas corpus).

165. This is the reason that, in the capital sentencing context, *Kuhlmann v. Wilson* and *Smith v. Murray* represent important exceptions to otherwise strict procedural barriers. As stated above, *Teague*'s second category is not the same as the innocence exception in *Wilson* and *Smith*. In *Teague*, Justice O'Connor did not accept Justice Harlan's view from Desist v. United States, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting), that "all 'new' constitutional rules which significantly improve the pre-existing factfinding procedures are to be retroactively applied on habeas." 489 U.S. at 312 (quoting dissent of Harlan, J. in *Desist*). Instead, Justice O'Connor added a requirement, inferred from Justice Harlan's opinion in Mackey v. United States, 401 U.S. 667, 675 (1971) (separate opinion of Harlan, J.), that the procedure involved in the claim of error "implicate the fundamental fairness of the trial." *Teague*, 489 U.S. at 312. Further, she toughened that standard by describing fundamental fairness in terms of "basic due process," *id.* at 313, "bedrock procedural element," *id.* at 315, and the classic examples from Justice Stevens' dissent in Rose v. Lundy, 455 U.S. 509, 544 (1982): "that the proceeding was

I have elsewhere listed some of the sentencing errors that undermine accuracy, which the defendant should be able to raise in habeas corpus.[166] I will not repeat that analysis here. Given the Fifth Circuit's en banc decision in *Sawyer v. Butler*, which was recently affirmed by the Supreme Court,[167] it bears noting, however, that a *Caldwell* error seems to be the sort of error that an innocent defendant would be permitted to raise. Judge Higginbotham's majority opinion in *Sawyer v. Butler* seems to assume that footnote six in *Dugger v. Adams* means that a "Caldwell violation . . . [is] not so fundamental as to require an exception to the procedural default doctrine."[168] Actually, Justice White's approach in *Adams* seems to be the opposite: that a *Caldwell* error is the right type of error, but that the effect of the error on a defendant's conviction in a particular case must be proven.[169]

What about errors that do not affect the accuracy of guilt or sentence determinations? The plurality opinion in *Wilson*, which is still the Court's most thorough discussion of innocence, did not limit the "ends of justice" exception that allows consideration of successive habeas corpus petitions to errors that undermine accuracy. Justice Powell simply required that "the

---

dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." 489 U.S. at 313. But while it may be equitable to deny relief to a defendant who is guilty of the offense and does deserve the death penalty, unless the error in his case is as fundamental as mob violence, it is not at all equitable to do the same with regard to a defendant who is innocent of the crime or of his sentence. In that context, one would expect Justice O'Connor to accept the accuracy element of *Desist* alone. That is, one can predict an expansion of *Teague*'s second exception. *See supra* text accompanying notes 79-97.

166. *See* Ledewitz, *supra* note 5, at 403-10.

167. 881 F.2d 1273 (5th Cir. 1989), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

Justice Kennedy's opinion characterizes the rule in *Caldwell* as a "systemic rule enhancing reliability" added to due process guarantees of fairness. *Sawyer*, 110 S. Ct. at 2832. *Caldwell* is not an "absolute prerequisite to fundamental fairness" so as to come within *Teague*'s second exception. *Id.* (quoting Teague v. Lane, 489 U.S. 288 (1989)). The opinion does not discuss or consider potential claims of innocence under *Teague*, an issue apparently not raised in *Sawyer*. Justice Kennedy, as did the Fifth Circuit, seems to draw a parallel between *Teague*'s second exception and the miscarriage of justice exception to procedural default. *Id.* at 2832-33. As argued below, *see infra* text accompanying notes 168-69, such a link in the *Caldwell* context tends to lead to an overbroad reading of Dugger v. Adams, 489 U.S. 401 (1989). Nevertheless, the suggestion that *Teague*'s second exception and the procedural default exception are linked supports the prediction that *Teague* will be interpreted to protect the innocent defendant. That is, any defendant who theoretically could qualify for an exception to the procedural default bar should be granted an exception to *Teague*'s bar against retroactivity. It bears repeating that the Court in Dugger v. Adams, 489 U.S. 401 (1989), and Sawyer v. Smith, 110 S. Ct. 2822 (1990), did not view those particular defendants as having established that they were in any sense innocent of the death sentence. The Court may prove less strict in consideration of the range of errors that may be considered in cases in which defendants do make such an innocence showing.

168. 881 F.2d at 1294.

169. *See Adams*, 109 S. Ct. at 1217 n.6. This is not to say that because an error is the right type under *Kuhlmann v. Wilson* and *Murray v. Carrier*, it is necessarily so under *Teague*. That conjunction depends on the evolution of *Teague*'s language as discussed above, *see supra* notes 89-114 and accompanying text.

prisoner supplement[ ] his constitutional claim with a colorable showing of factual innocence."[170] Perhaps any claim of error will do.

The purpose of an innocence exception is to do justice for a particular defendant. The type of error involved is irrelevant to that goal. As long as the defendant deserves relief because he is innocent, the error should be thought of as merely the occasion for relief.[171] For example, if it has been discovered inadvertently that a defendant is not the one who committed the murder for which he was convicted, the presence of a racially discriminatory grand jury venire, though a procedurally defaulted claim, could provide the opportunity to reverse a conviction which, in justice, should be reversed. As this illustration shows, there should be no requirement that the error raised itself undermined the accuracy of the sentence.

Restriction of the sort of error the innocent defendant may raise would undermine the safety valve function of habeas corpus. The innocent defendant is in need of the habeas corpus safety valve whether the error in his case is the kind that generally undermines the accuracy of convictions and sentences or not. The critical link Justice O'Connor made in discussing the second exception in *Teague* was between relief in habeas corpus and the "accuracy of convictions."[172] It is that link, between relief and innocence, upon which the innocent defendant relies. For habeas corpus to serve as a safety valve, and a particularly needed one given the new limits on habeas corpus, it must be able always to cure injustice in a particular case.

The parallel to the innocent defendant's raising of a non-accuracy related claim is the movement from cause and prejudice alone as an exception to procedural default to the innocence supplement. Justice O'Connor pointed out in *Murray v. Carrier* that "for the most part" the cause and prejudice exception will prevent a fundamental miscarriage of justice, which she defined as "the conviction of one who is actually innocent."[173] But because "this will [not] always be true," she held that innocence must also be an available exception to procedural default.[174]

---

170. 477 U.S. 436, 454 (1986).

171. Indeed, it is this concept — that the error is merely the occasion for relief and thus that its nature does not matter — that accounts for the disagreement in Smith v. Murray, 477 U.S. 527 (1986), between Justice O'Connor's majority opinion and Justice Stevens' dissent. Justice Stevens argued for habeas relief based on the fundamental unfairness of an error leading to imposition of a death penalty. *Wilson*, 477 U.S. at 541-46. Justice O'Connor rejected this view and accused Justice Stevens of enforcing only certain, unspecified constitutional provisions. *Id.* at 538 ("[p]recisely which parts of the Constitution are 'fundamental' and which are not is left to future elaboration"). It would make no sense to read her opinion, then, as distinguishing between enforceable and non-enforceable parts of the Constitution: accuracy-related claims versus non-accuracy related claims. Instead, it is the defendant's factual innocence that causes his claim of error to be heard, not the nature of the error.

172. 489 U.S. 288, 313 (1989) ("[O]ur cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review.").

173. Murray v. Carrier, 477 U.S. 478, 495-96 (1986).

174. *Id.* at 496.

No doubt correcting errors that undermine accuracy will also, "for the most part," protect the innocent defendant.[175] But the focus should be, as in *Carrier*, on the need to protect the innocent defendant. When, for whatever reason, it is not the case that an innocent defendant claims an innocence related error, the error that would prevent the miscarriage of justice in his case should nevertheless be addressed.

D. The Case of An Innocent Defendant Without Any Error

Since *Jackson v. Virginia*,[176] a state prisoner has been entitled to habeas corpus relief "if it is found that upon the record evidence addressed at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt."[177] The importance of *Jackson* is that the Court recognized for the first time that conviction and punishment of an innocent defendant can, for reason of innocence alone, serve as grounds for relief in habeas corpus. It is true that the *Jackson* opinion is written in the language of due process rather than innocence.[178] But the "error" identified in *Jackson* is closely tied to the innocence of the prisoner.[179] Without that showing of innocence, there would be no error.[180]

Despite the Court's concern about innocence, the *Jackson* standard is not sufficient to protect an innocent defendant for several reasons. First, the standard does not take into account the weight of the evidence, even if that weight strongly suggests that the prisoner is innocent. Second, *Jackson* does not permit consideration of credibility even if credibility of key witnesses is highly suspect. Finally, *Jackson* does not allow for supplementation of the record, even if the newly discovered evidence is credible and probative of innocence.[181]

---

175. *Id.* at 495.

176. 443 U.S. 307 (1979).

177. *Id.* at 324.

178. *Id.* at 318 referring to *In re* Winship, 397 U.S. 358 (1970), which "established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process."

179. *Id.* at 323 ("[T]he question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence.").

180. *Jackson* was viewed at the time as related to a new, innocence-related approach in habeas corpus. *See generally* Note, *Guilt, Innocence and Federalism in Habeas Corpus*, 65 CORNELL L. REV. 1123 (1980); Note, *Federal Habeas Corpus: Greater Protection For "Innocent" State Prisoners After Jackson v. Virginia*, 14 U. RICH. L. REV. 455 (1980).

181. *See generally* Freedman, *Innocence, Federalism and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 315 (1990-91). Professor Freedman notes that state law often does not protect prisoners with claims of factual innocence. He details the incredible story of Ronald Monroe, whose plausible claim of innocence was ignored in several courts before his sentence of death was commuted by the Governor of Louisiana. Professor Freedman sees a danger in making the guilt/innocence determination the responsibility of the federal courts in habeas corpus. I would prefer the model of shared state and federal power he outlines, but prospects for such reform do not appear to be strong. It certainly is preferable that the federal courts serve as a safety valve for claims of innocence until state legislative reforms are enacted, than that no one do so.

The narrow reach of *Jackson* is a consequence of its limiting federal judges in habeas corpus to examination only of the same evidence that had been evaluated by the trier of fact at the defendant's trial. In the usual context, that would be sufficient. Without some suggestion of bias or other arbitrary factor, there would usually be no need for a federal judge to weigh evidence anew or to make a new determination about the credibility of witnesses. These are precisely the tasks that triers of fact are supposed to discharge.[182]

In his article about innocence, however, Judge Friendly did not restrict his concerns about the innocent defendant to evidence of record.[183] Judge Friendly supported the consideration of newly discovered evidence of innocence as another ground for reversal in collateral proceedings.[184] Such a case of newly discovered evidence would have little to do with *Jackson v. Virginia*. Obviously, there would still be, in such a case, the original evidence of record upon which a rational trier of fact could return a finding of guilt. But if new probative evidence or other changes created a fair probability that the verdict would be "not guilty," Judge Friendly would grant relief.

Judge Friendly's approach, rather than that of *Jackson*, has the potential for the prevention of miscarriages of justice. The inadequacy of *Jackson* is

182. Even in the absence of new evidence, this seemingly obvious division of responsibility is not without risk of unjust results. The later proceedings in Henry v. Mississippi, 379 U.S. 443 (1965), illustrate the good that a suspicious federal district judge can accomplish. *Henry* concerned the suppression of illegally obtained evidence — just the sort of situation the Court has since suggested does not raise issues of innocence. *See* Stone v. Powell, 428 U.S. 465 (1976) (respondent Powell, a convicted murderer, was denied habeas corpus relief sought under the contention that evidence of the murder weapon was the result of an illegal search and seizure). Henry's trial counsel failed to object to testimony by a police officer that corroborated the testimony of the 18-year-old complainant. The Mississippi Supreme Court held at first that the consent of Henry's wife to a search of his car did not operate to waive his rights. The court overlooked the failure to object contemporaneously in the mistaken belief that Henry's trial counsel was a non-resident, unfamiliar with state procedure. Upon learning of the presence of local counsel, the court withdrew its earlier ruling and held, inter alia, that the search issue had been waived. The United States Supreme Court reversed and remanded, for a hearing on whether there had been a "deliberate[ ] bypass[ ]" of state procedure. *Henry*, 379 U.S. at 452. Obviously, *Henry* no longer represents the Court's approach to issues of waiver. It is equally obvious that the Court does not believe that illegal searches raise issues of factual innocence. But this view of legal error is not always the whole story. After remand, relief was granted on the search issue in federal habeas corpus proceedings. Henry v. Williams, 299 F. Supp. 36 (N.D. Miss. 1969). Professors Fink and Tushnet capture the spirit of that final act: "The district court, unlike the Supreme Court, mentioned that Henry was a well-known black leader — the president of the Mississippi NAACP." H. FINK & M. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 840 (1987). District Judge Keady also noted the following arrangement at Henry's trial: "The weather was extremely warm that day and, although pitchers of ice water and cups were placed on the judge's bench and on the state's table, none was provided for the defense. Defense counsel were told, however, that they might use a 'for colored only' fountain located outside the courtroom." *Henry*, 299 F. Supp. at 41. Sometimes correcting a purely legal error masks a suspicion by a judge that substantive justice has not been done. And that suspicion can arise, as in *Henry*, over issues of credibility.

183. *See* Friendly, *supra* note 11.

184. *See supra* text accompanying note 124.

illustrated in *Giarratano v. Procunier*.[185] In *Giarratano*, the defendant did introduce in habeas corpus proceedings some evidence of innocence of the underlying offense.[186] The Fourth Circuit panel held that "it is not [a habeas court's] function to weigh the evidence or test the credibility of the witnesses."[187] But why should a defendant face execution if he can convince a district judge that he is not guilty of the crime?

It is true that Judge Friendly would have limited consideration of newly discovered evidence to that "which could not have been presented in the exercise of due diligence,"[188] and that the district judge in *Giarratano v. Procunier* found that there had not been due diligence.[189] But due diligence is not appropriate for innocence review. While a due diligence standard does serve the State's interest in finality, so does enforcement of procedural default and the prohibition against successive petitions for habeas corpus relief. The Court has held, nevertheless, that both procedural default and successive petitions are to be overlooked when the defendant makes the required showing of innocence.[190] Due diligence represents another, legitimate, enforcement mechanism for the States' interest in finality. Like the others, however, it should be trumped by the claims of the innocent prisoner.

It is one thing to stand by and see a guilty defendant who presents a clear, continuing threat to society executed despite legal error in his case. At least in such an instance, it can be said by some that the defendant deserved his punishment. But to watch an innocent person executed when, however it was discovered, we now believe he did not commit the crime, would not be compatible with a civilized legal system. The only rule consistent with habeas corpus as a safety valve is that all claims of innocence must be considered, whether they are claims of error or not.

Does this analysis also apply to innocence in sentencing? Should the federal courts examine sentencing innocence when there is no error? One obvious difference between innocence of the underlying crime and innocence of the death sentence is that very few criminal defendants will be able to make even a minimally convincing showing that they are factually innocent of the underlying offense. Thus, a standard giving special protection to defendants innocent of the offense will not create a heavy burden on the federal courts.

In contrast, there are few capital cases in which the prisoner will not be able to point to substantial, new mitigating evidence at some later stage in his case. If there is no requirement of independent error, and no requirement of due diligence, such a standard would ensure at least one such petition from every capital defendant. In fact, since innocence can also serve as an excep-

185. 891 F.2d 483 (4th Cir. 1989).

186. *Id.* at 487. There were purely legal claims in the case as well: an assertion of incompetence to be tried and several challenges to the evidence used at the sentencing hearing.

187. *Id.*

188. Friendly, *supra* note 11, at 159 n.87.

189. 891 F.2d 483, 487 (4th Cir. 1989).

190. *See supra* text accompanying notes 12-55.

tion to the bar against successive habeas corpus petitions, defendants on death row might file more than one petition.

These serious considerations, however, must be weighed against far more compelling ones. First, as a practical matter, the relatively small number of death penalty cases ensures that the burden on the federal courts will not be severe. There are probably more actually innocent defendants sentenced to prison in state courts every year than the 250-300 defendants sentenced to death every year. Second, the potential burden on the federal courts is reduced because a district judge will decide whether newly discovered mitigating evidence or newly discovered evidence undermining aggravation would be convincing to a hypothetical, newly convened sentencing jury. These judges see a number of death penalty cases in their careers; presumably they will be able to distinguish — even without an evidentiary hearing — what is significant new evidence from what is not.

But the foremost consideration in favor of considering innocence in sentencing independently of error is to avoid a miscarriage of justice. There are people on death row who do not deserve to be executed, and who would not have received the death penalty in a properly functioning sentencing context.

The claim that a defendant does not deserve death can be fairly assessed. While this sort of innocence is not as well defined as innocence of the underlying offense, it is not solely a matter of subjective judgment. If it were, the Court's enterprise to ensure that the death penalty is imposed rationally would be doomed to failure. We can understand, for example, a jury differentiating between the defendant who pulled the trigger and the defendant who was merely present at the scene of the crime. If it then should turn out that the death-sentenced defendant was not the one who pulled the trigger, the defendant's sentence should be reversed. Or evidence later discovered might mitigate the reasons for the defendant's crime — for example, the victim had supplied the illegal drugs that killed a member of the defendant's family.[191] If that occurred, it might well be concluded that the defendant would probably be given a different sentence were there a new sentencing hearing.[192]

191. A sentence of death in a similar case was affirmed by the Pennsylvania Supreme Court. In Commonwealth v. Pirela, 510 Pa. 43, 507 A.2d 23 (1986), by the Commonwealth's own theory of the case, the defendant participated in a brutal killing of the victim the day after an overdose of drugs killed the defendant's brother, for which the defendant held the victim responsible.

192. When evidence of aggravation relied on by a sentencing judge or jury in giving the death penalty later proves to have been inaccurate, Johnson v. Mississippi, 468 U.S. 578 (1988), suggests that the sentence will be reversed. In *Johnson*, the Court reversed a sentence of death because a prior conviction introduced at the sentencing hearing as an aggravating circumstance was overturned after the defendant's capital trial. *Johnson* could be understood to hold, as Justice White's concurrence argues, that when "inadmissible and prejudicial evidence" is introduced at a sentencing hearing, a death sentence must be reconsidered. *Id.* at 591. However, at the time of the capital trial in *Johnson*, the evidence was not only admissible, but appeared to be reliable; only subsequent information showed the unreliability of the evidence. As the majority stated, "[h]ere, the jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Id.* If *Johnson* establishes a per se rule that consideration of evidence later found

Obviously, the judgment that a defendant does not deserve to die is a difficult one to make even if the standard to be applied is phrased in terms of what a sentencing jury would probably do, given some change in the evidence. But the Supreme Court must know it has undertaken a serious burden in granting exceptions to procedural hurdles for the innocent defendant. The reason for accepting this burden is that the procedural hurdles preclude consideration of many habeas corpus cases. The innocence exception assuages the Court's concern that innocent defendants not be punished because of these hurdles. This is an important pursuit, and it is just as vital if the defendant may plausibly claim he does not deserve to die as if he can claim he is not guilty of the underlying offense. The innocence exception is just as needed in sentencing as it is in convictions of the underlying offenses.

I have left unresolved the legal basis on which a court may grant habeas corpus relief in a case of innocence without error. What legal authority does a federal court have to grant habeas corpus relief to a condemned state prisoner when the court believes that the currently available evidence would convince a sentencing jury to grant a life sentence, but there is no legal error in the case? The habeas corpus statute requires that, in order to obtain relief, the defendant must be held in violation of federal law.[193] If there is no legal error, how can such a showing be made?

This problem is not a difficult one. Prior to the decision in *Kuhlmann v. Wilson*, Congress had amended the habeas corpus statute to eliminate the "ends of justice" exception to the successive petition restriction.[194] Justice Powell nevertheless retained that standard in *Wilson*, claiming this exception was necessary in the context of showing innocence.[195] Habeas corpus has always been grounded in equity[196] and there is no more important equitable consideration than that an innocent defendant not be punished.[197] If the Court considers, instead, that congressional intent should be controlling, the only question that must be asked is whether Congress would wish an innocent defendant to be able to gain relief in habeas corpus? There is little doubt that

---

to have been inaccurate is grounds for reversal of a death sentence — unless it was harmless error — the case suggests that reliable outcome rather than identification of errors is the Court's goal in death penalty cases. Where, after all, was the error in *Johnson*? It would then be only a slight extension to suggest that inaccuracy can reside as well in the omission of evidence later revealed to be material and truthful as in the admission of evidence later revealed to be false.

193. 28 U.S.C. § 2254(a) (1988):

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

194. Kuhlmann v. Wilson, 477 U.S. 436, 449 (1986).

195. *Id.* at 454.

196. The writ is generally treated as "governed by equitable principles." Fay v. Noia, 372 U.S. 391, 438 (1963) (citing United States *ex rel.* Smith v. Baldi, 344 U.S. 561, 573 (1953) (Frankfurter, J., dissenting)).

197. Justice Powell's description of the importance of habeas corpus in Stone v. Powell, 428 U.S. 465, 491 n.31 (1976), would certainly justify relief for the innocent defendant, error or no error.

not only would there be a Congressional consensus but a broader social consensus that would support a general innocence protection.

If the courts nevertheless feel constrained by the statute, there is still no serious impediment to relief. As Professor Freedman notes, it would not be difficult to construe an eighth amendment or due process bar against the punishment — and certainly the execution — of an innocent defendant.[198] The error could even reside in the failure of state process to provide relief. There is no legal impediment to granting relief to the innocent defendant, whether there is an explicit error in his case or not.

CONCLUSION

Justice O'Connor and Justice White have now both referred to the case of the innocent defendant as an "extraordinary case."[199] Justice White in *Dugger v. Adams* warned against allowing the extraordinary case to become "an all too ordinary one."[200]

The Court is right that the punishment of the innocent is extraordinary. But this is not only because, we hope, few innocent defendants are convicted and few defendants deserving of life are sentenced to death. Each case of an innocent defendant is "extraordinary" because in each such case a fundamental miscarriage of justice has occurred. In fact, in each such case, the ultimate failure of justice has occurred. The Supreme Court, having recognized a judicial responsibility to correct such injustice where it can be identified, cannot now complain that such injustice occurs too often to be reversed. However high the standard of persuasion is set, if that standard is satisfied, the defendant must obtain relief. And that must be true whether there be one or many hundreds of innocent defendants in prison and on death row in America.

> Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. . . .
>
> We nevertheless afford broad habeas corpus relief, recognizing the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty. The Court in Fay v. Noia described habeas corpus as a remedy for "whatever society deems to be intolerable restraints," and recognized that those to whom the writ should be granted "are persons whom society has grievously wronged."

Id. at 491 n.31 (citation omitted).

198. Freedman, *supra* note 181, at 319 n.22; *see also* Ledewitz, *supra* note 5, at 421-23.

199. Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989); Murray v. Carrier, 477 U.S. 478, 496 (1986).

200. 489 U.S. 401, 410 n.6.