SUPREME COURT OF THE UNITED STATES

No. 91–6382

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

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

[June 22, 1992]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The issue before the Court is the standard for determining whether a petitioner bringing a successive, abusive, or defaulted federal habeas claim has shown he is ``actually innocent'' of the death penalty to which he has been sentenced so that the court may reach the merits of the claim. Robert Wayne Sawyer, the petitioner in this case, filed a second federal habeas petition containing successive and abusive claims. The Court of Appeals for the Fifth Circuit refused to examine the merits of Sawyer's claims. It held that Sawyer had not shown cause for failure to raise these claims in his earlier petition, and that he had not shown that he was ``actually innocent'' of the crime of which he was convicted or the penalty which was imposed. 945 F. 2d 812 (1991). We affirm the Court of Appeals and hold that to show "actual innocence" one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.

In 1979—13 years ago—petitioner and his accomplice, Charles Lane, brutally murdered Frances Arwood who was a guest in the home petitioner shared with his girlfriend, Cynthia Shano, and Shano's two young children. As we recounted in our earlier

review of this case, *Sawyer* v. *Smith*, 497 U. S. ___ (1990), petitioner and Lane returned to petitioner's home after a night of drinking, and argued with Arwood, accusing her of drugging one of the children. Petitioner and Lane then attacked Arwood, beat her with their fists, kicked her repeatedly, submerged her in the bathtub, and poured scalding water on her before dragging her back into the living room, pouring lighter fluid on her body and igniting it. Arwood lost consciousness sometime during the attack and remained in a coma until she died of her injuries approximately two months later. Shano and her children were in the home during the attack, and Shano testified that petitioner prevented them from leaving.[1]

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[1]The facts are more fully recounted in the opinion of the Louisiana Supreme Court affirming petitioner's conviction and sentence. *State* v. *Sawyer*, 422 So.2d 95, 97–98 (1982).

At trial, the jury failed to credit petitioner's ``toxic psychosis'' defense, and convicted petitioner of first-degree murder. At the sentencing phase, petitioner testified that he was intoxicated at the time of the murder and remembered only bits and pieces of the events. Petitioner's sister, Glenda White, testified about petitioner's deprived childhood, his affection and care for her children, and that as a teenager petitioner had been confined to a mental hospital for ``no reason'' where he had undergone shock therapy. 2 App. 505–516. The jury found three statutory aggravating factors, no statutory mitigating factors and sentenced petitioner to death.[2]

Sawyer's conviction and sentence were affirmed on appeal by the Louisiana Supreme Court. *State* v. *Sawyer*, 422 So. 2d 95 (1982). We granted certiorari, and vacated and remanded with instructions to reconsider in light of *Zant* v. *Stephens*, 462 U. S. 862 (1983). *Sawyer* v. *Louisiana*, 463 U. S. 1223 (1983). On remand, the Louisiana Supreme Court reaffirmed the sentence. *Sawyer* v. *State*, 442 So. 2d 1136 (1983), cert. denied, 466 U. S. 931 (1984). Petitioner's first petition for state postconviction relief was denied. *Louisiana ex rel. Sawyer* v. *Maggio*, 479 So. 2d 360, reconsideration denied, 480 So. 2d 313 (La. 1985).[3] In 1986, Sawyer filed his first federal

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[2]The jury found the following statutory aggravating factors: "(1) that [Sawyer] was engaged in the commission of aggravated arson, (2) that the offense was committed in an especially cruel, atrocious and heinous manner, and (3) that [Sawyer] had previously been convicted of an unrelated murder." *Id.,* at 100. The Louisiana Supreme Court held that the last aggravating circumstance was not supported by the evidence. *Id.*, at 101.

[3]The Louisiana Supreme Court twice remanded to the trial court for hearings on petitioner's ineffective assistance of counsel claim. *Louisiana ex rel. Sawyer*

habeas petition, raising 18 claims, all of which were denied on the merits. See *Sawyer* v. *Butler*, 848 F. 2d 582 (CA5 1988), aff'd on rehearing en banc, 881 F. 2d 1273 (CA5 1989). We again granted certiorari and affirmed the Court of Appeals' denial of relief. *Sawyer* v. *Smith, supra*.[4] Petitioner next filed a second motion for state postconviction relief. The state trial court summarily denied this petition as repetitive and without merit, and the Louisiana Supreme Court denied discretionary review. See 945 F. 2d, at 815.

The present petition before this Court arises out of Sawyer's second petition for federal habeas relief. After granting a stay and holding an evidentiary hearing, the District Court denied one of Sawyer's claims on the merits, and held that the others were barred as either abusive or successive. 772 F. Supp. 297 (ED La. 1991). The Court of Appeals granted a certificate of probable cause on the issue of whether petitioner had shown that he is actually "innocent of the death penalty" such that a court should reach the merits of the claims contained in this successive petition. 945 F. 2d, at 814. The Court of Appeals held that the petitioner had failed to show that he was actually innocent of the death penalty because the evidence he argued had been unconstitutionally kept from the jury failed to show that Sawyer was ineligible for the death penalty under Louisiana law. For the third time we granted Sawyer's petition for certiorari, 502 U. S. ___ (1991), and we now affirm.

Unless a habeas petitioner shows cause and prejudice, see *Wainwright* v. *Sykes*, 433 U. S. 72, (1977), a court may not reach the merits of: (a)

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v. *Maggio*, 450 So.2d 355 (1984); *Louisiana ex rel. Sawyer* v. *Maggio*, 468 So.2d 554 (1985).

[4]In this earlier review, we held that *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), could not be applied retroactively to petitioner's case under *Teague* v. *Lane*, 489 U. S. 288 (1989).

successive claims which raise grounds identical to grounds heard and decided on the merits in a previous petition, *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986); (b) new claims, not previously raised which constitute an *abuse of the writ*, *McCleskey* v. *Zant*, 499 U. S. ___ (1991); or (c) *procedurally defaulted claims* in which the petitioner failed to follow applicable state procedural rules in raising the claims. *Murray* v. *Carrier*, 477 U. S. 478 (1986). These cases are premised on our concerns for the finality of state judgments of conviction, and the "significant costs of federal habeas review." *McCleskey*, *supra*, at ___; see, *e.g.*, *Engle* v. *Isaac*, 456 U. S. 107, 126–128 (1982).

We have previously held that even if a state prisoner cannot meet the cause and prejudice standard a federal court may hear the merits of the successive claims if the failure to hear the claims would constitute a "miscarriage of justice." In a trio of 1986 decisions, we elaborated on the miscarriage of justice, or "actual innocence," exception. As we explained *Kuhlmann* v. *Wilson*, *supra*, the exception developed from the language of the federal habeas statute which, prior to 1966, allowed successive claims to be denied without a hearing if the judge were ``satisfied that the *ends of justice will not be served by such inquiry*.'' *Id.*, at 448. We held that despite the removal of this statutory language from 28 U. S. C. §2244(b) in 1966, the miscarriage of justice exception would allow successive claims to be heard if the petitioner ``establish[es] that under the probative evidence he has a colorable claim of factual innocence.'' *Kuhlmann*, 477 U. S., at 454.[5] In the

[5]Our standard for determining actual innocence was articulated in *Kuhlmann* as: ``[T]he prisoner must `show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of

second of these cases we held that the actual innocence exception also applies to procedurally defaulted claims. *Murray* v. *Carrier*, *supra*.[6]

In *Smith* v. *Murray*, 477 U. S. 527 (1986), we found no miscarriage of justice in the failure to examine the merits of procedurally defaulted claims in the capital sentencing context. We emphasized that the miscarriage of justice exception is concerned with actual as compared to legal innocence, and acknowledged that actual innocence ``does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense.'' *Id.*, at 537. We decided that the habeas petitioner in that case had failed to show actual innocence of the death penalty because the ``alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones.'' *Id.*, at 538.

In subsequent cases, we have emphasized the narrow scope of the fundamental miscarriage of justice exception. In *Dugger* v. *Adams*, 489 U. S. 401 (1989), we rejected the petitioner's claim that his procedural default should be excused because he had shown that he was actually innocent. Without endeavoring to define what it meant to be actually innocent of the death penalty, we stated that

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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.''' 477 U. S. at 455, n.17, quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970).

[6]We stated that the merits of a defaulted claim could be reached ``in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent . . . .'' *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986).

``[d]emonstrating 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.'' *Id.*, at 412, n. 6. Just last Term in *McCleskey* v. *Zant*, *supra*, at ——, we held that the ``narrow exception'' for miscarriage of justice was of no avail to the petitioner because the constitutional violation, if it occurred, ``resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination.''

The present case requires us to further amplify the meaning of "actual innocence" in the setting of capital punishment. A prototypical example of "actual innocence" in a colloquial sense is the case where the State has convicted the wrong person of the crime. Such claims are of course regularly made on motions for new trial after conviction in both state and federal courts, and quite regularly denied because the evidence adduced in support of them fails to meet the rigorous standards for granting such motions. But in rare instances it may turn out later, for example, that another person has credibly confessed to the crime, and it is evident that the law has made a mistake. In the context of a noncapital case, the concept of "actual innocence" is easy to grasp.

It is more difficult to develop an analogous framework when dealing with a defendant who has been sentenced to death. The phrase "innocent of death" is not a natural usage of those words, but we must strive to construct an analog to the simpler situation represented by the case of a noncapital defendant. In defining this analog, we bear in mind that the exception for "actual innocence" is a very narrow exception, and that to make it workable it must be subject to determination by relatively objective standards. In the every day context of

capital penalty proceedings, a federal district judge typically will be presented with a successive or abusive habeas petition a few days before, or even on the day of, a scheduled execution, and will have only a limited time to determine whether a petitioner has shown that his case falls within the "actual innocence" exception if such a claim is made.[7]

Since our decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), our Eighth Amendment jurisprudence has required those States imposing capital punishment to adopt procedural safeguards protecting against arbitrary and capricious impositions of the death sentence. See, *e.g., Gregg* v. *Georgia*, 428 U. S. 153 (1976); *Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976). In response, the States have adopted various narrowing factors which limit the class of offenders upon which the sentencer is authorized to impose the death penalty. For example, the Louisiana statute under which petitioner was convicted defines first-degree murder, a capital offense, as something more than intentional killing.[8]

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[7]While we recognize this as a fact on the basis of our own experience with applications for stays of execution in capital cases, we regard it as a regrettable fact. We of course do not in the least condone, but instead condemn, any efforts on the part of habeas petitioners to delay their filings until the last minute with a view to obtaining a stay because the district court will lack time to give them the necessary consideration before the scheduled execution. A court may resolve against such a petitioner doubts and uncertainties as to the sufficiency of his submission. See *Gomez* v. *United States District Court*, 503 U. S. — (1992) *(per curiam)*.

[8]La. Rev. Stat. Ann. §14:30 (West 1986 and Supp. 1992) defines first degree murder:

``First degree murder is the killing of a human being:

``(1) When the offender has specific intent to kill or

In addition, after a defendant is found guilty in Louisiana of capital murder, the jury must also find at the sentencing phase beyond a reasonable doubt at least one of a list of statutory aggravating factors before it may recommend that the death penalty be imposed.[9]

But once eligibility for the death penalty has been established to the satisfaction of the jury, its

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to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, first degree robbery or simple robbery;

``(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;

``(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

``(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

. . . . .

``Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the determination of the jury.''

[9]At the time of petitioner's trial La. Code Crim. Proc. Ann., Art. 905.3 (West 1984) provided: ``A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.''

deliberations assume a different tenor. In a series of cases beginning with *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978), we have held that the defendant must be permitted to introduce a wide variety of mitigating evidence pertaining to his character and background. The emphasis shifts from narrowing the class of eligible defendants by objective factors to individualized consideration of a particular defendant. Consideration of aggravating factors together with mitigating factors, in various combinations and methods dependent upon state law, results in the jury's or judge's ultimate decision as to what penalty shall be imposed.

Considering Louisiana law as an example, then, there are three possible ways in which "actual innocence" might be defined. The strictest definition would be to limit any showing to the elements of the crime which the State has made a capital offense. The showing would have to negate an essential element of that offense. The Solicitor General, filing as *amicus curiae* in support of respondent, urges the Court to adopt this standard. We reject this submission as too narrow, because it is contrary to the statement in *Smith* that the concept of "actual innocence" could be applied to mean "innocent" of the death penalty. 477 U. S., at 537. This statement suggested a more expansive meaning to the term of "actual innocence" in a capital case than simply innocence of the capital offense itself.

The most lenient of the three possibilities would be to allow the showing of "actual innocence" to extend not only to the elements of the crime, but also to the existence of aggravating factors, and to mitigating evidence which bore, not on the defendant's eligibility to receive the death penalty, but only on the ultimate discretionary decision between the death penalty and life imprisonment. This, in effect is what petitioner urges upon us. He contends that actual innocence of the death penalty exists where ``there is a `fair

probability' that the admission of false evidence, or the preclusion of true mitigating evidence, [caused by a constitutional error] resulted in a sentence of death.'' Brief for Petitioner 18 (citation and footnote omitted).[10] Although petitioner describes his standard as narrower than that adopted by the Eighth and Ninth Circuit Courts of Appeals,[11] in reality it is only more closely related to the facts of his case in which

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[10]Petitioner's standard derives from language in *Smith* v. *Murray*, *supra*. Petitioner maintains that *Smith* holds that if one can show that the error precludes the development of true mitigating evidence, actual innocence has been shown. Brief for Petitioner 21. By emphasizing that in *Smith* the fundamental miscarriage of justice exception had not been met because, *inter alia*, the constitutional error did not lead the jury to consider any false evidence, we did not hold its converse, that is that an error which leads to the consideration of ``false'' mitigating evidence amounts to a miscarriage of justice.

[11]In *Deutscher* v. *Whitley*, 946 F. 2d 1443 (CA9 1991), the Ninth Circuit phrased its test as follows: ``To establish a fundamental miscarriage of justice at sentencing, a defendant must establish that constitutional error substantially undermined the accuracy of the capital sentencing determination. This requires a showing that constitutional error infected the sentencing process to such a degree that it is more probable than not that, but for constitutional error, the sentence of death would not have been imposed.'' *Id.*, at 1446 (citations omitted).

The Eighth Circuit has adopted a similar test: ```In the penalty-phase context, this exception will be available if the federal constitutional error alleged probably resulted in a verdict of death against one whom the jury would otherwise have sentenced to life imprisonment.''' *Stokes* v. *Armontrout*, 893 F. 2d 152, 156 (CA8 1989) (quoting *Smith* v. *Armontrout*, 888 F.

he alleges that constitutional error kept true mitigating evidence from the jury. The crucial consideration according to petitioner, is whether due to constitutional error the sentencer was presented with ```a *factually inaccurate sentencing profile*''' of the petitioner. Brief for Petitioner 15, n. 21, quoting *Johnson* v. *Singletary*, 938 F. 2d 1166, 1200 (CA11 1991) (en banc) (Anderson, J. dissenting).

Insofar as petitioner's standard would include not merely the elements of the crime itself, but the existence of aggravating circumstances, it broadens the extent of the inquiry but not the type of inquiry. Both the elements of the crime and statutory aggravating circumstances in Louisiana are used to narrow the class of defendants eligible for the death penalty. And proof or disproof of aggravating circumstances, like proof of the elements of the crime, is confined by the statutory definitions to a relatively obvious class of relevant evidence. Sensible meaning is given to the term "innocent of the death penalty" by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met.[12]

But we reject petitioner's submission that the showing should extend beyond these elements of the capital sentence to the existence of additional mitigating evidence. In the first place, such an extension would mean that "actual innocence" amounts to little more than what is already required to show "prejudice," a necessary showing for habeas

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2d 530, 545 (CA8 1989)).

[12]Louisiana narrows the class of those eligible for the death penalty by limiting the type of offense for which it may be imposed, and by requiring a finding of at least one aggravating circumstance. See *supra*, at 7–8. Statutory provisions for restricting eligibility may, of course, vary from state to state.

relief for many constitutional errors. See, *e.g.*, *United States* v. *Bagley*, 473 U. S. 667, 682 (1985); *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984). If federal habeas review of capital sentences is to be at all rational, petitioner must show something more in order for a court to reach the merits of his claims on a successive habeas petition than he would have had to show to obtain relief on his first habeas petition.[13]

But, more importantly, petitioner's standard would so broaden the inquiry as to make it anything but a "narrow" exception to the principle of finality which we have previously described it to be. A federal district judge confronted with a claim of actual innocence may with relative ease determine whether a submission, for example, that a killing was not intentional, consists of credible, noncumulative and admissible evidence negating the element of intent. But it is a far more difficult task to assess how jurors would have reacted to additional showings of mitigating factors, particularly considering the breadth of those factors that a jury under our decisions must be allowed to consider.[14]

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[13]If a showing of actual innocence were reduced to actual prejudice, it would allow the evasion of the cause and prejudice standard which we have held also acts as an "exception" to a defaulted, abusive or successive claim. In practical terms a petitioner would no longer have to show cause, contrary to our prior cases. *McCleskey* v. *Zant,* 499 U. S. ——, —— (1991); *Carrier*, 477 U. S., at 493.

[14]The "clearly erroneous" standard suggested by JUSTICE STEVENS' opinion concurring in the judgment suffers from this weakness and others as well. The term "clearly erroneous" derives from Federal Rule of Civil Procedure 52(a), which provides that "findings of fact [in actions tried without a jury] shall not be set aside unless clearly erroneous." JUSTICE STEVENS wrenches the term out of this context—where it

The Court of Appeals in this case took the middle ground among these three possibilities for defining "actual innocence" of the death penalty, and adopted this test:

> ``[W]e must require the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty.'' 945 F. 2d, at 820 (footnotes omitted).

The Court of Appeals standard therefore hones in on the objective factors or conditions which must be shown to exist before a defendant is eligible to have the death penalty imposed. The Eleventh Circuit Court of Appeals has adopted a similar ``eligibility'' test for determining actual innocence. *Johnson* v.

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applies to written factual findings made by a trial judge—and would apply it to the imposition of the death sentence by a jury or judge. Not only is the latter determination different both quantitatively and qualitatively from a finding of fact in a bench trial, but JUSTICE STEVENS would not even bring with the term its established meaning in reviewing factfindings in bench trials. We held in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948), and reaffirmed in *Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985), that ```[a] finding is ``clearly erroneous'' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'''' But JUSTICE STEVENS would apparently equate it with the standard traditionally used for review of jury verdicts—that no reasonable sentencer could have imposed the death penalty. *Post*, at 12. Cf. *Jackson* v. *Virginia*, 443 U.S. 307, 316–318 (1979).

Singletary, 938 F. 2d 1166 (CA11 1991), petition for cert. pending, No. 91–6576.[15] We agree with the Courts of Appeals for the Fifth and Eleventh Circuits that the "actual innocence" requirement must focus on those elements which render a defendant eligible for the death penalty, and not on additional mitigating evidence which was prevented from being introduced as a result of a claimed constitutional error.

In the present petition, Sawyer advances two claims, arising from two distinct groups of evidentiary facts which were not considered by the jury which convicted and sentenced Sawyer. The first group of evidence relates to petitioner's role in the offense and consists of affidavits attacking the credibility of Cynthia Shano and an affidavit claiming that one of Shano's sons told a police officer that Sawyer was not responsible for pouring lighter fluid on Arwood and lighting it, and that in fact Sawyer tried to prevent Charles Lane from lighting Arwood on fire. Sawyer claims that the police failed to produce this exculpatory evidence in violation of his due process rights under *Brady* v. *Maryland*, 373 U. S. 83 (1963).

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[15]The Eleventh Circuit articulated the following test: ``Thus, a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates *all* of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body *could not* have found *any* aggravating factors and thus the petitioner was ineligible for the death penalty. In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is *ineligible* for the death penalty.'' *Johnson* v. *Singletary*, 938 F. 2d 1166, 1183 (CA11 1991) (emphasis in original).

The second group consists of medical records from Sawyer's stays as a teenager in two different mental heath institutions. Sawyer alleges ineffective assistance of counsel in trial counsel's failure to introduce these records in the sentencing phase of his trial.

The Court of Appeals held that petitioner's failure to assert his *Brady* claim in his first petition constituted an abuse of the writ, and that he had not shown cause for failing to raise the claim earlier under *McCleskey*. 945 F. 2d, at 824. The ineffective assistance claim was held by the Court of Appeals to be a successive claim because it was rejected on the merits in Sawyer's first petition, and petitioner failed to show cause for not bringing all the evidence in support of this claim earlier. *Id.*, at 823. Petitioner does not contest these findings of the Court of Appeals. Tr. of Oral Arg. 7. Therefore we must determine if petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under Louisiana law.

Under Louisiana law, petitioner is eligible for the death penalty because he was convicted of first-degree murder— that is, an intentional killing while in the process of committing an aggravated arson—and because at the sentencing phase the jury found two valid aggravating circumstances: that the murder was committed in the course of an aggravated arson, and that the murder was especially cruel, atrocious, and heinous. The psychological evidence petitioner alleges was kept from the jury due to the ineffective assistance of counsel does not relate to petitioner's guilt or innocence of the crime.[16] Neither does it relate to either of the aggravating factors found by

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[16]Petitioner does not allege that his mental condition was such that he could not form criminal intent under Louisiana law. Tr. of Oral Arg. 10.

the jury which made petitioner eligible for the death penalty. Even if this evidence had been before the jury, it cannot be said that a reasonable juror would not have found both of the aggravating factors which make petitioner eligible for the death penalty.[17] Therefore, as to this evidence, petitioner has not shown that there would be a fundamental miscarriage of justice for the Court to fail to reexamine the merits of this successive claim.

We are convinced that the evidence allegedly kept from the jury due to an alleged *Brady* violation also fails to show that the petitioner is actually innocent of the death penalty to which he has been sentenced. Much of the evidence goes to the credibility of Shano, suggesting *e.g.*, that contrary to her testimony at trial she knew Charles Lane prior to the day of the murder; that she was drinking the day before the murder; and that she testified under a grant of immunity from the prosecutor. 2 App. 589–608. This sort of latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of Shano's account of petitioner's actions.

The final bit of evidence petitioner alleges was unconstitutionally kept from the jury due to a *Brady* violation was a statement made by Shano's then 4–year–old son, Wayne, to a police officer the day after the murder. Petitioner has submitted an affidavit from one Diane Thibodeaux stating that she was present when Wayne told a police detective who asked who had lit Arwood on fire that ``Daddy [Sawyer] tried to help the lady'' and that the ``other man'' had pushed Sawyer back into a chair. 2 App.

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[17]In the same category are the affidavits from petitioner's family members attesting to the deprivation and abuse suffered by petitioner as a child. 2 App. 571–584.

587. The affidavit also states that Wayne showed the officer where to find a cigarette lighter and a can of lighter fluid in the trash. *Ibid.* Because this evidence goes to the jury's finding of aggravated arson, it goes both to petitioner's guilt or innocence of the crime of first-degree murder, and the aggravating circumstance of a murder committed in the course of an aggravated arson. However, we conclude that this affidavit, in view of all the other evidence in the record, does not show that no rational juror would find that petitioner committed both of the aggravating circumstances found by the jury. The murder was especially cruel, atrocious, and heinous based on the undisputed evidence of torture before the jury quite apart from the arson (*e.g.*, beating, scalding with boiling water). As for the finding of aggravated arson, we agree with the Court of Appeals that, even crediting the information in the hearsay affidavit,[18] it cannot be said that no reasonable juror would have found, in light of all the evidence, that petitioner was guilty of the aggravated arson for his participation under the Louisiana law of principals.[19]

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[18]Wayne Shano apparently has no clear memory of the crime today. 2 App. 602–603. This fact, together with his tender years at the time of the occurrence, suggests that Wayne himself would not corroborate the affidavit of Diane Thibodeaux, thus suggesting an independent basis for refusing to find that the affidavit showed anything by clear and convincing evidence.

[19]La. Rev. Stat. Ann. §14:24 (West 1986) defines principals as: ``All persons concerned in the commission of a crime . . . and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.''

Even considering the affidavit of Wayne Shano, it cannot be said that no reasonable juror would have

We therefore hold that petitioner has failed to show by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty under Louisiana law. The judgment of the Court of Appeals is therefore

Affirmed.

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found that petitioner committed the aggravated arson, given Cynthia Shano's testimony as to petitioner's statements to Lane on the day of the murder, and petitioner's fingerprints on the can of lighter fluid.