SUPREME COURT OF THE UNITED STATES

No. 93–7901

LLOYD SCHLUP, PETITIONER *v.* PAUL K. DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER

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

[January 23, 1995]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, dissenting.

The Court decides that the threshold standard for a showing of "actual innocence" in a successive or abusive habeas petition is that set forth in *Murray* v. *Carrier*, 477 U. S. 478 (1986), rather than that set forth in *Sawyer* v. *Whitley*, 505 U. S. ____ (1992). For reasons which I later set out, I believe the *Sawyer* standard should be applied to claims of guilt or innocence as well as to challenges to a petitioner's sentence. But, more importantly, I believe the Court's exegesis of the *Carrier* standard both waters down the standard suggested in that case, and will inevitably create confusion in the lower courts.

On February 3, 1984, three white inmates attacked and killed a black inmate named Arthur Dade. At trial, testimony by Sergeant Roger Flowers and Officer John Maylee indicated that inmate Rodnie Stewart threw a container of steaming liquid into Dade's face, petitioner jumped on Dade's back rendering him defenseless, and inmate Robert O'Neal proceeded to stab Dade to death. Petitioner's trial counsel attempted to discredit both eyewitness identifications. As to Sergeant Flowers, counsel argued that Flowers had brought a visitor into petitioner's cell less than an hour before the stabbing, and therefore, Flowers had Schlup "on the brain." Trial counsel attempted to discredit Officer Maylee's identification by arguing that Maylee was too far from the scene to properly view the incident. Through

discovery, petitioner's trial counsel uncovered a videotape in which petitioner is the first inmate to enter the cafeteria. One minute and five seconds after petitioner enters the cafeteria, a group of guards run out in apparent response to a distress call. Twenty-six seconds later, O'Neal is seen entering the cafeteria. Petitioner's trial counsel argued that the videotape established that petitioner could not have committed the murder because there was insufficient time for him to commit the crime and arrive at the cafeteria one minute and five seconds prior to the distress call. Petitioner's trial counsel also presented two alibi witnesses who testified that petitioner had walked in front of them to the cafeteria without incident.

The jury considered this conflicting evidence, determined that petitioner's story was not credible, and convicted him of capital murder. During the sentencing component of trial, the prosecution presented evidence that there were two statutory aggravating factors that warranted imposition of the death penalty: petitioner committed the murder in a place of lawful confinement, and petitioner had a substantial history of serious assaultive criminal convictions. As to the second aggravating factor, the prosecution presented testimony that for two weeks, petitioner had brutally beaten, tortured, and sodomized a cellmate in a county jail. The prosecution also presented testimony that petitioner was convicted of aggravated assault for slitting a cellmate's throat. On cross-examination, petitioner presented his version of the prior incidents. The jury considered this evidence, rejected petitioner's story, and returned a sentence of death.

On appeal, the Missouri Supreme Court affirmed petitioner's conviction and death sentence. Petitioner then filed state collateral proceedings claiming, among other things, that his trial counsel was ineffective for failing to present additional alibi witnesses and for failing to investigate fully the circumstances of the murder. The Missouri Circuit Court determined that petitioner's counsel provided effective assistance of counsel. The Missouri Supreme Court affirmed the denial of postconviction relief.

Petitioner then filed his first federal habeas petition claiming that his trial counsel was ineffective at both the guilt and penalty phases of trial. Though he previously refused to identify Randy Jordan as the alleged third participant in the murder, petitioner faulted his trial counsel for failing to call Randy Jordan as a witness.[1] The District Court denied relief. A

[1]The Missouri Circuit Court found that "[d]efense counsel

panel of the Eighth Circuit Court of Appeals concluded on the merits that petitioner's trial counsel had not been ineffective at the guilt or penalty phases of trial.[2] Petitioner sought review of the panel's decision by the en banc court. No Eighth Circuit judge questioned the panel's conclusion that petitioner's trial counsel provided effective assistance of counsel during the guilt phase of trial.

Petitioner filed a second federal habeas petition, again claiming that his trial counsel was ineffective at both the guilt and penalty phases of trial. Petitioner supplemented this filing with an affidavit from a former inmate, John Green. Green's affidavit related to the timing of the distress call. In his most recent statement, Green swore that Sergeant Flowers "was on his way to break up the fight when he told me to call base. I immediately went into the office, picked up the phone, and called base." App. 122.[3] Under

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did not interview Randy Jordan, whom Petitioner now alleges was the third participant in the murder with which the Petitioner was charged, because the Petitioner while maintaining someone else committed the acts attributable to him, refused to give the name of that person to his counsel." *Schlup* v. *Delo*, Respondent's Exhibit J, pp. 49–50.

[2]Senior Circuit Judge Heaney took issue only with the majority's conclusion that petitioner's trial counsel had rendered effective assistance at the penalty phase of trial. Cf. *Schlup* v. *Armontrout*, 941 F. 2d 631, 642 (1991) ("I disagree with the court's conclusion that Schlup was not prejudiced by his counsel's ineffectiveness during the penalty phase") (Heaney, J., dissenting).

[3]On the day of the incident Green told prison investigators that he had not observed the murder. At Stewart's trial, while under oath, Green testified that he saw no actual fight take place and made no mention of his call to base. App. 140. Green now also swears that he "called base . . . within seconds of Dade hitting the ground." *Id.*, at 123.

this timing sequence, petitioner submitted that he "ha[d] produced proof, which could not have been fabricated, that the call to which the guards [in the cafeteria] responded came seconds after the stabbing." *Id.*, at 100–101. Further, petitioner claimed that "Green's testimony thus makes it impossible, under any view of the evidence, for Schlup to have participated in Dade's murder: for thirty seconds to a minute before the distress call, the videotape plainly shows Lloyd Schlup in the prison dining room, quietly getting his lunch." Brief for Petitioner 12. Thus, petitioner's claim of "actual innocence" depends, in part, on the assumption that the officers in the cafeteria responded to Green's distress call "within seconds" of Dade hitting the ground.[4]

The District Court denied petitioner's second habeas petition without conducting an evidentiary hearing. While on appeal, petitioner supplemented

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[4]One problem with this theory is that O'Neal, an undisputed participant in the murder, entered the cafeteria 26 seconds after the guards responded to the distress call. As respondent explained at oral argument: "[I]f you believe that [Green] radioed immediately upon the time of the body falling . . . then you look at the video-tape, and there is only 26 seconds between the time that that call was supposedly made by Green and the time that O'Neal comes into the cafeteria downstairs, and all of the evidence in this case shows it's impossible for O'Neal, the admitted murderer . . . to have run down, . . . broken a window, thrown the knife out the window, come back, washed his hands . . . and go[ne] down to the cafeteria, *if you hold Green's present statement as controlling, the murder never occurred*." Tr. of Oral Arg. 30–31 (emphasis added). Thus, as the Court acknowledges, *ante*, at 8, n. 17, there was a delay between the time of the murder and the time that the guards in the cafeteria responded to the distress call.

his habeas petition with an additional affidavit from Robert Faherty, a former prison guard who previously testified at petitioner's trial. A divided panel of the Eighth Circuit applied the *Sawyer* standard to petitioner's gateway claim of "actual innocence" and determined that petitioner failed to meet that standard. The Eighth Circuit denied rehearing en banc. We granted certiorari to determine when, absent a showing of cause and prejudice, a district court may consider the merits of an abusive or successive habeas petition. 511 U. S. ___ (1994).

In *Kuhlmann* v. *Wilson*, the Court examined when a federal court could entertain a successive habeas petition. 477 U. S. 436 (1986). A plurality of the Court determined that the "`ends of justice'" required a district court to entertain the merits of an otherwise defaulted petition where the prisoner supplemented his constitutional claim with a showing of factual innocence. *Id.*, at 454. After citing Judge Friendly's definition of factual innocence, the plurality summarily determined that the District Court should not have entertained Wilson's petition because the evidence of guilt in his case had been "`nearly overwhelming.'" *Id.*, at 455.

In *Carrier*, the Court determined that a federal court could not review a procedurally defaulted habeas petition unless the petitioner demonstrated both cause for the default as well as prejudice resulting from the constitutional error. 477 U. S., at 492.[5] The *Carrier* Court, however, left open the possibility that in a truly extraordinary case, a federal habeas court might excuse a failure to establish cause and

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[5]The Court explicitly rejected the contention that "cause need not be shown if actual prejudice is shown," even where the constitutional claims "call[ed] into question the reliability of an adjudication of *legal guilt*." 477 U. S., at 495 (emphasis added); see also *Engle* v. *Isaac*, 456 U. S. 107, 129 (1982).

prejudice where "`a constitutional violation has probably resulted in the conviction of one who is *actually innocent*.'" *Ante*, at 28, quoting 477 U. S., at 496 (emphasis added).

In *Sawyer*, we described in some detail the showing of actual innocence required when a habeas petitioner brings an otherwise abusive, successive, or procedurally defaulted claim challenging the imposition of his death sentence, rather than his guilt of the crime. 505 U. S., at ___, (slip op., at 1). There the Court emphasized that innocence of the death penalty, like its "`actual innocence'" counterpart, is "a very narrow exception," and that in order to be "workable it must be subject to determination by relatively objective standards." *Id.*, at ___ (slip op., at 6). Thus, we concluded that a habeas petitioner who challenged his sentence in an otherwise defaulted petition 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." *Id.*, at ___ (slip op., at 14).

We have never until today had to similarly flesh out the standard of "actual innocence" in the context of a habeas petitioner claiming innocence of the crime. Thus, I agree that the question of what threshold standard should govern is an open one. As I have said earlier, I disagree with the Court's conclusion that *Carrier*, and not *Sawyer*, provides the proper standard. But far more troubling than the choice of *Carrier* over *Sawyer* is the watered down and confusing version of *Carrier* which is served up by the Court.

As the Court notes, to satisfy *Carrier* a habeas petitioner must demonstrate that "`a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Ante*, at 28 (quoting *Carrier*, 477 U. S., at 496). The Court informs us that a showing of "actual innocence" requires a habeas petitioner to "show that it is more likely than not that

no reasonable juror would have convicted him in the light of the new evidence." *Ante*, at 28–29. But this is a classic mixing of apples and oranges. "More likely than not" is a quintessential charge to a finder of fact, while "no reasonable juror would have convicted him in the light of the new evidence" is an equally quintessential conclusion of law similar to the standard that courts constantly employ in deciding motions for judgment of acquittal in criminal cases. The hybrid which the Court serves up is bound to be a source of confusion. Because new evidence not presented at trial will almost always be involved in these claims of actual innocence, the legal standard for judgment of acquittal cannot be bodily transposed for the determination of "actual innocence," but the sensible course would be to modify that familiar standard, see *infra*, at 8–9, rather than to create a confusing hybrid.

In the course of elaborating the *Carrier* standard, the Court takes pains to point out that it differs from the standard enunciated in *Jackson* v. *Virginia*, 443 U. S. 307 (1979), for review of the sufficiency of the evidence to meet the constitutional standard of proof beyond a reasonable doubt. Under *Jackson*, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*, at 319. This standard requires a solely retrospective analysis of the evidence considered by the jury and reflects a healthy respect for the trier of fact's "responsibility . . . to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to the ultimate facts." *Ibid.*

The Court fails to acknowledge expressly the similarities between the standard it has adopted and the *Jackson* standard. A habeas court reviewing a

claim of actual innocence does not write on a clean slate. Cf. *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983) ("Federal courts are not forums in which to relitigate state trials"); *Herrera* v. *Collins*, 506 U. S. ___, ___ (1993) (slip op., at 25) ("[I]n state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant"); *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977) ("Society's resources have been concentrated at [the state trial] in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens"). Therefore, as the Court acknowledges, a petitioner making a claim of actual innocence under *Carrier* falls short of satisfying his burden if the reviewing court determines that *any* juror reasonably would have found petitioner guilty of the crime. See *Ante*, at 31; cf. *Jackson*, *supra*, at 318–319.

The situation presented by a claim of actual innocence in a federal habeas petition is obviously different from that presented in *Jackson* because the habeas court analyzing an "actual innocence" claim is faced with a body of evidence that has been supplemented since the original trial. The reviewing court must somehow predict the effect that this new evidence would have had on the deliberations of reasonable jurors. It must necessarily weigh this new evidence in some manner, and may need to make credibility determinations as to witnesses who did not appear before the original jury. This new evidence, however, is not a license for the reviewing court to disregard the presumptively proper determination by the original trier of fact.

I think the standard enunciated in *Jackson*, properly modified because of the different body of evidence which must be considered, faithfully reflects the language used in *Carrier*. The habeas judge should initially consider the motion on the basis of the written submissions made by the parties. As the

Court suggests, habeas courts will be able to resolve the great majority of "actual innocence" claims routinely without any evidentiary hearing. See *ante*, at 26. This fact is important because, as we noted in *Sawyer:* "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." 505 U. S., at ___ (slip op., at 6–7).

But in the highly unusual case where the district court believes on the basis of written submissions that the necessary showing of "actual innocence" may be made out, it should conduct a limited evidentiary hearing at which the affiants whose testimony the Court believes to be crucial to the showing of actual innocence are present and may be cross examined as to veracity, reliability, and all of the other elements which affect the weight to be given the testimony of a witness. After such a hearing, the district court would be in as good a position as possible to make the required determination as to the showing of actual innocence.

The present state of our habeas jurisprudence is less than ideal in its complexity, but today's decision needlessly adds to that complexity. I believe that by adopting the *Sawyer* standard both for attacks on the sentence and on the judgment of conviction, we would take a step in the direction of simplifying this jurisprudence. See *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, ___ (1992) (slip op., at 8) (noting the importance of uniformity in the law of habeas corpus). The *Sawyer* standard strikes the proper balance among the State's interest in finality, *McCleskey*, 499 U. S., at 491–492, the federal courts' respect for principles of federalism, see, *e.g., Teague* v. *Lane*, 489 U. S.

288, 309 (1989) (plurality opinion), and "the ultimate equity on the prisoner's side—a sufficient showing of actual innocence," *Withrow* v. *Williams*, 507 U. S. ___, ___ (1993) (O'CONNOR, J., concurring in part and dissenting in part) (slip op., at 4). The Court of Appeals fully analyzed petitioner's new evidence and determined that that petitioner fell way short of "`show[ing] by clear and convincing evidence [that] no reasonable juror would find him [guilty of murder].'" 11 F. 3d 738, 743 (CA8 1993) (quoting *Sawyer*, *supra*, at ___) (slip op., at 14). I agree and therefore would affirm.

But if we are to adopt the *Carrier* standard, it should not be the confusing exegesis of that standard contained in the Court's opinion. It should be based on a modified version of *Jackson* v. *Virginia*, with a clearly defined area in which the district court may exercise its discretion to hold an evidentiary hearing.