HABEAS CORPUS IN THE SUPREME COURT IN 1992: CONFUSION, ILLUSION, AND LIMITATION

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INTRODUCTION

The Supreme Court's trend toward narrowing the scope of federal habeas corpus continued virtually without pause in 1992. Of the four cases decided during the October Term of 1991 relating to habeas, three restricted the ability of petitioners to raise claims on habeas corpus,[1] while the fourth, although appearing to expand the definition of what rules of law may be applied retroactively on habeas, in fact narrowed it for the vast majority of petitioners.[2] This Article examines these four cases in detail, exploring both their impact on the present and their implications for the future. Part I looks at the various opinions in *Wright v. West* and the confusion apparent from the widely divergent views held by the Justices. Part II examines *Stringer v. Black*, a retroactivity case that, although ruling in favor of the habeas petitioner, promises to make the task of subsequent petitioners much more difficult. Part III turns to *Keeney v. Tamayo-Reyes* and *Sawyer v. Whitley*, two cases that narrowed the availability of habeas relief for petitioners who have committed some error in their state court proceedings or who have filed previous federal habeas corpus petitions. Finally, Part IV synthesizes the cases, examining the positions of the Justices and identifying issues that will be determinative in future cases.

I. CONFUSION

The most intellectually fascinating habeas case of the 1991 Term is *Wright v. West*,[3] for two primary reasons. First, the Court explicitly went out of its way to consider an issue not presented by the parties in

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[1] *See* Sawyer v. Whitley, 112 S. Ct. 2514 (1992); Wright v. West, 112 S. Ct. 2482 (1992); Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992).

[2] *See* Stringer v. Black, 112 S. Ct. 1130 (1992).

[3] 112 S. Ct. 2482 (1992).

their petitions for certiorari. After initially granting the petition,[4] the Court subsequently expanded the grant and instructed the parties to brief and argue the following question:

> In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?[5]

Thus, the Court was requesting the parties to revisit the issue of deference to state court determinations of so-called "mixed" questions of law and fact, a question many thought decided long ago.[6]

Second, the decision generated five separate opinions from the Court, none joined by more than three Justices, and with no Justice joining more than one. Even more remarkable are the widely divergent approaches to the case taken by the various opinions, illustrating a lack of consensus that does not seem to be evident in any other doctrinal area of the Court's jurisprudence.

A. *The Case*

During the Christmas holidays of 1978, someone stole approximately $3500 worth of items from the Virginia home of Angelo Cardova. On the tenth of January of the following year, a lawful police search discovered a number of the items from the Cardova home in the house of Frank West, including an imitation mink coat embroidered with the name "Esther" and a silk jacket with the phrase "Korea 1970" on it. All in all, approximately $1100 worth of the Cardova's possessions were recovered from West's home.[7]

At trial, West claimed that he had purchased the items at a flea market from one Ronnie Elkins, but, as illustrated in a footnote to Justice Thomas' opinion, his testimony was none too clear or convincing.[8] Under Virginia law, the jury may infer that "a person who fails to

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[4] Wright v. West, 112 S. Ct. 656 (1991).

[5] Wright v. West, 112 S. Ct. 672 (1991). Justices Blackmun and Stevens dissented from this expansion of the certiorari grant. *Id.*

[6] *See* Wright v. West, 112 S. Ct. 2482, 2494-95 (O'Connor, J., concurring in judgment).

[7] *Id.* at 2484 (opinion of Thomas, J.).

[8] *See id.* at 2484 n.1.

explain, or falsely explains, his exclusive possession of recently stolen property is the thief."[9] West was convicted, and his petition for appeal to the Supreme Court of Virginia was denied in 1980.[10] Seven years later, after procuring an allegedly exculpatory statement from Elkins, West filed in state court for a petition for habeas corpus, on the basis of both the insufficiency of the evidence from the original trial and the new evidence contained in the Elkins affidavit. The Supreme Court of Virginia denied relief, as did the federal District Court for the Eastern District of Virginia.[11]

The U.S. Court of Appeals for the Fourth Circuit, however, reversed.[12] The court first noted the appropriate standard for deciding insufficiency claims: "[A] claim that evidence is insufficient to support a conviction as a matter of due process depends on '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.' "[13] In analyzing the evidence under this standard, the Fourth Circuit determined that the quick recovery of the items, the fact that only one-third (by value) of the stolen items were found in West's home, the location of the items in plain view in West's house, the explanation offered by West, and the lack of corroborating evidence all combined to create a doubt such that no reasonable jury could have convicted him.[14] Obviously dissatisfied with the outcome, Virginia sought a writ of certiorari from the U.S. Supreme Court.

B. *The Thomas Opinion*

Justice Thomas announced the judgment of the Court in what was likely the most divided unanimous judgment of the Term. Speaking for himself, Chief Justice Rehnquist, and Justice Scalia, Justice Thomas began his opinion with a rather curious recitation of the history of habeas corpus.[15] He argued that, under its earliest understanding,

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[9] *Id.* at 2485.

[10] *Id.*

[11] *Id.*

[12] West v. Wright, 931 F.2d 262 (4th Cir. 1991).

[13] *West*, 112 S. Ct. at 2485-86 (opinion of Thomas, J.) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[14] *West*, 931 F.2d at 268-70.

[15] *See West*, 112 S. Ct. at 2486. This discussion is interesting because it is wholly unnecessary; the debate over the proper deference to be accorded state-court judgments on mixed ques-

habeas corpus was available only if the prisoner could successfully challenge "the jurisdiction of the court that had rendered the judgment under which he was in custody."[16] Later, federal courts "began to recognize federal claims by state prisoners if no state court had provided a full and fair opportunity to litigate those claims."[17] However, "the state-court judgment was entitled to 'absolute respect' "[18] if the prisoner had received an adequate opportunity to obtain full and fair consideration of his or her federal claims in the state forum.[19]

The Thomas opinion noted that habeas law was fundamentally altered in the 1953 by the "landmark decision"[20] of *Brown v. Allen*.[21] Before considering *Brown*, it is important to recognize that the case included two opinions that were joined, at least in part, by a majority of the Court. The first, written by Justice Reed, decided the question of the preclusive effect to be given state court judgments on later federal habeas petitions. The second, authored by Justice Frankfurter, represented the majority view on the precedential effect of a denial of certiorari on a subsequent habeas petition by the same prisoner. All members of the current Court agree that the decision stands for at least two principles: First, although deference to state court factfinding is appropriate (indeed, required by statute[22]), "[i]n other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata*."[23] Second, "denial of certiorari cannot be interpreted as an expression of opinion on the merits."[24] This straightforward proposition, accepted without question today, actually generated some dispute in the habeas context, the argument be-

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tions of law and fact is not joined in earnest until 1953 in *Brown v. Allen*. Further, as is seen in Justice O'Connor's opinion, even this historical dicta is not uniformly viewed by all members of the Court. *See id.* at 2493 (O'Connor, J., concurring in judgment).

[16] *Id.* at 2486 (opinion of Thomas, J.).

[17] *Id.*

[18] *Id.* (quoting Kuhlmann v. Wilson, 477 U.S. 436, 446 (1986) (opinion of Powell, J.)). This quotation is important to note because Justice O'Connor takes issue with the characterization of Justice Powell's views implied by the use of the quote. *See id.* at 2494 (O'Connor, J., concurring in judgment).

[19] As innocuous as it seems, this summary of the history of habeas corpus prior to 1953 is sharply attacked by Justice O'Connor in her opinion. *See id.* at 2493 (O'Connor, J., concurring in judgment). This argument, and Justice Thomas' response, will be discussed *infra*.

[20] *Id.* at 2487.

[21] 344 U.S. 443 (1953).

[22] *See* 28 U.S.C. § 2254(d) (1988).

[23] *Brown*, 344 U.S. at 458 (opinion of Reed, J.).

[24] *Id.* at 497 (opinion of Frankfurter, J.).

ing that a denial of certiorari constituted a federal court rejection of the claims pressed in the certiorari petition, and so a district court need not hear the same contentions on habeas corpus.[25] Beyond these two accepted holdings, the scope of *Brown v. Allen* is hotly debated.

The Reed opinion concludes, in a section entitled "Right to Plenary Hearing," that a petition for a writ of habeas corpus may be denied by a district court if it determines that the state proceeding "has resulted in a satisfactory conclusion."[26] In *West*, Justice Thomas read this section to mean that "the federal courts enjoy at least the discretion to take into consideration the fact that a state court has previously rejected the federal claims asserted on habeas."[27] Regardless of the proper reading of that section, however, the Reed opinion never addressed the specific issue of deference to state court determinations of mixed law and fact. The Frankfurter opinion fills that gap, but its precedential value is questionable.

Justice Frankfurter begins by positing "two general questions which must be considered before the Court can pass on the specific situations presented by these cases."[28] The issues are "[t]he legal significance of a denial of certiorari . . . when an application for a writ of habeas corpus thereafter comes before a district court,"[29] and "[t]he bearing that the proceedings in the State courts should have on the disposition of such an application in a district court."[30] An examination of the opinions of the various Justices reveals that Justice Frankfurter's answer to the first question was joined by a majority of the Court,[31] whereas his discussion of the second was signed by only himself and two others, thereby diminishing the value of that section as precedent.[32]

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[25] *See id.* at 456 (opinion of Reed, J.).

[26] *Id.* at 463.

[27] Wright v. West, 112 S. Ct. 2482, 2487 (1992); *see also Brown*, 344 U.S. at 465 ("[A] federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction . . . .").

[28] *Brown*, 344 U.S. at 488 (opinion of Frankfurter, J.).

[29] *Id.*

[30] *Id.*

[31] *See id.* at 487-88 (opinion noting the positions of Justices Burton and Clark that a denial of a petition for certiorari has no precedential effect); *id.* at 513 (opinion of Black, J., joined by Douglas, J.) (stating that a "previous denial of certiorari in a case should be given no legal significance when an application for a writ of habeas corpus in that case comes before a Federal District Court").

[32] *See id.* at 513 (opinion of Black, J., joined by Douglas, J.) (agreeing with Justice Frankfurter as to "the bearing of the proceedings in the State courts upon the disposition of an application for a writ of habeas corpus"). There is a rather cryptic statement in the opinion noting the

At the beginning of the second section of his opinion, Justice Frankfurter states that "[t]his opinion is designed to make explicit and detailed matters that are also the concern of Mr. Justice Reed's opinion,"[33] and that "[t]he views of the Court on these questions may thus be drawn from the two opinions jointly."[34] Unfortunately, Justice Reed's opinion does not directly discuss the issue of deference to state-court determinations of mixed questions of law and fact, so that directive is unhelpful. Throughout this section of the opinion, Justice Frankfurter makes a number of statements that might appear contradictory, but in fact fit together to suggest a workable approach to federal court consideration of prior state determinations. Consider the following excerpts:

> [T]he District Judge must take due account of the proceedings that are challenged by the application for a writ. All that has gone before is not to be ignored as irrelevant. But the prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have. . . . The prior State determination may guide [the district court judge's] discretion in deciding upon the appropriate course to be followed in disposing of the application before him.[35]

> Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, the District Judge must exercise his own judgment on this blend of facts . . . and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.[36]

> Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what

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positions of Justices Burton and Clark that arguably lends support to the second Frankfurter position: "[Justices Burton and Clark] also recognize the propriety of the considerations to which Mr. Justice Frankfurter invites the attention of a federal court when confronted with a petition for a writ of habeas corpus under the circumstances stated." *Id.* at 488 (opinion noting position of Burton, J., and Clark, J.). However, whatever its meaning, this is too slender a reed on which to place binding precedential effect.

[33] *Id.* at 497 (opinion of Frankfurter, J.).

[34] *Id.*

[35] *Id.* at 500 (citation omitted).

[36] *Id.* at 507.

> procedurally may be deemed fairness, may have misconceived a federal constitutional right.[37]

Justice Thomas' opinion in *West* cites the "guide" language from the first excerpt and the "shut his eyes" phrase from the third in support of the proposition that the Frankfurter opinion was endorsing at least some type of deferential approach.[38] In contrast, Justice O'Connor's opinion focuses on the second excerpt and on the last sentence of the third in defense of the argument that the federal judge must decide mixed questions *de novo*.[39] Taken as a whole, the Frankfurter position seems to be identical to that expressed by Justice Reed concerning the *res judicata* effect of state criminal judgments:[40] The state court judgment is considered persuasive precedent, but has no other effect on the determination of the federal court. The federal court should take the state court finding into account not because it is bound by the ruling, but because the decision may provide valuable information on the very subject now before the federal court.

The Thomas opinion in *West* does not argue that the Frankfurter opinion in *Brown* absolutely established a rule of deferential review of state court findings on mixed questions.[41] Rather, as noted in a footnoted response to Justice O'Connor, Justice Thomas claims "not that *Brown v. Allen* establishes deferential review for reasonableness, but only that *Brown* does not squarely foreclose it."[42] On this score, Justice Thomas is correct. The second section of the Frankfurter opinion, regardless of its proper interpretation, was not endorsed by a majority of the Court, and so the argument that *Brown* settled the issue of the standard of review for state court determinations of mixed questions of law and fact does not survive close scrutiny.[43] As will be seen, this is critical to the analysis of Justice Thomas.

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[37] *Id.* at 508.

[38] *See* Wright v. West, 112 S. Ct. 2482, 2488 (1992) (opinion of Thomas, J.).

[39] *See id.* at 2495 (O'Connor, J., concurring in judgment).

[40] *See* Brown v. Allen, 344 U.S. 443, 458 (1953) (opinion of Reed, J.).

[41] Justice Thomas does, however, claim that the various statements of Justice Frankfurter "can be reconciled, of course, on the assumption that the habeas judge must review the state-court determination for reasonableness." *West*, 112 S. Ct. at 2488 n.5 (opinion of Thomas, J.).

[42] *Id.*

[43] Even if this analysis is incorrect and the statement of the positions of Justices Burton and Clark did in fact endorse the second section of Justice Frankfurter's opinion, that section, even though signed by a majority of the Justices, nonetheless did not represent the "Opinion of the Court," and so is not entitled to status as binding precedent.

After reviewing the many cases since *Brown* involving mixed constitutional questions, Justice Thomas concluded that none of them ever considered the issue of whether review of state-court findings on the issue should be *de novo* or deferential.[44] However, he conceded that "we have gradually come to treat as settled the rule that mixed constitutional questions are subject to plenary federal review on habeas."[45] The importance of this conclusion is made clear by another footnote responding to the criticisms of Justice O'Connor: "[A]n unadorned citation to *Brown* should not have been enough, at least as an original matter, to establish *de novo* review with respect to mixed questions; and . . . in none of our leading cases was the choice between a *de novo* and a deferential standard outcome determinative."[46] If indeed all decisions recognizing a *de novo* standard of review for mixed questions can be traced to *Brown*, then Justice Thomas feels that the Court should not hesitate to revisit the question, because *Brown* itself did not decide the question.

For further evidence of the propriety of reconsidering the issue, Justice Thomas turned to the habeas cases concerning retroactive application of new law.[47] He argued that those recent cases "have implicitly questioned"[48] the use of a *de novo* standard of review for mixed questions of law and fact. Under the retroactivity cases, a habeas petitioner "generally cannot benefit from a new rule of criminal procedure announced after his conviction has become final on direct appeal."[49] The accepted definition is that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[50] The Court later explained that a rule is new if its outcome was "susceptible to debate among reasonable minds"[51] prior to its being announced. Thus, "if a state court has reasonably rejected the legal claim asserted by a habeas petitioner under existing law, then the claim seeks the benefit of a 'new' rule under *But-*

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[44] *See West*, 112 S. Ct. at 2488.

[45] *Id.* at 2489 (quotation omitted).

[46] *Id.* at 2489 n.6.

[47] *See id.* at 2489. These cases include Sawyer v. Smith, 497 U.S. 227 (1990); Saffle v. Parks, 494 U.S. 484 (1990); Butler v. McKellar, 494 U.S. 407 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989); and Teague v. Lane, 489 U.S. 288 (1989).

[48] *West*, 112 S. Ct. at 2489.

[49] *Id.* A conviction is "final" for retroactivity purposes on the date the U.S. Supreme Court denies the defendant's petition for certiorari on direct appeal.

[50] Teague v. Lane, 489 U.S. 288, 301 (1989) (opinion of O'Connor, J.).

[51] Butler v. McKellar, 494 U.S. 407, 415 (1990).

ler, and is therefore not cognizable on habeas under *Teague*."[52] All of this is undoubtedly correct, but it has no relevance whatsoever to the question of the standard of review to be applied to a state court determination on a mixed question of law and fact.[53]

Teague and its progeny have nothing to do with standards of review, and the difference is not merely "a matter of phrasing,"[54] as Justice Thomas claims. To the extent that federal courts defer to state court rulings for retroactivity purposes, such deference is a *byproduct* of the doctrine, not a result of its design. An explanation of the retroactivity doctrine's operation will help illustrate the point.

When a federal court embarks on the "new rule" inquiry, it seeks to determine whether the rule sought to be invoked by the habeas petitioner was commanded by precedent in existence when the petitioner's direct review process ended. The rule in question is typically one announced by the U.S. Supreme Court in a case decided after the prisoner's petition for certiorari on direct review has been denied. The battle is thus centered on whether the recent Court decision was merely a trivial extension of existing precedent (and therefore not a "new rule"), or whether it constituted a sharp break with earlier law, in which case the petitioner will be foreclosed from using it.[55] To make this determination, the federal court will first look to see if other courts, state *or* federal, considered the same question prior to the Supreme Court's holding.[56] If so, and if one or more of them ruled against adoption of the rule, this is persuasive evidence that the rule was not "dictated by

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[52] *West*, 112 S. Ct. at 2490 (opinion of Thomas, J.).

[53] Justices O'Connor and Kennedy each raise this concern. *See id.* at 2497 (O'Connor, J., concurring); *id.* at 2498 (Kennedy, J., concurring). Their arguments will be discussed *infra*.

[54] *Id.* at 2490 n.8 (opinion of Thomas, J. (quoting O'Connor, J.)).

[55] Even if the rule is new, the petitioner may still qualify for its application to him under one of two exceptions to the general prohibition. However, these exceptions are narrow, and the Court has shown no willingness to apply them expansively. For a complete discussion of the Court's retroactivity law, see Karl N. Metzner, Note, *Retroactivity, Habeas Corpus, and the Death Penalty: An Unholy Alliance*, 41 DUKE L.J. 160 (1991).

[56] For example, in Caldwell v. Mississippi, 472 U.S. 320 (1985), the Supreme Court ruled that any prosecutorial argument that diminished the jury's sense of responsibility for its verdict or sentence was impermissible, and constituted reversible error. *See id.* at 328-29. Five years later, in Sawyer v. Smith, 497 U.S. 227 (1990), the Court had to determine whether the *Caldwell* holding made new law or was merely an explicit statement of a guarantee already implied by earlier rulings. To do so, the Court examined other court decisions prior to 1985 that had considered the same argument. Because some courts, including the U.S. Supreme Court, had rejected the idea that such prosecutorial statements constituted reversible constitutional error, the *Caldwell* rule was deemed to be "new." *See id.* at 232.

prior precedent," because obviously at least one court did not feel compelled to adopt it.

Justice Thomas would equate this inquiry with "deference" to the court ruling against adoption of the rule. However, the concept of "deference" means that the reviewing court will decline to exercise its own judgment on a particular question, adopting instead the reasoning of the lower court. In a "new rule" inquiry, the federal court is deciding *de novo* whether a particular rule is "new;" the lower courts did not consider the newness question, but rather the issue of whether to adopt or reject the rule itself in the first instance.[57] The fact of rejection by a lower court is *evidence* that the rule subsequently adopted is "new," but its reasoning on why to reject the rule plays no part in the ultimate holding by the federal court on the newness question. Further, even if each court to have considered the question has decided to adopt the rule, the Supreme Court may nonetheless decide that the rule represents a sufficiently sharp departure from existing precedent so as to be "new."

No consideration by a lower court need ever have taken place for a rule to be struck down as "new." For example, the petitioner may be pressing an entirely novel theory of constitutional error, never before adopted in any court. Because acceptance of such an argument would undoubtedly create a "new rule," a federal habeas petitioner would be foreclosed from relying on it. Yet there would be no lower court rejection of the rule to which to "defer." Deference simply plays no role whatsoever in the new rule inquiry, and Justice Thomas was wrong to rely on the retroactivity cases for support for the proposition that federal courts should defer to state court determinations on mixed questions of law and fact.

After making all the arguments that federal courts should defer at least somewhat to state court rulings on mixed questions, Justice Thomas then refuses to so hold:

> We need not decide such far-reaching issues in this case. . . . [T]he claim advanced by the habeas petitioner must fail even assuming that the state court's rejection of it should be reconsidered *de novo*. Whatever the appropri-

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[57] In one case, two lower federal courts had ruled on the issue of whether a particular rule was "new" for habeas retroactivity purposes. In *Sawyer*, the Supreme Court granted certiorari to resolve a circuit split over whether the *Caldwell* rule was "new." No mention is made of "deferring" to the judgment of one lower court or another on the issue, and rightly so. The question of newness is one of law, to be considered *de novo* in the Supreme Court.

> ate standard of review, we conclude that there was more than enough evidence to support West's conviction.[58]

Thus, the Thomas opinion leaves the question it sought to resolve unanswered. Apparently, the only case that will present the opportunity to decide the issue is one in which *de novo* review would generate a different result than would deferential review. Justice Thomas apparently preferred to wait until such a case presented itself before resolving the question.

C. *The White Opinion*

Justice White's opinion consisted of one sentence: "*Jackson v. Virginia* required the federal courts to deny the requested writ of habeas corpus if, under the *Jackson* standard, there was sufficient evidence to support West's conviction, which, as the Court amply demonstrates, there certainly was."[59] He therefore declined to enter the fray between Justices Thomas and O'Connor, refusing to offer an opinion on a question he felt to be irrelevant to the outcome.

D. *The O'Connor Opinion*

Although concurring in the result, Justice O'Connor (joined by Justices Blackmun and Stevens) wrote "to express disagreement with certain statements"[60] in the Thomas opinion. This is the understatement of the Term; Justice O'Connor listed nine separate objections to Justice Thomas' reasoning, taking issue with virtually every conclusion he reached.

To begin with, Justice O'Connor disputed Justice Thomas' recitation of the history of habeas corpus. She claimed that the rule barring habeas relief if the petitioner had received a full and fair hearing in state court "was not a threshold bar to the consideration of other federal claims,"[61] but the manifestation of the due process inquiry itself. Because the incorporation doctrine had not yet taken root, the only constitutional due process claim that could be raised by a state prisoner

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[58] Wright v. West, 112 S. Ct. 2482, 2493 (1992) (opinion of Thomas, J.).
[59] *West*, 112 S. Ct. at 2493 (White, J., concurring in judgment).
[60] *Id.* at 2493 (O'Connor, J., concurring in judgment).
[61] *Id.*

was the lack of a fair hearing. "Thus, when the Court stated that a state prisoner who had been afforded a full and fair hearing could not obtain a writ of habeas corpus, the Court was propounding a rule of constitutional law, not a threshold requirement of habeas corpus."[62] In response, Justice Thomas simply read the relevant cases differently, contending that "a claim that the habeas petitioner had been denied due process at trial was not cognizable on habeas unless the petitioner also had been denied a full and fair opportunity to raise that claim on appeal."[63]

Justice O'Connor then turned to Justice Thomas's analysis of *Brown v. Allen*. Considering the Reed opinion, she argued that any hint of deference came in the context of review of factual determinations, noting that the section from which Justice Thomas quoted was entitled "Right to a Plenary Hearing," and thus fact-related.[64] Justice Thomas retorted that "if only factual questions were at issue, we would have authorized a denial of the writ not whenever the state-court proceeding "has resulted in a satisfactory *conclusion*" (as we did), but only whenever the state-court proceeding has resulted in satisfactory *factfinding*."[65] As for the Frankfurter opinion in *Brown*, Justice O'Connor has the better of the argument when she asserts that nothing in that opinion suggests anything approaching deference to state court findings on mixed questions, but only that such holdings may inform the judgment of the federal court.[66] However, because the section of the Frankfurter opinion discussing the standard of review was apparently not joined by a majority, its precedential effect is diminished, and Justice Thomas' contention that "an unadorned citation to *Brown*" was insufficient to settle the matter is correct.

Justice O'Connor cites more than twenty-five cases for the proposition that *de novo* review of mixed questions has long been the accepted standard.[67] Although she is undoubtedly correct, as Justice Thomas

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[62] *Id.* As stated earlier, *see supra* note 15, this argument is wholly irrelevant to the question of the type of review to be applied to mixed constitutional questions. However, Justice O'Connor apparently felt the need to respond, lest Justice Thomas' contentions become law by silent acquiescence.

[63] *Id.* at 2487 n.3 (opinion of Thomas, J.).

[64] *Id.* at 2494-95 (O'Connor, J., concurring in judgment).

[65] *Id.* at 2488 n.4 (opinion of Thomas, J.) (citation omitted). As stated earlier, whichever position is superior has very little bearing on the outcome, as Justice Reed's opinion never explicitly considered the standard of review for mixed questions.

[66] *See id.* at 2495 (O'Connor, J., concurring in judgment).

[67] *See id.* at 2495-96 (O'Connor, J., concurring in judgment).

concedes,[68] the doctrine may be traced back to *Brown v. Allen*, which did not settle the issue. Further, in none of the subsequent cases was the choice between *de novo* and deferential review outcome determinative, and so the Court never had to explicitly reconsider and choose between the two.[69] Of course, the fact that a particular doctrine may be traced to somewhat suspect roots does not necessarily argue in favor of its abandonment,[70] but it does make its reconsideration less onerous to the rule of *stare decisis*.[71]

By contrast, Justice O'Connor's response to Justice Thomas' reliance on the recent retroactivity cases clearly gets the better of the argument. "*Teague* did not establish a 'deferential' standard of review of state court determinations of federal law. It did not establish a standard of review at all."[72] Her characterization of what *Teague* does in fact mean is worthy of note: "*Teague* requires courts to ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by binding precedent at the time his state court conviction became final."[73] Further, "the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new."[74] This is important because, as the author of *Teague* and a subsequent retroactivity decision,[75] Justice O'Connor seems to be expressing her displeasure with the later cases' restructuring of the new rule definition, even though she joined the majority opinion in each of those cases.[76] Not surprisingly, Justice Thomas refutes this reading of *Teague* and its progeny: "Our precedents . . . require a different standard."[77]

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[68] *See id.* at 2489 n.6 (opinion of Thomas, J.).

[69] *Id.*

[70] *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808-12 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[71] The argument is that the issue was never really considered in the first place, but merely came to be accepted and was never tested in a situation in which the choice between *de novo* and deferential review would have affected the outcome. Viewed in this light, Justice Thomas was arguing only that the court could and should revisit the issue and resolve the question head-on. For whatever reason, however, he elected not to do so.

[72] *West*, 112 S. Ct. at 2497 (O'Connor, J., concurring in judgment).

[73] *Id.*

[74] *Id.*

[75] *See* Penry v. Lynaugh, 492 U.S. 302 (1989).

[76] *See* Sawyer v. Smith, 497 U.S. 227 (1990); Saffle v. Parks, 494 U.S. 484 (1990); Butler v. McKellar, 494 U.S. 407 (1990).

[77] *West*, 112 S. Ct. at 2490 n.8 (opinion of Thomas, J.); *see also* Metzner, *supra* note 55, at 163-76 (outlining the development of the new rule definition). Justice Kennedy's extended discussion of this question will be examined *infra*.

Justice O'Connor thus agreed that there was sufficient evidence to sustain the conviction of Frank West, but disputed every conclusion reached by Justice Thomas in his opinion, an opinion that is quite arguably entirely *dicta*. With three Justices signing the Thomas opinion[78] and three signing the O'Connor opinion,[79] the remaining three could have weighed in to resolve the issue one way or another. However, as noted, Justice White preferred to remain above the fray.[80] The remaining two Justices, Justice Souter and Justice Kennedy, each had their own perspective on the case, and so wrote separately, refusing to join either of the two primary opinions.

E. *The Souter Opinion*

The opinion of Justice Souter in *Wright v. West* illustrates his orthodox approach to precedent, as well as his understanding of the retroactivity doctrine. Under the *Teague* doctrine, the question of retroactive application of new rules is treated as a threshold inquiry; if the court finds that the petitioner seeks the benefit of such a new rule, the petition is dismissed without reaching the merits.[81] Justice Souter found this to be the case in *West*: "This habeas case begins with a *Teague* question, and its answer does not favor West. I would go no further."[82]

Under Justice Souter's analysis, a rule must pass two "newness" inquiries:

> To survive *Teague*, it must be "old" enough to have predated the finality of the prisoner's conviction, and specific enough to dictate the rule on which the conviction may be held to be unlawful. A rule old enough for *Teague* may of course be too general, and while identifying the required age of the rule of relief is a simple matter of comparing dates, passing on its required specificity calls for analytical care.[83]

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[78] Chief Justice Rehnquist, Justice Scalia, and Justice Thomas.

[79] Justice Blackmun, Justice Stevens, and Justice O'Connor.

[80] *See supra* text accompanying note 59.

[81] Teague v. Lane, 489 U.S. 288, 300 (1989).

[82] Wright v. West, 112 S. Ct. 2482, 2500 (1992) (Souter, J., concurring in judgment). In an attached footnote he stated that, because of his reasoning on the *Teague* issue, he did "not take a position in the disagreement between JUSTICE THOMAS and JUSTICE O'CONNOR." *Id.* at 2500 n.1.

[83] *Id.* at 2501.

Justice Souter read *Butler v. McKellar*[84] and *Sawyer v. Smith*,[85] two earlier retroactivity cases, as refusing to apply the rules proffered by the petitioners at the level of generality they desired. Careful analyses of those cases, however, shows that reliance on them for the "generality" inquiry espoused by Justice Souter is misplaced.

In *Butler*, the petitioner sought to benefit from the rule of *Arizona v. Roberson*,[86] which held that "the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation."[87] Unfortunately for Butler, *Roberson* was decided six years after his conviction had become final,[88] and so, to benefit from its holding, Butler had to demonstrate that the holding in *Roberson* was dictated by precedent in existence in 1982. In an attempt to do so, Butler turned to *Edwards v. Arizona*,[89] a 1981 decision requiring the police to abstain from questioning a suspect about a particular case once the individual has requested a lawyer for that case. Thus, the question for decision was whether the holding in *Roberson* "was merely an application of *Edwards* to a slightly different set of facts"[90] or whether it broke "new ground" or imposed "a new obligation" on the states.[91] The majority held that, given the circuit split on the issue between the Fourth and Seventh Circuits,[92] "the outcome in *Roberson* was susceptible to debate among reasonable minds."[93] Thus, the *Roberson* rule was deemed "new," foreclosing Butler from relying upon it.

Nowhere in *Butler* is the argument made that the rule in *Edwards* was being invoked "at too high a level of generality,"[94] as claimed by Justice Souter in *West*. Rather, two separate rules were at issue: The *Edwards* rule, forbidding further interrogation of a prisoner concerning a particular offense after his or her invocation of the right to counsel for that offense, and the *Roberson* rule, barring questioning regarding *any* offense after a request for an attorney has been made. *Edwards*

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[84] 494 U.S. 407 (1990).

[85] 497 U.S. 227 (1990).

[86] 486 U.S. 675 (1988).

[87] *Butler*, 494 U.S. at 411.

[88] Butler's petition for certiorari on direct appeal was denied in 1982. Butler v. South Carolina, 459 U.S. 932 (1982).

[89] 451 U.S. 477 (1981).

[90] *Butler*, 494 U.S. at 414.

[91] *Id.* at 412.

[92] *See id.*

[93] *Id.* at 415.

[94] Wright v. West, 112 S. Ct. 2482, 2501 (1992) (Souter, J., concurring in judgment).

does not represent a general rule; in fact, *Roberson*'s rule is more general, whereas *Edwards*' is limited to a particular factual scenario.

In *Sawyer v. Smith*,[95] Justice Souter may find more support for his position. There, the petitioner sought refuge in the rule of *Caldwell v. Mississippi*,[96] which held that "the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere."[97] As in *Butler*, however, *Caldwell* was decided after Sawyer's petition for certiorari on direct appeal had been denied,[98] and so the "new rule" question again came into play. Arguing that the *Caldwell* rule was " 'rooted' in the Eighth Amendment command of reliable sentencing,"[99] Sawyer claimed that the older cases of *Lockett v. Ohio*[100] and *Eddings v. Oklahoma*[101] dictated the *Caldwell* result. Rejecting this contention, the Court stated that the retroactivity newness "test would be meaningless if applied at this level of generality."[102] However, the proper response was that the petitioner's reliance on *Lockett* and *Eddings* was misplaced, not that those cases promulgated too general a rule on which to rely.

Lockett and *Eddings* "invalidated statutory schemes that imposed an absolute prohibition against consideration of certain mitigating evidence by the sentencer."[103] As such, the "rule" from those cases is that the states may not prevent capital defendants from offering whatever mitigating evidence they choose at their sentencing hearings, not the more general statement offered by the petitioner in *Sawyer* that capital sentencing must be "reliable." There is little doubt that the *Caldwell* rule was "new" when it was announced; Justice Souter should not convert a long-shot argument by Sawyer's counsel into an additional requirement for habeas retroactivity cases.

If the generality test were carried to its logical extreme, *every* rule would fail, because no prior case would have announced exactly the

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[95] 497 U.S. 227 (1990).
[96] 472 U.S. 320 (1985).
[97] *Sawyer*, 497 U.S. at 232.
[98] Sawyer v. Louisiana, 466 U.S. 931 (1984).
[99] *Sawyer*, 497 U.S. at 236.
[100] 438 U.S. 586 (1978).
[101] 455 U.S. 104 (1982).
[102] *Sawyer*, 497 U.S. at 236.
[103] *Id.*

same rule as the one sought to be relied upon by the petitioner.[104] Justice Souter attempts to allay these fears in his opinion: "This does not mean, of course, that a habeas petitioner must be able to point to an old case decided on facts identical to the facts of his own. But it does mean that, in light of authority extant when his conviction became final, its unlawfulness must be apparent."[105] His application of this formula, however, does little to assuage the concerns over its potential sweep.

The critical question in *West* was whether the habeas petitioner had made out a due process violation as defined by *Jackson v. Virginia*.[106] As previously noted, under that holding, the evidence supporting a defendant's conviction will not be deemed insufficient unless, after viewing all the evidence in the light most favorable to the prosecution, no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[107] Because West's conviction became final one year after the holding in *Jackson*,[108] questions of retroactivity do not seem to be present. Justice Souter, however, sees *Jackson* as too general to support the rule West seeks to use, and so looks further.

In 1982, two years after West's conviction became final, the U.S. Court of Appeals for the Eleventh Circuit considered a Georgia statute permitting an inference of guilt by unexplained possession of stolen goods similar to Virginia's.[109] That court read *Jackson* as requiring five inquiries when the sufficiency of the evidence is challenged in such a case: (1) the recency of possession relative to the date of the crime; (2) the number of stolen items in the possession of the defendant relative to the total number of items stolen; (3) whether the defendant attempted to conceal the stolen items; (4) the plausibility of the defendant's explanation as to how he came to acquire the items; and (5) the existence of

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[104] If so, of course, the Supreme Court would not have bothered to hear the subsequent case, but would merely have denied certiorari (if the lower court was correct) or summarily reversed and remanded (if it was not).

[105] *West*, 112 S. Ct. at 2502 (Souter, J., concurring in judgment).

[106] 443 U.S. 307 (1979).

[107] *Id.* at 319.

[108] West did not seek U.S. Supreme Court review of his conviction on direct appeal. Therefore, the date of finality is apparently the date of denial by the Supreme Court of Virginia, which refused to hear the case in 1980. An interesting question arises concerning the date of finality in a situation such as this; presumably, were the Court to consider the question, the appropriate date would be the last day within which the defendant must have filed his direct review certiorari petition to the Supreme Court, had he chosen to do so.

[109] *See* Cosby v. Jones, 682 F.2d 1373 (11th Cir. 1982).

significant corroborating evidence supporting the conviction.[110] The U.S. Court of Appeals for the Fourth Circuit followed this approach in considering West's claim for relief.[111]

Under Justice Souter's reasoning, the Eleventh Circuit in *Cosby* translated "the unadorned *Jackson* norm" into a "more specific rule."[112] Thus, West was actually seeking to use the *Cosby* rule, generated two years after his conviction was finalized, rather than the *Jackson* rule, and so was required to surmount the presumption against retroactive application of new rules. This analysis is replete with dilemmas.

First, *Cosby* was not a Supreme Court case. Suppose, for example, that *Cosby* had been decided in 1979, but that the Fourth Circuit did not adopt the same reasoning until 1981. Because West's conviction became final in 1980, if he seeks to use the *Cosby* rule in the Fourth Circuit, is it or is it not a new rule? Are *all* rules new until the Supreme Court decides to grant certiorari and affirm them? Cosby won at the circuit court level, and the state chose not to file a petition for certiorari. Suppose, however, that such a petition was filed, but denied. As *Brown v. Allen* teaches, no significance can be attached to such a denial. Is the result then that *no* habeas petitioner can rely on a particular lower court holding until such time as the Supreme Court sees fit to grant certiorari and affirm or reject the rule? If so, the results would be draconian. In West's case, for example, the Supreme Court had not (and still has not) explicitly adopted the *Cosby* approach for sufficiency claims challenging the permissive inference of guilt by possession. Therefore, under Justice Souter's approach, no habeas petitioner *ever* could rely on the *Cosby* rule, because it is forever "new," not having been adopted by the Supreme Court, even though it has been the accepted law of the Eleventh Circuit for a decade.

Second, this approach ignores the fact that the lower federal courts constantly must take broad pronouncements of the Supreme Court and apply them to widely varying factual situations. To do so, tests are developed that bridge the gap between the language of the Supreme Court and the reality of numerous complex cases. Under Justice Souter's approach, every time a circuit court tries to flesh out a particular Supreme Court case to make it more applicable to the facts

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[110] *Id.* at 1382-83.

[111] *See* West v. Wright, 931 F.2d 262, 268-69 (4th Cir. 1991).

[112] *West*, 112 S. Ct. at 2502 (Souter, J., concurring in judgment).

at hand, a new rule will have been generated. The *Jackson* situation is an ideal example.

In *Jackson*, the Court announced the proper approach to be taken in evaluating sufficiency claims. However, given the myriad of scenarios in which sufficiency claims might be brought, the Court did not attempt to micromanage the lower courts by prescribing specific tests to cover every eventuality. This was of course entirely rational, as even the most thorough opinion could not possibly foresee every permutation of the various possible sufficiency claims. This is precisely the task ideally suited to the circuit courts, and one they apparently performed quite well. The *Cosby* holding was no groundbreaking decision, but merely an application of *Jackson*'s command to evaluate claims of insufficient evidence.

Justice Souter thus argues that West's claim must be evaluated in light of *Jackson*, but in ignorance of *Cosby*. Yet this makes no sense, unless *Cosby* was an improper reading of *Jackson* (which Justice Souter does not claim), because *Cosby* is the *method* by which the sufficiency standard of *Jackson* is applied to cases involving permissive inferences drawn because of unexplained possession of stolen goods. Thus turning a blind eye to *Cosby*, Justice Souter converted West's challenge to his conviction into an all-or-nothing attack on the constitutionality of the permissive inference itself.[113] Having done so, he easily concluded that such a challenge would require the generation of a new rule (i.e., the striking down of the permissive inference) and was therefore barred by *Teague*.[114]

Justice Souter's motives are admirable, but his suggested modifications to the new rule test are confusing and unnecessary. The retroactivity doctrine as applied to habeas corpus is already byzantine in its complexity, and a further addition to the existing tests only compounds the difficulty. It is also unnecessary; the "dictated by existing precedent" test suffices to weed out those claims based on too general a proposition of law, without adding on a "generality" inquiry. Further, such a test opens a Pandora's Box of problems concerning lower court applications of Supreme Court precedents. Justice Souter properly recognized that one result of the new rule inquiry is to eliminate reliance on overly general propositions of law, but he should not have converted that result into an additional test.

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[113] *See id.* at 2503 ("Thus, the portion of the state rule under attack here is that falsely explained recent possession suffices to identify the possessor as the thief.").

[114] *See id.*

F. *The Kennedy Opinion*

Like Justice Souter, Justice Kennedy began his opinion with a disclaimer: "I do not enter the debate about the reasons that took us to the point where mixed constitutional questions are subject to *de novo* review in federal habeas corpus proceedings."[115] Rather, he wrote to emphasize his misgivings with the section of Justice Thomas' opinion relying on the *Teague* retroactivity doctrine.

As did Justice O'Connor, Justice Kennedy disputed Justice Thomas' reading of the retroactivity precedents: "In my view, it would be a misreading of *Teague* to interpret it as resting on the necessity to defer to state court determinations. *Teague* did not establish a deferential standard of review of state court decisions of federal law. It established instead a principle of retroactivity."[116] As discussed earlier,[117] Justices O'Connor and Kennedy make the far better arguments on this score. Turning to Justice Souter's opinion, Justice Kennedy rejected that reasoning as well. "If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule."[118] Further, "[w]here the beginning point is a rule of . . . general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."[119]

To this point in his opinion, Justice Kennedy appears to be the only member of the Court with a firm grasp on an admittedly complicated doctrine. However, he then proceeds to make an assertion that goes against the very fabric of the *Teague* doctrine:

> Although as a general matter new rules will not be applied or announced in habeas proceedings, there is no requirement that we engage in the threshold *Teague* inquiry in a case in which it is clear that the prisoner would not be entitled to the relief he seeks even if his case were pending on direct review.[120]

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[115] *Id.* at 2498 (Kennedy, J., concurring in judgment).

[116] *Id.*

[117] *See supra* text accompanying notes 72-77.

[118] *West*, 112 S. Ct. at 2499 (Kennedy, J., concurring in judgment).

[119] *Id.*

[120] *Id.* (internal quotation and citation omitted).

For all its faults, Justice Souter's opinion has the virtue of absolute loyalty to his understanding of the *Teague* doctrine; Justice Kennedy cannot say the same. The issue of whether the habeas petitioner seeks the benefit of a new rule must be addressed as a threshold matter, the theory being that the merits of the claim are irrelevant if the rule sought is indeed new. A federal court would be unfaithful to the doctrine if it were to "skip" the *Teague* question whenever it was difficult, as long as no relief would be forthcoming regardless of the result. This is the kind of "reverse engineering" often decried in judicial decision-making, and Justice Kennedy should not have endorsed this approach.

Near the end of the opinion, Justice Kennedy waded into the argument that he stated at the outset he was trying to avoid, but in an unpredictable manner. He found the existence of the *Teague* doctrine to be a persuasive reason to retain *de novo* review: "*Teague* gives substantial assurance that habeas proceedings will not use a new rule to upset a state conviction that conformed to rules then existing. With this safeguard in place, recognizing the importance of finality, *de novo* review can be exercised within its proper sphere."[121] This statement may be helpful in predicting Justice Kennedy's position in future habeas cases, because it appears that, although he has joined (or written) most of the opinions limiting the scope of habeas corpus during his tenure, he may be beginning to feel that the pendulum has swung far enough, and that further limitations would serve no purpose other than to make habeas appeals more difficult for state prisoners. Future cases advocating a further limitation on federal habeas corpus petitions may thus have difficulty attracting Justice Kennedy's vote.

G. *Conclusion*

Wright v. West illustrates the ever-increasing complexity of the issues attached to even the most routine petition for habeas corpus, and the widely varying judicial approaches to them taken by members of the Court. Recent decisions such as *Lee v. Weisman*[122] and *Planned Parenthood v. Casey*[123] have led some commentators to posit the existence of a "moderate conservative block" on the Court, made up of Justices O'Connor, Kennedy, and Souter. In *West*, Justices O'Connor and Kennedy fit this mold, but Justice Souter broke away, advocating a

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[121] *Id.* at 2500.
[122] 112 S. Ct. 2649 (1992).
[123] 112 S. Ct. 2791 (1992).

more restrictive interpretation of *Teague* that would, if adopted, make the new rule inquiry a virtual black hole for habeas petitioners from which no escape would be possible. Justice White remains the unknown factor on this issue, refusing to explicitly adopt either position. Were the question to be presented again to this Court, however, an educated guess would place both Justices White and Souter with Chief Justice Rehnquist and Justices Scalia and Thomas, resulting in a five member majority favoring adoption of a deferential approach to state court findings on mixed questions of law and fact. As is apparently true in many other doctrinal areas, Justices O'Connor and Kennedy seem to be concerned about the rapid shift to the right in this field, and would probably vote against further limitations, as certainly would Justices Blackmun and Stevens. Once again, however, those in favor of expansive federal habeas corpus review of state criminal convictions would fall one vote short.

II. ILLUSION

In *Stringer v. Black*,[124] the Supreme Court found that the holdings of *Maynard v. Cartwright*[125] and *Clemons v. Mississippi*[126] did not generate "new rules" for the purposes of habeas corpus retroactivity analysis, and therefore that James Stringer was entitled to invoke those holdings to the extent they would assist him. Given the development of the "new rule" doctrine, the outcome was nothing short of stunning.[127] However, any celebrations by those in favor of broader habeas corpus review should be short-lived; careful analysis of *Stringer* demonstrates that very few individuals will benefit from its holding, and that in the process of granting relief, the majority stiffened the "new rule" inquiry, to the likely detriment of future petitioners.

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[124] 112 S. Ct. 1130 (1992).

[125] 486 U.S. 356 (1988).

[126] 494 U.S. 738 (1990).

[127] For a complete analysis of *Stringer*, including discussion of background cases, briefs, and oral argument, see Karl N. Metzner, *Anatomy of an Upset: The Supreme Court's Shocker on Habeas Retroactivity*, 28 CRIM. L. BULL. 521 (1992).

A. *The Case*

In June of 1982, James Stringer participated in an armed robbery that resulted in the deaths of a Jackson, Mississippi couple.[128] Although Stringer did not personally kill either individual, the trial jury found that the murders were part of the robbery plan from its inception. Under Mississippi law, an individual is not eligible to be considered for the death penalty unless he is convicted of "capital murder," a category that includes murders committed during the course of a robbery. Further, at the sentencing stage, the jury must unanimously find the existence of at least one of eight statutory aggravating factors; having done so, it then weighs all aggravating factors so found against the mitigating evidence presented by the defense to make the final determination of life in prison or death. Among the three statutory aggravating factors found by Stringer's jury was that the murder "was especially heinous, atrocious or cruel."[129] Stringer was sentenced to death, and that sentence was affirmed on direct review by the Mississippi Supreme Court.[130] His conviction became final for retroactivity purposes on February 19, 1985, when his petition for certiorari on direct review was denied.[131]

While Stringer's post-conviction petitions were filtering through the federal courts, the Supreme Court handed down two rulings having a bearing on Stringer's case. In *Godfrey v. Georgia*,[132] decided in 1980, the Court had considered the validity of one of Georgia's statutory aggravating factors. Under Georgia law, a defendant convicted of murder was eligible for the death penalty if the jury determined that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."[133] The Court found this construction to be unconstitutionally vague. "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibilities could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible

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[128] This recitation of the facts is taken from *Stringer*, 112 S. Ct. at 1134.

[129] *Id.*

[130] Stringer v. State, 454 So. 2d 468 (Miss. 1984).

[131] Stringer v. Mississippi, 469 U.S. 1230 (1985).

[132] 446 U.S. 420 (1980).

[133] *Id.* at 422 (construing Ga. Code Ann. § 27-2534.1(b)(7) (Michie 1978)).

and inhuman.' "[134] In *Maynard v. Cartwright*,[135] the respondent contended that Oklahoma's "especially heinous, atrocious, or cruel" aggravating factor was invalid on the same grounds as was the "outrageously or wantonly vile, horrible or inhuman" factor in *Godfrey*. The Court agreed, stating that "*Godfrey* controls this case."[136] The Court reasoned that "the language of the Oklahoma aggravating circumstance at issue . . . gave no more guidance than the . . . language that the jury returned in its verdict in *Godfrey*."[137]

In *Clemons v. Mississippi*,[138] the Court considered whether the finding of an invalid aggravating factor, along with other valid factors, required the reversal of a death sentence in a "weighing" state.[139] The Court first noted that it would be permissible for an appellate court to invalidate one or more aggravating circumstance but nevertheless affirm the sentence "after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence."[140] Thus, the concept of appellate "reweighing" was explicitly endorsed as a permissible option.[141]

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[134] *Id.* at 428-29.

[135] 486 U.S. 356 (1988).

[136] *Id.* at 363.

[137] *Id.* at 363-64.

[138] 494 U.S. 738 (1990).

[139] In Zant v. Stephens, 462 U.S. 862 (1983), the Court had ruled that an invalid aggravating factor did not irrevocably taint a death sentence if other valid aggravating factors were present, as long as the function of those aggravating factors was to *narrow* the class of eligible defendants for the death penalty, rather than to *select* individuals from that class. *Id.* at 878-79. In Mississippi, the narrowing function is performed by the definition of capital murder as a subclass of murder; because Mississippi is a "weighing" state (i.e., it instructs its juries to weigh the aggravating factors against the mitigating evidence to determine sentence), the aggravating factors perform a selection function. The question of whether an invalid aggravating factor would require reversal in a weighing state was specifically left open in *Stephens*. *See id.* at 890 ("We do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.").

[140] *Clemons*, 494 U.S. at 745.

[141] The Court rejected both a Sixth Amendment and an Eighth Amendment challenge to the practice. Under the Sixth Amendment right to trial by jury claim, the Court held that "[a]ny argument that the Constitution requires that a jury impose the sentence of death or make the finding prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." *Id.* As to the Eighth Amendment contention, the Court noted that "[i]n scrutinizing death penalty procedures under the Eighth Amendment, the Court has emphasized the 'twin objectives' of 'measured consistent application and fairness to the accused.' Nothing inherent in the process of appellate reweighing is inconsistent with the pursuit of the foregoing objectives." *Id.* at 748 (citations omitted).

The Court emphatically rejected a rule whereby no reweighing would be necessary if a valid aggravating factor were present: "An automatic rule of affirmance in a weighing State would be invalid under *Lockett v. Ohio*[142] and *Eddings v. Oklahoma*[143] for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances."[144] As an alternative, the Court left open the possibility that the sentence could be upheld if the state court found the consideration of the invalid aggravating factor to be harmless error.[145]

Thus, *Clemons* had two distinct holdings. First, in a weighing state, an appellate court faced with an invalid aggravating factor may independently reweigh the aggravating and mitigating circumstances, or it may apply harmless error analysis to sustain the sentence. Second, in a weighing state, a rule of automatic affirmance, whereby a death sentence founded in part on an invalid aggravating factor would be automatically upheld if other valid aggravating factors were present, violates the constitutional requirement of individualized sentencing.

James Stringer was therefore presented with two holdings beneficial to his appeal, provided he would be permitted to use them. In *Cartwright*, the Court had struck down the "heinous, atrocious, or cruel" aggravating factor in Oklahoma, and Mississippi used identical language in one of the aggravating factors under which Stringer was sentenced. In *Clemons*, the Court had explicitly rejected the notion that a death sentence imposed as a result of an invalid aggravating factor could be affirmed in a weighing state as long as other valid aggravating factors were present. However, because Stringer sought to rely on *Cartwright* and *Clemons* in a habeas petition, he first had to convince the Court that those cases did not announce "new rules" for retroactive application purposes.

B. *The Majority Opinion*

Unlike in *West*, one opinion was able to attract a majority of the Justices. Writing for the Court, Justice Kennedy (joined by Chief Justice Rehnquist and Justices White, Blackmun, Stevens, and O'Connor)

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[142] 438 U.S. 586 (1978).
[143] 455 U.S. 104 (1982).
[144] *Clemons*, 494 U.S. at 752.
[145] *See id.* at 754.

first restated the accepted principles of habeas retroactivity analysis.[146] However, he then added a second inquiry to be performed after the rule in question is deemed not to be new:

> If, however, the decision did not announce a new rule, it is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent. The interests in finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent.[147]

Thus, the new rule inquiry now has two branches. First, the petitioner must prove that the case on which he wishes to rely itself did not generate a new rule, and second, that application of that case to his specific situation will not so "extend the precedent" as to create a new rule. In Stringer's case, the first proved easy to satisfy, but the second appeared nearly insurmountable.

The specific holding of *Cartwright*, that the use of an "especially heinous, atrocious, or cruel" aggravating factor in the Oklahoma capital sentencing scheme was unconstitutionally vague, was virtually indistinguishable from the ruling in *Godfrey*, due to the similarities between the Oklahoma and Georgia systems. Thus, *Cartwright* itself did not generate a new rule. However, the question of whether its application to Mississippi would do so was much more problematic. Prior to *Cartwright*, the Fifth Circuit had rejected a challenge to Mississippi's "especially heinous, atrocious, or cruel" aggravating factor based on *Godfrey*.[148] Further, the first time it considered Stringer's petition for habeas corpus, the Fifth Circuit had held that, *Cartwright* notwithstanding, the differences between the Oklahoma and Mississippi schemes were significant enough to preclude application of *Cartwright* to Mississippi.[149] In most cases, that would be the end of the matter; as

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[146] *See Stringer*, 112 S. Ct. at 1135.

[147] *Id.* (citation omitted).

[148] *See* Johnson v. Thigpen, 806 F.2d 1243, 1247-49 (5th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).

[149] *See* Stringer v. Jackson, 862 F.2d 1108, 1114-15 (5th Cir. 1988). The court noted that in the Mississippi scheme "the finding of a statutory aggravating circumstance plays some role in guiding the sentencing body in the exercise of its discretion in addition to its function of narrowing the class of defendants convicted of murder who are eligible for the death penalty." *Id.* at 1114. In Mississippi, the narrowing process actually occurs twice. By statute, only those murders classified as "capital murder" are eligible for consideration for the death penalty, meeting the constitu-

noted earlier, when making the new rule determination, the Court looks to see if other lower courts have considered adoption of the same rule. If they have, and have rejected it, this usually is conclusive evidence that reasonable minds could differ over adoption of the rule, thus making it "new" for habeas retroactivity purposes. In *Stringer*, the Court saw it differently, holding that "application of the *Godfrey* principles to the Mississippi sentencing process follows, *a fortiori*, from its application to the Georgia system."[150]

The Court focused on the role played by aggravating factors in Mississippi's selection stage, discounting its effect at the narrowing stage.[151] "What is dispositive is the fact that the Mississippi Supreme Court . . . has at all times viewed its sentencing scheme as one in which aggravating factors are critical in the jury's determination whether to impose the death penalty."[152] Thus characterized, the Court concluded that a vague aggravating factor in a weighing state was impermissible

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tional narrowing requirement. However, even within that narrowed class, the state requires the jury to unanimously find the presence of at least one statutory aggravating factor before the death penalty may be considered for that individual. Once such a factor is found, the jury is then instructed to weigh the statutory aggravating factors against any mitigating circumstances, thereby meeting the second constitutional requirement of individualized sentencing. In the abstract, then, the Mississippi system actually provides *more* protection for defendants than is constitutionally required. Concentrating on the narrowing function of the aggravating circumstances, the Court of Appeals upheld Stringer's sentence:

> When the jury's discretion in sentencing is narrowed by its finding of appropriate aggravating factors, there should be no constitutional objection to the jury considering the heinousness of the crime—even though heinousness, as defined or even under the facts, would not alone have narrowed the jury's discretion so as to satisfy Eighth Amendment requirements.

Id. at 1115. The court was unmoved by the fact that the jury was instructed to weigh the aggravating factors against the mitigating circumstances:

> That the jury was instructed to weigh statutory aggravating circumstances against mitigating circumstances does not alter the federal decision. We see no difference, other than one in semantics, between instructing a jury to weigh aggravating against mitigating circumstances in determining the sentence and instructing a jury to consider all aggravating and mitigating circumstances in deciding on the sentence.

Id. Thus, the Fifth Circuit addressed the question specifically left open by the Supreme Court in *Zant v. Stephens*, and held that the outcome was not affected by the fact that the jury was instructed to weigh the various factors when passing sentence.

[150] *Stringer*, 112 S. Ct. at 1136.

[151] Mississippi provides a dual role for statutory aggravating factors: The jury must unanimously find at least one such factor before the death penalty may be considered at all (this is the *narrowing* function), and then the aggravating factors are weighed against the mitigating circumstances to determine whether to impose the death sentence in the particular case (this being the *selection* function).

[152] *Stringer*, 112 S. Ct. at 1139.

under precedent existing before *Cartwright*. "A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance."[153] Therefore, application of *Cartwright* to the Mississippi system did not generate a new rule, and so Stringer was entitled to rely on its holding to argue that he had been sentenced under an invalid aggravating factor.

However, Stringer was only halfway home. He still had to convince the Court that a rule barring automatic affirmance of a death sentence in a weighing state as long as one valid aggravating factor remains—the *Clemons* rule—was also not new. If he failed, his victory on the *Cartwright* issue would be illusory, because the Mississippi Supreme Court's affirmance of his sentence would be permitted to stand. Once again, the Fifth Circuit had held that there was nothing unconstitutional about a rule of automatic affirmance in a weighing state.[154] But once again, the majority found the *Clemons* rule not to be "susceptible to debate among reasonable minds"[155] and thus not new.

The Court held that the fact that Mississippi was a weighing state made it clear long ago that a rule of automatic affirmance when faced with an invalid aggravating factor would not be tolerated:

> When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence. This clear principle emerges not from any single case, . . . but from our long line of authority setting forth the dual constitutional criteria of precise and individualized sentencing.[156]

Nevertheless, Mississippi still could point to the two Fifth Circuit cases holding that the principles of *Cartwright* and *Clemons* did not apply to their state. Facing the issue head-on, the Court responded that "[t]he short answer to the State's argument is that the Fifth Circuit made a

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[153] *Id.*

[154] *See* Stringer v. Jackson, 862 F.2d 1108, 1115 (5th Cir. 1988); Edwards v. Scroggy, 849 F.2d 204, 211 (5th Cir. 1988).

[155] Butler v. McKellar, 494 U.S. 407, 415 (1990).

[156] *Stringer*, 112 S. Ct. at 1137.

serious mistake"[157] when it held *Cartwright* and *Clemons* inapplicable to the Mississippi capital sentencing scheme. This is the most startling aspect of the *Stringer* decision, because it constitutes a conclusion that the rulings of a United States Court of Appeals were not even objectively "reasonable" in light of precedent existing at the time.

The majority thus held that a habeas petitioner from Mississippi is entitled to challenge any death penalty imposed at least in part on the basis of a finding that the murder was "especially heinous, atrocious, or cruel," and that the Mississippi Supreme Court may not automatically affirm such a sentence simply because other valid aggravating factors were found by the sentencing jury. This does not ensure, however, that such defendants will receive new sentencing hearings. *Clemons* permits state appellate courts to engage in reweighing of valid factors or in harmless error review,[158] so sentences affected by *Stringer* are likely to be reaffirmed in the vast majority of cases. Nevertheless, *Stringer* indicates that a majority of the Court is willing to find a particular rule not to be "new," at least in some cases. For those who thought this would never occur,[159] this is a substantial surprise.

C. *The Dissent*

Justice Souter, joined by Justices Scalia and Thomas, was incredulous at the majority's application of the new rule doctrine. After discussing the applicable law decided both before and after Stringer's case became final,[160] Justice Souter found it impossible to understand how the question expressly left undecided in *Zant v. Stephens* could possibly have been "dictated" before it was definitively resolved in *Clemons*: "To conclude after *Stephens* that the outcome in *Cartwright* and *Clemons* was dictated is a leap of reason."[161] Justice Souter claimed that the majority's conclusion that "no reasonable jurist could have failed to discover a concern with randomness in this Court's individualized-sentencing cases, or have failed to realize that a sentencer's weigh-

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[157] *Id.* at 1140.

[158] *See* Clemons v. Mississippi, 494 U.S. 738, 754 (1990).

[159] *See* Metzner, *supra* note 55, at 184 n.150.

[160] *See* Stringer v. Black, 112 S. Ct. 1130, 1141-43 (1992) (Souter, J., dissenting).

[161] *Id.* at 1144. Recall the disclaimer of *Stephens*: "We do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." Zant v. Stephens, 462 U.S. 862, 890 (1983).

ing of a vague aggravating circumstance deprives a defendant of individualized sentencing" was requiring "prescience, not reasonableness" of lower court judges.[162]

Not unreasonably, Justice Souter further notes that the various holdings of the Fifth Circuit on these questions, although arguably incorrect, were certainly within reason.[163] Under *Teague*, he argues, reasonableness is all that is required; whether the Court agrees with the outcome is irrelevant for new rule purposes. Justice Souter's concluding paragraph is virtually unassailable:

> In sum, I do not think that precedent in 1985 dictated the rule that weighing a vague aggravating circumstance necessarily violates the Eighth Amendment even where there is a finding of at least one other, unobjectionable, aggravating circumstance. It follows that I think that it was reasonable to believe that neither reweighing nor harmless-error review would be required in that situation.[164]

Thus, the situation in *Stringer* is precisely the opposite of that in *Wright v. West*: Justice Souter has the better argument on the retroactivity doctrine, whereas Justice Kennedy's opinion requires both a tortured reading of *Teague* and its progeny and a powerful rebuke directed at the decisionmaking ability of a federal circuit court.

D. *Conclusion*

There can be little doubt that an objective application of the retroactivity doctrine in *Stringer* would have resulted in a finding in favor of the state. However, the result is not disastrous for those advocating a more limited role for the federal courts in the habeas corpus context. Only inmates on death row in Mississippi are affected, and *Clemons* permits the Mississippi Supreme Court to reinstate each challenged death sentence after either reweighing the remaining valid factors or performing harmless error review. In this fashion, *Stringer v. Black* is a rubber crutch for most habeas petitioners; if they attempt to lean on it for support, it will give way under their weight. Further, a new obstacle has been erected along the new rule road. Now, not only must the habeas petitioner prove that the rule on which he wishes to rely was not

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[162] *Stringer*, 112 S. Ct. at 1144 (Souter, J., dissenting).
[163] *See id.* at 1145.
[164] *Id.* at 1145-46.

new at the time it was decided, but also that application of that rule to his case would not itself generate a new rule. It is uncertain whether this additional requirement will result in more habeas petitions being stricken at the new rule stage, but it certainly will not make the process any easier for the petitioners.

III. LIMITATION

Two cases from the 1991 Term clearly demonstrate the trend in habeas corpus law. The first, *Keeney v. Tamayo-Reyes*,[165] made it more difficult for a habeas petitioner to obtain an evidentiary hearing in federal court if he failed to develop a material fact in his state court proceedings. The second, *Sawyer v. Whitley*,[166] limited the definition of the "actual innocence" exception to the prohibition against successive or abusive habeas petitions in the context of challenges to death sentences. Although the cases are not otherwise related, taken together they illustrate the continuing effort by the Supreme Court to lessen the burden of habeas petitions on the federal district courts.

A. *Keeney v. Tamayo-Reyes*

The issue in *Keeney v. Tamayo-Reyes* was whether a federal district court must grant an evidentiary hearing to a habeas petitioner if that petitioner failed to develop the facts on which he desires a hearing during his state court proceedings.[167] The Court's consideration of this question dates back some two decades, and it is necessary to understand the development of the law in the interim before taking up the precise issue in *Tamayo-Reyes*.

1. Background Cases

In 1963, the Supreme Court considered two cases implicating the scope of federal court authority on habeas corpus. In *Fay v. Noia*,[168] the Court recognized that federal courts, although not required to rec-

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[165] 112 S. Ct. 1715 (1992).
[166] 112 S. Ct. 2514 (1992).
[167] *Tamayo-Reyes*, 112 S. Ct. at 1717.
[168] 372 U.S. 391 (1963), *overruled by* Coleman v. Thompson, 111 S. Ct. 2546 (1991).

ognize state procedural defaults as grounds for denying a habeas petition, could choose to do so under certain circumstances:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the *deliberate by-passing* of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claim on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default.[169]

Thus, only if the habeas petitioner had intentionally chosen not to present his federal claim to the state courts would his habeas petition be dismissed from federal court on default grounds. On the same day, in *Townsend v. Sain*,[170] the Court considered the situations in which a federal district court must grant an evidentiary hearing to a habeas petitioner. The Court held as follows:

> [A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[171]

Amplifying on the fifth factor, the Court stated that "[i]f, for any reason not attributable to the inexcusable neglect of petitioner, evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled."[172] The Court adopted as the definition of "inexcusable neglect" the "de-

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[169] *Id.* at 439 (emphasis added).

[170] 372 U.S. 293 (1963), *overruled by* Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992).

[171] *Id.* at 313.

[172] *Id.* at 317 (citation omitted).

liberate bypass" standard of *Noia*.[173] Therefore, taken together, *Noia* and *Townsend* ensured that, unless a state prisoner had intentionally disregarded a material fact relevant to his federal claim during his state proceedings, he could obtain a hearing on the matter in federal court on a petition for habeas corpus. Over time, however, this broad entitlement to a hearing began to be slowly eroded.

In *Francis v. Henderson*,[174] the Court began to undermine *Noia* by applying a more rigorous standard to excuse state waivers on federal habeas corpus. In that case, Francis had failed to object to the composition of the indicting grand jury prior to his trial, as required by state law, but sought to raise such an objection on federal habeas corpus.[175] The Court, adopting a rule applicable to appeals of federal convictions, held that "when a federal court is asked in a habeas corpus proceeding to overturn a state-court conviction because of an allegedly unconstitutional grand jury indictment,"[176] the petitioner must make "not only a showing of 'cause' for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice."[177]

Any hopes that *Francis* might be limited to its specific facts were dashed the following year by *Wainwright v. Sykes*.[178] There, the Court expressly limited *Fay v. Noia* to its facts[179] and applied the "cause and prejudice" standard "to a waived objection to the admission of a confession at trial."[180] Thus, to escape dismissal based on state procedural default, a habeas petitioner was now required to show cause for failing to meet the state requirements and prejudice resulting from that failure.

This new "cause and prejudice" standard operated to prevent habeas petitioners from having their federal claims considered on the merits, but did not affect the availability of an evidentiary hearing. In *McCleskey v. Zant*,[181] however, the issue of when to grant a hearing resurfaced. The case concerned the proper standard to be applied to

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[173] *See id.* ("The standard of inexcusable default set down in *Fay v. Noia* adequately protects the legitimate state interest in orderly criminal procedure . . . .").

[174] 425 U.S. 536 (1976).

[175] *Id.* at 537-38.

[176] *Id.* at 542.

[177] *Id.*

[178] 433 U.S. 72 (1977).

[179] *See id.* at 87-88 ("It is the sweeping language of *Fay v. Noia*, going far beyond the facts of the case eliciting it, which we today reject.").

[180] *Id.* at 87.

[181] 111 S. Ct. 1454 (1991).

determine whether a prisoner's second or later habeas petition was "abusing" the writ by making allegations not raised in the first petition.[182] The Court chose to adopt the same "cause and prejudice" standard applied to state procedural default cases, concluding "from the unity of structure and purpose in the jurisprudence of state procedural defaults and abuse of the writ that the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts."[183] However, the Court added a note concerning evidentiary hearings in abuse cases: "The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard."[184] The *McCleskey* Court therefore adopted a much more limited approach to hearings in the abuse context than had previously existed in the state procedural default doctrine.

Finally, in *Coleman v. Thompson*,[185] the Court eliminated all vestiges of *Noia*'s deliberate bypass rule:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.[186]

Thus, although *Townsend* remained as good law, the standard on which it relied to determine whether to grant an evidentiary hearing had been overruled. This set the stage for the decision in *Tamayo-Reyes*.

2. The Case

In *Keeney v. Tamayo-Reyes*,[187] defendant José Tamayo-Reyes, who spoke no English, was charged with murder in connection with a barroom fight that resulted in the stabbing death of a patron.[188] His court-appointed attorney negotiated a plea to first-degree manslaugh-

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[182] *See id.* at 1457.
[183] *Id.* at 1470.
[184] *Id.*
[185] 111 S. Ct. 2546 (1991).
[186] *Id.* at 2565.
[187] 112 S. Ct. 1715 (1992).
[188] This recitation of the facts is taken from *Tamayo-Reyes*, 112 S. Ct. at 1716-17.

ter, and advised Tamayo-Reyes to accept it. Although he signed the plea agreement, Tamayo-Reyes later alleged in a state-court collateral attack that his court-appointed translator had not fully informed him of the consequences of the plea, and that he thought he was only agreeing to be *tried* for manslaughter. The state court denied relief, and Tamayo-Reyes petitioned the federal district court in Oregon for a writ of habeas corpus, seeking an evidentiary hearing on the constitutionality of his plea, and invoking *Townsend* as authority for his right to such a hearing.

The district court denied to grant a hearing, but the U.S. Court of Appeals for the Ninth Circuit reversed.[189] It held that the standards of *Townsend* and *Noia* still controlled, and that a hearing was required unless the petitioner had deliberately bypassed the opportunity to develop the facts of his federal claim in state court.[190] Finding no such bypass, the court remanded the case for a hearing before the district court.[191] The state of Oregon then sought a writ of certiorari from the Supreme Court.[192]

3. The Majority Opinion

Writing for a bare five-four majority, Justice White (joined by Chief Justice Rehnquist and Justices Scalia, Souter, and Thomas) immediately overruled the portion of *Townsend* on which the Ninth Circuit had relied.[193] He outlined the history of the gradual replacement of the deliberate bypass standard with the cause and prejudice test, and determined that there was no principled reason to retain the broader test in the evidentiary hearing context. "As in cases of state procedural default, application of the cause-and-prejudice standard to excuse a state prisoner's failure to develop material facts in state court will appropriately accommodate concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum."[194]

Justice White admitted that one animating concern behind the decision was that it "advance[d] uniformity in the law of habeas

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[189] Tamayo-Reyes v. Keeney, 926 F.2d 1492 (9th Cir. 1991).
[190] *Id.* at 1502.
[191] *Id.*
[192] Keeney v. Tamayo-Reyes, 112 S. Ct. 48 (1991).
[193] *Tamayo-Reyes*, 112 S. Ct. at 1717.
[194] *Id.* at 1719.

corpus."[195] He reasoned that "little can be said for holding a habeas petitioner to one standard for failing to bring a claim in state court and excusing the petitioner under another, lower standard for failing to develop the factual basis of that claim in the same forum."[196] This is a strong argument, and possesses the virtue of bringing a kernel of clarity and uniformity into an incredibly complex area. Further, retention of the old standard could foster some of the perverse incentives that the other areas of habeas law have tried to eliminate.

For example, there may be some situations in which defense counsel feels that it would be to his or her advantage to develop only enough facts on the federal claims in state court to avoid procedural default, then to present a strengthened version to the federal district court in a petition for habeas corpus, seeking an evidentiary hearing and an opportunity to reargue most of the case. If the federal claims were fully argued before the state court, no additional hearing would be necessary, and the defense counsel would be placed in the uncomfortable position of asking a federal court to rule, on exactly the same record, that the same contentions rejected by the state court were in fact meritorious. With the heightened concern for comity and respect for state judgments being expressed by federal courts, this is a difficult argument on which to prevail. If, on the other hand, the record could be somehow enhanced at the federal level, defense counsel would need only argue that the state court would have itself recognized the error if only all the evidence had been presented to it, giving the federal district court a way to rule in favor of the petitioner without explicitly rejecting the reasoning of the state court. Especially in the case of death row inmates, this would operate to extend the time for the appeal process, thereby furthering the defense's goal of delaying the imposition of sentence as long as possible.[197]

The most significant impact of this holding is that it eliminates the "incompetent counsel" justification for an evidentiary hearing at the federal level. The most common reason for failure to develop the material facts of a federal claim in the state courts is that the defendant's lawyer did not fully understand the applicable law and the need to pur-

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[195] *Id.* at 1720.

[196] *Id.*

[197] As noted in Justice Kennedy's brief dissent, these concerns may be wholly illusory and unsupported by the existing evidence. *See id.* at 1727-28 (Kennedy, J., dissenting). Nevertheless, a rule that operates to remove these concerns entirely, while at the same time subjecting all habeas petitioners to the same standard for explaining their failure to fully develop or pursue their case at the state level, is superior to the previous regime.

sue the claim. "Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default."[198] Therefore, because cause now must be shown to obtain a hearing, the errors of counsel will not suffice unless they rise to the egregious level of constitutionally ineffective assistance.[199] Further, if the alleged mistake occurred during state post-conviction proceedings, even the narrow claim of constitutionally ineffective assistance of counsel would be unavailable. "There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings."[200] Justice White concedes this result,[201] but argues that "cause may be shown for reasons other than attorney error."[202]

Given the prior holdings of the Court in the habeas area over the last few Terms, *Tamayo-Reyes* seems like little more than a minor step in the same direction. Further, because the Court retained the traditional "fundamental miscarriage of justice" exception to the cause and prejudice requirement (limited though it is),[203] the opportunity for habeas petitioners to receive hearings in federal court when they have truly meritorious claims that were overlooked by the petitioner's trial counsel still remains. Judging from the tone of the dissent, however, this is no minor case.

4. The O'Connor Dissent

Claiming that "the Court has changed the law of habeas corpus in a fundamental way," Justice O'Connor (joined by Justices Blackmun, Stevens, and Kennedy) argued that "the balance of state and federal interests regarding whether a federal court will *consider* a claim raised on habeas cannot be simply lifted and transposed to the different question whether, once the court will consider the claim, it should hold an

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[198] McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991).

[199] *See* Strickland v. Washington, 466 U.S. 668 (1984) (discussing the contours of the ineffectiveness claim).

[200] Coleman v. Thompson, 111 S. Ct. 2546, 2566 (1991) (citations omitted).

[201] *See* Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1720 n.5 (1991) ("We agree with Justice O'CONNOR that under our holding a claim invoking the fifth circumstance of *Townsend* will be unavailing where the cause asserted is attorney error.").

[202] *Id.*

[203] *See id.* at 1721 ("A habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing.").

evidentiary hearing."[204] She contended that the majority was not merely overruling a small portion of *Townsend*, but was "depart[ing] significantly from the pre-*Townsend* law of habeas corpus."[205]

Under Justice O'Connor's analysis, federal courts had always deferred to state court factfinding if appropriate procedures had been followed, but would "examine the facts anew" were this not the case.[206] *Townsend* thus " 'did not launch the Court in any new directions,' "[207] but only "clarified how the district court should measure the adequacy of the state court proceeding."[208] Further, she argued that the overruling of *Fay v. Noia* by *Sykes* and *Coleman* was not a reason to do the same to *Townsend*, even though *Townsend* did adopt *Noia*'s deliberate bypass standard:

> The *Townsend* Court did *not* suggest that the issues in *Townsend* and [*Noia*] were identical, or that they were so similar that logic required an identical answer to each. . . . *Townsend* was essentially an elaboration of our prior cases regarding the holding of hearings in federal habeas cases; [*Noia*] represented an overruling of our prior cases regarding procedural defaults.[209]

Regardless of the proper reading of *Townsend*, however, Justice O'Connor was convinced that the cause and prejudice standard was inappropriate for the question of whether to grant a hearing.

Justice O'Connor disputed the majority's reliance on the cases endorsing the cause and prejudice standard, arguing that they all concerned "the question whether the federal court will *consider* the merits of the claim" presented.[210] In contrast, here the district court has already agreed to consider the issue; "the only question is how the court will go about it."[211] Justice O'Connor felt that the federalism and comity concerns motivating the various decisions limiting federal court power to inquire into state court judgments was "diminished some-

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[204] *Id.* at 1721 (O'Connor, J., dissenting).

[205] *Id.* at 1724.

[206] *Id.* at 1723.

[207] *Id.* (quoting Charles D. Weisselberg, *Evidentiary Hearings in Federal Habeas Corpus Cases*, 1990 B.Y.U. L. REV. 131, 150).

[208] *Id.*

[209] *Id.* at 1724.

[210] *Id.* at 1725.

[211] *Id.*

what"[212] when that claim was already properly before the federal court.[213]

Justice O'Connor thus draws a bright-line distinction between restrictions on hearing claims on the merits and restrictions on the presentation of those claims once the district courts have agreed to hear them. Although she may be correct in her interpretation of pre-*Townsend* law, the majority opinion has the better of the argument given the reality of modern habeas law. The purpose of habeas corpus is not to retry every federal constitutional issue in a given case; it is only to ensure that the appropriate state court has properly ruled on those issues. There is no reason not to require defendants to fully develop their federal constitutional claims during their state proceedings; if evidence is later discovered that affects the claims, a hearing may still be had in federal court.[214] If the petitioner's attorney has been constitutionally ineffective during the defendant's trial or first appeal as of right, relief will be available. Lastly, the catch-all "fundamental miscarriage of justice" exception remains to permit the federal courts to right the most egregious wrongs. Taken as a whole, the new standard does little to punish those with meritorious claims, and operates to prevent brinkmanship from those seeking only to manipulate the process for delay.

5. The Kennedy Dissent

Sensing the underlying motivation in the majority opinion, Justice Kennedy wrote separately to dispute the contention that requests for evidentiary hearings were currently deluging the federal district courts. "By definition, the cases within the ambit of the Court's holding are confined to those in which the factual record developed in the state-court proceedings is inadequate to resolve the legal question. I should

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[212] *Id.*

[213] In the remainder of her opinion, Justice O'Connor argued that 28 U.S.C. § 2254(d)(3) (1988), which lists the circumstances under which state court findings of fact lose their presumption of correctness, works in tandem with *Townsend*, and so to overrule *Townsend* would be to flout the implicit intent of Congress. *See Tamayo-Reyes*, 112 S. Ct. at 1725-26. Justice White disputes this contention. *See id.* at 1720 n.5. Justice O'Connor also makes the argument noted above, that the holding of the case effectively removes the opportunity for a hearing for an individual who received inept (but not constitutionally ineffective) assistance of counsel. *See id.* at 1726-27 (O'Connor, J., dissenting).

[214] *See Tamayo-Reyes*, 112 S. Ct. at 1723 (O'Connor, J., dissenting) (relating the fourth *Townsend* factor, permitting an evidentiary hearing in federal court if "there is a substantial allegation of newly discovered evidence").

think those cases will be few in number."[215] More revealing, however, is Justice Kennedy's final paragraph, in which he seems to be expressing some misgivings with the continued limitation of habeas corpus:

> Our recent decisions in *Coleman v. Thompson*, *McCleskey v. Zant*, and *Teague v. Lane* serve to protect the integrity of the writ, curbing its abuse and insuring that the legal questions presented are ones which, if resolved against the State, can invalidate a final judgment. So we consider today only those habeas actions which present questions federal courts are bound to decide in order to protect constitutional rights. We ought not to take steps which diminish the likelihood that those courts will base their legal decision on an accurate assessment of the facts.[216]

6. Conclusion

Keeney v. Tamayo-Reyes illustrates the apparent development of two distinct camps among the conservatives on habeas corpus issues. In one are Justices O'Connor and Kennedy, who, although they both originally joined or wrote a number of opinions limiting the scope of habeas review,[217] appear now to be very uncomfortable with its continued emasculation. In the other are Chief Justice Rehnquist and Justices White, Scalia, Souter, and Thomas, who apparently do not feel that habeas corpus has been limited enough, and would likely vote to curtail it still further. Only future cases (and future appointments) will definitively determine the role of habeas corpus in the 1990s and beyond.[218]

B. *Sawyer v. Whitley*

As noted earlier, throughout the various limitations on the availability of habeas corpus runs a particular exception: The petitioner's successive, abusive, or defaulted claim will nonetheless be heard by the

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[215] *Id.* at 1727 (Kennedy, J., dissenting).

[216] *Id.* at 1727-28 (citations omitted).

[217] *See, e.g.*, Coleman v. Thompson, 111 S. Ct. 2546 (1991); McCleskey v. Zant, 111 S. Ct. 1454 (1991); Sawyer v. Smith, 497 U.S. 227 (1990); Teague v. Lane, 489 U.S. 288 (1989).

[218] Of course, Congress could act and amend the statute, but the possibility of any amendment that would be seen as "soft on crime" is remote at best. Any amendments to the habeas corpus statute are likely to codify existing case law, rather than reverse it, and so those desirous of increasing the scope of federal habeas corpus should probably steer clear of Capitol Hill.

federal court if failure to do so would result in a "fundamental miscarriage of justice." As defined by a number of cases,[219] this means that the petitioner must make a "colorable claim of factual innocence"[220] before his otherwise barred claim will be heard on the merits. In *Sawyer v. Whitley*,[221] the Court considered the problems presented by this definition when the petitioner is seeking relief from a death sentence, rather than challenging the underlying conviction.

Robert Sawyer's case was not unfamiliar to the Supreme Court when it was presented in 1992. Two years earlier, in *Sawyer v. Smith*,[222] the Court had refused to permit Sawyer to retroactively benefit from the holding of *Caldwell v. Mississippi*.[223] Sawyer's second federal habeas petition was filed soon thereafter, raising three previously asserted claims and three new ones.[224] The district court rejected the first three as successive,[225] two others as abusive,[226] and the third on the merits.[227] On appeal, the U.S. Court of Appeals for the Fifth Circuit refused to apply the "actual innocence" exception to Sawyer's barred claims, and affirmed the denial of the writ.[228] The Supreme Court granted certiorari to determine the scope and contours of the actual innocence exception as applied to death sentence challenges.[229]

Writing for the Court, Chief Justice Rehnquist (joined by Justices White, Scalia, Kennedy, Souter, and Thomas) first detailed the development of the actual innocence exception, and then noted the difficulty of its application to death penalty review:

> 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

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[219] *See* Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989); Smith v. Murray, 477 U.S. 527, 537 (1986); Murray v. Carrier, 477 U.S. 478, 496 (1986); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986).

[220] *Wilson*, 477 U.S. at 454.

[221] 112 S. Ct. 2514 (1992).

[222] 497 U.S. 227 (1990).

[223] 472 U.S. 320 (1985).

[224] *See* Sawyer v. Whitley, 772 F. Supp. 297, 302 (E.D. La. 1991).

[225] *See id.* at 303-04.

[226] *See id.* at 305-06.

[227] *See id.* at 306-08.

[228] *See* Sawyer v. Whitley, 945 F.2d 812, 816-25 (5th Cir. 1991).

[229] Sawyer v. Whitley, 112 S. Ct. 434 (1991).

> make it workable it must be subject to determination by relatively objective standards.[230]

The Chief Justice then considered three possible definitions for the standard. The first, offered by the Solicitor General as *amicus*, would "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."[231] The majority rejected this standard, noting that it would leave no avenue for challenging the sentence itself, focusing as it would only on the underlying offense.[232] The only startling aspect of this rejection is that the Solicitor General's office suggested such a ludicrous standard in the first place. Adoption of their position would have resulted in no possible review of death sentences once the prisoner had defaulted his claims, however meritorious. The Court gave the submission the short shrift it deserved.

The second possible definition, and the most lenient, was the construction offered by Sawyer's counsel. That formulation would "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."[233] Chief Justice Rehnquist adopted the first portion of the suggested test, but rejected the second. "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."[234] However, he refused to accept "that the showing should extend beyond these elements of the capital sentence to the existence of additional mitigating evidence,"[235] for two reasons.

First, the Chief Justice felt that an argument that the defendant had not been able to offer certain mitigating evidence was nothing more than a claim of "prejudice," the normal showing required to sur-

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[230] Sawyer v. Whitley, 112 S. Ct. 2514, 2520 (1992).
[231] *Id.* at 2521.
[232] *See id.*
[233] *Id.*
[234] *Id.* at 2522.
[235] *Id.*

mount a procedural default.[236] The exception, he reasoned, was for those unable to meet the "cause and prejudice" requirements, and must be limited to the most egregious of cases. If not, a habeas petitioner would no longer be required to show "cause," because the "fundamental miscarriage of justice" exception reserved for those unable to show "cause and prejudice" would be reduced to a requirement that the petitioner merely show "prejudice."[237]

Second, Chief Justice Rehnquist argued that adoption of the broader test would destroy its character as a " 'narrow' exception to the principle of finality which we have previously described it to be."[238] Given the difficulty of predicting juror reaction to additional mitigating evidence, the Chief Justice felt that such an inquiry was beyond the expertise of a federal district court judge.[239]

Seeking a middle ground, the Court turned to the standard adopted by the Fifth Circuit in the case below. There, the court required "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."[240] The Supreme Court agreed 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."[241]

It is somewhat misleading to consider this position a "compromise." The extreme position taken by the Solicitor General had not been adopted by any court, and was quickly dispatched by Chief Justice Rehnquist. On the other hand, the broad construction offered by Sawyer had been accepted by both the Eighth[242] and Ninth Circuits.[243] Thus, the Court was actually resolving a circuit split between two possible interpretations of the "actual innocence" exception as applied to death penalty cases, and it chose the narrower of the two.

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[236] *See id.*

[237] *See id.* at 2522 n.13.

[238] *Id.*

[239] *See id.*

[240] Stringer v. Whitley, 945 F.2d 812, 820 (5th Cir. 1991) (footnotes omitted). The Eleventh Circuit had also adopted a similar test. *See* Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991).

[241] *Sawyer*, 112 S. Ct. at 2523.

[242] *See* Stokes v. Armontrout, 893 F.2d 152, 156 (8th Cir. 1989).

[243] *See* Deutscher v. Whitley, 946 F.2d 1443, 1446 (9th Cir. 1991).

Under the formulation adopted by the Court, then, a habeas petitioner on death row seeking to be heard on the merits of otherwise defaulted claims, and who is unable to show "cause and prejudice" for his defaults, may only contest those elements of his sentence determining his *eligibility* for the death penalty. In accepted parlance, this means that only the factors used by the state in its *narrowing* process are contestable under this exception, whereas the elements of the *selection* phase are immune from review. Further, the showing must be made by "clear and convincing evidence,"[244] rather than by merely a preponderance of the evidence.

The limits of the majority's holding did not go unnoticed. In a stinging dissent, Justice Stevens, joined by Justices Blackmun and O'Connor, first reiterated the principle that "the death penalty is qualitatively and morally different from any other penalty,"[245] and argued that allegations of constitutional violations in such cases generate a "special obligation"[246] to consider them on the part of the reviewing court. Then he stated his two primary objections to the Court's decision: "First, the 'clear and convincing evidence' standard departs from a line of decisions defining the 'actual innocence' exception to the cause-and-prejudice requirement. Second, and more fundamentally, the Court's focus on eligibility for the death penalty conflicts with the very structure of the constitutional law of capital punishment."[247]

With regard to the second (and more serious) objection, Justice Stevens noted that of the two coordinate aspects of death penalty jurisprudence—narrowing and selection—only narrowing is implicated. Justice Stevens considered this view an "impoverished vision of capital sentencing" that "is at odds with both the doctrine and the theory developed in our many decisions concerning capital punishment."[248] How-

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[244] *Sawyer*, 112 S. Ct. at 2517.

[245] *Id.* at 2530 (Stevens, J., dissenting).

[246] *Id.* at 2531.

[247] *Id.* In the interests of brevity (although that may be a lost cause at this point), Justice Stevens' first objection will not be discussed further. This is because, although his reading of the law is persuasive, it is difficult to envision a situation in which a petitioner is able to bring forth enough evidence concerning his eligibility for the death sentence to satisfy a preponderance standard, but is turned away by the district court because he falls just short of a "clear and convincing" standard. It is important to remember that this doctrine operates to preclude consideration on the merits; a district court is not likely to refuse consideration of the petitioner's colorable claim, notwithstanding the standard announced by the Court. However, Justice Stevens is unarguably correct in his conclusion that "[n]owhere is the need for accuracy greater than when the State exercises its ultimate authority and takes the life of one of its citizens." *Id.* at 2533.

[248] *Id.* at 2534.

ever, his example of why the Court's approach is flawed is itself riddled with difficulties. Justice Stevens argued:

> If, for example, the sentencer, in assigning a sentence of death, relied heavily on a finding that the defendant severely tortured the victim, but later it is discovered that another person was responsible for the torture, the elimination of the aggravating circumstance will, in some cases, indicate that the death sentence is a miscarriage of justice.[249]

There are at least two problems with this example.

First, it is utterly impossible to determine whether a sentencing jury "relied heavily" on one aggravating or mitigating factor or another. Given the extraordinary subjectivity of the determination, guided though it is, a district court judge reviewing a case years after the fact would be utterly at a loss to discern which factors the jury found to be important.

Second, the specific example posited may yet be reviewed, the new standard notwithstanding. If the fact that another individual was responsible for the torture was not discovered, through no fault of the defendant, until after the fact, that would constitute "cause" for the "cause and prejudice" inquiry, and the petitioner would then only need to show a harmful effect from the omission of the evidence for his claims to be heard on review. This illustrates the fact that the "innocence of death" standard is implicated only in the following situation: the claim at issue is successive (i.e., raised in an earlier petition), abusive (i.e., not raised in an earlier petition), or procedurally defaulted (i.e., not raised in state proceedings), *and* the petitioner cannot show cause for the default and prejudice resulting therefrom. Only then does the "fundamental miscarriage of justice" standard come into play, giving the petitioner yet another chance to have his contentions heard on the merits.

With regard to what he considered the appropriate test, Justice Stevens argued for a "clearly erroneous" standard.[250] Under that test, not only would eligibility arguments be included, but also claims that the "mitigating circumstances so far outweighed aggravating circumstances that no reasonable sentencer would have imposed the death penalty. Such a case might arise if constitutional error either precluded the defendant from demonstrating that aggravating circumstances did

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[249] *Id.* at 2535.

[250] *See id.* at 2536.

not obtain or precluded the sentencer's consideration of important mitigating evidence."[251] Justice Stevens would thus have the habeas court perform much the same function as a state appellate court: reconsider the aggravating and mitigating circumstances and determine whether a verdict of death is supportable.

Although Justice Stevens is correct concerning the qualitative difference between the death penalty and all other forms of punishment, and the unique safeguards that must consequently accompany its imposition, the majority formulation of the "innocent of death" inquiry better comports with the proper role of habeas corpus in the federal system. It is important to remember that this is not the standard to be applied on direct review, nor is it to be used for a properly presented first habeas corpus petition. It is only invoked when the defendant has somehow defaulted his claims, and then only when he fails to show "cause and prejudice" for having done so. This "third chance" is appropriately limited to protecting the lives of those who could not have been sentenced to death in the first place. The real danger would be if later cases attempted to transpose this standard from its proper sphere into situations involving direct first-time review. In that situation, the justifications for a limited exception are no longer present, and the federal court should engage in its traditional comprehensive review of constitutional questions.[252]

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[251] *Id.* (citation omitted).

[252] Before leaving the discussion of *Sawyer*, it should be noted that Justice Blackmun, in addition to joining the dissent of Justice Stevens, wrote a separate opinion. *See id.* at 2525 (Blackmun, J., dissenting). Part I of this dissent makes many of the same arguments made by Justice Stevens, but with a slightly different twist. *See id.* at 2525-29. Part II is more notable not for its relevance to this particular case, but for its reconsideration of Justice Blackmun's acquiescence to the imposition of the death penalty at all. To wit:

> As I review the state of this Court's capital jurisprudence, I . . . am left to wonder how the ever-shrinking authority of the federal courts to reach and redress constitutional errors affects the legitimacy of the death penalty itself. Since *Gregg v. Georgia*, the Court has upheld the constitutionality of the death penalty where sufficient procedural safeguards exist to ensure that the State's administration of the penalty is neither arbitrary nor capricious. At the time those decisions issued, federal courts possessed much broader authority than they do today to address claims of constitutional error on habeas review and, therefore, to examine the adequacy of a State's capital scheme and the fairness and reliability of its decision to impose the death penalty in a particular case. The more the Court constrains the federal courts' power to reach the constitutional claims of those sentenced to death, the more the Court undermines the very legitimacy of capital punishment itself.

Id. at 2529-30 (citations omitted). If Justice Blackmun remains on the Court for a few more years, then, we may see the resurrection of the dissents from the denials of certiorari always signed by Justices Brennan and Marshall, indicating their categorical opposition to the death pen-

The impact of this decision will be felt most by death row inmates who were represented by incompetent (but not constitutionally ineffective) counsel during their trials and first appeals. Because mistakes of counsel do not constitute "cause," an inmate in the following situation will be in serious trouble: At the sentencing phase of his trial, assume that the defendant's attorney failed to present mitigating evidence concerning the physical and sexual abuse of the defendant when he was a child. After the jury sentenced him to death, the defendant's attorney appointed for appeal failed to include this contention as a reason for a new sentencing hearing. The defendant's conviction was affirmed in the state system, and his petition for certiorari from the Supreme Court was denied. When the defendant's new lawyer tried to make this claim in her first habeas petition, she found it to have been procedurally barred on account of the failure to raise it on the initial appeal. Further, the mistakes of the attorney do not rise to the level of "cause," so the defendant was left only with the catch-all "innocent of death" exception. However, because there is no allegation concerning the defendant's eligibility for the death penalty, the federal court refused to hear the claim.

This illustration is a strong policy argument against the majority's holding, but it is legally unpersuasive. It would be the ultimate in elitism for the Supreme Court to take into consideration the perceived lack of expertise among attorneys appointed to handle capital murder cases, accurate though that perception may be. The Court's function is to determine the proper scope of federal review of state convictions so as to ensure constitutional protections but avoid undue interference with state criminal justice systems. The holding of *Sawyer v. Whitley* has satisfied that obligation.

IV. ANALYSIS AND CONCLUSION

The habeas corpus cases of the 1991 Term provide a revealing look at the various philosophies among the Justices in this area. Taken together, they indicate that three Justices take a very restrictive view of habeas corpus, three a more expansive approach, with the remaining three deciding the outcome. The chart below illustrates the various groupings:

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alty in all circumstances. The language would certainly be different, but the objection would nonetheless be made.

Alignment of the Justices in the 1992 Habeas Cases

Most Permissive				Most Restrictive
Blackmun	Kennedy	White	Rehnquist	Scalia
Stevens				Souter
O'Connor				Thomas

Analyzing the distribution among the four cases previously considered, only Justices Blackmun, Stevens, and O'Connor took what may be considered expansive positions in each one. In *Wright v. West*, they were together in arguing that federal habeas review of state court determinations of mixed questions of law and fact should be *de novo*, rather than deferential; in *Stringer v. Black*, they joined Justice Kennedy's majority opinion granting retroactive application of the rules in *Cartwright* and *Clemons*; in *Keeney v. Tamayo-Reyes*, they joined to object to the application of the higher standard for obtaining an evidentiary hearing before a federal court on habeas; and in *Sawyer v. Whitley*, they argued that the majority's narrow construction of the "actual innocence" standard in death penalty cases was not supported by precedent or policy.

At the opposite end, Justices Scalia, Souter, and Thomas invariably voted to limit the scope of habeas review, joining the majority in both *Tamayo-Reyes* and *Sawyer* and dissenting in *Stringer*. In *West*, Justices Thomas and Scalia argued that a habeas court should give only deferential review to state court determinations of mixed questions of law and fact, whereas Justice Souter, although expressing no opinion on that issue, argued in favor of an expansive definition of "new rule" that would prevent many habeas petitioners from being heard on the merits.

The other three Justices, then, determined the outcome in these cases. Chief Justice Rehnquist joined Justices Scalia and Thomas in *Tamayo-Reyes*, *West*, and *Sawyer*, but voted with the majority against them in *Stringer*. Justice Kennedy, on the other hand, who was with Justices Blackmun, Stevens, and O'Connor in *Tamayo-Reyes* and *Stringer*, joined Chief Justice Rehnquist's opinion in *Sawyer*, and wrote separately in *West*. The key Justice this Term in habeas corpus was Justice White. In *Keeney v. Tamayo-Reyes*, he provided the fifth vote and wrote the opinion limiting the availability of evidentiary hearings on habeas. In *Stringer v. Black*, he was once again in the majority, permitting Stringer to use *Maynard v. Cartwright* and *Clemons v. Mis-*

sissippi retroactively. In *Sawyer v. Whitley*, Justice White again sided with the victors, agreeing with Chief Justice Rehnquist's definition of "actual innocence" in death penalty cases. In *Wright v. West*, he refused to take either side, staying above the fray altogether; it is perhaps then no coincidence that none of the opinions in that case attracted a majority.

Of the nine Justices, however, the future positions of only four can be predicted with confidence. Justices Stevens and Blackmun will almost assuredly vote for expansive federal review of state convictions on habeas, whereas Justices Scalia and Thomas will just as surely vote to limit such power. Justices O'Connor and Kennedy appear to be very concerned with the continued erosion of rights in habeas, and so would likely be receptive to arguments in favor of more substantial review. This is a fascinating development, because both Justices signed and authored opinions limiting federal review of habeas as recently as last Term.[253] Apparently they felt then that the system was in need of some adjustment, but now are worried that the scale has been tipped too far to the right. Chief Justice Rehnquist would likely agree with Justices Scalia and Thomas most of the time, but his vote in *Stringer* must make one hesitate before jumping to conclusions. Justice Souter seems to be the most doctrinaire of all the Justices in this area, rigorously applying the retroactivity concepts (and others) regardless of the outcome. Only Justice White remains a mystery. Usually solidly conservative on crime issues,[254] his decisions in *Stringer* and *West* illustrate that he will not rush to adopt a particular doctrinal position, but will wait for the appropriate case before expressing his opinion.[255]

The obvious trend in the cases is a desire to lessen the burden on the federal district courts. In *West*, adoption of the deferential review standard would permit the district courts to dispose of mixed constitutional questions more easily, without the need for searching analysis. The holding of *Tamayo-Reyes* allows the district courts to refuse to grant evidentiary hearings in some habeas cases, avoiding a potential

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[253] Justice O'Connor wrote the majority opinion in Coleman v. Thompson, 111 S. Ct. 2546 (1991), and was joined by Justice Kennedy. In McCleskey v. Zant, 111 S. Ct. 1454 (1991), Justice Kennedy authored the opinion of the Court and was joined by Justice O'Connor.

[254] *See, e.g.*, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992); White v. Illinois, 112 S. Ct. 736 (1992).

[255] Shortly before this article went to press, Justice White announced his retirement, effective in July, 1993. As of the time of publication, no successor had been nominated. As the above analysis illustrates, the new Justice may have an immediate impact on habeas jurisprudence, and this unstable body of law may thus be redesigned yet again.

source of docket crowding and excessive consumption of judicial resources. Finally, *Sawyer* lets district courts quickly dispose of the many "emergency stay" applications they get just before an inmate is scheduled to be executed. Under its holding, the district judges will only need to make sure that the aggravating factors found by the sentencing jury were supported by the record, a much easier task than reweighing mitigating and aggravating factors and holding hearings on whether certain mitigating evidence would have affected the outcome. The open question, of course, is whether the desire to relieve the burden on the district courts is an appropriate goal for the Supreme Court to pursue.

Of course, nowhere in the majority opinions of this year's habeas cases do the justifications just mentioned appear; each decision is properly grounded in precedent, reasoning, and analysis. But between the ideological goals of those who would have the federal courts nearly abdicate their role as reviewer of the constitutionality of state court convictions, and those who recognize the impact of the continuing flood of habeas petitions on the district courts, the end result of future cases is likely to be a further limitation on the role of the federal courts in habeas corpus.

Federal courts must retain their ability to decide questions of federal or constitutional law, mixed or otherwise, *de novo*, rather than deferring to the reasoning of a state court on the matter; in this regard, Justice Thomas' opinion in *Wright v. West* is unpersuasive. However, once a petitioner has been given a full and fair opportunity to litigate his constitutional issues through both the state and federal system, the federal courts should not provide incentives for repetitious litigation or dilatory tactics. Once the state prisoner has either fully litigated or defaulted his federal claims, the federal courts need not provide him with endless opportunities to raise the same contentions. As long as the appropriate safeguards are in place to permit those with truly meritorious claims to be heard,[256] which the cases from the 1991 Term for the most part retain,[257] the federal courts are serving their proper function as protectors of individual constitutional rights as asserted through the petition for a writ of habeas corpus.

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[256] This is the primary problem with the Court's retroactivity doctrine as it applies to death sentence review. Because the law has changed in the interim, it is no fault of the petitioner's, but rather that of the courts, that the claim was not raised earlier. This is why the second exception to the bar against retroactive application of new law on habeas, covering watershed rules of criminal procedure, should be modified in the capital context. *See* Metzner, *supra* note 55, at 182-90.

[257] The opinion of the Court in *West* does not do so, but it was not joined by a majority and so does not operate as binding precedent.