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Schlup v. Delo: The Result of Curbing Unlimited Jurisdiction by Limiting Discretion

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Schlup v. Delo: The Result of Curbing Unlimited Jurisdiction By Limiting Discretion

The writ of habeas corpus[1] has long occupied a place of honor in the hearts of jurists. Sir William Blackstone referred to it as "the great and efficacious writ, in all manner of illegal confinement,"[2] and "the most celebrated writ in the English law."[3] Chief Justice Salmon Chase lauded its reach, stating, "This legislation [enacting the writ] is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."[4] Although the stated purpose of the writ is to free prisoners from illegal confinement,[5] it has provided the impetus for some of the nation's most famous constitutional law cases, from the right to counsel[6] to the death penalty.[7]

However, the halcyon years of the "Great Writ"[8] are over, and have been for quite some time. In sharp contrast to the Warren Court's expansive interpretation of the scope of the writ,[9] the Burger and Rehnquist Courts have systematically restricted its availability,[10] mainly through the rules of procedural default.[11] "Procedural

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1. Professors Liebman and Hertz have written what is perhaps the definitive work on habeas corpus for practicing attorneys. JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (2d ed. 1994).

2. 3 WILLIAM BLACKSTONE, COMMENTARIES *131.

3. *Id.* at *129.

4. *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325-26 (1868).

5. 28 U.S.C. § 2254 (1988).

6. Gideon v. Wainwright, 372 U.S. 335, 337 (1963).

7. McCleskey v. Kemp, 481 U.S. 279, 297-98 (1987) (upholding constitutionality of Georgia death sentencing process despite study showing that death sentencing in Georgia is infected with racial bias).

8. This nickname for the writ was popularized by Chief Justice Marshall in *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807) ("[W]hen we say *the writ of habeas corpus*, without addition, we most generally mean that great writ which is now applied for; and in that sense it is used in the constitution.")

9. *See infra* notes 93-99 and accompanying text.

10. *See infra* notes 104-55 and accompanying text. Justice Blackmun referred to this process as the Court's "crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims." Coleman v. Thompson, 501 U.S. 722, 758-59 (1991) (Blackmun, J., dissenting).

11. *See, e.g.*, Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 567-79 (1994); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 593-602 (1982); *see generally* Kathleen Patchel, *The New*

default" occurs when a state court refuses to hear a habeas corpus petition, even a potentially meritorious one, because the petitioner has not brought his claim(s) properly.[12] The habeas decisions of the Burger and Rehnquist Courts preclude the federal courts from considering the merits of these "defaulted" petitions, absent some independent outside justification.[13] One situation in which a habeas court may address an otherwise defaulted petition is when the prisoner shows both "cause" for her failure to comply with proper procedure and that the underlying constitutional error for which she seeks relief caused "actual prejudice" to her case.[14] The other justification for which a habeas court may hear the merits of a defaulted petition is when the petitioner is the victim of a "fundamental miscarriage of justice."[15] A petitioner may show this by presenting evidence of her actual innocence of the crime.[16]

Although the "fundamental miscarriage of justice" exception has been recognized for nearly ten years,[17] the lower federal courts have

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Habeas, 42 HASTINGS L.J. 939, 958-1066 (1991) (criticizing the Burger and Rehnquist Courts' procedural default jurisprudence).

12. *See* Bruce S. Ledewitz, *Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence*, 24 CRIM. L. BULL. 379, 379 (1988). These barred petitions for relief fall into three categories. "Successive" petitions "raise[] grounds identical to those raised and rejected on the merits on a prior petition." Kuhlmann v. Wilson, 477 U.S. 436, 444 n.6 (1986). "Abusive" petitions are those in which "a prisoner files a petition raising grounds that were available but not relied upon in a prior petition, or engages in other conduct that 'disentitle[s] him to the relief he seeks.' " *Id.* (quoting Sanders v. United States, 373 U.S. 1, 17 (1963)). "Defaulted" petitions are those which are barred because they violate a specific procedural rule, such as the contemporaneous objection rule, which requires a defendant to object to certain constitutional violations at trial or waive his objection. *See* Wainwright v. Sykes, 433 U.S. 72, 75-77 (1977). There is considerable overlap between these categories; indeed, a petition may fall into more than one category. *See, e.g.*, Sawyer v. Whitley, 505 U.S. 333, 333 (1992) (upholding dismissal of petition containing successive and abusive claims); McCleskey v. Zant, 499 U.S. 467, 490 (1991) ("The prohibition against adjudication in federal habeas corpus of claims defaulted in state court is similar in purpose and design to the abuse-of-the-writ doctrine . . . .").

13. *See* Ledewitz, *supra* note 12, at 379.

14. *Sykes*, 433 U.S. at 87.

15. *See, e.g.*, *McCleskey*, 499 U.S. at 494-95; Smith v. Murray, 477 U.S. 527, 537 (1986); Murray v. Carrier, 477 U.S. 478, 495 (1986); Engle v. Isaac, 456 U.S. 107, 135 (1982).

16. *See, e.g.*, Herrera v. Collins, 113 S. Ct. 853, 862 (1993); *Carrier*, 477 U.S. at 495; *Kuhlmann*, 477 U.S. at 454.

17. Although the Supreme Court intimated in several early decisions that such an exception might be available for habeas petitioners, *see infra* notes 115-25 and accompanying text, a *de jure* exception to the procedural default rules was not truly established until 1986, in a trio of habeas cases decided the same day, *see infra* notes 126-42 and accompanying text.

had some difficulty applying it,[18] and in any event have not allowed it with any regularity.[19] What is a "colorable showing" of innocence? What is the level of evidence required to make such a showing? In *Schlup v. Delo*,[20] the Supreme Court confronted these questions.

This Note focuses on the development of the "fundamental miscarriage of justice" exception to the procedural default rules, and the present formulation of the exception in *Schlup*. After reviewing the factual circumstances of the case and the Court's holding,[21] the Note turns to the extensive case law preceding *Schlup*.[22] It begins with a short historical examination of the birth and early development of the writ of habeas corpus in the United States.[23] The Note then examines both the Warren Court's rapid expansion of the jurisdictional scope of habeas[24] and the Burger and Rehnquist Courts' use of procedural default rules to restrict the lower courts' discretion to exercise their broad habeas jurisdiction.[25] In the process, the Note traces the evolution of the "fundamental miscarriage of justice" exception from its inception as an outgrowth of the procedural default rules[26] to its recognition and consequent development as a separate doctrinal inquiry.[27] The Note then analyzes the decision in *Schlup*, with emphasis on the majority's formulation of a threshold showing of "actual innocence."[28] It examines the claims of the dissenters[29]

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18. *See generally* John P. Hale, Note, *The Federal Circuits' Development, Scope, and Definition of "Actual Innocence" and the Limitation of the Claim by* Herrera v. Collins *and* Sawyer v. Whitley, 71 U. DET. MERCY L. REV. 1025 (1994) (citing many differences among the federal circuits in the standard used to evaluate innocence claims and the situations in which innocence claims are allowed).

19. In the words of one commentator, "Of the several hundred reported federal decisions confronting defaulted claims since [*Murray*, 477 U.S. at 495-96 (establishing possibility of review of a barred petition contingent upon a sufficient showing of petitioner's innocence)], few have permitted habeas review via the innocence exception." Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 341 (1993). According to the Supreme Court, however, the infrequency of its application is one of the strengths of the standard. *See, e.g.*, Schlup v. Delo, 115 S. Ct. 851, 864 (1995) ("To ensure that the fundamental miscarriage of justice exception would remain 'rare' . . . this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence.").

20. 115 S. Ct. 851 (1995).

21. *See infra* notes 32-82 and accompanying text.

22. *See infra* notes 83-157 and accompanying text.

23. *See infra* notes 83-92 and accompanying text.

24. *See infra* notes 93-99 and accompanying text.

25. *See infra* notes 100-57 and accompanying text.

26. *See infra* notes 115-25 and accompanying text.

27. *See infra* notes 126-57 and accompanying text.

28. *See infra* notes 158-199 and accompanying text.

29. *See infra* notes 207-39 and accompanying text.

and concludes that although their reasoning is less persuasive than the majority's, the concerns they show for aspects of the majority opinion are well-founded.[30] Finally, this Note concludes that while the Court makes sound use of precedent, the valid concerns raised by the dissent and the inherent inconsistencies in the Court's habeas corpus jurisprudence will pose future problems for application of the *Schlup* standard.[31]

The factual background of *Schlup* involved the murder of an African-American inmate named Arthur Dade, who was stabbed to death on February 3, 1984 at the Missouri State Penitentiary.[32] Three white inmates, including Lloyd Schlup, were charged with capital murder in connection with Dade's death.[33] At Schlup's trial, the State presented the testimony of two guards, but never offered any testimony from other witnesses or, for that matter, any physical evidence linking Schlup to the killing.[34] Schlup maintained his innocence, contending that the State had the wrong man,[35] but he

30. *See infra* notes 240-55 and accompanying text.

31. *See infra* notes 256-72 and accompanying text.

32. *Schlup*, 115 S. Ct. at 854. Dade was allegedly the victim of a planned "hit" by members of the Aryan Brotherhood, a white supremacist prison gang. *See* Brief for Petitioner at 16, Schlup v. Delo, 115 S. Ct. 851 (1995) (No. 93-7901).

33. *Schlup*, 115 S. Ct. at 854-55. During the commotion surrounding the lunch hour at the prison, inmate Rodnie Stewart somehow acquired a cup of steaming liquid and had thrown it in Dade's face, blinding him to a subsequent attack by inmate Robert O'Neal, a member of the Aryan Brotherhood, who stabbed Dade repeatedly with a homemade ice pick. *Id.* at 855. Dade was further prevented from defending himself by a third inmate, who leaped on his back and pinned his arms behind him. *Id.* Two prison guards identified this third inmate as Lloyd Schlup. *Id.*

34. *Id.* at 855.

35. *Id.* At trial, Schlup relied heavily on two allegations: First, he alleged that the guards who testified to his presence at the crime scene were mistaken in their identification. *Id.* at 855 n.6. The first guard was three floors away from the murder and had an obstructed view of the altercation. *Id.* The second guard, Schlup contended, had taken a visitor to Schlup's cell just 30 minutes before the murder and thus had "Schlup on the brain," which, given the confusion surrounding the murder, could have produced a misidentification. *Id.*

Schlup's second and more convincing charge was based on videotape from a prison security camera. *Id.* at 855. The tape showed that Schlup was the first prisoner to walk into the prison cafeteria for lunch on the day of the murder and that he went through the line and got his food. *Id.* Approximately 65 seconds later, several guards ran out of the cafeteria, responding to the distress call that had gone out after the attack on Dade. *Id.* Twenty-six seconds later, Robert O'Neal ran into the cafeteria, dripping blood. He had broken a window with his hand and had thrown the murder weapon out the window, cutting himself in the process. *Id.* at 855 n.4. Schlup maintained that it would have been impossible for him to have participated in the murder and still have been able to return to the cafeteria 65 seconds before the sounding of the distress call. *Id.* at 855.

was nevertheless convicted and sentenced to death.[36] After exhausting his state collateral remedies,[37] Schlup filed a *pro se* petition for federal habeas corpus relief, which was denied.[38]

Represented by new counsel, Schlup filed a second petition on March 11, 1992, claiming that: (1) he was actually innocent and that executing him would violate the Eighth and Fourteenth Amendments,[39] (2) his trial counsel was ineffective for failing to interview several alibi witnesses,[40] and (3) the State had violated

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Thus, establishing the timing of the distress call was a critical element of Schlup's defense: If the distress call had been sounded immediately after the attack, his defense would be extremely plausible, but a delay of a few minutes between the attack and the distress call would have given him enough time to participate in the attack on Dade, clean up, and enter the cafeteria at the time indicated on the videotape. *Id.*

36. The Missouri Supreme Court affirmed, State v. Schlup, 724 S.W.2d 236, 243 (Mo. 1987), and the Supreme Court denied certiorari, Schlup v. Missouri, 482 U.S. 920, 920 (1987). O'Neal and Stewart were tried separately and sentenced, respectively, to death and 50 years imprisonment without parole. *See* State v. O'Neal, 718 S.W.2d 498, 499 (Mo. 1986) (en banc), *cert. denied*, O'Neal v. Missouri, 480 U.S. 926 (1987); State v. Stewart, 714 S.W.2d 724, 724 (Mo. Ct. App. 1986).

37. *See* Schlup v. State, 758 S.W.2d 715, 717 (Mo. 1988) (en banc) (denying motion for state post-conviction relief). A prerequisite to federal habeas corpus relief is that the petitioner "has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b) (1988). *See generally* 2 LIEBMAN & HERTZ, *supra* note 1, §§ 23.3-23.5 (explaining the exhaustion doctrine).

38. Schlup v. Armontrout, No. 89-0020C(3), 1989 WL 513565 at *5 (E.D. Mo. May 31, 1989), *aff'd*, 941 F.2d 631 (8th Cir. 1991), *cert. denied*, 503 U.S. 909 (1992). Schlup claimed, *inter alia*, that his trial counsel was ineffective for failing to interview four inmates whom Schlup claimed had witnessed the attack and could establish his innocence. *Id.* at *4. Trial counsel had also failed to interview inmate Randy Jordan, a member of the Aryan Brotherhood, whom Schlup identified as the third participant in the murder. *Id.* The district court ruled that Schlup's ineffectiveness claim was procedurally barred because although he had raised it in his state post-conviction motion, he had failed to do so on direct appeal in state court. *Id.* at *3-4.

The Eighth Circuit affirmed the district court's decision, Schlup v. Armontrout, 941 F.2d 631, 642 (8th Cir. 1991), *cert. denied*, 503 U.S. 909 (1992), but instead of relying on the alleged procedural default, denied the petition on the merits, finding the performance of Schlup's trial counsel to be constitutionally effective. *Id.* at 638-41. The Eighth Circuit later denied Schlup's petition for rehearing and suggestion for rehearing en banc, Schlup v. Armontrout, 945 F.2d 1062 (8th Cir. 1991), and the Supreme Court denied certiorari, Schlup v. Armontrout, 503 U.S. 909 (1992).

39. The Court rejected an essentially identical claim in the much-publicized decision of Herrera v. Collins, 113 S. Ct. 853 (1993), although *Herrera* had not yet been decided when Schlup filed his second petition for habeas relief. In addressing the "miscarriage of justice" exception *vis-a-vis* Schlup's claims of constitutional error, the Court in *Schlup* made a concerted effort to distinguish bare-innocence claims, like that in *Herrera*, from situations in which the exception is applicable. *See infra* notes 163-70 and accompanying text.

40. Judge Heaney, dissenting from the Eighth Circuit decision that affirmed the denial of Schlup's second petition, noted that:

Brady v. Maryland[41] by failing to disclose critical exculpatory evidence.[42] To buttress his claim of innocence, Schlup attached several detailed affidavits from inmate witnesses[43] in a traverse to the State's responsive pleading.[44] The district court did not reach the merits of Schlup's new claims, ruling that Schlup did not provide adequate cause for failing to raise his new claims more promptly, and as such, the claims were procedurally barred.[45] The court also concluded, using the standard from *Sawyer v. Whitley*,[46] that Schlup had failed to present enough evidence of his innocence to show that a dismissal of his petition would result in a "fundamental miscarriage of justice" and therefore justify consideration of his procedurally barred claims.[47]

> Schlup present[ed] five affidavits of eyewitnesses to the murder, none of whom were contacted by Schlup's defense counsel, none of whom testified at trial, and all of whom appear[ed] willing to give their testimony in open court. . . . This testimony . . . persuasively demonstrates the utter ineffectiveness of Schlup's trial counsel in failing to investigate the circumstances of Dade's murder.

Schlup v. Delo, 11 F.3d 738, 744-45 (8th Cir. 1993) (Heaney, J., dissenting), *vacated*, 115 S. Ct. 851 (1995).

41. 373 U.S. 83, 85-86 (1963) (holding that suppression by the prosecution of material evidence favorable to an accused who has requested it violates due process).

42. *Schlup*, 115 S. Ct. at 857.

43. *Id.* at 858 n.18. These affidavits were all from African-American inmates, which, given the allegedly racially motivated murder, should have lent them additional credence. *Id.* at 862.

44. *Id.* at 858. The State's response included transcripts of inmate interviews conducted by prison investigators a few days after the murder. *Id.* at 857. One of these transcripts contained an interview with John Green, an inmate serving as a clerk for the prison unit. *Id.* In his interview, Green claimed that, at the instruction of a guard, he had radioed for assistance (thus prompting the distress call) shortly after Dade had fallen. *Id.* In his traverse, Schlup contended that this conclusively proved his innocence, as it indicated that only a short time had passed between the murder and the resulting distress call. *Id.* at 857-58.

45. *Id.* at 858. An "abuse of the writ" may occur when a petitioner includes a claim in a habeas petition that she could have raised in an earlier petition. *See, e.g.*, Sanders v. United States, 373 U.S. 1, 17 (1963). If a petitioner has abused the writ, then her claim is procedurally barred, the purpose being to deter dilatory tactics and "sandbagging." *See* Wainwright v. Sykes, 433 U.S. 72, 89-90 (1977). However, under the test set forth in *Sykes*, a petitioner may overcome the procedural bar if she shows sufficient cause for not raising the claim earlier and actual prejudice to her case from the alleged error. *Id.* at 87; *see also* Francis v. Henderson, 425 U.S. 536, 542 (1976) (originating "cause-and-prejudice" test).

46. 505 U.S. 333 (1992).

47. *Schlup*, 115 S. Ct. at 858. In response, Schlup filed a motion to set aside the order of dismissal, calling attention once more to his claim of innocence and supplementing the motion with additional evidence: Schlup's counsel had managed to locate John Green, *see supra* note 44, and had obtained a detailed affidavit in which Green not only confirmed his post-incident statement regarding the timing of his radio call for help, but also

Schlup appealed to the Eighth Circuit Court of Appeals, stating that the district court should have used the more lenient standard delineated in *Kuhlmann v. Wilson*[48] rather than the *Sawyer* standard in determining whether the evidence of his innocence implicated a "fundamental miscarriage of justice" and thereby authorized review of his petition on the merits.[49] The court of appeals upheld the district court's reasoning, stating that the *Sawyer* test was proper and that evidence of Schlup's guilt at his trial foreclosed consideration of his constitutional claims under *Sawyer*.[50]

Meanwhile, Schlup's attorney obtained further evidence of Schlup's innocence—an exculpatory affidavit from Robert Faherty, one of the prison guards who had supervised the transfer of the inmates from their cells to the cafeteria.[51] On November 15, 1993, the Eighth Circuit vacated its earlier opinion in favor of a more detailed analysis, still affirming the denial of habeas, but adding an extended discussion of Schlup's new evidence and the court's rationale for denying relief notwithstanding that evidence.[52] Two days later,

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identified Randy Jordan rather than Schlup as the third attacker. *Id.* at 858. In the affidavit, Green stated that he had not previously identified Jordan for fear that the Aryan Brotherhood would have had him killed in prison, but, as he had been out of prison for almost eight years, he no longer feared an attempt on his life. *Id.* at 858 n.21. The district court denied the motion without opinion. *Id.* at 859.

48. 477 U.S. 436 (1986) (plurality opinion).

49. *Schlup*, 115 S. Ct. at 859. The standard announced in *Kuhlmann* states that a petitioner wishing to overcome a procedural bar by claiming that a miscarriage of justice has occurred in his case must make a "colorable showing of factual innocence." *Kuhlmann*, 477 U.S. at 454. The *Sawyer* standard is more stringent, requiring "clear and convincing" evidence of innocence before a petitioner may use the exception. *Sawyer*, 505 U.S. at 336.

50. Schlup v. Delo, 1993 WL 409815, at *2-3 (8th Cir. Oct. 15, 1993), *opinion vacated and superseded*, 11 F.3d 738 (8th Cir. 1993), *vacated*, 115 S. Ct. 851 (1995). One judge dissented, concluding that Schlup had met both the *Kuhlmann* standard and a proper reading of the *Sawyer* standard. *Id.* at *3-10 (Heaney, J., dissenting).

51. Brief for Petitioner at App. 2, Affidavit of Robert Faherty, Exhibit B, Schlup v. Delo, 115 S. Ct. 851 (1995) (No. 93-7901). Faherty stated in his affidavit that on the day of the murder, Schlup was in his presence for at least two and a half minutes before Schlup entered the lunchroom, that Schlup was walking at a leisurely pace, and that Schlup did not seem agitated or nervous. *Id.* at App. 3. Faherty also attested to the reliability of John Green as a witness. *Id.* at App. 4. See *supra* notes 44, 47 for a summary of John Green's testimony.

52. Schlup v. Delo, 11 F.3d 738, 739-44 (8th Cir. 1993), *vacated*, 115 S. Ct. 851 (1995). The majority opinion noted in particular some inconsistencies between Green's affidavit and both his prison interview and his testimony at Stewart's trial. *Id.* at 742. The Eighth Circuit dismissed Faherty's affidavit as merely embellishing his earlier testimony. *Id.* at 743.

Judge Heaney again dissented, concluding that Schlup had presented evidence of his innocence such that the district court should have addressed the merits of his constitutional

the court of appeals denied a suggestion for rehearing en banc.[53] Three judges dissented from the denial, stating that the question of which standard to apply was a "question of great importance in habeas corpus jurisprudence," and as such, should have been addressed.[54] The Supreme Court granted certiorari[55] "to consider whether the *Sawyer* standard provides adequate protection against the kind of miscarriage of justice that would result from the execution of a person who is actually innocent."[56]

In *Schlup v. Delo*,[57] the Court held in a five to four decision[58] that the Eighth Circuit erred in using the *Sawyer* standard and instead should have used the standard from *Murray v. Carrier*,[59] which states that an otherwise barred claim will implicate a "fundamental miscarriage of justice," thereby justifying review on the merits, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent."[60] The majority reasoned that a standard for adjudicating defaulted petitions supported by evidence of actual innocence must properly balance the individual interest in avoiding injustice against the systemic interests in finality of judgments, comity,[61] and the conservation of scarce judicial resources.[62] In the majority's view, the *Carrier* standard, rather than the

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claims. *Id.* at 744 (Heaney, J., dissenting). He noted with particularity the fact that Schlup's trial counsel, although given access to all of the post-incident interviews conducted by prison officials, had not interviewed any of the potential witnesses to the crime, *id.* at 747 n.5 (Heaney, J., dissenting), and concluded that the case should be remanded for the district court to conduct an evidentiary hearing and address the merits of Schlup's constitutional claims, if appropriate. *Id.* at 747, 749 n.7 (Heaney, J., dissenting).

53. *Id.* at 754.

54. *Id.* at 755 (Arnold, C.J., dissenting, joined by McMillian, J., and Wollman, J.).

55. Schlup v. Delo, 114 S. Ct. 1368 (1994).

56. *Schlup*, 115 S. Ct. at 854.

57. 115 S. Ct. 851 (1995).

58. Justice Stevens wrote the majority opinion, joined by Justices O'Connor (who also wrote a separate concurrence), Souter, Ginsburg, and Breyer. *Id.* at 854. The Chief Justice dissented, joined by Justices Kennedy and Thomas. *Id.* at 870 (Rehnquist, C.J., dissenting). Justice Scalia also wrote a dissent, in which Justice Thomas joined. *Id.* at 874 (Scalia, J., dissenting).

59. 477 U.S. 478 (1986).

60. *Id.* at 495-96. *Carrier* is part of a trio of 1986 decisions (along with Kuhlmann v. Wilson, 477 U.S. 436 (1986) (plurality opinion) and Smith v. Murray, 477 U.S. 527 (1986)) that refined and shaped the "fundamental miscarriage of justice" exception to the procedural bar rules. *See infra* notes 126-42 and accompanying text.

61. Judicial comity is "[t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

62. *Schlup*, 115 S. Ct. at 862-65.

Sawyer standard, strikes the proper balance between systemic and individual interests and therefore should govern the "miscarriage of justice" inquiry for claims such as Schlup's.[63]

The Court then formulated a test to apply in such circumstances, ruling that to satisfy the *Carrier* standard, a petitioner needs to show that it is "more likely than not that no reasonable juror would have convicted him in the light of the new evidence."[64] The majority elaborated that a habeas court is not bound by traditional evidentiary rules of admissibility in making its assessment, but may consider the probative value of evidence allegedly illegally admitted or wrongly excluded.[65] Finally, the Court noted that the test is not framed in terms of the district court's assessment of the existence or nonexistence of a reasonable doubt, but is based instead on a probabilistic assessment of whether a reasonable *juror* would find the petitioner guilty beyond a reasonable doubt.[66]

Justice O'Connor concurred, largely in response to the criticisms from the dissenters.[67] In answer to Chief Justice Rehnquist's claim[68] that the standard articulated by the Court was muddled and apt to be confused with the *Jackson v. Virginia*[69] standard for legal sufficiency of the evidence supporting a guilty verdict, she distinguished the *Schlup* inquiry, which focuses on the *likelihood* of jurors reaching a specific result, from the *Jackson* standard, which focuses on jurors' legal *authority* to do so.[70] Justice O'Connor then turned to Justice Scalia's contention[71] that the section of the habeas corpus statute concerning multiple petitions[72] gives lower court judges complete discretion in deciding whether to entertain otherwise defaulted claims. Citing *Cooter & Gell v. Hartmarx Corp.*,[73] she

63. *Id.* at 865. For a discussion of the disposition of the case on remand, see *infra* note 186.

64. *Schlup*, 115 S. Ct. at 867.

65. *Id.*

66. *Id.* at 868.

67. *Id.* at 869-70 (O'Connor, J., concurring).

68. *See id.* at 873-74 (Rehnquist, C.J., dissenting).

69. 443 U.S. 307, 319-21 (1979) (entitling petitioner to habeas corpus relief if, upon record evidence, no rational trier of fact could have found proof of a petitioner's guilt beyond a reasonable doubt).

70. *Schlup*, 115 S. Ct. at 870 (O'Connor, J., concurring).

71. *See id.* at 874-78 (Scalia, J., dissenting).

72. 28 U.S.C. § 2244(b) (1988). For further discussion of this statute, see *infra* notes 91-92, 97, and accompanying text and *supra* note 225 and accompanying text.

73. 496 U.S. 384, 402 (1990) (relying on Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982), in holding that a finding on review that a lower court's decision was based on an erroneous view of the law will justify reversal under an abuse of discretion standard).

replied that the court of appeals' reliance on an erroneous standard represented a "paradigmatic" abuse of discretion, and as such, the Court did not need to decide whether abuse of discretion represented the proper standard of review.[74]

Joined by Justices Kennedy and Thomas, the Chief Justice dissented.[75] He placed greater importance on the states' interest in finality of judgments and asserted that the *Sawyer* standard strikes the proper balance between systemic and individual interests.[76] However, his primary criticism of the majority opinion was with its exegesis of the *Carrier* standard, which he felt "water[ed] down" the original standard and would lead to confusion when lower courts attempted to apply it.[77] Justice Scalia, also joined by Justice Thomas, dissented, arguing that the question of whether a habeas court should reach the merits of a barred petition is governed neither by the *Carrier* standard nor by the *Sawyer* standard, but by statute.[78] According to Justice Scalia, the section of the United States Code governing successive and abusive petitions[79] leaves the decision to the habeas court's discretion.[80] Moreover, he stated, the "fundamental miscarriage of justice" exception, requiring a habeas court to review a barred petition, was announced by a mere plurality in *Kuhlmann* and is therefore not binding precedent.[81] As he found no duty to address the merits of Schlup's petition, and because he believed the lower court had not abused its discretion in denying the petition, Justice Scalia saw no reason to interfere with the court of appeals' decision.[82]

The debate over the scope and role of federal habeas corpus review for state prisoners has occupied a large part of the discussion surrounding the Great Writ. With roots stretching back to English

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74. *Schlup*, 115 S. Ct. at 870 (O'Connor, J., concurring). This reply, however, rings somewhat hollow; there may be more effective ways to address Justice Scalia's statutory concerns. *See infra* notes 235-39 and accompanying text.

75. *See Schlup*, 115 S. Ct. at 870-74 (Rehnquist, C.J., dissenting).

76. *Id.* (Rehnquist, C.J., dissenting).

77. *Id.* at 870 (Rehnquist, C.J., dissenting). This Note suggests that the Chief Justice's concerns are well-placed; the majority's explanation of the *Carrier* standard is somewhat ambiguous. *See infra* notes 240-49 and accompanying text.

78. *Schlup*, 115 S. Ct. at 874-78 (Scalia, J., dissenting).

79. 28 U.S.C. § 2244(b) (1988). See *infra* note 225 for the pertinent text of the statute.

80. *Schlup*, 115 S. Ct. at 875-76 (Scalia, J., dissenting).

81. *Id.* at 876-77 (Scalia, J., dissenting). See *infra* note 138 and accompanying text for further discussion of the precedential weight of *Kuhlmann*.

82. *Schlup*, 115 S. Ct. at 878 (Scalia, J., dissenting).

common law,[83] the purpose of the writ of habeas corpus is to release a prisoner who is being held unlawfully, that is to say, unconstitutionally.[84] This aim is accomplished quite literally: The typical relief granted to a successful habeas petitioner is a conditional release.[85] In the United States, the federal courts were first given the authority to issue the write by the Judiciary Act of 1789,[86] which provided the writ for individuals in the custody of federal authorities. However, the true beginnings of the current debate stem from an 1867 amendment of the 1789 Act in which Congress, with typical Reconstruction fervor, broadened the Supreme Court's habeas jurisdiction to include federal constitutional claims arising in state courts.[87] This broad jurisdiction notwithstanding, the *scope* of the writ was quite narrow. Under the 1789 Act, a determination by a state court of adequate jurisdiction was immune from habeas review, and a petitioner could challenge a conviction only on grounds related to the jurisdiction of the state court.[88]

Another important common-law feature of the writ was that if a prisoner's petition was denied in one court, the prisoner could make a renewed application to any other court that had jurisdiction; the previous denial would have no preclusive effect.[89] However, with the increasing availability of appellate review, the validity of the unlimited-petitions approach came into question, and courts began to

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83. *See generally* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 12-94 (1980) (describing the English origins of the writ of habeas corpus).

84. As Chief Justice Marshall stated in *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830), "The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment."

85. *See* Herrera v. Collins, 113 S. Ct. 853, 862 (1993). Under a conditional release, unless the State elects to hold a new trial, the prisoner is set free. *See id.*

86. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (current version at 28 U.S.C § 2241(a) (1988)).

87. Act of Feb. 5, 1867, ch. 27, 14 Stat. 385; *see* 1 LIEBMAN & HERTZ, *supra* note 1, § 2.4(d), at 40-43.

88. This doctrine was summarized by Chief Justice Marshall in *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830):

> The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. . . .
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> . . . An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject . . . .

Id. at 202-03. *But see* 1 LIEBMAN & HERTZ, *supra* note 1, § 2.4(d), at 37-40 (arguing that the Supreme Court granted relief on nonjurisdictional claims during this period).

89. *See* DUKER, *supra* note 83, at 5-6.

search for ways to limit multiple petitions.[90] Finally, in 1948, Congress enacted 28 U.S.C. § 2244.[91] This section of the habeas statute, titled "Finality of Determination," directly addressed the issue of multiple petitions, stating that federal judges "need not" address second or subsequent petitions unless (1) the petition alleges a new ground for relief, and (2) the applicant convinces the judge that he did not deliberately withhold the claim or otherwise abuse the writ.[92]

Even though the habeas corpus debate caught the attention of Congress, the modern era of habeas corpus jurisprudence did not commence until five years later with the Supreme Court's landmark decision in *Brown v. Allen*.[93] Up to this time, the "jurisdictional" theory of habeas corpus—that determinations of constitutional claims by state courts of competent jurisdiction are controlling[94]—still guided the use of the writ.[95] Justice Reed, writing for the majority, eradicated sixty years of habeas corpus theory with a stroke of his pen in *Brown*, ruling that state adjudication of a federal constitutional claim does not bar a federal habeas court from reviewing the claim *de novo*.[96] Ten years later, a trio of habeas decisions would increase

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90. *See, e.g.*, Price v. Johnston, 334 U.S. 266, 292 (1948) (holding that "inadequate" explanation for previous failure to raise a new claim constitutes grounds for denial of a successive petition); Salinger v. Loisel, 265 U.S. 224, 231 (1924) (advocating use of "sound judicial discretion" in adjudicating second and subsequent petitions); Wong Doo v. United States, 265 U.S. 239, 241 (1924) (holding that "sound judicial discretion" dictates that "controlling weight must [be] given to the prior refusal" when second petition contains claim that was raised, but not argued, in first petition).

91. Act of June 25, 1948, ch. 646, § 1, 62 Stat. 965 (current version at 28 U.S.C. § 2244(a) (1988)).

92. Former § 2244 states in pertinent part:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

28 U.S.C. § 2244 (1952) (current version at 28 U.S.C. § 2244(a) (1988)).

93. 344 U.S. 443 (1953).

94. *See supra* note 88 and accompanying text.

95. *See* DUKER, *supra* note 83, at 257.

96. In the words of Justice Reed,

> [T]he 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*.
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> . . . .
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> The District Court and the Court of Appeals recognized the power of the District Court to reexamine federal constitutional issues even after trial and review by a state . . . .

the availability of the writ even further, allowing the court to reach the merits of successive and abusive petitions,[97] eliminating the preclusive effect of state court verdicts and procedural bars,[98] and even requiring a habeas court to conduct an evidentiary hearing upon an insufficient finding of fact by the state court.[99]

Brown, 344 U.S. at 458-59 (footnote omitted). In a separate opinion, Justice Frankfurter elaborated, stating:

> In exercising the [statutory power of habeas corpus review of federal constitutional claims], the 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 [*see supra* note 87 and accompanying text], provided it should not have.

Id. at 500 (separate opinion of Frankfurter, J.).

97. Sanders v. United States, 373 U.S. 1, 11-19 (1963). At the time of *Sanders*, § 2244 of Title 28 of the United States Code, governing successive petitions filed by state prisoners, stated that a habeas court would be required to entertain a successive petition unless the district judge was satisfied that the "ends of justice" would not be served by entertaining the petition. 28 U.S.C. § 2244 (1958) (current version at 28 U.S.C. § 2244(a) (1988)). However, § 2255, which governed petitions by federal prisoners, did not contain the "ends of justice" language. 28 U.S.C. § 2255 (1958) (current version at 28 U.S.C. § 2255 (1988 & Supp. V 1993)). The *Sanders* Court held that the "ends of justice" inquiry was applicable to both federal and state prisoners, finding that the intent of Congress in enacting § 2255 was to codify then-current habeas corpus practice. *Sanders*, 373 U.S. at 14. The *Sanders* Court further held that the "ends of justice" language would apply not only to successive petitions but also to abusive petitions, which were not addressed by the statute, stating:

> The principles governing both justifications for denial of a hearing on a successive application [i.e., that the petition was successive or that it was abusive] are addressed to the sound discretion of the federal trial judges. . . . [T]heirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits. Even as to such an application, the federal judge clearly has the power—and, if the ends of justice demand, the duty—to reach the merits.

Id. at 18-19.

98. In Fay v. Noia, 372 U.S. 391 (1963), the Court ruled on an issue that *Brown* discussed only peripherally, holding that state court procedural bars do not deprive federal courts of habeas jurisdiction. *Id.* at 398-99, 426-34. The Court based its holding on the view that discretionary and not jurisdictional considerations govern habeas review of claims defaulted on state grounds, *id.* at 424-36, and set forth a standard for the use of such discretion by the lower courts, ruling that state forfeitures should not be enforced on federal habeas review unless the petitioner has "deliberately bypassed" state procedures in order to reach the federal courts, *id.* at 438.

99. In Townsend v. Sain, 372 U.S. 293 (1963), *overruled in part*, Keeney v. Tamayo-Reyes, 504 U.S. 1, 5 (1992), the Court expanded the scope of evidentiary review on habeas, requiring a federal evidentiary hearing in conjunction with a prisoner's habeas petition unless the state court trier of fact has reliably found the relevant facts after a full hearing. *Id.* at 312-13.

However, the expansion of the scope of habeas corpus review necessarily came at the expense of the finality of state court judgments. State court judges, who felt as if their expertise was being belittled by the Supreme Court, criticized the expansionist approach.[100] Federal judges, too, became dissatisfied with what they saw as the endless process of trial followed by appeal followed by multiple habeas corpus petitions.[101] Moreover, the late 1960s and early 1970s saw a near-complete replacement of the Warren Court that had decided *Brown*[102] with the more conservative Burger Court.[103]

In 1976 the Burger Court rang in the end of the expansive interpretation of habeas corpus with its decision in *Stone v. Powell*,[104] ruling that habeas courts should not entertain illegal search and seizure claims under the Fourth Amendment's exclusionary rule where there has been "an opportunity for full and fair litigation of the claim" in the state courts.[105] Justice Powell, writing for the majority, used a cost-benefit analysis, weighing the "costs" of the exclusionary rule, including the general "cost" to the finality of judgments imposed by habeas review, against the utility of the exclusionary rule as a deterrent to unlawful searches. The *Stone* Court concluded that while the balance of factors was sufficient to justify use of the rule at the trial and appellate levels, the added finality costs of habeas relitigation tipped the balance against

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100. *See* STATE JUSTICE INSTITUTE, NATIONAL CENTER FOR STATE COURTS, HABEAS CORPUS IN STATE AND FEDERAL COURTS 3 n.10, 5-6 (Victor E. Flango ed., 1994).

101. *Id.* at 5-6.

102. By 1976, the time of the Court's significant withdrawal from the principles of *Brown* (in *Stone v. Powell, see infra* notes 104-09 and accompanying text), none of the Justices who had taken part in *Brown* remained on the Court. *See* COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, THE SUPREME COURT OF THE UNITED STATES: ITS BEGINNINGS & ITS JUSTICES 1790-1991, at 268-91 (1992) (presenting a chart of the succession of the Justices of the Court). In fact, six new Justices (Marshall, Burger, Blackmun, Rehnquist, Powell, and Stevens) had been appointed since the Court had decided *Sanders*, *Noia*, and *Townsend* in 1963. *Id.* Finally, of the three remaining Justices (Brennan, Stewart, and White) who had decided the 1963 trio of cases, two were plainly uncomfortable with the post-*Brown* expansion of habeas review: Justices Stewart and White had dissented in *Townsend*, 372 U.S. at 325 (Stewart, J., dissenting); Justice Stewart had joined Justice Harlan's dissent in *Noia* as well, 372 U.S. at 448 (Harlan, J., dissenting).

103. For a discussion of the "post-Warren" Court's shift to a more conservative criminal procedure jurisprudence, see JOHN F. DECKER, REVOLUTION TO THE RIGHT: CRIMINAL PROCEDURE JURISPRUDENCE DURING THE BURGER-REHNQUIST COURT ERA (1992).

104. 428 U.S. 465 (1976).

105. *Id.* at 482.

consideration of exclusionary rule claims on federal habeas review.[106]

Stone represented a major turning point in the Court's habeas corpus jurisprudence. The *Brown* Court had viewed relitigation of all constitutional issues as deriving from a congressional mandate, stating that Congress, not the courts, had the power to decide whether to allow relitigation of a certain claim.[107] The *Stone* doctrine, however, seemed to empower the federal courts to use their equitable judgment to determine which claims are justifiably relitigated,[108] creating a discretionary restriction to the extremely broad powers granted the courts by statute.[109]

Wainwright v. Sykes,[110] another decision that same term, struck down *Fay v. Noia*'s "deliberate bypass" standard[111] for procedural default.[112] In *Sykes*, the Court authorized greater discretion on the part of habeas courts to enforce state procedural defaults, announcing that a petitioner wishing to avoid the preclusive effect of state procedural default rules must show cause for her failure to file her constitutional claim properly, and actual prejudice to her case arising from the alleged constitutional error.[113] As in *Stone*, the majority

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106. *Id.* at 491-94.

107. In *Brown*, Justice Frankfurter, writing separately, stated:

> [T]he wisdom of such a modification in the law [denying habeas review of claims previously adjudicated in state courts] is for Congress to consider . . . . It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress. By giving the federal courts that jurisdiction, Congress has imbedded into federal legislation the historic function of habeas corpus adapted to reaching an enlarged area of claims.

Brown v. Allen, 344 U.S. 443, 500 (1953) (separate opinion of Frankfurter, J.).

108. *See* Steiker, *supra* note 19, at 363.

109. The statute, 28 U.S.C. § 2254(a) (1988), states in pertinent part, "[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

110. 433 U.S. 72 (1976).

111. See *supra* note 98 and accompanying text for further discussion of *Noia* and the "deliberate bypass" standard.

112. *Sykes*, 433 U.S. at 87 ("It is the sweeping language of *Fay v. Noia* . . . which we today reject."); *see also* Steiker, *supra* note 19, at 329-32 (describing outgrowth of *Sykes* from two earlier cases: Davis v. United States, 411 U.S. 233 (1973), and Francis v. Henderson, 425 U.S. 536 (1976)).

113. *Sykes*, 433 U.S. at 87. It is important to note that the Burger Court's habeas jurisprudence, while restricting the range in which habeas courts may exercise their discretion to hear petitions, did not affect the essential holdings of *Brown* and *Noia*: The federal courts still possess the *power* to relitigate all state determinations of federal issues and to ignore state procedural bars. *See* Ledewitz, *supra* note 12, at 385; Patchel, *supra* note 11, at 1024; Steiker, *supra* note 19, at 324.

in *Sykes* balanced the relative interests and interpreted the Court's equitable powers broadly to create a federal common law restriction on habeas corpus.[114]

Against this backdrop, the groundwork was laid for the "fundamental miscarriage of justice" exception. In *Sykes*, then-Associate Justice Rehnquist, writing for the majority, suggested that the role of the writ of habeas corpus was to prevent a miscarriage of justice:

> The "cause-and-prejudice" exception . . . will afford an adequate guarantee, we think, that [Florida's procedural default rule] will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice.[115]

Two 1982 opinions written by Justice O'Connor explored the concept of a "miscarriage of justice."[116] In *Engle v. Isaac*,[117] petitioner's trial counsel failed to object to an unconstitutional jury instruction regarding the burden of proof for self-defense and thus defaulted on this claim for purposes of his habeas petition.[118] Justice O'Connor suggested that the normal definition of "cause" might be expanded in special cases to correct a "fundamentally unjust incarceration,"[119] although she did not seem to think that *Engle* presented such a case.[120] She expanded upon the notion of habeas corpus as a device to correct an "unjust" incarceration in *United States v. Frady*,[121] decided on the same day as *Engle*. Frady's habeas petition claimed that his jury had been improperly instructed on the meaning of malice.[122] Writing for the majority, Justice O'Connor held that Frady failed to satisfy the "actual prejudice" prong of the *Sykes* standard because the jury would have convicted him even if the instruction had been correct.[123] However, before she began her "prejudice" inquiry, Justice O'Connor stated,

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114. *See* Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 465 (1980).

115. *Sykes*, 433 U.S. at 90-91.

116. *See* Ledewitz, *supra* note 12, at 390-92.

117. 456 U.S. 107 (1982).

118. *Id.* at 109, 124-29.

119. *Id.* at 135. However, Justice O'Connor soon backed away from this explanation of the "miscarriage of justice" exception, concluding that it involves a separate inquiry from that used to determine cause and prejudice. *See* Ledewitz, *supra* note 12, at 391.

120. *Engle*, 456 U.S. at 135.

121. 456 U.S. 152 (1982).

122. *Id.* at 157-58.

123. *Id.* at 172.

> At the outset, we emphasize that this would be a different case had Frady brought before the District Court affirmative evidence indicating that he had been convicted wrongly of a crime of which he was innocent. But Frady . . . did not assert at trial that he . . . beat [the victim] to death without malice.[124]

Later in the opinion, she tied Frady's lack of evidence of a wrongful conviction to the possibility of injustice:

> [T]he strong . . . evidence of malice in the record, coupled with Frady's utter failure to come forward with a colorable claim that he acted without malice, disposes of his contention . . . that reversal of his conviction . . . could be justified. *We perceive no risk of a fundamental miscarriage of justice in this case.*[125]

A trio of 1986 cases, *Kuhlmann v. Wilson*,[126] *Murray v. Carrier*,[127] and *Smith v. Murray*,[128] finished the work begun in *Engle* and *Frady* and firmly established the possibility of a "miscarriage of justice" as a second distinct exception to dismissal of a procedurally barred claim. The 1986 cases affirmed the basic habeas doctrine that had come out of *Stone*, *Sykes*, and their progeny: Judicial discretion, rather than statutory jurisdiction, should govern the scope of habeas corpus review.[129] When a prisoner submits a potentially meritorious

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124. *Id.* at 171.
125. *Id.* at 172 (emphasis added).
126. 477 U.S. 436 (1986).
127. 477 U.S. 478 (1986).
128. 477 U.S. 527 (1986).
129. *See* Patchel, *supra* note 11, at 1012-24. *See generally* Steiker, *supra* note 19 (arguing that the Court's entire post-*Stone* habeas corpus jurisprudence represents the use of equitable principles rather than statutory jurisdiction to define the scope of the writ).

Justice Blackmun expressed his dismay at the course that the Court's habeas jurisprudence had taken after *Brown*, singling out the 1986 cases:

> By the traditional understanding of habeas corpus, a "fundamental miscarriage of justice" occurs whenever a conviction or sentence is secured in violation of a federal constitutional right. Justice Holmes explained that the concern of a federal court in reviewing the validity of a conviction and death sentence on a writ of habeas corpus is "solely the question whether [the petitioner's] constitutional rights have been preserved."
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> In a trio of 1986 decisions [*Kuhlmann*, *Carrier*, and *Smith*], however, the Court ignored these traditional teachings and, out of a purported concern for state sovereignty, for the preservation of state resources, and for the finality of state court judgments, shifted the focus of federal habeas review of procedurally defaulted, successive, or abusive claims away from the preservation of constitutional rights to a fact-based inquiry into the petitioner's innocence or guilt.

but procedurally barred petition this discretion should be applied in an attempt to balance the competing equities with an increased regard for the systemic interests, particularly the finality of judgments.[130] The 1986 decisions refined this doctrine, at the same time giving shape to the somewhat nebulous systemic interests and, more importantly, establishing a measure of an individual's interest in preventing injustice: her innocence.

Prior to *Kuhlmann v. Wilson*,[131] the only way that a habeas petitioner could have the merits of his procedurally barred claims heard was to satisfy the *Sykes* cause-and-prejudice standard,[132] the "miscarriage of justice" in *Engle* and *Frady*[133] notwithstanding. The plurality decision in *Kuhlmann* posited a second possibility, stating that the "ends of justice"[134] allow a federal habeas court to entertain a successive petition "where the prisoner supplements his

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Sawyer v. Whitley, 505 U.S. 333, 352 (1992) (Blackmun, J., concurring in the judgment) (citations omitted).

130. The concern for finality was expressed by Justice O'Connor as follows:

> We . . . reject the suggestion that there is anything "fundamentally unfair" about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination. In view of the profound societal costs that attend the exercise of habeas jurisdiction, such exercise "carries a serious burden of justification."

Smith v. Murray, 477 U.S. 527, 539 (1986) (citation omitted). The emphasis on accuracy of verdicts reflects the influence of Judge Henry Friendly. *See infra* notes 259-60 and accompanying text. In fact, the quotation at the end of the preceding passage comes from Judge Friendly's influential law review article. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgements*, 38 U. CHI. L. REV. 142, 146 (1970).

131. 477 U.S. 436 (1986) (plurality opinion).

132. *See supra* notes 110-14 and accompanying text.

133. See *supra* notes 116-25 and accompanying text for further discussion of *Engle* and *Frady*.

134. Three years after *Sanders v. United States*, 373 U.S. 1 (1963), *see supra* note 97, Congress had amended 28 U.S.C. § 2244 to establish different rules for successive petitions for federal and state prisoners. Act of Nov. 2, 1966, Pub. L. 89-711, § 1, 80 Stat. 1104 (current version at 28 U.S.C. §§ 2244(b), (c) (1988)). The old § 2244 became the new § 2244(a) governing claims by federal prisoners, and retained the "ends of justice" language upon which the *Sanders* Court had relied. *Id.*; *see supra* note 97 and accompanying text. However, the new section governing claims by state prisoners, § 2244(b), did not include the "ends of justice" language, thus leaving open the question whether the "ends of justice" should be considered in review of state court convictions.

The *Kuhlmann* Court determined that the language of the statute revealed the intent of Congress to give federal courts the discretion to hear successive petitions from both federal and state prisoners, and stated that "as a means of identifying the rare case in which federal courts should exercise their discretion to hear a successive petition, we continue to rely on the reference in *Sanders* to the 'ends of justice.' " *Kuhlmann*, 477 U.S. at 451 (plurality opinion).

constitutional claim with a colorable showing of factual innocence."[135] Without citing *Kuhlmann*, the majority in *Murray v. Carrier*[136] affirmed the same basic reasoning, holding that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."[137] In so holding, the *Carrier* Court not only provided support for the dictum in *Kuhlmann*,[138] but also refined the concept of a "colorable showing of factual innocence," framing it in the context of the accuracy of the trial verdict.[139] *Smith v. Murray*[140] emphasized that the miscarriage of justice exception addressed "actual" as opposed to "legal" innocence.[141] In the context of the case, that meant that the petitioner could not obtain relief based on the improper admission of truthful evidence helpful to the prosecution because the petitioner was "actually" guilty, even though the evidence proving this had been improperly admitted.[142]

Subsequent decisions bear out the conclusion that the 1986 cases in fact established a second means by which a federal habeas court could reach the merits of a barred petition, but did little to clarify the inquiry. In *McCleskey v. Zant*,[143] the majority applied the *Carrier* standard in refusing to review the merits of McCleskey's barred petition, stating that the constitutional error of which the petitioner complained resulted in the admission of truthful inculpatory evidence and thus did not result in an unreliable guilty verdict.[144] *Sawyer v.*

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135. *Kuhlmann*, 477 U.S. at 454 (plurality opinion). This concept comes directly from the writings of Judge Friendly. *See* Friendly, *supra* note 130, at 142 ("My thesis is that, with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence.").

136. 477 U.S. 478 (1986).

137. *Id.* at 496.

138. Because the *Kuhlmann* Court affirmed the denial of Wilson's petition, the portion of Justice Powell's majority opinion that addressed the miscarriage of justice exception was technically dictum. *See Kuhlmann*, 477 U.S. at 461. In addition, only three other Justices (Burger, Rehnquist, O'Connor) joined the portion of the opinion in which Justice Powell set forth the exception, relegating that portion to the status of a plurality decision. *Id.* at 438.

139. *See* Steiker, *supra* note 19, at 336-42.

140. 477 U.S. 527 (1986).

141. *See id.* at 541-42.

142. *Id.* at 537-38.

143. 499 U.S. 467 (1991).

144. The majority opinion, written by Justice Kennedy, stated:

Whitley[145] presented the question of whether the exception could be applied to a death sentence.[146] Robert Wayne Sawyer alleged in his second habeas corpus petition not that he was innocent of the murder for which he had been sentenced to death, but that he was "innocent" of the death penalty itself, claiming that various constitutional errors had prevented the jury from hearing mitigating evidence on his behalf.[147] The six-justice majority[148] agreed with Sawyer's reasoning and found that a petitioner who claimed "actual innocence" of the death penalty could present evidence of this in an attempt to bypass a procedurally defaulted petition,[149] but affirmed the denial of Sawyer's petition on the ground that his evidentiary showing was insufficient.[150] In so ruling, the *Sawyer* majority used a seemingly more stringent standard than that in *Carrier*, stating that for a habeas petitioner to use the "miscarriage of justice" exception to challenge his death sentence, he must show by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty under state law.[151]

> Federal courts retain the authority to issue the writ of habeas corpus in a further, narrow class of cases despite a petitioner's failure to show cause for a procedural default. These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice.
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> . . . [The miscarriage of justice] exception is of no avail to McCleskey. The [alleged] violation . . . resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination. . . . McCleskey cannot demonstrate that the . . . violation caused the conviction of an innocent person.

Id. at 494, 502 (citations omitted). Note that the majority's focus was not on whether the jury would have acquitted McCleskey, but rather, if the jury would have been correct in so doing. It was McCleskey's *actual* innocence, and not his legal innocence, that mattered. See Ledewitz, *supra* note 12, at 392-98 for a further discussion of the significance of "actual" innocence.

145. 505 U.S. 333 (1992).

146. *Id.* at 335.

147. *Id.* at 337-38.

148. All nine Justices agreed in the judgment, but Justices Blackmun, O'Connor and Stevens refused to join the majority opinion. *Id.* at 335.

149. *See id.* at 340-42.

150. *Id.* at 349-51.

151. *Id.* at 336. This finding had two implications in Sawyer's case. First, it presented him with a higher standard of evidence than if he were seeking habeas review of his conviction under *Carrier*. Second, and perhaps more importantly, it doomed his type of claim from the beginning. Sawyer alleged that constitutional error had prevented the jury from hearing mitigating evidence in his favor. *Id.* at 336. However, to find Sawyer *eligible* for the death penalty under the Louisiana statute, the jury needed only to find the

Only a year after confronting the difficult problem of what it means to be "actually innocent" of the death penalty, the Court was faced with *Herrera v. Collins*,[152] which raised an even more troubling question. Without alleging constitutional error at his trial or in the appellate process, Leonel Herrera filed a second habeas corpus petition accompanied by newly discovered evidence of his innocence and claimed that his impending execution would thus violate the Eighth and Fourteenth Amendments because he was actually innocent.[153] The Court denied Herrera's petition, stating that his claims were not eligible for habeas corpus relief.[154] In so ruling, the

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existence of one or more statutory aggravating factors, and then was required to balance aggravating against mitigating factors to guide its discretion whether to impose the death penalty. *See id.* at 349-50. As such, even if Sawyer could have proved his claims with 100% certainty, the jury in Louisiana, although it might have been less likely to impose the death penalty, could still have found Sawyer eligible for the death penalty on the basis of the aggravating factors. Thus, Sawyer was not "actually innocent" under the majority's formulation. *See id.* at 349-50. Concurring in the judgment, Justices Blackmun, O'Connor, and Stevens took issue with the majority's formula for precisely these reasons. *See id.* at 356-57 (Blackmun, J., concurring in the judgment); *id.* at 365-73 (Stevens, J., concurring in the judgment).

152. 113 S. Ct. 853 (1993).

153. *Id.* at 856-57. Herrera was convicted for the murders of two police officers. *Id.* at 857. His newly discovered evidence consisted of the affidavits of an attorney who had represented Herrera's brother Raul, and one of Raul's former cellmates. *Id.* at 858. Both men claimed that Raul (who died two years after Herrera's trial) told them that he committed the killings. *Id.* Although deciding the case on other grounds, the Court gave little credence to the affidavits, citing particularly Herrera's own confession to the two murders, factual inconsistencies between the affidavits, their "eleventh-hour" nature, and the convenient death of the alleged true killer. *Id.* at 869.

154. *Id.* at 859. Herrera's claim was, in substance, a claim for relief based on newly discovered evidence, and in the words of the Court, "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Id.* at 860. However, the majority opinion, written by Chief Justice Rehnquist, holds out a tantalizing possibility for capital defendants:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But . . . the threshold showing . . . would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold.

Id. at 869. Naturally, with dicta this intriguing the *Herrera* case is the subject of numerous writings, with correspondingly provocative titles. *See, e.g.*, Vivian Berger, Herrera v. Collins*: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943 (1994); Kathleen Cava Boyd, Note, *The Paradox of "Actual Innocence" in Federal Habeas Corpus After* Herrera v. Collins, 72 N.C. L. REV. 479 (1994); Tara L. Swafford, Note, *Responding to* Herrera v. Collins*: Ensuring That Innocents Are Not Executed*, 45 CASE W. RES. L. REV. 603 (1995); Phaedra Tanner, Note, Herrera v. Collins*: Assuming the Constitution Prohibits the Execution of an Innocent Person, Is the Needle Worth the Search?*, 1994 UTAH L. REV. 1283.

majority noted that the "fundamental miscarriage of justice" exception was inapplicable to Herrera's claim, stating that "a claim of 'actual innocence' is not itself a constitutional claim [that may be addressed by a habeas court], but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."[155]

It is rather ironic that, although *Herrera*, *Sawyer*, *McCleskey*, and the 1986 trio of cases defined and shaped the scope of a second exception to the procedural default rules, they did so while restricting the availability of habeas relief in general.[156] Moreover, the Court denied relief in each case because the petitioners did not make sufficient evidentiary showings of their innocence,[157] which left the lower courts without an example of a case in which the Supreme Court had ruled that use of the "miscarriage of justice" exception was proper.

Schlup's petition, therefore, confronted the Court with a dilemma: What does it mean to say that a convicted defendant is "probably innocent," and more importantly, how does a habeas petitioner prove such an allegation? The Eighth Circuit used the *Sawyer v. Whitley*[158] test, which required "clear and convincing" evidence of innocence,[159] and decided that Schlup did not meet this standard.[160] Schlup claimed that the Eighth Circuit had erred,[161] and instead should have used the standard from *Kuhlmann v. Wilson*.[162] In deciding the case, the majority undertook a three-part inquiry.

First, the Court took pains to distinguish the case at hand from *Herrera*,[163] finding two important differences. Schlup's claim of

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155. *Herrera*, 113 S. Ct. at 862.

156. *See, e.g.*, Margolis, *supra* note 11, at 567-79; Patchel, *supra* note 11, at 968-82; Steiker, *supra* note 19, at 320-69.

157. *See Herrera*, 113 S. Ct. at 869; Sawyer v. Whitley, 505 U.S. 333, 348-49 (1992); McCleskey v. Zant, 499 U.S. 467, 502 (1991); Smith v. Murray, 477 U.S. 527, 537-38 (1986); Murray v. Carrier, 477 U.S. 478, 496-97 (1986); Kuhlmann v. Wilson, 477 U.S. 436, 454-55 (1986).

158. 505 U.S. 333 (1992).

159. *Id.* at 336; *see supra* notes 145-51 and accompanying text.

160. Schlup v. Delo, 11 F.3d 738, 744 (1993), *vacated*, 115 S. Ct. 851 (1995).

161. Brief for Petitioner at 21, Schlup v. Delo, 115 S. Ct. 851 (1995) (No. 93-7901).

162. *See* Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) ("[W]e conclude that the 'ends of justice' require federal courts to entertain [procedurally barred] petitions . . . where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."); *supra* notes 131-35 and accompanying text.

163. The Court's denial of Leonel Herrera's habeas corpus petition set off a wave of uproar. *See supra* note 154. Presumably, by making absolutely clear that its decision in

innocence, unlike Herrera's, was completely independent of his claim for relief.[164] Quoting *Herrera*, the majority stated that Schlup's claim of innocence was "not itself a constitutional claim, but a gateway through which [Schlup] must pass to have his otherwise barred constitutional claim considered on the merits."[165] More importantly, the underlying assumptions of the two petitions were completely different. Herrera had stated that, even if his trial had been free of constitutional error, his execution would be unconstitutional because of his innocence.[166] Schlup, on the other hand, asserted that his trial had been infected with constitutional error,[167] and, in effect, pointed to his alleged innocence as *evidence* of this.[168] According to the majority, Schlup's evidence of innocence should therefore carry less of a burden than Herrera's:

Schlup was based on a completely different issue than the constitutional quandary presented by *Herrera*, i.e., whether the Constitution prevents the execution of an innocent man, the majority believed it could avoid further controversy. *But see infra* note 169 (discussing the majority's treatment of *Herrera*-type claims).

164. *Schlup*, 115 S. Ct. at 851. Technically, Herrera did not ask for relief based solely on his innocence, but brought his evidence of innocence as proof of his constitutional claim—that the Texas state court had violated his constitutional rights by condemning him to death when he was innocent. *Herrera*, 113 S. Ct. at 859. The *Herrera* majority, however, did not address Herrera's claim in this procedural posture, but instead looked beyond the semantics of the claim and addressed it as a unified claim for relief based on newly discovered evidence, stating,

> Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state proceeding.
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> . . . .
>
> Petitioner . . . argues that he is entitled to habeas relief because newly discovered evidence shows that his conviction is factually incorrect. The fundamental miscarriage of justice exception is available "only where the prisoner *supplements* his constitutional claim with a colorable showing of factual innocence."

Id. at 860, 862 (quoting Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986)). Justice O'Connor agreed with the majority's assessment:

> [T]he issue . . . is not whether a State can execute the innocent. It is . . . whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, . . . notwithstanding his failure to demonstrate that constitutional error infected his trial.

Id. at 870 (O'Connor, J. concurring).

165. *Schlup*, 115 S. Ct. at 861 (quoting Herrera v. Collins, 113 S.Ct. 853, 862 (1993)).

166. *Id.*

167. The constitutional error asserted was the ineffectiveness of his trial counsel, which Schlup alleged had deprived him of his Sixth Amendment right to counsel. *See id.* at 860.

168. *See id.* at 861.

> If there were no question about the fairness of the criminal trial, a *Herrera*-type claim[169] would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish Schlup's innocence. On the other hand, if the habeas court were merely convinced that those new facts raised sufficient doubt about Schlup's guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error, Schlup's threshold showing of innocence would justify a review of the merits of the constitutional claims.[170]

Having eliminated innocence-only claims from the picture, the Court next set out to determine the proper standard to govern the miscarriage of justice inquiry. The majority began with a brief history of habeas corpus jurisprudence, detailing the expansion of the scope of habeas corpus review, the consequent threat to "the finality of state court judgments and to principles of comity and federalism,"[171] and the response of Congress and the courts in the form of statutory[172] and procedural barriers[173] to consideration of multiple petitions.[174] The Court concluded that the end result of this response was "the adoption in habeas corpus of a 'qualified application of the doctrine of res judicata.' "[175]

However, the majority noted that "habeas corpus is, at its core, an equitable remedy,"[176] and that, as such, the Court had consistently engaged in an equitable inquiry, balancing the individual's interest in a trial free of constitutional error against the systemic interests in finality, comity, and conservation of judicial resources, to determine the applicability of habeas corpus review.[177] In cases like

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169. The majority's eagerness to refer to "*Herrera*-type" claims as such is interesting, in one respect because "*Herrera*-type" claims were never formally recognized in *Herrera*; the Court merely assumed *arguendo* that such a claim was cognizable. Herrera v. Collins, 113 S. Ct. 856, 869-70 (1993). Also, Justice Stevens, who wrote the majority opinion in *Schlup*, joined Justice Blackmun's dissent in *Herrera*. *Id.* at 876-84 (Blackmun, J. dissenting). It is conceivable that Justice Stevens made conspicuous mention of "*Herrera*-type" claims in *Schlup* in order to lend such claims some legitimacy beyond their mere theoretical recognition in *Herrera*.

170. *Schlup*, 115 S. Ct. at 862.

171. *Id.*

172. *See supra* notes 91-92 and accompanying text.

173. See *supra* notes 104-55 and accompanying text for a discussion of these barriers.

174. *Schlup*, 115 S. Ct. at 862.

175. *Id.* at 863 (quoting McCleskey v. Zant, 499 U.S. 467, 486 (1989) (quoting S. REP. No. 1797, 89th Cong., 2d Sess. 2 (1966))).

176. *Id.*

177. *Id.* at 863-64; *see also supra* notes 108-09, 114, 129-30 and accompanying text (citing examples).

Schlup's, the majority explained, the balance of equities favors a less stringent standard than *Sawyer*. On the systemic side, the Court reasoned that claims of innocence are much more rare than claims of an improper sentence, and thus would pose less of a threat to judicial resources and to principles of finality and comity.[178] On the individual side, the Court pointed out the greater individual interest of a person who is entirely innocent of the crime as opposed to one who claims that his sentence is too severe.[179] Given the smaller threat

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178. *Schlup*, 115 S. Ct. at 865-66. In the words of the Court,

> Though challenges to the propriety of imposing a sentence of death are routinely asserted in capital cases, experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare.... Even under the pre-*Sawyer* regime, "in virtually every case, the allegation of actual innocence has been summarily rejected." The threat to judicial resources, finality, and comity posed by claims of actual innocence is thus significantly less than that posed by claims relating only to sentencing.

Id. (citation omitted). In this passage, the Court defines the systemic interests at stake in terms of the relative frequency of a given claim, much in the same way it has equated the individual interests with actual innocence. *See id.* at 864 ("[To ensure that] the [miscarriage of justice] exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence."); *cf.* Withrow v. Williams, 113 S. Ct. 1745, 1755 (1993) ("It is not reasonable ... to expect [instances in which a federal court overturns a state court conviction] to be frequent enough to amount to a substantial cost of reviewing *Miranda* claims on habeas or to raise federal-state tensions to an appreciable degree."). The intended effect seems to be a system designed to allow as little review as possible, imposing a lower standard for claims that are rarely brought and a higher standard for more frequent claims.

179. *Schlup*, 115 S. Ct. at 866. There are two flaws in the Court's logic on this point. First, the majority seems to misread *Sawyer*, stating that a less severe burden of proof should be imposed on "a habeas petitioner alleging a fundamental miscarriage of justice than on one alleging that his sentence is too severe," and thus assuming that a situation in which a prisoner is the victim of an inaccurate sentencing determination does not implicate a "fundamental miscarriage of justice." *Id.* However, the *Sawyer* Court ruled that claims of "innocence" of the death penalty would be evaluated as to whether they implicated a miscarriage of justice:

> [I]t cannot be said that a reasonable juror would not have found both of the aggravating factors which make [Sawyer] eligible for the death penalty. Therefore,... petitioner has not shown that there would be a *fundamental miscarriage of justice* for the Court to fail to reexamine the merits of this successive claim.

Sawyer v. Whitley, 505 U.S. 333, 350 (1992) (emphasis added). According to the *Sawyer* Court, it seems, an incorrect death sentence is a "fundamental miscarriage of justice." To read *Sawyer* otherwise one would need to supply a reason for the Court to allow an exception to the procedural default rules without a showing either of cause and prejudice or of a miscarriage of justice.

Second, it is certainly arguable that the degree of injustice is indistinguishable between executing a prisoner who is innocent of the crime and executing a prisoner who is "merely" innocent of the penalty. In both cases, the judicial system has put someone to death who did not "deserve" to die.

to systemic resources and the greater individual interests at stake, the Court found that the *Carrier* standard,[180] and not the *Sawyer* standard, "properly strikes [the] balance when the claimed injustice is that constitutional error has resulted in the conviction of one who is actually innocent of the crime."[181]

In the third step of its analysis, the Court determined the proper burden of evidence for Schlup to meet on remand.[182] The pertinent language of *Carrier* states: "[I]n an extraordinary case, *where a constitutional violation has probably resulted in the conviction of one who is actually innocent,* a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."[183] However, the *Carrier* Court stopped short of providing a test to determine when such a case has occurred, concluding merely that Carrier's was not "extraordinary" enough.[184] Drawing from *Carrier*, *Sawyer*, and even *In re Winship*,[185] the *Schlup* Court established the threshold showing that a defendant seeking the use of the exception would have to make, ruling that

> [t]o establish the requisite probability [that is, that constitutional error probably has resulted in the conviction of someone who is actually innocent], the petitioner must show that it is more likely than not that no reasonable juror

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180. Although Schlup claimed that the proper standard in his case was the *Kuhlmann* standard, the Court seemed to find that *Carrier* represented a further elaboration of the *Kuhlmann* standard:

> In addition to linking miscarriages of justice to innocence, *Carrier*, and *Kuhlmann* also expressed the standard of proof that should govern consideration of those claims. In *Carrier*, for example, the Court stated that the petitioner must show that the constitutional error "probably" resulted in the conviction of one who was actually innocent. The *Kuhlmann* plurality, though using the term "colorable claim of factual innocence," elaborated that the petitioner would be required to establish, by a " 'fair probability,' " that " 'the trier of the facts would have entertained a reasonable doubt of his guilt.' "

Schlup, 115 S. Ct. at 864 (quoting Kuhlmann v. Wilson, 477 U.S. 436, 454 n.17 (1986) (quoting Friendly, *supra* note 130, at 160)).

181. *Id.* at 865.

182. *See id.* at 867-69. For a discussion of the disposition of the case on remand, see *infra* note 186.

183. Murray v. Carrier, 477 U.S. 478, 496 (1986) (emphasis added).

184. *See Schlup*, 115 S. Ct. at 873 (Rehnquist, C.J., dissenting) ("We have never until today had to . . . flesh out the standard of 'actual innocence' in the context of a habeas petitioner claiming innocence of the crime. Thus, I agree [with the majority] that the question of what threshold standard should govern is an open one.").

185. 397 U.S. 358, 361-63 (1970) (striking down a New York criminal statute allowing a conviction if the prosecution could prove guilt with a preponderance of the evidence; stating that the prosecutorial burden of proof in all criminal cases must be guilt beyond a reasonable doubt).

> would have convicted him in the light of the new evidence.[186]

The majority justified this formulation for the same reasons it had chosen the *Carrier* standard: to choose a burden sufficiently high to keep the exception "rare," but not as rare as in *Sawyer*.[187] They did so by choosing "more likely than not," which denotes a stronger showing than that needed to establish prejudice,[188] but is not as stringent as the *Sawyer* standard, which requires "clear and convincing evidence" of the petitioner's innocence.[189]

The Court added several caveats to this formulation: The miscarriage of justice exception, it stated, is tied to the petitioner's *actual*, not *legal*, innocence.[190] As such, the reviewing court is not limited to evidence that would be admissible at trial, but also may consider probative evidence illegally admitted or excluded, as well as evidence unavailable at trial.[191] However, the Court cautioned, the standard does not address the district court's independent judgment as to whether a reasonable doubt exists, but its assessment of what a reasonable jury would likely decide.[192]

Finally, the majority distinguished its test from the test to evaluate the constitutional sufficiency of evidence found in *Jackson v. Virginia*,[193] citing two main differences: First, the *Jackson* test is

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186. *Schlup*, 115 S. Ct. at 867. On remand, the district court ruled that Schlup's new evidence of innocence met the standard articulated by the Supreme Court, and granted him a hearing on the merits of his habeas petition, which was set for January 26, 1996. Schlup v. Delo, No. 4:92CV443, 1995 WL 793315 at *7-8 (E.D. Mo. Dec. 8, 1995). As of this writing, the district court has not handed down a ruling from the January hearing.

187. *Schlup*, 115 S. Ct. at 867.

188. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 695 (1984) (holding that test for whether deficient performance by counsel has prejudiced defendant's case is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

189. Sawyer v. Whitley, 505 U.S. 333, 336 (1992).

190. *See Schlup*, 115 S. Ct. at 867 ("The *Carrier* standard is intended to focus the inquiry on actual innocence.").

191. *Id.* Note that this emphasis on actual innocence and the corresponding effect upon the evidence a reviewing court may consider come directly from the writings of Judge Friendly. *See* Friendly, *supra* note 130, at 160.

192. *Schlup*, 115 S. Ct. at 867-68. At this point in the opinion, the majority rephrased the test in terms of a reasonable doubt, presenting the following: "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* at 868. This Note suggests that the majority's choice of words at this juncture may have had unforeseen repurcussions. *See infra* notes 218-21 and accompanying text.

193. 443 U.S. 307 (1978). In *Jackson*, the petitioner had claimed that the evidence was insufficient to convict him. *Id.* at 312. In denying his petition, the Court formulated a test

used to determine the sufficiency of the evidence used to convict the petitioner, and as such is limited to record evidence, unlike the *Schlup* test.[194] The second and more important difference between the *Jackson* and *Schlup* tests is the nature of the inquiry involved.[195] *Jackson* tests the constitutional *power* of the jury to reach a guilty verdict, hence its use of the word "could," while the *Schlup* test is probabilistic, focusing on the likely behavior of the jury; the use of the word "would" and the phrase "more likely than not" reflect this.[196] The Court turned to the Eighth Circuit's application of *Sawyer* to illustrate the difference. The Eighth Circuit held that Schlup did not satisfy the *Sawyer* test because the trial record contained sufficient evidence to support the jury's guilty verdict.[197] However, the Eighth Circuit made this ruling after assuming *arguendo* that all of Schlup's evidence—sworn statements of eyewitnesses that he was not involved in the crime, *plus* evidence that cast serious doubt on whether there had been sufficient time for Schlup to commit the crime—was true.[198] If a jury had found this to be the case, Justice Stevens asserted, it is doubtful that they would have found proof enough to convict beyond a reasonable doubt; the Eighth Circuit thus misapplied *Sawyer* by using a "power to convict" test to evaluate a "likelihood of conviction" standard.[199]

Justice O'Connor added a short concurrence to "explain, in light of the dissenting opinions, what [she understood] the court to decide and what it [did] not."[200] She first addressed Chief Justice Rehnquist's concerns about the feasibility of the majority's test,[201] re-explaining the placement of the *Schlup* threshold showing of evidence in the hierarchy between "prejudice" and *Sawyer*'s "clear

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for the constitutional sufficiency of evidence to convict, stating that a petitioner "is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof beyond a reasonable doubt." *Id.* at 324. Note the close similarity between this test and the *Schlup* majority's reformulation of their test in terms of a reasonable doubt. *See supra* note 192. See *infra* notes 210-12 and accompanying text for a discussion of the Chief Justice's reaction to this similarity.

194. *Schlup*, 115 S. Ct. at 868.

195. *Id.*

196. Although this is an appealing theoretical distinction, the practical distinction between the two standards may be less than the majority is willing to admit. See *infra* notes 241-49 for a discussion of this issue.

197. *See* Schlup v. Delo, 11 F.3d 738, 741 (8th Cir. 1993), *vacated*, 115 S. Ct. 851 (1995).

198. *Id.*

199. *See Schlup*, 115 S. Ct. at 869.

200. *Id.* at 869 (O'Connor, J., concurring).

201. *See id.* at 873-74 (Rehnquist, C.J., dissenting). See *infra* notes 207-23 and accompanying text for further discussion of the Chief Justice's dissent.

and convincing" test.[202] However, she phrased the *Schlup* test in the negative, stating that a petitioner will be *denied* the benefit of the exception if "the district court believes it more likely than not that there is any juror who, acting reasonably, would have found the petitioner guilty beyond a reasonable doubt."[203] She also reaffirmed the probability/power distinction between the *Schlup* and *Jackson* tests.[204] Next, Justice O'Connor turned to Justice Scalia's contention that, under 28 U.S.C. § 2244, the question of whether to address a successive petition should be left to the discretion of the district court judge.[205] She responded by pointing out that the district court had based its decision on an erroneous view of the law, thus committing a "paradigmatic" abuse of discretion and obviating the need to pass on the question of discretion.[206]

The Chief Justice dissented to voice his concerns regarding the inscrutability of the majority's standard and to express his own views regarding the proper balance of the equities for *Schlup*-type claims.[207] He stated that while the standard "more likely than not" is a traditional charge to a jury, a finding that "no reasonable juror would have convicted in the light of the new evidence" is a conclusion of law.[208] According to the Chief Justice, this "hybrid" standard would prove to be a source of confusion for the lower federal courts.[209]

Chief Justice Rehnquist also commented upon the similarity of the majority's standard to the *Jackson* standard, asserting that the

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202. *Schlup*, 115 S. Ct. at 870 (O'Connor, J., concurring).

203. *Id.* (O'Connor, J., concurring). Justice O'Connor's reformulation of the *Schlup* standard is also extremely close to the *Jackson* standard, as the Chief Justice points out in his dissent. *See id.* at 873 (Rehnquist, C.J., dissenting) ("Under *Jackson*, 'the relevant question is whether . . . *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

204. *Id.* at 870 (O'Connor, J., concurring).

205. *See id.* at 875-76 (Scalia, J., dissenting). See *infra* notes 224-39 and accompanying text for further discussion of Justice Scalia's dissent.

206. *Schlup*, 115 S. Ct. at 870 (O'Connor, J., concurring) (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990)). It appears, however, that Justice O'Connor missed the point of Justice Scalia's statutory argument. According to Justice Scalia, the district court was under no duty to use either *Carrier* or *Sawyer* and thus cannot be faulted under an abuse-of-discretion analysis for using its discretion to choose either standard. *See id.* at 877-78 (Scalia, J., dissenting); *see also infra* notes 237-39 and accompanying text (responding to Justice Scalia's statutory concerns).

207. *See Schlup*, 115 S. Ct. at 873-74 (Rehnquist, C.J., dissenting). Justices Kennedy and Thomas joined this dissent. *Id.* at 873 (Rehnquist, C.J., dissenting).

208. *Id.* (Rehnquist, C.J., dissenting).

209. *Id.* (Rehnquist, C.J., dissenting).

only difference between the two standards is as to the body of evidence that may be evaluated.[210] Given the similarity between the two standards, he felt that the *Jackson* standard, modified as to the body of evidence to be considered, more faithfully reflected the theory behind the *Carrier* holding.[211] However, he stated that given the choice between the *Carrier* standard and *Sawyer*, he would choose *Sawyer*, which would provide a uniform test for both guilt- and sentence-related claims and which, in his opinion, more faithfully struck the proper balance between systemic and individual interests.[212]

The Chief Justice's concerns, although understandable, are arguably unjustified. Although he referred to the majority's standard as a confusing hybrid of questions of law and fact, he failed to address the fact that the *Sawyer* standard to which he gave his approval also represents an admixture of traditional charges of law and fact.[213] His misgivings regarding the *Jackson* standard are also misplaced. Although he astutely pointed out the cosmetic similarity between the two standards,[214] he did not acknowledge the larger theoretical differences between them. The Chief Justice claimed, correctly, that under either *Jackson* or *Schlup* the petitioner would be denied relief

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210. *Id.* at 873-74 (Rehnquist, C.J., dissenting).

211. *Id.* at 874 (Rehnquist, C.J., dissenting).

212. *Id.* (Rehnquist, C.J., dissenting).

213. As the majority pointed out,

> [The *Carrier* standard] is no more a mixing of apples and oranges than is the standard adopted by the Court in *Sawyer*. Though it is true that " '[m]ore likely than not' " is a "quintessential charge to a finder of fact," that is equally true of the "clear and convincing evidence" component of the *Sawyer* formulation . . . .
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> Nor do we accept THE CHIEF JUSTICE's description of the *Carrier* standard as a "hybrid." Finders of fact are often called upon to make predictions about the likely actions of hypothetical "reasonable" actors. Thus the application [in *Schlup*] is neither illogical nor unusual.

Id. at 868 n.48 (citations omitted).

214. The Chief Justice wrote: "[A]s the Court acknowledges, a petitioner making a claim of actual innocence under *Carrier* falls short of satisfying his burden if the reviewing court determines that *any* juror reasonably would have found petitioner guilty of the crime." *Schlup*, 115 S. Ct. at 873 (Rehnquist, C.J., dissenting) (citing *Schlup*, 115 S. Ct. at 870 (O'Connor, J., concurring); Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (containing similar language to describe the test for constitutional sufficiency of evidence to convict)).

The language of the two standards is indeed very similar. The *Schlup* majority states that "the petitioner must show that it is more likely than not that no reasonable juror *would* have convicted him in the light of the new evidence," *Schlup*, 115 S. Ct. at 867 (emphasis added), while the equivalent language from *Jackson* states that the petitioner "is entitled to habeas corpus relief if it is found that . . . no rational trier of fact *could* have found proof of guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 324 (emphasis added).

if the reviewing court found that any juror *would* have found guilt beyond a reasonable doubt.[215] However, despite the cosmetic similarity between the two standards, the reason under each for denial of relief is quite different. Under *Jackson*, this finding forecloses review of a petitioner's claim because a finder of fact that *would* have found evidence of the defendant's guilt beyond a reasonable doubt obviously had the constitutional *power* to do so, thus satisfying the *Jackson* test.[216] Under *Schlup*, if a juror *would* have found petitioner guilty, it is axiomatic that petitioner's evidence has failed to meet the necessary standard of probability for a jury to find him not guilty.[217]

The apparent confusion in the Chief Justice's dissent may stem from the "no juror" language in the majority's reformulation of the test, which states that "a petitioner does not meet the threshold requirement unless he persuades the district court that . . . *no juror*, acting reasonably, would have voted to find him not guilty beyond a reasonable doubt."[218] It is debatable, however, whether the majority intended a strictly literal reading of the words "no juror."[219] As one recent commentator pointed out, reading the test literally means that a petitioner will be denied relief if the lower court decides that one juror out of one hundred would find the petitioner guilty.[220] However, *Schlup* purports to establish "more likely than not" as the standard of review; it would be nonsensical to deny relief under this standard to a petitioner whom ninety-nine out of one hundred jurors would acquit. Even more nonsensically, the "no juror" language suggests that more than one juror must be considered, forcing a reviewing judge to invent a host of fictional jurors and speculate as to their individual hypothetical decisions. A reading more consistent with the majority's stated intent would substitute "jury" for "juror" at

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215. *Schlup*, 115 S. Ct. at 873 (Rehnquist, C.J., dissenting).

216. *See* Jackson v. Virginia, 443 U.S. 307, 319 (1979).

217. *See Schlup*, 115 S. Ct. at 868. However, this Note posits that while theoretical differences between the *Schlup* and *Jackson* standards exist, as the above example shows, their practical application may lead to much the same results. *See infra* notes 241-49 and accompanying text.

218. *Schlup*, 115 S. Ct. at 868 (emphasis added).

219. In the quoted passage, Justice Stevens used the word "juror" to emphasize that in evaluating petitions under the *Schlup* standard, a district court should base its ruling on the likely behavior of *jurors*, and not on its own opinion as to a petitioner's guilt or innocence. *See supra* note 192 and accompanying text.

220. *See* Joseph M. Ditkoff, Recent Development, *The Ever More Complicated "Actual Innocence" Gateway to Habeas Review:* Schlup v. Delo, *115 S. Ct. 851 (1995)*, 18 HARV. J.L. & PUB. POL'Y 889, 898 (1995).

the appropriate place in the test, thus inviting the reviewing judge to consider the likely behavior of the jury as a whole and avoiding the logical inconsistency described above.[221]

The Chief Justice's preference for the *Sawyer* standard is also difficult to defend. The majority states, fairly convincingly, that there exists in a *Schlup*-type claim both a greater individual interest[222] and a lesser state interest[223] than in a *Sawyer*-type claim. One need only accept one of these credible assertions to come to the conclusion that the balance of equities in *Schlup* is weighted more in the favor of the petitioner than the corresponding balance of equities in *Sawyer,* and therefore that the *Sawyer* test is inappropriate when a petitioner presents a claim bolstered by evidence that she is innocent of the crime.

Justice Scalia's response to the majority was intriguing. He read the majority opinion as requiring a federal habeas court to entertain an otherwise defaulted petition if the petitioner meets the *Schlup/Carrier* standard.[224] Calling attention to the section of the United States Code governing subsequent petitions,[225] he stated that the majority's analysis failed to take into account the language of the statute, which he contended was controlling in this situation.[226]

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221. Unfortunately, at least one court has already relied on the "no juror" language to deny habeas review under *Schlup.* In Fairchild v. Norris, 51 F.3d 129 (8th Cir. 1995), the Eighth Circuit affirmed the denial of Barry Lee Fairchild's petition, stating, "We hold . . . that *at least one juror,* acting reasonably and properly instructed, would have found petitioner [guilty]." *Id.* at 130-31 (emphasis added). This statement begs the question as to how many jurors the court believed would have acquitted Fairchild.

222. *See supra* note 179 and accompanying text.

223. *See supra* note 178 and accompanying text.

224. *Schlup,* 115 S. Ct. at 876-77 (Scalia, J., dissenting). Specifically, he stated:

> [The *Kuhlmann* holding] contains two complementary propositions . . . . The second is that a habeas court *must* hear a claim of actual innocence and reach the merits of the petition if the claim is sufficiently persuasive. . . . It is the Court's prerogative to adopt that dictum today, but to adopt it without analysis, as though it were binding precedent, will not do.

Id. (Scalia, J., dissenting).

225. 28 U.S.C. § 2244(b) (1988). This section states in pertinent part:

> [A] subsequent application for a writ of habeas corpus . . . need not be entertained by a court of the United States . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

Id.

226. *Schlup,* 115 S. Ct. at 875. The dissent was written with Justice Scalia's usual acerbic wit:

Justice Scalia also found fault with the majority for basing the authority to circumscribe the district courts' discretion on the *Kuhlmann* holding, which, he observed, had been announced by a mere plurality and as such had no precedential value.[227] Moreover, he contended, the language from *Kuhlmann* implying that a federal court is required to hear a successive petition upon a threshold showing of evidence was not only pure dictum,[228] but was indefensible when read against the language of the statute, which states specifically that a court "need not" hear successive petitions, except as provided by statute.[229] Justice Scalia also objected to the effect of the *Schlup* holding, which he felt crossed the line from guiding the discretion of the lower federal courts "to eliminat[ing] it entirely, dividing the entire universe of successive and abusive petitions into those that *must not* be entertained . . . and those that *must* be entertained [thus converting] a statute redolent of permissiveness . . . into a rigid command."[230] Finally, he addressed the majority's

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> The reader of today's opinion will be unencumbered with knowledge of [28 U.S.C. § 2244], since it is not there discussed or quoted, and indeed is only cited *en passant.* Rather than asking what the statute says, or even what we have said the statute says, the Court asks only what is the fairest standard to apply, and answers that question by looking to the various semi-consistent standards articulated in our most recent decisions—minutely parsing phrases, and seeking shades of meaning in the interstices of words, as though a discursive judicial opinion were a statute. I would proceed differently.

Id. at 874-75 (Scalia, J., dissenting) (citation omitted). One commentator has proposed that this biting sarcasm is the product of what he calls the "Frankfurterization" of Justice Scalia. *See* Erwin Chemerinsky, *The Crowded Center*, A.B.A. J., Oct. 1994, at 78:

> In some ways, Scalia appears to be following the pattern of Justice Felix Frankfurter, . . . like Scalia a former law professor, [who] went on to the Court convinced he was smarter than many of his colleagues and had the "right" answers to many constitutional questions. Frankfurter became increasingly frustrated when his brethren would not go along with his views, and his rhetoric became increasingly strident.

Id. at 80 (citation omitted).

227. *Schlup*, 115 S. Ct. at 877 (Scalia, J., dissenting). See *supra* note 138 for further discussion of the precedential weight of *Kuhlmann.*

228. *See id.* (Scalia, J., dissenting).

229. *See* 28 U.S.C. § 2244(b) (1988); *see also supra* note 225 (quoting pertinent section of statute).

230. *Schlup*, 115 S. Ct. at 877 (Scalia, J., dissenting) (footnote omitted). However, Justice Scalia's outrage at this effect is seemingly inconsistent with his support for the Court's per curiam decision in Stokes v. Delo, 495 U.S. 320 (1990) (per curiam). In *Stokes*, the Court ruled that granting a stay of execution in order to address claims in a clearly abusive petition constituted an "abuse of discretion," and vacated the stay. *Id.* at 322. Thus, the Court seemed to hold that addressing an abusive petition, absent either "cause and prejudice" or a factual innocence exception, is *always* an abuse of discretion, creating the sort of "rigid command" that is at the heart of Justice Scalia's dissatisfaction with the

contention that federal habeas corpus jurisprudence has historically been governed by equitable principles,[231] reading two possible meanings into this assertion: If the majority's commitment to equitable principles referred to a process of filling gaps and ambiguities in the habeas statute, he stated, then the majority should have explained why the statute did not apply to the case at hand.[232] On the other hand, he warned, if the majority's reasoning meant that it had relegated the statute to the status of an "equitable consideration," their decision would be unconstitutional, as the federal courts have no inherent power to issue the writ.[233] Thus, Justice Scalia concluded, the majority could not avoid confronting the statute, and as he found no abuse of discretion in the record, the decision of the Eighth Circuit should have been affirmed.[234]

Although the reasoning of Justice Scalia's statutory argument is sound, his dissent appears to be based on a fundamental misreading of the majority opinion. At no point in *Schlup* did the majority state that a habeas court *must* reach the merits of a successive petition if the petitioner makes the threshold showing. On the contrary, the majority asserted that it is this threshold showing that *allows* the habeas court to reach the merits.[235] Justice Scalia's dissent seems to argue that the Court's reversal and remand represents the proposition

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holding in *Schlup*.

231. *See Schlup*, 115 S. Ct. at 863 n.35 ("This Court has repeatedly noted the interplay between statutory language and judicially-managed equitable considerations in the development of habeas corpus jurisprudence.").

232. *See id.* at 878 (Scalia, J., dissenting). Again, Justice Scalia's assertion of error on the part of the majority appears to conflict with his stance on an earlier issue. *See supra* note 230. Although he scoffs at the majority's homage to traditional equitable principles, just a few years earlier, he had joined the majority opinion in McCleskey v. Zant, 499 U.S. 467 (1991), which states that "Congress did not intend [28 U.S.C.] § 2244(b) to foreclose application of the *court-announced principles* defining and limiting a district court's discretion to entertain abusive petitions." *Id.* at 487 (emphasis added). Interestingly enough, as support for the quoted passage the *McCleskey* opinion cites *Stokes*, 495 U.S. 320. See *infra* notes 251-54 and accompanying text for further discussion of *Stokes*.

233. *See Schlup*, 115 S. Ct. at 878 (Scalia, J., dissenting) (citing *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94-95 (1807)).

234. *Id.* (Scalia, J., dissenting).

235. *See, e.g., id.* at 861 ("[New evidence of innocence is needed to establish] a miscarriage of justice that would *allow* a habeas court to reach the merits of a barred claim.") (emphasis added); *id.* at 862 ("Schlup's threshold showing of innocence would *justify* a review of the merits of [his petition] . . . . [The Court's recent decisions] delineate the circumstances under which a district court *may* consider claims raised in a [successive] petition.") (emphasis added); *id.* at 865 ("[C]ause and prejudice would generally define the situations in which a federal court *might* entertain an abusive petition, [but] the Court recognized an exception for [miscarriages of justice].") (emphasis added).

that the district court must hear Schlup's claim on the merits if he meets the threshold standard. However, as Justice O'Connor explained in her concurrence, the case was remanded because the district court based its conclusion on an erroneous view of the law.[236] A simpler answer to Justice Scalia's concerns is that, prudential or not, the doctrine advocated by the *Kuhlmann* plurality[237] has been adopted by the Court,[238] allowing the Court to channel the discretion of the lower courts via its definition of the "ends of justice."[239]

Despite the apparent weaknesses of the stances advocated by the dissenting opinions, they do make an important contribution to the opinion, for the points raised by Justices Rehnquist and Scalia reveal shortcomings in the majority opinion that the Court will need to address in the future.

Chief Justice Rehnquist, although in the minority in his assessment of the proper test for the sufficiency of the petitioner's evidence of innocence, is certainly justified in expressing concern over the degree of difficulty that will accompany the application of the *Schlup* standard. The *Schlup* majority takes pains to distinguish its "probabilistic" test from the test of constitutional-power-to-convict set forth in *Jackson*, describing the difference as follows:

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236. Justice O'Connor explained her reasoning as follows:

> Having decided that the district court committed legal error, and thus abused its discretion by relying on *Sawyer v. Whitley*, . . . the court need not decide the question . . . whether abuse of discretion is the proper standard of review. . . . In reversing the judgment . . . the Court does not disturb the traditional discretion of district courts in this area . . . .

Id. at 870 (O'Connor, J., concurring) (citations omitted). The last part of this passage is slightly disturbing; Justice O'Connor speaks about the "traditional," as opposed to the "statutory" discretion of district courts, intimating that she may not accept that 28 U.S.C. § 2244, as interpreted in *Kuhlmann*, *see supra* notes 131-35, is on point.

237. *Kuhlmann* advocated reading into 28 U.S.C. § 2244(b) (1988) a Congressional intent to include consideration for the "ends of justice." See *supra* notes 131-35 and accompanying text for further discussion of *Kuhlmann* and its implications.

238. In fact, in his dissent, Justice Scalia cites a number of cases that have cited *Kuhlmann* with approval. *See Schlup*, 115 S. Ct. at 877-78 (Scalia, J., dissenting) (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992); McCleskey v. Zant, 499 U.S. 467, 494 (1991); Murray v. Carrier, 477 U.S. 478, 496 (1986)). To this list may be added Teague v. Lane, 489 U.S. 288, 312 (1989) ("[O]ur cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review. *See, e.g.*, [*Kuhlmann*].").

239. *But cf.* Steiker, *supra* note 19, at 344-46 (claiming that the *Sanders* Court's interpretation betrayed the statutory language and confirmed that the scope of federal habeas was a matter of federal common law rather than statutory interpretation).

> Under *Jackson*, the question whether the trier of fact has power to make a finding of guilt requires a binary response: either the trier of fact has power as a matter of law or it does not. Under *Carrier*, in contrast, the habeas court must consider what reasonable triers of fact are likely to do.[240]

While the theoretical difference between the two standards is easily discernible, however, their practical differences are more difficult to uncover.[241] In fact, when one presumes, as directed by the *Schlup* majority, that a reasonable juror "would consider fairly all of the evidence presented," and "would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt,"[242] the *Schlup* test takes on a binary nature similar to that of *Jackson*.[243] A jury confronted with new evidence sufficient to raise a reasonable doubt does not have the power to convict,[244] and therefore cannot. Conversely, if the new evidence does not raise a reasonable doubt then the jury is by definition convinced beyond a reasonable doubt of petitioner's guilt and has no motive to acquit.

Thus, the true focus of the inquiry is the likelihood that a petitioner's new evidence will raise a reasonable doubt of her guilt.[245] But where does variability enter the calculus? Given a certain quantum of evidence, what makes one reasonable trier of fact vote to acquit and another vote to convict? The answer, of course, is their respective evaluations regarding the credibility and probative

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240. *Schlup*, 115 S. Ct. at 868.

241. In attempting to isolate the differences between the two standards, this Note will ignore the different bodies of evidence examined by the two standards, *see Schlup*, 115 S. Ct. at 867. Instead, this Note will focus solely on the nature of the evaluation, given a certain quantity of evidence.

242. *Id.* at 868.

243. Consider this example: A petitioner seeking review of her otherwise defaulted claims makes an evidentiary showing such that if it were record evidence evaluated under *Jackson*, i.e., in the light most favorable to the prosecution, it would warrant habeas relief. *See* Jackson v. Virginia, 443 U.S. 307, 319 (1979). At this point, there is no probabilistic determination: A jury presented with this evidence would not have the constitutional *power* to convict under *Winship*, *see In re* Winship, 397 U.S. 358, 362-63 (1970), and therefore the *likelihood* that they will convict is zero.

244. *See, e.g.*, *Jackson*, 443 U.S. at 315-18; *Winship*, 397 U.S. at 361-64.

245. Thus, the majority's contention that "[t]he meaning of actual innocence . . . does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty," *Schlup*, 115 S. Ct. at 868, rings false in the face of the constitutional command of *Winship*, for the factfinder's decision to convict cannot be made independently of its assessment of the existence of a reasonable doubt of guilt.

force of the evidence.[246] Here is where the true difference between *Schlup* and *Jackson* lies. Under *Jackson*, the factors that produce variability between verdicts are eliminated, because the reviewing court must consider all of the evidence in the light most favorable to the prosecution.[247] Yet, it is precisely these factors—differences in juror opinions regarding credibility and probative value of evidence—that produce the different possibilities crucial to a probabilistic test, such as the one in *Schlup*. The majority does not seem to consider this difference very important,[248] but aside from the larger body of evidence allowed under the *Schlup* inquiry, it is the crucial practical distinction between the two standards, a fine one that might be overlooked in the mass of petitions alleging "actual innocence" that will almost certainly follow the decision in *Schlup*.[249]

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246. This assumes, as the *Schlup* standard directs, a completely reasonable finder of fact, one whom, it is presumed, does not make her decision based upon extraneous sentiments. *Cf.* California v. Brown, 479 U.S. 538, 541-42 (1987) (plurality opinion) (upholding constitutionality of jury instruction during penalty phase of capital trial directing jurors not to be "swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling").

247. *Jackson*, 443 U.S. at 319 ("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.").

248. In fact, the majority seems to indicate that credibility assessments will not be necessary in every case: "[U]nder the gateway standard we describe today, the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court *may* have to make some credibility assessments." *Schlup*, 115 S. Ct. at 868 (emphasis added).

249. As of this writing, at least 29 reported decisions in the lower federal courts have been based in whole or in part on *Schlup*. *See, e.g.*, Brownlow v. Groose, 66 F.3d 997, 999 (8th Cir. 1995); Commer Glass v. Vaughn, 65 F.3d 13, 16-17 (3d Cir. 1995); Battle v. Delo, 64 F.3d 347, 350-54 (8th Cir. 1995); Nave v. Delo, 62 F.3d 1024, 1032-33 (8th Cir. 1995); Whitmore v. Avery, 63 F.3d 688, 689-91 (8th Cir. 1995); George v. Perrill 62 F.3d 333, 335 (10th Cir. 1995); Oxford v. Delo, 59 F.3d 741, 744 (8th Cir. 1995); Stafford v. Ward, 59 F.3d 1025, 1027 (10th Cir. 1995); Burks v. Dubois, 55 F.3d 712, 717-18 (1st Cir. 1995); Weekley v. Jones, 56 F.3d 889, 895 n.4 (8th Cir. 1995); Jones v. Delo, 56 F.3d 878, 881-84 (8th Cir. 1995); Allen v. Nix, 55 F.3d 414, 417 (8th Cir. 1995); Coley v. Gonzales, 55 F.3d 1385, 1387 (9th Cir. 1995); Ward v. Cain, 53 F.3d 106, 107 n.5, 108 n.7 (5th Cir. 1995); Fairchild v. Norris, 51 F.3d 129, 130 (8th Cir. 1995); Whitlock v. Godinez, 51 F.3d 59, 62-64 (7th Cir. 1995); Barrington v. Norris, 49 F.3d 440, 441-42 (8th Cir. 1995); Nachtigall v. Class, 48 F.3d 1076, 1079 (8th Cir. 1995); Washington v. Delo, 51 F.3d 756, 761 (8th Cir. 1995); Deere v. Calderon, 890 F. Supp. 893, 904 (C.D. Cal. 1995); Bolender v. Singletary, 898 F. Supp. 876, 881-82 (S.D. Fla. 1995); Galeska v. Duncan, 894 F. Supp. 1375, 1379-80 (C.D. Cal 1995); United States *ex rel.* Balderas v. Godinez, 890 F. Supp. 732, 744 n.17 (N.D. Ill. 1995); McGann v. Kelly, 891 F. Supp. 128, 135 (S.D.N.Y. 1995); Schneider v. Delo, 890 F. Supp. 791, 820 (E.D. Mo. 1995); Meatley v. Artuz, 886 F. Supp. 1009, 1017 (E.D.N.Y. 1995); Carpenter v. Vaughn, 888 F. Supp. 658, 660-62 (M.D. Pa. 1995); Ward v. Whitley, 887 F. Supp. 897, 900-01 (E.D. La. 1995); Perry v. Norris, 879 F. Supp. 1503, 1523-24 (E.D. Ark. 1995).

Justice Scalia's dissent raises concerns about the process as well. His charge that the majority has turned "a statute redolent of permissiveness into a rigid command"[250] is not quite accurate, but it does prompt an interesting question: When does "may" equal "must"? In *Stokes v. Delo*,[251] the District Court for the Eastern District of Missouri granted a stay of execution in order to review the merits of Stokes' clearly abusive fourth habeas petition.[252] The Court ruled that this constituted an abuse of discretion, and consequently vacated the stay.[253] The habeas statute states that a district court "need not" entertain an abusive petition; it does not mandate that the district court deny the application.[254] Yet the Court, to quote Justice Scalia, specifically "divid[ed] the entire universe of . . . abusive petitions."[255] By stating in effect that it is always an abuse of discretion to entertain an abusive petition absent a recognized justification, the *Stokes* Court created a category of petitions that *must not* be entertained on pain of reversal. Using this rationale, the Court theoretically could create another such category for *Schlup*-type claims; it is arguable that it would be an abuse of discretion for a district court to reject a petition, abusive or otherwise, that implicates a "fundamental miscarriage of justice."

These inconsistencies in the *Schlup* test to which the dissenters give their attention defy easy explanation. However, one of the causes may lie in the roots of the "post-Warren" Court's habeas jurisprudence, the philosophical background of which may be found in part in two extremely influential but very dissimilar law review articles, both critical of the Warren Court's expansion of the scope of habeas.

In *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, Professor Paul Bator argues that habeas review of state court decisions should be reserved for those instances in which the state's own mechanisms for adjudication of constitutional claims have proven inadequate.[256] Professor Bator's "process-oriented" view of

250. *Schlup*, 115 S. Ct. at 877 (Scalia, J., dissenting).
251. 495 U.S. 320 (1990) (per curiam).
252. *Id.* at 321.
253. *Id.* at 322.
254. 28 U.S.C. § 2244(b) (1988).
255. *Schlup*, 115 S. Ct. at 877 (Scalia, J., dissenting).
256. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 441-45 (1963); *see also* Patchel, *supra* note 11, at 943-53 (analyzing Professor Bator's views); Seidman, *supra* note 114, at 457-59 (discussing Professor Bator's article).

habeas holds that ultimate truth will never be discovered through a judicial proceeding, and thus attempts to correct "wrong" or "incorrect" proceedings are by definition futile.[257] Therefore, the choice of whether to review a state court decision should be based on policy considerations rather than an interest in accuracy.[258]

In the second article, *Is Innocence Irrelevant? Collateral Attack on State Court Judgments*, Judge Henry Friendly argues for the restriction of habeas review based on the idea that unlimited habeas review interferes with what he considers the basic goal of the criminal justice system: to separate the guilty from the innocent.[259] Thus, with a few exceptions, habeas corpus relief should be reserved for those cases in which "a convicted defendant makes a colorable showing that an error, whether 'constitutional' or not, may be producing the continued punishment of an innocent man."[260]

The views of these two scholars have pervaded the Court's habeas jurisprudence over the past twenty years.[261] For example, Professor Seidman states that *Stone*, which began the retreat from the Warren Court's activist approach to habeas review, seemed to use Judge Friendly's rhetoric to promulgate Professor Bator's approach.[262] As evaluated by the *Stone* Court, the "costs" of the exclusionary rule come from those instances in which it operates to free guilty prisoners, a concern clearly lifted from the writings of Judge Friendly:

> Application of the [exclusionary] rule . . . deflects the truth finding process and often frees the guilty. The disparity in particular cases between the error committed by the police and the windfall afforded a guilty defendant by

257. *See* Bator, *supra* note 256, at 446-50.

258. *See id.* at 449-53; Patchel, *supra* note 11, at 943-45.

259. *See* Friendly, *supra* note 130, at 149; Seidman, *supra* note 114, at 456-57.

260. Friendly, *supra* note 130, at 160 (footnote omitted).

261. A number of Supreme Court habeas decisions cite prominently to Professor Bator and Judge Friendly. *See, e.g.*, *Schlup*, 115 S. Ct. at 864 n.37, 867 n.46, 872 (citing Judge Friendly); Herrera v. Collins, 113 S. Ct. 853, 880, 883 (1993) (citing Judge Friendly); Sawyer v. Whitley, 505 U.S. 333, 339 n.5 (1992) (citing Judge Friendly); *Id.* at 361 (Stevens, J., concurring in the judgment) (citing Judge Friendly); McCleskey v. Zant, 499 U.S. 467, 478, 492, 518 (1991) (citing Professor Bator); Kuhlmann v. Wilson, 477 U.S. 436, 453-54 nn.14, 16 & 17 (1986) (citing Judge Friendly); *id.* at 453 n.14 (citing Professor Bator); Engle v. Isaac, 456 U.S. 107, 126 n.31, 127 n.32 (1982) (citing Judge Friendly); *id.* at 127 n.32, 128 n.33 (citing Professor Bator); Wainwright v. Sykes, 433 U.S. 72, 77 n.6 (1977) (citing Professor Bator); Stone v. Powell, 428 U.S. 465, 480 n.13, 491 n.31, 500 (1976) (citing Judge Friendly); *id.* at 476 n.8, 476 n.9, 494 n.35 (citing Professor Bator).

262. *See* Seidman, *supra* note 114, at 456-59; *Stone*, 428 U.S. at 494 n.35 (quoting Bator, *supra* note 256, at 509).

> application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. . . . These . . . costs of the rule persist when a criminal conviction is sought to be overturned on collateral review on the ground that a search-and-seizure claim was erroneously rejected by two or more tiers of state courts.[263]

However, the *Stone* doctrine bars habeas relief when state court procedure has afforded the petitioner an adequate forum, his actual guilt notwithstanding: "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[264] This reflects Professor Bator's process-oriented rationale for habeas review, and not Judge Friendly's concern for the propriety of the verdict; whether the petitioner has been granted a "full and fair opportunity" to litigate her claim has nothing to do with her innocence.[265]

The use of Judge Friendly's values but Professor Bator's approach is evident in the *Schlup* decision as well. The basis of the test, the petitioner's "actual innocence," clearly reflects Judge Friendly's concerns. However, in administering the *Schlup* test, the reviewing court is guided by Professor Bator's epistemological skepticism: Rather than determining for itself the ultimate "truth" regarding the petitioner's innocence, the reviewing court must instead look to the finder of fact and hypothesize as to its probable decision, in terms of a reasonable doubt.[266] If a petitioner achieves review of the merits of her petition under *Schlup*, it is not because she is innocent, but because her new evidence seems to indicate that the *process* has failed, and a "fundamental miscarriage of justice" has possibly occurred. The admixture of these not-entirely-compatible theories has created a habeas corpus jurisprudence the complexity of

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263. *Stone*, 428 U.S. at 490-91 (footnotes omitted). Although the *Stone* opinion does not explicitly cite to Judge Friendly in the quoted passage as it does at other points in the opinion, *see supra* note 261, his influence is clearly present. *See* Patchel, *supra* note 11, at 961.

264. *Stone*, 428 U.S. at 494 (footnotes omitted).

265. *See* Patchel, *supra* note 11, at 961; Seidman, *supra* note 114, at 456.

266. In the majority's words: "It is not the district court's independent judgment as to whether reasonable doubt exists that the [*Schlup*] standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Schlup*, 115 S. Ct. at 868.

which has been criticized by commentators[267] and the Chief Justice[268] alike, and which has resulted in decisions laden with uncertainty, like that in *Schlup*.

In *Schlup*, the majority's analysis was logical and well-reasoned, with a few minor exceptions.[269] The majority adhered to the Supreme Court's post-*Stone* habeas jurisprudence, balancing the systemic interests against Schlup's individual interest and using that calculus to establish a threshold showing of evidence that "properly balances the dictates of justice with the need to ensure that the actual innocence exception remains only a ' "safety valve" for the "extraordinary case." ' "[270] However, sometimes following precedent is insufficient. The concerns about the extra-statutory theoretical basis of the standard and about the difficulty of its application will only increase with the complexity of habeas petitions presented to the Court for review. Already, cases in the federal system are testing the limits of *Schlup*.[271]

The apparent flaws in *Schlup* may be traced not to the reasoning of the majority, but to the Court's habeas jurisprudence over the last

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267. *See, e.g.*, Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015 (1993).

268. "The present state of our habeas jurisprudence is less than ideal in its complexity, but today's decision needlessly adds to that complexity." *Schlup*, 115 S. Ct. at 874 (Rehnquist, C.J., dissenting).

269. *See supra* note 179 and accompanying text.

270. *Schlup*, 115 S. Ct. at 870 (O'Connor, J., concurring).

271. The next likely subject for debate is that of *mens rea* as it pertains to "actual innocence." In Jones v. Delo, 56 F.3d 878 (8th Cir. 1995), the petitioner asked the Eighth Circuit to reach the merits of his defaulted petition, presenting evidence that he suffered from an organic brain disease that rendered him incapable of forming the necessary mental state for capital murder. *Id.* at 882. Although the Eighth Circuit affirmed the district court's denial of the petition on other grounds, the opinion also stated: "Should [petitioner's] contention that he could not deliberate prove true, he would have been incapable of satisfying an essential element of the crime for which he was convicted. This meets the definition of actual innocence." *Id.* at 883 (citation omitted). However, the District Court for the Central District of California came to quite a different conclusion in Deere v. Calderon, 890 F. Supp. 893 (C.D. Cal. 1995). As in *Jones v. Delo*, the petitioner in *Deere* claimed that he was insane at the time of his crimes and sought review of his procedurally defaulted claims under *Schlup*. *Id.* at 904. In denying the petition, the district court stated:

> The clear example of actual innocence is where the wrong person has been convicted. Stated another way, "the quintessential miscarriage of justice is the execution of a person who is entirely innocent." An insanity defense is the opposite of actual innocence: it *concedes* the act, but interposes a bar to legal responsibility.

Id. at 904 (citations and footnote omitted). If the Ninth Circuit affirms *Deere*, it seems only logical that the Supreme Court will eventually be called upon to settle the split in the circuit courts.

two decades, which seeks to balance a host of competing concerns: individual interests in justice, systemic interests in finality and conservation of resources, the mandate of Judge Friendly that habeas review should be reserved for the innocent, and the equally compelling claim of Professor Bator that it should instead be used to "fix" the system when it breaks down. However, in trying to thread its way through this doctrinal maze, the Court seems to have lost sight of the original purpose of the Great Writ—to provide a remedy for constitutional wrongs[272]—and instead has created a complex system rife with contradiction, the only purpose of which seems to many petitioners to be allowing as little review as possible. Until the Court solves the inherent doctrinal difficulties in a system that combines unlimited jurisdiction with limited discretion, confusion in its habeas corpus jurisprudence, like that in *Schlup v. Delo*, is inevitable.

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272. Recall the words of Justice Brennan in *Noia*:

> Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment . . . .

Fay v. Noia, 372 U.S. 391, 401-02 (1962).