UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NOT FOR PUBLICATION

GEORGE JOHNSON, Petitioner, v. STEVEN PINCHAK, Administrator, East Jersey State Prison, and PETER VERNIERO, Attorney General of New Jersey, Respondents.	Civil Action No. 99-0685 **Amended Opinion**

KATHARINE S. HAYDEN, U.S.D.J.

George Johnson ("petitioner") pled guilty to felony murder for the smothering death of a 76-year-old man during the course of a robbery. He was sentenced to life imprisonment with a 30-year period of parole ineligibility. He has petitioned this Court for relief under 28 U.S.C. § 2254 alleging ineffective assistance of counsel and the involuntariness of his guilty plea.

BACKGROUND

Petitioner, now a 53-year-old man, has been incarcerated for the past twenty years on a state conviction for felony murder. Prior to his arrest in February of 1983, he had obtained a seventh-grade education, had served in the Vietnam War, and had no prior criminal record. In May of 1983, he was charged with first-degree murder for the killing of a fellow occupant of an Asbury Park rooming house who woke up during Johnson's attempt to steal his wallet. A year earlier, New Jersey had reinstated the death penalty for certain types of murder, including first

degree murder. On July 22, 1983, pursuant to a plea agreement, the State agreed to dismiss the first degree murder charge in exchange for petitioner's guilty plea to felony murder. During plea negotiations, and at the plea and sentencing hearings, the prosecutor, defense counsel, and the trial judge all mistakenly assumed that under the statutory provisions reinstating the death penalty, felony murder was a crime subject to capital punishment. When he sentenced petitioner, the trial judge actually held a penalty phase hearing. After determining that mitigating factors outweighed aggravating factors, the judge sentenced petitioner to life imprisonment with a 30-year period of parole ineligibility.

Represented by new counsel, petitioner took a direct appeal and challenged the voluntariness of his plea and the effectiveness of his trial counsel. His appellate grounds did not include the capital sentencing error. Rather, counsel contended that petitioner's trial lawyer never told him at the time he pleaded guilty that if he was spared the death penalty, he would instead face a mandatory 30-year stipulated period of parole ineligibility. The Appellate Division affirmed November 29, 1984, finding that the trial judge sufficiently advised petitioner during his plea hearing that he could be sentenced to a mandatory term of 30-year period of ineligibility, and that this exposure was also reflected in the terms of the plea agreement. Petitioner did not petition for certification to the New Jersey Supreme Court.

In May 1987, represented by another new attorney, petitioner filed his first application for post conviction relief ("PCR"), asserting that he had been denied his constitutional right to the effective assistance of counsel, that his plea was not knowing or voluntary, and that the sentencing proceedings had been improperly conducted (but not because of the mistaken sentencing assumptions shared by the lawyers and the judge). Rather, the PCR application

asserted that trial counsel was ineffective in failing to advise petitioner of the nature and elements of the criminal charges and in failing to establish an adequate record at the plea colloquy in order to preserve issues for appeal. Further, petitioner criticized the questions posed by the trial court during the plea hearing as insufficient to enable the court to conclude that petitioner knowingly and voluntarily entered his plea. The trial court denied this application in June 1987 and the Appellate Division affirmed in April 1989. Petitioner then sought certification from the New Jersey Supreme Court. Once again, he had a new attorney, who for the first time raised the issue that it had been error for the trial court to accept petitioner's plea on the basis that his plea to felony murder rendered him death eligible and requested the court to consider the merits despite prior counsels' failure to raise the issue. The New Jersey Supreme Court denied certification in September 1989.

Thereafter, petitioner, *pro se*, filed a petition for writ of habeas corpus on March 26, 1990, which was dismissed without prejudice in February of 1991 when the district court ruled that petitioner's application constituted a "mixed" petition of both exhausted and unexhausted claims (none of which alluded to the capital sentencing mistake).

In August 1991, petitioner, again *pro se*, filed a second PCR application in state court and raised the unexhausted claim that he was suffering, at the time of the crime and the plea, from Post Traumatic Stress Disorder ("PTSD") relating to his service time in Vietnam. In addition to grounds previously raised in his first PCR application, he argued that PTSD was a new legal defense that would have been effective against the charges or a mitigating factor at sentencing. On the day of his hearing his assigned counsel apparently prepared an addendum letter, which was attached to petitioner's *pro se* brief, that made the argument that the plea was invalid

because petitioner had been advised by all concerned that he faced the death penalty if he was convicted. In the letter petitioner asserted that his trial lawyer told him that his only option to avoid exposure to the death penalty was to accept the State's plea agreement.

The trial court denied petitioner's second application for PCR in January 1992 as untimely, citing to the five year limitation on the filing of PCR applications in N.J. Ct. R. 3:22-12.[1] The court added that it found no evidence in the record to support a finding that petitioner suffered from PTSD. The court did not address the erroneous sentencing information given to petitioner that was set out in the addendum. It held that petitioner's original lawyer's performance was not so deficient as to deny him his Sixth Amendment right to counsel. On appeal, in setting out the issues raised, the Appellate Division expressly noted that petitioner had raised the death eligibility mistake in his addendum submission. However, the Appellate Division **also** did not address the substance of the issue, and affirmed in June 1994. In July 1994, the New Jersey Supreme Court summarily denied certification.

In July 1995, petitioner, appearing *pro se*, filed a third PCR application, arguing that his plea was invalid because of defects in the New Jersey plea form and alleging certain defects in the plea hearing itself. He contended that he was misinformed that entry of a guilty plea served as a waiver of his constitutional right to testify at trial and that he was denied the effective assistance of counsel because his attorney failed to submit medical reports corroborating his PTSD affliction as mitigating evidence during sentencing. The trial court denied the application in September 1995. The Appellate Division affirmed on the basis that petitioner's motion was

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[1] N.J.Ct.R. 3:22-12 provides that "[a] petition to correct an illegal sentence may be filed at any time. No other petition shall be filed pursuant to this rule more than 5 years after rendition of the judgment or sentence sought to be attacked unless it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect."

time-barred, and the New Jersey Supreme Court denied certification.

Petitioner now seeks federal review of his state court conviction pursuant to 28 U.S.C. § 2254.

STANDARD OF REVIEW

A state prisoner claiming that he is "in custody in violation of the Constitution or law or treaties of the United States," may petition the federal courts for a writ of habeas corpus. McCandless v. Vaughan, 172 F.3d 255, 260 (3d. Cir. 1999) (*quoting* 28 U.S.C. §2254(a)). Only claims arising under the United States Constitution, federal law or international treaties may be heard in such petitions. *See* Lewis v. Jeffers, 497 U.S. 764, 780 (1991) (federal habeas corpus relief does not lie for errors of state law). A habeas petitioner bears the burden of establishing each claim in his petition. *See* Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") limits a federal court's review of any state court disposition of federal claims. In relevant part, the AEDPA provides that:

> (a) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d) (1996).

In interpreting the AEDPA standard, the Third Circuit has held that a federal court must first "identify whether the Supreme Court has articulated a rule specific enough to trigger

'contrary to' review; and second, only if it has not, to evaluate whether the state court unreasonably applied the relevant body of precedent." Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 888 (3d Cir. 1999). After that analysis is made, a state court decision is deemed "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." Williams v. Taylor, 529 U.S. 362, 405-06 (2000). Alternatively, a decision is an "unreasonable application" of the law "if the state court identifies the correct governing legal rule from [United States Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case." Id. at 407. In addition to purported errors of law, under 29 U.S.C. § 2254(d)(2) unreasonable determinations of the facts in light of the evidence raised may also be reviewed on a petition for habeas corpus.

Once a habeas petition presents a constitutional issue, "a prerequisite of federal habeas review is that the petitioner have exhausted the remedies available to him in the state courts to the extent such remedies exist and are effective." Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000). "[F]ederal courts refrain from addressing the merits of any claim raised by a habeas petitioner that was not properly exhausted in state court[.]" Lines, 208 F.3d at 159. "In order for a claim to be exhausted, it must be 'fairly presented' to the state courts 'by invoking one complete round of the State's established appellate review process.'" Carpenter v. Vaughn, 296 F.3d 138, 146 (3d Cir. 2002) (*quoting* O'Sullivan v. Boerckel, 526 U.S. 838, 844-45 (1999)). "A petitioner who has raised an issue on direct appeal, however, is not required to raise it again in a state post-conviction proceeding[,]" in order to satisfy the exhaustion requirement. Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997).

The exhaustion requirement may be waived "if a return to state court would be futile."

Lines, 208 F.3d at 162. Futility can be established when "exhaustion is not possible because the state court would refuse on procedural grounds to hear the merits of the claims." Doctor v. Walters, 96 F.3d 675, 681 (3d Cir. 1996) "If a claim has not been fairly presented to the state courts but state law forecloses review, exhaustion is excused, but the doctrine of procedural default may come into play." Carpenter, 296 F.3d at 146 (citations omitted).

Procedural default has various technical dimensions. "[I]f a state court has refused to consider a petitioner's claims because of a violation of state procedural rules, a federal habeas court is barred by th[at] procedural default from considering the claims . . . " Caswell v. Ryan, 953 F.2d 853, 857 (3d Cir. 1992). In such an instance, "claims deemed exhausted because of a state procedural bar are procedurally defaulted, and federal courts may not consider their merits unless the petitioner 'establishes 'cause and prejudice' or a 'fundamental miscarriage of justice' to excuse the default.'" McCandless, 172 F.3d at 260 (*quoting* Coleman v. Thompson, 501 U.S. 722, 731 (1991)). Additionally, even where there has been no default of a state court rule, if a defendant has failed to raise a claim on direct review, that claim is procedurally defaulted and "may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" Bousley v. United States, 523 U.S. 614, 622 (1998) (citations omitted); *accord* Cristin v. Brennan, 281 F.3d 404, 412 (2002).

In short form, then, the technical requirements placed on a habeas petitioner are that he first present his constitutional claims on direct appeal in state court. Where a petitioner has failed appropriately to bring constitutional claims on direct appeal, without regard to whether he later asserts such claims in a state court post-conviction proceeding or simply brings a federal habeas corpus petition, those claims will be procedurally defaulted and he must overcome that

procedural default before a federal court may reach the merits of his claims. A review of this petitioner's post-conviction litigation quickly reveals that a significant portion of the federal court's legal analysis must address the issue of procedural default.

DISCUSSION

Petitioner makes three basic assertions in his habeas petition to this Court. First he alleges that he was denied effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments, because (1) his trial attorney incorrectly told him that he could be sentenced to death on the felony murder charge; (2) his trial attorney did not advise him that he was waiving his rights to testify and present witnesses at trial when he entered a guilty plea; and (3) his trial and various appellate and post-conviction attorneys did not present/investigate petitioner's PTSD as a defense. Additionally, petitioner challenges his conviction on grounds that he did not knowingly and intelligently enter a guilty plea because (1) the New Jersey plea form did not advise or warn him that he would be waiving his Sixth Amendment right to testify and present witnesses at trial; (2) counsel did not inform him that PTSD was a potential defense available to petitioner had he chosen to go to trial; and (3) his plea was entered under the mistaken belief that a conviction for felony murder potentially carried a capital sentence. Finally, petitioner asserts that he was denied due process as a result of his illegal plea.

A. Exhaustion

This case presents a striking example of criminal proceedings that were off the mark – including a judicial hearing to determine, after weighing aggravating and mitigating circumstances, whether the defendant would be sentenced to death, a punishment for which petitioner was never eligible. To say that those circumstances do not have a bearing on the

voluntariness of George Johnson's guilty plea is disingenuous. But habeas jurisprudence requires this Court to consider the procedural landscape of this case, which is a minefield of default. *See generally* Szuchon v. Lehman, 273 F.3d 299, 321 (3d Cir. 2001) (recognizing "the substantial concerns of comity and federalism" in the context of exhaustion and procedural default). With that said, a principled decision must still encompass "the values of, not only comity and federalism, but also 'judicial efficiency,' and 'the ends of justice.'" Smith v. Horn, 120 F.3d 400, 407 (3d Cir. 1997) (*quoting* Granberry v. Greer, 481 U.S. 129, 135 (1987); Keller v. Petsock, 853 F.2d 1122, 1127 (3d Cir. 1988)).

Going back to the beginning and reviewing the state court proceedings in detail: following imposition of the sentence, petitioner's first appellate lawyer raised two issues on direct appeal: ineffective assistance of counsel and a violation of due process. Both of these challenges were based upon an assertion that neither trial counsel nor the trial judge informed petitioner that he faced a 30-year period of parole ineligibility. Thus, while the direct appeal claimed the same legal errors as this petition -- ineffective assistance and insufficient information to satisfy the requirement of voluntariness in pleading guilty -- the basis for the claims was different. What distinguishes this federal proceeding from all of petitioner's prior applications is that for the first time two things are happening within the same legal proceeding: Johnson is asserting that the judge and all the lawyers on the trial level were wrong about the sentence he faced under the law and the judge to whom he is making that assertion is considering it.

Although that signal issue was not raised on direct appeal by petitioner's lawyer, it is important to recognize that the Appellate Division spotted it – in a footnote. The panel's resort to a footnote may well have set the course for the rest of petitioner's lengthy post conviction

litigation, and was unfortunate. *See* In re Opinion 662 of the Advisory Committee on Professional Ethics, 133 N.J. 22, 32 (1993) (Clifford, J., concurring). The opinion on Johnson's direct appeal is short, unpublished, and spends two of its less than three pages on factual background, following which, with little legal analysis, the court states "[w]e have carefully considered the contentions raised and the arguments advanced in support of them and find they are clearly without merit." [2] Only a portion of a single paragraph addresses petitioner's claim that he was not advised about the mandatory term of parole ineligibility. The opinion's analysis of the claim of ineffective assistance of counsel before the court concludes that "[c]onsequently, there was no denial of effective assistance of counsel." This latter observation in the text is at odds with footnote 2, where the panel flagged the misinformation issue in a single sentence that stands as the first and last time any court addressed it until now:

> We have not been called upon in this appeal to decide whether the misinformation from the court, defense counsel and prosecutor that both the willful-purposeful murder and felony murder exposed defendant to the death penalty, prejudicially impacted upon defendant's decision to plead guilty.

Appellate counsel never followed up on this footnote, either by going back to the trial court or by filing a petition for certification. Nothing was done.

While this surely offends the sensibilities of any legal observer, the fact remains that this habeas petitioner never exhausted the two claims that were presented to the Appellate Division, as well as the third issue recognized in footnote 2, because he failed to complete a full round of appellate review before the state courts. *See* Picard v. Connor, 404 U.S. 270, 275-76 (1971) ("[t]he 'fairly presented' requirement . . . requires that the prisoner present his federal habeas

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[2]The relevant context of the opinion is set forth *infra* in page 14 of the Discussion portion of this opinion where the Court addresses procedural default.

claims at *all levels* of state court adjudication") (emphasis added); Lines, 208 F.3d at 159-60 (the Third Circuit holding that all claims "must have been fairly presented to *each level* of the state court," and stating that petitioners "who have not fairly presented their claims to the highest state court have failed to exhaust those claims") (emphasis added)). The Supreme Court has re-emphasized this requirement in O'Sullivan v. Boerckel:

> Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process. Here, Illinois' established, normal appellate review procedure is a two-tiered system. Comity, in these circumstances, dictates that [the petitioner] use the State's established appellate review procedures before he presents his claims to a federal court. Unlike the extraordinary procedures that we found unnecessary in *Brown v. Allen* and *Wilwording v. Swenson,* a petition for discretionary review in Illinois' Supreme Court is a normal, simple, and established part of the State's appellate review process. In the words of the statute, state prisoners have "the right ... to raise" their claims through a petition for discretionary review in the State's highest court. § 2254(c). Granted, as [the petitioner] contends, Brief for Respondent 16, he has no right to *review* in the Illinois Supreme Court, but he does have a "right ... to raise" his claims before that court. That is all § 2254(c) requires.

526 U.S. 838, 845 (1999) (emphasis in original). The Circuit followed this reasoning and found failure to exhaust in Wenger v. Frank, 266 F.3d 218, 224 (3d Cir. 2001) because the petitioner "did not file a timely petition for allowance of review." *See also* Hollawell v. Gillis, 65 Fed. Appx. 809, 813 (3d Cir. 2003) ("a habeas petitioner gives the state courts a full opportunity to address his case by *attempting* to appeal through the chain of appeals to the state's highest court") (emphasis added).

Under New Jersey law, there is one exception to this clearly defined requirement, and that is when the claim being made is ineffective assistance of counsel. In State v. Martini, 144 N.J. 603, 609 (1996), the supreme court held that an ineffective assistance of counsel claim relaxes

the general rule that a criminal defendant must first make a claim on direct appeal, or otherwise overcome the procedural default of having not made the claim, before such a claim can be addressed in a PCR proceeding. But in this case, Johnson did raise an ineffective assistance of counsel claim on direct appeal, using a different lawyer and asserting that the lawyer who represented him on the guilty plea failed to advise of him of the mandatory 30-year period of parole ineligibility. Because of this, under New Jersey law, the Appellate Division holding on this issue on direct appeal is conclusive and binding upon the court in any later PCR application. N.J. Ct. R. 3:22-5. Nonetheless, petitioner remained free in his first PCR application to bring claims of ineffective assistance of counsel "that differ from those asserted" on direct appeal. State v. McQuaid, 147 N.J. 464, 484 (1997) (stating that "'[p]reclusion of consideration of an argument presented in post-conviction relief should be effected *only* if the issue is identical or substantially equivalent' to that issue previously adjudicated on its merits") (emphasis added) (*quoting* Picard, 404 U.S. at 276-77).

So, despite having made an ineffective assistance claim on direct appeal, petitioner could still have used his first PCR proceeding to seize upon the Appellate Division's footnote 2 to support a new and different claim of ineffective assistance of counsel relating to trial counsel's performance in having misinformed petitioner about his death eligibility. He could have also used his first PCR application to assert a claim against appellate counsel who failed the recognize and raise the issue of death eligibility on direct appeal and then failed to submit a petition for certification on petitioner's behalf once the Appellate Division had highlighted the issue in its footnote 2. But, in his *pro se*, timely-filed first PCR petition, petitioner failed to raise the issues framed above and missed the opportunity for procedurally appropriate review even that late in

the case. Compounding the mistake further, when petitioner was appointed counsel at his initial PCR hearing and again appointed counsel to appeal the denial of that first PCR application, those appointed lawyers also failed to assert the manifest error on the issue of death eligibility. The net result is that petitioner did not bring an ineffective assistance of counsel claim relating to the death eligibility determination either on direct appeal or during his first PCR application and has failed to exhaust that claim.[3]

This procedural state of affairs calls for a futility analysis. The New Jersey Supreme Court could not now entertain a petition for certification relative to petitioner's direct appeal in light of the time that has elapsed and the intervening applications for post-conviction relief. Doctors v. Walters, 96 F.3d 675, 681 (3d Cir. 1996) (stating that exhaustion is excused as futile where "exhaustion is not possible because the state court would refuse on procedural grounds to hear the merits of the claims"). But, critically, this "finding of futility merely eliminates the procedural pretense of requiring a federal habeas petitioner to return to an unavailable state forum for nonexistent relief." Lines, 208 F.3d at 166. What faces petitioner now is the requirement that he overcome the procedural defaults that render exhaustion futile.

B. Procedural Default

Petitioner is not new to the requirement of vaulting procedural default; he has heard about it already in state court. Indeed, procedural defaults have dogged his entire appeal and post-conviction relief process, despite his having been regularly represented by counsel, even if at

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[3]This is not, however, a case where petitioner has failed to exhaust his state remedies for lack of trying. He prosecuted a direct appeal, albeit only through the first level of the state court appellate process, and then prosecuted three applications for post-conviction relief.

times assigned counsel participated only peripherally.[4] Even before post-conviction litigation began, petitioner's state remedies on direct appeal were limited to those issues that were preserved for and presented upon appeal. *See* N.J. Ct. R. 1:7-2. On direct appeal, the Appellate Division carefully cabined the issues to be decided:

> Defendant was sentenced to imprisonment for life and required to serve 30 years before becoming eligible for parole. As part of the plea agreement, charges of willful or purposeful murder, robbery and conspiracy to commit burglary were dismissed. He now appeals, contending:
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> 1. The Court erred in not informing the defendant of the mandatory sentencing provisions of N.J.S.A. 2C:11-3b.[1]
> 2. The Defendant received ineffective assistance of counsel and, therefore, was denied due process and his conviction should therefore be reversed.
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> [1] Footnote: *We note that defendant never made a motion before the trial court to withdraw his plea pursuant to R. 3:21-1 or for a change in sentence pursuant to R. 3:21-10(a).*
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> We have carefully considered the contentions raised and the arguments advanced in support of them and find they are clearly without merit. R. 2:11-3(e)(2). We add simply that the trial judge clearly advised defendant that he could be sentenced to a term of imprisonment of up to life and that he could be required to serve 30 years without parole eligibility. The plea agreement form contained the same information. Hence, we are satisfied that the court satisfied its responsibility of making sure "that defendant understands the possibility that a stated period of parole ineligibility can be made part of the sentence." State v. Kovack, 91 N.J. 467, 484 (1982). [2]
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> [2] Footnote: *We have not been called upon in this appeal to decide whether the misinformation from the court, defense counsel and prosecutor that both the willful-purposeful murder and felony murder exposed defendant to the death penalty, prejudicially impacted upon defendant's decision to plead guilty.*
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> The judgment of conviction is accordingly affirmed.

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[4]For example, in each of petitioner's PCR applications, petitioner made the written submissions, and was only later represented, pursuant to Court Rule, at the PCR hearings by counsel who had not participated in the drafting of written submissions or the formulation of arguments or legal theories.

State v. Johnson, Docket No. a-496-83T4 (App. Div., November 29, 1984) (emphasis added).[5] So from the first step in his proceedings, petitioner experienced first hand the limiting effect of procedural rules on substantive claims. And his lawyer earned two disapproving footnotes.

Then, when he pursued post-conviction relief, petitioner faced procedural requirements that are not dissimilar to those imposed under federal habeas law. Under the applicable Rules:

> Any ground for relief not raised in a prior proceeding under this rule, or in the proceedings resulting in the conviction . . . is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds (a) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or (b) that enforcement of the bar would result in fundamental injustice; or (c) that denial of relief would be contrary to the Constitution of the United States or the State of New Jersey.

N.J. Ct. R. 3:22-4.

And, even where a state prisoner seeking post-conviction relief in state court has first presented an issue on direct appeal, "[a] prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding . . . " N.J. Ct. R. 3:22-5. An applicant for post-conviction relief must carefully maneuver between bringing "new" claims that are barred under R. 3:22-4 and "old" claims the disposition of which is conclusive under R. 3:22-5.

Bound by these considerations, petitioner did not fare well. In 1987, he filed his first PCR application *pro se*, asserting two claims that had previously been made on direct appeal and

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[5]In a further twist of irony, it appears that the Appellate Division *could* have reached the merits of that significant issue right out of the gate. *See* R. 2:10-2 (stating that "the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court"); *see also* State v. Macon, 57 N.J. 325 (1971) (obligating an appellate court to notice 'constitutional' error even when not raised below or by the parties); *cf.* State v. Johnson, 109 N.J. Super. 69 (App. Div. 1970) (finding that errors in sentencing may constitute plain error thereby permitting appellate review under R. 2:10-2).

a third claim that had never before been presented. Ultimately, the court assigned counsel to represent him at the hearing. But this lawyer had not served either as petitioner's trial or appellate counsel, and apparently relied on petitioner's *pro se* brief. In a bench opinion, when the application was argued, the trial court made the following findings:

> This defendant, George Johnson – this is a motion for post-conviction relief. And he urges three arguments:
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> First, he urges that he had ineffective assistance of counsel.
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> The second ground is it wasn't a knowing and intelligent plea by him.
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> Now, both these grounds went to the Appellate Division. And in Docket No. A-496-83-T4, the Court expressly held that the trial judge clearly advised the defendant that he could be sentence to a term of imprisonment of up to life and that he would have to be required – he could be required to serve 30 years without parole eligibility.
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> And the Court also held in the opinion that there was no denial of effective assistance of counsel.
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> The third ground arises as a result of Rule 3:22-4, bar of grounds not raised in prior proceedings. And the adequacy and sufficiency of defendant's plea clearly could have reasonably been raised in a prior proceeding.
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> And that being the case, this motion is denied.

The court did not go into the merits, but focused on procedural grounds in reaching its conclusion, noting the "conclusive" effect of the Appellate Division's ruling on two of petitioner's claims, as well as the bar to relief on the claim not previously asserted.

Petitioner then filed an appeal of this application for PCR through yet another assigned attorney. The brief on appeal of this first PCR application, which the attorney wrote, sought relief from the procedural bar to the claim about the sufficiency of the plea on the theory that petitioner's defaulted claim fell within one of the exceptions to the procedural bar expressly set forth in Rule 3:22-4. The New Jersey Appellate Division responded in this *per curiam* opinion (set forth in full):

> A [post-conviction relief] hearing was conducted on May 22, 1987. The judge concluded that the issues of ineffective assistance of counsel and the propriety

of the sentence had been raised and decided in defendant's direct appeal and that R. 3:22-5 precludes further review. State v. Smith, 43 N.J. 67, 74 (1964); State v. Boyd, 165 N.J. Super. 304, 309-11 (App. Div. 1979), certif. den. 85 N.J. 128 (1980). The judge further concluded that defendant was barred by R. 3:22-4 from raising the other issues because they could and should have been raised in the prior appeal.

In this appeal, defendant contends:

I. The formal series of questions posed by the trial court and the one word response (yes or no) by the defendant during the taking of the guilty plea failed to meet the necessary legal requirements.

II. Defendant's plea of guilty was not made voluntarily.

III. The court, when deciding the motion for post-conviction relief, misstated the grounds upon which defendant was barred from raising that issue again, failed to make findings and conclusion when rendering his decision, and failed to answer issues concerning exception to the rule.

We have considered the contentions raised in light of the record which we have reviewed and find they are clearly without merit. R. 2:11-3(e) (2). We also agree with the trial court that the issues raised were either raised or should have been raised in the direct appeal. The order dated June 12, 1987 denying defendant's application for post-conviction relief is affirmed.

State v. Johnson, Docket No. A-5721-86T4 (App. Div., Apr. 26, 1989).

Yet another attorney filed a petition for certification and, finally, among other claims, a reviewing court was presented with the issue flagged in Footnote 2 of the opinion on the direct appeal. From the Petition for Certification:

Point II

Defendant's guilty plea was involuntary because he was erroneously told a conviction for felony murder exposed him to the death penalty.

As previously stated the court below erroneously believed defendant's guilty plea to felony murder exposed defendant to the death penalty. Without any objections from counsel the court even went as far as to conduct a pro forma penalty phase. It can only be assumed, based on the manner in which the plea form was completed and the acquiescence of counsel in the proceedings, that defendant considered the possibility he might be executed when he decided to plead guilty. It is defendant's contention that this misinformation invalidated his plea in its entirety.

It can not be seriously disputed that the possibility of death is a serious factor a defendant must weigh in a case such as the case at bar. When that possibility is illusory but defendant is not told this then defendant has relied on misinformation and his guilty plea is involuntary. State v. Howard, 110 N.J. 113, 122 (1988); State v. Nichols, 71 N.J. 358, 361 (1976). Defendant's plea therefore must be vacated or

at the very least a hearing should be conducted by the Law Division to determine whether defendant considered the possibility of the death penalty in reaching his decision.

Defendant concedes that this issue could have (and should have) been raised on direct appeal. See State v. Johnson, a-496-83T4 (App. Div. 1984) at 2 n.1 (Da 14). However, since it would be a fundamental injustice to allow defendant's plea to stand when it was influenced by such a gross error by the trial court, the prosecutor and, most importantly, defense counsel, the Court should still consider granting relief on this issue.

On September 26, 1989 the New Jersey Supreme Court entered a one-sentence Order summarily denying the petition for certification.[6] State v. Johnson, 117 N.J. 670 (1989).

On August 15, 1991 Petitioner, again proceeding *pro se*, filed a second application for PCR. In it, he challenged the validity of his plea, the effectiveness of counsel, and the court's refusal to admit evidentiary material that would establish a diminished capacity affirmative defense. Once again, petitioner was represented at his post-conviction hearing by brand new counsel who relied primarily on petitioner's *pro se* brief. This time petitioner did supplement his brief on the day of the hearing with a supplemental memorandum challenging the validity of his plea based upon erroneous information about whether felony murder was a death eligible offense.

> [T]he Court, Prosecutor and Defense Counsel represented that if I were found guilty of Felony-Murder, 2C:11-3a I would still be subject to the death penalty. Which brings us to the plea bargain and the reason for entering a guilty plea to Felony-Murder charges.
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> Defense Counsel informed me that the only way to escape the possibility of receiving the death penalty was to accept the plea bargain offered by the State. Which was explained to me as follows; By pleading guilty to the Felony-Murder charg [sic] alone the State would dismiss the other four (4) counts of the indictment and would not object to the fact that the mitigating factors far out-weighted [sic] the only aggravating factor advanced by the State. Thereby, the

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[6]Only three years later, the same supreme court would expressly recognize that "[w]here meritorious issues are presented, our interest in affording defendants access to both state post-conviction and federal habeas review outweighs our interest in finality through an unnecessarily-rigid enforcement of state procedural rules." Preciose, 129 N.J. 451, 476-77 (1992).

possibility of the death penalty of the Felony-Murder charge pursuant to N.J.S. 2C:11-3c(3)(b). And if I rejected the offer the State would vigorously pursue the death penalty in the matter.

Notwithstanding this clear and unambiguous statement about the circumstances of his plea, on January 17, 1992, the court denied relief without ever alluding to it:

> The defendant is claiming that the trial court erred in allowing him to plead guilty without investigating his motion to dismiss counsel. If for some reason the matter is not time barred and someone finds excusable neglect, *the defendant on this issue has provided no evidence that such an application was ever made.*
>
> The defendant also contends that the trial court and counsel erred in not allowing him to obtain or submit evidence of mental disease or defect. The defendant now claims that evidence of mental disease should have been admitted to negate the state of mind element of the crime.
>
> This claim is also without merit. There is no evidence, in fact, in this record that the defendant suffers from a mental disease and there still remains no such evidence.
>
> The defendant also has failed to satisfy the Strickland test used to determine ineffective assistance of counsel. The Strickland test requires firstly that the defendant show counsel's performance was deficient and secondly the defendant must show the deficient performance prejudiced him and thereby deprived him of a fair trial. Strickland v. Washington, 446 U.S. 668.
>
> The defendant here claims prejudice, inadequate investigation. However, once again these claims are unsubstantiated. He has not met his burden of establishing proper deficient performance let alone showing the second step. An attorney who makes a strategic choice to channel his investigation into all plausible lines of defense is effective, so long as the assumptions upon which he bases his strategy are reasonable and his choice on the basis of those assumptions are reasonable. It appears that was done here.
>
> The defendant has provided no hint that counsel's assumptions and choices as to defense strategy were unreasonable. Accordingly, the motion in its entirety is denied.

(Hr'g Tr. 4:15-6:11; (emphasis added).)

The admonishment, italicized above, that petitioner "has provided no evidence that such an application [to dismiss trial counsel] was ever made," is probably not deserved. There is a document attached as an exhibit to petitioner's letter brief on appeal of the denial of his third PCR application that supports Johnson's claims that he was not permitted to raise the issue to the

trial court: a notice of motion to dismiss counsel dated July 14, 1983.

Petitioner appealed, once again with the assistance of newly assigned counsel. The New Jersey Appellate Division affirmed in a *per curiam,* unpublished opinion that first set forth the claims that petitioner had made on direct appeal, in his first PCR application, on appeal of the denial of that application, and in the court below on his second PCR application. After this review of petitioner's procedural history the decision then closed by stating:

> In this appeal from the denial of his second petition for PCR, defendant makes the following contentions:
>
> Point I: Defendant entered a guilty plea to capital murder under such misinformation and undue influence that he is entitled to have his plea withdrawn.
>
> Point II: Defendant was denied effective assistance of counsel in violation of his constitutional rights, entitling him to a reversal of the denial of his petition.
>
> Point III: The Court erroneously denied defendant's second petition for post-conviction relief entitling him to a reversal and remand for further proceedings.
>
> Point IV: Evidence of post-traumatic stress syndrome is cognizable on an application for post-conviction relief.
>
> Point V: Defendant is entitled to a plea withdrawal based upon failure to introduce evidence of PTSD.
>
> Point VI: Defendant is entitled to withdraw his plea based upon the standard of "manifest injustice." R. 3:21-1.
>
> We affirm essentially for reasons expressed in the oral opinion of [the trial] Judge []. Affirmed.

State v. Johnson, Docket No. A-3241-91T4 (App. Div., Jun. 6, 1994).

The decision bears examining. Point III does not assert any substantive basis for a claim, but merely asserts that "[t]he [c]ourt erroneously denied defendant's second petition." Points II, IV, V and VI represent substantive issues presented below and addressed by the trial judge. Significantly, as noted above, the trial judge's oral opinion never dealt with Point I at all. Yet, the Appellate Division affirmed as to all Points "for the reasons expressed in the oral opinion" of the trial judge, and a month later the New Jersey Supreme Court summarily denied petitioner's

petition for certification. State v. Johnson, 137 N.J. 315 (1994).

The next year, on July 24, 1995, petitioner filed a third application for PCR *pro se*. He formally asserted only one claim: that his guilty plea was not knowingly or voluntarily made. The basis he set forth was counsel's not having told him that entering a guilty plea would result in a waiver of his right to testify at trial. Additionally, although not set forth as a separate claim, he devoted more than half of his brief to an assertion that his lawyer should have raised the issue of PTSD at sentencing. He was not assigned an attorney on this third PCR. The trial court rejected all claims on September 11, 1995 in an order denying relief based upon "[t]he Court having heard arguments of counsel and for good cause shown." Although the court's order expressly stated that the "arguments of counsel" were heard, suggesting that both parties were represented at oral argument, that same order also reflects that the matter was opened to the court "by Defendant George L. Johnson, Pro Se."

Petitioner, still proceeding *pro se*, appealed, contending generally that his PCR application should not have been denied on procedural grounds. He claimed too that his guilty plea was unconstitutional because he did not know he was simultaneously waiving his rights to testify and call witnesses at trial. In a one-page opinion, the Appellate Division first noted that petitioner's "application was filed more than twelve years after defendant's conviction. It is clearly time barred." State v. Johnson, Docket No. A-7550-95T2 (App. Div., Dec. 18, 1997). Then, the appellate court addressed the constitutionality of the guilty plea exclusively in the context of petitioner's assertions that he was not advised that he would also be waiving his right to testify and call witnesses, holding that "it is inconceivable that his knowing and voluntary waiver of a jury trial did not include a recognition that he was giving up the right to testify at

such trial." Id.

What makes the reader flinch is that while this opinion appropriately notes that the appellant is "clearly time-barred," the court also states, clearly in error and contrary to the first appellate opinion, footnote 2, that "[a]t the time of his guilty plea, defendant faced the death penalty." At this point in the course of Johnson's post-conviction litigation, the profound mistakes made by the prosecutor, judge, and defense attorney were so lost in the shuffle that state appellate review that began with the observation that petitioner was not death eligible when he was sentenced ended with a flat out assertion that petitioner *was* facing the death penalty when he was sentenced.

Petitioner filed a petition for certification, still *pro se*, and again asserted, as he had throughout this third PCR application, that his application should not be subject to procedural bars and that his plea was involuntary because he was not aware that he was waiving his right to testify and present witnesses at trial. It appears that at this stage, petitioner had become so familiar with the concept of procedural default that he explicitly stated in his petition that "the Appellate Division affirmed the denial of petitioner's third application for Post-Conviction Relief on procedural grounds." Not surprisingly, the supreme court denied the petition for certification. State v. Johnson, 153 N.J. 215 (1998). This ruling represents the final decision of a state court on petitioner's conviction.

Ironically, there is precedent in New Jersey for a collateral review of death eligibility notwithstanding multiple procedural defaults. In State v. McQuaid, 143 N.J. 328 (1996), the New Jersey Supreme Court granted a petition for certification in the context of a second PCR application by a criminal defendant. The court refused "to conclude that defendant should be

penalized because trial counsel, appellate counsel and PCR counsel failed to raise th[e] [death eligibility] issue at an earlier stage." State v. McQuaid, 147 N.J. 464, 494 (1997). As a consequence, the court examined on the merits McQuaid's claim that his guilty plea was involuntary because it was based on the erroneous advice by counsel that he was death eligible. Id. at 495.

Like Johnson, McQuaid was charged with murder shortly after the re-institution of the death penalty. His lawyer advised him that he was death eligible and McQuaid pled guilty. In fact, and again like Johnson, McQuaid was not death eligible under the newly enacted capital punishment statute, and he too did not raise the death eligibility issue until he filed his second PCR application in 1992 (within months of the date that George Johnson filed his second PCR application).[7] In reaching the merits, the supreme court easily found that the reason McQuaid had not raised the critical contention on direct appeal or in his first PCR application "undoubtedly is attributable to counsel's failure to recognize the potential significance of the question," and noted that defendant "should not pay the exacting price for state procedural forfeitures . . . regardless of whether counsel's error violates constitutional standards." Id. at 494.[8]

This analysis is a quantum leap from the one sentence, summary denial of certification in 1989 issued by the supreme court when petitioner's appointed counsel very clearly framed the

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[7]Even though Johnson and McQuaid filed at about the same time and raised strikingly similar issues, the New Jersey Supreme Court did not entertain McQuaid's petition until 1996, two years after it denied Johnson's.

[8]McQuaid was ultimately unable to demonstrate that he should be afforded PCR relief, but was, however, permitted to present the merits of his claim.

issue of the sentencing exposure mistake and its impact on the conviction. In another example of state jurisprudence that was not applied to petitioner, the New Jersey Supreme Court has stated:

> It would be a bitter irony indeed if our courts, in an attempt to accommodate the Supreme Court's entrenchment of federal habeas review, were artificially to elevate procedural rules over substantive adjudications in post-conviction review, at a time when the Court's curtailment of habeas review forces state prisoners to rely increasingly on state post-conviction proceedings.

State v. Preciose, 129 N.J. 451, 477 (1992). Preciose was decided two years prior to petitioner's petition for certification on his second PCR application, which included his addendum that clearly stated he pleaded guilty to felony murder because he thought he faced the death penalty. McQuaid came out in 1997, 10 months before the supreme court summarily denied Johnson's petition for certification in connection with his third PCR application.

While the reasoning in the foregoing cases should have afforded petitioner state court review of the merits of his death eligibility claim, his state court procedural defaults seriously interfere with Johnson's chances of a review on the merits in this Court under traditional habeas analysis. Certainly, these cases suggest that state review became a robotic application of procedural default principles. The issue now becomes whether federal habeas jurisprudence operates to deny a merits analysis. Smith v. Horn, 120 F.3d 400, 407 (3d Cir. 1997) (balancing the interests of "not only comity and federalism, but also 'judicial efficiency,' and 'the ends of justice'" in the context of a habeas petition).

a. Cause and Prejudice

A habeas petitioner may present the merits of his federal constitutional claims that have otherwise been procedurally defaulted by showing cause for his failure to raise the claim earlier and actual prejudice as a result of the alleged violation of federal law. Coleman v. Thompson,

501 U.S. 722, 750 (1991). "[C]ause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986); Caswell v. Ryan, 953 F.2d 853, 862 (3d Cir. 1992). "Attorney ignorance or inadvertence is not 'cause' . . . [but] [a]ttorney error that constitutes ineffective assistance of counsel is cause." Coleman, 501 U.S. at 753. There is, however, no constitutional right to the effective assistance of counsel beyond an initial appeal as of right. Pennsylvania v. Finley, 481 U.S. 551 (1987); Ross v. Moffitt, 417 U.S. 600 (1974).

Here, petitioner has procedurally defaulted his various claims at several points in the state court proceedings. Because of the exceptions explicitly provided by the state court rule governing procedural default in a PCR proceeding, petitioner could have defaulted a claim on direct appeal, yet been permitted to bring that claim in a PCR application. That, however, did not happen, particularly with regard to his claims relating to death eligibility. Now petitioner must establish cause and prejudice for each and every default in state court or his claims will once again be defaulted here. Cristin v. Brennan, 281 F.3d 404, 412 (2002) (requiring that a petitioner "must establish 'cause and prejudice' for [all] defaults").

Assuming for the moment that petitioner could establish that his trial and appellate counsel were constitutionally ineffective,[9] that substandard performance by counsel might serve

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[9]It is no leap to conclude that trial and appellate counsel were ineffective. The failure by petitioner's trial and appellate counsel to raise the death eligibility issue would not only fall below an objective standard of reasonableness, but would surely have resulted in the proceedings having been different. Strickland v. Washington, 466 U.S. 668, 687-96 (1984); *accord* United States v. Nino, 878 F.2d 101, 103 (3d Cir. 1989). *See also* Baker v. Barbo, 177 F.3d 149, 154 (3d Cir. 1999) (holding that "an attorney who does not know the basic sentence for an offense at the time that his client is contemplating entering a plea is ineffective").

as 'cause' to excuse only his procedural defaults in the direct appeal proceedings. "Because [petitioner] had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of [his] claims in state court cannot constitute cause to excuse the default in federal habeas." Coleman, 501 U.S. at 757. Accordingly, no matter how inept his counsel at trial and on direct appeal, their ineffective assistance is insufficient to overcome petitioner's procedural defaults at the PCR stage of his state court proceedings. To overcome these further defaults, petitioner would be required to demonstrate some other objective factors constituting cause. He has not made such a showing.

Moreover, petitioner is required to exhaust in state court *all* claims of alleged ineffective assistance of counsel. A careful review demonstrates that the only claim of ineffective assistance of counsel petitioner has pursued from direct appeal, through each of his applications for PCR, and in this habeas petition, is his claim against trial counsel. That claim appears to be viable 'cause' excusing procedural default, but it would only excuse his initial procedural default - failing to raise the death eligibility claim on direct appeal.

At first glance, then, it might also appear that petitioner maintains a viable substantive claim of ineffective assistance of counsel relative to his trial attorney's performance because he has exhausted that claim in state court. But each time he raised his Sixth Amendment claim he framed it around different alleged deficiencies, sometimes asserting error in trial counsel's failure to advise of a mandatory parole ineligibility term, at other times asserting error in trial counsel's failure to present PTSD as a mitigating factor at sentencing, and at other times asserting error in trial counsel's failure to challenge petitioner's death eligibility. Although it would be satisfying to conclude that the cumulation of these errors would surely constitute ineffective assistance of

counsel -- many counsel, as it turns out, given the parade of attorneys who represented petitioner at one point or the other -- petitioner did not present any one of these purported errors in a linear fashion through the state court proceedings and thereby permit their consideration on the merits here. *See* Lambert v. Blackwell, 134 F.3d 506, 517 (3d Cir. 1997) (holding that a habeas petitioner's claims were barred because the numerous claims brought at various stages in different proceedings were not substantially equivalent to one another).

Even if petitioner could demonstrate cause sufficient to overcome each procedural default, he is also required to make a showing of prejudice. "With regard to the prejudice requirement, the habeas petitioner must prove ''not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension.''" Werts v. Vaughn, 228 F.3d 178, 193 (3d Cir. 2000) (*quoting* Murray v. Carrier, 477 U.S. 478, 494 (1986)) (further quotations omitted). Prejudice is demonstrated where "there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different." Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996).

Here, even assuming that petitioner's cause for his procedural default would be the ineffective assistance of counsel, petitioner must now also demonstrate that trial counsel's misinformation directly affected the outcome of the proceedings. That prejudice could be that petitioner would not have pled guilty if he had not been erroneously advised that he was subject to the death penalty on two of the homicide charges he was facing. Or it could be that petitioner would have been in a position to plea bargain to a different lesser charge, one that did not carry a mandatory minimum 30-year sentence. Had the sentencing judge known that the death penalty

was off the table, the same mitigating factors that led him to impose a 30-year sentence instead of death may have led to a lower sentence – again, the 30 years was a mandatory minimum. But because petitioner remains unable to demonstrate 'cause' for each of his successive procedural defaults, he cannot satisfy the 'cause and prejudice' exception which requires a demonstration of both cause and prejudice.

b. Actual Innocence (Miscarriage of Justice)

Federal courts recognize a second and alternative means to cause and prejudice analysis by which an otherwise defaulted petitioner may have the merits of his substantive claims heard by the court. Under this analysis, even if no cause and prejudice is shown to excuse the procedural default, relief may be available if the petitioner can show with sufficient probability that the procedural bar will create a fundamental miscarriage of justice. *See* Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Werts, 228 F.3d at 193. The fundamental miscarriage of justice at issue in this context is the conviction of a person who is actually innocent of the crime. Id.

"[O]ur habeas jurisprudence makes clear that a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404 (1993). "[I]n habeas jurisprudence, ''actual innocence' means factual innocence, not mere legal insufficiency.'" United States v. Garth, 188 F.3d 99, 107 (3d Cir. 1999) (*quoting* Bousley v. United States, 523 U.S. 614, 623 (1998)). To establish actual innocence, petitioner must demonstrate that the alleged constitutional error "has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 496.

While the foregoing may seem an academic discussion because petitioner pled guilty and has never denied that his conduct resulted in the death of another, the United States Supreme Court and this Circuit have utilized an adaptation of the actual innocence standard when capital sentencing issues are involved. To show actual innocence on a capital sentencing claim, a petitioner must demonstrate actual innocence not of the crime, but actual innocence of the death penalty. Szuchon v. Lehman, 273 F.3d 299, 324 n. 14 (3d Cir. 2001). The seminal case on this is Sawyer v. Whitley, 505 U.S. 333, 336 (1992), which establishes a standard requiring that a habeas petitioner show "by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner *eligible* for the death penalty under the applicable state law." (Emphasis added.)

"This standard focuses on actual innocence of the minimum prerequisites that rendered the petitioner *eligible* for the death penalty." Szuchon , 273 F.3d at 324 (emphasis added); Sawyer, 505 U.S. at 347 (stating that "the 'actual innocence' requirement must focus on those elements that render a defendant *eligible* for the death penalty") (emphasis added). "[T]he petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is *ineligible* for the death penalty." Johnson v. Singletary, 938 F.2d 1166, 1183 (11th Cir. 1991) (*cited with approval in* Sawyer, 505 U.S. at 347 n. 15) (emphasis added). In short, in this context, the actual innocence standard does not address factual innocence with respect to the crime and can, therefore, be invoked even where a guilty plea has been entered. The critical component is a finding of death eligibility.

In this case, the judge, defense counsel and the prosecutor all framed the plea hearing and the sentencing determination in terms of Johnson's death eligibility. Petitioner asserted in his

first PCR application that he was advised by counsel that if "I rejected the offer the State would vigorously pursue the death penalty in the matter." He accepted the plea, the trial court clearly found him to be *eligible* for capital punishment and, only after conducting a full mitigation hearing, instead of ordering that he be executed, imposed a life sentence with 30 years parole ineligibility. The strong impression is that death eligibility drove the proceedings, and the sentencing was all about avoidance of the ultimate punishment of death.

Precedent does not make clear whether the "actually innocent of the death penalty" standard is available to a habeas petitioner who has not actually received a death sentence. But because the focus of the standard is on eligibility, it seems logical to conclude that the ultimate sentence is not dispositive of whether the standard applies. Instead, the critical issue is whether there was wrongful exposure to the death penalty. Support for this is inherent in the Supreme Court's observation that "the precise scope of the miscarriage of justice exception depends on the nature of the challenge brought by the habeas petitioner." Calderon v. Thompson, 523 U.S. 538, 559 (1998) (applying the actual innocence standard in the context of death eligibility).

Johnson does not plead actual innocence and his claims come without the trappings of an assertion that he did not commit the crime. But he does assert, however inartfully, that he was not death eligible at the time he entered his plea and in that assertion, he alone, out of those professionals involved in his plea and sentencing, is correct. In that regard, he explicitly makes the point in this petition that he is actually innocent of the death penalty for purposes of the procedural default analysis.

Putting a practical face on the above, there is no doubt that had the sentencing judge ignored the recommendation of the prosecutor and imposed a capital sentence, he would have

been imposing an illegal sentence. New Jersey had reinstated capital punishment for certain offenses effective in August of 1982. Petitioner was arrested in February, 1983, the day after the crime was committed; he pleaded guilty in July, 1983; and he was sentenced in August, 1983. The capital punishment statute unambiguously identified what crimes were subject to capital punishment and felony murder was not included. N.J.S.A. 2C:11-3(c.) (permitting imposition of the death penalty for "[a]ny person convicted under subsection a.(1) or (2)," with subsection a.(1) addressing purposeful murder and subsection a.(2) addressing knowing murder, and not prescribing the death penalty for convictions under subsection a.(3) which addressed felony murder). In addition to the express statutory language of the statute that excludes felony murder as a capital offense, the legislative statement accompanying the capital punishment bill declared in its introductory paragraph that "persons convicted under the felony-murder doctrine . . . would not be eligible for capital punishment." Moreover, at least one other New Jersey state court had, at the time of petitioner's plea, already addressed the precise issue of whether felony murder subjected a defendant to capital punishment and concluded that the governing statute did not provide for such a sentence. State v. Gantt, 186 N.J. Super. 262, 278 (Law Div. 1982), *aff'd* 195 N.J. Super. 114 (App. Div. 1984), *aff'd* 101 N.J. 573 (1986). [10]

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[10]That the New Jersey statute would not permit imposition of the death penalty would not, in and of itself be a matter cognizable on federal habeas review. *See* 28 U.S.C. §2254 (permitting habeas relief for violations of only federal and constitutional law, not state law). It is appropriate, however, for this Court to consider death eligibility under a state statute within the limited "gateway" function of actual innocence. *See* Herrera v. Collins, 506 U.S. 390, 404 (1993) (stating that the actual innocence analysis is not itself a substantive habeas claim, but merely a gateway through which a court could otherwise reach a constitutional habeas claim). Here, petitioner's constitutional claims relate to the voluntariness of his plea and his Sixth Amendment right to counsel, not any Eighth Amendment claim that might be implicated by the state's capital punishment statute.

In light of the foregoing, this Court finds that petitioner has met the clear and convincing standard that is his burden and sufficiently asserts actual innocence of the death penalty for purposes of satisfying the exception to the procedural default bar. *See* Szuchon, 273 F.3d at 324 n. 14. The nature of the circumstances surrounding his plea and sentencing, the unlikelihood that they could repeat themselves, and the power of the mistake that led to a full blown eligibility hearing, demonstrating conclusively that all the professionals in the judicial system were wrong, lead to an affirmative answer to the final query of whether the actual innocence exception is available to him even though he is not sentenced to death. The sentencing judge acted as a fact-finder and assumed the role of the jury, and exercised discretion in making the sentencing determination – actions that were based upon the indisputable error that Johnson was death eligible. As such, the required elements for actual innocence of the death penalty are present, and under the circumstances presented this Court finds that this petition falls into "'the narrow scope' of the [miscarriage of justice] exception." Calderon, 523 U.S. at 559 (*quoting* Sawyer, 505 U.S. at 340; Harris v. Reed, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring)). The procedural default is excused and the Court will address the merits of his claims that relate to the sentencing misinformation.

C. Structural Defect

This Court has carefully applied traditional analysis in deciding the issue at the core of Johnson's petition in its complicated procedural posture. Attention to the rigors of procedural default jurisprudence was required in the face of multiple procedural defaults. But it bears noting that the comity principles at the heart of procedural default wilt in the face of the demonstrated failure of the state courts to apply the New Jersey Supreme Court's observation in McQuaid that

the defendant's multiple procedural defaults were "undoubtedly . . . attributable to counsel's failure to recognize the potential significance of the question," and that defendant "should not pay the exacting price for state procedural forfeitures . . . regardless of whether counsel's error violates constitutional standards." State v. McQuaid, 147 N.J. 464, 494 (1997). Petitioner was at the time of his arrest a poorly educated man with no prior criminal record and had an admitted drug addiction. He was charged in connection with a homicide and, on advice of counsel, waived his constitutional right to a trial and was convicted and sentenced within a few months of his arrest through a process that was dead wrong in its universal assumption that he faced the death penalty that had been reinstated under New Jersey law the year before. Embedded in any notion of due process is petitioner's right to a merits analysis of the impact of that mistake, particularly when it strikes at the heart of the only two legal proceedings petitioner participated in on the trial level – his plea hearing and his sentencing. Failing to address the claim by observing the interests in comity would repeat the errors manifest in the state courts' treatment of this claim and would ignore the irony that had any of the state courts applied New Jersey's own laudable caution in this regard when petitioner brought his PCR applications, they could have reached the merits using state jurisprudence.

Addressing the merits, then, it is clear to this Court that the gravity of petitioner's claim, namely that petitioner's guilty plea was neither knowing nor voluntary in the face of erroneous advice of counsel, an improper plea agreement, and an unlawful plea hearing, all of which were infected by the erroneous assumption that he was death eligible, puts petitioner's claim into that very limited class of cases for which relief is afforded when the constitutional violations "by their very nature cast so much doubt on the fairness of the [criminal] process" that courts invoke the

doctrine of structural defect in spite of procedural bars. Satterwhite v. Texas, 486 U.S. 249, 256 (1988); *see* Vasquez v. Hillery, 474 U.S. 254 (1986) (finding structural error on a habeas petition in the face of procedural defaults); McKaskle v. Wiggins, 465 U.S. 168 (1984) (same).

"The Supreme Court has distinguished between two types of constitutional error that occur at both trial and sentencing: 'trial errors' which are subject to constitutional harmless error analysis, and 'structural defects,' which require automatic reversal or vacatur." United States v. Stevens, 223 F.3d 239, 243 (3d Cir. 2000); Lewis v. Pinchak, 348 F.3d 355, 357 (3d Cir. 2003). A constitutional trial error can be "quantitatively assessed . . . in order to determine whether its [effect] was harmless." Arizona v. Fulminante, 499 U.S. 279, 308 (1991). Harmless-error analysis is a quantitative evaluation performed when the scope of the error is readily identifiable and an assessment can made of the likelihood that the error affected the outcome of the case. Holloway v. Arkansas, 435 U.S. 475, 490 (1978).

"At the other end of the spectrum of constitutional errors lie 'structural defects' in the constitution of the trial mechanism which defy analysis by 'harmless error' standards.'" Brecht v. Abrahamson, 507 U.S. 619, 629 (1993) (*quoting* Fulminante, 499 U.S. at 309). Structural defects are more than simple trial errors that occurred during the criminal proceedings, but are errors which deprive a defendant of basic constitutional protections so as to undermine the reliability of the proceedings, pervade the entire proceedings with a taint of error, and infect and contaminate the complete process of adjudication. Neder v. United States, 527 U.S. 1, 8-9 (1999); Brecht, 507 U.S. at 630; Satterwhite, 486 U.S. at 256-57; United States v. Vazquez, 271 F.3d 93, 103 (3d Cir. 2001); Stevens, 233 F.3d at 244.

The doctrine of structural defect affords relief when the constitutional violations "by their

very nature cast so much doubt on the fairness of the [criminal] process that, as a matter of law, they can never be considered harmless." Satterwhite, 486 U.S. at 256. Where constitutional error has pervaded the entire proceedings, "inquiry into its effect on the outcome of the case would be purely speculative." Id.; Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) (finding structural error where harmless-error inquiry would involve "pure speculation"); Holloway, 435 at 490 (refusing to apply harmless error analysis where "it would be difficult to judge intelligently the impact" of an error and where an attempt to do so would involve "unguided speculation"). In such an instance, the consequences of the constitutional deprivation is "necessarily unquantifiable and indeterminate, [and] unquestionably qualifies as 'structural error.'" Sullivan, 508 U.S. at 282.

In this case, petitioner was charged, entered a guilty plea, and was sentenced. He did not benefit from a full trial. Essentially, a plea hearing and a sentencing hearing constituted the entirety of the proceedings in his case, and everything was done in the shadow of the death penalty. At the plea hearing, the judge asked petitioner directly:

Q: Do you understand the charge and what it means?
A: Yes.
Q: Okay. And do you understand that that is a capital crime, one in which the penalty that could be imposed is death . . . ?
A: Yes.

(Hr'g Tr. at p. 4:14-25.) The judge continued on to advise petitioner that "it being a capital case, you also have an additional right to have a jury decide whether you should get death." (Id. at p. 6:14-16.) He then asked "Do you understand when you [waive your right to jury trial] that, then the Court will decide whether to accept your guilty plea and also then the Court will, after hearing, make the decision as to whether or not you should get the death penalty . . ." to which

petitioner replied in the affirmative. (Id. at p. 7:15-18.) In assessing whether that waiver was the result of the sentencing misinformation, the Court notes petitioner's assertion that he was told that if he went to trial before a jury, the prosecutor would vigorously pursue the death penalty. The trial judge concluded the colloquy finding that petitioner "understands fully what is involved in this case, . . . [and] what the penalties are under the law" and accepted his guilty plea. (Id. at p. 17:24-18:1.) He then handwrote on petitioner's written trial waiver inclusion of a waiver of a jury trial "on the penalty to be imposed" and asked petitioner to initial that handwritten notation. (Id. at p. 21:11-14.)

During this entire hearing and all the references to capital punishment that permeated the proceeding, no objection or correction was made by defense counsel or the prosecutor. Whether the trial court's sentencing error is framed in terms of a Sixth Amendment violation arising from defense counsel's failure to know the law even if the judge did not, or his failure to render adequate legal advice leading to petitioner's waivers; or whether the error is framed in terms of the trial judge conducting both a plea colloquy and sentencing hearing in which he made repeated reference to and nearly imposed a sentence that he could not legally impose, or in terms of the State seeking a sentence it was statutorily forbidden to seek – in the end, the choices are immaterial.

Put in basic terms, the manifest error committed by all involved rises to the level of error that "'seriously affec[ts] the fairness, integrity or public reputation of judicial proceedings.'" Neder, 527 U.S. at 9 (*quoting* Johnson v. United States, 520 U.S. 461, 469 (1997)). In a plea hearing whose foundation is this seriously flawed, what has been pronounced about a structurally defective trial applies: "[t]he structure has been removed. There was no way of repairing it. The

framework within which the trial proceeds has been eliminated. The verdict is a nullity." United States v. Mortimer, 161 F.3d 240, 241 (3d Cir. 1998) (internal quotations and citations omitted) (finding structural error). *Cf.* United States v. Stevens, 223 F.3d 239, 245 (3d Cir. 2000) (recognizing that adequate representation by counsel and the presence of an impartial judge are protections to be considered when determining whether an error is structural). "When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity *nor evaluate the resulting harm.*" Vasquez, 474 U.S. at 263 (granting habeas relief to a state prisoner) (emphasis added).

Johnson, then, has demonstrated indisputable error that pervaded his plea and his sentencing and that constitutes structural error. In the proceedings below, no state court addressed the error. A district court applying the AEDPA standard may not grant a habeas petition unless the state court's adjudication of claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d). Under the "unreasonable application" standard, the focus is whether "the state court's application of clearly established federal law is objectively unreasonable." Bell v. Cone, 535 U.S. 685, 694 (2002).

The structural defect that contaminated petitioner's criminal proceedings was a due process violation that rendered his guilty plea involuntary. By July of 1983 when petitioner entered his plea, the United States Supreme Court had clearly and unambiguously held that in order for a guilty plea to be constitutional it must be knowingly and voluntarily given, and this holding was of long standing. Brady v. United States, 397 U.S. 742, 747 n. 4 (1970) (stating that

"[t]he requirement that a plea of guilty must be intelligent and voluntary to be valid has long been recognized"); *accord* Henderson v. Morgan, 426 U.S. 637, 644-45 (1976); McCarthy v. United States, 394 U.S. 459, 466 (1969); Johnson v. Zerbst, 304 U.S. 458, 464 (1938). As a required condition for accepting petitioner's guilty plea, the trial court applied this standard when it found that petitioner had validly waived his right to trial. The irony is that the trial court's findings, and appellate review of them, were irrelevant because the information petitioner was given by the court and his attorney was wrong. As such, from the outset, petitioner could not supply knowing and voluntary answers to questions that were framed around a fundamental, powerful mistake.

Moreover, petitioner's lawyer not only offered no assistance in righting this wrong, but perpetuated it. As did the prosecution: based on how the case was charged and presented, the grand jury indicted petitioner on capital offenses and only two months later petitioner stood convicted under the brand new death penalty statute.[11] On direct appeal, despite the failure of appellate counsel to spot the issue, the court recognized that this abundance of misinformation on death eligibility might have "prejudicially impacted upon defendant's decision to plead guilty." But despite this express acknowledgment that the core validity of the appeal might well be involved (the appellate panel surely knew there had been, of all things, a penalty hearing that was entirely uncalled for and demonstrated plain error on the part of the trial court), the state court

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[11]The speed with which petitioner was convicted and sentenced leads to the conclusion that further proceedings to test the credibility of his assertion that he pleaded to avoid vigorous prosecution on the capital crimes he was facing are unnecessary. These circumstances are sufficient to make the finding that the sentencing misinformation was at the root of the decision to plead guilty and distinguishes petitioner's case from others where further exploration of the pleading defendant's motivation was undertaken.

elected to apply no federal law, reasonably or not. Ducking this issue became the only treatment the issue was given, despite its constitutional dimension, every time it was raised to a state tribunal. The failure to apply clearly defined constitutional law under the circumstances is manifestly unreasonable.

If this unreasonable application of federal law were not enough, the state courts also rendered decisions that were "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d) (1996). A state court decision based on a factual determination may be overturned on factual grounds if that determination "was objectively unreasonable in light of the evidence presented in the state proceeding." Rico v. Leftridge-Byrd, 340 F.3d 178, 181 (3d Cir. 2003) (*citing* Miller-El v. Cockrell, 537 U.S. 322 (2003)).

In petitioner's third PCR application, the Appellate Division stated in its opinion that "[a]t the time of his guilty plea, defendant faced the death penalty." This determination of death eligibility was not objectively reasonable based upon the evidence presented at petitioner's plea and sentencing hearings. During those hearings, the trial court addressed only the charge of felony murder, a crime not subject to capital punishment, and elicited testimony limited to the burglary and the resulting death. Nowhere in the trial court proceedings was there any evidence presented indicating that petitioner's conduct fell within any other category of murder that would rightfully have subjected petitioner to death under the statutory scheme. Having only evidence of felony murder presented in the state court proceedings, it was an unreasonable determination by the Appellate Division in light of that evidence that petitioner faced the death penalty. This is particularly so when that determination was made subsequent to the determination on direct

appeal that he actually did not.

The Court concludes that petitioner waived his right to a jury trial and exposed himself to the death penalty in the hope that his acceptance of responsibility would spare him, and received a mandatory minimum sentence of 30 years, based upon misinformation given by his attorney and acted upon by the prosecutor and the trial court. Under those circumstances, his guilty plea was neither voluntary nor knowing. He has been denied his constitutional right of due process in the criminal proceedings below and his conviction must be vacated. In light of the foregoing, it is clear that all other claims made by petitioner in this habeas application are clustered around, and in fact consumed by, the events that rendered his guilty plea unconstitutional. This Court will not, therefore, address the merits of petitioner's remaining claims.

This Court recognizes that in the habeas context it "cannot revise the state court judgment; it can act only on the body of the petitioner." Fay v. Noia, 372 U.S. 391, 430-31 (1963). Upon a finding that there "has been an improper detention by virtue of the state court judgment," a federal court may "order[] the immediate release of the prisoner, conditioned on the state's opportunity to correct constitutional errors that we conclude occurred in the initial proceedings." Henderson v. Frank, 155 F.3d 159, 168 (3d Cir. 1998). The release of a successful habeas petitioner may be delayed while the State acts upon the findings and holds further proceedings consistent with them, or pursues an appeal. See Fed. R. App. P. 23(c) (permitting a court to order the continued detention of a habeas petitioner pending appeal by the State). Such will be the order of this Court, along with the appointment of an attorney to represent petitioner in any further federal proceedings.

CONCLUSION

Petitioner's application for a writ of habeas corpus is **granted**. In light of the complexity of the issues and in the interests of justice, counsel will be assigned by separate order to represent petitioner under the Criminal Justice Act for the purposes of any subsequent federal proceedings. *See* 18 U.S.C. § 3006A(a)(2)(B). Petitioner shall remain in the custody of the State pending further proceedings and orders of the Court. *See* F. R. Cr. P. 23(c)-(d).

Dated: January 21, 2004

s/ KATHARINE S. HAYDEN
Katharine S. Hayden, U.S.D.J.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-1307

GEORGE JOHNSON

v.

STEVEN PINCHAK; ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Appellants

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 99-cv-00685)
District Judge: Honorable Katharine S. Hayden

Argued November 1, 2004
Before: ALITO, FUENTES, and BECKER, *Circuit Judges*.

(Filed: December 22, 2004)

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

When petitioner, George Johnson, pled guilty to felony murder under the misapprehension that he was eligible for the death penalty for that crime, felony murder in New Jersey was not in fact a capital offense. However, after receiving a sentence of life imprisonment with thirty years parole ineligibility and after exhausting his state remedies, Johnson sought federal habeas corpus relief alleging ineffective assistance of counsel and involuntariness of his guilty plea. The District Court ultimately granted relief on grounds that the state court's mistake about Johnson's death eligibility for felony murder was structural error, and thus, per se reversible.

The threshold question on this appeal is whether Johnson's claim is procedurally defaulted. Johnson did not raise the death penalty eligibility claim in his direct appeal to the New Jersey Superior Court, Appellate Division, nor did he address it in his first Post Conviction Relief (PCR) petition to the New Jersey courts. He first raised the claim in his petition for certification to the New Jersey Supreme Court; however, this petition was summarily denied. Over a year later, Johnson raised the death penalty eligibility claim in a second PCR petition, but that petition was filed more than five years after his sentence was handed down, and thus was time-barred under New Jersey Rule of Court 3:22-12. Rather than barring Johnson's claim on procedural grounds, however, the District Court invoked the "actual innocence" exception to the procedural default rules, which allows consideration of the merits of a claim, notwithstanding procedural default, to avoid a miscarriage of justice.

We conclude that, in so doing, the District Court misconstrued the scope of the actual innocence exception by applying it where the petitioner wrongly was led to believe he was death eligible, but where the death penalty was not actually imposed. Rather, we hold that the touchstone of the actual innocence inquiry is innocence of the sentence actually *imposed*, not innocence of a sentence for which the petitioner was merely eligible. We also conclude that Johnson's death-eligibility claim was procedurally defaulted because of his failure to bring the claim before the New Jersey state courts in accordance with their procedural rules. Supporting the procedural default conclusion are the facts that: (1) the New Jersey courts

considering Johnson's application clearly relied on such procedural default as a separate and independent basis for their denial of relief, and (2) the five-year time bar under N.J.R. 3:22-12 is an adequate state ground, as it is strictly and consistently enforced in all but the most exceptional cases.

Accordingly, we will reverse the order of the District Court and remand with directions to dismiss Johnson's habeas petition as procedurally defaulted.

I. FACTS AND PROCEDURAL HISTORY

In 1983, Johnson pled guilty to felony murder for the smothering death of a 76-year old man during the course of a robbery. The relevant facts of the crime are not in dispute. Johnson and his co-conspirator Mary Susan Karnish, entered Gerald Clayton's hotel room at the Poughkeepsie Hotel in Asbury Park, New Jersey, with the intent to steal his wallet. As Clayton slept, they searched the room, but initially found nothing and left. Shortly thereafter, Johnson and Karnish returned to Clayton's room to search under the bed. Clayton awoke and screamed. Johnson then grabbed a pillow and placed it over Clayton's face, holding it there until Clayton suffocated to death. Johnson then saw the wallet on the bed, took it, and fled.

The next day, Karnish gave a statement to the police, detailing her involvement in the crime and naming Johnson as an accomplice. Later that day, Johnson gave a confession to the authorities in which he admitted suffocating Clayton. In May 1983, the grand jury charged Johnson with five crimes: murder in the first degree for purposely or knowingly causing the death of or serious bodily injury resulting in death of Gerald Clayton; felony murder; robbery; conspiracy; and burglary. JA 15-18. Pursuant to a plea agreement, the state agreed to dismiss the first degree murder charge in exchange for a guilty plea to felony murder. Johnson entered a guilty plea to the second count of the indictment for felony murder.

This case hinges around a mistake, made during the course of the plea negotiations and at the plea and sentencing hearing, by the New Jersey trial court, Johnson's defense counsel, and the prosecution, all of whom erroneously believed that felony murder could be a capital offense under New Jersey law. New Jersey had only reinstated the death penalty one year before Johnson entered his guilty plea, N.J. Stat. Ann. § 2C:11-3C, effective August 6, 1982, and confusion about the applicability of the death penalty apparently abounded in New Jersey courts. Johnson pled to felony murder, with the understanding that the prosecution would not in fact seek the death penalty, and that to this end, it would stipulate to several mitigating factors and only one aggravating factor at sentencing. At the

sentencing hearing, on August 19, 1983, the trial court did consider the death penalty as a possibility for felony murder. Nevertheless, the court did not sentence Johnson to death, but rather, based on a balance of the mitigating and aggravating factors, sentenced him to life in prison with thirty years parole ineligibility.

Johnson pursued a timely direct appeal which challenged the voluntariness of his plea and the effectiveness of trial counsel, but which did not raise the claim that he was misinformed about his death eligibility. Instead, he contended that his trial counsel did not inform him of the thirty-year parole ineligibility. On November 29, 1984, the New Jersey Superior Court Appellate Division affirmed Johnson's conviction and sentence. He did not seek discretionary review by the New Jersey Supreme Court.

In 1987, Johnson filed a *pro se* petition for post conviction relief (PCR), which raised issues of the effectiveness of counsel and the voluntariness of his plea, and asserted that the sentencing proceedings were improperly conducted. This (first) PCR petition also failed to raise the death-eligibility mistake as a basis for relief. The petition was denied by the trial court and the Appellate Division affirmed. Johnson then sought certification from the New Jersey Supreme Court, where for the first time, he claimed that it had been error for the trial court to accept his plea because he had been misinformed about his death penalty eligibility for the felony murder count. The New Jersey Supreme Court denied certification in September 1989.

Johnson then filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the District of New Jersey, which was dismissed without prejudice in February 1991 because it was a "mixed" petition, containing both exhausted and unexhausted claims. Returning to state court, Johnson filed a second PCR application in August 1991, in which he explicitly raised the death-eligibility issue as well as the unexhausted issue that he was suffering from Post Traumatic Stress Disorder at the time of the crime and his plea. The trial court denied his petition as untimely under Rule 3:22-12, which requires a PCR petition challenging a sentence to be filed within five years after the sentence is imposed. In June 1994, the Appellate Division affirmed and the New Jersey Supreme Court denied certification.[1]

Johnson, still proceeding *pro se*, then sought federal review of

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1 In July 1995, Johnson filed a third PCR application, *pro se*, arguing other defects in the sentencing and plea procedure, which were also denied.

his state court conviction pursuant to 28 U.S.C. § 2254, reviving his argument that his plea was not entered knowingly and intelligently because he was operating under the mistaken impression that he could have received the death penalty for felony murder. The District Court found that Johnson had procedurally defaulted this claim by failing to bring it before the New Jersey courts in a timely fashion. Nevertheless, the court excused the procedural default on the grounds that Johnson was "actually innocent" of the death penalty and that his conviction would constitute a fundamental miscarriage of justice. Even though Johnson was not actually sentenced to death, the District Court determined that the actual innocence inquiry focuses on *eligibility* for the death penalty, rather than *imposition* of a death sentence.

Following the determination that Johnson can proceed on the merits of his claim under the actual innocence exception, the court went on to determine that the misinformation provided to Johnson constituted a "structural error" requiring an automatic reversal or vacatur, as such errors are not subject to harmless error analysis. On this basis, the District Court entered an order granting Johnson's application for a writ of habeas corpus.

The State filed this appeal, arguing that Johnson had procedurally defaulted on the death-eligibility claim and that the District Court erred in invoking the "actual innocence" exception to excuse the procedural default. The State also contends that the District Court erred in holding that the misinformation about death eligibility constituted a "structural error" requiring automatic reversal. Instead, the State submits that this type of error should be subjected to harmless error analysis, and that the error was indeed harmless because the evidence shows Johnson would have accepted the plea even if he had been properly informed about his eligibility for the death penalty.

Before the District Court can entertain a federal habeas petition, it is well established that a petitioner must first exhaust his federal claims in state court. 28 U.S.C. § 2254(b), (c); *Rose v. Lundy*, 455 U.S. 509, 510 (1982). Exhaustion requires that petitioner present in substance the same claim he is now seeking to have the federal courts review. *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986). Even if a state court fails to rule on the merits of a claim, a properly presented claim will be considered exhausted. *See Swanger v. Zimmerman*, 750 F.2d 291, 295 (3d Cir. 1984).

Notwithstanding the fact that the New Jersey trial court refused to hear Johnson's death-eligibility claim on procedural grounds, the exhaustion requirement was satisfied in this case, as

Johnson clearly presented the claim to the New Jersey courts in his second PCR petition, and the denial of relief was affirmed by the New Jersey Appellate Division and New Jersey Supreme Court.

II. PROCEDURAL DEFAULT

Where a state court refuses to consider a petitioner's claims because of a violation of state procedural rules, a federal habeas court is barred by the procedural default doctrine from considering the claims, *Harris v. Reed*, 489 U.S. 255 (1989); *Caswell v. Ryan*, 953 F.2d 853, 857 (3d Cir. 1992), unless the habeas petitioner can show "cause" for the default and "prejudice" attributable thereto. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). Any procedural default, however, must rest on "adequate and independent" state law grounds. *Harris*, 489 U.S. at 262.

The District Court concluded that the New Jersey courts had refused to consider Johnson's claim because his petition was time-barred under N.J.R. 3:22-12, that Johnson procedurally defaulted his death-eligibility claim and did not demonstrate "cause and prejudice." In a federal habeas proceeding, "review of the district court's legal conclusions is plenary and factual findings in dispute are reviewed under the clearly erroneous standard." *Bond v. Fulcomer*, 864 F.2d 306, 309 (3d Cir. 1989).

A. The "Independence" Requirement

A state procedural ground will not bar federal habeas relief if the state law ground is so "interwoven with federal law" that it can not be said to be independent of the merits of a petitioner's federal claims. *Coleman*, 501 U.S. at 740. Relatedly, "[i]f the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available." *Ylst v. Nunnemaker,* 501 U.S. 797, 801 (1991). The threshold question, therefore, is whether the New Jersey courts, in denying Johnson's death-eligibility claim, relied independently on a violation of state procedure or based their decision on the merits of the claim.

In *Harris v. Reed, supra*, the Supreme Court established a "plain statement" rule that there would be no procedural default, for purposes of federal habeas review, unless "the last state court rendering judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." 489 U.S. at 263. *Harris*'s plain statement rule was subsequently narrowed by *Coleman v. Thompson*, 501 U.S. 722 , 735 (1991), which established that the first step is to determine whether the decision of the last state court to which the petitioner presented his federal claims "fairly appears to rest primarily on federal law, or to be interwoven with the federal law."

See also Caswell, 953 F.2d at 859-60. Only then, if there is such a reliance on federal law, do we look at whether the state court clearly and expressly based its ruling on a state procedural ground. *Id.*

The last state court to render judgment in this case, the New Jersey Supreme Court, denied certification on Johnson's petition. The U.S. Supreme Court addressed such a situation in *Ylst v. Nunnemaker*, *supra*, 501 U.S. 797, holding that when the last state court decision simply affirms summarily the lower court's denial of relief, a federal court should look to the "last *explained* state-court judgment on the . . . claim" to determine whether it "fairly appears to rest primarily on federal law" or instead relies upon a state procedural bar to deny relief. *Id.* at 802, 805 (emphasis in original). Therefore, "[W]here . . . the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Id.* at 803.

The New Jersey courts, while addressing the merits of the case as alternative holdings, clearly rested on state procedural grounds as a separate and independent basis for their decision to deny Johnson's death-eligibility claim. The Appellate Division, which is the highest state court to write an opinion on the case, itself relied on the trial court's reasoning, affirming "essentially for the reasons expressed in the oral opinion of [the trial court judge]." The Appellate Division found that the trial judge barred the review of sentence under N.J.R. 3:22-12 because the petition was filed beyond the rule's five-year time limit, but that the trial judge, in the event that the petition was not time barred, also rejected certain claims on the merits. JA 487. The Appellate Division's only comment on the merits was, "However, assuming the petition was not time barred, the [trial] court found no evidence defendant had made a motion to dismiss counsel nor that defendant had suffered from mental disease; the claim of ineffective assistance of counsel was found to be without merit." JA 487.

In Johnson's second PCR petition, the trial court expressly cited N.J.R. 3:22-12, which requires a petition to be filed within five years after the sentence unless the delay was due to excusable neglect, and found that there were not "any facts alleged that would constitute excusable neglect." JA 654. Similarly, the trial court found that "the challenge" could have been made on the defendant's many appeals and prior applications for post-conviction relief. JA 654. Although "the challenge" does not refer to any one specific claim, it appears that

the trial court was referring to all the claims in the petition.[2]

The fact that both the New Jersey trial court and Appellate Division made reference to the merits of the case as an alternative holding does not prevent us from finding procedural default. In *Harris v. Reed*, the U.S. Supreme Court noted that

> a state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law. Thus, by applying this doctrine to habeas cases, *Sykes* curtails reconsideration of the federal issue on federal habeas as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision. In this way, a state court may reach a federal question without sacrificing its interests in finality, federalism, and comity.

489 U.S. at 264 n.10 (citations omitted, emphasis in original); *see also Cabrera v. Barbo*, 175 F.3d 307, 314 (3d Cir. 1999) (holding that the fact that Appellate Division also addressed the lack of merit in the ineffective assistance of counsel claim "does not undermine our conclusion that the state courts rejected Cabrera's claim on an independent and adequate state basis, as the comment at most was an alternative holding").

In this case, both the Appellate Division and the trial court explicitly invoked the procedural bar under N.J.R. 3:22-12, which was an independent basis for the Appellate Division to deny Johnson relief.

B. Adequacy of the Procedural Bar

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2 The trial court went on to briefly address some of the claims on their merits. On the claim that it was error to allow Johnson to plead without investigating his motion to dismiss, the trial court considered that "if for some reason the matter is not time barred and someone finds excusable neglect" then the defendant would fail because of a lack of evidence. For the mental illness claim, the trial court also found a lack of evidence that he suffered from mental illness. Finally, the court rejected the ineffective assistance claim by applying the *Strickland* test. JA 655. The trial court did not address the death-eligibility claim on the merits.

Johnson also challenges the adequacy of the procedural bar under N.J.R. 3:22-12.

> A state rule provides an independent and adequate basis for precluding federal review of a state prisoner's habeas claims only if: (1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) the state courts' refusal in this instance is consistent with other decisions.

Doctor v. Walters, 96 F.3d 675, 683-84 (3d Cir. 1996). Thus, a state rule can be rendered inadequate if the rule is not "strictly or regularly followed." *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims."). Nevertheless, neither "an occasional act of grace by a state court in excusing or disregarding a state procedural rule" nor a "willingness in a few cases to overlook the rule and address a claim on the merits" renders a state procedural rule inadequate. *Banks v. Horn*, 126 F.3d 206, 211 (3d Cir. 1997).

The procedural rule, in this case N.J.R. 3:22-12, speaks in unmistakable terms requiring any challenge to a sentence to be filed within five years of the sentencing proceeding. Moreover, as we discussed above, *see* Part II.A, *supra*, the state appellate courts found that this rule procedurally barred Johnson's death-eligibility claim, and thus discussed the merits of the case only as an alternative holding. Instead, Johnson challenges the adequacy of the state court rulings by arguing that the state courts' refusal to hear his claim is not consistent with other New Jersey decisions and that N.J.R. 3:22-12 is not "strictly or regularly followed."

As it will appear, New Jersey state law ultimately resolves the adequacy issue against Johnson, and it arguably might be enough simply to rely on the state court's holding. However, in view of the vigor with which Johnson advanced the argument that the New Jersey procedural bar constitutes inadequate state law grounds, it seems prudent to address this claim, hence we do so.

1. The Putative Exception to the Time Limit as a Procedural Bar

Johnson claims that he did not actually violate a state procedural rule because his case falls into a "well-recognized exception" to the five-year time limit. Citing a New Jersey Supreme Court decision, *State v. Milne*, 842 A.2d 140, 144 (N.J. 2004), Johnson contends that when a new case is announced, which provides

relief not previously available to the defendant, the New Jersey courts permit the five-year time limitation to run from the date of that "new" decision. Johnson points to *State v. Kiett*, 582 A.2d 630 (N.J. 1990), which he says opened such a new avenue of relief by holding that "a defendant who entered a guilty plea to avoid imposition of the death penalty, but who cannot be put to death as a matter of law, labors under the kind of mistake that entitles him or her to withdraw the plea." *Id.* at 633.

Johnson's arguments are unavailing on several counts. First, New Jersey precedent does not support his claim that there is an automatic "new law" exception to the five-year time limit. While *State v. Milne* reasoned that new law can, in certain "compelling" circumstances, reset the five-year clock, 842 A.2d at 144, *Milne* considered the "extent and cause of the delay, the prejudice to the State, and the importance of petitioner's claim in determining whether there has been an injustice sufficient to relax the time limits" before allowing any exception to the time bar. *Id.* at 143-44 (internal quotation marks omitted). Thus, the "new law" exception is by no means automatic, but rather requires a balancing of interests. In *Milne*, the defendant tried to raise his claim more than five years after the "new law" had been handed down. Although that was the primary rationale for the New Jersey Supreme court's rejection of petitioner's claim in that case, the court also expressed strong reservations about the prospect of reviewing a sixteen-year old conviction as it would entail substantial prejudice to the State and cause "difficulties and hardships to the system." *Id.* at 144. In Johnson's case the guilty plea and conviction are twenty-one years old, and certainly the State's ability to put on a trial at this late date would be seriously handicapped.

Second, it is not clear that *Kiett* should be considered new grounds for relief, as there were several earlier cases which are congruent with *Kiett*'s holding. *See State v. Nichols*, 365 A.2d 467 (N.J. 1976) (permitting defendant to withdraw guilty plea where he was misinformed about whether he could receive consecutive sentences for his involvement in an armed robbery if he went to trial); *State v. Kovack*, 453 A.2d 521, 524 (N.J. 1982) (finding that a plea was not entered knowingly where the defendant was not informed of his parole ineligibility). While no prior New Jersey case specifically dealt with a mistake about death eligibility, these earlier cases afforded relief to petitioners who labored under mistakes about their eligibility for less grave sentences, so it would seem logical that such relief would *a fortiori* have been available to petitioners who were

mistaken about eligibility for the death penalty.[3]

At all events, the argument that *Kiett* opened a new avenue of relief is contradicted by the history of this case, for it is clear that Johnson was put on notice of the viability of his death-eligibility claim well before *Kiett*. The Appellate Division decision on direct appeal, in Johnson's own case, handed down in 1984, should have put Johnson on notice that the death-eligibility claim could have provided additional grounds for appeal. The Appellate Division specifically commented that it had not been called upon to determine whether misinformation about death eligibility prejudicially impacted the defendant's decision to plead guilty, implying that this omission was a mistake by Johnson's counsel.

Although he did not raise it in his first PCR petition to the trial court, Johnson included the death-eligibility claim in his petition for certification to the New Jersey Supreme Court, filed in 1989–one year before *Kiett*. In that petition, Johnson cited *Nichols, supra*, 365 A.2d 467, to support the proposition that the misinformation about his death eligibility rendered his plea involuntary and "conceded that this issue could have (and should have) been raised on direct appeal." Johnson did not file his second PCR petition, raising the instant claim, until over a year after offering this admission in his petition to the New Jersey Supreme Court.

The fact that he was on notice that he could raise this claim as an avenue of relief, and failed to do so, seems to exclude Johnson's petition from the set of "compelling" cases that *Milne* contemplates for leniency.

2. Adequacy of the State Procedural Rule

In the same vein, Johnson claims that the state grounds were inadequate because New Jersey courts do not strictly or regularly enforce N.J.R. 3:22-12's five-year time bar. He points to liberal language in the New Jersey Supreme Court opinions in *Milne, supra*, and *State v. Preciose*, 609 A.2d 1280 (1992).[4] *Milne* noted that the

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3 It should be noted that even if *Kiett* could be considered "new" grounds for relief, it is not clear that the New Jersey courts would give it retroactive effect. *See State v. Afanador*, 697 A.2d 529, 536-38 (N.J. 1997) (explaining the retroactivity analysis for "new law" in New Jersey as a series of three factors but generally resting on the court's discretion).

4 Johnson's counsel also claimed, at oral argument, that there are thousands of unpublished New Jersey state court decisions, many of which take a permissive approach to the five-year time bar. We find that undocumented assertion unhelpful, and confine our analysis to

"five-year time limit is not absolute" and that a "court may relax the time bar if the defendant alleges facts demonstrating that the delay was due to the defendant's excusable neglect or if the 'interests of justice' demand it." 842 A.2d at 143. Nevertheless, *Milne* cautioned that "[a]bsent compelling, extenuating circumstances, the burden to justify filing a petition after the five-year period will increase with the extent of the delay." *Id.* at 144.

In *Preciose*, the New Jersey Supreme Court engaged in an exegesis of the federal law of procedural default in its attempt to decide whether state lower courts should make express rulings on state procedural grounds in order to foreclose potential avenues of federal habeas relief. 609 A.2d at 1292. Announcing a relatively pliable view of state procedural rules, in *Preciose*, the court declined to read at least one procedural rule narrowly, and concluded that New Jersey's system of post-conviction relief is broader than federal habeas review. *Id.* at 1294. In so doing, the court noted that "when meritorious issues are raised that require analysis and explanation, our traditions of comprehensive justice will best be served by decisions that reflect thoughtful and thorough consideration and disposition of substantive contentions." *Id.*

Notwithstanding these pronouncements of relative flexibility, a review of New Jersey case law, set forth *infra*, reveals that the New Jersey courts have generally applied the time bar set forth in N.J.R. 3:22-12 so that this rule can fairly be said to have been firmly established and regularly followed. *See Banks v. Horn*, 126 F.3d 206, 211 (3d Cir. 1997) ("[I]f a state supreme court faithfully has applied a procedural rule in 'the vast majority' of cases, its willingness in a few cases to overlook the rule and address a claim on the merits does not mean that it does not apply the procedural rule regularly or consistently."). Therefore, the mere fact that *Preciose* and *Milne* expressed the potential for greater leniency than federal habeas law does not mean that the five-year time limit is not adequate grounds for procedural default. Indeed, *Milne* itself refused to relax the time bar where the defendant failed to file his petition within five years of a case announcing a new rule of law and had no excuse for his neglect. 842 A.2d at 144-46. The *Milne* court further admonished the defendant for waiting more than a year after the District Court's decision on his federal habeas claim to file his second PCR petition and noted that if he had acted more promptly, he could have remained within the five-year window of the "new law." *Id.*

Somewhat analogously, in this case, Johnson's petition for

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documented material.

certification for his first PCR petition raised the death-eligibility claim. Although this certification was denied, Johnson waited more than a year to file his second PCR petition and to again raise the death-eligibility claim. While Johnson would not have been within the five-year time bar even if he had filed his second PCR petition more expeditiously, such delay does not exhibit exceptional diligence. Therefore, *Milne*'s application of the procedural bar, rather than its rhetoric, seems the appropriate rule in this case.

The State has provided a list of the many cases in which the New Jersey courts have enforced the time bar. We too have conducted a review of New Jersey Supreme Court precedents and have found few cases that have actually relaxed N.J.R. 3:22-12's five-year time bar. To this end, the New Jersey Supreme Court has repeatedly emphasized that the time bar should be relaxed only in "exceptional," "compelling," or "extenuating" circumstances. *See, e.g.*, *State v. Goodwin*, 803 A.2d 102, 108 (N.J. 2002) ("The time bar [under 3:22-12] should be relaxed only under exceptional circumstances . . . We consistently have recognized the importance of adhering to this procedural bar."); *State v. Marshall*, 801 A.2d 1142, 1150 (N.J. 2002) (finding no basis for excusable neglect and barring the PCR petition under Rule 3:22-12); *State v. Murray*, 744 A.2d 131 (N.J. 2000) (recognizing two exceptions to the five-year limit, an illegal sentence and excusable neglect, finding defendant satisfied neither); *State v. Afanador*, 697 A.2d 529, 534 (N.J. 1997) ("[A] court should only relax the bar of Rule 3:22-12 under exceptional circumstances. . . . Absent compelling, extenuating circumstances, the burden to justify filing a petition after the five-year period will increase with the extent of the delay."). From the unambiguous language of Rule 3:22-12 and from the many prior cases that have consistently applied the time bar, it is clear that this procedural rule was an independent and adequate state ground establishing procedural default.

Instead of looking to the overwhelming majority of cases where the time bar has been consistently applied, Johnson points to the few exceptional cases where the New Jersey Supreme Court was willing to overlook the five-year time bar because of compelling circumstances. *See, e.g.*, *Afanador*, 697 A.2d at 534 (finding that the petitioner had alleged exceptional circumstances where the defendant was "caught in a Catch-22 situation" because for four years and seven months he could not file a PCR petition while his direct review was pending, and where defendant "did everything within his power to preserve the issue" including attempting to raise it in a timely *pro se* petition).

In particular, Johnson and the District Court cite *State v.*

McQuaid, 688 A.2d 584 (N.J. 1997), a case decided nearly six years after Johnson filed his second PCR petition, as precedent for collateral review of an error regarding death eligibility notwithstanding several procedural defaults. McQuaid had been an accomplice in a robbery-turned-murder. McQuaid too labored under the misapprehension that he faced the death penalty, in that case, on count one of his indictment---"murder by his own conduct"---and so pled guilty to felony murder to avoid what he wrongly believed was a capital charge. In fact, the court subsequently decided that "murder by his own conduct" is not a capital offense unless the defendant was the trigger-person, which McQuaid was not. Similar to this case, McQuaid did not raise the claim of misinformation about death eligibility until his second PCR petition, which was filed more than five-years after his sentence.

The New Jersey Supreme Court considered a range of reasons McQuaid might face procedural bars to his PCR petition, including Rule 3:22-12; however, because the misinformation was immaterial to his plea decision, the court did not decide the procedural bar issue but rather denied the petition on the merits. *Id.* at 600. Like *Milne* and *Preciose*, *McQuaid* contains expansive language about the harshness of strictly barring claims on procedural grounds. 688 A.2d at 600 (observing that "defendants should not pay the exacting price for state procedural forfeitures that result from the ignorance or inadvertence of their counsel"). Still, *McQuaid* does not stand for the proposition that the New Jersey courts will simply forgive a procedural default; rather, it demonstrates that in accord with *Preciose*, they are willing to weigh procedural and substantive grounds, at times, in the alternative. Indeed, in considering the merits the court particularly stressed the significant prejudice to the State if it was to allow the defendant to withdraw his guilty plea, a factor which would also cut against a relaxation of the procedural bar under *Milne*'s balancing test. *Id.* at 601-02.[5]

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5 Indeed, it is worth noting that the factors that would allow a defendant to withdrawal his plea on the merits are similar to those that might excuse a procedural bar. A separate New Jersey procedural rule requires a motion to withdraw a plea to be made before sentencing, N.J.R. 3:21-1; however, after sentencing a court can permit withdrawal to "correct a manifest injustice." New Jersey courts, therefore, have established a balancing test to determine whether a plea may be withdrawn which is nearly identical to the test for relaxation of a procedural bar set forth in *Milne*, 842 A.2d at 143-44 (considering the "extent and cause of the delay, the prejudice to the State, and the

Notwithstanding *McQuaid*'s decision to deny the petition on the merits in an analogous case, the New Jersey courts have reviewed Johnson's claim and have not found that his case fits into the exceptional category of cases, but rather, have applied their normal rule limiting the time to challenge a sentence to five-years. In light of the foregoing discussion, this decision reflects an adequate state law ground.

C. Cause and Prejudice

A procedural default generally bars review of a federal habeas corpus petition absent a showing of cause and prejudice. *Wainwright v. Sykes, supra,* 433 U.S. 72; *Moscato v. Federal Bureau of Prisons*, 98 F.3d 757, 761 (3d Cir. 1996). "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier,* 477 U.S. 478, 488 (1986). Cause, therefore, can be established by showing, for example, that the factual or legal basis for a claim was not reasonably available to counsel or that government interference made compliance with the procedural rule impracticable. *Id.*; *Hull v. Freeman*, 991 F.2d 86, 91 (3d Cir. 1993). Attorney error may constitute cause only where such error rises to the level of ineffective assistance of counsel in violation of the Sixth Amendment. *Murray*, 477 U.S. at 488-89. Nevertheless, "ineffective assistance of post-conviction counsel cannot constitute 'cause' because the Sixth Amendment does not entitle a defendant to post-conviction counsel," and thus, the petitioner bears the risk of attorney error in such proceedings. *Hull*, 991 F.2d at 91; *See also Coleman v. Thompson*, 501 U.S. 722, 752-54 (1991).

The District Court rightly determined that Johnson did not

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importance of the petitioner's claim in determining whether there has been an injustice sufficient to relax the time limits" before allowing any exception to the time bar). The test for withdrawal weighs the State's interest in the finality of judgments against the defendant's interest in entering a knowing and voluntary plea. *See McQuaid*, 688 A.2d at 596. The defendant's interest in withdrawal will depend on whether the misinformation was material to his plea and whether he was prejudiced as a result. *Id.* at 598. On the other side of the balance, the state's interest in finality will be greater when the state would be prejudiced in its ability to re-try the defendant. *Id.* at 601. Thus, the finding in *McQuaid* that the defendant's claim was undeserving on the merits would also inform a future court's decision on whether it would be appropriate to waive the procedural bar.

establish cause for the procedural default of this claim. Johnson does not now even argue that he had cause or suffered prejudice. Moreover, none of the typical reasons for "cause" apply in this case. There was no novel constitutional rule, nor was there a new factual predicate. There was no hindrance by the state court in complying with the procedural rule. Johnson cannot claim ineffective assistance of counsel for his failure to raise the death-eligibility claim in his post-conviction proceedings because he had no right to counsel to pursue his appeal in state post-conviction relief; thus, attorney error at that stage cannot constitute cause. *Coleman*, 501 U.S. at 752-54. In short, Johnson's failure to raise the death-eligibility claim in his first PCR petition can not be excused by attorney error. Finally, Johnson has "fail[ed] to allege the existence of an external impediment" and therefore, cannot establish cause for his procedural default. *Moscato*, 98 F.3d at 762.

III. ACTUAL INNOCENCE/MISCARRIAGE OF JUSTICE

In addition to the cause and prejudice standard, a limited exception to procedural default has been recognized where "failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The miscarriage of justice exception, however, applies only to the case where the miscarriage is tied to the petitioner's actual innocence. *Schlup v. Delo*, 513 U.S. 298, 321-22 (1995). In those "rare" or "extraordinary" cases, the "truly deserving" may receive relief by allowing "the principles of comity and finality, which animate the procedural default rule" to "yield to the imperative of correcting a fundamentally unjust incarceration." *Schlup v. Delo*, 513 U.S. at 319-21.

The "prototypical example" of the application of the "actual innocence" exception is where a petitioner is innocent of all criminal wrongdoing, such as where he claims that the government has convicted the wrong person for the crime. *See Sawyer v. Whitley*, 505 U.S. 333, 340 (1992). Nevertheless, the Court has recognized that the exception can be extended to cases where the defendant claims to be "innocent of the death penalty." *Id.* at 340-41. To qualify for this exception, a petitioner "must show by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty in light of the new evidence. *Calderon v. Thompson*, 523 U.S. 538, 560 (1998) (internal quotations omitted).

The District Court relied on this exception to excuse Johnson's procedural default and to permit a consideration of Johnson's claim on the merits. The court concluded that Johnson was actually innocent of the death penalty and that the miscarriage of justice was

that he was "wrongfully *exposed* to a pro forma capital sentencing hearing," even though he was actually sentenced to life imprisonment. (emphasis added).

There is no dispute that Johnson, at a minimum, is guilty of felony murder. He does not deny suffocating the victim in the course of a robbery. Rather, the District Court's holding rests on the assumption that he was "innocent" of a capital crime. This first proposition is disputed and arguably incorrect. While Johnson pled guilty to felony murder, a crime which was wrongly believed at the time of sentencing to potentially carry a death sentence, he was also charged with, and potentially was guilty of, capital murder. *See State v. Bey*, 610 A.2d 814, 825 (N.J. 1992) ("Strangulation is commonly understood as a form of violence designed and likely to kill a victim, and hence would ordinarily not be used by one whose purpose was only to inflict serious bodily injury.").

As a result, even if exposure to the death penalty could trigger the actual innocence exception, Johnson still would not likely be entitled to relief because "In cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." *Bousley v. United States*, 523 U.S. 614, 624 (1998). Under this case law, Johnson would need to demonstrate not only that he was ineligible for the death penalty for felony murder, but also that he was innocent of the capital murder charge, which the prosecution dismissed in exchange for his guilty plea to felony murder. Under the facts of Johnson's confession, it is far from clear that he could establish actual innocence of the capital murder charge.

But even if Johnson could not have received the death sentence for any charge, the key factor is that Johnson was not sentenced to death and is indubitably guilty of the sentence he *actually received* for felony murder---life imprisonment. Even though the state trial court wrongly considered the death penalty at sentencing, it did not impose the death penalty. While Johnson may have been prejudiced in his decision to accept the plea because he believed he faced a looming, but ultimately improper, death penalty, this fact does not make him actually innocent of felony murder.

We hold that the District Court erred in concluding that the focus of the "actual innocence" standard is *eligibility* for the death penalty and in holding that "the ultimate sentence is not dispositive of whether the [actual innocence exception] applies. Instead, the critical issue is whether there was wrongful exposure to the death penalty." Rather, the touchstone of the actual innocence inquiry is the sentence actually *imposed.*

The District Court's focus on death eligibility is without precedential support. No case has been cited to us in which the courts have used the actual innocence exception to overturn a conviction or to allow a withdrawal of a plea based on innocence of sentence to which the petitioner was merely exposed, rather than innocence of a sentence actually imposed. To the contrary, each case that has applied this exception has focused on the sentence which was received. *See, e.g.*, *Sawyer*, 505 U.S. 333 ("The issue . . . is the standard for determining whether a petitioner . . . has shown he is 'actually innocent' of the death penalty *to which he has been sentenced.*" (emphasis added)); *Cristin v. Brennan*, 281 F.3d 404, 420-22 (3d Cir. 2002) (framing the inquiry as whether defendant was "actually innocent of *his sentence*" and questioning whether the exception even applies in cases where a defendant was not sentenced to death (emphasis added)); *Spence v. Superintendent*, 219 F.3d 162, 172 (2d Cir. 2000) (applying the actual innocence exception where the petitioner "is actually innocent of the conduct *on which his sentence is based*"(emphasis added)); *Smith v. Collins*, 977 F.2d 951, 959 (5th Cir. 1992) ("[F]or a defendant to demonstrate actual innocence of the sentence imposed he would have to show that but for the constitutional error he would not have been legally eligible for the *sentence he received.*" (emphasis added)); *Mills v. Jordan*, 979 F.2d 1273, 1279 (7th Cir. 1992) ("The question in *Sawyer* was not whether the petitioner was innocent of the murder for which he was convicted, but rather whether he was innocent of the aggravating factors *upon which his death sentence was based.*"(emphasis added)).

The Supreme Court, in establishing the actual innocence exception, spoke of being actually innocent *of the death penalty*, *see Smith v. Murray,* 477 U.S. 527, 537 (1986), rather than some general unfairness in the sentencing process. Thus, it is not enough for the petitioner to argue that his sentence might have been different but for the constitutional error; rather he must establish that he was in fact ineligible for the sentence imposed. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The Supreme Court has also rejected the application of the actual innocence exception to cases alleging improper discretion or unfairness in sentencing, choosing instead to focus on factual innocence of the elements that permitted the imposition of the death penalty under state law. *See Dugger v. Adams*, 489 U.S. 401, 410 (1989).

In each of these cases, the Supreme Court's reasoning rests on the assumption that the petitioner faced the death penalty, and that it was the potential for an improper imposition of that grave sentence, rather than some general irregularity in the sentencing process that

could justify excusing the procedural bar to avoid a true miscarriage of justice. It is in this context that the Court has repeatedly emphasized that the actual innocence inquiry means "actual innocence, not mere legal insufficiency." *See Bousley*, 523 U.S. at 623-24; *Sawyer v. Whitley*, 505 U.S. at 339.

Given the narrow scope of the exception, we decline to follow the District Court's reasoning and consider whether the defendant was innocent of a sentence which was not actually imposed. If mere exposure were sufficient to trigger the miscarriage of justice exception, every defendant would have a habeas claim if the judge or prosecution considers a sentence of which the defendant might be "innocent," and every defendant who pled guilty to ensure life imprisonment but was threatened with the death penalty at sentencing, might claim that he was wrongly exposed to the death penalty because for some reason he was death ineligible. The result of applying the District Court's exposure rationale would surely run afoul of the Supreme Court's admonition that this exception is to be applied only in the "extraordinary case" and that it is "narrow" in scope. *Schlup v. Delo*, 513 U.S. at 321; *see also Dugger*, 489 U.S. at 410 n.6 ("Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received. Th[is] approach . . . would turn the case in which an error results in a fundamental miscarriage of justice, the 'extraordinary case,' into an all too ordinary one.").

Additionally, in cases where the death sentence was not actually imposed, the individual interest of avoiding injustice, cited in *Schlup*, 513 U.S. at 324-25, as an important factor in allowing this limited exception to the procedural default rules, is considerably less compelling than in cases where an individual faces imminent execution. Given our past precedents and the extraordinary nature of the actual innocence exception, we hold that the District Court erred in applying the actual innocence exception based on improper death eligibility rather than focusing on the sentence actually imposed.[6]

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6 Because we rest on procedural default grounds, we do not decide the question of structural error. In determining whether an error is structural in nature:

> The Supreme Court has distinguished between two types of constitutional error that occur at both trial and sentencing: 'trial errors,' which are subject to constitutional harmless error analysis, and 'structural

IV. CONCLUSION

For the foregoing reasons, we will reverse the District Court order of January 21, 2004 and remand with directions to dismiss Johnson's habeas petition.

> defects,' which require automatic reversal or vacatur. *See Arizona v. Fulminante*, 499 U.S. 279, 309 (1991); *United States v. Pavelko*, 992 F.2d 32, 35 (3d Cir.1993). Structural defects 'defy analysis by harmless error standards,' *Fulminante*, 499 U.S. at 309, because they 'infect the entire trial process,' *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993).

U.S. v. Stevens, 223 F.3d 239, 244 (3d Cir. 2000).

We note that there is significant prior precedent for requiring harmless error analysis in the plea bargaining context. *See, e.g.*, *United States v. Dixon*, 308 F.3d 229 (3d Cir. 2002) (applying harmless error analysis where petitioner was misinformed about his maximum possible sentence); *United States v. Ebel*, 299 F.3d 187, 191 (3d Cir. 2002) ("inherently coercive" involvement of a judge in a plea negotiation did not require automatic reversal); *United States v. Westcott,* 159 F.3d 107, 112-14 (2d Cir. 1998) (requiring demonstration that misinformation about his maximum possible sentence was material to petitioner's guilty plea). Moreover, the recent Supreme Court decision in *United States v. Dominguez-Benitez*, No. 03-167 2004 WL 1300161 (U.S. June 14, 2004), casts serious doubt on the District Court's holding that misinformation about maximum sentences in the plea bargaining process constitutes a structural error. In *Dominguez-Benitez*, the Court held that it was not structural error for the District Court to fail to warn the defendant that he would not be allowed to withdraw his plea if the court rejected the government's sentencing recommendation as required by Fed. R. Crim. P. 11. *Id.* at *5.