

(ORDER LIST: 582 U.S.)

MONDAY, JUNE 19, 2017

**CERTIORARI -- SUMMARY DISPOSITION**

15-734 MILBERG LLP, ET AL. V. LABER, LANCE

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Microsoft Corp. v. Baker*, 582 U. S. \_\_\_\_ (2017).

**ORDERS IN PENDING CASES**

16M139 CLINE, DONALD R. V. BALL, SUPT., AVERY-MITCHELL

16M140 WILLIAMS, KIRK D. V. GROUNDS, WARDEN

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

16-1215 LAMAR, ARCHER & COFRIN, LLP V. APPLING, R. SCOTT

The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

16-8842 HERNANDEZ-GONZALEZ, MIGUEL A. V. SESSIONS, ATT'Y GEN.

16-9213 FRANCISCO, RENIERO V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* are denied. Petitioners are allowed until July 10, 2017, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

**JURISDICTION POSTPONED**

16-1161 GILL, BEVERLY R., ET AL. V. WHITFORD, WILLIAM, ET AL.

Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

**CERTIORARI DENIED**

16-217 LENZ, STEPHANIE V. UNIVERSAL MUSIC CORP., ET AL.  
16-837 LAUREL-ABARCA, FERNANDO V. SESSIONS, ATT'Y GEN.  
16-952 SINGH, SURINDER V. SESSIONS, ATT'Y GEN.  
16-1016 MACY'S, INC. V. NLRB  
16-1063 WILCHCOMBE, MARIO, ET AL. V. UNITED STATES  
16-1068 COALITION FOR HOMELESS, ET AL. V. HUSTED, OH SEC. OF STATE, ET AL.  
16-1082 GARCIA, KARINA, ET AL. V. BLOOMBERG, MICHAEL R., ET AL.  
16-1085 ULTRAFLO CORP. V. PELICAN TANK PARTS, INC., ET AL.  
16-1089 NEW MIGHTY U.S. TRUST, ET AL. V. WANG, YUEH-LAN  
16-1106 COX COMMUNICATIONS, INC., ET AL. V. SPRINT COMMUNICATION CO., ET AL.  
16-1110 BLOOMINGDALE'S, INC. V. VITOLLO, NANCY  
16-1113 MEYERS, JEREMY V. NICOLET RESTAURANT  
16-1123 POLY-AMERICA V. API INDUSTRIES  
16-1151 FLOCK, THOMAS O., ET AL. V. DEPT. OF TRANSPORTATION, ET AL.  
16-1155 MILLER, FREDERICK V. STAMM, MARY  
16-1157 ACTIVELAF, LLC, ET AL. V. JAMES DUHON  
16-1178 DONZIGER, STEVEN, ET AL. V. CHEVRON CORPORATION  
16-1214 CONOVER, DONALD L., ET AL. V. FISHER, JEFFREY B., ET AL.  
16-1218 MARQUEZ, MIKE, ET AL. V. SUPERIOR COURT OF CA, ET AL.  
16-1227 ROBERTSON, MICHAEL V. EMI CHRISTIAN MUSIC, ET AL.  
16-1229 McKINLEY, GARY V. LeGRAND, WARDEN  
16-1232 BACH, MARGARET V. LABOR & INDUSTRY REVIEW, ET AL.  
16-1234 DAVIS, JESSE J., ET UX. V. JPMORGAN CHASE BANK NA  
16-1243 JONES, RICKEY N. V. ADMIN. OFFICE OF THE COURTS  
16-1260 R.J. REYNOLDS TOBACCO CO. V. MI DEPT. OF TREASURY

16-1264 LUCAS, MARGARET A., ET AL. V. UNITED STATES  
16-1267 NORBER, ERIC V. FAA  
16-1269 ZIOBER, KEVIN V. BLB RESOURCES, INC.  
16-1272 RAPLEE, GLORIA V. UNITED STATES  
16-1273 WIEST, CHRISTOPHER D. V. CINCINNATI BAR ASSOCIATION  
16-1315 MELVIN, PAMELA V. NAYLOR, TRACY, ET AL.  
16-1326 BRIGHAM, DANA P., ET UX. V. PATLA, STRAUS, ROBINSON & MOORE  
16-1358 DIETRICH, CHERI B. V. SOO LINE RAILROAD  
16-1377 TRUSTEES OF NY ENGINEERS FUND V. IVY ASSET MANAGEMENT, ET AL.  
16-1383 SWECKER, DANIEL B. V. COLORADO  
16-7182 SULLIVAN, MARCUS V. UNITED STATES  
16-7662 PIPER, FRANK S. V. UNITED STATES  
16-7686 BREWTON, WALLACE L. V. UNITED STATES  
16-7689 HERNANDEZ-CIFUENTES, ANGEL V. UNITED STATES  
16-7756 DURHAM, WAYNE V. UNITED STATES  
16-7869 HERNANDEZ-ESPINOZA, LUIS V. UNITED STATES  
16-7874 CANTU, IVAN A. V. DAVIS, DIR., TX DCJ  
16-7883 FRITTS, DERWIN D. V. UNITED STATES  
16-8003 HUNNICUTT, CRAIG E. V. UNITED STATES  
16-8054 McCANDLESS, JAMES V. UNITED STATES  
16-8072 SEABROOKS, ISAAC V. UNITED STATES  
16-8186 CULBRETH, JAMES A. V. ALABAMA  
16-8192 CERVANTES-SANDOVAL, JUAN C. V. UNITED STATES  
16-8336 PETERS, SPENCER V. UNITED STATES  
16-8357 BURGNER, MICHAEL R. V. CALIFORNIA  
16-8448 GREENE, TRAVERS A. V. NEVADA  
16-8536 SALDIERNA-ROJAS, RAMON O. V. UNITED STATES  
16-8689 HOLMAN, DONNA J. V. IOWA

16-8701 KOBE V. McMASTER, GOV. OF SC, ET AL.  
16-8706 STEWART, ELIJAH V. ILLINOIS  
16-8711 SCOTT, ERIC B. V. WRIGHT, VERDELL, ET AL.  
16-8722 SCHOONOVER, RICHARD J. V. VIRGINIA  
16-8727 R. M. V. COMMITTEE ON CHARACTER  
16-8728 WILLIAMS, ESSEABASI S. V. TEXAS  
16-8739 CAMICK, LESLIE L. V. WATTLEY, EVELYN A., ET AL.  
16-8740 BOSTICK, RONNIE J. V. UNITED STATES  
16-8741 LEE, BEN V. MACOMBER  
16-8743 KEY, BRIAN R. V. DAVIS, DIR., TX DCJ  
16-8750 SAMPSON, KEITH V. VIRGINIA  
16-8753 CAISON, NORMAN E. V. FLORIDA  
16-8757 WHITNUM-BAKER, LISA V. BAKER, JAMES J.  
16-8779 HESS, WILLIAM V. WOODS, WARDEN  
16-8797 BYFORD, ROBERT V. NEVADA  
16-8806 HARDY, FRANK V. RIVARD, WARDEN  
16-8818 STAMPS, TERAH L. V. HAAS, WARDEN  
16-8824 ARMSTRONG, ARTHUR V. USDC ND GA  
16-8827 FLOYD, STEPHEN V. HOFFNER, WARDEN  
16-8830 LAMPKIN, CASSANDRA V. BROCK, LYNN  
16-8845 HART, AARON J. V. BERRYHILL, ACTING COMM'R OF SSA  
16-8851 McKENZIE, RYAN C. V. SESSIONS, ATT'Y GEN.  
16-8859 M. B. V. OHIO  
16-8860 C. B. V. OHIO  
16-8890 LYNCH, SANDRA K. V. UNITED STATES  
16-8903 NUSHAWN W. V. NEW YORK  
16-8932 GILLILAND, MICHAEL W. V. KELLEY, DIR., AR DOC  
16-8938 MALDONADO, HECTOR V. GILMORE, SUPT., GREENE, ET AL.

16-8939 ODUESO, SEYI V. NORTH CAROLINA  
16-8958 COACH, JOHNNY L. V. FLORIDA  
16-9004 SIMPSON, WILLIE C. V. ECKSTEIN, WARDEN  
16-9020 TOWNSEND, SYLVESTER V. RICHARDSON, WARDEN  
16-9060 OWEN, TEODORA L. V. OPM  
16-9117 ESTRADA-JIMENEZ, LUIS A. V. ECKSTEIN, WARDEN  
16-9118 SCHAEFER, STEVEN J. V. WISCONSIN  
16-9131 CLARDY, GIORGIO S. V. NIKE, INC, ET AL.  
16-9133 JONES, CHRISTOPHER A. V. NEVEN, WARDEN, ET AL.  
16-9134 JONES, CHRISTOPHER A. V. SKOLNIK, HOWARD, ET AL.  
16-9144 BARNETT, STEVEN V. GEORGIA  
16-9148 WRIGHT, LEMARCUS A. V. UNITED STATES  
16-9152 ROGERS, RAYMOND L. V. USDC D KS  
16-9163 STONE, NEAL S. V. UNITED STATES  
16-9164 SCARLETT, LEON V. UNITED STATES  
16-9166 JENKINS, ANTWON V. UNITED STATES  
16-9172 WILLIAMS, JOHNNY M. V. UNITED STATES  
16-9174 WILES, PAUL G. V. UNITED STATES  
16-9176 LEE, SEAN W. V. UNITED STATES  
16-9183 BAUTISTA, ERIC V. UNITED STATES  
16-9184 BLACKMON, AARON V. UNITED STATES  
16-9185 ROSALES-ACOSTA, LUIS E. V. UNITED STATES  
16-9192 HARRINGTON, PERRY V. UNITED STATES  
16-9195 NEMAN, SHERVIN V. UNITED STATES  
16-9197 LEWIS, ALDEN B. V. UNITED STATES  
16-9204 BEAR, CHAD E. V. UNITED STATES  
16-9206 ANDRADE, ROY R. V. UNITED STATES  
16-9209 HELMER, DENNIS C. V. UNITED STATES

16-9210 FERNANDEZ, ANGELO V. UNITED STATES  
16-9211 GODFREY, CASEY J. V. UNITED STATES  
16-9212 HERRERA, SAID F. V. UNITED STATES  
16-9223 COOK, JOHN V. UNITED STATES  
16-9225 KRASNIQI, BRUNO, ET AL. V. UNITED STATES  
16-9227 MONSHIZADEH, SOHAIL V. UNITED STATES  
16-9229 GARCIA-MARTINEZ, JAVIER V. UNITED STATES

The petitions for writs of certiorari are denied.

16-866 CONNECTICUT V. DICKSON, ANDREW

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

16-1084 FREDERICKSEN, ABIGAIL V. OLSEN, JENNIFER, ET AL.

The motion of Concerned United Birthparents, Inc. for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

16-1224 FLORIDA V. K. C.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

16-1230 CUNNINGHAM, LINDY G., ET VIR V. JACKSON HOLE MTN. RESORT CORP.

The petition for a writ of certiorari is denied. Justice Gorsuch took no part in the consideration or decision of this petition.

16-1236 QUINN, JOHN P., ET AL. V. DETROIT, MI, ET AL

The motion of Ad Hoc Committee of Allied Nevada, Inc., Shareholders for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

16-1252 FLORIDA V. JOHNSON, PAUL B.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

16-1304 NTCH V. FCC, ET AL.

The petition for a writ of certiorari is denied. The Chief Justice took no part in the consideration or decision of this petition.

16-1376 WHISENANT, TONY R. V. SHERIDAN PRODUCTION CO., LLC

16-6786 VERDIN-GARCIA, FIDENCIO, ET AL. V. UNITED STATES

16-7953 GILMORE, JEREMY V. UNITED STATES

The petitions for writs of certiorari are denied. Justice Gorsuch took no part in the consideration or decision of these petitions.

16-9191 HINES, COREY L. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

16-9214 GARCIA, GERALDO V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

#### **HABEAS CORPUS DENIED**

16-1402 IN RE LEROY SINGLETON

16-9290 IN RE CHARLES NEUMAN

16-9364 IN RE TREVOR JOHNSON

16-9386 IN RE ANDRE BOSTON

The petitions for writs of habeas corpus are denied.

**MANDAMUS DENIED**

16-1281 IN RE EDWARD L. TOBINICK, ET AL.  
16-8748 IN RE JEREMY C. SOUTHGATE  
16-8767 IN RE RELMON H. DAVIS, III  
16-8778 IN RE ALICE A. HOWELL

The petitions for writs of mandamus are denied.

16-8716 IN RE NANCY GLEIS

The petition for a writ of mandamus and/or prohibition is denied.

**REHEARINGS DENIED**

16-1091 HILL, JEFFREY L. V. SUWANNEE RIVER MANAGEMENT  
16-7610 MINARD, JOHN D. V. WAL-MART STORES  
16-7914 JOHNSON, ANTHONY L. V. KERNAN, SEC., CA DOC, ET AL.  
16-8010 BYERS, ERIC M. V. UNITED STATES  
16-8144 DUNLAP, DARNELL V. HORTON, WARDEN  
16-8175 WILLIAMS, KEVIN A. V. PFISTER, WARDEN  
16-8221 ANDREWS, ROY V. CASSADY, WARDEN  
16-8274 JORDAN, JOSEPH R. V. UNITED STATES  
16-8397 MITCHELL, SETH V. NEW YORK UNIV., ET AL.  
16-8556 IN RE CLIFTON RAY, JR.

The petitions for rehearing are denied.

**ATTORNEY DISCIPLINE**

D-2948 IN THE MATTER OF DISBARMENT OF MARVIN S. DAVIDSON

Marvin S. Davidson, of West Orange, New Jersey, having been suspended from the practice of law in this Court by order of February 21, 2017; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;



It is ordered that Marvin S. Davidson is disbarred from the practice of law in this Court.

D-2950 IN THE MATTER OF DISBARMENT OF ROBERT THOMAS THOMPSON, JR.

Robert Thomas Thompson, Jr., of Atlanta, Georgia, having been suspended from the practice of law in this Court by order of February 21, 2017; and a rule having been issued requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Robert Thomas Thompson, Jr. is disbarred from the practice of law in this Court.

D-2954 IN THE MATTER OF DISBARMENT OF BRUCE C. HARRINGTON

Bruce C. Harrington, of Topeka, Kansas, having been suspended from the practice of law in this Court by order of March 20, 2017; and a rule having been issued requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Bruce C. Harrington is disbarred from the practice of law in this Court.

D-2955 IN THE MATTER OF DISBARMENT OF DENNIS H. SULLIVAN, JR.

Dennis H. Sullivan, Jr., of Wilmington, North Carolina, having been suspended from the practice of law in this Court by order of March 20, 2017; and a rule having been issued and served upon him requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Dennis H. Sullivan, Jr. is disbarred from the practice of law in this Court.

D-2956 IN THE MATTER OF DISBARMENT OF CHRISTOPHER J. GOLDTHORPE

Christopher J. Goldthorpe, of Westerville, Ohio, having been

suspended from the practice of law in this Court by order of March 20, 2017; and a rule having been issued requiring him to show cause why he should not be disbarred; and the time to file a response having expired;

It is ordered that Christopher J. Goldthorpe is disbarred from the practice of law in this Court.

D-2990 IN THE MATTER OF DISCIPLINE OF RICHARD CARL MOENNING

Richard Carl Moenning, of Evanston, Illinois, is suspended from the practice of law in this Court and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-2991 IN THE MATTER OF DISCIPLINE OF FRANCIS JOSEPH COYLE, JR.

Francis Joseph Coyle, Jr., of Rock Island, Illinois, is suspended from the practice of law in this Court and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-2992 IN THE MATTER OF DISCIPLINE OF SQUIRE PADGETT, JR.

Squire Padgett, Jr., of Alexandria, Virginia, is suspended from the practice of law in this Court and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-2993 IN THE MATTER OF DISCIPLINE OF GEORGE R. CARTER

George R. Carter, of Las Vegas, Nevada, is suspended from the practice of law in this Court and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

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**SUPREME COURT OF THE UNITED STATES**

CHARLOTTE JENKINS, WARDEN *v.* PERCY HUTTON

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

No. 16–1116. Decided June 19, 2017

PER CURIAM.

Respondent Percy Hutton accused two friends, Derek Mitchell and Samuel Simmons Jr., of stealing a sewing machine, in which he had hidden \$750. Mitchell and Simmons denied the accusation, but Hutton remained suspicious. On the night of September 16, 1985, he lured the pair into his car and, after pointing a gun at each, drove them around town in search of the machine. By night’s end, Hutton had recovered his sewing machine, Simmons was in the hospital with two gunshot wounds to the head, and Mitchell was nowhere to be found. Simmons survived, but Mitchell was found dead a few weeks later, also having been shot twice.

More than 30 years ago, an Ohio jury convicted Hutton of aggravated murder, attempted murder, and kidnaping. In connection with the aggravated murder conviction, the jury made two additional findings: that Hutton engaged in “a course of conduct involving the . . . attempt to kill two or more persons,” and that Hutton murdered Mitchell while “committing, attempting to commit, or fleeing immediately after . . . kidnaping,” Ohio Rev. Code Ann. §§2929.04(A)(5), (7) (Lexis 1982). Because of these “aggravating circumstances,” Ohio law required that Hutton be sentenced to “death, life imprisonment without parole, [or] life imprisonment with parole eligibility after” no fewer than 20 years in prison. §2929.03(C)(2).

Several days after rendering its verdict, the jury reconvened for the penalty phase of the trial. The State argued for the death penalty. In opposition, Hutton gave an

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unsworn statement professing his innocence and presented evidence about his background and psychological profile. When the presentations concluded, the trial court instructed the jury that it could recommend a death sentence only if it unanimously found that the State had “prove[d] beyond a reasonable doubt that the aggravating circumstances, of which the Defendant was found guilty, outweigh[ed] the [mitigating factors].” *State v. Hutton*, 100 Ohio St. 3d 176, 185, 2003-Ohio-5607, 797 N. E. 2d 948, 958; see Ohio Rev. Code Ann. §2929.03(D)(2). The jury deliberated and recommended death. The trial court accepted the recommendation after also finding, “beyond a reasonable doubt, . . . that the aggravating circumstances . . . outweigh[ed] the mitigating factors.” §2929.03(D)(3).

The Ohio Court of Appeals and the Ohio Supreme Court affirmed Hutton’s death sentence. In doing so, both concluded that “the evidence support[ed] the finding of the aggravating circumstances.” §2929.05(A); see *Hutton*, 100 Ohio St. 3d, at 187, 797 N. E. 2d, at 961; *State v. Hutton*, 72 Ohio App. 3d 348, 350, 594 N. E. 2d 692, 694 (1995). The courts also “independently weigh[ed] all of the facts . . . to determine whether the aggravating circumstances [Hutton] was found guilty of committing outweigh[ed] the mitigating factors.” Ohio Rev. Code Ann. §2929.05(A). Both agreed with the jury and the trial court that “aggravating circumstances outweigh[ed] the mitigating factors,” and that a death sentence was warranted. *Hutton*, 100 Ohio St. 3d, at 191, 797 N. E. 2d, at 963–964; see *Hutton*, 72 Ohio App. 3d, at 352, 594 N. E. 2d, at 695.

The case before this Court concerns Hutton’s subsequent petition for federal habeas relief. In 2005, Hutton filed such a petition pursuant to 28 U. S. C. §2254, arguing that the trial court violated his due process rights during the penalty phase of his trial. According to Hutton, the court gave the jurors insufficient guidance because it failed to tell them that, when weighing aggravating and

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mitigating factors, they could consider only the two aggravating factors they had found during the guilt phase. Hutton, however, had not objected to the trial court's instruction or raised this argument on direct appeal, and the District Court on federal habeas concluded that his due process claim was procedurally defaulted. *Hutton v. Mitchell*, 2013 WL 2476333, \*64 (ND Ohio, June 7, 2013); see *State v. Hutton*, 53 Ohio St. 3d 36, 39, n. 1, 559 N. E. 2d 432, 437–438, n. 1 (1990) (declining to address trial court's instructions because Hutton “specifically declined to object . . . at trial, and ha[d] not raised or briefed the issue” on appeal).

The United States Court of Appeals for the Sixth Circuit reversed. The court concluded that, notwithstanding the procedural default, it could “reach the merits” of Hutton's claim to “avoid a fundamental miscarriage of justice.” *Hutton v. Mitchell*, 839 F. 3d 486, 498 (2016) (internal quotation marks omitted). The Sixth Circuit began its analysis with *Sawyer v. Whitley*, 505 U. S. 333 (1992). In that decision, this Court established that a habeas petitioner may obtain review of a defaulted claim upon “show[ing] by clear and convincing evidence that, but for a constitutional error, no reasonable jury would have found [him] eligible for the death penalty under the applicable state law.” *Id.*, at 336.

Hutton had not argued that this exception to default applied to his case. Nonetheless, the Sixth Circuit held that the exception justified reviewing his claim. The court gave two reasons: First, Hutton was not eligible to receive a death sentence because “the jury had not made the necessary finding of the existence of aggravating circumstances.” 839 F. 3d, at 498–499. And second, since the trial court “gave the jury no guidance as to what to consider as aggravating circumstances” when weighing aggravating and mitigating factors, the record did not show that the jury's death recommendation “was actually based on a

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review of any valid aggravating circumstances.” *Id.*, at 500. On the merits, the court concluded that the trial court violated Hutton’s constitutional rights by giving an erroneous jury instruction. Judge Rogers dissented on the ground that Hutton could not overcome the procedural default.

The Sixth Circuit was wrong to reach the merits of Hutton’s claim. The court’s first reason for excusing default was that “the jury had not [found] the existence of aggravating circumstances.” *Id.*, at 498–499. But it had, at the guilt phase of Hutton’s trial. As Judge Rogers pointed out, “the jury found two such factors”—engaging in a course of conduct designed to kill multiple people and committing kidnaping—“in the process of convicting Hutton . . . of aggravated murder.” *Id.*, at 511. Each of those findings “rendered Hutton eligible for the death penalty.” *Ibid.* Hutton has not argued that the trial court improperly instructed the jury about aggravating circumstances at the guilt phase. Nor did the Sixth Circuit identify any such error. Instead, the instruction that Hutton contends is incorrect, and that the Sixth Circuit analyzed, was given at the *penalty* phase of trial. That penalty phase instruction plainly had no effect on the jury’s decision—delivered after the *guilt* phase and pursuant to an unchallenged instruction—that aggravating circumstances were present when Hutton murdered Mitchell.

The Sixth Circuit’s second reason for reaching the merits rests on a legal error. Under *Sawyer*, a court may review a procedurally defaulted claim if, “*but for a constitutional error*, no reasonable jury would have found the petitioner eligible for the death penalty.” 505 U. S., at 336 (emphasis added). Here, the alleged error was the trial court’s failure to specify that, when weighing aggravating and mitigating factors, the jury could consider only the aggravating circumstances it found at the guilt phase. Assuming such an error can provide a basis for excusing default, the Sixth Circuit should have considered the

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following: Whether, given *proper* instructions about the two aggravating circumstances, a reasonable jury could have decided that those aggravating circumstances outweighed the mitigating circumstances.

But the court did not ask that question. Instead, it considered whether, given the (alleged) *improper* instructions, the jury might have been relying on invalid aggravating circumstances when it recommended a death sentence. See 839 F. 3d, at 500 (explaining that, because the trial court gave “no guidance as to what to consider as aggravating circumstances,” the court could not determine whether the death recommendation “was actually based on a review of any valid aggravating circumstances”). The court, in other words, considered whether the alleged error might have affected the jury’s verdict, not whether a properly instructed jury could have recommended death. That approach, which would justify excusing default whenever an instructional error could have been relevant to a jury’s decision, is incompatible with *Sawyer*.

Neither Hutton nor the Sixth Circuit has “show[n] by clear and convincing evidence that”—if properly instructed—“no reasonable juror would have” concluded that the aggravating circumstances in Hutton’s case outweigh the mitigating circumstances. *Sawyer*, 505 U. S., at 336. In fact, the trial court, Ohio Court of Appeals, and Ohio Supreme Court each independently weighed those factors and concluded that the death penalty was justified. On the facts of this case, the Sixth Circuit was wrong to hold that it could review Hutton’s claim under the miscarriage of justice exception to procedural default.

The petition for certiorari and motion for leave to proceed *in forma pauperis* are granted, the judgment of the United States Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*