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NOTES

Curiouser and Curiouser: The United States Supreme Court Continues Its Assault on Federal Habeas Corpus

MICHAEL J. MITCHELL*

INTRODUCTION

Lewis Carroll would have loved federal habeas corpus practice, at least the version that has evolved over the past decade. The author of the splendidly absurd *Alice's Adventures in Wonderland* would have been hard pressed to devise a more befuddling system of rules, tests, and procedures for habeas practice than presently exists. It is a system that the United States Supreme Court seems bent on making "curiouser and curiouser"[1] with each decision concerning the role of federal courts in reviewing state criminal convictions.

During 1991, the Supreme Court decided two cases that added to this confusion and seriously curtailed the availability of federal habeas: *McCleskey v. Zant*[2] and *Coleman v. Thompson*.[3] These cases are but the latest in a series of decisions that demonstrate the Court's efforts to eliminate habeas as a meaningful remedy, a trend noted in legal literature.[4]

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* J.D. Candidate, 1993, Indiana University School of Law—Indianapolis; A.B., 1973, University of Southern California; M.A., 1978, University of Southern California.

1. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 17 (N.Y., Chanticleer Press 1948) (1865).

2. 111 S. Ct. 1454 (1991).

3. 111 S. Ct. 2546 (1991).

4. *See generally* Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 941 (1991); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362 (1991); Eric M. Freedman, Habeas Corpus Cases Rewrote the Doctrine, NAT'L L.J., Aug. 19, 1991, at 56.

For the past three years, Congress has debated the need for habeas corpus reform, but has yet to reach a consensus.[5]

This Note will examine the impact of *McCleskey v. Zant*, which severely restricted the availability of second or subsequent federal habeas petitions, and *Coleman v. Thompson*, which all but eliminated federal review of substantive claims that have been ruled defaulted in state courts because of procedural errors. This Note also will discuss the differing approaches to habeas reform being debated in Congress, and argue that the Supreme Court has unilaterally "legislated" a habeas practice so restrictive that unfair results are inevitable.

I. Background

Federal habeas corpus review has served as an important protection of individual liberties for as long as there has been a federal judiciary. In 1789, Congress established habeas corpus as an avenue to remedy violations of rights of persons held under federal authority.[6] When Congress ratified the Fourteenth Amendment to the United States Constitution following the Civil War, it also granted federal courts the power to conduct habeas review of state criminal convictions.[7] In 1948, Congress codified these guarantees when it adopted 28 U.S.C. § 2254, requiring federal courts to hear applications for writs of habeas corpus from persons "in custody pursuant to the judgment of a State court . . . on the ground that he is in custody in violation of the Constitution, or laws or treaties of the United States."[8]

In 1963, the United States Supreme Court decided, in *Fay v. Noia*,[9] that a state prisoner always has access to federal review of his or her conviction unless the petitioner deliberately bypasses the state's appeals process in order to go directly to federal court.[10] *Fay* proved to be the zenith of federal review of state convictions; since then, the Supreme Court has curtailed sharply access to federal habeas.[11]

In June 1988, United States Supreme Court Chief Justice William H. Rehnquist appointed an *ad hoc* committee of the Judicial Conference of

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5. A conference committee of the 102d Congress attempted to reconcile competing bills passed by the Senate and House. Senate Bill 1241 mirrored the Bush Administration proposals for tight restrictions on habeas review; and House Bill 3371 reflected many competing American Bar Association (ABA) proposals, which seek open access to federal habeas by state prisoners. No bill was ultimately passed by Congress. *See infra* notes 13-15 and accompanying text.

6. The Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82.

7. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

8. 28 U.S.C. § 2254(a) (1948).

9. 372 U.S. 391 (1963).

10. *Id.* at 438-39.

11. *See supra* note 4.

the United States to study what most experts agree has become an unreasonably complex and lengthy process for habeas corpus litigation of death penalty cases. That committee, chaired by former Supreme Court Justice Lewis Powell, issued its report fifteen months later; and Chief Justice Rehnquist forwarded the report to Congress for consideration.[12] Many of the recommendations of the Powell Committee, designed to curtail federal habeas corpus review of state criminal convictions, were included in draft legislation supported by President George Bush and presented to Congress as the Habeas Corpus Reform Act.[13]

At the same time that the Powell Committee was conducting its study, the American Bar Association (ABA) undertook its own investigation of capital habeas litigation, naming a task force co-chaired by Chief Justice Malcolm M. Lucas of the California Supreme Court and Judge Alvin B. Rubin of the United States Court of Appeals for the Fifth Circuit.[14] The ABA study produced a set of recommendations that differed greatly with the Bush Administration proposal and generally urged greater access to federal habeas review for state prisoners than did the Bush Administration proposal.[15]

Although both the Bush Administration and ABA proposals agree that federal habeas review needs to be simplified and expedited, they disagree as to how that can best be accomplished. As a result, Congress has grappled with competing approaches, and the debate has divided along partisan political lines. Conservatives tend to support the Administration proposal; congressional liberals tend to support the ABA proposal.

The United States Supreme Court, however, is divided by no such partisan schism. In fact, in recent years, the Court has implemented several of the key Bush Administration proposals on its own initiative. As little as two years ago, habeas corpus "reform" legislation generally meant an attempt to rein in federal review of state criminal convictions. Today, "reform" probably means the attempt to reopen the federal courthouse door.

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12. Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, report issued September 1989 [hereinafter Powell Committee Report].

13. H.R. 1400, 102d Cong., 1st Sess. (1991) [hereinafter Bush Administration proposal]. Most of the bill's proposals were embodied in Senate Bill 1241, which was approved by the Senate in July 1991.

14. American Bar Association Criminal Justice Section Report to the House of Delegates of the ABA [hereinafter ABA proposal]. Many of the ABA recommendations were incorporated into House Bill 3371, which was approved by the House of Representatives in October 1991. H.R. 3371, 102d Cong., 1st Sess. (1991).

15. *Compare* Bush Administration Proposal, *supra* note 13 and ABA Proposal, *supra* note 14.

II. Successive Petitions and *McCleskey v. Zant*

Under 28 U.S.C. § 2244, a state prisoner "officially" may file a second or subsequent application for habeas corpus based on the discovery of a new factual basis for an appeal, provided the prisoner's attorney made a "reasonably diligent" attempt to discover the new facts before bringing the application.[16] The Supreme Court, however, has interpreted § 2244 narrowly in recent years, all but prohibiting such successive petitions.

The Bush Administration proposal would, essentially, codify recent Supreme Court restrictions. Among other things, the proposal would limit prisoners under capital sentences to one federal habeas petition unless the prisoner could show both a justification for failing to raise the claim on the initial federal petition *and* facts sufficient to "undermine the court's confidence in the determination of *guilt*."[17] The insistence on a strict "guilt" standard is one of the major points of contention between Administration and ABA supporters.

The less-restrictive ABA proposal would permit a person facing the death penalty to bring a successive petition for a new claim upon a showing of some genuine justification for not bringing the claim earlier, or unconstitutional interference with the defense by state officials. The ABA proposal also would require a showing of underlying facts sufficient to cast doubt on either the guilt of the defendant or "the validity of that [capital] sentence under Federal law."[18]

During both the 101st and 102d sessions of Congress, the House of Representatives adopted the ABA proposal over the Bush Administration approach.[19] The Powell Committee recommended a strict "guilt" standard for successive federal petitions; but the full Judicial Conference, which had ordered the Powell Committee study, adopted language similar to the ABA proposal. Thus, the Judicial Conference rejected its own committee's recommendations and urged Congress to adopt legislation permitting the filing of a successive petition when facts indicate innocence or call into question "the appropriateness of the sentence of death."[20]

While Congress debated the matter, the United States Supreme Court, in *McCleskey v. Zant*,[21] determined that successive petitions should be governed largely by the Bush Administration approach; the Court's method, however, was far less direct than either legislative proposal.

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16. 28 U.S.C. § 2244 (1988).
17. H.R. 1400, 102d Cong., 1st Sess. § 2257(c)(3) (1991) (emphasis added).
18. H.R. 3371, 102d Cong., 1st Sess. § 1106(2)(B) (1991).
19. The Habeas Corpus Revision Act was ultimately deleted from the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified at 18 U.S.C. § 1 nt).
20. H.R. Rep. No. 681, 101st Cong., 2d Sess., pt. 1, at 121 (1990).
21. 111 S. Ct. 1454 (1991).

A. Warren McCleskey's Odyssey Through the Courts

Warren McCleskey was convicted in Georgia under a felony murder statute for taking part in a furniture store robbery in which a police officer was killed. Although he admitted to taking part in the robbery, McCleskey denied being the gunman, and no eyewitness was produced at trial.[22] Of the four persons involved in the robbery, only McCleskey received the death penalty.[23]

Among the key evidence in McCleskey's trial was the testimony by a witness who turned out to be a police informant, a fact that the jury was never told.[24] The defense had difficulty proving the existence of a deal between the witness and the state, until McCleskey's attorneys obtained a copy of a twenty-one-page statement from the witness that had been made to police prior to trial.[25] The attorneys did not receive the statement until long after McCleskey's first federal habeas review.

McCleskey's attorneys, throughout direct appeal, state habeas review, and a first federal habeas petition, argued that the trial judge had wrongly admitted into evidence the testimony of the witness, Offie Evans, who had been placed by police in a jail cell next to McCleskey to obtain evidence against him. Promised by detectives that they would speak to prosecutors on his behalf to obtain a possible lighter sentence for his own criminal acts, Evans engaged McCleskey in conversation, during which McCleskey allegedly admitted the murder.[26] McCleskey, however, steadfastly denied the killing.

McCleskey, through his attorneys, argued that the prosecutor in the case had "deliberately withheld" the informant's statement during discovery, a clear violation of *Brady v. Maryland*.[27] McCleskey also argued that the state had violated his due process rights under *Giglio v. United States*[28] by its failure to disclose an agreement to drop pending escape charges against the informant in return for "his cooperation and testimony."[29] Finally, McCleskey argued a violation of his Sixth Amendment

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22. *Id.* at 1458.

23. Peter Applebome, *Man Whose Appeals Shook The Courts Faces Execution*, N.Y. TIMES, Sept. 24, 1991, at A18.

24. *McCleskey*, 111 S. Ct. at 1458-59.

25. *Id.* at 1459.

26. *Id.* at 1459-60.

27. 373 U.S. 83 (1963) (holding that suppression by the prosecution of evidence favorable to an accused upon request by the defense violates due process where the evidence is material to guilt or punishment, regardless of good or bad faith on the part of the prosecution).

28. 405 U.S. 150 (1972) (holding that nondisclosure of a promise by the government not to prosecute a witness if he cooperates with the government violates the defendant's due process rights).

29. *McCleskey*, 111 S. Ct. at 1458.

right to counsel under *Massiah v. United States*,[30] claiming that the prosecution, by planting an informant in a cell adjacent to McCleskey, had induced him into making incriminating statements without effective assistance of counsel.[31]

All three constitutional claims were raised in McCleskey's first state habeas appeal, but only the deliberate withholding and due process claims were raised in his first federal petition.[32] None of the theories prevailed, and the United States Supreme Court denied relief on his first federal appeal after granting certiorari to consider a separate line of attack.[33]

McCleskey's attorneys finally learned of the existence of the prosecution witness statement, which confirmed their suspicions of a deal between prosecutors and the witness, through a state open records statute filing.[34] The police and prosecutors had denied the existence of the statement or knowledge of an agreement with the informant until that filing.[35] Atlanta police provided a copy of the twenty-one-page statement to McCleskey's attorneys one month before he filed his second federal petition.[36] Armed with proof that would support their Sixth Amendment claim under *Massiah*, McCleskey's attorneys filed a second federal petition.

The Supreme Court reasoned that because McCleskey himself was present during the jail house conversations, he had actual knowledge of everything contained in the statement and should have known he could pursue a Sixth Amendment claim at the time of his first habeas petition.[37] The Court declared that a prisoner will only be permitted to bring a successive petition when the prisoner was prevented from raising a new claim because of some external force, such as government interference.[38] The Court did not consider the prosecution's denial that it had a deal with the witness to constitute government inference.

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30. 377 U.S. 201 (1964) (holding that a defendant's Fifth and Sixth Amendment rights are violated by the use of incriminating statements made by the defendant to a co-defendant in the absence of defendant's attorney when the accused did not know that the co-defendant had agreed to cooperate with the prosecution).

31. *McCleskey*, 111 S. Ct. at 1459.

32. *Id.*

33. *Id.* The Court denied relief on a claim by McCleskey that the Georgia death penalty was unconstitutionally applied in that persons who kill whites are far likelier to receive the death penalty that those who kill blacks. McCleskey v. Kemp, 481 U.S. 279 (1987).

34. McCleskey v. Zant, 111 S. Ct. 1454, 1487 n.11 (1991) (Marshall, J., dissenting).

35. *Id.* at 1487 (Marshall, J., dissenting).

36. *Id.* at 1459.

37. *Id.* at 1473.

38. *Id.* at 1470.

Similarly, the significance of a statement from one of McCleskey's jailers that corroborated the existence of a deal between the prosecution and the witness was diminished by the Supreme Court, notwithstanding the fact that the identity of the jailer and his information were not discovered until after the twenty-one-page statement was furnished, reluctantly, to McCleskey's attorneys. The Court reasoned that because the defense did not need the jailer's testimony to raise the *Massiah* claim on the initial federal petition, it could not rely on it for the second.[39]

The Court ignored that, although he knew of his own statements, McCleskey did not know that his cell mate was an informant. The Court insisted that because the twenty-one-page statement was not critical to McCleskey's "notice" of a Sixth Amendment claim under *Massiah*, it did not require re-examination of a lower court decision to dismiss the underlying claim.[40] The Supreme Court affirmed the lower court's denial of relief on McCleskey's second habeas petition,[41] and McCleskey was executed in Georgia on September 25, 1991.[42]

B. Shifting Standards for Successive Petitions

Prior to the Court ruling in *McCleskey v. Zant*, the question of whether a person under state conviction could file a second or subsequent federal habeas corpus petition turned on whether the federal court would consider the later petition to be an "abuse of writ."[43] The grounds for denial of a second or subsequent petition were described in *Sanders v. United States*,[44] as including re-raising issues that had been determined in a prior petition on the merits if "the ends of justice would not be served by reaching the merits" again,[45] or deliberately withholding claims from a first habeas petition so as to "vex, harass, or delay" the federal proceedings.[46]

In *Sanders*, the Supreme Court equated abuse of writ with the "deliberate bypass" of state opportunities to litigate found in *Fay v. Noia*.[47] The result under *Fay* was that any arguably meritorious claim was at least heard in federal court. Thus, abuse of writ was thought

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39. McCleskey v. Zant, 111 S. Ct. 1454, 1472-73 (1991).
40. *Id.* at 1474.
41. *Id.* at 1475.
42. Peter Applebome, *Georgia Inmate Is Executed After 'Chaotic' Legal Move*, N.Y. TIMES, Sept. 26, 1991, at A10.
43. 28 U.S.C. § 2254, Rule 9 (1988). *See also* 28 U.S.C. § 2244(b) (1988).
44. 373 U.S. 1 (1963).
45. *Id.* at 15.
46. *Id.* at 18.
47. *Sanders*, 373 U.S. at 18 (citing Fay v. Noia, 372 U.S. 391 (1963)).

to occur only when a prisoner brought an obviously frivolous or repetitive claim and was merely attempting to avoid a final judgment.

The Court in *Sanders* also determined that the government bears the burden of showing abuse of writ.[48] In addition, the Court declared that a petitioner who had omitted a claim from a first federal habeas petition could avoid an abuse of writ charge by demonstrating that they had used "reasonable diligence" to discover the factual predicate of the new claim.[49] In 1977, Congress amended the federal habeas corpus statute and adopted Rule 9(b) of 28 U.S.C. § 2255 "as codifications of the guidelines the Court itself prescribed in *Sanders*."[50]

However, *McCleskey v. Zant* redefined abuse of writ, requiring prisoners who file a second or successive federal petition to satisfy a new, tougher standard, one that had been announced in 1977 for determining whether to excuse procedural defaults. The new test was borrowed from *Wainwright v. Sykes*[51] and requires defendants to demonstrate both a "cause" for failing to raise a new claim earlier, and "prejudice," defined broadly as an unjust result.

The *McCleskey* majority made the leap from the old abuse of writ standard of *Sanders* to the new "cause and prejudice" test of *Sykes* in a two-step process. First, the Court said that deliberate abandonment of a claim was not the only way to abuse the writ.[52] "[A] petitioner may abuse the writ by failing to raise a claim through inexcusable neglect . . . regardless of whether the failure to raise it earlier stemmed from a deliberate choice."[53] Secondly, the Court stated that the "inexcusable neglect standard demands more from a petitioner than the standard of deliberate abandonment."[54]

The Court admitted that it previously offered little guidance to lower courts as to the meaning of "inexcusable neglect."[55] It concluded that "inexcusable neglect" was most like procedural default in that "[t]he doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review."[56] Therefore, "abuse of writ" was equated with procedural

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48. *Id.* at 17.
49. *Id.*
50. H.R. REP. No. 681, 101st Cong., 2d. Sess., pt. 1, at 119 (1990).
51. 433 U.S. 72 (1977).
52. McCleskey v. Zant, 111 S. Ct. 1454, 1468 (1991).
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* The Court cited as significant costs delays in finality of state decisions, burdens to an overworked federal court system, and intentional delay tactics by defendants. *Id.* at 1469.

default and, thus, the "cause and prejudice" test of *Sykes* was imposed for determining whether to permit successive habeas petitions.[57]

The *McCleskey* Court next stated that the "cause" prong of the *Sykes* test required a prisoner "to show that 'some objective factor external to the defense impeded counsel's efforts' to raise the claim in state court."[58] These objective factors, the Court said:

> [I]nclude "interference by officials" that makes compliance with the state's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." In addition, constitutionally "ineffective assistance of counsel . . . is cause." Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default.[59]

In utilizing the "cause and prejudice" standard for abuse of writ analysis, the Court ignored the articulated legislative intent of Congress to maintain the *Sanders* "reasonable diligence" standard. The House Judiciary Report on habeas during the 101st Congress[60] addressed the *Sanders* standard and found it insufficient to control successive habeas petitions.[61] The Judiciary Committee approved a habeas bill that would have limited successive habeas petitions for capital defendants, but that bill was not enacted; thus, the *Sanders* standard remains law.[62]

It was not the first time that Congress has considered and rejected attempts to toughen requirements for successive petitions. In 1977, when Congress amended the federal habeas act and enacted Rule 9(b) to codify *Sanders*, Congress deleted language from the rule that would have permitted a federal judge to deny a successive petition if the petitioner's failure to raise the claim initially was seen as "not excusable."[63] The report declared that "the 'not excusable' language created a new and undefined standard that gave a judge too broad a discretion to dismiss a second or successive petition."[64] The fact that the Court side-stepped Congress in the *McCleskey* decision was duly noted by the three-member minority.[65]

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57. McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991).

58. *Id.* (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).

59. *McCleskey*, 111 S. Ct. at 1470 (quoting Murray v. Carrier, 477 U.S. 478, 486-88 (1986) (citations omitted)).

60. H.R. REP. No. 681, 101st Cong., 2d. Sess., pt. 1, at 119 (1990).

61. *Id.*

62. The limits adopted by the Judiciary Report are similar to those included in House Bill 3371 of the 102d Congress and chiefly represent language supported by the ABA. *See supra* notes 14-15 and accompanying text.

63. H.R. REP. No. 1471, 89th Cong., 1st Sess., at 7 (1976).

64. *Id.*

65. McCleskey v. Zant, 111 S. Ct. 1454, 1489 (1991) (Marshall, J., dissenting).

Justice Thurgood Marshall, writing the dissenting opinion in *McCleskey*, declared that the "cause and prejudice" standard imposed by the *McCleskey* majority for abuse of writ "creates a near-irrebuttable presumption that omitted claims are permanently barred."[66] The result, Marshall wrote, would be to encourage frivolous claims because "[r]ather than face the cause-and-prejudice bar, a petitioner will assert all conceivable claims, whether or not these claims reasonably appear to have merit. . . . Far from promoting efficiency, the majority's rule thus invites the very type of 'baseless claims' . . . that the majority seeks to avert."[67]

Once the "cause" prong of the *Sykes* test is satisfied, a petitioner fighting off an abuse of writ claim must show "actual prejudice," which the Court in *McCleskey* did not define aside from making a bare citation to *United States v. Frady*.[68] In *Frady*, a petitioner claimed that a jury instruction given at his trial prejudiced his case. The Supreme Court rejected the claim and said that in order to show "prejudice," the petitioner had to demonstrate "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[69]

In *McCleskey*, the Court found no need to explain "actual prejudice" on the facts of the case because it concluded, astonishingly, that defendant Warren McCleskey had not satisfied the "cause" prong, even though he demonstrated that the prosecution had deliberately withheld evidence it knew would aid him until after McCleskey filed his first federal habeas petition.[70]

Finding that McCleskey had not demonstrated "cause" is all the more surprising in that the majority opinion refers directly to a published legislative interpretation that "newly discovered evidence" constitutes an acceptable excuse for failing to raise a claim earlier.[71] The *McCleskey* majority again used sleight of hand to avoid following the rule it had just acknowledged, by characterizing McCleskey's "new evidence" as somehow not new. The Court said that McCleskey should have known he had a valid Sixth Amendment claim when making his first habeas petition because he was obviously present during his conversation with the jailhouse informant, and knew the content of that conversation. That argument ignores the important distinction that although McCleskey

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66. *Id.* at 1484-85 (Marshall, J., dissenting).
67. *Id.* at 1485 (citation omitted) (Marshall, J., dissenting).
68. *Id.* at 1470 (quoting United States v. Frady, 456 U.S. 152, 168 (1982)).
69. United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis in original).
70. *McCleskey*, 111 S. Ct. at 1472-73.
71. *Id.* at 1467 (citing 28 U.S.C. § 2254, Rule 9, advisory committee notes, pp. 426-27).

knew the content of his own conversation, he did not know that he was speaking to an informant.

Finally, the Court declared that a successive habeas petition could be maintained, even absent a "cause and prejudice" showing, if the new petition was necessary to correct "a miscarriage of justice."[72] However, the Court defined "miscarriage" as a showing of facts which indicate innocence,[73] the very standard that the Powell Committee recommended for successive petitions, but which both the Supreme Court's own Judicial Council and the ABA rejected as overly harsh.[74]

The Supreme Court did not consider whether the death penalty was inappropriately harsh in McCleskey's case. Two of the jurors from McCleskey's trial, however, did consider whether the death penalty was appropriately applied in McCleskey's case; they concluded it was not.[75] The two jurors told a Georgia Board of Pardons and Paroles hearing that they would not have voted to execute McCleskey had they known that witness Offie Evans was an informant testifying because he had struck a deal with police;[76] but the Pardons Board was unmoved. McCleskey was executed on September 25, 1991, following four eleventh-hour stays of execution, including one in which McCleskey was placed in the electric chair, then removed.[77]

McCleskey's case demonstrates the need for a federal habeas practice that places considerations of justice ahead of arcane procedure and blind deference to state judgments. The ABA proposal is more just than the Bush Administration proposal because it would permit a successive petition when a prisoner discovers new facts that either show innocence or that the sentence was inappropriately harsh.

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72. *Id.* at 1474.

73. *Id.* at 1474-75.

74. *See supra* note 20 and accompanying text.

75. Peter Applebome, *Man Whose Appeals Shook the Courts Faces Execution*, N.Y. TIMES, Sept. 24, 1991, at A18.

76. *Id.*

77. Peter Applebome, *Georgia Inmate Is Executed After 'Chaotic' Legal Move*, N.Y. TIMES, Sept. 26, 1991, at A10. The Supreme Court not only refused to review Georgia's actions in the McCleskey case, but foreclosed further discussion at the federal level by dismissing the habeas petition, rather than remanding for further hearings consistent with its new test for abuse of writ. In his dissent, Justice Marshall pointed out that when the Supreme Court announces a new rule or test, as it did in *McCleskey*, it usually remands for further consideration in light of its new ruling. *McClesky*, 111 S. Ct. 1454, 1486 (1991) (Marshall, J., dissenting). However, the denial of relief in McCleskey's case simply was affirmed without remand. His attorneys, when filing their first habeas petition, had a reasonable expectation that if they were to later obtain the evidence they needed to raise their Sixth Amendment claim, they would be held to the *Sanders* "reasonable diligence" test, which was clearly satisfied. *Id.*

In explaining its capital habeas reform proposal, which insists that successive petitions demonstrate innocence and not just cast doubt on whether a capital sentence was justified, the Administration wrote:

> The main justification cited for these [ABA 'validity of sentence'] broad exceptions is that the President's bill could permit a guilty death row inmate to be executed even if his death sentence (not his guilty verdict) was based upon perjured testimony which the government had knowledge of [sic]. This ignores the fact that State habeas corpus is available for claims based on newly discovered evidence. It also ignores the States' ability to grant executive clemency.[78]

Whether a state has the "ability" to grant clemency or habeas relief is not the issue. The reason that federal habeas exists at all is that too often states refuse to *actually* exercise reasonable review.[79]

III. Procedural Default and *Coleman v. Thompson*

Two months after handing down its decision in *McCleskey v. Zant*, the United States Supreme Court dealt another resounding defeat for the pro-habeas forces when it announced its decision in *Coleman v. Thompson*.[80] This time, the Court took up the question of whether the default of an entire appeal in state court, based on a state procedural rule, could bar federal review of all issues in the case. The Court also took the opportunity to examine further the extent to which attorney error may be offered as an excuse or "cause" for procedural default. Not surprisingly, the Court further limited the ability of federal district courts and appellate courts to hear habeas claims.

Roger Keith Coleman of Virginia sought to appeal, in federal court, his 1982 capital conviction for the rape and murder of his sister-in-law. At trial, he produced physical evidence which showed that, although his clothes were saturated with coal dust on the night of the crime, no coal dust was found on the victim or in her home.[81] The evidence against him was entirely circumstantial.[82] His two court-appointed lawyers had never handled a capital case before, and Coleman was convicted and sentenced to death. He maintained his innocence throughout his trial, and beyond.

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78. Open Letter, *An Explanation of President Bush's Capital Habeas Reform Proposal* (obtained through the Office of the Minority Counsel, House Subcommittee on Habeas Corpus Reform) [hereinafter Open Letter].

79. *See infra* notes 143-44 and accompanying text.

80. 111 S. Ct. 2546 (1991).

81. Coleman v. Commonwealth, 307 S.E.2d 864, 868 (Va. 1983).

82. *Id.* at 865.

After the trial, Coleman sought to argue that his attorneys had been ineffective. He raised the ineffectiveness claim during a two-day state habeas hearing; but the Buchanan County Circuit Court ruled against him.[83] Coleman then sought to appeal to the Virginia Supreme Court; but his attorney missed the deadline for filing his notice of appeal by three days.[84] The United States Supreme Court held that the procedural default (missing the filing deadline) barred further review of his case, even his claim of ineffective counsel.[85]

The least surprising aspect of the *Coleman* decision came when the Court finally laid to rest the rule of *Fay v. Noia*,[86] which for many years had been the icon of open federal habeas policy. *Fay* held that a state prisoner who had defaulted his or her entire state appeal by failure to file any appeal could still file a federal habeas petition, unless they deliberately bypassed the state system.[87] The rule of *Fay*, however, has been whittled away by recent decisions, most notably *Wainwright v. Sykes*,[88] which "limited *Fay* to its facts"[89] and imposed the "cause and prejudice" standard for determining whether to excuse procedural defaults.

In *Coleman*, the Court removed the last narrow application of *Fay*, and held that a state prisoner who defaulted his *entire* appeal in state court could not seek federal relief.[90] In unmistakably clear language, the majority declared:

> [B]y filing late, [defendant] Coleman defaulted his entire state collateral appeal. . . . In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.[91]

First, it appears that the *Coleman* Court took "fundamental miscarriage of justice" to mean only a showing of factual innocence. The

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83. *Id.*
84. Coleman v. Thompson, 111 S. Ct. 2546, 2552-53 (1991).
85. *Id.* at 2568.
86. 372 U.S. 391 (1963).
87. *Id.* at 398-99.
88. 433 U.S. 72 (1977).
89. Coleman v. Thompson, 111 S. Ct. 2546, 2563 (1991).
90. *Id.* at 2565.
91. *Id.* at 2564-65.

Court would not consider "miscarriage" to include any mitigating circumstances tending to cast doubt on the validity of a death sentence. Although the Court in *Coleman* did not address the "miscarriage" standard, because defendant Coleman did not raise it,[92] the United States Supreme Court has demonstrated its insistence on a strict innocence standard for "miscarriage" in *McCleskey v. Zant*[93] and in *Harris v. Reed*.[94]

If the *Coleman* decision went no further than to overrule *Fay*, it likely would be little more than a footnote in habeas practice, as the "deliberate bypass" rule of *Fay* has had little vitality in recent years.[95] The Court, however, went a good deal further, and again narrowed the availability of federal habeas by undoing, without saying it was overturning, a key conclusive presumption used by state prisoners to press their federal petitions.

The presumption, announced in *Michigan v. Long*,[96] and expanded to federal habeas cases in *Harris v. Reed*,[97] provided that unless a state appellate court clearly expressed its reliance on an adequate and independent state-law ground when dismissing a petitioner's claim, a federal court could hear the federal claim that had been considered by the state court.[98] The effect of the *Long* and *Harris* "plain statement" presumption was to permit federal courts to hear habeas petitions that had been dismissed in state court. Further, the presumption applied regardless of whether the state-law ground for dismissal was based on substantive law or procedural rules.[99]

When, as often occurs, a particular appeal raises both federal- and state-law issues, state courts sometimes fail to explain the actual basis upon which they rest their final decisions. State courts may discuss claims by referring to general legal principles without saying whether they are interpreting federal law or state law. The *Harris* and *Long* presumption has had the desirable effect of preventing *ad hoc* determinations by

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92. *Id.* at 2568.

93. 111 S. Ct. 1454, 1470 (1991).

94. 489 U.S. 255 (1989). Justice O'Connor, who wrote the majority opinion in *Coleman* and concurred in the majority opinion in *Zant*, asserted in a concurring opinion in *Harris* that "miscarriage of justice" is "a kind of 'safety valve' for the 'extraordinary case' where a substantial claim of factual innocence is precluded by an inability to show cause." 489 U.S. at 271.

95. The "deliberate bypass" standard was replaced for most factual settings by the "cause and prejudice" test. *See supra* notes 47-54 and accompanying text.

96. 463 U.S. 1032 (1983).

97. 489 U.S. 255 (1989).

98. *Id.* at 263.

99. *Id.* at 261.

federal courts as to whether they ought to hear claims on habeas review that had been invalid in state courts.

The Court, in *Harris*, after lengthy analysis weighing the value and cost of imposing its *per se* rule, declared that a conclusive presumption was appropriate: "[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar."[100] The decision came in an 8-1 vote, rare near-unanimity for recent Court decisions on habeas practice. Only Justice Kennedy dissented; but, the argument of his dissent, which called for the imposition of exactly the opposite of the majority's "plain statement" rule, won a majority in *Coleman*.

In *Coleman*, the court did not claim to overrule *Harris*, but rather to explain it, by insisting that defendant Coleman read *Harris* "too broadly" and took it out of context.[101] In a stinging dissent, however, Justice Harry Blackmun declared that it was the majority that had misread *Harris*:

> I submit . . . that it is the majority that has wrested *Harris* out of the context of a preference for the vindication of fundamental constitutional rights and that has set it down in a vacuum of rhetoric about federalism. In its attempt to justify a blind abdication of responsibility by the federal courts, the majority's opinion marks the nadir of the Court's recent habeas jurisprudence, where the discourse of rights is routinely replaced with the functional dialect of interests. The Court's habeas jurisprudence now routinely, and without evident reflection, subordinates fundamental constitutional rights to mere utilitarian interests.[102]

The *Coleman* majority ruled that before the *Harris* presumption can be asserted, a habeas petitioner must show that the state court opinion dismissing the appeal "fairly appear[ed] to rest primarily on, or to be interwoven with, federal law."[103]

The *Coleman* majority side-stepped the fact that both the *Long* and *Harris* decisions dealt fully with the possibility that some decisions would be more ambiguous than others, and yet still imposed a *per se* conclusive presumption favoring federal review on the merits when any ambiguity exists. In *Harris*, the Court adopted the "plain statement" rule for habeas proceedings because, after weighing the impact of such a *per se*

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100. *Id.* at 263 (quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985) (quoting Michigan v. Long, 463 U.S. 1032, 1041 (1983))).

101. *Coleman*, 111 S. Ct. at 2557.

102. *Id.* at 2572-73 (Blackmun, J., dissenting).

103. *Id.* at 2550.

rule on both state and federal courts, it decided that the rule "achieves the important objective of permitting the federal court rapidly to identify whether federal issues are properly presented before it."[104] Before adopting the presumption favoring habeas, however, the Court considered an opposite rule, which would have required federal courts, when faced with ambiguous state appellate rulings that mingle federal law and state procedure, to presume that *state* law had been the basis of a ruling, which would effectively block most federal appeals. Those favoring this alternative presumption argued that applying the "plain statement" rule of *Long* would create needless delays and improperly usurp state authority.[105]

The *Harris* Court decided, however, that the "plain statement" rule favoring federal review "burdens those interests only minimally, if at all. The benefits, in contrast, are substantial."[106] The Court also pointed out that a state court desiring to avoid federal habeas review of its decision needed only to make it clear that it was relying on a state procedural bar, which would "foreclose federal habeas review to the extent permitted by *Sykes*."[107]

> Requiring a state court to be explicit in its reliance on a procedural default does not interfere unduly with state judicial decision-making. As *Long* itself recognized, it would be more intrusive for a federal court to second-guess a state court's determination of state law. . . . Moreover, state courts have become familiar with the "plain statement" requirement. . . .[108]

The *Harris* Court concluded that imposing a presumption opposite to the "plain statement" rule of *Long* would impose substantial burdens on the federal courts:

> [T]he federal habeas court would be forced to examine the state-court [sic] record to determine whether procedural default was argued to the state court, or would be required to undertake an extensive analysis of state law to determine whether a procedural bar was potentially applicable to the particular case. . . . Much time would be lost in reviewing legal and factual issues that the state court, familiar with state law and the record before it, is better suited to address expeditiously.[109]

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104. Harris v. Reed, 489 U.S. 255, 265 (1989).
105. *Id.* at 271-79 (Kennedy, J., dissenting).
106. *Id.* at 264.
107. *Id.*
108. *Id.* (citation omitted).
109. Harris v. Reed, 489 U.S. 255, 264-65 (1989) (citation omitted).

As the lone dissenter in *Harris*, Justice Kennedy supported the imposition in habeas cases of the mirror image of the plain statement rule, i.e., that a state procedural ground should be presumed as the basis for an ambiguous ruling, *unless* the court clearly stated that it relied on federal law.[110]

In *Coleman*, the majority declared that federal review of a state ruling will be permitted only when the state ruling "fairly appear[s] to rest primarily on, or to be interwoven with, federal law."[111] The originally stated *Long* presumption sought to avoid involving the federal court in determining the effect of state law by permitting the federal court to cut through state procedural matters and go to the merits of the federal claim.

By insisting on the predicate that the state ruling "fairly appear" to involve federal law, the *Coleman* Court has forced federal habeas courts to do what the Court in *Harris* told them not to do: examine the entire record of the state appeal to make determinations of state procedural law.[112] Because the *Coleman* opinion offers no guidelines for determining what constitutes "fairly appearing" to involve federal law, federal judges are back to the pre-*Long* days, and must make *ad hoc* determinations that inevitably will lead to inconsistent standards applied from district to district. Given the Supreme Court's hostility to habeas review generally, it is not unreasonable to conclude that the Supreme Court, and thus lower federal courts, will take a very restrictive view of "fairly appearing."

It is especially ironic that the majority opinion placed so much importance on finality and saving judicial resources, but was not troubled by the delaying impact that its rule in *Coleman* will cause. Federal courts will have to sift through state law before reaching the merits of a claim. The *Coleman* majority minimized that concern, stating: "Any efficiency gained by applying a conclusive presumption, and thereby avoiding inquiry into state law, is simply not worth the cost in the loss of respect for the State that such a rule would entail."[113] The Court did focus at length, however, on the added cost to the state that would allegedly accrue if federal courts examined the merits of a case on habeas review.

The majority also declared that it was modifying the plain statement rule because it had "no power to tell state courts how they must write their opinions"[114] and, thus, would not impose on state courts "the responsibility for using particular language in every case in which a state

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110. *Id.* at 286.
111. Coleman v. Thompson, 111 S. Ct. 2546, 2550 (1991).
112. Freedman, *supra* note 4, at C7.
113. *Id.* at 2558.
114. *Id.* at 2559.

prisoner presents a federal claim."[115] The Court did not explain why such a requirement would be such a burden, nor why that alleged burden was more important than cutting through procedure and getting to the merits of a claim.

In a method similar to the one it used in *McCleskey v. Zant*,[116] the *Coleman* Court dealt its judgment from a stacked deck—first announcing a new, higher threshold test for the petitioner to reach when presenting a claim in federal court, then determining that the defendant was unable to reach it.[117]

In *Coleman*, the Court first turned the "plain statement" rule on its head, then determined that defendant Coleman could not meet the requirements of its new rule, because the Virginia Supreme Court's decision was clear in basing its decision on state procedural law, and did not "fairly appear" to intermingle federal law.[118] That declaration, however, was simply and completely wrong.

Coleman's attorney missed, by three days, the deadline for filing a notice of intent to appeal the Virginia trial court's judgment against Coleman.[119] The state moved for dismissal of the entire appeal, but the Virginia Supreme Court declined to rule immediately. Both sides in the case then filed briefs on the merits, and the Virginia Supreme Court issued its ruling six months later with a terse announcement that it was dismissing the case "upon consideration" of all papers filed.[120]

Because Coleman's briefs included several federal constitutional claims, in his federal habeas petition, Coleman claimed that the state supreme court had intermingled its procedural law with federal law and, thus, he should be permitted to pursue his federal claim under the rule of *Harris*.[121]

The judgment by the Court that Virginia had not intermingled state law is mystifying in light of the majority's observation: "There is no doubt that the Virginia Supreme Court's 'consideration' of all filed papers adds some ambiguity. . . ."[122] Despite that, the Supreme Court insisted that the state court had been "explicit" in basing its dismissal "solely on procedural grounds."[123] The Supreme Court did not attempt

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115. *Id.*

116. 111 S. Ct. 1454 (1991).

117. The court in *McCleskey* established the "cause and prejudice" test for abuse of writ, then determined that McCleskey could not meet the "cause" prong without addressing the "prejudice" prong, which McCleskey surely would have satisfied.

118. Coleman v. Thompson, 111 S. Ct. 2546, 2559 (1991).

119. *Id.* at 2552-53.

120. *Id.*

121. *Id.*

122. *Id.* at 2561.

123. *Id.*

to explain how the Virginia decision could be both ambiguous and explicit at the same time.

Coleman also argued, in vain, that his case was similar to *Ake v. Oklahoma*,[124] in which the United States Supreme Court held that when a state excuses its own procedural defaults in cases arguing "fundamental trial error" on appeal, federal law was necessarily implicated; thus, federal habeas review is available in such cases. Coleman argued that because the Virginia Supreme Court examined the underlying merits of his claim before issuing its ruling, it was subject to the rule of federal review as set forth in *Ake*.[125] To buttress the argument, Coleman cited a Virginia case, *Tharp v. Commonwealth*,[126] that indicated the state of Virginia would forgive procedural defaults when failing to do so would "abridge a constitutional right."[127] Coleman had raised a constitutional claim.

The United States Supreme Court brushed aside the *Ake* comparison, asserting only that *Ake* was a direct-review case and, accordingly, not applicable to habeas situations.[128] The Court then distinguished *Tharp* by noting that *Tharp* concerned the filing of actual appeal *petitions*, whereas Coleman's default had been in failure to file *notice* of an appeal.[129] Whatever technical justification there may have been for ignoring *Ake* and *Tharp*, the Court seemed more intent on splitting hairs than discussing the underlying claims. Justice Blackmun made that point forcefully in his dissent: "[T]he Court today continues its crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims . . . creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights . . . ."[130]

Attorneys for Coleman also sought to remedy their procedural default by arguing "cause and prejudice" under the *Sykes* test.[131] Defendant Coleman had a strong case that he would suffer "prejudice" if not permitted federal review. Indeed, Coleman faced execution because his attorneys filed his notice of appeal three days late. As in the *McCleskey* decision, however, the Court avoided determining whether the petitioner would be able to show prejudice, by determining that Coleman was unable to show "cause."

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124. 470 U.S. 68 (1985).
125. Coleman v. Thompson, 111 S. Ct. 2546, 2560 (1991).
126. 175 S.E.2d 277 (Va. 1970).
127. *Id.* at 278.
128. Coleman v. Thompson, 111 S. Ct. 2546, 2560 (1991).
129. *Id.* at 2560-61.
130. *Id.* at 2569 (Blackmon, J., dissenting).
131. *See supra* notes 51-57 and accompanying text.

The Court determined that attorney error is insufficient to show "cause." Citing *Murray v. Carrier*,[132] the Court reaffirmed that ignorant or inadvertent attorney error is an insufficient cause,[133] unless the attorney error rises to the level of Sixth Amendment ineffective assistance of counsel, as detailed in *Strickland v. Washington*.[134]

The *Coleman* majority concluded that attorney "ignorance or inadvertence" is not cause "because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'"[135] Coleman had argued that his attorney's ineffective assistance at trial and appeal was so severe that his lawyer ceased to be his agent.[136] However, the Court declared that to accept this argument would "be contrary to well-settled principles of agency law."[137]

This agency law analysis underscores the callousness of the Court, which saw no difference between matters of civil litigation based in agency law and a capital murder case. Equating the two leads to potentially absurd results. If agency law, indeed, is of central concern in capital cases, then what is the defendant's remedy against his attorney after he has been executed by the state? Because only the state can commute a death sentence, a defendant could not seek an injunction to stop his execution based on a claim that his attorney was merely "ignorant and inadvertent." Of what use would a traditional money judgment be to a capital defendant? Would his family inherit his right to sue? Finally, if such a money judgment was sought, what percentage of responsibility would a merely "ignorant" attorney bear in helping to send his client to the gas chamber?

The Court also reaffirmed in *Coleman* the rule in *Murray* that, because a petitioner has no constitutional right to counsel in state post-conviction proceedings, a petitioner may not claim ineffective assistance of counsel in such proceedings.[138] The Court rejected Coleman's con-

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132. 477 U.S. 478 (1986).

133. *Coleman*, 111 S. Ct. at 2566-67.

134. *Id.* at 2566 (citing Strickland v. Washington, 466 U.S. 668 (1984)). *Strickland* set a "cause and prejudice" test and determined that a defendant seeking to show ineffectiveness of counsel severe enough to reach constitutional magnitude must demonstrate that his attorney's performance was deficient and that it prejudiced the defense. The "benchmark" of the standard is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). The *Strickland* standard is considered generally a very difficult standard to meet. *See generally* GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, THE LAW AND ETHICS OF LAWYERING 156-80 (1990).

135. *Coleman*, 111 S. Ct. at 2566-67 (citations omitted).

136. *Id.* at 2567.

137. *Id.* (citations omitted).

138. *Id.* at 2566.

tention that when no constitutional right to counsel exists, it should be enough that the defendant is able to show ineffective assistance of counsel that would meet the *Strickland* standard.

Finally, the *Coleman* majority ignored that the state appeals court had made fundamental judgments of federal law that were held binding on Coleman without review by a federal court. Inexplicably, the Court argued both that the Virginia Supreme Court did not "fairly appear" to base its decision on federal law, and that Coleman had a fair hearing of his federal claims. The Court did not try to explain that inconsistency, nor does it appear it could have.

Roger Keith Coleman was executed in the Virginia electric chair on May 20, 1992.[139] In the final weeks of his life, his case became a *cause celebre* that focused national attention on capital punishment and the appeals process.[140] Coleman was interviewed by scores of journalists, and Time Magazine put his picture on the cover of its May 18, 1992 edition.[141] Just two days before his execution, in a particularly macabre episode, Coleman was interviewed from his jail cell on the television show "Donahue" as his weeping mother sat watching from the show's studio.[142]

IV. Assistance of Counsel in Capital Cases

Neither side in the habeas debate in Congress disputes the need to eliminate frivolous habeas claims and bring criminal proceedings to finality.[143] The ABA proposal lays the blame for lengthy habeas at the doorstep of the states for failing to provide adequate counsel in the initial stages of capital cases.[144] In fact, the ABA Habeas Task Force claims:

> [A] single defect in the current system of processing capital cases in this country is principally responsible for the disproportionate

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139. Peter Applebome, *Virginia Executes Inmate Despite Claim of Innocence*, N.Y. Times, May 21, 1992, at A20.

140. *Id.*

141. *This Man Might Be Innocent; This Man is Due to Die*, Time, May 18, 1992.

142. Applebome, *supra* note 139.

143. Though habeas corpus practice involves both capital and non-capital litigation, both sides in the habeas debate focus on capital litigation as the primary source of concern since capital cases are the most involved and subject to more levels of review than non-capital cases.

144. *Fairness and Efficiency in Habeas Corpus Adjudication: Hearings Before the Subcomm. on Civil and Constitutional Rights*, 101st Cong., 2d Sess. (1991) (summary of testimony of John J. Curtin, Jr., President of the American Bar Association, and James S. Liebman, Professor of Law, Columbia University School of Law, and member, ABA Task Force on Death Penalty Habeas Corpus, on Behalf of the ABA) [hereinafter Liebman statement].

> and wasteful amount of time and resources devoted to reviewing capital convictions and sentences in federal habeas corpus proceedings. That defect is the absence, insufficient compensation, and/or inexperience of counsel in the state capital proceedings that precede federal habeas proceedings.[145]

The most recent habeas reform legislation passed by the House of Representatives, House Bill 3371,[146] adopts the ABA and Judicial Conference proposals, and would require states to set up a system of neutrally certified and adequately compensated attorneys at all stages of capital litigation.

The most recent bill approved by the Senate, Senate Bill 1241,[147] would not require states to provide counsel in capital cases, but would offer incentives for them to do so in the form of tougher standards for permitting federal habeas review of capital cases. These tougher standards would be available only to those states that choose to provide attorneys to indigents. The Senate bill would require states to provide such representation only during postconviction proceedings and would permit states to set up any system for appointing and monitoring the attorneys they choose, as long as all indigent clients under capital sentence have access to counsel.

V. The "Full and Fair" Standard

The most controversial aspect of the Bush Administration habeas proposal is a provision that would prohibit entirely federal habeas review of any claim that has been "fully and fairly adjudicated in State proceedings."[148] Opponents of the "full and fair" standard claim it would

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145. *Id.* Additionally, the ABA claims that the absence and inadequacy of state counsel is the principal cause for a 40% rate of constitutional error found in capital cases. *Id.*

146. H.R. 3371, 102d Cong., 1st Sess. § 1105 (1991).

147. S. 1241, 102d Cong., 1st Sess. § 2256 (1991).

148. S. 1241, 102d Cong., 1st Sess. § 2254(d) (1991). The current habeas statute, 28 U.S.C. § 2254, provides only that state court determinations are presumed to be correct "unless it shall otherwise appear . . . that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or that the applicant was otherwise denied due process of the law in the State court proceeding." *Id.* Applicants under the current statute may rebut the presumption that state findings are correct by offering "convincing" evidence. 28 U.S.C. § 2254(d). Senate Bill 1241, in addition to prohibiting a federal court from hearing any claim that received a "full and fair" hearing, sought to raise the requirement for rebutting the presumption to "clear and convincing" evidence. S. 1241, 102d Cong., 1st Sess. § 2254(d),(e).

Another major issue in habeas reform involves the retroactive application of "new rules" of law to persons awaiting habeas corpus review. Under Teague v. Lane, 489 U.S.

strip the federal courts of their habeas corpus review power; proponents claim that it would require reasonable deference to state decisions.

Opponents of the "full and fair" standard include about 400 law professors, from around the country, who signed a letter from Professor Larry W. Yackle of Boston University School of Law to the House Judiciary Committee "warning the Committee that adoption of this standard 'will largely abolish the Federal courts' current and long standing [sic] authority to enforce the Bill of Rights in [the habeas corpus] context.'"[149] The House Judiciary Committee of the 102d Congress agreed with the opponents, and rejected an amendment that would have added the "full and fair" standard to House Bill 3371.[150]

The Bush Administration claimed that the "full and fair" standard would "apply a uniform criteria of reasonableness to review both factual and non-factual determinations . . . [and would] further the legitimate interest of finality."[151] The Bush Administration said that the "full and fair" standard would apply only if the claim presented was decided on the merits in state proceedings, the state determination was a reasonable interpretation of federal law and the facts, and adjudication was conducted in a manner consistent with the procedural requirements of federal law.[152]

The House Judiciary Committee concluded that the definition and likely construction by the courts of "full and fair" was too uncertain. The Committee decided not to attempt to write a definition of the standard because, it said, the Supreme Court likely would consider only the statute's exact language and not the published legislative intent when trying to interpret the "full and fair" standard.[153] The Committee concluded that the Supreme Court "might well" define "full and fair" in such a way as to eliminate habeas corpus as a postconviction remedy.[154]

The Bush Administration claims that federal courts, and not state courts, will determine whether a state claim was "fully and fairly" adjudicated.[155] This, however, is not very reassuring. The Supreme Court

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288 (1989), a "new rule" that would be favorable to a prisoner may not be applied retroactively during habeas corpus proceedings, but may be applied only while the prisoner's case is pending on direct appeal. Opponents of *Teague* claim that it, like the "full and fair" standard, threatens to eliminate completely federal habeas corpus. The ABA proposal calls for Congress to overrule *Teague*. The Bush Administration proposal supports *Teague*. A full discussion of retroactivity is beyond the scope of this Note.

149. H.R. Rep. No. 242, 102d Cong., 1st Sess., pt. 1, at 123 (1991).

150. *Id.* at 119.

151. Open Letter, *supra* note 78.

152. *Id.*

153. H.R. Rep. No. 242, 102d Cong., 1st Sess., pt. 1, at 124.

154. *Id.*

155. Open Letter, *supra* note 78.

has worked diligently to curtail federal habeas corpus. Therefore, the lower federal courts will be prevented from looking too deeply at state decisions. The result of any law that prohibits federal review of a "fully and fairly" adjudicated state claim will be the death of federal habeas corpus.

VI. Conclusion

In recent years, the United States Supreme Court has implemented most of the restrictions on federal habeas corpus review that the Bush Administration bill would impose. All that remains is for habeas corpus to be eliminated completely, an effect which would be accomplished by imposing the "full and fair" standard. Those in Congress who favor a more open habeas policy are likely to find little support because of the hostility that President Bush and the Supreme Court have exhibited toward habeas.

However, Congress ought to demand, at least, that concerns for procedural rules and legal technicalities do not prevent justice from being served. Congress should adopt a habeas law that would ensure state prisoners are not locked out of federal court because of unintended or "ignorant" errors of their attorneys. In addition, successive habeas petitions ought to be permitted when new facts show that a prisoner was either wrongly convicted, or that a sentence was too harsh.

Habeas corpus exists, and has for 202 years, to make certain that criminal sanctions are applied uniformly. This requires a watchful federal court system that is prepared to examine a suspect decision. The Supreme Court, by making it clear that it will permit federal review in only very few cases, is encouraging state courts to act capriciously. The message to prosecutors from *McCleskey* and *Coleman* is clear: Violate individual rights if you wish, but cover your tracks.

Being tough on crime does not require locking the federal courthouse door. The elimination of habeas corpus will not demonstrate to the nation that Congress or the Supreme Court are on the side of law and order; it will demonstrate that those institutions value political expedience over justice.