CHAPTER 15

HABEAS CORPUS

A. INTRODUCTION

After a person has been convicted of a crime and exhausted all appeals, he or she may file a petition for a writ of habeas corpus in federal court. Habeas petitions are commonly filed by inmates while they are in prison. Although there are difficult procedural issues for petitioners to navigate, there is no right to counsel to assist in the filing of habeas corpus petitions. This chapter discusses in detail the procedural hurdles for habeas corpus petitions, as well as the limitation on the types of claims that may be made through habeas corpus petitions.

A person convicted in a state court proceeding generally may secure federal court review of the state court's judgments and proceedings only by first exhausting all available appeals within the state system. Federal district courts lack the authority to hear appeals from state judicial systems. Under federal law, a person who claims to be held in custody by a state government in violation of the Constitution, treaties, or laws of the United States may file a civil lawsuit in federal court seeking a writ of habeas corpus. Technically, federal court consideration of the habeas corpus petition is not considered a direct review of the state court decision; rather, the petition constitutes a separate civil suit filed in federal court and is termed *collateral relief*. If the federal court grants a writ of habeas corpus, it may order the release of a state prisoner who is held by the state in violation of federal law. Federal courts may also hear habeas petitions of federal prisoners pursuant to 28 U.S.C. §2255.

The writ of habeas corpus has its origins in English law.[1] Blackstone referred to habeas corpus as "the most celebrated writ in English law."[2] Recognizing its importance, the Framers of the Constitution provided that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[3] Under the Judiciary Act of 1789, habeas corpus was available to prisoners who claimed that they were held in custody by the *federal* government in violation of the Constitution, treaties, or laws of the United States.[4] After the Civil War, at a time of great distrust in the ability and willingness of state courts to protect federal rights, Congress provided habeas corpus relief to state prisoners if they were held "in custody in violation of the Constitution or laws or treaties of the United States."[5]

The writ of habeas corpus protects individuals against arbitrary and wrongful imprisonment. It is not surprising, therefore, that habeas corpus long has been

1. For an excellent history of habeas corpus, *see* W. Duker, *A Constitutional History of Habeas Corpus* (1980).
2. 3 *Blackstone's Commentaries* 129 (1791).
3. U.S. Const. art. I, §9, cl. 2.
4. Judiciary Act of 1789, ch. 20, 1 Stat. 73.
5. 28 U.S.C. §2254.

viewed as the "great writ of liberty."[6] At the same time, however, the availability of federal court relief pursuant to the writ of habeas corpus remains enormously controversial. Conservatives feel that habeas corpus is a vehicle that guilty criminals often use to escape their convictions and their sentences.[7] But liberals see the writ as an essential protection of constitutional rights—ensuring that individuals are not held in custody in violation of those rights.[8] The writ of habeas corpus also is controversial because it is a source of direct confrontation between federal district courts and state judiciaries. The power of a single federal judge to overturn a decision affirmed by an entire state court system is troubling to many.[9] A reflection of this ideological split is that in 1996, the Republican-controlled Congress enacted the Antiterrorism and Effective Death Penalty Act, which substantially changed the law of habeas corpus and, in many ways, restricted its availability.[10] Yet the controversy over habeas corpus must be put in perspective. Statistics indicate that less than 1 percent of state prisoners who file habeas corpus petitions ultimately prevail.[11]

Over the last two decades, there has been a major debate over whether federal courts should be able to exercise habeas corpus over those who are detained as part of the war on terrorism, especially those held in Guantánamo Bay, Cuba.[12] In Rasul v. Bush, the Supreme Court held that federal courts have jurisdiction to hear habeas petitions by those detained in Guantánamo.[13] Congress responded by enacting the Detainee Treatment Act, which held that those held in Guantánamo shall not have access to federal courts via a writ of habeas corpus; they must go through military commissions and then seek review in the District of Columbia Circuit.[14] In Hamdan v. Rumsfeld, the Supreme Court held that this provision applies only prospectively, not retroactively to those petitions that already were pending in federal court at the time that the law was enacted.[15] In the fall of 2006, Congress responded by enacting the Military Commissions Act of 2006, which makes clear that the restrictions on habeas corpus in the Detainee Treatment Act apply retroactively.[16] In Boumediene v. Bush, in 2008, the Supreme Court declared this unconstitutional as an impermissible suspension of the writ of habeas corpus.[17] But

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6. Duker, *supra* note 1, at 3.

7. *See, e.g.*, Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970) (arguing that habeas corpus should be available only where there is a colorable showing of a defendant's innocence).

8. *See, e.g.*, Stephen A. Saltzburg, *Habeas Corpus: The Supreme Court and the Congress*, 44 Ohio St. L.J. 367 (1983) (habeas corpus is symbolic of the ideal that no person should be convicted in violation of the fundamental law of the land).

9. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 126 (1982).

10. Pub. L. No. 104-132, April 24, 1996.

11. John Blume, *AEDPA: The "Hype" and the "Bite,"* 91 Cornell L. Rev. 259, 284 (2006).

12. This is discussed in detail in section D below.

13. 542 U.S. 466 (2004).

14. 119 Stat. 2739, codified at 10 U.S.C. §801.

15. 548 U.S. 557 (2006).

16. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

17. 553 U.S. 723 (2008).

since then, for well over a decade, those in Guantanamo have had little success, especially in the United States Court of Appeals for the District of Columbia Circuit, and the Supreme Court has denied review in these cases.

These events reflect a deep disagreement over whether federal courts, via habeas corpus, should be available to those held as enemy combatants. The Bush administration and Congress saw habeas corpus review as inconsistent with the war on terrorism. But the Supreme Court viewed habeas corpus review as essential to make sure that no one is detained indefinitely without meaningful due process. Yet, the Court, despite many opportunities, has not taken a case from a Guantanamo detainee since *Boumediene* was decided in 2008.

Because of the divergence of views concerning habeas corpus for prisoners and for detainees, it is hardly surprising that the law concerning habeas corpus availability has been particularly volatile. No area of federal jurisdiction has changed more dramatically in the last 25 years than habeas corpus. As discussed below, the Court has imposed substantial new obstacles to habeas relief, including generally preventing successive habeas petitions[18] and preventing the use of habeas corpus to develop new rules of constitutional law.[19] Even more dramatically, the Antiterrorism and Effective Death Penalty Act substantially changed many aspects of the law of habeas corpus, including creating a statute of limitations for filing petitions, precluding successive petitions except in very limited circumstances and only with the approval of a United States Court of Appeals, and narrowing the scope of federal court review.[20] In addition, as mentioned above, twice Congress enacted statutes precluding habeas corpus by those held as enemy combatants.

This chapter is divided into three major sections. First, section B considers the major issues that must be addressed in order for a federal court to grant habeas corpus review. Second, section C summarizes key procedural issues in habeas corpus litigation. Finally, section D looks at habeas corpus for those held as enemy combatants as part of the war on terrorism.

B. THE ISSUES THAT MUST BE ADDRESSED IN ORDER FOR A FEDERAL COURT TO GRANT HABEAS CORPUS RELIEF

Federal statutes and Supreme Court interpretation of them have created a number of hurdles that must be overcome in order for a federal court to grant a habeas corpus petition. Although the order of the questions is somewhat arbitrary, a federal court considering a habeas petition must address all of the following issues:

1. Is the habeas petition time barred? The Antiterrorism and Effective Death Penalty Act has created strict time limits for when a habeas petition must be filed. If the petition is untimely, it must be dismissed.

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18. McCleskey v. Zant, 499 U.S. 467 (1991), discussed below.
19. Teague v. Lane, 489 U.S. 288 (1989), discussed below.
20. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

2. Is it a first habeas petition by the individual or is it a successive petition (a second, third, fourth, etc. petition)? If it is a successive petition, it must be dismissed unless the federal court of appeals approves its filing based on finding that the case meets stringent requirements for successive petitions.
3. Has there been exhaustion of state procedures for all claims presented in the habeas petition? If there has not been exhaustion for all claims, then the entire petition must be dismissed.
4. Does the petition rely on an already established rule of criminal procedure, or does it seek recognition of a new rule? If it seeks the recognition of a new rule, the petition must be dismissed unless it is an extraordinary rule that applies retroactively.
5. Is it a claim that can be heard on habeas corpus? Generally, individuals are allowed to relitigate their constitutional claims on habeas, but there is a notable exception: Fourth Amendment claims by state prisoners generally cannot be raised on habeas corpus as long as there was a full and fair hearing in state court.
6. Has there been a procedural default in the sense of a failure to follow the required procedures of the forum, state or federal, in which the person was convicted? For example, were the claims raised in the habeas petition properly raised at trial, or were they defaulted for failure to raise them? If a claim was procedurally defaulted, it must be dismissed unless there is either a showing of good cause for the failure and prejudice to not being heard on habeas or a showing of likely actual innocence.
7. If the claim is heard, can the federal court hold an evidentiary hearing, or is it limited to the record that was in the state court?
8. Can the federal court provide habeas corpus relief? For example, under the provisions of the Antiterrorism and Effective Death Penalty Act, a federal court may grant habeas corpus relief only if the state court decision is contrary to or an unreasonable application of law clearly established by the Supreme Court.

These eight questions might be thought of as filters, with each question causing a significant number of habeas petitions to be dismissed. Relatively few make it to the last question, and even fewer are granted. This section is organized around these eight questions. These are not the only requirements for habeas corpus. Others are discussed in section C below, such as the requirement that a person be in custody. But these issues certainly are the focus of most habeas corpus litigation in the United States.

1. Is the Petition Time Barred?

Until 1996, the federal statutes concerning habeas corpus review did not prescribe any time limit within which petitions must be filed.[21] The habeas corpus rules

21. *See, e.g.*, United States v. Smith, 331 U.S. 469, 475 (1947). Indeed, prior to the act's going into effect, the Court ruled that there was no time limit on first habeas petitions, and they could be filed even on the day of execution. Lonchar v. Thomas, 517 U.S. 314 (1996).

that went into effect in 1977 provided that a petition may be dismissed if the state is prejudiced by a delay in the filing of the petition, "unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred."[22]

The Antiterrorism and Effective Death Penalty Act, enacted in 1996, imposes a one-year statute of limitations on the filing of habeas petitions. Section 101 of the act provides, "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court."[23] Section 101 also states that "[t]he time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."[24]

The act also provides that in capital cases a six-month statute of limitations applies if it is determined that a state has established an adequate system for providing attorneys for post-conviction proceedings.[25] In Calderon v. Ashmus, the Supreme Court unanimously dismissed as nonjusticiable a request for a declaratory judgment by death-row inmates that California was not in compliance with the act.[26] *Calderon* means that inmates cannot seek a system-wide determination of whether a state is in compliance with the act; rather, in each case, the issue must be raised and litigated.

The crucial issue in habeas litigation frequently is whether there was tolling of the statute of limitations. One key aspect of this is whether there is tolling while a habeas petition is pending in federal court. If a state prisoner files a habeas corpus petition in federal court that is then dismissed, is the time that it was pending counted toward the statute of limitations for the habeas petition? The Supreme Court addressed this in Duncan v. Walker, 533 U.S. 167 (2001). Justice O'Connor, writing for the Court, held that the statutory language in the act provided that the statute of limitations was tolled while a prisoner was seeking collateral relief in state court under state law but not while a habeas petition was pending in federal court.[27]

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22. 28 U.S.C. §2254, Rule 9(a).

23. 28 U.S.C. §2244.

24. *Id.*

25. The act states that the shorter statute of limitations applies "if a State establishes by statute, rules of its court of last resort, or by another agency authorized by state law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes." 28 U.S.C. §2261.

26. 523 U.S. 740 (1998).

27. Also, in Lawrence v. Florida, 549 U.S. 327 (2007), the Court considered whether there is tolling—that is, whether the statute of limitations clock stops running—while a petition for a writ of certiorari is pending in the Supreme Court seeking review of a state court's denial of relief in collateral proceedings. In other words, while a state habeas corpus petition is pending, there is tolling of the statute of limitations; does that include the time while certiorari is being sought in the Supreme Court of the state court's decision? The Supreme Court, 5-4, held that there was not tolling.

Justice O'Connor wrote:

> To begin with, Congress placed the word "State" before "post-conviction or other collateral review" without specifically naming any kind of "Federal" review. The essence of respondent's position is that Congress used the phrase "other collateral review" to incorporate federal habeas petitions into the class of applications for review that toll the limitation period. But a comparison of the text of §2244(d)(2) with the language of other AEDPA provisions supplies strong evidence that, had Congress intended to include federal habeas petitions within the scope of §2244(d)(2), Congress would have mentioned "Federal" review expressly. In several other portions of AEDPA, Congress specifically used both the words "State" and "Federal" to denote state and federal proceedings. For example, 28 U.S.C. §2254(i) provides: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."
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> Section 2244(d)(2), by contrast, employs the word "State," but not the word "Federal," as a modifier for "review." It is well settled that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." We find no likely explanation for Congress' omission of the word "Federal" in §2244(d)(2) other than that Congress did not intend properly filed applications for federal review to toll the limitation period. It would be anomalous, to say the least, for Congress to usher in federal review under the generic rubric of "other collateral review" in a statutory provision that refers expressly to "State" review, while denominating expressly both "State" and "Federal" proceedings in other parts of the same statute. The anomaly is underscored by the fact that the words "State" and "Federal" are likely to be of no small import when Congress drafts a statute that governs federal collateral review of state court judgments.

Justice Stevens, in an opinion concurring and concurring in the judgment, expressed concern that the majority's holding could lead to tremendous unfairness. Imagine a state prisoner who files an immediate habeas petition in federal court after completion of the state proceedings, but the federal court waits 13 months before dismissing the petition for failure to adequately exhaust state remedies. The entire year of the statute of limitations has expired because there is no tolling while the case was pending in federal court. Justice Stevens explained:

> This possibility is not purely theoretical. A Justice Department study indicates that 63% of all habeas petitions are dismissed, and 57% of those are dismissed for failure to exhaust state remedies. And it can take courts a significant amount of time to dispose of even those petitions that are not addressed on the merits; on the average, district courts took 268 days to dismiss petitions on procedural grounds. Thus, if the words "other collateral review" do not include federal collateral review, a large group of federal habeas petitioners, seeking to return to federal court after subsequent state-court rejection of an unexhausted claim, may find their claims

> time barred. Moreover, because district courts vary substantially in the time they take to rule on habeas petitions, two identically situated prisoners can receive opposite results. If Prisoner A and Prisoner B file mixed petitions in different district courts six months before the federal limitations period expires, and the court takes three months to dismiss Prisoner A's petition, but seven months to dismiss Prisoner B's petition, Prisoner A will be able to return to federal court after exhausting state remedies, but Prisoner B—due to no fault of his own—may not.

Justice Stevens suggested that the solution would be to allow federal courts to use equitable tolling to preserve the ability of the habeas petitioner to have access to the federal court. He wrote:

> [N]either the Court's narrow holding, nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period tolled for such a petition as a matter of equity. The Court's opinion does not address a federal court's ability to toll the limitations period apart from §2244(d)(2). Furthermore, a federal court might very well conclude that tolling is appropriate based on the reasonable belief that Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdiction within the 1-year interval prescribed by AEDPA.

In Holland v. Florida, the Supreme Court held that equitable tolling, as suggested by Justice Stevens, is permissible.

Holland v. Florida

560 U.S. 631 (2010)

Justice Breyer delivered the opinion of the Court.

We here decide that the timeliness provision in the federal habeas corpus statute is subject to equitable tolling. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). We also consider its application in this case. In the Court of Appeals' view, when a petitioner seeks to excuse a late filing on the basis of his attorney's unprofessional conduct, that conduct, even if it is "negligent" or "grossly negligent," cannot "rise to the level of egregious attorney misconduct" that would warrant equitable tolling unless the petitioner offers "proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth." In our view, this standard is too rigid.

I

AEDPA states that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." It also says that "[t]he time during which a properly filed application for State post-conviction . . . review" is "pending shall not be counted" against the 1-year period.

On January 19, 2006, Albert Holland filed a *pro se* habeas corpus petition in the Federal District Court for the Southern District of Florida. Both Holland (the

petitioner) and the State of Florida (the respondent) agree that, unless equitably tolled, the statutory limitations period applicable to Holland's petition expired approximately five weeks before the petition was filed. Holland asked the District Court to toll the limitations period for equitable reasons. We shall set forth in some detail the record facts that underlie Holland's claim.

In 1997, Holland was convicted of first-degree murder and sentenced to death. The Florida Supreme Court affirmed that judgment. On *October 1, 2001*, this Court denied Holland's petition for certiorari. And on that date—the date that our denial of the petition ended further direct review of Holland's conviction—the 1-year AEDPA limitations clock began to run.

Thirty-seven days later, on *November 7, 2001*, Florida appointed attorney Bradley Collins to represent Holland in all state and federal postconviction proceedings. By *September 19, 2002*—316 days after his appointment and 12 days before the 1-year AEDPA limitations period expired—Collins, acting on Holland's behalf, filed a motion for postconviction relief in the state trial court. That filing automatically stopped the running of the AEDPA limitations period, with, as we have said, 12 days left on the clock.

For the next three years, Holland's petition remained pending in the state courts. During that time, Holland wrote Collins letters asking him to make certain that all of his claims would be preserved for any subsequent federal habeas corpus review. Collins wrote back, stating, "I would like to reassure you that we are aware of state-time limitations and federal exhaustion requirements." He also said that he would "presen[t] . . . to the . . . federal courts" any of Holland's claims that the state courts denied.

In mid-May 2003 the state trial court denied Holland relief, and Collins appealed that denial to the Florida Supreme Court. Almost two years later, in February 2005, the Florida Supreme Court heard oral argument in the case. But during that 2-year period, relations between Collins and Holland began to break down. Indeed, between April 2003 and January 2006, Collins communicated with Holland only three times—each time by letter.

Holland, unhappy with this lack of communication, twice wrote to the Florida Supreme Court, asking it to remove Collins from his case. In the second letter, filed on June 17, 2004, he said that he and Collins had experienced "a complete breakdown in communication." The State responded that Holland could not file any *pro se* papers with the court while he was represented by counsel, including papers seeking new counsel. The Florida Supreme Court agreed and denied Holland's requests.

Collins argued Holland's appeal before the Florida Supreme Court on February 10, 2005. Shortly thereafter, Holland wrote to Collins emphasizing the importance of filing a timely petition for habeas corpus in federal court once the Florida Supreme Court issued its ruling.

Five months later, in November 2005, the Florida Supreme Court affirmed the lower court decision denying Holland relief. Three weeks after that, on *December 1, 2005*, the court issued its mandate, making its decision final. At that point, the AEDPA federal habeas clock again began to tick—with 12 days left on the 1-year meter. Twelve days later, on December 13, 2005, Holland's AEDPA time limit expired.

Four weeks after the AEDPA time limit expired, on January 9, 2006, Holland, still unaware of the Florida Supreme Court ruling issued in his case two months earlier, wrote Collins [again].

Nine days later, on January 18, 2006, Holland, working in the prison library, learned for the first time that the Florida Supreme Court had issued a final determination in his case and that its mandate had issued—five weeks prior. He immediately wrote out his own *pro se* federal habeas petition and mailed it to the Federal District Court for the Southern District of Florida the next day.

After considering the briefs, the Federal District Court held that the facts did not warrant equitable tolling and that consequently Holland's petition was untimely. On appeal, the Eleventh Circuit agreed with the District Court that Holland's habeas petition was untimely.

II

We have not decided whether AEDPA's statutory limitations period may be tolled for equitable reasons. Now, like all 11 Courts of Appeals that have considered the question, we hold that §2244(d) is subject to equitable tolling in appropriate cases.

We base our conclusion on the following considerations. First, the AEDPA "statute of limitations defense . . . is not 'jurisdictional.' " It does not set forth "an inflexible rule requiring dismissal whenever" its "clock has run." We have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a "rebuttable presumption" in *favor* "of equitable tolling."

In the case of AEDPA, the presumption's strength is reinforced by the fact that " 'equitable principles' " have traditionally " 'governed' " the substantive law of habeas corpus, for we will "not construe a statute to displace courts' traditional equitable authority absent the 'clearest command.' "

[F]inally, we disagree with respondent that equitable tolling undermines AEDPA's basic purposes. We recognize that AEDPA seeks to eliminate delays in the federal habeas review process. But AEDPA seeks to do so without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law, under which a petition's timeliness was always determined under equitable principles. When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the "writ of habeas corpus plays a vital role in protecting constitutional rights." It did not seek to end every possible delay at all costs. The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, §9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open.

III

We have previously made clear that a "petitioner" is "entitled to equitable tolling" only if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. In this case, the "extraordinary circumstances" at issue involve an attorney's failure to satisfy professional standards of care. The Court of Appeals held that, where that is so, even attorney conduct that is "grossly negligent" can never warrant tolling absent "bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part." But in our view, the Court of Appeals' standard is too rigid.

We have said that courts of equity "must be governed by rules and precedents no less than the courts of law." But we have also made clear that often the "exercise of a court's equity powers . . . must be made on a case-by-case basis." In emphasizing the need for "flexibility," for avoiding "mechanical rules," we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity." The "flexibility" inherent in "equitable procedure" enables courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

In short, no pre-existing rule of law or precedent demands a rule like the one set forth by the Eleventh Circuit in this case. That rule is difficult to reconcile with more general equitable principles in that it fails to recognize that, at least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling. And, given the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments. Several lower courts have specifically held that unprofessional attorney conduct may, in certain circumstances, prove "egregious" and can be "extraordinary" even though the conduct in question may not satisfy the Eleventh Circuit's rule.

We have previously held that "a garden variety claim of excusable neglect," such as a simple "miscalculation" that leads a lawyer to miss a filing deadline, does not warrant equitable tolling. But the case before us does not involve, and we are not considering, a "garden variety claim" of attorney negligence. Rather, the facts of this case present far more serious instances of attorney misconduct. And, as we have said, although the circumstances of a case must be "extraordinary" before equitable tolling can be applied, we hold that such circumstances are not limited to those that satisfy the test that the Court of Appeals used in this case.

IV

The record facts that we have set forth in Part I of this opinion suggest that this case may well be an "extraordinary" instance in which petitioner's attorney's conduct constituted far more than "garden variety" or "excusable neglect." Here, Collins failed to file Holland's federal petition on time despite Holland's many letters that repeatedly emphasized the importance of his doing so. Collins apparently did not do the research necessary to find out the proper filing date, despite Holland's letters that went so far as to identify the applicable legal rules. Collins failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland's many pleas for that information. And Collins failed to communicate with his client over a period of years, despite various pleas from Holland that Collins respond to his letters. And in this case, the failures seriously prejudiced a client who thereby lost what was likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence.

We do not state our conclusion in absolute form, however, because more proceedings may be necessary. And we also recognize the prudence, when faced with an "equitable, often fact-intensive" inquiry, of allowing the lower courts "to undertake it in the first instance." Thus, because we conclude that the District Court's determination must be set aside, we leave it to the Court of Appeals to determine whether the facts in this record entitle Holland to equitable tolling, or whether further proceedings, including an evidentiary hearing, might indicate that respondent should prevail.

Justice ALITO, concurring in part and concurring in the judgment.

Although I agree that the Court of Appeals applied the *wrong* standard, I think that the majority does not do enough to explain the *right* standard. It is of course true that equitable tolling requires "extraordinary circumstances," but that conclusory formulation does not provide much guidance to lower courts charged with reviewing the many habeas petitions filed every year. I therefore write separately to set forth my understanding of the principles governing the availability of equitable tolling in cases involving attorney misconduct.

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." The dispute in this case concerns whether and when attorney misconduct amounts to an "extraordinary circumstance" that stands in a petitioner's way and prevents the petitioner from filing a timely petition. I agree with the majority that it is not practical to attempt to provide an exhaustive compilation of the kinds of situations in which attorney misconduct may provide a basis for equitable tolling. In my view, however, it is useful to note that several broad principles may be distilled from this Court's precedents.

First, our prior cases make it abundantly clear that attorney negligence is not an extraordinary circumstance warranting equitable tolling. Second, the mere fact that a missed deadline involves "gross negligence" on the part of counsel does not by itself establish an extraordinary circumstance. [T]he principal rationale for disallowing equitable tolling based on ordinary attorney miscalculation is that the error of an attorney is constructively attributable to the client and thus is not a circumstance beyond the litigant's control. That rationale plainly applies regardless whether the attorney error in question involves ordinary or gross negligence.

Allowing equitable tolling in cases involving *gross* rather than *ordinary* attorney negligence would not only fail to make sense in light of our prior cases; it would also be impractical in the extreme. Missing the statute of limitations will generally, if not always, amount to negligence, and it has been aptly said that gross negligence is ordinary negligence with a vituperative epithet added. Therefore, if gross negligence may be enough for equitable tolling, there will be a basis for arguing that tolling is appropriate in almost every counseled case involving a missed deadline. This would not just impose a severe burden on the district courts; it would also make the availability of tolling turn on the highly artificial distinction between gross and ordinary negligence. That line would be hard to administer, would needlessly consume scarce judicial resources, and would almost certainly yield inconsistent and often unsatisfying results.

Finally, it is worth noting that a rule that distinguishes between ordinary and gross attorney negligence for purposes of the equitable tolling analysis would

have demonstrably "inequitable" consequences. For example, it is hard to see why a habeas petitioner should be effectively penalized just because his counsel was negligent rather than grossly negligent, or why the State should be penalized just because petitioner's counsel was grossly negligent rather than moderately negligent. Regardless of how one characterizes counsel's deficient performance in such cases, the petitioner is not personally at fault for the untimely filing, attorney error is a but-for cause of the late filing, and the governmental interest in enforcing the statutory limitations period is the same.

Although attorney negligence, however styled, does not provide a basis for equitable tolling, the AEDPA statute of limitations may be tolled if the missed deadline results from attorney misconduct that is not constructively attributable to the petitioner. In this case, petitioner alleges facts that amount to such misconduct. In particular, he alleges that his attorney essentially "abandoned" him, as evidenced by counsel's near-total failure to communicate with petitioner or to respond to petitioner's many inquiries and requests over a period of several years.

If true, petitioner's allegations would suffice to establish extraordinary circumstances beyond his control. Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word. That is particularly so if the litigant's reasonable efforts to terminate the attorney's representation have been thwarted by forces wholly beyond the petitioner's control. The Court of Appeals apparently did not consider petitioner's abandonment argument or assess whether the State improperly prevented petitioner from either obtaining new representation or assuming the responsibility of representing himself. Accordingly, I agree with the majority that the appropriate disposition is to reverse and remand so that the lower courts may apply the correct standard to the facts alleged here.

Justice Scalia, with whom Justice Thomas joins, dissenting.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), establishes a 1-year limitations period for state prisoners to seek federal habeas relief, subject to several specific exceptions. 28 U.S.C. §2244(d). In my view §2244(d) leaves no room for equitable exceptions, and Holland could not qualify even if it did.

I

If §2244(d) merely created a limitations period for federal habeas applicants, I agree that applying equitable tolling would be appropriate.

But §2244(d) does much more than that, establishing a detailed scheme regarding the filing deadline that addresses an array of contingencies.

The question, therefore, is not whether §2244(d)'s time bar is subject to tolling, but whether it is consistent with §2244(d) for federal courts to toll the time bar for *additional* reasons beyond those Congress included.

In my view it is not. It is fair enough to infer, when a statute of limitations says nothing about equitable tolling, that Congress did not displace the default rule. But when Congress has *codified* that default rule and specified the instances where it applies, we have no warrant to extend it to other cases. Unless the Court believes §2244(d) contains an implicit, across-the-board exception that subsumes (and thus renders unnecessary) §2244(d)(1)(B)-(D) and (d)(2), it must rely on

the untenable assumption that when Congress enumerated the events that toll the limitations period—with no indication the list is merely illustrative—it implicitly authorized courts to add others as they see fit. We should assume the opposite: that by specifying situations in which an equitable principle applies to a specific requirement, Congress has displaced courts' discretion to develop ad hoc exceptions.

II

Even if §2244(d) left room for equitable tolling in some situations, tolling surely should not excuse the delay here. Where equitable tolling is available, we have held that a litigant is entitled to it only if he has diligently pursued his rights and—the requirement relevant here—if " 'some extraordinary circumstance stood in his way.' " Because the attorney is the litigant's agent, the attorney's acts (or failures to act) within the scope of the representation are treated as those of his client, and thus such acts (or failures to act) are necessarily not extraordinary circumstances.

To be sure, the rule that an attorney's acts and oversights are attributable to the client is relaxed where the client has a constitutional right to effective assistance of counsel. Where a State is constitutionally obliged to provide an attorney but fails to provide an effective one, the attorney's failures that fall below the standard set forth in *Strickland v. Washington* (1984), are chargeable to the State, not to the prisoner. But where the client has no right to counsel—which in habeas proceedings he does not—the rule holding him responsible for his attorney's acts applies with full force. Thus, when a state habeas petitioner's appeal is filed too late because of attorney error, the petitioner is out of luck—no less than if he had proceeded *pro se* and neglected to file the appeal himself.

Congress could, of course, have included errors by state-appointed habeas counsel as a basis for delaying the limitations period, but it did not. Nor was that an oversight: Section 2244(d)(1)(B) expressly allows tolling for state-created impediments that prevent a prisoner from filing his application, but *only if* the impediment violates the Constitution or federal law.

The Court's impulse to intervene when a litigant's lawyer has made mistakes is understandable; the temptation to tinker with technical rules to achieve what appears a just result is often strong, especially when the client faces a capital sentence. But the Constitution does not empower federal courts to rewrite, in the name of equity, rules that Congress has made. Endowing unelected judges with that power is irreconcilable with our system, for it "would literally place the whole rights and property of the community under the arbitrary will of the judge," arming him with "a despotic and sovereign authority." The danger is doubled when we disregard our own precedent, leaving only our own consciences to constrain our discretion. Because both the statute and *stare decisis* foreclose Holland's claim, I respectfully dissent.

Another mechanism for preventing injustice from the lack of tolling discussed by some of the justices in Duncan v. Walker is "stay and abeyance"—federal courts keep the case on their docket, stay the proceedings, and allow the petitioner to

return to exhaust state court proceedings. When they are completed, the petitioner then can resume the federal court habeas proceedings without needing to be concerned about the statute of limitations. However, subsequent to Duncan v. Walker, in Rhines v. Weber, 544 U.S. 269 (2005), the Supreme Court held that stay and abeyance should be used only in exceptional circumstances. The Court, in an opinion by Justice O'Connor, concluded that "[d]istrict courts do ordinarily have authority to issue stays, where such a stay would be a proper exercise of discretion. AEDPA does not deprive district courts of that authority."

But the Court then went on to declare:

> [S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. Even where stay and abeyance is appropriate, the district court's discretion in structuring the stay is limited by the timeliness concerns reflected in AEDPA. A mixed petition should not be stayed indefinitely. Without time limits, petitioners could frustrate AEDPA's goal of finality by dragging out indefinitely their federal habeas review. Thus, district courts should place reasonable time limits on a petitioner's trip to state court and back. And if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all.

Still, it is crucial to note that Rhines v. Weber does expressly authorize the stay and abeyance procedure. Indeed, the Court concluded its opinion by declaring:

> On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed petition.

Subsequently, the Court has recognized one other exception from the statute of limitations: showing of actual innocence by the habeas petitioner.

McQuiggin v. Perkins

569 U.S. 383 (2013)

Justice Ginsburg delivered the opinion of the Court.

This case concerns the "actual innocence" gateway to federal habeas review applied in Schlup v. Delo (1995), and further explained in House v. Bell (2006). In those cases, a convincing showing of actual innocence enabled habeas petitioners to overcome a procedural bar to consideration of the merits of their constitutional

claims. Here, the question arises in the context of 28 U.S.C. §2244(d)(1), the statute of limitations on federal habeas petitions prescribed in the Antiterrorism and Effective Death Penalty Act of 1996. Specifically, if the petitioner does not file her federal habeas petition, at the latest, within one year of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," §2244(d)(1)(D), can the time bar be overcome by a convincing showing that she committed no crime?

We hold that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare: "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." And in making an assessment of the kind *Schlup* envisioned, "the timing of the [petition]" is a factor bearing on the "reliability of th[e] evidence" purporting to show actual innocence.

Our opinion clarifies that a federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown.

I

On March 4, 1993, respondent Floyd Perkins attended a party in Flint, Michigan, in the company of his friend, Rodney Henderson, and an acquaintance, Damarr Jones. The three men left the party together. Henderson was later discovered on a wooded trail, murdered by stab wounds to his head.

Perkins was charged with the murder of Henderson. At trial, Jones was the key witness for the prosecution. He testified that Perkins alone committed the murder while Jones looked on.

Chauncey Vaughn, a friend of Perkins and Henderson, testified that, prior to the murder, Perkins had told him he would kill Henderson, and that Perkins later called Vaughn, confessing to his commission of the crime. A third witness, Torriano Player, also a friend of both Perkins and Henderson, testified that Perkins told him, had he known how Player felt about Henderson, he would not have killed Henderson.

Perkins, testifying in his own defense, offered a different account of the episode. He testified that he left Henderson and Jones to purchase cigarettes at a convenience store. When he exited the store, Perkins related, Jones and Henderson were gone. Perkins said that he then visited his girlfriend. About an hour later, Perkins recalled, he saw Jones standing under a streetlight with blood on his pants, shoes, and plaid coat.

The jury convicted Perkins of first-degree murder. He was sentenced to life in prison without the possibility of parole on October 27, 1993. The Michigan Court of Appeals affirmed Perkins' conviction and sentence, and the Michigan Supreme Court denied Perkins leave to appeal on January 31, 1997. Perkins' conviction became final on May 5, 1997.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, a state prisoner ordinarily has one year to file a federal petition for

habeas corpus, starting from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. §2244(d)(1)(A). If the petition alleges newly discovered evidence, however, the filing deadline is one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." §2244(d)(1)(D).

Perkins filed his federal habeas corpus petition on June 13, 2008, more than 11 years after his conviction became final. Under Sixth Circuit precedent, the District Court stated, "a habeas petitioner who demonstrates a credible claim of actual innocence based on new evidence may, in exceptional circumstances, be entitled to equitable tolling of habeas limitations." But Perkins had not established exceptional circumstances, the District Court determined. In any event, the District Court observed, equitable tolling requires diligence and Perkins "ha[d] failed utterly to demonstrate the necessary diligence in exercising his rights." Alternatively, the District Court found that Perkins had failed to meet the strict standard by which pleas of actual innocence are measured: He had not shown that, taking account of all the evidence, "it is more likely than not that no reasonable juror would have convicted him," or even that the evidence was new.

Perkins appealed the District Court's judgment. Although recognizing that AEDPA's statute of limitations had expired and that Perkins had not diligently pursued his rights, the Sixth Circuit granted a certificate of appealability limited to a single question: Is reasonable diligence a precondition to relying on actual innocence as a gateway to adjudication of a federal habeas petition on the merits?

On consideration of the certified question, the Court of Appeals reversed the District Court's judgment. Adhering to Circuit precedent, the Sixth Circuit held that Perkins' gateway actual-innocence allegations allowed him to present his ineffective-assistance-of-counsel claim as if it were filed on time. On remand, the Court of Appeals instructed, "the [D]istrict [C]ourt [should] fully consider whether Perkins assert[ed] a credible claim of actual innocence."

II

In Holland v. Florida (2010), this Court addressed the circumstances in which a federal habeas petitioner could invoke the doctrine of "equitable tolling." *Holland* held that "a [habeas] petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." As the courts below comprehended, Perkins does not qualify for equitable tolling. In possession of all three affidavits by July 2002, he waited nearly six years to seek federal postconviction relief.

Perkins, however, asserts not an excuse for filing after the statute of limitations has run. Instead, he maintains that a plea of actual innocence can overcome AEDPA's one-year statute of limitations. He thus seeks an equitable *exception* to §2244(d)(1), not an extension of the time statutorily prescribed.

Decisions of this Court support Perkins' view of the significance of a convincing actual-innocence claim. We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence. Herrera v. Collins, 506 (1993). We have recognized, however, that a prisoner "otherwise

subject to defenses of abusive or successive use of the writ [of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence." In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims (here, ineffective assistance of counsel) on the merits notwithstanding the existence of a procedural bar to relief. "This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons."

We have applied the miscarriage of justice exception to overcome various procedural defaults. These include "successive" petitions asserting previously rejected claims, "abusive" petitions asserting in a second petition claims that could have been raised in a first petition, failure to develop facts in state court, and failure to observe state procedural rules, including filing deadlines.

The miscarriage of justice exception, our decisions bear out, survived AEDPA's passage. These decisions "see[k] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations.

The State ties to §2244(d)'s text its insistence that AEDPA's statute of limitations precludes courts from considering late-filed actual-innocence gateway claims. "Section 2244(d)(1)(D)," the State contends, "forecloses any argument that a habeas petitioner has unlimited time to present new evidence in support of a constitutional claim." That is so, the State maintains, because AEDPA prescribes a comprehensive system for determining when its one-year limitations period begins to run.

The State's argument in this regard bears blinders. AEDPA's time limitations apply to the typical case in which no allegation of actual innocence is made. The miscarriage of justice exception, we underscore, applies to a severely confined category: cases in which new evidence shows "it is more likely than not that no reasonable juror would have convicted [the petitioner]." Section 2244(d)(1)(D) is both modestly more stringent (because it requires diligence) and dramatically less stringent (because it requires no showing of innocence). Many petitions that could not pass through the actual-innocence gateway will be timely or not measured by §2244(d)(1)(D)'s triggering provision. That provision, in short, will hardly be rendered superfluous by recognition of the miscarriage of justice exception.

Our reading of the statute is supported by the Court's opinion in *Holland*. "[E]quitable principles have traditionally governed the substantive law of habeas corpus," *Holland* reminded, and affirmed that "we will not construe a statute to displace courts' traditional equitable authority absent the clearest command." The text of §2244(d)(1) contains no clear command countering the courts' equitable authority to invoke the miscarriage of justice exception to overcome expiration of the statute of limitations governing a first federal habeas petition.

III

While we reject the State's argument that habeas petitioners who assert convincing actual-innocence claims must prove diligence to cross a federal court's threshold, we hold that the Sixth Circuit erred to the extent that it eliminated

timing as a factor relevant in evaluating the reliability of a petitioner's proof of innocence. To invoke the miscarriage of justice exception to AEDPA's statute of limitations, we repeat, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing. Perkins so acknowledges. As we stated in *Schlup*, "[a] court may consider how the timing of the submission and the likely credibility of [a petitioner's] affiants bear on the probable reliability of . . . evidence [of actual innocence]."

We stress once again that the *Schlup* standard is demanding. The gateway should open only when a petition presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error."

Justice Scalia, with whom The Chief Justice and Justice Thomas join, and with whom Justice Alito joins as to Parts I, II, and III, dissenting.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that a "1–year period of limitation shall apply" to a state prisoner's application for a writ of habeas corpus in federal court. 28 U.S.C. §2244(d)(1). The gaping hole in today's opinion for the Court is its failure to answer the crucial question upon which all else depends: What is the source of the Court's power to fashion what it concedes is an "exception" to this clear statutory command?

That question is unanswered because there is no answer. This Court has no such power, and not one of the cases cited by the opinion says otherwise. The Constitution vests legislative power only in Congress, which never enacted the exception the Court creates today. That inconvenient truth resolves this case.

I

"Actual innocence" has, until today, been an exception only to judge-made, prudential barriers to habeas relief, or as a means of channeling judges' statutorily conferred discretion not to apply a procedural bar. Never before have we applied the exception to circumvent a categorical *statutory* bar to relief. We have not done so because we have no power to do so. Where Congress has erected a constitutionally valid barrier to habeas relief, a court *cannot* decline to give it effect.

Because we have no "equitable" power to discard statutory barriers to habeas relief, we cannot simply extend judge-made exceptions to judge-made barriers into the statutory realm. The Court's insupportable leap from judge-made procedural bars to *all* procedural bars, including *statutory* bars, does all the work in its opinion—and there is not a whit of precedential support for it.

The opinion for the Court also trots out post-AEDPA cases to prove the irrelevant point that "[t]he miscarriage of justice exception . . . survived AEDPA's passage." What it ignores, yet again, is that after AEDPA's passage, as before, the exception applied only to *nonstatutory* obstacles to relief.

There are many statutory bars to relief other than statutes of limitations, and we had never (and before today, have never) created an actual-innocence exception to *any* of them. The reason why is obvious: Judicially amending a validly enacted statute in this way is a flagrant breach of the separation of powers.

II

The Court has no qualms about transgressing such a basic principle. It does not even attempt to cloak its act of judicial legislation in the pretense that it is merely construing the statute; indeed, it freely admits that its opinion recognizes an "exception" that the statute does not contain. And it dismisses, with a series of transparent non sequiturs, Michigan's overwhelming textual argument that the statute provides no such exception and envisions none.

The key textual point is that two provisions of §2244, working in tandem, provide a comprehensive path to relief for an innocent prisoner who has newly discovered evidence that supports his constitutional claim. Section 2244(d)(1)(D) gives him a fresh year in which to file, starting on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," while §2244(b)(2)(B) lifts the bar on second or successive petitions. Congress clearly anticipated the scenario of a habeas petitioner with a credible innocence claim and addressed it by crafting an exception (and an exception, by the way, more restrictive than the one that pleases the Court today). One cannot assume that Congress left room for other, judge-made applications of the actual-innocence exception, any more than one would add another gear to a Swiss watch on the theory that the watchmaker surely would have included it if he had thought of it. In both cases, the intricate craftsmanship tells us that the designer arranged things just as he wanted them.

The Court's feeble rejoinder is that its (judicially invented) version of the "actual innocence" exception applies only to a "severely confined category" of cases. Since cases qualifying for the actual-innocence exception will be rare, it explains, the statutory path for innocent petitioners will not "be rendered superfluous." That is no answer at all. That the Court's exception would not *entirely* frustrate Congress's design does not weaken the force of the State's argument that Congress addressed the issue comprehensively and chose to exclude dilatory prisoners like respondent. By the Court's logic, a statute banning littering could simply be deemed to contain an exception for cigarette butts; after all, the statute as thus amended would still cover *something*. That is not how a court respectful of the separation of powers should interpret statutes.

III

Three years ago, in Holland v. Florida (2010), we held that AEDPA's statute of limitations is subject to equitable tolling. That holding offers no support for importing a novel actual-innocence exception. Equitable tolling—extending the deadline for a filing because of an event or circumstance that deprives the filer, through no fault of his own, of the full period accorded by the statute—seeks to vindicate what might be considered the genuine intent of the statute. By contrast, suspending the statute because of a separate policy that the court believes should trump it ("actual innocence") is a blatant overruling. Moreover, the doctrine of equitable tolling is centuries old, and dates from a time when the separation of the legislative and judicial powers was incomplete.

Here, by contrast, the Court has ambushed Congress with an utterly unprecedented (and thus unforeseeable) maneuver. Congressional silence, "while

permitting an inference that Congress intended to apply *ordinary* background" principles, "cannot show that it intended to apply an unusual modification of those rules." Because there is no plausible basis for inferring that Congress intended or could have anticipated this exception, its adoption here amounts to a pure judicial override of the statute Congress enacted. "It is wrong for us to reshape" AEDPA "on the very lathe of judge-made habeas jurisprudence it was designed to repair."

* * *

"It would be marvellously inspiring to be able to boast that we have a criminal-justice system in which a claim of 'actual innocence' will always be heard, no matter how late it is brought forward, and no matter how much the failure to bring it forward at the proper time is the defendant's own fault." I suspect it is this vision of perfect justice through abundant procedure that impels the Court today. Of course, "we do not have such a system, and no society unwilling to devote unlimited resources to repetitive criminal litigation ever could." Until today, a district court could dismiss an untimely petition without delving into the underlying facts. From now on, each time an untimely petitioner claims innocence—and how many prisoners asking to be let out of jail do not?—the district court will be obligated to expend limited judicial resources wading into the murky merits of the petitioner's innocence claim. The Court notes "that tenable actual-innocence gateway pleas are rare." That discouraging reality, intended as reassurance, is in truth "the condemnation of the procedure which has encouraged frivolous cases."

It has now been 60 years since Brown v. Allen, in which we struck the Faustian bargain that traded the simple elegance of the common-law writ of habeas corpus for federal-court power to probe the substantive merits of state-court convictions. Even after AEDPA's pass through the Augean stables, no one in a position to observe the functioning of our byzantine federal-habeas system can believe it an efficient device for separating the truly deserving from the multitude of prisoners pressing false claims. "[F]loods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own. . . . It must prejudice the occasional meritorious applicant to be buried in a flood of worthless ones."

The "inundation" that Justice Jackson lamented in 1953 "consisted of 541" federal habeas petitions filed by state prisoners. By 1969, that number had grown to 7,359. In the year ending on September 30, 2012, 15,929 such petitions were filed. Today's decision piles yet more dead weight onto a postconviction habeas system already creaking at its rusted joints.

2. Is It a First or a Successive Habeas Corpus Petition?

One of the most important changes in habeas corpus law in the 1990s was the imposition, by both the Supreme Court and Congress, of strict bans on successive habeas corpus petitions. As originally drafted, the habeas corpus statutes did not bar individuals from filing repeated petitions presenting the same claims. In the 1948 revisions of the habeas corpus laws, a provision was added excusing a federal court from ruling on a petition when the matter contained in it already had been

presented and decided in a prior petition. Specifically, §2244(a) provided that a judge need not entertain a petition for a writ of habeas corpus when the legality of the detention "has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

In McCleskey v. Zant, 499 U.S. 467 (1991), the Supreme Court held that an individual who has previously filed a habeas corpus petition challenging a conviction may file a subsequent petition presenting a new issue only if the individual can show cause and prejudice from the earlier omission of the issue. A criminal defendant, who had been sentenced to death, learned after the filing of his first habeas corpus petition that there had been an informant in his cell. The defendant then filed a second habeas corpus petition arguing that the government's coaching and use of the informant violated Massiah v. United States, 377 U.S. 201 (1964), which held that the government may not, in the absence of counsel, deliberately elicit statements from a person under indictment.

The Supreme Court held that the defendant could not raise the issue in the second habeas petition. The Court explained that the doctrines of abuse of the writ and procedural default implicate "nearly identical concerns flowing from the significant costs of federal habeas corpus review." Thus, the Court concluded that "[w]e have held that a procedural default will be excused only upon a showing of cause and prejudice. . . . We now hold that the same standard applies to determine if there has been an abuse of the writ through inexcusable neglect." The majority concluded that in this case, the petitioner knew enough without the wrongly withheld information that he should have pursued his *Massiah* claim in his earlier habeas petition.

Justice Marshall, joined by Justices Blackmun and Stevens, strongly criticized the decision. Justice Marshall, in dissent, wrote that "[t]oday's decision departs drastically from the norms that inform the proper judicial function. Without even the most casual admission that it is discarding long-standing legal principles, the Court radically redefines the content of the abuse of the writ doctrine." The dissent objected especially to precluding a second habeas petition that was based on information that was not available when the first was filed, precisely because the government wrongly had withheld the information from the defendant.

McCleskey never has been overruled, but from a practical perspective it has been superseded by the ever stricter restrictions on successive petitions contained in the Antiterrorism and Effective Death Penalty Act. Under AEDPA, an individual may file a successive petition only if he or she first obtains permission from the United States Court of Appeals. The act states, "Before a second or successive application permitted by the section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. §2244(3)(A).

Moreover, the act provides that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." In Felker v. Turpin, 518 U.S. 651 (1996), the Supreme Court upheld the constitutionality of this preclusion of its ability to review court of appeals decisions denying

successive petitions. The Court explained that its review was not completely foreclosed because the Court retained the ability to grant habeas corpus petitions in its original jurisdiction. The Court also stressed the broad authority of Congress to control the procedures concerning habeas corpus. Chief Justice Rehnquist, writing for the Court, said, "[W]e have long recognized that the power to award the writ, by any of the courts of the United States must be found in the written law, and we have likewise recognized that judgments about the proper scope of the writ are normally for Congress to make." The Court thus rejected the claim that the restrictions on successive petitions amounted to an unconstitutional suspension of the writ of habeas corpus.

Under the act, a court of appeals may allow a successive petition only in two circumstances. First, a successive petition may be allowed if "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable." Alternatively, the petition may be permitted if "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

In Tyler v. Cain, below, the Court considered whether a federal court may grant a habeas petition by finding that a Supreme Court decision applies retroactively or whether it requires that the Supreme Court, itself, deem that the rule applies retroactively. In other words, under a prior Supreme Court decision, a conviction was clearly unconstitutional. But could the federal district court and court of appeals provide habeas relief by finding that it was a decision that should be applied retroactively, or did it require an express declaration by the Supreme Court that its decision applied retroactively?

Tyler v. Cain

533 U.S. 656 (2001)

Justice Thomas delivered the opinion of the Court.

Under Cage v. Louisiana (1990), a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt. In this case, we must decide whether this rule was "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. §2244(b)(2)(A). We hold that it was not.

I

During a fight with his estranged girlfriend in March 1975, petitioner Melvin Tyler shot and killed their 20-day-old daughter. A jury found Tyler guilty of second-degree murder, and his conviction was affirmed on appeal. After sentencing, Tyler assiduously sought postconviction relief. By 1986, he had filed five state petitions, all of which were denied. He next filed a federal habeas petition, which was unsuccessful as well. After this Court's decision in *Cage*, Tyler continued his efforts.

Because the jury instruction defining reasonable doubt at Tyler's trial was substantively identical to the instruction condemned in *Cage*, Tyler filed a sixth state postconviction petition, this time raising a *Cage* claim. The State District Court denied relief, and the Louisiana Supreme Court affirmed.

In early 1997, Tyler returned to federal court. Seeking to pursue his *Cage* claim, Tyler moved the United States Court of Appeals for the Fifth Circuit for permission to file a second habeas corpus application, as required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Court of Appeals recognized that it could not grant the motion unless Tyler made "a prima facie showing," §2244(b)(3)(C), that his "claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," §2244(b)(2)(A). Finding that Tyler had made the requisite prima facie showing, the Court of Appeals granted the motion, thereby allowing Tyler to file a habeas petition in District Court.

II

AEDPA greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications. If the prisoner asserts a claim that he has already presented in a previous federal habeas petition, the claim must be dismissed in all cases. §2244(b)(1). And if the prisoner asserts a claim that was not presented in a previous petition, the claim must be dismissed unless it falls within one of two narrow exceptions. One of these exceptions is for claims predicated on newly discovered facts that call into question the accuracy of a guilty verdict. §2244(b)(2)(B). The other is for certain claims relying on new rules of constitutional law. §2244(b)(2)(A).

It is the latter exception that concerns us today. Specifically, §2244(b)(2)(A) covers claims that "rel[y] on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." This provision establishes three prerequisites to obtaining relief in a second or successive petition: First, the rule on which the claim relies must be a "new rule" of constitutional law; second, the rule must have been "made retroactive to cases on collateral review by the Supreme Court"; and third, the claim must have been "previously unavailable." In this case, the parties ask us to interpret only the second requirement; respondent does not dispute that Cage created a "new rule" that was "previously unavailable." Based on the plain meaning of the text read as a whole, we conclude that "made" means "held" and, thus, the requirement is satisfied only if this Court has held that the new rule is retroactively applicable to cases on collateral review.

A

As commonly defined, "made" has several alternative meanings, none of which is entirely free from ambiguity. See, e.g., Webster's Ninth New Collegiate Dictionary 718-719 (1991) (defining "to make" as "to cause to happen," "to cause to exist, occur or appear," "to lay out and construct," and "to cause to act in a certain way"). Out of context, it may thus be unclear which meaning should apply in §2244(b)(2)(A), and how the term should be understood. We do not, however, construe the meaning of statutory terms in a vacuum. Rather, we interpret the words "in their context and

with a view to their place in the overall statutory scheme." In §2244(b)(2)(A), the word "made" falls within a clause that reads as follows: "[A] new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." Quite significantly, under this provision, the Supreme Court is the only entity that can "ma[k]e" a new rule retroactive. The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court.

The only way the Supreme Court can, by itself, "lay out and construct" a rule's retroactive effect, or "cause" that effect "to exist, occur, or appear," is through a holding. The Supreme Court does not "ma[k]e" a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts. In such an event, any legal conclusion that is derived from the principles is developed by the lower court (or perhaps by a combination of courts), not by the Supreme Court. We thus conclude that a new rule is not "made retroactive to cases on collateral review" unless the Supreme Court holds it to be retroactive.

B

Because "made" means "held" for purposes of §2244(b)(2)(A), it is clear that the *Cage* rule has not been "made retroactive to cases on collateral review by the Supreme Court." *Cage* itself does not hold that it is retroactive. The only holding in *Cage* is that the particular jury instruction violated the Due Process Clause.

Finally, Tyler suggests that, if *Cage* has not been made retroactive to cases on collateral review, we should make it retroactive today. We disagree. Because Tyler's habeas application was his second, the District Court was required to dismiss it unless Tyler showed that this Court already had made *Cage* retroactive. §2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section"). We cannot decide today whether *Cage* is retroactive to cases on collateral review, because that decision would not help Tyler in this case. Any statement on *Cage*'s retroactivity would be dictum, so we decline to comment further on the issue.

Justice O'Connor, concurring.

I join the Court's opinion and write separately to explain more fully the circumstances in which a new rule is "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. §2244(b)(2)(A).

It is only through the holdings of this Court, as opposed to this Court's dicta and as opposed to the decisions of any other court, that a new rule is "made retroactive . . . by the Supreme Court" within the meaning of §2244(b)(2)(A). The clearest instance, of course, in which we can be said to have "made" a new rule retroactive is where we expressly have held the new rule to be retroactive in a case on collateral review and applied the rule to that case. But, as the Court recognizes, a single case that expressly holds a rule to be retroactive is not a sine qua non for the satisfaction of this statutory provision. This Court instead may "ma[k]e" a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule.

The relationship between the conclusion that a new rule is retroactive and the holdings that "ma[k]e" this rule retroactive, however, must be strictly logical—i.e., the holdings must dictate the conclusion and not merely provide principles from which one may conclude that the rule applies retroactively. As the Court observes, "[t]he Supreme Court does not 'ma[k]e' a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts." The Court instead can be said to have "made" a rule retroactive within the meaning of §2244(b)(2)(A) only where the Court's holdings logically permit no other conclusion than that the rule is retroactive.

Justice Breyer, with whom Justice Stevens, Justice Souter, and Justice Ginsburg join, dissenting.

In Cage v. Louisiana (1990), this Court held that a certain jury instruction violated the Constitution because it inaccurately defined "reasonable doubt," thereby permitting a jury to convict "based on a degree of proof below that required by the Due Process Clause." Here we must decide whether this Court has "made" *Cage* "retroactive to cases on collateral review." I believe that it has.

Insofar as the majority means to suggest that a rule may be sufficiently "new" that it does not apply retroactively but not "new enough" to qualify for the watershed exception, I note only that the cases establishing this exception suggest no such requirement. Rather than focus on the "degree of newness" of a new rule, these decisions emphasize that watershed rules are those that form part of the fundamental requirements of due process.

[T]he most likely consequence of the majority's holding is further procedural complexity. After today's opinion, the only way in which this Court can make a rule such as *Cage*'s retroactive is to repeat its reasoning in a case triggered by a prisoner's filing a first habeas petition (a "second or successive" petition itself being barred by the provision here at issue) or in some other case that presents the issue in a posture that allows such language to have the status of a "holding." Then, after the Court takes the case and says that it meant what it previously said, prisoners could file "second or successive" petitions to take advantage of the now-clearly-made-applicable new rule. We will be required to restate the obvious, case by case, even when we have explicitly said, but not "held," that a new rule is retroactive.

Even this complex route will remain open only if the relevant statute of limitations is interpreted to permit its 1-year filing period to run from the time that this Court has "made" a new rule retroactive, not from the time it initially recognized that new right. See 28 U.S.C. §2244(d)(1)(C) (limitations period runs from "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"). Otherwise, the Court's approach will generate not only complexity, along with its attendant risk of confusion, but also serious additional unfairness.

I do not understand the basis for the Court's approach. I fear its consequences. For these reasons, with respect, I dissent.

In Panetti v. Quarterman, 551 U.S. 930 (2007), the Supreme Court considered whether a person facing execution could bring a successive habeas corpus petition on the grounds of mental incompetence to be executed. As Justice Kennedy, who wrote for the majority, explained:

> [T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Ford v. Wainwright (1986). The prohibition applies despite a prisoner's earlier competency to be held responsible for committing a crime and to be tried for it. Prior findings of competency do not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition. Under *Ford*, once a prisoner makes the requisite preliminary showing that his current mental state would bar his execution, the Eighth Amendment, applicable to the States under the Due Process Clause of the Fourteenth Amendment, entitles him to an adjudication to determine his condition.

The Court, by a 5-4 margin, concluded that the bar on successive habeas petitions does not apply to those challenging competence to be executed.

> We conclude, that Congress did not intend the provisions of AEDPA addressing "second or successive" petitions to govern a filing in the unusual posture presented here: a §2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe.
>
> Our conclusion is confirmed when we consider AEDPA's purposes. The statute's design is to "further the principles of comity, finality, and federalism." These purposes, and the practical effects of our holdings, should be considered when interpreting AEDPA. This is particularly so when petitioners "run the risk" under the proposed interpretation of "forever losing their opportunity for any federal review of their unexhausted claims." An empty formality requiring prisoners to file unripe *Ford* claims neither respects the limited legal resources available to the States nor encourages the exhaustion of state remedies. Instructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources, "reduc[e] piecemeal litigation," or "streamlin[e] federal habeas proceedings." And last-minute filings that are frivolous and designed to delay executions can be dismissed in the regular course. The requirement of a threshold preliminary showing, for instance, will, as a general matter, be imposed before a stay is granted or the action is allowed to proceed.
>
> There is, in addition, no argument that petitioner's actions constituted an abuse of the writ, as that concept is explained in our cases. To the contrary, we have confirmed that claims of incompetency to be executed remain unripe at early stages of the proceedings.
>
> In the usual case, a petition filed second in time and not otherwise permitted by the terms of §2244 will not survive AEDPA's "second or successive" bar. There are, however, exceptions. We are hesitant to construe a statute, implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party.

> The statutory bar on "second or successive" applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe. Petitioner's habeas application was properly filed, and the District Court had jurisdiction to adjudicate his claim.

Justice Thomas, writing for the four dissenters, stressed that the statutory language creates no exception for successive petitions based on incompetency to be executed. He wrote:

> This case should be simple. Panetti brings a claim under Ford v. Wainwright (1986), that he is incompetent to be executed. Presented for the first time in Panetti's second federal habeas application, this claim undisputedly does not meet the statutory requirements for filing a "second or successive" habeas application. As such, Panetti's habeas application must be dismissed. Ignoring this clear statutory mandate, the Court bends over backwards to allow Panetti to bring his *Ford* claim despite no evidence that his condition has worsened—or even changed—since 1995.
>
> The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires applicants to receive permission from the court of appeals prior to filing second or successive federal habeas applications. 28 U.S.C. §2244(b)(3). Even if permission is sought, AEDPA requires courts to decline such requests in all but two narrow circumstances. §2244(b)(3)(C); §2244(b)(2). Panetti raised his *Ford* claim for the first time in his second federal habeas application, but he admits that he did not seek authorization from the Court of Appeals and that his claim does not satisfy either of the statutory exceptions. Accordingly, §2244(b) requires dismissal of Panetti's second habeas corpus application.
>
> Requiring that *Ford* claims be included in an initial habeas application would have the added benefit of putting a State on notice that a prisoner intends to challenge his or her competency to be executed. In any event, regardless of whether the Court's concern is justified, judicial economy considerations cannot override AEDPA's plain meaning. Remaining faithful to AEDPA's mandate, I would dismiss Panetti's application as second or successive.

The Court also has considered whether it was an impermissible successive petition if a prisoner prevailed on a first habeas petition, was accorded a new trial, and then sought to file a habeas petition relative to challenge the conviction or sentence from that proceeding. The Court held that this was not a successive petition, and thus the restrictive rules of AEDPA did not apply.

Magwood v. Patterson

561 U.S. 320 (2010)

Justice Thomas delivered the opinion of the Court.

Petitioner Billy Joe Magwood was sentenced to death for murdering a sheriff. After the Alabama courts denied relief on direct appeal and in postconviction proceedings, Magwood filed an application for a writ of habeas corpus in Federal

District Court, challenging both his conviction and his sentence. The District Court conditionally granted the writ as to the sentence, mandating that Magwood either be released or resentenced. The state trial court conducted a new sentencing hearing and again sentenced Magwood to death. Magwood filed an application for a writ of habeas corpus in federal court challenging this new sentence. The District Court once again conditionally granted the writ, finding constitutional defects in the new sentence. The Court of Appeals for the Eleventh Circuit reversed, holding in relevant part that Magwood's challenge to his new death sentence was an unreviewable "second or successive" challenge under 28 U.S.C. §2244(b) because he could have mounted the same challenge to his original death sentence. We granted certiorari, and now reverse. Because Magwood's habeas application challenges a new judgment for the first time, it is not "second or successive" under §2244(b).

I

After a conviction for a drug offense, Magwood served several years in the Coffee County Jail in Elba, Alabama, under the watch of Sheriff C.F. "Neil" Grantham. During his incarceration, Magwood, who had a long history of mental illness, became convinced that Grantham had imprisoned him without cause, and vowed to get even upon his release. Magwood followed through on his threat. On the morning of March 1, 1979, shortly after his release, he parked outside the jail and awaited the sheriff's arrival. When Grantham exited his car, Magwood shot him and fled the scene.

The prosecution asked the jury to find Magwood guilty of aggravated murder as charged in the indictment, and sought the death penalty. Magwood pleaded not guilty by reason of insanity; however, the jury found him guilty of capital murder and imposed the sentence of death based on the aggravation charged in the indictment. In accordance with Alabama law, the trial court reviewed the basis for the jury's decision. Weighing the aggravation against the mitigating factors, the court approved the sentence of death. The Alabama courts affirmed.

Eight days before his scheduled execution, Magwood filed an application for a writ of habeas corpus under 28 U.S.C. §2254, and the District Court granted a stay of execution. After briefing by the parties, the District Court upheld Magwood's conviction but vacated his sentence and conditionally granted the writ based on the trial court's failure to find statutory mitigating circumstances relating to Magwood's mental state.

In response to the conditional writ, the state trial court held a new sentencing proceeding in September 1986. This time, the judge found that Magwood's mental state, as well as his age and lack of criminal history, qualified as statutory mitigating circumstances. As before, the court found that Magwood's capital felony included sufficient aggravation to render him death eligible. The Alabama courts affirmed, and this Court denied certiorari.

In April 1997, Magwood sought leave to file a second or successive application for a writ of habeas corpus challenging his 1981 judgment of conviction. The Court of Appeals denied his request. He simultaneously filed a petition for a writ of habeas corpus challenging his new death sentence, which the District Court conditionally granted. In that petition, Magwood again argued that his sentence was unconstitutional because he did not have fair warning at the time of his offense that his conduct

would be sufficient to warrant a death sentence under Alabama law, and that his attorney rendered ineffective assistance during the resentencing proceeding.

We granted certiorari to determine whether Magwood's application challenging his 1986 death sentence, imposed as part of resentencing in response to a conditional writ from the District Court, is subject to the constraints that §2244(b) imposes on the review of "second or successive" habeas applications.

II

This case turns on the meaning of the phrase "second or successive" in §2244(b). More specifically, it turns on when a claim should be deemed to arise in a "second or successive habeas corpus application." If an application is "second or successive," the petitioner must obtain leave from the Court of Appeals before filing it with the district court. The district court must dismiss any claim presented in an authorized second or successive application unless the applicant shows that the claim satisfies certain statutory requirements. Thus, if Magwood's application was "second or successive," the District Court should have dismissed it in its entirety because he failed to obtain the requisite authorization from the Court of Appeals. If, however, Magwood's application was not second or successive, it was not subject to §2244(b) at all, and his fair-warning claim was reviewable (absent procedural default).

The State contends that although §2244(b), as amended by AEDPA, applies the phrase "second or successive" to "application[s]," it "is a claim-focused statute," and "[c]laims, not applications, are barred by §2244(b)." According to the State, the phrase should be read to reflect a principle that "a prisoner is entitled to one, but only one, full and fair opportunity to wage a collateral attack." The State asserts that under this "one opportunity" rule, Magwood's fair-warning claim was successive because he had an opportunity to raise it in his first application, but did not do so.

Magwood, in contrast, reads §2244(b) to apply only to a "second or successive" application challenging the same state-court *judgment*. According to Magwood, his 1986 resentencing led to a new judgment, and his first application challenging that new judgment cannot be "second or successive" such that §2244(b) would apply. We agree.

We begin with the text. Although Congress did not define the phrase "second or successive," as used to modify "habeas corpus application under section 2254," it is well settled that the phrase does not simply "refe[r] to all §2254 applications filed second or successively in time."

We have described the phrase "second or successive" as a "term of art." To determine its meaning, we look first to the statutory context. The limitations imposed by §2244(b) apply only to a "habeas corpus application under §2254," that is, an "application for a writ of habeas corpus on behalf of a person in custody pursuant to *the judgment* of a State court." The reference to a state-court judgment in §2254(b) is significant because the term "application" cannot be defined in a vacuum. A §2254 petitioner is applying for something: His petition "seeks *invalidation* (in whole or in part) *of the judgment* authorizing the prisoner's confinement." If his petition results in a district court's granting of the writ, "the State may seek a *new* judgment (through a new trial or a new sentencing proceeding)." Thus, both §2254(b)'s text and the relief it provides indicate that the phrase "second or successive" must be interpreted with respect to the judgment challenged.

III

Appearing to recognize that Magwood has the stronger textual argument, the State argues that we should rule based on the statutory purpose. According to the State, a "one opportunity" rule is consistent with the statutory text, and better reflects AEDPA's purpose of preventing piecemeal litigation and gamesmanship.

We are not persuaded. AEDPA uses the phrase "second or successive" to modify "application." The State reads the phrase to modify "claims." We cannot replace the actual text with speculation as to Congress' intent.

The State's reading leads to a second, more fundamental error. Under the State's "one opportunity" rule, the phrase "second or successive" would apply to any claim that the petitioner had a full and fair opportunity to raise in a prior application. And the phrase "second or successive" would *not* apply to a claim that the petitioner did *not* have a full and fair opportunity to raise previously.

This is Magwood's *first* application challenging that intervening judgment. The errors he alleges are *new*. It is obvious to us—and the State does not dispute—that his claim of ineffective assistance at resentencing turns upon new errors. But, according to the State, his fair-warning claim does not, because the state court made the same mistake before. We disagree. An error made a second time is still a new error. That is especially clear here, where the state court conducted a full resentencing and reviewed the aggravating evidence afresh.

For these reasons, we conclude that Magwood's first application challenging his new sentence under the 1986 judgment is not "second or successive" under §2244(b). The Court of Appeals erred by reading §2244(b) to bar review of the fair-warning claim Magwood presented in that application. We do not address whether the fair-warning claim is procedurally defaulted. Nor do we address Magwood's contention that the Court of Appeals erred in rejecting his ineffective-assistance claim by not addressing whether his attorney should have objected under federal law.

Justice Kennedy, with whom the Chief Justice, Justice Ginsburg, and Justice Alito join, dissenting.

The Court today decides that a state prisoner who succeeds in his first federal habeas petition on a discrete sentencing claim may later file a second petition raising numerous previously unraised claims, even if that petition is an abuse of the writ of habeas corpus. The Court, in my respectful submission, reaches this conclusion by misreading precedents on the meaning of the phrase "second or successive" in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Court then rewrites AEDPA's text but refuses to grapple with the logical consequences of its own editorial judgment. The design and purpose of AEDPA is to avoid abuses of the writ of habeas corpus, in recognition of the potential for the writ's intrusive effect on state criminal justice systems. But today's opinion, with considerable irony, is not only a step back from AEDPA protection for States but also a step back even from abuse-of-the-writ principles that were in place before AEDPA. So this respectful dissent becomes necessary.

I

Absent two exceptions that are inapplicable here, the relevant statutory provision in AEDPA provides: "A claim presented in a second or successive habeas

corpus application under section 2254 that was not presented in a prior application shall be dismissed. . . ."

The question before the Court is whether petitioner Billy Joe Magwood filed "a second or successive" application by raising a claim in his second habeas petition that he had available and yet failed to raise in his first petition. The term "second or successive" is a habeas "term of art." It incorporates the pre-AEDPA abuse-of-the-writ doctrine. Under that rule, to determine whether an application is "second or successive," a court must look to the substance of the claim the application raises and decide whether the petitioner had a full and fair opportunity to raise the claim in the prior application. Applying this analytical framework puts applications into one of three categories.

First, if the petitioner had a full and fair opportunity to raise the claim in the prior application, a second-in-time application that seeks to raise the same claim is barred as "second or successive." This is consistent with pre-AEDPA cases applying the abuse-of-the-writ doctrine and the bar on "second or successive" applications.

Second, if the petitioner had no fair opportunity to raise the claim in the prior application, a subsequent application raising that claim is not "second or successive," and §2244(b)(2)'s bar does not apply. This can occur where the claim was not yet ripe at the time of the first petition, or where the alleged violation occurred only after the denial of the first petition, such as the State's failure to grant the prisoner parole as required by state law. And to respond to the Court's concern, if the applicant in his second petition raises a claim that he raised in his first petition but the District Court left unaddressed at its own discretion, the second application would not be "second or successive." Reraising a previously unaddressed claim is not abusive by any definition.

Third, a "mixed petition"—raising both abusive and nonabusive claims—would be "second or successive." In that circumstance the petitioner would have to obtain authorization from the court of appeals to proceed with the nonabusive claims. After the court of appeals makes its determination, a district court may consider nonabusive claims that the petitioner had no fair opportunity to present in his first petition and dismiss the abusive claims.

The above principles apply to a situation, like the present one, where the petitioner in his first habeas proceeding succeeds in obtaining a conditional grant of relief, which allows the state court to correct an error that occurred at the original sentencing. Assume, as alleged here, that in correcting the error in a new sentencing proceeding, the state court duplicates a different mistake that also occurred at the first sentencing. The second application is "second or successive" with respect to that claim because the alleged error "could and should have" been raised in the first petition. Put another way, under abuse-of-the-writ principles, a petitioner loses his right to challenge the error by not raising a claim at the first opportunity after his claim becomes ripe. On the other hand, if the petitioner raises a claim in his second habeas petition that could not have been raised in the earlier petition—perhaps because the error occurred for the first time during resentencing—then the application raising the claim is not "second or successive" and §2244(b)(2)'s bar does not apply.

Although the above-cited authorities are adequate to show that the application in this case is "second or successive," it must be noted that no previous case from this Court has dealt with the precise sequence of events here: A petitioner attempts

to bring a previously unraised claim after a second resentencing proceeding that followed a grant of federal habeas relief. The conclusion that such an application is barred as "second or successive" unless the claim was previously unavailable is consistent with the approach of every court of appeals that has considered the issue, although some of those cases highlight subtleties that are not relevant under abuse-of-the-writ principles.

In the present case the Court should conclude that Magwood has filed a "second or successive habeas corpus application." In 1983, he filed a first federal habeas petition raising nine claims, including that the trial court improperly failed to consider two mitigating factors when it imposed Magwood's death sentence. The District Court granted Magwood's petition and ordered relief only on the mitigating factor claim. The state trial court then held a new sentencing proceeding, in which it considered all of the mitigating factors and reimposed the death penalty. In 1997, Magwood brought a second habeas petition, this time raising an argument that could have been, but was not, raised in his first petition. The argument was that he was not eligible for the death penalty because he did not have fair notice that his crime rendered him death eligible. There is no reason that Magwood could not have raised the identical argument in his first habeas petition. Because Magwood had a full and fair opportunity to adjudicate his death-eligibility claim in his first petition in 1983, his 1997 petition raising this claim is barred as "second or successive."

II

The Court reaches the opposite result by creating an ill-defined exception to the "second or successive" application bar. The Court concludes that because AEDPA refers to "second or successive" applications rather than "second or successive" claims, the nature of the claims raised in the second application is irrelevant. This is incorrect. [D]eciding whether an application itself is "second or successive" requires looking to the nature of the claim that the application raises to determine whether the petitioner had a full and fair opportunity to raise that claim in his earlier petition.

Failing to consider the nature of the claim when deciding whether an application is barred as "second or successive" raises other difficulties. Consider a second-in-time habeas petition challenging an alleged violation that occurred entirely after the denial of the first petition; for example, a failure to grant a prisoner parole at the time promised him by state law or the unlawful withdrawal of good-time credits. Under the Court's rule, it would appear that a habeas application challenging those alleged violations would be barred as "second or successive" because it would be a second-in-time application challenging custody pursuant to the same judgment. That result would be inconsistent with abuse-of-the-writ principles and might work a suspension of the writ of habeas corpus.

Having unmoored the phrase "second or successive" from its textual and historical underpinnings, the Court creates a new puzzle for itself: If the nature of the claim is not what makes an application "second or successive," then to what should a court look?

The Court's approach disregards AEDPA's " 'principles of comity, finality, and federalism.' " Under the Court's newly created exception to the "second or

successive" application bar, a defendant who succeeds on even the most minor and discrete issue relating to his sentencing would be able to raise 25 or 50 new sentencing claims in his second habeas petition, all based on arguments he failed to raise in his first petition. "[I]f reexamination of [a] convictio[n] in the first round of habeas offends federalism and comity, the offense increases when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition."

The Court's novel exception would also allow the once-successful petitioner to reraise every argument against a sentence that was rejected by the federal courts during the first round of federal habeas review. Because traditional res judicata principles do not apply to federal habeas proceedings, this would force federal courts to address twice (or thrice, or more) the same claims of error. The State and the victims would have to bear anew the "significant costs of federal habeas corpus review," all because the petitioner previously succeeded on a wholly different, discrete, and possibly unrelated claim.

The Court's suggestion that "[i]t will not take a court long to dispose of such claims where the court has already analyzed the legal issues," misses the point. This reassurance will be cold comfort to overworked state district attorneys, who will now have to waste time and resources writing briefs analyzing dozens of claims that should be barred by abuse-of-the-writ principles. It is difficult to motivate even the most dedicated professionals to do their best work, day after day, when they have to deal with the dispiriting task of responding to previously rejected or otherwise abusive claims. But that is exactly what the Court is mandating, under a statute that was designed to require just the opposite result. If the analysis in this dissent is sound it is to be hoped that the States will document the ill effects of the Court's opinion so that its costs and deficiencies are better understood if this issue, or a related one, can again come before the Court.

The Court's new exception will apply not only to death penalty cases like the present one, where the newly raised claim appears arguably meritorious. It will apply to all federal habeas petitions following a prior successful petition, most of which will not be in death cases and where the abusive claims the Court now permits will wholly lack merit. And, in this vein, it is striking that the Court's decision means that States subject to federal habeas review henceforth receive less recognition of a finality interest than the Federal Government does on direct review of federal criminal convictions.

The Court's approach also turns AEDPA's bar against "second or successive" applications into a one-way ratchet that favors habeas petitioners. Had Magwood been unsuccessful in his first petition, all agree that claims then available, but not raised, would be barred. But because he prevailed in his attack on one part of his sentencing proceeding the first time around, the Court rules that he is free, post-sentencing, to pursue claims on federal habeas review that might have been raised earlier. The Court is mistaken in concluding that Congress, in enacting a statute aimed at placing new restrictions on successive petitions, would have intended this irrational result.

Magwood had every chance to raise his death-eligibility claim in his first habeas petition. He has abused the writ by raising this claim for the first time in his second petition. His application is therefore "second or successive." I would affirm the judgment of the Court of Appeals.

3. Has There Been Exhaustion of All of the Claims Raised in the Habeas Petition?

An extremely important limitation on the power of federal courts to hear habeas corpus petitions is the requirement that petitioners in state custody exhaust all available state court procedures prior to seeking federal court review. One study of habeas corpus in federal courts in Massachusetts found that over half of all habeas petitions were dismissed for failure to exhaust state remedies.[28] Because the Supreme Court has made the exhaustion requirement even more stringent since this study was completed, it is quite likely that a large number of habeas petitions will continue to be dismissed for failure to exhaust state remedies. Some studies suggest that between 30 and 50 percent of habeas petitions are dismissed for failure to exhaust.[29]

The exhaustion requirement originally was created by the Supreme Court, although now it is embodied in the habeas statutes. The original statutes authorizing habeas corpus review for state prisoners did not require exhaustion of state court proceedings prior to federal habeas corpus review. However, in Ex parte Royall, 117 U.S. 241 (1886), the Court held that because of comity considerations and deference to state courts, federal courts should not entertain a claim in a habeas corpus petition until after the state courts have had an opportunity to hear the matter. Royall had been indicted under two state statutes and sought habeas corpus review to have the statutes declared unconstitutional.

The Supreme Court upheld the lower court's refusal to hear the habeas corpus petition. The Court stated that habeas corpus jurisdiction "should be exercised in light of the relations existing under our system of government, between judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."

In 1948, the habeas corpus statutes were revised and among the changes was the inclusion of specific language requiring that individuals challenging state custody exhaust state court remedies. Specifically, 28 U.S.C. §2254(b) provides:

> 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 unless it appears that (A) the applicant has exhausted remedies available in the courts of the State; or (B) (i) there is an absence of available State corrective process or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

The exhaustion requirement prevents federal courts from interfering with ongoing state criminal prosecutions. If there were no exhaustion requirement, then a person contending that he or she was being prosecuted under an unconstitutional

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28. David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 Harv. L. Rev. 321, 333-334 (1973).

29. *See* Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *2002 Supplement to Hart & Wechsler's The Federal Courts and the Federal System* 218 (2002).

statute could halt the state court litigation by filing a habeas corpus petition in federal court. But the Supreme Court has emphasized that considerations of equity and comity prevent federal courts from enjoining or otherwise interfering with pending state criminal proceedings.[30] Thus, the exhaustion requirement for federal court habeas corpus review allows state courts to interpret and enforce state criminal laws. Federal court review is delayed until the state has had a full chance to correct any errors in its law or procedures.

In analyzing the exhaustion requirement, three questions are crucial: What state court procedures must be used? What must be presented to state courts? When are petitions deemed sufficient to meet the exhaustion requirement? Each question is considered in turn.

First, the petitioner must pursue all available state court remedies; that is, exhaustion of state proceedings is incomplete as long as there remains an available state court proceeding that might provide the relief sought by the petitioner. This means that a habeas corpus petition may be brought if potential state remedies once existed but are no longer available. For example, exhaustion has occurred if the time limit for direct appeal has expired such that no state remedies are available at the time of the filing of the habeas petition.[31] However, the failure to use available state procedures likely will prevent federal habeas corpus relief, not because of exhaustion problems but rather, as discussed below, because state procedural defaults bar federal habeas corpus relief unless there is good "cause" for the omission and "prejudice" to the denial of review. The Supreme Court has ruled that a failure to include claims in a petition for discretionary review before a state's highest court is a procedural default that precludes raising those claims on habeas corpus.

A state prisoner need not seek United States Supreme Court review of the state court's decision in order to present a federal court habeas petition.[32] Nor is habeas corpus precluded when a state prisoner seeks Supreme Court review of the state court ruling via a writ of certiorari and the Supreme Court declines to hear the case.[33] Of course, if the Supreme Court hears and decides the case, the Court's decision is determinative and must be followed in subsequent habeas corpus proceedings.

A state prisoner need not use state procedures for collateral review, such as state court habeas corpus mechanisms, as long as the issues have been presented and decided by the state courts on direct appeal. The Court explained that it "is not necessary . . . for the prisoner to ask the state for collateral relief, based on the same evidence and issues already decided by direct review."[34] However, a petitioner must use available state court collateral review procedures for issues not raised on direct appeal.[35] Conversely, a petitioner need not present a matter on direct appeal

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30. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971) (federal courts may not enjoin pending state court criminal prosecutions).

31. Fay v. Noia, 372 U.S. 391 (1963).

32. Lawrence v. Florida, 127 S. Ct. 1079, 1083 (2007); Fay v. Noia, 372 U.S. 391, 435 (1963).

33. *See, e.g.*, Brown v. Allen, 344 U.S. 443, 450 (1953).

34. Brown v. Allen, 344 U.S. 443, 447 (1953); *see also* Roberts v. LaVallee, 389 U.S. 40, 42-43 (1967).

35. *See, e.g.*, Wade v. Mayo, 334 U.S. 672, 677-678 (1948).

to the state courts, even if direct appeals are still available, if the issue already was raised and decided by the state court in a collateral proceeding. In other words, once an issue is raised and litigated in state court it need not be presented again even when additional state proceedings are possible.

Section 2254(b) excuses the failure to use state procedures if "circumstances render such process ineffective to protect the rights of the prisoner." The Court has interpreted this clause as creating an exception to the exhaustion requirement "only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief."[36]

A second major issue concerning exhaustion of state remedies involves what must be presented to the state courts in order for the exhaustion requirement to be deemed fulfilled. The Supreme Court has held that the "federal claim must be fairly presented to the state courts."[37] That is, the same matter raised in the federal court habeas corpus petition must have been presented to the state court or the matter will be dismissed for the failure to exhaust if state proceedings remain available where the issue can be raised. Federal courts use state court records to determine whether the petitioner raised the same issue in state court that is now presented in the habeas proceeding.

However, the exhaustion requirement is deemed to have been met when the habeas petitioner supplements the evidence presented in state court but does not raise a new issue. In Vasquez v. Hillery, 474 U.S. 254 (1986), the Supreme Court permitted a habeas corpus petitioner to present additional statistical evidence proving discrimination in the selection of the grand jury. The Court explained that it had "never held that presentation of additional facts to the district court, pursuant to that court's directions, evades the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts." In other words, exhaustion will not present a problem to the defendant who is supplementing the evidence for a claim already presented to the state court and is not raising a new issue. However, there certainly will be cases in which it is a fine line between what constitutes a new issue as opposed to merely new evidence.[38]

Finally, there is the issue of what the petition must contain in order to meet the exhaustion requirement. The Supreme Court, in Rose v. Lundy, considered how a federal court should handle a habeas petition that includes some claims that have been exhausted in state court and some in which there has not been exhaustion.

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36. Duckworth v. Serrano, 454 U.S. 1, 3 (1981).

37. Picard v. Connor, 404 U.S. 270, 275 (1971); *see also* Anderson v. Harless, 459 U.S. 4 (1982).

38. It should be noted that issues must be presented to the state courts even when it is clear that the state law or procedures are unconstitutional. Duckworth v. Serrano, 454 U.S. 1, 4 (1981). Thus, there is no exception to the exhaustion requirement for patently unconstitutional state statutes.

Rose v. Lundy

455 U.S. 509 (1982)

Justice O'Connor delivered the opinion of the Court, except as to Part III-C.

In this case we consider whether the exhaustion rule in 28 U.S.C. §§2254(b), (c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statute, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

I

Following a jury trial, respondent Noah Lundy was convicted on charges of rape and crime against nature, and sentenced to the Tennessee State Penitentiary. After the Tennessee Court of Criminal Appeals affirmed the convictions and the Tennessee Supreme Court denied review, the respondent filed an unsuccessful petition for post-conviction relief in the Knox County Criminal Court.

The respondent subsequently filed a petition in Federal District Court for a writ of habeas corpus under 28 U.S.C. §2254, alleging four grounds for relief: (1) that he had been denied the right to confrontation because the trial court limited the defense counsel's questioning of the victim; (2) that he had been denied the right to a fair trial because the prosecuting attorney stated that the respondent had a violent character; (3) that he had been denied the right to a fair trial because the prosecutor improperly remarked in his closing argument that the State's evidence was uncontradicted; and (4) that the trial judge improperly instructed the jury that every witness is presumed to swear the truth. After reviewing the state court records, however, the District Court concluded that it could not consider claims three and four "in the constitutional framework" because the respondent had not exhausted his state remedies for those grounds. The court nevertheless stated that "in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally." In short, the District Court considered several instances of prosecutorial misconduct never challenged in the state trial or appellate courts, or even raised in the respondent's habeas petition.

The Sixth Circuit affirmed the judgment of the District Court, concluding in an unreported order that the court properly found that the respondent's constitutional rights had been "seriously impaired by the improper limitation of his counsel's cross-examination of the prosecutrix and by the prosecutorial misconduct." The court specifically rejected the State's argument that the District Court should have dismissed the petition because it included both exhausted and unexhausted claims.

II

The petitioner urges this Court to apply a "total exhaustion" rule requiring district courts to dismiss every habeas corpus petition that contains both exhausted

and unexhausted claims. The petitioner argues at length that such a rule furthers the policy of comity underlying the exhaustion doctrine because it gives the state courts the first opportunity to correct federal constitutional errors and minimizes federal interference and disruption of state judicial proceedings. The petitioner also believes that uniform adherence to a total exhaustion rule reduces the amount of piecemeal habeas litigation.

Under the petitioner's approach, a district court would dismiss a petition containing both exhausted and unexhausted claims, giving the prisoner the choice of returning to state court to litigate his unexhausted claims, or of proceeding with only his exhausted claims in federal court. The petitioner believes that a prisoner would be reluctant to choose the latter route since a district court could, in appropriate circumstances under Habeas Corpus Rule 9(b), dismiss subsequent federal habeas petitions as an abuse of the writ. In other words, if the prisoner amended the petition to delete the unexhausted claims or immediately refiled in federal court a petition alleging only his exhausted claims, he could lose the opportunity to litigate his presently unexhausted claims in federal court.

In order to evaluate the merits of the petitioner's arguments, we turn to the habeas statute, its legislative history, and the policies underlying the exhaustion doctrine.

III

A

The exhaustion doctrine existed long before its codification by Congress in 1948. In Ex parte Royall (1886), this Court wrote that as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act. Subsequent cases refined the principle that state remedies must be exhausted except in unusual circumstances. None of these cases, however, specifically applied the exhaustion doctrine to habeas petitions containing both exhausted and unexhausted claims.

In 1948, Congress codified the exhaustion doctrine in 28 U.S.C. §2254. Section 2254, however, does not directly address the problem of mixed petitions. To be sure, the provision states that a remedy is not exhausted if there exists a state procedure to raise "the question presented," but we believe this phrase to be too ambiguous to sustain the conclusion that Congress intended to either permit or prohibit review of mixed petitions. Because the legislative history of §2254, as well as the pre-1948 cases, contains no reference to the problem of mixed petitions, in all likelihood Congress never thought of the problem. Consequently, we must analyze the policies underlying the statutory provision to determine its proper scope.

B

The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. Under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution." Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a

constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues. Equally as important, federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review.

The facts of the present case underscore the need for a rule encouraging exhaustion of all federal claims. In his opinion, the District Court Judge wrote that "there is such mixture of violations that one cannot be separated from and considered independently of the others." Because the two unexhausted claims for relief were intertwined with the exhausted ones, the judge apparently considered all of the claims in ruling on the petition. Requiring dismissal of petitions containing both exhausted and unexhausted claims will relieve the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims.

Rather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition. To the extent that the exhaustion requirement reduces piecemeal litigation, both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review.

C

The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims. A total exhaustion rule will not impair that interest since he can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims. By invoking this procedure, however, the prisoner would risk forfeiting consideration of his unexhausted claims in federal court.[39]

IV

In sum, because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims.

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39. Subsequent to Rose v. Lundy, the Antiterrorism and Effective Death Penalty Act was adopted, which greatly limits successive habeas corpus petitions. This is discussed above. [Footnote by casebook authors.]

Justice BLACKMUN, concurring in the judgment.

The important issue before the Court in this case is whether the conservative "total exhaustion" rule is required by 28 U.S.C. §§2254(b) and (c), or whether a district court may review the exhausted claims of a mixed petition is the proper interpretation of the statute.

I do not dispute the value of comity when it is applicable and productive of harmony between state and federal courts, nor do I deny the principle of exhaustion that §§2254(b) and (c) so clearly embrace. What troubles me is that the "total exhaustion" rule, now adopted by this Court, can be read into the statute, as the Court concedes, only by sheer force; that it operates as a trap for the uneducated and indigent pro se prisoner-applicant; that it delays the resolution of claims that are not frivolous; and that it tends to increase, rather than to alleviate, the caseload burdens on both state and federal courts. To use the old expression, the Court's ruling seems to me to "throw the baby out with the bath water."

Although purporting to rely on the policies upon which the exhaustion requirement is based, the Court uses that doctrine as "a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes that underlie the doctrine and that called it into existence." Those purposes do not require the result the Court reaches; in fact, they support the approach taken by the Court of Appeals in this case and call for dismissal of only the unexhausted claims of a mixed habeas petition. Moreover, to the extent that the Court's ruling today has any impact whatsoever on the workings of federal habeas, it will alter, I fear, the litigation techniques of very few habeas petitioners.

The Court correctly observes that neither the language nor the legislative history of the exhaustion provisions of §§2254(b) and (c) mandates dismissal of a habeas petition containing both exhausted and unexhausted claims. Nor does precedent dictate the result reached here.

The Court fails to note, moreover, that prisoners are not compelled to utilize every available state procedure in order to satisfy the exhaustion requirement. Although this Court's precedents do not address specifically the appropriate treatment of mixed habeas petitions, they plainly suggest that state courts need not inevitably be given every opportunity to safeguard a prisoner's constitutional rights and to provide him relief before a federal court may entertain his habeas petition.

In reversing the judgment of the Sixth Circuit, the Court focuses, as it must, on the purposes the exhaustion doctrine is intended to serve. I do not dispute the importance of the exhaustion requirement or the validity of the policies on which it is based. But I cannot agree that those concerns will be sacrificed by permitting district courts to consider exhausted habeas claims.

The first interest relied on by the Court involves an offshoot of the doctrine of federal-state comity. The Court hopes to preserve the state courts' role in protecting constitutional rights, as well as to afford those courts an opportunity to correct constitutional errors and—somewhat patronizingly—to "become increasingly familiar with and hospitable toward federal constitutional issues." My proposal, however, is not inconsistent with the Court's concern for comity: indeed, the state courts have occasion to rule first on every constitutional challenge, and have ample opportunity to correct any such error, before it is considered by a federal court on habeas.

In some respects, the Court's ruling appears more destructive than solicitous of federal-state comity. Remitting a habeas petitioner to state court to exhaust a

patently frivolous claim before the federal court may consider a serious, exhausted ground for relief hardly demonstrates respect for the state courts. The state judiciary's time and resources are then spent rejecting the obviously meritless unexhausted claim, which doubtless will receive little or no attention in the subsequent federal proceeding that focuses on the substantial exhausted claim. I can "conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is predetermined by established federal principles."

A pending state proceeding involving claims not included in the prisoner's federal habeas petition will be mooted only if the federal court grants the applicant relief. Even in those cases, though, the state courts will be saved the trouble of undertaking the useless exercise of ruling on unexhausted claims that are unnecessary to the disposition of the case.

The second set of interests relied upon by the Court involves those of federal judicial administration — ensuring that a §2254 petition is accompanied by a complete factual record to facilitate review and relieving the district courts of the responsibility for determining when exhausted and unexhausted claims are interrelated. If a prisoner has presented a particular challenge in the state courts, however, the habeas court will have before it the complete factual record relating to that claim. And the Court's Draconian approach is hardly necessary to relieve district courts of the obligation to consider exhausted grounds for relief when the prisoner also has advanced interrelated claims not yet reviewed by the state courts. When the district court believes, on the facts of the case before it, that the record is inadequate or that full consideration of the exhausted claims is impossible, it has always been free to dismiss the entire habeas petition pending resolution of unexhausted claims in the state courts. Certainly, it makes sense to commit these decisions to the discretion of the lower federal courts, which will be familiar with the specific factual context of each case.

The federal courts that have addressed the issue of interrelatedness have had no difficulty distinguishing related from unrelated habeas claims. Mixed habeas petitions have been dismissed in toto when "the issues before the federal court logically depend for their relevance upon resolution of an unexhausted issue," or when consideration of the exhausted claim "would necessarily be affected . . ." by the unexhausted claim. Thus, some of the factors to be considered in determining whether a prisoner's grounds for collateral relief are interrelated are whether the claims are based on the same constitutional right or factual issue, and whether they require an understanding of the totality of the circumstances and therefore necessitate examination of the entire record.

The Court's interest in efficient administration of the federal courts therefore does not require dismissal of mixed habeas petitions. In fact, that concern militates against the approach taken by the Court today. In order to comply with the Court's ruling, a federal court now will have to review the record in a §2254 proceeding at least summarily in order to determine whether all claims have been exhausted. In many cases a decision on the merits will involve only negligible additional effort. And in other cases the court may not realize that one of a number of claims is unexhausted until after substantial work has been done. If the district court must nevertheless dismiss the entire petition until all grounds for relief have been exhausted, the prisoner will likely return to federal court eventually, thereby necessitating duplicative examination of the record and consideration of the exhausted

claims—perhaps by another district judge. Moreover, when the §2254 petition does find its way back to federal court, the record on the exhausted grounds for relief may well be state and resolution of the merits more difficult.

The interest of the prisoner and of society in "preserv[ing] the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement,' " is the final policy consideration to be weighed in the balance. Compelling the habeas petitioner to repeat his journey through the entire state and federal legal process before receiving a ruling on his exhausted claims obviously entails substantial delay. And if the prisoner must choose between undergoing that delay and forfeiting unexhausted claims, society is likewise forced to sacrifice either the swiftness of habeas or its availability to remedy all unconstitutional imprisonments. Dismissing only unexhausted grounds for habeas relief, while ruling on the merits of all unrelated exhausted claims, will diminish neither the promptness nor the efficacy of the remedy and, at the same time, will serve the state and federal interests described by the Court.

I therefore would remand the case, directing that the courts below dismiss respondent's unexhausted claims and examine those that have been properly presented to the state courts in order to determine whether they are interrelated with the unexhausted grounds and, if not, whether they warrant collateral relief.

Justice Brennan, with whom Justice Marshall joins, concurring in part and dissenting in part.

I agree with the Court's holding that the exhaustion requirement of 28 U.S.C. §§2254(b), (c) obliges a federal district court to dismiss, without consideration on the merits, a habeas corpus petition from a state prisoner when that petition contains claims that have not been exhausted in the state courts, "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." But I disagree with the plurality's view, that a habeas petitioner must "risk forfeiting consideration of his unexhausted claims in federal court" if he "decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims" in the face of the district court's refusal to consider his "mixed" petition.

Justice Stevens, dissenting.

This case raises important questions about the authority of federal judges. In my opinion claims of constitutional error are not fungible. There are at least four types. The one most frequently encountered is a claim that attaches a constitutional label to a set of facts that does not disclose a violation of any constitutional right. In my opinion, each of the four claims asserted in this case falls in that category. The second class includes constitutional violations that are not of sufficient import in a particular case to justify reversal even on direct appeal, when the evidence is still fresh and a fair retrial could be promptly conducted. A third category includes errors that are important enough to require reversal on direct appeal but do not reveal the kind of fundamental unfairness to the accused that will support a collateral attack on a final judgment. The fourth category includes those errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained. This category

cannot be defined precisely; concepts of "fundamental fairness" are not frozen in time. But the kind of error that falls in this category is best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods. Errors of this kind justify collateral relief no matter how long a judgment may have been final and even though they may not have been preserved properly in the original trial.

In this case, I think it is clear that neither the exhausted claims nor the unexhausted claims describe any error demonstrating that respondent's trial was fundamentally unfair. Since his lawyer found insufficient merit in the two unexhausted claims to object to the error at trial or to raise the claims on direct appeal, I would expect that the Tennessee courts will consider them to have been waived as a matter of state law; thereafter, they undoubtedly will not support federal relief. This case is thus destined to return to the Federal District Court and the Court of Appeals where, it is safe to predict, those courts will once again come to the conclusion that the writ should issue. The additional procedure that the Court requires before considering the merits will be totally unproductive.

If my appraisal of respondent's exhausted claims is incorrect—if the trial actually was fundamentally unfair to the respondent—postponing relief until another round of review in the state and federal judicial systems has been completed is truly outrageous. The unnecessary delay will make it more difficult for the prosecutor to obtain a conviction on retrial if respondent is in fact guilty; if he is innocent, requiring him to languish in jail because he made a pleading error is callous indeed.

There are some situations in which a district judge should refuse to entertain a mixed petition until all of the prisoner's claims have been exhausted. If the unexhausted claim appears to involve error of the most serious kind and if it is reasonably clear that the exhausted claims do not, addressing the merits of the exhausted claims will merely delay the ultimate disposition of the case. Or if an evidentiary hearing is necessary to decide the merits of both the exhausted and unexhausted claims, a procedure that enables all fact questions to be resolved in the same hearing should be followed. I therefore would allow district judges to exercise discretion to determine whether the presence of an unexhausted claim in a habeas corpus application makes it inappropriate to consider the merits of a properly pleaded exhausted claim. The inflexible, mechanical rule the Court adopts today arbitrarily denies district judges the kind of authority they need to administer their calendars effectively.

In recent years federal judges at times have lost sight of the true office of the great writ of habeas corpus. It is quite unlike the common-law writ of error that enabled a higher court to correct errors committed by a nisi prius tribunal in the trial of civil or criminal cases by ordering further proceedings whenever trial error was detected. The writ of habeas corpus is a fundamental guarantee of liberty.

Procedural regularity is a matter of fundamental importance in the administration of justice. But procedural niceties that merely complicate and delay the resolution of disputes are another matter. In my opinion the federal habeas corpus statute should be construed to protect the former and, whenever possible, to avoid the latter.

4. *Does the Petition Rely on Existing Rules or Seek Recognition of a New Rule of Constitutional Law?*

Teague v. Lane, below, is one of the Supreme Court's most important habeas corpus decisions in that it substantially limits the ability of federal courts to hear constitutional claims raised in habeas corpus petitions. Until *Teague*, the Supreme Court considered habeas corpus petitions alleging constitutional violations, even when they asked the Court to recognize a new constitutional right that would not be applied retroactively to other cases. When the Court articulated a new right it benefitted the habeas petitioner and future criminal defendants. The Court subsequently would decide, in another case, whether it was to be applied retroactively to others. But in *Teague*, the Supreme Court ruled that retroactivity must be determined first; federal courts may not hear habeas petitions asking the Court to recognize new rights unless such rights would be retroactively applied in all cases. Simply put, *Teague* means that a habeas petition almost always must rely only on existing rights and cannot seek the recognition of any that would be regarded as new rights.

Teague v. Lane

489 U.S. 288 (1989)

Justice O'Connor announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Parts IV and V, in which The Chief Justice, Justice Scalia, and Justice Kennedy join.

In Taylor v. Louisiana (1975), this Court held that the Sixth Amendment required that the jury venire be drawn from a fair cross section of the community. The Court stated, however, that "in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition." The principal question presented in this case is whether the Sixth Amendment's fair cross section requirement should now be extended to the petit jury. Because we adopt Justice Harlan's approach to retroactivity for cases on collateral review, we leave the resolution of that question for another day.

I

Petitioner, a black man, was convicted by an all-white Illinois jury of three counts of attempted murder, two counts of armed robbery, and one count of aggravated battery. During jury selection for petitioner's trial, the prosecutor used all 10 of his peremptory challenges to exclude blacks. Petitioner's counsel used one of his 10 peremptory challenges to exclude a black woman who was married to a police officer. After the prosecutor had struck six blacks, petitioner's counsel moved for a mistrial. The trial court denied the motion. When the prosecutor struck four more blacks, petitioner's counsel again moved for a mistrial, arguing that petitioner was "entitled to a jury of his peers." The prosecutor defended the challenges by stating

that he was trying to achieve a balance of men and women on the jury. The trial court denied the motion, reasoning that the jury "appear[ed] to be a fair [one]."

On appeal, petitioner argued that the prosecutor's use of peremptory challenges denied him the right to be tried by a jury that was representative of the community. The Illinois Appellate Court rejected petitioner's fair cross section claim. The Illinois Supreme Court denied leave to appeal, and we denied certiorari.

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. Petitioner repeated his fair cross section claim, and argued that the opinions of several Justices concurring in, or dissenting from, the denial of certiorari in McCray v. New York (1983), had invited a reexamination of Swain v. Alabama, (1965), which prohibited States from purposefully and systematically denying blacks the opportunity to serve on juries. He also argued, for the first time, that under *Swain* a prosecutor could be questioned about his use of peremptory challenges once he volunteered an explanation. The District Court, though sympathetic to petitioner's arguments, held that it was bound by *Swain* and Circuit precedent. On appeal, petitioner repeated his fair cross section claim and his *McCray* argument. A panel of the Court of Appeals agreed with petitioner that the Sixth Amendment's fair cross section requirement applied to the petit jury and held that petitioner had made out a prima facie case of discrimination. A majority of the judges on the Court of Appeals voted to rehear the case en banc, and the panel opinion was vacated. Rehearing was postponed until after our decision in Batson v. Kentucky, (1986), which overruled a portion of *Swain*. After *Batson* was decided, the Court of Appeals held that petitioner could not benefit from the rule in that case because [we] had held that *Batson* would not be applied retroactively to cases on collateral review.

II

Petitioner's first contention is that he should receive the benefit of our decision in *Batson* even though his conviction became final before *Batson* was decided. Before addressing petitioner's argument, we think it helpful to explain how *Batson* modified *Swain*. *Swain* held that a "State's purposeful or deliberate denial" to blacks of an opportunity to serve as jurors solely on account of race violates the Equal Protection Clause of the Fourteenth Amendment. In order to establish a prima facie case of discrimination under *Swain*, a defendant had to demonstrate that the peremptory challenge system had been "perverted." A defendant could raise an inference of purposeful discrimination if he showed that the prosecutor in the county where the trial was held "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be," has been responsible for the removal of qualified blacks who had survived challenges for cause, with the result that no blacks ever served on petit juries.

In *Batson*, the Court overruled that portion of *Swain* setting forth the evidentiary showing necessary to make out a prima facie case of racial discrimination under the Equal Protection Clause. The Court held that a defendant can establish a prima facie case by showing that he is a "member of a cognizable racial group," that the prosecutor exercised "peremptory challenges to remove from the venire members of the defendant's race," and that those "facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude

the veniremen from the petit jury on account of their race." Once the defendant makes out a prima facie case of discrimination, the burden shifts to the prosecutor "to come forward with a neutral explanation for challenging black jurors."

[T]he Court concluded that the rule announced in *Batson* should not be applied retroactively on collateral review of convictions that became final before *Batson* was announced. The Court defined final to mean a case " 'where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in' *Batson*. . . ."

Petitioner's conviction became final 21/2 years prior to *Batson*, thus depriving petitioner of any benefit from the rule announced in that case.

[III]

Petitioner's final contention is that the Sixth Amendment's fair cross section requirement applies to the petit jury. As we noted at the outset, *Taylor* expressly stated that the fair cross section requirement does not apply to the petit jury. Petitioner nevertheless contends that the ratio decidendi of *Taylor* cannot be limited to the jury venire, and he urges adoption of a new rule. Because we hold that the rule urged by petitioner should not be applied retroactively to cases on collateral review, we decline to address petitioner's contention.

A

In the past, the Court has, without discussion, often applied a new constitutional rule of criminal procedure to the defendant in the case announcing the new rule, and has confronted the question of retroactivity later when a different defendant sought the benefit of that rule.

The question of retroactivity with regard to petitioner's fair cross section claim has been raised only in an amicus brief. *See* Brief for Criminal Justice Legal Foundation as Amicus Curiae. Nevertheless, that question is not foreign to the parties, who have addressed retroactivity with respect to petitioner's *Batson* claim. In our view, the question "whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision." Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. Thus, before deciding whether the fair cross section requirement should be extended to the petit jury, we should ask whether such a rule would be applied retroactively to the case at issue. This retroactivity determination would normally entail application of the *Linkletter* standard, but we believe that our approach to retroactivity for cases on collateral review requires modification.

It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

B

Justice Harlan believed that new rules generally should not be applied retroactively to cases on collateral review. He argued that retroactivity for cases on collateral review could "be responsibly [determined] only by focusing, in the first instance, on the nature, function, and scope of the adjudicatory process in which such cases arise. The relevant frame of reference, in other words, is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available." With regard to the nature of habeas corpus, Justice Harlan wrote:

> Habeas corpus always has been a collateral remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.

Given the "broad scope of constitutional issues cognizable on habeas," Justice Harlan argued that it is "sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation." Justice Harlan identified only two exceptions to his general rule of nonretroactivity for cases on collateral review. First, a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Second, a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.' "

We agree with Justice Harlan's description of the function of habeas corpus. "[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error." Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review. These underlying considerations of finality find significant and compelling parallels in the criminal context.

Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions "shows only that 'conventional notions of finality' should not have as much place in criminal as in civil litigation, not that they should have none."

We find these criticisms to be persuasive, and we now adopt Justice Harlan's view of retroactivity for cases on collateral review. Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.

V

Petitioner's conviction became final in 1983. As a result, the rule petitioner urges would not be applicable to this case, which is on collateral review, unless it would fall within an exception.

The first exception suggested by Justice Harlan—that a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,"—is not relevant here. Application of the fair cross section requirement to the petit jury would not accord constitutional protection to any primary activity whatsoever.

The second exception suggested by Justice Harlan—that a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty,' "—we apply with a modification. The language used by Justice Harlan in *Mackey* leaves no doubt that he meant the second exception to be reserved for watershed rules of criminal procedure:

> We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated. Because a decision extending the fair cross section requirement to the petit jury would not be applied retroactively to cases on collateral review under the approach we adopt today, we do not address petitioner's claim.

Justice Stevens, with whom Justice Blackmun joins, concurring in part and concurring in the judgment.

When a criminal defendant claims that a procedural error tainted his conviction, an appellate court often decides whether error occurred before deciding whether that error requires reversal or should be classified as harmless. I would follow a parallel approach in cases raising novel questions of constitutional law on collateral review, first determining whether the trial process violated any of the petitioner's constitutional rights and then deciding whether the petitioner is entitled to relief. If error occurred, factors relating to retroactivity—most importantly, the magnitude of unfairness—should be examined before granting the petitioner relief. Proceeding in reverse, a plurality of the Court today declares that a new rule should not apply retroactively without ever deciding whether there is such a rule.

Justice Brennan, with whom Justice Marshall joins, dissenting.

Today a plurality of this Court, without benefit of briefing and oral argument, adopts a novel threshold test for federal review of state criminal convictions on habeas corpus. It does so without regard for—indeed, without even mentioning—our contrary decisions over the past 35 years delineating the broad scope of habeas relief. The plurality further appears oblivious to the importance we have consistently accorded the principle of stare decisis in nonconstitutional cases. Out of an exaggerated concern for treating similarly situated habeas petitioners the same, the plurality would for the first time preclude the federal courts from considering on collateral review a vast range of important constitutional challenges; where those challenges have merit, it would bar the vindication of personal constitutional

rights and deny society a check against further violations until the same claim is presented on direct review. In my view, the plurality's "blind adherence to the principle of treating like cases alike" amounts to "letting the tail wag the dog" when it stymies the resolution of substantial and unheralded constitutional questions. Because I cannot acquiesce in this unprecedented curtailment of the reach of the Great Writ, particularly in the absence of any discussion of these momentous changes by the parties or the lower courts, I dissent.

Unfortunately, the plurality turns its back on established case law and would erect a formidable new barrier to relief. Any time a federal habeas petitioner's claim, if successful, would result in the announcement of a new rule of law, the plurality says, it may only be adjudicated if that rule would "plac[e] 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' " Equally disturbing, in my view, is the plurality's infidelity to the doctrine of stare decisis. The plurality does not so much as mention stare decisis. Indeed, from the plurality's exposition of its new rule, one might infer that its novel fabrication will work no great change in the availability of federal collateral review of state convictions. Nothing could be further from the truth. Although the plurality declines to "define the spectrum of what may or may not constitute a new rule for retroactivity purposes," it does say that generally "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." Otherwise phrased, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." This account is extremely broad. Few decisions on appeal or collateral review are "dictated" by what came before. Most such cases involve a question of law that is at least debatable, permitting a rational judge to resolve the case in more than one way. Virtually no case that prompts a dissent on the relevant legal point, for example, could be said to be "dictated" by prior decisions. By the plurality's test, therefore, a great many cases could only be heard on habeas if the rule urged by the petitioner fell within one of the two exceptions the plurality has sketched. Those exceptions, however, are narrow. Rules that place " 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,' " are rare. And rules that would require "new procedures without which the likelihood of an accurate conviction is seriously diminished," are not appreciably more common. The plurality admits, in fact, that it "believe[s] it unlikely that many such components of basic due process have yet to emerge." The plurality's approach today can thus be expected to contract substantially the Great Writ's sweep.

[There are an] abundance and variety of habeas cases we have decided in recent years that could never have been adjudicated had the plurality's new rule been in effect.

Teague applies whenever the habeas petition seeks recognition of a "new right." The Court broadly defined what is a "new" right, thus limiting the constitutional claims that can be presented to a federal court on habeas corpus. The Court said that a case announces a new rule "when it breaks new ground or imposes a new obligation on the States or Federal government. . . . [A] case announces new

rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."

If the petitioner is seeking a new right, the question then becomes whether it would apply retroactively. Because very few criminal procedure rights have retroactive application, the effect will be to prevent habeas petitions from preventing claims except as to rights that have been previously established. There now is only one situation in which rights have retroactive effect: a situation in which the new rules place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."

The Court clarified this in Montgomery v. Louisiana, 136 S. Ct. 718 (2016), the Court said that the key question is whether the prior Supreme Court decision is *substantive*, in which case it applies retroactively, or *procedural*, in which case it does not apply retroactively. In Miller v. Alabama, 567 U.S. 460 (2012), the Court ruled that it is cruel and unusual punishment to impose a mandatory sentence of life in prison without parole for a homicide committed by a juvenile. In *Montgomery*, the Court said that this applies retroactively because it is a substantive change in the law. Justice Kennedy, writing for the Court, explained:

> The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts. . . .
>
> This Court's precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application establish that the Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final.

Teague also recognized another exception where Supreme Court decisions would apply retroactively: for "watershed rules of criminal procedure." From 1989, when *Teague* was decided, until 2021, no decision was found to meet this standard. In 2021, in Edwards v. Vannoy, the Court expressly overruled this aspect of *Teague* and the possibility that there could be a watershed rule of criminal procedure that would apply retroactively.

The year before, in Ramos v. Louisiana (2020), the Court held that the Sixth Amendment's requirement for a unanimous jury verdict is incorporated and applies to state governments. (This is presented in Chapter 1 and also in Chapter 12.) The issue in *Edwards* was whether this applies retroactively to those who were convicted by non-unanimous juries before *Ramos*. The Court held that *Ramos* does not apply retroactively.

Edwards v. Vannoy

141 S.Ct. 1547 (2021)

Justice KAVANAUGH delivered the opinion of the Court.

Last Term in *Ramos* v. *Louisiana* (2020), this Court held that a state jury must be unanimous to convict a criminal defendant of a serious offense. *Ramos* repudiated

this Court's 1972 decision in which had allowed non-unanimous juries in state criminal trials. The question in this case is whether the new rule of criminal procedure announced in *Ramos* applies retroactively to overturn final convictions on federal collateral review. Under this Court's retroactivity precedents, the answer is no.

This Court has repeatedly stated that a decision announcing a new rule of criminal procedure ordinarily does not apply retroactively on federal collateral review. See *Teague v. Lane* (1989). Indeed, in the 32 years since *Teague* underscored that principle, this Court has announced many important new rules of criminal procedure. But the Court has not applied *any* of those new rules retroactively on federal collateral review. And for decades before *Teague*, the Court also regularly declined to apply new rules retroactively, including on federal collateral review.

In light of the Court's well-settled retroactivity doctrine, we conclude that the *Ramos* jury-unanimity rule likewise does not apply retroactively on federal collateral review.

A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded. But under the habeas corpus statute as interpreted by this Court, a new rule of criminal procedure ordinarily does not apply retroactively to overturn final convictions on federal *collateral* review.

In stating that new procedural rules ordinarily do not apply retroactively on federal collateral review, *Teague* reinforced what had already been the Court's regular practice for several decades under the retroactivity standard articulated in *Linkletter v. Walker* (1965). Put simply, the "costs imposed upon the States by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application." For that reason, the Court has repeatedly stated that new rules of criminal procedure ordinarily do not apply retroactively on federal collateral review.

The Court has identified only one possible exception to that principle. The Court has stated that a new procedural rule will apply retroactively on federal collateral review only if it constitutes a "watershed" rule of criminal procedure. But the *Teague* Court stated that it was "unlikely" that such watershed "components of basic due process have yet to emerge." And in the 32 years since *Teague*, as we will explain, the Court has *never* found that any new procedural rule actually satisfies that purported exception.

To determine whether *Ramos* applies retroactively on federal collateral review, we must answer two questions. First, did *Ramos* announce a new rule of criminal procedure, as opposed to applying a settled rule? A new rule ordinarily does not apply retroactively on federal collateral review. Second, if *Ramos* announced a new rule, does it fall within an exception for watershed rules of criminal procedure that apply retroactively on federal collateral review?

Ramos held that a state jury must be unanimous to convict a defendant of a serious offense. In so holding, *Ramos* announced a new rule. A rule is new unless it was "*dictated* by precedent existing at the time the defendant's conviction became final." In other words, a rule is new unless, at the time the conviction became final, the rule was already "apparent to all reasonable jurists." The starkest example of a decision announcing a new rule is a decision that overrules an earlier case.

The jury-unanimity requirement announced in *Ramos* was not dictated by precedent or apparent to all reasonable jurists when Edwards's conviction became final in 2011. By renouncing *Apodaca* and expressly requiring unanimous jury

verdicts in state criminal trials, *Ramos* plainly announced a new rule for purposes of this Court's retroactivity doctrine. And new rules of criminal procedure ordinarily do not apply retroactively on federal collateral review.

Having determined that *Ramos* announced a new rule requiring jury unanimity, we must consider whether that new rule falls within an exception for watershed rules of criminal procedure that apply retroactively on federal collateral review. This Court has stated that the watershed exception is "extremely narrow" and applies only when, among other things, the new rule alters "our understanding of the bedrock procedural elements essential to the fairness of a proceeding."

In the abstract, those various adjectives—watershed, narrow, bedrock, essential—do not tell us much about whether a particular decision of this Court qualifies for the watershed exception. In practice, the exception has been theoretical, not real. The Court has identified only one pre-*Teague* procedural rule as watershed: the right to counsel recognized in the Court's landmark decision in *Gideon v. Wainwright* (1963). The Court has never identified any other pre-*Teague* or post-*Teague* rule as watershed. None.

Moreover, the Court has flatly proclaimed on multiple occasions that the watershed exception is unlikely to cover any more new rules. Even 32 years ago in *Teague* itself, the Court stated that it was "unlikely" that additional watershed rules would "emerge." And since *Teague*, the Court has often reiterated that "it is unlikely that any such rules have yet to emerge." Consistent with those many emphatic pronouncements, the Court since *Teague* has rejected *every* claim that a new procedural rule qualifies as a watershed rule.

If landmark and historic criminal procedure decisions do not apply retroactively on federal collateral review, how can any additional new rules of criminal procedure apply retroactively on federal collateral review? At this point, some 32 years after *Teague*, we think the only candid answer is that none can—that is, no new rules of criminal procedure can satisfy the watershed exception. We cannot responsibly continue to suggest otherwise to litigants and courts.

Continuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts. Moreover, no one can reasonably rely on an exception that is non-existent in practice, so no reliance interests can be affected by forthrightly acknowledging reality. It is time—probably long past time—to make explicit what has become increasingly apparent to bench and bar over the last 32 years: New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund. It must "be regarded as retaining no vitality."

To summarize the Court's retroactivity principles: New substantive rules alter "the range of conduct or the class of persons that the law punishes." Those new substantive rules apply to cases pending in trial courts and on direct review, and they also apply retroactively on federal collateral review. New procedural rules alter "only the manner of determining the defendant's culpability." Those new procedural rules apply to cases pending in trial courts and on direct review. But new procedural rules do not apply retroactively on federal collateral review.

Ramos announced a new rule of criminal procedure. It does not apply retroactively on federal collateral review.

Justice KAGAN, with whom Justice BREYER and Justice SOTOMAYOR join, dissenting.

"A verdict, taken from eleven, [i]s no verdict at all," this Court proclaimed just last Term (2020). Citing centuries of history, the Court in *Ramos* termed the Sixth Amendment right to a unanimous jury "vital," "essential," "indispensable," and "fundamental" to the American legal system. The Court therefore saw fit to disregard *stare decisis* and overturn a 50-year-old precedent enabling States to convict criminal defendants based on non-unanimous verdicts. And in taking that weighty step, the Court also vindicated core principles of racial justice. For in the Court's view, the state laws countenancing non-unanimous verdicts originated in white supremacism and continued in our own time to have racially discriminatory effects. Put all that together, and it is easy to see why the opinions in *Ramos* read as historic. Rarely does this Court make such a fundamental change in the rules thought necessary to ensure fair criminal process. If you were scanning a thesaurus for a single word to describe the decision, you would stop when you came to "watershed."

Yet the Court insists that *Ramos*'s holding does not count as a "watershed" procedural rule under *Teague* [*v. Lane*]. The result of today's ruling is easily stated. *Ramos* will not apply retroactively, meaning that a prisoner whose appeals ran out before the decision can receive no aid from the change in law it made. So Thedrick Edwards, unlike Evangelisto Ramos, will serve the rest of his life in prison based on a 10-to-2 jury verdict. Only the reasoning of today's holding resists explanation. The majority cannot (and indeed does not) deny, given all *Ramos* said, that the jury unanimity requirement fits to a tee *Teague*'s description of a watershed procedural rule. Nor can the majority explain its result by relying on precedent. Although flaunting decisions since *Teague* that held rules non-retroactive, the majority comes up with none comparable to this case. Search high and low the settled law of retroactivity, and the majority still has no reason to deny *Ramos* watershed status.

So everything rests on the majority's last move—the overturning of *Teague*'s watershed exception. If there can never be *any* watershed rules—as the majority here asserts out of the blue—then, yes, jury unanimity cannot be one. The result follows trippingly from the premise. But adopting the premise requires departing from judicial practice and principle. In overruling a critical aspect of *Teague*, the majority follows none of the usual rules of *stare decisis*. It discards precedent without a party requesting that action. And it does so with barely a reason given, much less the "special justification" our law demands. The majority in that way compounds its initial error: Not content to misapply *Teague*'s watershed provision here, the majority forecloses any future application. It prevents any procedural rule ever—no matter how integral to adjudicative fairness—from benefiting a defendant on habeas review. Thus does a settled principle of retroactivity law die, in an effort to support an insupportable ruling.

And putting talk of *stare decisis* aside, there remains much more in *Ramos* to echo *Teague*. If, as today's majority says, *Teague* is full of "adjectives," so too is *Ramos*—and mostly the same ones. Jury unanimity, the Court pronounced, is an "essential element[ ]" of the jury trial right, and thus is "fundamental to the American scheme of justice." The Court discussed the rule's "ancient" history—"400 years of English and American cases requiring unanimity" leading up to the Sixth Amendment. As early as the 14th century, English common law recognized

jury unanimity as a "vital right." Adopting that view, the early American States likewise treated unanimity as an "essential feature of the jury trial." So by the time the Framers drafted the Sixth Amendment, "the right to a jury trial *meant* a trial in which the jury renders a unanimous verdict." Because that was so, no jury verdict could stand (or in some metaphysical sense, even exist) absent full agreement: "A verdict, taken from eleven, was no verdict at all." Unanimity served as a critical safeguard, needed to protect against wrongful deprivations of citizens' "hard-won liberty." Or as Justice Story summarized the law a few decades after the Founding: To obtain a conviction, "unanimity in the verdict of the jury is indispensable."

If a rule so understood isn't a watershed one, then nothing is. (And that is, of course, what the majority eventually says.) Once more, from the quotations just above: "fundamental," "essential," "vital," "indispensable." No wonder today's majority declares a new-found aversion to "adjectives"—or, as a concurring opinion says, "all these words." The unanimity rule, as *Ramos* described it, is as "bedrock" as bedrock comes. It is as grounded in the Nation's constitutional traditions—with centuries-old practice becoming part of the Sixth Amendment's original meaning. And it is as central to the Nation's idea of a fair and reliable guilty verdict.

So the majority is left to overrule *Teague*'s holding on watershed rules.[7] On the last page or so of its merits discussion (before it turns to pre-butting this dissent), the majority eliminates the watershed exception, declaring it "long past time" to do so. *Teague* had said there would not be "many" (retroactive) watershed rules. The majority now says there will be none at all. If that is so, of course, jury unanimity cannot be watershed. Finally, the majority offers an intelligible reason for declining to apply *Ramos* retroactively.

But in taking that road, the majority breaks a core judicial rule: respect for precedent. *Stare decisis* is a foundation stone of the rule of law, "promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process."

To begin with, no one here asked us to overrule *Teague*. This Court usually confines itself to the issues raised and briefed by the parties. There may be reasons to ignore that rule in one or another everyday case. But to do so in pursuit of overturning precedent is nothing short of extraordinary.

Equally striking, the majority gives only the sketchiest of reasons for reversing *Teague*'s watershed exception. In deciding whether to depart from precedent, the Court usually considers—and usually at length—a familiar set of factors capable of providing the needed special justification. The majority can't be bothered with that customary, and disciplining, practice; it barely goes through the motions. Seldom has this Court so casually, so off-handedly, tossed aside precedent. In its page of analysis, the majority offers just one ground for its decision—that since *Teague*, the Court has not identified a new rule as watershed, and so "the purported exception has become an empty promise." But even viewed in the abstract, that argument does not fly. That the Court has not found a watershed rule since *Teague* does not mean it could or would not in the future. *Teague* itself understood that point: It saw value in the watershed exception even while recognizing that watershed rules would be few and far between. And viewed in the context of this case, the majority's argument positively craters. For the majority today comes face-to-face with a rule that perfectly fits each of *Teague*'s criteria: Jury unanimity, as described in

Ramos, is watershed—even though no prior rule was. That airtight match between *Ramos* and *Teague* refutes the majority's one stated reason for overruling the latter decision. The majority could not rely on the absence of watershed rules to topple *Teague* if it had just faithfully applied that decision to this case.

I would not discard *Teague*'s watershed exception and so keep those unfairly convicted people from getting new trials. Instead, I would accept the consequences of last Term's holding in *Ramos*. A decision like that comes with a promise, or at any rate should. If the right to a unanimous jury is so fundamental—if a verdict rendered by a divided jury is "no verdict at all"—then Thedrick Edwards should not spend his life behind bars over two jurors' opposition. I respectfully dissent.

5. Is It an Issue That Can Be Raised on Habeas Corpus?

The principles of res judicata and collateral estoppel generally preclude a party from relitigating a matter already presented to a court and decided on. Brown v. Allen, 344 U.S. 443 (1953), created an important exception to collateral estoppel and res judicata for habeas petitions. The Supreme Court, in an opinion by Justice Frankfurter, held that a constitutional claim may be raised on habeas even though it had been raised, fully litigated, and decided in state court. Justice Frankfurter observed that "even the highest State courts" had failed to give adequate protection to federal constitutional rights. Because the *Brown* Court believed that habeas corpus exists to remedy state court disregard of violations of defendant's rights, the Court established that a state prisoner should have the chance to have a hearing in federal court on federal constitutional claims.

In fact, the Warren Court so valued the importance of the opportunity to relitigate constitutional issues to ensure correct decisions that it held that a prisoner convicted by a *federal* court also may raise issues on habeas that had been presented and decided at trial.[40] The Court concluded that "[t]he provision of federal collateral remedies rests . . . fundamentally upon a recognition that adequate protection of constitutional rights . . . requires the continuing availability of a mechanism for relief."

There is one major exception to Brown v. Allen. In Stone v. Powell, the Supreme Court held that claims that a state court improperly failed to exclude evidence as being the product of an illegal search or seizure could not be relitigated on habeas corpus if the state court provided a full and fair opportunity for a hearing.

Stone v. Powell

428 U.S. 465 (1976)

Justice Powell delivered the opinion of the Court.

Respondents in these cases were convicted of criminal offenses in state courts, and their convictions were affirmed on appeal. The prosecution in each case relied

40. Kaufman v. United States, 394 U.S. 217 (1969).

upon evidence obtained by searches and seizures alleged by respondents to have been unlawful. Each respondent subsequently sought relief in a Federal District Court by filing a petition for a writ of federal habeas corpus. The question presented is whether a federal court should consider, in ruling on a petition for habeas corpus relief filed by a state prisoner, a claim that evidence obtained by an unconstitutional search or seizure was introduced at his trial, when he has previously been afforded an opportunity for full and fair litigation of his claim in the state courts. The issue is of considerable importance to the administration of criminal justice.

I

In the landmark decision in Brown v. Allen (1953), the scope of the writ was expanded. In that case and its companion case, Daniels v. Allen, prisoners applied for federal habeas corpus relief claiming that the trial courts had erred in failing to quash their indictments due to alleged discrimination in the selection of grand jurors and in ruling certain confessions admissible. In *Brown*, the highest court of the State had rejected these claims on direct appeal, and this Court had denied certiorari. Despite the apparent adequacy of the state corrective process, the Court reviewed the denial of the writ of habeas corpus and held that Brown was entitled to a full reconsideration of these constitutional claims, including, if appropriate, a hearing in the Federal District Court.

During the period in which the substantive scope of the writ was expanded, the Court did not consider whether exceptions to full review might exist with respect to particular categories of constitutional claims. Prior to the Court's decision in Kaufman v. United States (1969), however, a substantial majority of the Federal Courts of Appeals had concluded that collateral review of search-and-seizure claims was inappropriate on motions filed by federal prisoners under 28 U.S.C. §2255, the modern post conviction procedure available to federal prisoners in lieu of habeas corpus. The primary rationale advanced in support of those decisions was that Fourth Amendment violations are different in kind from denials of Fifth or Sixth Amendment rights in that claims of illegal search and seizure do not "impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather, the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers."

Kaufman rejected this rationale and held that search-and-seizure claims are cognizable in §2255 proceedings. The Court noted that "the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial."

The discussion in *Kaufman* of the scope of federal habeas corpus rests on the view that the effectuation of the Fourth Amendment, as applied to the States through the Fourteenth Amendment, requires the granting of habeas corpus relief when a prisoner has been convicted in state court on the basis of evidence obtained in an illegal search or seizure since those Amendments were held in Mapp v. Ohio (1961), to require exclusion of such evidence at trial and reversal of conviction upon direct review. Until these cases we have not had occasion fully to consider the validity of this view. Upon examination, we conclude, in light of the nature and purpose of the Fourth Amendment exclusionary rule, that this view is unjustified.

We hold, therefore, that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

III

The Fourth Amendment assures the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Amendment was primarily a reaction to the evils associated with the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect the "sanctity of a man's home and the privacies of life" from searches under unchecked general authority.

The exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment. Prior to the Court's decisions in Weeks v. United States (1914), and Gouled v. United States (1921), there existed no barrier to the introduction in criminal trials of evidence obtained in violation of the Amendment. In *Weeks*, the Court held that the defendant could petition before trial for the return of property secured through an illegal search or seizure conducted by federal authorities. In *Gouled*, the Court held broadly that such evidence could not be introduced in a federal prosecution.

Decisions prior to *Mapp* [v. Ohio (1961)] advanced two principal reasons for application of the rule in federal trials. The Court in the context of its special supervisory role over the lower federal courts, referred to the "imperative of judicial integrity," suggesting that exclusion of illegally seized evidence prevents contamination of the judicial process. The *Mapp* majority justified the application of the rule to the States on several grounds, but relied principally upon the belief that exclusion would deter future unlawful police conduct.

Although our decisions often have alluded to the "imperative of judicial integrity," they demonstrate the limited role of this justification in the determination whether to apply the rule in a particular context. Logically extended this justification would require that courts exclude unconstitutionally seized evidence despite lack of objection by the defendant, or even over his assent. It also would require abandonment of the standing limitations on who may object to the introduction of unconstitutionally seized evidence, and retreat from the proposition that judicial proceedings need not abate when the defendant's person is unconstitutionally seized. Similarly, the interest in promoting judicial integrity does not prevent the use of illegally seized evidence in grand jury proceedings. Nor does it require that the trial court exclude such evidence from use for impeachment of a defendant, even though its introduction is certain to result in conviction in some cases.

The teaching of these cases is clear. While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence. The force of this justification becomes minimal where federal habeas corpus relief is sought by a prisoner who previously has been afforded the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct review.

The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. Post-*Mapp* decisions have

established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any "[r]eparation comes too late." Instead, "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect. . . ."

IV

We turn now to the specific question presented by these cases. Respondents allege violations of Fourth Amendment rights guaranteed them through the Fourteenth Amendment. The question is whether state prisoners who have been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state courts at trial and on direct review may invoke their claim again on federal habeas corpus review. The answer is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims.

The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.

Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice. These long-recognized costs of the rule persist when a criminal conviction is sought to be overturned on collateral review on the ground that a search-and-seizure claim was erroneously rejected by two or more tiers of state courts.

We nevertheless afford broad habeas corpus relief, recognizing the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty. The Court in Fay v. Noia (1963), described habeas corpus as a remedy for "whatever society deems to be intolerable restraints," and recognized that those to whom the writ should be granted "are persons whom society has grievously wronged." But in the case of a typical Fourth Amendment claim, asserted on collateral attack, a convicted defendant is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration.

Evidence obtained by police officers in violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future violations will decrease. Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.

We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions. But the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs. To be sure, each case in which such claim is considered may add marginally to an awareness of the values protected by the Fourth Amendment. There is no reason to believe, however, that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions. Nor is there reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant. The view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal.[41] Even if one rationally could assume that some additional incremental deterrent effect would be presented in isolated cases, the resulting advance of the legitimate goal of furthering Fourth Amendment rights would be outweighed by the acknowledged costs to other values vital to a rational system of criminal justice.

In sum, we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of application of the rule persist with special force.

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41. The policy arguments that respondents marshal in support of the view that federal habeas corpus review is necessary to effectuate the Fourth Amendment stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule, and the oversight jurisdiction of this Court on certiorari is an inadequate safeguard. The principal rationale for this view emphasizes the broad differences in the respective institutional settings within which federal judges and state judges operate. Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems. In sum, there is "no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [consideration of Fourth Amendment claims] than his neighbor in the state courthouse." [Footnote by the Court.]

With all respect, the hyperbole of the dissenting opinion is misdirected. Our decision today is not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right, and we emphasize the minimal utility of the rule when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding. In sum, we hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. Our decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been both such a showing and a Fourth Amendment violation.

Justice BRENNAN, with whom Justice MARSHALL concurs, dissenting.

The Court today holds "that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." To be sure, my Brethren are hostile to the continued vitality of the exclusionary rule as part and parcel of the Fourth Amendment's prohibition of unreasonable searches and seizures. Today's holding portends substantial evisceration of federal habeas corpus jurisdiction, and I dissent.

The Court's opinion does not specify the particular basis on which it denies federal habeas jurisdiction over claims of Fourth Amendment violations brought by state prisoners.

Much of the Court's analysis implies that respondents are not entitled to habeas relief because they are not being unconstitutionally detained. Although purportedly adhering to the principle that the Fourth and Fourteenth Amendments "require exclusion" of evidence seized in violation of their commands, the Court informs us that there has merely been a "view" in our cases that "the effectuation of the Fourth Amendment . . . requires the granting of habeas corpus relief when a prisoner has been convicted in state court on the basis of evidence obtained in an illegal search or seizure. . . ." Applying a "balancing test," the Court then concludes that this "view" is unjustified and that the policies of the Fourth Amendment would not be implemented if claims to the benefits of the exclusionary rule were cognizable in collateral attacks on state-court convictions.

Understandably the Court must purport to cast its holding in constitutional terms, because that avoids a direct confrontation with the incontrovertible facts that the habeas statutes have heretofore always been construed to grant jurisdiction to entertain Fourth Amendment claims of both state and federal prisoners, that Fourth Amendment principles have been applied in decisions on the merits in numerous cases on collateral review of final convictions, and that Congress has legislatively accepted our interpretation of congressional intent as to the necessary scope and function of habeas relief. Indeed, the Court reaches its result without explicitly overruling any of our plethora of precedents inconsistent with that result or even discussing principles of stare decisis. Rather, the Court asserts, in essence, that the Justices joining those prior decisions or reaching the merits of Fourth Amendment claims simply overlooked the obvious constitutional dimension to the

problem in adhering to the "view" that granting collateral relief when state courts erroneously decide Fourth Amendment issues would effectuate the principles underlying that Amendment.

But, shorn of the rhetoric of "interest balancing" used to obscure what is at stake in this case, it is evident that today's attempt to rest the decision on the Constitution must fail so long as Mapp v. Ohio remains undisturbed.

Under *Mapp*, as a matter of federal constitutional law, a state court must exclude evidence from the trial of an individual whose Fourth and Fourteenth Amendment rights were violated by a search or seizure that directly or indirectly resulted in the acquisition of that evidence. When a state court admits such evidence, it has committed a constitutional error, and unless that error is harmless under federal standards, it follows ineluctably that the defendant has been placed "in custody in violation of the Constitution" within the comprehension of 28 U.S.C. §2254. In short, it escapes me as to what logic can support the assertion that the defendant's unconstitutional confinement obtains during the process of direct review, no matter how long that process takes, but that the unconstitutionality then suddenly dissipates at the moment the claim is asserted in a collateral attack on the conviction.

The only conceivable rationale upon which the Court's "constitutional" thesis might rest is the statement that "the [exclusionary] rule is not a personal constitutional right. . . . Instead, 'the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.' " [I]n light of contrary decisions establishing the role of the exclusionary rule, the premise that an individual has no constitutional right to have unconstitutionally seized evidence excluded from all use by the government [has no basis]. [But] I need not dispute that point here. For today's holding is not logically defensible. However, the Court reinterprets *Mapp*, and whatever the rationale now attributed to *Mapp*'s holding or the purpose ascribed to the exclusionary rule, the prevailing constitutional rule is that unconstitutionally seized evidence cannot be admitted in the criminal trial of a person whose federal constitutional rights were violated by the search or seizure. The erroneous admission of such evidence is a violation of the Federal Constitution—*Mapp* inexorably means at least this much, or there would be no basis for applying the exclusionary rule in state criminal proceedings—and an accused against whom such evidence is admitted has been convicted in derogation of rights mandated by, and is "in custody in violation," of the Constitution of the United States. Indeed, since state courts violate the strictures of the Federal Constitution by admitting such evidence, then even if federal habeas review did not directly effectuate Fourth Amendment values, a proposition I deny, that review would nevertheless serve to effectuate what is concededly a constitutional principle concerning admissibility of evidence at trial.

The Court's arguments respecting the cost/benefit analysis of applying the exclusionary rule on collateral attack also have no merit. For all of the "costs" of applying the exclusionary rule on habeas should already have been incurred at the trial or on direct review if the state court had not misapplied federal constitutional principles. As such, these "costs" were evaluated and deemed to be outweighed when the exclusionary rule was fashioned. The only proper question on habeas is whether federal courts, acting under congressional directive to have the last say as to enforcement of federal constitutional principles, are to permit the States free

enjoyment of the fruits of a conviction which by definition were only obtained through violations of the Constitution as interpreted in *Mapp*. And as to the question whether any "educative" function is served by such habeas review, today's decision will certainly provide a lesson that, tragically for an individual's constitutional rights, will not be lost on state courts.

Therefore, the real ground of today's decision—a ground that is particularly troubling in light of its portent for habeas jurisdiction generally—is the Court's novel reinterpretation of the habeas statutes; this would read the statutes as requiring the district courts routinely to deny habeas relief to prisoners "in custody in violation of the Constitution or laws . . . of the United States" as a matter of judicial "discretion"—a "discretion" judicially manufactured today contrary to the express statutory language—because such claims are "different in kind" from other constitutional violations in that they "do not 'impugn the integrity of the fact-finding process,' " and because application of such constitutional strictures "often frees the guilty." Much in the Court's opinion suggests that a construction of the habeas statutes to deny relief for non-"guilt-related" constitutional violations, based on this Court's vague notions of comity and federalism, is the actual premise for today's decision, and although the Court attempts to bury its underlying premises in footnotes, those premises mark this case as a harbinger of future eviscerations of the habeas statutes that plainly does violence to congressional power to frame the statutory contours of habeas jurisdiction. For we are told that "[r]esort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government," including waste of judicial resources, lack of finality of criminal convictions, friction between the federal and state judiciaries, and incursions on "federalism." We are told that federal determination of Fourth Amendment claims merely involves "an issue that has no bearing on the basic justice of [the defendant's] incarceration," and that "the ultimate question [in the criminal process should invariably be] guilt or innocence." We are told that the "policy arguments" of respondents to the effect that federal courts must be the ultimate arbiters of federal constitutional rights, and that our certiorari jurisdiction is inadequate to perform this task, "stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights"; the Court, however, finds itself "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States," and asserts that it is "unpersuaded" by "the argument that federal judges are more expert in applying federal constitutional law" because "there is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [consideration of Fourth Amendment claims] than his neighbor in the state courthouse.'" Finally, we are provided a revisionist history of the genesis and growth of federal habeas corpus jurisdiction. If today's decision were only that erroneous state-court resolution of Fourth Amendment claims did not render the defendant's resultant confinement "in violation of the Constitution," these pronouncements would have been wholly irrelevant and unnecessary. I am therefore justified in apprehending that the groundwork is being laid today for a drastic withdrawal of federal habeas jurisdiction, if not for all grounds of alleged unconstitutional detention, then at least for claims—for example, of double jeopardy, entrapment, self-incrimination,

Miranda violations, and use of invalid identification procedures—that this Court later decides are not "guilt related."

At least since Brown v. Allen, detention emanating from judicial proceedings in which constitutional rights were denied has been deemed "contrary to fundamental law," and all constitutional claims have thus been cognizable on federal habeas corpus. There is no foundation in the language or history of the habeas statutes for discriminating between types of constitutional transgressions, and efforts to relegate certain categories of claims to the status of "second-class rights" by excluding them from that jurisdiction have been repulsed. Today's opinion, however, marks the triumph of those who have sought to establish a hierarchy of constitutional rights, and to deny for all practical purposes a federal forum for review of those rights that this Court deems less worthy or important. Without even paying the slightest deference to principles of stare decisis or acknowledging Congress' failure for two decades to alter the habeas statutes in light of our interpretation of congressional intent to render all federal constitutional contentions cognizable on habeas, the Court today rewrites Congress' jurisdictional statutes as heretofore construed and bars access to federal courts by state prisoners with constitutional claims distasteful to a majority of my Brethren. But even ignoring principles of stare decisis dictating that Congress is the appropriate vehicle for embarking on such a fundamental shift in the jurisdiction of the federal courts, I can find no adequate justification elucidated by the Court for concluding that habeas relief for all federal constitutional claims is no longer compelled under the reasoning of *Brown*, *Fay*, and *Kaufman*.

For a time it appeared that *Stone* might represent a first step to overruling Brown v. Allen and thus would prevent relitigation of constitutional claims on habeas corpus. After all, if the legislative history of the habeas corpus statutes is read as preventing relitigation, or if state courts are generally equal to federal courts in their protection of constitutional rights, relitigation appears unnecessary. However, the Supreme Court has not extended *Stone* to other constitutional rights or further limited the application of Brown v. Allen.

In Rose v. Mitchell, 443 U.S. 545 (1979), the Supreme Court held that habeas petitioners could challenge the racial composition of grand juries even when the claim had been litigated and rejected in the state court. Although on the merits the Court found that there was no discrimination, the Court emphasized the availability of habeas corpus review to determine the issue. The Court, in an opinion by Justice Blackmun, said that federal habeas review was "necessary to ensure that constitutional defects in the state judiciary's grand jury selection procedure are not overlooked by the very judges who operate that system." Thus the Court concluded that a claim of discrimination in grand jury selection is not rendered harmless by a subsequent determination of guilt beyond a reasonable doubt by a petit jury and that *Stone* did not apply to foreclose federal court habeas review.

Likewise, the Supreme Court held that the constitutionality of jury instructions concerning the standard of proof to be applied could be challenged on habeas corpus even though the issue had been presented and decided at trial. In Jackson v. Virginia, 443 U.S. 307 (1979), the Court held that habeas corpus review

is available for a petitioner who claims that "no rational trier of fact" could have concluded that the state presented sufficient evidence to establish each element of the crime beyond a reasonable doubt. The Court expressly stated that this contention could be relitigated on habeas corpus even though it had been rejected by the state courts.

In Kimmelman v. Morrison, 477 U.S. 365 (1986), the Supreme Court held that a Sixth Amendment claim of ineffective assistance of counsel could be relitigated on habeas corpus, even where the attorney's error was a failure to raise Fourth Amendment objections to the introduction of evidence. In *Kimmelman*, the defendant was convicted of rape largely on the basis of evidence obtained in an allegedly illegal search. The defendant sought habeas corpus relief both on the grounds that illegally seized evidence was admitted and that the defense attorney's failure to object to the introduction of the evidence constituted ineffective assistance of counsel.

The Supreme Court held that although Stone v. Powell barred litigating the Fourth Amendment claim on habeas corpus, the Sixth Amendment issue of ineffective assistance of counsel could be relitigated in federal court. The Court, in an opinion by Justice Brennan, observed that "[t]he right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy of our adversary process." As such the Court concluded that "while respondent's defaulted Fourth Amendment claim is one element of proof of his Sixth Amendment claim, the two claims have separate identities and reflect different constitutional values."

Most recently and most importantly, in Withrow v. Williams, 507 U.S. 680 (1993), the Court refused to extend Stone v. Powell to *Miranda* claims. Justice Souter, writing for the Court, declared, "Today we hold that *Stone*'s restriction on the exercise of federal habeas jurisdiction does not extend to a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by Miranda v. Arizona (1966)."

The decision provided the occasion for the majority and dissenting justices to express very different views about *Miranda* and its constitutional status. Justice Souter, writing for the majority, stated:

> We have made it clear that *Stone*'s limitation on federal habeas relief was not jurisdictional in nature, but rested on prudential concerns counseling against the application of the Fourth Amendment exclusionary rule on collateral review. We simply concluded in *Stone* that the costs of applying the exclusionary rule on collateral review outweighed any potential advantage to be gained by applying it there.
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> Petitioner, supported by the United States as amicus curiae, argues that *Miranda*'s safeguards are not constitutional in character, but merely "prophylactic," and that in consequence habeas review should not extend to a claim that a state conviction rests on statements obtained in the absence of those safeguards. We accept petitioner's premise for purposes of this case, but not her conclusion.
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> The *Miranda* Court did of course caution that the Constitution requires no "particular solution for the inherent compulsions of the interrogation process," and left it open to a State to meet its burden by adopting "other procedures . . . at least as effective in apprising accused

persons" of their rights. The Court indeed acknowledged that, in barring introduction of a statement obtained without the required warnings, *Miranda* might exclude a confession that we would not condemn as "involuntary in traditional terms," and for this reason we have sometimes called the *Miranda* safeguards "prophylactic" in nature. Calling the *Miranda* safeguards "prophylactic," however, is a far cry from putting *Miranda* on all fours with *Mapp*, or from rendering *Miranda* subject to *Stone*.

As we explained in *Stone*, the *Mapp* rule "is not a personal constitutional right," but serves to deter future constitutional violations; although it mitigates the juridical consequences of invading the defendant's privacy, the exclusion of evidence at trial can do nothing to remedy the completed and wholly extrajudicial Fourth Amendment violation. Nor can the *Mapp* rule be thought to enhance the soundness of the criminal process by improving the reliability of evidence introduced at trial. Quite the contrary, as we explained in *Stone*, the evidence excluded under *Mapp* "is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant."

Miranda differs from *Mapp* in both respects. "Prophylactic" though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards "a fundamental trial right." The privilege embodies "principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle," and reflects "many of our fundamental values and most noble aspirations: . . . our preference for an accusatorial rather than an inquisitorial system of criminal justice"; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Nor does the Fifth Amendment "trial right" protected by *Miranda* serve some value necessarily divorced from the correct ascertainment of guilt. "[A] system of criminal law enforcement which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system relying on independent investigation." By bracing against "the possibility of unreliable statements in every instance of in-custody interrogation," *Miranda* serves to guard against "the use of unreliable statements at trial."

Finally, and most importantly, eliminating review of *Miranda* claims would not significantly benefit the federal courts in their exercise of habeas jurisdiction, or advance the cause of federalism in any substantial way. As one amicus concedes, eliminating habeas review of *Miranda* issues would not prevent a state prisoner from simply converting his barred *Miranda* claim into a due process claim that his conviction rested on an

involuntary confession. Indeed, although counsel could provide us with no empirical basis for projecting the consequence of adopting petitioner's position, it seems reasonable to suppose that virtually all *Miranda* claims would simply be recast in this way.

If that is so, the federal courts would certainly not have heard the last of *Miranda* on collateral review. Under the due process approach, as we have already seen, courts look to the totality of circumstances to determine whether a confession was voluntary. Those potential circumstances include not only the crucial element of police coercion, the length of the interrogation, its location, the defendant's maturity, education, physical condition, and mental health. They also include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation. We could lock the front door against *Miranda*, but not the back.

We thus fail to see how abdicating *Miranda*'s bright-line (or, at least, brighter-line) rules in favor of an exhaustive totality-of-circumstances approach on habeas would do much of anything to lighten the burdens placed on busy federal courts. We likewise fail to see how purporting to eliminate *Miranda* issues from federal habeas would go very far to relieve such tensions as *Miranda* may now raise between the two judicial systems. Relegation of habeas petitioners to straight involuntariness claims would not likely reduce the amount of litigation, and each such claim would in any event present a legal question requiring an independent federal determination on habeas.

But four justices would have extended *Stone* to *Miranda* claims. Justice O'Connor, with whom the chief justice joined, dissented and expressed a very different view of *Miranda*. She wrote:

Today the Court permits the federal courts to overturn on habeas the conviction of a double murderer, not on the basis of an inexorable constitutional or statutory command, but because it believes the result desirable from the standpoint of equity and judicial administration. Because the principles that inform our habeas jurisprudence—finality, federalism, and fairness—counsel decisively against the result the Court reaches, I respectfully dissent from this holding.

Today we face the question whether Stone v. Powell should extend to bar claims on habeas that alleged violations of the prophylactic rule of Miranda v. Arizona (1966). Continuing the tradition of caution in this area, the Court answers that question in the negative. This time I must disagree. In my view, the "prudential concerns," that inform our habeas jurisprudence counsel the exclusion of *Miranda* claims just as strongly as they did the exclusionary rule claims at issue in *Stone* itself.

I continue to believe that these same considerations apply to *Miranda* claims with equal, if not greater, force. Like the suppression of the fruits of an illegal search or seizure, the exclusion of statements obtained in violation of *Miranda* is not constitutionally required. This Court repeatedly has held that *Miranda*'s warning requirement is not a dictate of the Fifth Amendment itself, but a prophylactic rule. Because *Miranda* "sweeps

more broadly than the Fifth Amendment itself," it excludes some confessions even though the Constitution would not. Indeed, "in the individual case, *Miranda*'s preventive medicine [often] provides a remedy even to the defendant who has suffered no identifiable constitutional harm."

Miranda's overbreadth, of course, is not without justification. The exclusion of unwarned statements provides a strong incentive for the police to adopt "procedural safeguards," against the exaction of compelled or involuntary statements. It also promotes institutional respect for constitutional values. But, like the exclusionary rule for illegally seized evidence, *Miranda*'s prophylactic rule does so at a substantial cost. Unlike involuntary or compelled statements—which are of dubious reliability and are therefore inadmissible for any purpose—confessions obtained in violation of *Miranda* are not necessarily untrustworthy. In fact, because voluntary statements are "trustworthy" even when obtained without proper warnings, their suppression actually impairs the pursuit of truth by concealing probative information from the trier of fact.

When the case is on direct review, that damage to the truth-seeking function is deemed an acceptable sacrifice for the deterrence and respect for constitutional values that the *Miranda* rule brings. But once a case is on collateral review, the balance between the costs and benefits shifts; the interests of federalism, finality, and fairness compel *Miranda*'s exclusion from habeas. The benefit of enforcing *Miranda* through habeas is marginal at best. To the extent *Miranda* ensures the exclusion of involuntary statements, that task can be performed more accurately by adjudicating the voluntariness question directly. And, to the extent exclusion of voluntary but unwarned confessions serves a deterrent function, "[t]he awarding of habeas relief years after conviction will often strike like lightning, and it is absurd to think that this added possibility . . . will have any appreciable effect on police training or behavior."

Despite its meager benefits, the relitigation of *Miranda* claims on habeas imposes substantial costs. Just like the application of the exclusionary rule, application of *Miranda*'s prophylactic rule on habeas consumes scarce judicial resources on an issue unrelated to guilt or innocence. No less than the exclusionary rule, it undercuts finality. It creates tension between the state and federal courts. And it upsets the division of responsibilities that underlies our federal system. But most troubling of all, *Miranda*'s application on habeas sometimes precludes the just application of law altogether. The order excluding the statement will often be issued "years after trial, when a new trial may be a practical impossibility." Whether the Court admits it or not, the grim result of applying *Miranda* on habeas will be, time and time again, "the release of an admittedly guilty individual who may pose a continuing threat to society."

Any rule that so demonstrably renders truth and society "the loser," "bear[s] a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness." That burden is heavier still on collateral review. In light of the meager deterrent benefit it brings and the tremendous costs it imposes, in my view application of *Miranda*'s prophylactic rule on habeas "falls short" of justification.

> As the Court emphasizes today, *Miranda*'s prophylactic rule is now 27 years old; the police and the state courts have indeed grown accustomed to it. But it is precisely because the rule is well accepted that there is little further benefit to enforcing it on habeas. We can depend on law enforcement officials to administer warnings in the first instance and the state courts to provide a remedy when law enforcement officers err. None of the Court's asserted justifications for enforcing Miranda's prophylactic rule through habeas — neither reverence for the Fifth Amendment nor the concerns of reliability, efficiency, and federalism — counsel in favor of the Court's chosen course. Indeed, in my view they cut in precisely the opposite direction. The Court may reconsider its decision when presented with empirical data. But I see little reason for such a costly delay. Logic and experience are at our disposal now. And they amply demonstrate that applying *Miranda*'s prophylactic rule on habeas does not increase the amount of justice dispensed; it only increases the frequency with which the admittedly guilty go free. In my view, *Miranda* imposes such grave costs and produces so little benefit on habeas that its continued application is neither tolerable nor justified.

Justice Scalia also wrote a dissent, with which Justice Thomas joined, in which he said:

> In my view, both the Court and Justice O'Connor disregard the most powerful equitable consideration: that Williams has already had full and fair opportunity to litigate this claim. He had the opportunity to raise it in the Michigan trial court; he did so and lost. He had the opportunity to seek review of the trial court's judgment in the Michigan Court of Appeals; he did so and lost. Finally, he had the opportunity to seek discretionary review of that Court of Appeals judgment in both the Michigan Supreme Court and this Court; he did so and review was denied. The question at this stage is whether, given all that, a federal habeas court should now reopen the issue and adjudicate the *Miranda* claim anew. The answer seems to me obvious: it should not. That would be the course followed by a federal habeas court reviewing a federal conviction; it mocks our federal system to accord state convictions less respect.

So, at least for now, the only constitutional claims that cannot be raised on habeas corpus are Fourth Amendment exclusionary rule claims that have had a full and fair opportunity to be litigated in state court.

6. Has There Been a Procedural Default, and If So, Is There Either Cause and Prejudice or an Adequate Showing of Actual Innocence?

Criminal defendants are required to raise their constitutional claims during their trials and direct appeals. The failure to do so is deemed a procedural default. The question is whether such procedural defaults bar a convicted defendant from then raising the issue on habeas corpus.

The law has changed dramatically over the past half century concerning when a defendant may present a matter on habeas corpus that was not litigated at the trial. Under the Warren Court's decisions, a defendant was allowed to raise matters not argued in the state courts unless it could be demonstrated that the defendant deliberately chose to bypass the state court procedures. In other words, there was a strong presumption that procedural defaults would not bar federal habeas corpus review.

In Fay v. Noia, 372 U.S. 391 (1963), the Supreme Court held that an individual convicted in state court may raise on habeas issues that were not presented at trial, unless it can be demonstrated that he or she deliberately chose to bypass the state procedures. In *Fay*, three codefendants were convicted. Two of the defendants appealed and were successful in having their convictions overturned because of the manner in which their confessions were obtained. Noia, the third defendant, then tried to obtain relief in the New York state courts. The New York courts, however, denied Noia's motion to have his conviction overturned because his failure to appeal constituted a procedural default precluding review.

The United States Supreme Court rejected the argument that failure to comply with state procedures bars federal court review on habeas corpus. The Court concluded that "a forfeiture of remedies does not legitimize the unconstitutional conduct by which . . . [a] conviction was procured." In *Fay*, the Court perceived its role and the purpose of habeas corpus as preventing the detention of individuals whose conviction resulted from unconstitutional conduct. The Court said that a habeas petitioner would be foreclosed from raising an issue on the ground that it was not presented at trial only if he or she "deliberately bypassed the orderly procedure of the state courts."

In sharp contrast, the Burger and Rehnquist Courts departed from and ultimately overruled *Fay*. The Court held that a defendant could present matters on habeas corpus that were not raised at the trial only if the defendant could demonstrate either actual innocence or good "cause" for the procedural default, and either "prejudice" from the federal court's refusal to hear the matter or a showing of actual innocence. Under this approach, there is a strong presumption that procedural defaults in state court will preclude habeas corpus litigation.

Wainwright v. Sykes was the key Supreme Court case signaling a departure from Fay v. Noia and a different approach to handling procedural defaults on habeas corpus. In reading Wainwright v. Sykes, it is important to consider how it rests on different assumptions than Fay v. Noia concerning why procedural defaults happen and the fairness of precluding constitutional claims from being raised.

Wainwright v. Sykes

433 U.S. 72 (1977)

Justice Rehnquist delivered the opinion of the Court.

We granted certiorari to consider the availability of federal habeas corpus to review a state convict's claim that testimony was admitted at his trial in violation of his rights under Miranda v. Arizona (1966), a claim which the Florida courts have previously refused to consider on the merits because of noncompliance with a state contemporaneous-objection rule.

Respondent Sykes was convicted of third-degree murder after a jury trial in the Circuit Court of DeSoto County. He testified at trial that on the evening of January 8, 1972, he told his wife to summon the police because he had just shot Willie Gilbert. Other evidence indicated that when the police arrived at respondent's trailer home, they found Gilbert dead of a shotgun wound, lying a few feet from the front porch. Shortly after their arrival, respondent came from across the road and volunteered that he had shot Gilbert, and a few minutes later respondent's wife approached the police and told them the same thing. Sykes was immediately arrested and taken to the police station.

Once there, it is conceded that he was read his *Miranda* rights, and that he declined to seek the aid of counsel and indicated a desire to talk. He then made a statement, which was admitted into evidence at trial through the testimony of the two officers who heard it, to the effect that he had shot Gilbert from the front porch of his trailer home. There were several references during the trial to respondent's consumption of alcohol during the preceding day and to his apparent state of intoxication, facts which were acknowledged by the officers who arrived at the scene. At no time during the trial, however, was the admissibility of any of respondent's statements challenged by his counsel on the ground that respondent had not understood the *Miranda* warnings. Nor did the trial judge question their admissibility on his own motion or hold a factfinding hearing bearing on that issue.

Respondent appealed his conviction, but apparently did not challenge the admissibility of the inculpatory statements. He later filed in the trial court a motion to vacate the conviction and, in the State District Court of Appeals and Supreme Court, petitions for habeas corpus. These filings, apparently for the first time, challenged the statements made to police on grounds of involuntariness. In all of these efforts respondent was unsuccessful.

The simple legal question before the Court calls for a construction of the language of 28 U.S.C. §2254(a), which provides that the federal courts shall entertain an application for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." But, to put it mildly, we do not write on a clean slate in construing this statutory provision.

As to the role of adequate and independent state grounds, it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts. The application of this principle in the context of a federal habeas proceeding has therefore excluded from consideration any questions of state substantive law, and thus effectively barred federal habeas review where questions of that sort are either the only ones raised by a petitioner or are in themselves dispositive of his case. The area of controversy which has developed has concerned the reviewability of federal claims which the state court has declined to pass on because not presented in the manner prescribed by its procedural rules.

We conclude that Florida procedure did, consistently with the United States Constitution, require that respondents' confession be challenged at trial or not at all, and thus his failure to timely object to its admission amounted to an independent and adequate state procedural ground which would have prevented direct review here. We thus come to the crux of this case. Shall the rule of Francis v.

Henderson, supra, barring federal habeas review absent a showing of "cause" and "prejudice" attendant to a state procedural waiver, be applied to a waived objection to the admission of a confession at trial? We answer that question in the affirmative.

[S]ince Brown v. Allen (1953), it has been the rule that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings. This rule of Brown v. Allen is in no way changed by our holding today. Rather, we deal only with contentions of federal law which were not resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure. We leave open for resolution in future decisions the precise definition of the "cause"-and-"prejudice" standard, and note here only that it is narrower than the standard set forth in dicta in Fay v. Noia, which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention. It is the sweeping language of Fay v. Noia, going far beyond the facts of the case eliciting it, which we today reject.

The reasons for our rejection of it are several. The contemporaneous-objection rule itself is by no means peculiar to Florida, and deserves greater respect than *Fay* gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right. A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding. It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question.

A contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation. Without the evidence claimed to be vulnerable on federal constitutional grounds, the jury may acquit the defendant, and that will be the end of the case; or it may nonetheless convict the defendant, and he will have one less federal constitutional claim to assert in his federal habeas petition. Subtler considerations as well militate in favor of honoring a state contemporaneous-objection rule. An objection on the spot may force the prosecution to take a hard look at its whole card, and even if the prosecutor thinks that the state trial judge will admit the evidence he must contemplate the possibility of reversal by the state appellate courts or the ultimate issuance of a federal writ of habeas corpus based on the impropriety of the state court's rejection of the federal constitutional claim.

We think that the rule of Fay v. Noia, broadly stated, may encourage "sandbagging" on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off. The refusal of federal habeas courts to honor contemporaneous-objection rules may also make state courts themselves less stringent in their enforcement. Under the rule of Fay v. Noia, state appellate courts know that a federal constitutional issue raised for the first time in the proceeding before them may well be decided in any event by a federal

habeas tribunal. Thus, their choice is between addressing the issue notwithstanding the petitioner's failure to timely object, or else face the prospect that the federal habeas court will decide the question without the benefit of their views.

The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.

We believe the adoption of the [cause and prejudice] rule in this situation will have the salutary effect of making the state trial on the merits the "main event," so to speak, rather than a "tryout on the road" for what will later be the determinative federal habeas hearing. There is nothing in the Constitution or in the language of §2254 which requires that the state trial on the issue of guilt or innocence be devoted largely to the testimony of fact witnesses directed to the elements of the state crime, while only later will there occur in a federal habeas hearing a full airing of the federal constitutional claims which were not raised in the state proceedings. If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection.

The "cause"-and-"prejudice" exception will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice. Whatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here. Respondent has advanced no explanation whatever for his failure to object at trial, and, as the proceeding unfolded, the trial judge is certainly not to be faulted for failing to question the admission of the confession himself. The other evidence of guilt presented at trial, moreover, was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement.

Justice Brennan, with whom Justice Marshall joins, dissenting.

Over the course of the last decade, the deliberate-bypass standard announced in Fay v. Noia (1963), has played a central role in efforts by the federal judiciary to accommodate the constitutional rights of the individual with the States' interests in the integrity of their judicial procedural regimes. The Court today decides that this standard should no longer apply with respect to procedural defaults occurring during the trial of a criminal defendant. In its place, the Court adopts the two-part "cause"-and-"prejudice" test. [T]oday's decision makes no effort to provide

concrete guidance as to the content of those terms. More particularly, left unanswered is the thorny question that must be recognized to be central to a realistic rationalization of this area of law: How should the federal habeas court treat a procedural default in a state court that is attributable purely and simply to the error or negligence of a defendant's trial counsel? Because this key issue remains unresolved, I shall attempt in this opinion a re-examination of the policies that should inform and in *Fay* did inform the selection of the standard governing the availability of federal habeas corpus jurisdiction in the face of an intervening procedural default in the state court.

I

I begin with the threshold question: What is the meaning and import of a procedural default? If it could be assumed that a procedural default more often than not is the product of a defendant's conscious refusal to abide by the duly constituted, legitimate processes of the state courts, then I might agree that a regime of collateral review weighted in favor of a State's procedural rules would be warranted. *Fay*, however, recognized that such rarely is the case; and therein lies *Fay*'s basic unwillingness to embrace a view of habeas jurisdiction that results in "an airtight system of (procedural) forfeitures."

This, of course, is not to deny that there are times when the failure to heed a state procedural requirement stems from an intentional decision to avoid the presentation of constitutional claims to the state forum. *Fay* was not insensitive to this possibility. Indeed, the very purpose of its bypass test is to detect and enforce such intentional procedural forfeitures of outstanding constitutionally based claims. *Fay* does so through application of the longstanding rule used to test whether action or inaction on the part of a criminal defendant should be construed as a decision to surrender the assertion of rights secured by the Constitution: To be an effective waiver, there must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst (1938). Incorporating this standard, *Fay* recognized that if one "understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief. . . ." For this reason, the Court's assertion that it "think[s]" that the *Fay* rule encourages intentional "sandbagging" on the part of the defense lawyers is without basis; certainly the Court points to no cases or commentary arising during the past 15 years of actual use of the *Fay* test to support this criticism. Rather, a consistent reading of case law demonstrates that the bypass formula has provided a workable vehicle for protecting the integrity of state rules in those instances when such protection would be both meaningful and just.

But having created the bypass exception to the availability of collateral review, *Fay* recognized that intentional, tactical forfeitures are not the norm upon which to build a rational system of federal habeas jurisdiction. In the ordinary case, litigants simply have no incentive to slight the state tribunal, since constitutional adjudication on the state and federal levels are not mutually exclusive. Brown v. Allen (1953). Under the regime of collateral review recognized since the days of Brown

v. Allen, and enforced by the *Fay* bypass test, no rational lawyer would risk the "sandbagging" feared by the Court. If a constitutional challenge is not properly raised on the state level, the explanation generally will be found elsewhere than in an intentional tactical decision.

In brief then, any realistic system of federal habeas corpus jurisdiction must be premised on the reality that the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel. *Fay*'s answer thus is plain: the bypass test simply refuses to credit what is essentially a lawyer's mistake as a forfeiture of constitutional rights. I persist in the belief that the interests of Sykes and the State of Florida are best rationalized by adherence to this test, and by declining to react to inadvertent defaults through the creation of an "airtight system of forfeitures."

II

What are the interests that Sykes can assert in preserving the availability of federal collateral relief in the face of his inadvertent state procedural default? Two are paramount.

As is true with any federal habeas applicant, Sykes seeks access to the federal court for the determination of the validity of his federal constitutional claim. Since at least Brown v. Allen, it has been recognized that the "fair effect [of] the habeas corpus jurisdiction as enacted by Congress" entitles a state prisoner to such federal review. While some of my Brethen may feel uncomfortable with this congressional choice of policy, the Legislative Branch nonetheless remains entirely free to determine that the constitutional rights of an individual subject to state custody are best preserved by interposing the federal courts between the states and the people, as guardians of the people's federal rights.

With respect to federal habeas corpus jurisdiction, Congress explicitly chose to effectuate the federal court's primary responsibility for preserving federal rights and privileges by authorizing the litigation of constitutional claims and defenses in a district court after the State vindicates its own interest through trial of the substantive criminal offense in the state courts. This, of course, was not the only course that Congress might have followed: As an alternative, it might well have decided entirely to circumvent all state procedure through the expansion of existing federal removal statutes such as 28 U.S.C. §§1442(a)(1) and 1443, thereby authorizing the pretrial transfer of all state criminal cases to the federal courts whenever federal defenses or claims are in issue. But liberal post-trial federal review is the redress that Congress ultimately chose to allow and the consequences of a state procedural default should be evaluated in conformance with this policy choice. Certainly, we can all agree that once a state court has assumed jurisdiction of a criminal case, the integrity of its own process is a matter of legitimate concern. The *Fay* bypass test, by seeking to discover intentional abuses of the rules of the state forum, is, I believe, compatible with this state institutional interest. But whether *Fay* was correct in penalizing a litigant solely for his intentional forfeitures properly must be read in light of Congress' desired norm of widened post-trial access to the federal courts. If the standard adopted today is later construed to require that the simple mistakes of attorneys are to be treated as binding forfeitures, it would serve to subordinate the fundamental rights contained in our constitutional charter to

inadvertent defaults of rules promulgated by state agencies, and would essentially leave it to the States, through the enactment of procedure and the certification of the competence of local attorneys, to determine whether a habeas applicant will be permitted the access to the federal forum that is guaranteed him by Congress.

Thus, I remain concerned that undue deference to local procedure can only serve to undermine the ready access to a federal court to which a state defendant otherwise is entitled. But federal review is not the full measure of Sykes' interest, for there is another of even greater immediacy: assuring that his constitutional claims can be addressed to some court. For the obvious consequence of barring Sykes from the federal courthouse is to insulate Florida's alleged constitutional violation from any and all judicial review because of a lawyer's mistake. From the standpoint of the habeas petitioner, it is a harsh rule indeed that denies him "any review at all where the state has granted none," particularly when he would have enjoyed both state and federal consideration had his attorney not erred.

In sum, I believe that *Fay*'s commitment to enforcing intentional but not inadvertent procedural defaults offers a realistic measure of protection for the habeas corpus petitioner seeking federal review of federal claims that were not litigated before the State. The threatened creation of a more "airtight system of forfeitures" would effectively deprive habeas petitioners of the opportunity for litigating their constitutional claims before any forum and would disparage the paramount importance of constitutional rights in our system of government. Such a restriction of habeas corpus jurisdiction should be countenanced, I submit, only if it fairly can be concluded that *Fay*'s focus on knowing and voluntary forfeitures unduly interferes with the legitimate interests of state courts or institutions. The majority offers no suggestion that actual experience has shown that *Fay*'s bypass test can be criticized on this score.

III

A regime of federal habeas corpus jurisdiction that permits the reopening of state procedural defaults does not invalidate any state procedural rule as such; Florida's courts remain entirely free to enforce their own rules as they choose, and to deny any and all state rights and remedies to a defendant who fails to comply with applicable state procedure. The relevant inquiry is whether more is required specifically, whether the fulfillment of important interests of the State necessitates that federal courts be called upon to impose additional sanctions for inadvertent noncompliance with state procedural requirements such as the contemporaneous-objection rule involved here.

Florida, of course, can point to a variety of legitimate interests in seeking allegiance to its reasonable procedural requirements, the contemporaneous-objection rule included. The question remains, however, whether any of these policies or interests are efficiently and fairly served by enforcing both intentional and inadvertent defaults pursuant to the identical stringent standard. I remain convinced that when one pierces the surface justifications for a harsher rule posited by the Court, no standard stricter than *Fay*'s deliberate-bypass test is realistically defensible.

Punishing a lawyer's unintentional errors by closing the federal courthouse door to his client is both a senseless and misdirected method of deterring the slighting of state rules. It is senseless because unplanned and unintentional action

of any kind generally is not subject to deterrence; and, to the extent that it is hoped that a threatened sanction addressed to the defense will induce greater care and caution on the part of trial lawyers, thereby forestalling negligent conduct or error, the potential loss of all valuable state remedies would be sufficient to this end. And it is a misdirected sanction because even if the penalization of incompetence or carelessness will encourage more thorough legal training and trial preparation, the habeas applicant, as opposed to his lawyer, hardly is the proper recipient of such a penalty. Especially with fundamental constitutional rights at stake, no fictional relationship of principal-agent or the like can justify holding the criminal defendant accountable for the naked errors of his attorney. This is especially true when so many indigent defendants are without any realistic choice in selecting who ultimately represents them at trial. Indeed, if responsibility for error must be apportioned between the parties, it is the State, through its attorney's admissions and certification policies, that is more fairly held to blame for the fact that practicing lawyers too often are ill-prepared or ill-equipped to act carefully and knowledgeably when faced with decisions governed by state procedural requirements.

Hence, while I can well agree that the proper functioning of our system of criminal justice, both federal and state, necessarily places heavy reliance on the professionalism and judgment of trial attorneys, I cannot accept a system that ascribes the absolute forfeiture of an individual's constitutional claims to situations where his lawyer manifestly exercises no professional judgment at all where carelessness, mistake, or ignorance is the explanation for a procedural default. Of course, it is regrettable that certain errors that might have been cured earlier had trial counsel acted expeditiously must be corrected collaterally and belatedly. I can understand the Court's wistfully wishing for the day when the trial was the sole, binding and final "event" of the adversarial process although I hesitate to agree that in the eyes of the criminal defendant it has ever ceased being the "main" one. But it should be plain that in the real world, the interest in finality is repeatedly compromised in numerous ways that arise with far greater frequency than do procedural defaults.

In short, I believe that the demands of our criminal justice system warrant visiting the mistakes of a trial attorney on the head of a habeas corpus applicant only when we are convinced that the lawyer actually exercised his expertise and judgment in his client's service, and with his client's knowing and intelligent participation where possible. This, of course, is the precise system of habeas review established by Fay v. Noia.

Although *Wainwright* and its progeny implicitly overruled *Fay*, it was not until Coleman v. Thompson, 501 U.S. 722 (1991), that *Fay* was explicitly overturned and the Court held that all procedural defaults are to be evaluated under the cause and prejudice test. Justice O'Connor, writing for the majority, declared:

> We now make it explicit: 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 claim 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 the failure to consider the claim will result in a fundamental miscarriage of justice.

In *Coleman*, a defendant in a capital case was denied appeal to the state court of appeals of his state habeas petition because he filed the notice of appeals three days late. The issue was whether the procedural error precluded federal habeas review. The Supreme Court explained that Wainwright v. Sykes effectively had overruled Fay v. Noia and that the petitioner's procedural default would preclude federal habeas review unless he could show cause and prejudice or a likelihood of actual innocence. In May 1992, Coleman was executed in Virginia despite some evidence that he was actually innocent.[42] No federal court ever heard Coleman's claim.

While the *Wainwright* decision clearly adopted the "cause" and "prejudice" test for habeas corpus review, the Court explicitly avoided defining these two terms. Subsequent cases have given content to this test. Several decisions have focused on what is sufficient "cause" to excuse a state court procedural default and permit a habeas corpus petitioner to raise matters not presented in the state courts.

Engle v. Isaac, 456 U.S. 107 (1982), indicated how difficult it is to show "cause." In *Engle*, a defendant used habeas corpus to challenge the constitutionality of the jury instructions used in his trial. In a case decided subsequent to his conviction, the Ohio Supreme Court held that the type of jury instructions given violated Ohio law and that its ruling applied retroactively to all cases in which they had been used. Nonetheless, the Supreme Court held that the issue could not be raised on habeas corpus because the defense counsel did not object at trial, even though at that time there was no reason to think that the instructions were unconstitutional. Justice O'Connor, writing for the majority, concluded, "[T]he futility of presenting an objection to the state courts cannot alone constitute cause for failure to object at trial. . . . Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid."

The Court in *Engle* made it clear that it took a very different view of habeas corpus than had the Warren Court. Justice O'Connor expressed great reservations about the availability of habeas corpus because it imposes "significant costs" on society, including "undermin[ing] the usual principles of finality" and "cost[ing] society the right to punish admitted offenders." According to the Court, these cost considerations outweigh the value of providing relief to an individual who was convicted and incarcerated as a result of admittedly unconstitutional jury instructions.

Two years after *Engle*, in Reed v. Ross, 468 U.S. 1 (1984), the Supreme Court recognized that under limited circumstances, "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel," a defendant may present matters on habeas that were not raised at trial. *Reed* was a 5-4 decision, with four of the justices who were in the majority in *Engle*—Justices Burger, Blackmun, O'Connor, and Rehnquist—dissenting. Like *Engle*, *Reed* involved a challenge to jury instructions about the burden of proof for a claim of self-defense. The majority distinguished *Reed* from *Engle* based on the time the trial occurred. The trial took place in *Engle* after the Supreme Court's 1970 decision in In re Winship, 397 U.S. 358 (1969), which required the state to prove every element of a crime beyond a reasonable doubt. Thus, the *Engle* Court concluded that in light of *Winship* and subsequent lower

42. *See* Jill Smolowe, *Must This Man Die?*, Time, May 18, 1992, at 40.

court cases interpreting it, the defendant's attorney should have thought to object to the jury instructions. But in *Ross*, the trial occurred in 1969, before *Winship*, and the Court decided that it would be inappropriate to require the defense attorney to anticipate a major Supreme Court decision.

In allowing the defendant to challenge the jury instruction on habeas corpus, the Supreme Court in *Reed* identified circumstances in which habeas petitioners can raise issues based on cases decided after their trial but applied retroactively. The Court's criteria indicated the breadth of the *Engle* holding and the narrowness of the *Reed* exception. Justice Brennan, writing for a plurality, said that a defendant could present claims that became apparent subsequent to the trial when there was a Supreme Court decision that explicitly overrules precedent, or when the decision overturns "a longstanding and widespread practice to which the Court has not spoken," or when the decision disapproves "a practice this Court arguably has sanctioned in prior cases." In short, even in distinguishing *Engle*, the *Reed* Court affirmed its conclusion that mere novelty of a claim is not sufficient cause for a defense counsel's failure to present it at trial. As Professor Resnik notes, "[a]lthough the *Ross* plurality found a crevice in the seeming impregnable 'cause' requirement of *Isaac*, the aperture is narrow. . . . Under *Ross*, the hurdle of 'cause' only can be surmounted in rare instances."

In a subsequent decision concerning the meaning of "cause," Lee v. Kemna, 534 U.S. 362 (2002), the Supreme Court found that there was a sufficient basis for allowing a federal habeas petition to be heard despite a state procedural default. At a murder trial in Missouri state court, a defendant asked for an overnight continuance when key witnesses were not present in the courtroom. The trial judge denied the request for a continuance, explaining that he had a daughter in the hospital and another trial scheduled to begin the next day. After the defendant was convicted, his appeal for a violation of due process was denied on the grounds that he did not follow the Missouri law requiring that requests for continuances be in writing and supported by affidavits. The federal district court denied habeas corpus based on the failure to comply with state procedures, and the United States Court of Appeals for the Eighth Circuit affirmed.

The Supreme Court reversed. Justice Ginsburg, writing for the Court, said that "[t]here are . . . exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate." Ginsburg explained that a written motion for a continuance would not have made any difference; it would not have overcome the reasons why the judge denied the continuance. Also, the Court said that nothing in Missouri law required compliance with the procedural rules in a circumstance where there is an unexpected disappearance of a key witness. Finally, the Court emphasized that Lee had substantially complied with the state rules through his motion for a continuance and his explanation of the reasons for the request. Lee v. Kemna is important because it clearly holds that in some circumstances the failure to comply with state procedures will not preclude a subsequent habeas corpus petition.

In a subsequent decision concerning procedural default, the Court found that abandonment by a defense lawyer, as opposed to negligence, is sufficient to excuse a procedural default.

Maples v. Thomas

565 U.S. 266 (2012)

Justice GINSBURG delivered the opinion of the Court.

Cory R. Maples is an Alabama capital prisoner sentenced to death in 1997 for the murder of two individuals. At trial, he was represented by two appointed lawyers, minimally paid and with scant experience in capital cases. Maples sought postconviction relief in state court, alleging ineffective assistance of counsel and several other trial infirmities. His petition, filed in August 2001, was written by two New York attorneys serving *pro bono*, both associated with the same New York-based large law firm. An Alabama attorney, designated as local counsel, moved the admission of the out-of-state counsel *pro hac vice*. As understood by New York counsel, local counsel would facilitate their appearance, but would undertake no substantive involvement in the case.

In the summer of 2002, while Maples' postconviction petition remained pending in the Alabama trial court, his New York attorneys left the law firm; their new employment disabled them from continuing to represent Maples. They did not inform Maples of their departure and consequent inability to serve as his counsel. Nor did they seek the Alabama trial court's leave to withdraw. Neither they nor anyone else moved for the substitution of counsel able to handle Maples' case.

In May 2003, the Alabama trial court denied Maples' petition. Notices of the court's order were posted to the New York attorneys at the address of the law firm with which they had been associated. Those postings were returned, unopened, to the trial court clerk, who attempted no further mailing. With no attorney of record in fact acting on Maples' behalf, the time to appeal ran out.

Thereafter, Maples petitioned for a writ of habeas corpus in federal court. The District Court and, in turn, the Eleventh Circuit, rejected his petition, pointing to the procedural default in state court, *i.e.*, Maples' failure timely to appeal the Alabama trial court's order denying him postconviction relief. Maples, it is uncontested, was blameless for the default.

The sole question this Court has taken up for review is whether, on the extraordinary facts of Maples' case, there is "cause" to excuse the default. Maples maintains that there is, for the lawyers he believed to be vigilantly representing him had abandoned the case without leave of court, without informing Maples they could no longer represent him, and without securing any recorded substitution of counsel. We agree. Abandoned by counsel, Maples was left unrepresented at a critical time for his state postconviction petition, and he lacked a clue of any need to protect himself *pro se*. In these circumstances, no just system would lay the default at Maples' death-cell door. Satisfied that the requisite cause has been shown, we reverse the Eleventh Circuit's judgment.

I

Alabama sets low eligibility requirements for lawyers appointed to represent indigent capital defendants at trial. Appointed counsel need only be a member of the Alabama bar and have "five years' prior experience in the active practice

of criminal law." Experience with capital cases is not required. Nor does the State provide, or require appointed counsel to gain, any capital-case-specific professional education or training.

Appointed counsel in death penalty cases are also undercompensated. Until 1999, the State paid appointed capital defense attorneys just "$40.00 per hour for time expended in court and $20.00 per hour for time reasonably expended out of court in the preparation of [the defendant's] case." Although death penalty litigation is plainly time intensive, the State capped at $1,000 fees recoverable by capital defense attorneys for out-of-court work. Even today, court-appointed attorneys receive only $70 per hour.

Nearly alone among the States, Alabama does not guarantee representation to indigent capital defendants in postconviction proceedings. The State has elected, instead, "to rely on the efforts of typically well-funded [out-of-state] volunteers." Thus, as of 2006, 86% of the attorneys representing Alabama's death row inmates in state collateral review proceedings "either worked for the Equal Justice Initiative (headed by NYU Law professor Bryan Stevenson), out-of-state public interest groups like the Innocence Project, or an out-of-state mega-firm." On occasion, some prisoners sentenced to death receive no postconviction representation at all.

This system was in place when, in 1997, Alabama charged Maples with two counts of capital murder; the victims, Stacy Alan Terry and Barry Dewayne Robinson II, were Maples' friends who, on the night of the murders, had been out on the town with him. Maples pleaded not guilty, and his case proceeded to trial, where he was represented by two court-appointed Alabama attorneys. Only one of them had earlier served in a capital case. Neither counsel had previously tried the penalty phase of a capital case. Compensation for each lawyer was capped at $1,000 for time spent out-of-court preparing Maples' case, and at $40 per hour for in-court services.

Finding Maples guilty on both counts, the jury recommended that he be sentenced to death. The vote was 10 to 2, the minimum number Alabama requires for a death recommendation. Accepting the jury's recommendation, the trial court sentenced Maples to death. On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed the convictions and sentence.

Two out-of-state volunteers represented Maples in postconviction proceedings: Jaasi Munanka and Clara Ingen-Housz, both associates at the New York offices of the Sullivan & Cromwell law firm. At the time, Alabama required out-of-state attorneys to associate local counsel when seeking admission to practice *pro hac vice* before an Alabama court, regardless of the nature of the proceeding. The Alabama Rule further prescribed that the local attorney's name "appear on all notices, orders, pleadings, and other documents filed in the cause," and that local counsel "accept joint and several responsibility with the foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters [relating to the case]."

Munanka and Ingen-Housz associated Huntsville, Alabama attorney John Butler as local counsel. Notwithstanding his obligations under Alabama law, Butler informed Munanka and Ingen-Housz, "at the outset," that he would serve as local counsel only for the purpose of allowing the two New York attorneys to appear

pro hac vice on behalf of Maples. Given his lack of "resources, available time [and] experience," Butler told the Sullivan & Cromwell lawyers, he could not "deal with substantive issues in the case." The Sullivan & Cromwell attorneys accepted Butler's conditions. This arrangement between out-of-state and local attorneys, it appears, was hardly atypical.

With the aid of his *pro bono* counsel, Maples filed a petition for postconviction relief under Alabama Rule of Criminal Procedure 32. Among other claims, Maples asserted that his court-appointed attorneys provided constitutionally ineffective assistance during both guilt and penalty phases of his capital trial. He alleged, in this regard, that his inexperienced and underfunded attorneys failed to develop and raise an obvious intoxication defense, did not object to several egregious instances of prosecutorial misconduct, and woefully underprepared for the penalty phase of his trial.

[I]n the summer of 2002, both Munanka and Ingen-Housz left Sullivan & Cromwell. Munanka gained a clerkship with a federal judge; Ingen-Housz accepted a position with the European Commission in Belgium. Neither attorney told Maples of their departure from Sullivan & Cromwell or of their resulting inability to continue to represent him. In disregard of Alabama law, neither attorney sought the trial court's leave to withdraw. Compounding Munanka's and Ingen-Housz's inaction, no other Sullivan & Cromwell lawyer entered an appearance on Maples' behalf, moved to substitute counsel, or otherwise notified the court of any change in Maples' representation.

Another nine months passed. During this time period, no Sullivan & Cromwell attorneys assigned to Maples' case sought admission to the Alabama bar, entered appearances on Maples' behalf, or otherwise advised the Alabama court that Munanka and Ingen-Housz were no longer Maples' attorneys. Thus, Munanka and Ingen-Housz (along with Butler) remained Maples' listed, and only, "attorneys of record."

There things stood when, in May 2003, the trial court, without holding a hearing, entered an order denying Maples' Rule 32 petition. The clerk of the Alabama trial court mailed copies of the order to Maples' three attorneys of record. He sent Munanka's and Ingen-Housz's copies to Sullivan & Cromwell's New York address, which the pair had provided upon entering their appearances.

When those copies arrived at Sullivan & Cromwell, Munanka and Ingen-Housz had long since departed. The notices, however, were not forwarded to another Sullivan & Cromwell attorney. Instead, a mailroom employee sent the unopened envelopes back to the court. "Returned to Sender—Attempted, Unknown" was stamped on the envelope addressed to Munanka. A similar stamp appeared on the envelope addressed to Ingen-Housz, along with the handwritten notation "Return to Sender—Left Firm."

Upon receiving back the unopened envelopes he had mailed to Munanka and Ingen-Housz, the Alabama court clerk took no further action. In particular, the clerk did not contact Munanka or Ingen-Housz at the personal telephone numbers or home addresses they had provided in their *pro hac vice* applications. Nor did the clerk alert Sullivan & Cromwell or Butler. Butler received his copy of the order, but did not act on it. He assumed that Munanka and Ingen-Housz, who had been "CC'd" on the order, would take care of filing an appeal.

Meanwhile, the clock ticked on Maples' appeal. Under Alabama's Rules of Appellate Procedure, Maples had 42 days to file a notice of appeal from the trial court's May 22, 2003 order denying Maples' petition for postconviction relief. No appeal notice was filed, and the time allowed for filing expired on July 7, 2003.

A little over a month later, on August 13, 2003, Alabama Assistant Attorney General Jon Hayden, the attorney representing the State in Maples' collateral review proceedings, sent a letter directly to Maples. Hayden's letter informed Maples of the missed deadline for initiating an appeal within the State's system, and notified him that four weeks remained during which he could file a federal habeas petition. Hayden mailed the letter to Maples only, using his prison address. No copy was sent to Maples' attorneys of record, or to anyone else acting on Maples' behalf.

Upon receiving the State's letter, Maples immediately contacted his mother. She telephoned Sullivan & Cromwell to inquire about her son's case. *Ibid.* Prompted by her call, Sullivan & Cromwell attorneys Marc De Leeuw, Felice Duffy, and Kathy Brewer submitted a motion, through Butler, asking the trial court to reissue its order denying Maples' Rule 32 petition, thereby restarting the 42-day appeal period.

The trial court denied the motion. Maples next petitioned the Alabama Court of Criminal Appeals for a writ of mandamus, granting him leave to file an out-of-time appeal. Rejecting Maples' plea, the Court of Criminal Appeals determined that, although the clerk had "assumed a duty to notify the parties of the resolution of Maples's Rule 32 petition," the clerk had satisfied that obligation by sending notices to the attorneys of record at the addresses those attorneys provided.

Having exhausted his state postconviction remedies, Maples sought federal habeas corpus relief. Addressing the ineffective-assistance-of-trial-counsel claims Maples stated in his federal petition, the State urged that Maples had forever forfeited those claims. The District Court determined that Maples had defaulted his ineffective-assistance claims, and that he had not shown "cause" sufficient to overcome the default. A divided panel of the Eleventh Circuit affirmed.

II

A

As a rule, a state prisoner's habeas claims may not be entertained by a federal court "when (1) 'a state court [has] declined to address [those] claims because the prisoner had failed to meet a state procedural requirement,' and (2) 'the state judgment rests on independent and adequate state procedural grounds.' " The bar to federal review may be lifted, however, if "the prisoner can demonstrate cause for the [procedural] default [in state court] and actual prejudice as a result of the alleged violation of federal law."

Given the single issue on which we granted review, we will assume, for purposes of this decision, that the Alabama Court of Criminal Appeals' refusal to consider Maples' ineffective-assistance claims rested on an independent and adequate state procedural ground: namely, Maples' failure to satisfy Alabama's Rule requiring a notice of appeal to be filed within 42 days from the trial court's final order. Accordingly, we confine our consideration to the question whether Maples has shown cause to excuse the missed notice of appeal deadline.

Cause for a procedural default exists where "something *external* to the petitioner, something that cannot fairly be attributed to him[,] . . . 'impeded [his] efforts to comply with the State's procedural rule.' " Negligence on the part of a prisoner's postconviction attorney does not qualify as "cause." That is so because the attorney is the prisoner's agent, and under "well-settled principles of agency law," the principal bears the risk of negligent conduct on the part of his agent. Thus, when a petitioner's postconviction attorney misses a filing deadline, the petitioner is bound by the oversight and cannot rely on it to establish cause. We do not disturb that general rule.

A markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default. Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative. His acts or omissions therefore "cannot fairly be attributed to [the client]."

We agree that, under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him. We therefore inquire whether Maples has shown that his attorneys of record abandoned him, thereby supplying the "extraordinary circumstances beyond his control," necessary to lift the state procedural bar to his federal petition.

B

From the time he filed his initial Rule 32 petition until well after time ran out for appealing the trial court's denial of that petition, Maples had only three attorneys of record: Munanka, Ingen-Housz, and Butler. Unknown to Maples, not one of these lawyers was in fact serving as his attorney during the 42 days permitted for an appeal from the trial court's order.

The State contends that Sullivan & Cromwell represented Maples throughout his state postconviction proceedings. Accordingly, the State urges, Maples cannot establish abandonment by counsel continuing through the six weeks allowed for noticing an appeal from the trial court's denial of his Rule 32 petition. We disagree. It is undisputed that Munanka and Ingen-Housz severed their agency relationship with Maples long before the default occurred. Both Munanka and Ingen-Housz left Sullivan & Cromwell's employ in the summer of 2002, at least nine months before the Alabama trial court entered its order denying Rule 32 relief. Their new employment—Munanka as a law clerk for a federal judge, Ingen-Housz as an employee of the European Commission in Belgium—disabled them from continuing to represent Maples. Hornbook agency law establishes that the attorneys' departure from Sullivan & Cromwell and their commencement of employment that prevented them from representing Maples ended their agency relationship with him.

Furthermore, the two attorneys did not observe Alabama's Rule requiring them to seek the trial court's permission to withdraw. By failing to seek permission to withdraw, Munanka and Ingen-Housz allowed the court's records to convey that they represented Maples. As listed attorneys of record, they, not Maples, would be the addressees of court orders Alabama law requires the clerk to furnish.

Maples' only other attorney of record, local counsel Butler, also left him abandoned. Indeed, Butler did not even begin to represent Maples. Butler informed

Munanka and Ingen-Housz that he would serve as local counsel only for the purpose of enabling the two out-of-state attorneys to appear *pro hac vice*. Lacking the necessary "resources, available time [and] experience," Butler told the two Sullivan & Cromwell lawyers, he would not "deal with substantive issues in the case." That the minimal participation he undertook was inconsistent with Alabama law, underscores the absurdity of holding Maples barred because Butler signed on as local counsel.

In sum, the record admits of only one reading: At no time before the missed deadline was Butler serving as Maples' agent "in any meaningful sense of that word."

Not only was Maples left without any functioning attorney of record, the very listing of Munanka, Ingen-Housz, and Butler as his representatives meant that he had no right personally to receive notice. He in fact received none or any other warning that he had better fend for himself. Had counsel of record or the State's attorney informed Maples of his plight before the time to appeal ran out, he could have filed a notice of appeal himself or enlisted the aid of new volunteer attorneys. Given no reason to suspect that he lacked counsel able and willing to represent him, Maples surely was blocked from complying with the State's procedural rule.

C

"The cause and prejudice requirement," we have said, "shows due regard for States' finality and comity interests while ensuring that 'fundamental fairness [remains] the central concern of the writ of habeas corpus.' " In the unusual circumstances of this case, principles of agency law and fundamental fairness point to the same conclusion: There was indeed cause to excuse Maples' procedural default. Through no fault of his own, Maples lacked the assistance of any authorized attorney during the 42 days Alabama allows for noticing an appeal from a trial court's denial of postconviction relief. As just observed, he had no reason to suspect that, in reality, he had been reduced to *pro se* status. Maples was disarmed by extraordinary circumstances quite beyond his control. He has shown ample cause, we hold, to excuse the procedural default into which he was trapped when counsel of record abandoned him without a word of warning.

Justice Scalia, with whom Justice Thomas joins, dissenting.

Our doctrine of procedural default reflects, and furthers, the principle that errors in state criminal trials should be remedied in state court. As we have long recognized, federal habeas review for state prisoners imposes significant costs on the States, undermining not only their practical interest in the finality of their criminal judgments, but also the primacy of their courts in adjudicating the constitutional rights of defendants prosecuted under state law. We have further recognized that "[t]hese costs are particularly high . . . when a state prisoner, through a procedural default, prevents adjudication of his constitutional claims in state court." For that reason, and because permitting federal-court review of defaulted claims would "undercu[t] the State's ability to enforce its procedural rules," we have held that when a state court has relied on an adequate and independent state procedural ground in denying a prisoner's claims, the prisoner ordinarily may not obtain federal habeas relief.

To be sure, the prohibition on federal-court review of defaulted claims is not absolute. A habeas petitioner's default in state court will not bar federal habeas review if "the petitioner demonstrates cause and actual prejudice,"—"cause" constituting "something *external* to the petitioner, something that cannot fairly be attributed to him," that impeded compliance with the State's procedural rule. As a general matter, an attorney's mistakes (or omissions) do not meet the standard "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.' "

In light of the principles just set out, the Court is correct to conclude that a habeas petitioner's procedural default may be excused when it is attributable to abandonment by his attorney. I likewise agree with the Court's conclusion that Maples' two out-of-state attorneys of record, Jaasi Munanka and Clara Ingen-Housz, had abandoned Maples by the time the Alabama trial court entered its order denying his petition for postconviction relief.

It is an unjustified leap, however, to conclude that Maples was left unrepresented during the relevant window between the Alabama trial court's dismissal of his postconviction petition and expiration of the 42-day period for filing a notice of appeal. Start with Maples' own allegations: In his amended federal habeas petition, Maples alleged that, at the time he sought postconviction relief in Alabama trial court, he "was represented by Sullivan & Cromwell of New York, New York." Although the petition went on to identify Munanka and Ingen-Housz as "the two Sullivan lawyers handling the matter," its statement that Maples was "represented" by the firm itself strongly suggests that Maples viewed himself as having retained the services of the firm as a whole, a perfectly natural understanding. "When a client retains a lawyer who practices with a firm, the presumption is that both the lawyer and the firm have been retained."

In any case, even if Maples had no attorney-client relationship with the Sullivan & Cromwell firm, Munanka and Ingen-Housz were surely not the only Sullivan & Cromwell lawyers who represented Maples on an individual basis. In sum, there is every indication that when the trial court entered its order dismissing Maples' postconviction petition in May 2003, Maples continued to be represented by a team of attorneys in Sullivan & Cromwell's New York office.

But even leaving aside the question of Maples' "unadmitted" attorneys at Sullivan & Cromwell, Maples had a fully admitted attorney, who had entered an appearance, in the person of local counsel, John Butler. There is no support for the Court's conclusion that Butler "did not even begin to represent Maples." True, the affidavit Butler filed with the Alabama trial court in the proceeding seeking extension of the deadline stated that he had "no substantive involvement" with the case, and that he had "agreed to serve as local counsel only." But a disclaimer of "substantive involvement" in a case, whether or not it violates a lawyer's ethical obligations, see is not equivalent to a denial of any agency role at all. A local attorney's "nonsubstantive" involvement would surely include, *at a minimum*, keeping track of local court orders and advising "substantive" counsel of impending deadlines. Nor did Butler's explanation for his failure to act when he received a copy of the trial court's order sound in abandonment. Butler did not say, for instance, that he ignored the order because he did not consider Maples to be his client. Instead, based on "past practice" and the content of the order, Butler "assumed" that Maples' lawyers at Sullivan & Cromwell would receive a copy.

One suspects that today's decision is motivated in large part by an understandable sense of frustration with the State's refusal to waive Maples' procedural default in the interest of fairness. Indeed, that frustration may well explain the Court's lengthy indictment of Alabama's general procedures for providing representation to capital defendants, a portion of the Court's opinion that is so disconnected from the rest of its analysis as to be otherwise inexplicable.

But if the interest of fairness justifies our excusing Maples' procedural default here, it does so whenever a defendant's procedural default is caused by his attorney. That is simply not the law—and cannot be, if the states are to have an orderly system of criminal litigation conducted by counsel. Our precedents allow a State to stand on its rights and enforce a habeas petitioner's procedural default even when counsel is to blame. Because a faithful application of those precedents leads to the conclusion that Maples has not demonstrated cause to excuse his procedural default; and because the reasoning by which the Court justifies the opposite conclusion invites future evisceration of the principle that defendants are responsible for the mistakes of their attorneys; I respectfully dissent.

Beginning in two decisions decided on the same day—Murray v. Carrier, 477 U.S. 478 (1986), and Smith v. Murray, 477 U.S. 27 (1986)—the Supreme Court has held that as an alternative to demonstrating cause, a habeas petitioner may raise matters not argued in the state courts by demonstrating that he or she is probably innocent of the charges.

The issue in Murray v. Carrier was whether a habeas petitioner could show cause for a procedural default by demonstrating that the defense counsel inadvertently failed to raise an issue. The inadvertence, however, did not amount to ineffective assistance of counsel. In *Murray*, the defense attorney inadvertently omitted an important issue from the notice of appeal. Under the pertinent state law, a failure to include an issue in the notice of appeal was deemed a waiver. Hence, the state courts refused to hear or rule on the omitted issue. The Supreme Court concluded that there was not sufficient cause to permit the defendant to raise the issue in a federal court habeas proceeding.

The *Murray* Court did indicate, however, one alternative to demonstrating cause. The Court said that a state prisoner who could show that he or she is probably actually innocent should be able to secure relief regardless of the reason for the state court procedural default. Justice O'Connor explained that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."

In two cases, below, Herrara v. Collins and House v. Bell, the Court considered when actual innocence can excuse a procedural default. In reading these cases, it is important to note that the Court was considering two different uses of "actual innocence": as a "gateway" to raise a procedurally defaulted claim and as a "free-standing" claim that would justify overturning a conviction on habeas corpus. In reading these cases, consider how the justices approach the questions of what is the standard for showing actual innocence as a gateway to raising a procedurally

defaulted claim. Also, is executing an innocent person unconstitutional so as to allow "freestanding" claims of innocence? And if so, what is the standard for freestanding claims of innocence?

Herrera v. Collins

506 U.S. 390 (1993)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner Leonel Torres Herrera was convicted of capital murder and sentenced to death in January 1982. He unsuccessfully challenged the conviction on direct appeal and state collateral proceedings in the Texas state courts, and in a federal habeas petition. In February 1992—10 years after his conviction—he urged in a second federal habeas petition that he was "actually innocent" of the murder for which he was sentenced to death, and that the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process of law therefore forbid his execution. He supported this claim with affidavits tending to show that his now-dead brother, rather than he, had been the perpetrator of the crime. Petitioner urges us to hold that this showing of innocence entitles him to relief in this federal habeas proceeding. We hold that it does not.

Shortly before 11 P.M. on an evening in late September 1981, the body of Texas Department of Public Safety Officer David Rucker was found by a passer-by on a stretch of highway about six miles east of Los Fresnos, Texas, a few miles north of Brownsville in the Rio Grande Valley. Rucker's body was lying beside his patrol car. He had been shot in the head.

At about the same time, Los Fresnos Police Officer Enrique Carrisalez observed a speeding vehicle traveling west towards Los Fresnos, away from the place where Rucker's body had been found, along the same road. Carrisalez, who was accompanied in his patrol car by Enrique Hernandez, turned on his flashing red lights and pursued the speeding vehicle. After the car had stopped briefly at a red light, it signaled that it would pull over and did so. The patrol car pulled up behind it. Carrisalez took a flashlight and walked toward the car of the speeder. The driver opened his door and exchanged a few words with Carrisalez before firing at least one shot at Carrisalez' chest. The officer died nine days later.

Petitioner Herrera was arrested a few days after the shootings and charged with the capital murder of both Carrisalez and Rucker. He was tried and found guilty of the capital murder of Carrisalez in January 1982, and sentenced to death. In July 1982, petitioner pleaded guilty to the murder of Rucker.

At petitioner's trial for the murder of Carrisalez, Hernandez, who had witnessed Carrisalez' slaying from the officer's patrol car, identified petitioner as the person who had wielded the gun. A declaration by Officer Carrisalez to the same effect, made while he was in the hospital, was also admitted. Through a license plate check, it was shown that the speeding car involved in Carrisalez' murder was registered to petitioner's "live-in" girlfriend. Petitioner was known to drive this car, and he had a set of keys to the car in his pants pocket when he was arrested. Hernandez identified the car as the vehicle from which the murderer had emerged to fire the fatal shot. He also testified that there had been only one person in the car that night.

The evidence showed that Herrera's Social Security card had been found alongside Rucker's patrol car on the night he was killed. Splatters of blood on the car identified as the vehicle involved in the shootings, and on petitioner's blue jeans and wallet were identified as type A blood—the same type which Rucker had. (Herrera has type O blood.) Similar evidence with respect to strands of hair found in the car indicated that the hair was Rucker's and not Herrera's. A handwritten letter was also found on the person of petitioner when he was arrested, which strongly implied that he had killed Rucker.

Petitioner appealed his conviction and sentence, arguing, among other things, that Hernandez' and Carrisalez' identifications were unreliable and improperly admitted. The Texas Court of Criminal Appeals affirmed, and we denied certiorari. Petitioner's application for state habeas relief was denied. Petitioner then filed a federal habeas petition, again challenging the identifications offered against him at trial. This petition was denied, and we again denied certiorari.

Petitioner next returned to state court and filed a second habeas petition, raising, among other things, a claim of "actual innocence" based on newly discovered evidence. In support of this claim petitioner presented the affidavits of Hector Villarreal, an attorney who had represented petitioner's brother, Raul Herrera, Sr., and of Juan Franco Palacious, one of Raul, Senior's former cellmates. Both individuals claimed that Raul, Senior, who died in 1984, had told them that he—and not petitioner—had killed Officers Rucker and Carrisalez. The State District Court denied this application, finding that "no evidence at trial remotely suggest[ed] that anyone other than [petitioner] committed the offense."

In February 1992, petitioner lodged the instant habeas petition—his second—in federal court, alleging, among other things, that he is innocent of the murders of Rucker and Carrisalez, and that his execution would thus violate the Eighth and Fourteenth Amendments. In addition to proffering the above affidavits, petitioner presented the affidavits of Raul Herrera, Jr., Raul Senior's son, and Jose Ybarra, Jr., a schoolmate of the Herrera brothers. Raul, Junior, averred that he had witnessed his father shoot Officers Rucker and Carrisalez and petitioner was not present. Raul, Junior, was nine years old at the time of the killings. Ybarra alleged that Raul, Senior, told him one summer night in 1983 that he had shot the two police officers. Petitioner alleged that law enforcement officials were aware of this evidence, and had withheld it in violation of Brady v. Maryland (1963).

Petitioner asserts that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of a person who is innocent of the crime for which he was convicted. This proposition has an elemental appeal, as would the similar proposition that the Constitution prohibits the imprisonment of one who is innocent of the crime for which he was convicted. After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent. But the evidence upon which petitioner's claim of innocence rests was not produced at his trial, but rather eight years later. In any system of criminal justice, "innocence" or "guilt" must be determined in some sort of a judicial proceeding. Petitioner's showing of innocence, and indeed his constitutional claim for relief based upon that showing, must be evaluated in the light of the previous proceedings in this case, which have stretched over a span of 10 years.

A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. In

re Winship (1970). Other constitutional provisions also have the effect of ensuring against the risk of convicting an innocent person. All of these constitutional safeguards, of course, make it more difficult for the State to rebut and finally overturn the presumption of innocence which attaches to every criminal defendant. But we have also observed that "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." To conclude otherwise would all but paralyze our system for enforcement of the criminal law.

Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. Here, it is not disputed that the State met its burden of proving at trial that petitioner was guilty of the capital murder of Officer Carrisalez beyond a reasonable doubt. Thus, in the eyes of the law, petitioner does not come before the Court as one who is "innocent," but, on the contrary, as one who has been convicted by due process of law of two brutal murders.

Based on affidavits here filed, petitioner claims that evidence never presented to the trial court proves him innocent notwithstanding the verdict reached at his trial. Such a claim is not cognizable in the state courts of Texas. For to obtain a new trial based on newly discovered evidence, a defendant must file a motion within 30 days after imposition or suspension of sentence. The Texas courts have construed this 30-day time limit as jurisdictional.

Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.

The dissent fails to articulate the relief that would be available if petitioner were to meet its "probable innocence" standard. Would it be commutation of petitioner's death sentence, new trial, or unconditional release from imprisonment? The typical relief granted in federal habeas corpus is a conditional order of release unless the State elects to retry the successful habeas petitioner, or in a capital case a similar conditional order vacating the death sentence. Were petitioner to satisfy the dissent's "probable innocence" standard, therefore, the District Court would presumably be required to grant a conditional order of relief, which would in effect require the State to retry petitioner 10 years after his first trial, not because of any constitutional violation which had occurred at the first trial, but simply because of a belief that in light of petitioner's new-found evidence a jury might find him not guilty at a second trial.

Yet there is no guarantee that the guilt or innocence determination would be any more exact. To the contrary, the passage of time only diminishes the reliability of criminal adjudications. Under the dissent's approach, the District Court would be placed in the even more difficult position of having to weigh the probative value of "hot" and "cold" evidence on petitioner's guilt or innocence.

This is not to say that our habeas jurisprudence casts a blind eye toward innocence. In a series of cases, we have held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in

the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons. But this body of our 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.

Petitioner in this case is simply not entitled to habeas relief based on the reasoning of this line of cases. For he does not seek excusal of a procedural error so that he may bring an independent constitutional claim challenging his conviction or sentence, but rather argues that he is entitled to habeas relief because newly discovered evidence shows that his conviction is factually incorrect. The fundamental miscarriage of justice exception is available "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." We have never held that it extends to freestanding claims of actual innocence. Therefore, the exception is inapplicable here.

Petitioner asserts that this case is different because he has been sentenced to death. But we have "refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus."

Alternatively, petitioner invokes the Fourteenth Amendment's guarantee of due process of law in support of his claim that his showing of actual innocence entitles him to a new trial, or at least to a vacation of his death sentence. "[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition," we have "exercis[ed] substantial deference to legislative judgments in this area." Thus, we have found criminal process lacking only where it " 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " We cannot say that Texas' refusal to entertain petitioner's newly discovered evidence eight years after his conviction transgresses a principle of fundamental fairness "rooted in the traditions and conscience of our people."

This is not to say, however, that petitioner is left without a forum to raise his actual innocence claim. For under Texas law, petitioner may file a request for executive clemency. Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.

Executive clemency has provided the "fail safe" in our criminal justice system. It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence. In his classic work, Professor Edwin Borchard compiled 65 cases in which it was later determined that individuals had been wrongfully convicted of crimes. Clemency provided the relief mechanism in 47 of these cases; the remaining cases ended in judgments of acquittals after new trials. E. Borchard, Convicting the Innocent (1932). Recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of "actual innocence" have been made. See M. Radelet, H. Bedau, & C. Putnam, In Spite of Innocence 282-356 (1992).

As the foregoing discussion illustrates, in state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant. Federal habeas review of state convictions has traditionally been limited to claims

of constitutional violations occurring in the course of the underlying state criminal proceedings. Our federal habeas cases have treated claims of "actual innocence," not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits, even though his habeas petition would otherwise be regarded as successive or abusive. History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.

We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold.

The affidavits filed in this habeas proceeding were given over eight years after petitioner's trial. No satisfactory explanation has been given as to why the affiants waited until the 11th hour—and, indeed, until after the alleged perpetrator of the murders himself was dead—to make their statements. Equally troubling, no explanation has been offered as to why petitioner, by hypothesis an innocent man, pleaded guilty to the murder of Rucker. Moreover, the affidavits themselves contain inconsistencies, and therefore fail to provide a convincing account of what took place on the night Officers Rucker and Carrisalez were killed.

This is not to say that petitioner's affidavits are without probative value. Had this sort of testimony been offered at trial, it could have been weighed by the jury, along with the evidence offered by the State and petitioner, in deliberating upon its verdict. Since the statements in the affidavits contradict the evidence received at trial, the jury would have had to decide important issues of credibility. But coming 10 years after petitioner's trial, this showing of innocence falls far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, arguendo, to exist.

Justice O'Connor, with whom Justice Kennedy joins, concurring.

I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed—"contrary to contemporary standards of decency," "shocking to the conscience," or offensive to a " 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' "—the execution of a legally and factually innocent person would be a constitutionally intolerable event. Dispositive to this case, however, is an equally fundamental fact: Petitioner is not innocent, in any sense of the word.

As the Court explains, petitioner is not innocent in the eyes of the law because, in our system of justice, "the trial is the paramount event for determining the guilt or innocence of the defendant." In petitioner's case, that paramount event occurred 10 years ago. He was tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants. At the conclusion

of that trial, the jury found petitioner guilty beyond a reasonable doubt. Petitioner therefore does not appear before us as an innocent man on the verge of execution. He is instead a legally guilty one who, refusing to accept the jury's verdict, demands a hearing in which to have his culpability determined once again.

Consequently, the issue before us is not whether a State can execute the innocent. It is, as the Court notes, whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, 10 years after conviction, notwithstanding his failure to demonstrate that constitutional error infected his trial. In most circumstances, that question would answer itself in the negative. Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent. The question similarly would be answered in the negative today, except for the disturbing nature of the claim before us. Petitioner contends not only that the Constitution's protections "sometimes fail," but that their failure in his case will result in his execution—even though he is factually innocent and has evidence to prove it.

Exercising restraint, the Court and Justice White assume for the sake of argument that, if a prisoner were to make an exceptionally strong showing of actual innocence, the execution could not go forward. Justice Blackmun, in contrast, would expressly so hold; he would also announce the precise burden of proof. Resolving the issue is neither necessary nor advisable in this case. The question is a sensitive and, to say the least, troubling one. It implicates not just the life of a single individual, but also the State's powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations. Indeed, as the Court persuasively demonstrates, throughout our history the federal courts have assumed that they should not and could not intervene to prevent an execution so long as the prisoner had been convicted after a constitutionally adequate trial. The prisoner's sole remedy was a pardon or clemency.

Nonetheless, the proper disposition of this case is neither difficult nor troubling. No matter what the Court might say about claims of actual innocence today, petitioner could not obtain relief. The record overwhelmingly demonstrates that petitioner deliberately shot and killed Officers Rucker and Carrisalez the night of September 29, 1981; petitioner's new evidence is bereft of credibility. Indeed, despite its stinging criticism of the Court's decision, not even the dissent expresses a belief that petitioner might possibly be actually innocent. Nor could it: The record makes it abundantly clear that petitioner is not somehow the future victim of "simple murder," but instead himself the established perpetrator of two brutal and tragic ones.

Ultimately, two things about this case are clear. First is what the Court does not hold. Nowhere does the Court state that the Constitution permits the execution of an actually innocent person. Instead, the Court assumes for the sake of argument that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that federal habeas relief would be warranted if no state avenue were open to process the claim. Second is what petitioner has not demonstrated. Petitioner has failed to make a persuasive showing of actual innocence. Not one judge—no state court judge, not the District Court Judge, none of the three judges of the Court of Appeals, and none of the Justices

of this Court—has expressed doubt about petitioner's guilt. Accordingly, the Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence. That difficult question remains open. If the Constitution's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, it may never require resolution at all.

Justice Scalia, with whom Justice Thomas joins, concurring.

We granted certiorari on the question whether it violates due process or constitutes cruel and unusual punishment for a State to execute a person who, having been convicted of murder after a full and fair trial, later alleges that newly discovered evidence shows him to be "actually innocent." I would have preferred to decide that question, particularly since, as the Court's discussion shows, it is perfectly clear what the answer is: There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction. In saying that such a right exists, the dissenters apply nothing but their personal opinions to invalidate the rules of more than two-thirds of the States, and a Federal Rule of Criminal Procedure for which this Court itself is responsible. If the system that has been in place for 200 years (and remains widely approved) "shock[s]" the dissenters' consciences, perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of "conscience shocking" as a legal test.

I nonetheless join the entirety of the Court's opinion, including the final portion, because there is no legal error in deciding a case by assuming, arguendo, that an asserted constitutional right exists, and because I can understand, or at least am accustomed to, the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate. With any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon.

Justice White, concurring in the judgment.

In voting to affirm, I assume that a persuasive showing of "actual innocence" made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case. To be entitled to relief, however, petitioner would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt." For the reasons stated in the Court's opinion, petitioner's showing falls far short of satisfying even that standard, and I therefore concur in the judgment.

Justice Blackmun, with whom Justice Stevens and Justice Souter join, dissenting.

Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent.

I therefore must disagree with the long and general discussion that precedes the Court's disposition of this case. That discussion, of course, is dictum because the Court assumes, "for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." Without articulating the standard it is applying, however, the Court then decides that this petitioner has not made a sufficiently persuasive case. Because I believe that in the first instance the District Court should decide whether petitioner is entitled to a hearing and whether he is entitled to relief on the merits of his claim, I would reverse the order of the Court of Appeals and remand this case for further proceedings in the District Court.

The Court's enumeration of the constitutional rights of criminal defendants surely is entirely beside the point. These protections sometimes fail.[43] We really are being asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence. Despite the State of Texas' astonishing protestation to the contrary, I do not see how the answer can be anything but "yes."

The Eighth Amendment prohibits "cruel and unusual punishments." This proscription is not static but rather reflects evolving standards of decency. I think it is crystal clear that the execution of an innocent person is "at odds with contemporary standards of fairness and decency." Indeed, it is at odds with any standard of decency that I can imagine.

This Court has ruled that punishment is excessive and unconstitutional if it is "nothing more than the purposeless and needless imposition of pain and suffering," or if it is "grossly out of proportion to the severity of the crime." It has held that death is an excessive punishment for rape, and for mere participation in a robbery during which a killing takes place. If it is violative of the Eighth Amendment to execute someone who is guilty of those crimes, then it plainly is violative of the Eighth Amendment to execute a person who is actually innocent. Executing an innocent person epitomizes "the purposeless and needless imposition of pain and suffering."

The protection of the Eighth Amendment does not end once a defendant has been validly convicted and sentenced. Respondent and the United States as amicus curiae argue that the Eighth Amendment does not apply to petitioner because he is challenging his guilt, not his punishment. Whether petitioner is viewed as challenging simply his death sentence or also his continued detention, he still is challenging the State's right to punish him. Respondent and the United States would

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43 One impressive study has concluded that 23 innocent people have been executed in the United States in this century, including one as recently as 1984. Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 36, 173-179 (1987); Radelet, Bedau, & Putnam, In Spite of Innocence 282-356 (1992). The majority cites this study to show that clemency has been exercised frequently in capital cases when showings of actual innocence have been made. But the study also shows that requests for clemency by persons the authors believe were innocent have been refused. See, e.g., Bedau & Radelet, 40 Stan. L. Rev., at 91 (discussing James Adams who was executed in Florida on May 10, 1984); Radelet, Bedau, & Putnam, In Spite of Innocence, at 5-10 (same). [Footnote by the Court.]

impose a clear line between guilt and punishment, reasoning that every claim that concerns guilt necessarily does not involve punishment. Such a division is far too facile. What respondent and the United States fail to recognize is that the legitimacy of punishment is inextricably intertwined with guilt.

The Court also suggests that allowing petitioner to raise his claim of innocence would not serve society's interest in the reliable imposition of the death penalty because it might require a new trial that would be less accurate than the first. This suggestion misses the point entirely. The question is not whether a second trial would be more reliable than the first but whether, in light of new evidence, the result of the first trial is sufficiently reliable for the State to carry out a death sentence. Furthermore, it is far from clear that a State will seek to retry the rare prisoner who prevails on a claim of actual innocence. I believe a prisoner must show not just that there was probably a reasonable doubt about his guilt but that he is probably actually innocent. I find it difficult to believe that any State would choose to retry a person who meets this standard.

I believe it contrary to any standard of decency to execute someone who is actually innocent. Because the Eighth Amendment applies to questions of guilt or innocence, and to persons upon whom a valid sentence of death has been imposed, I also believe that petitioner may raise an Eighth Amendment challenge to his punishment on the ground that he is actually innocent.

Execution of the innocent is equally offensive to the Due Process Clause of the Fourteenth Amendment.

The majority's discussion of petitioner's constitutional claims is even more perverse when viewed in the light of this Court's recent habeas jurisprudence. Beginning with a trio of decisions in 1986, this Court shifted the focus of federal habeas review of successive, abusive, or defaulted claims away from the preservation of constitutional rights to a fact-based inquiry into the habeas petitioner's guilt or innocence. The Court sought to strike a balance between the State's interest in the finality of its criminal judgments and the prisoner's interest in access to a forum to test the basic justice of his sentence. In striking this balance, the Court adopted the view of Judge Friendly that there should be an exception to the concept of finality when a prisoner can make a colorable claim of actual innocence. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 160 (1970).

Having adopted an "actual-innocence" requirement for review of abusive, successive, or defaulted claims, however, the majority would now take the position 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." In other words, having held that a prisoner who is incarcerated in violation of the Constitution must show he is actually innocent to obtain relief, the majority would now hold that a prisoner who is actually innocent must show a constitutional violation to obtain relief. The only principle that would appear to reconcile these two positions is the principle that habeas relief should be denied whenever possible.

The Eighth and Fourteenth Amendments, of course, are binding on the States, and one would normally expect the States to adopt procedures to consider claims of actual innocence based on newly discovered evidence. The majority's disposition of this case, however, leaves the States uncertain of their constitutional obligations.

Whatever procedures a State might adopt to hear actual-innocence claims, one thing is certain: The possibility of executive clemency is not sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments. The majority correctly points out: " 'A pardon is an act of grace.'" The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal.

Like other constitutional claims, Eighth and Fourteenth Amendment claims of actual innocence advanced on behalf of a state prisoner can and should be heard in state court. If a State provides a judicial procedure for raising such claims, the prisoner may be required to exhaust that procedure before taking his claim of actual innocence to federal court. See 28 U.S.C. §§2254(b) and (c). Furthermore, state-court determinations of factual issues relating to the claim would be entitled to a presumption of correctness in any subsequent federal habeas proceeding. See §2254(d).

Texas provides no judicial procedure for hearing petitioner's claim of actual innocence and his habeas petition was properly filed in district court under §2254. The district court is entitled to dismiss the petition summarily only if "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief." §2254 Rule 4. If, as is the case here, the petition raises factual questions and the State has failed to provide a full and fair hearing, the district court is required to hold an evidentiary hearing.

The question that remains is what showing should be required to obtain relief on the merits of an Eighth or Fourteenth Amendment claim of actual innocence. I agree with the majority that "in state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant." I also think that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." The question is what "a truly persuasive demonstration" entails, a question the majority's disposition of this case leaves open.

In articulating the "actual-innocence" exception in our habeas jurisprudence, this Court has adopted a standard requiring the petitioner to show a " 'fair probability that, in light of all the evidence . . . , the trier of the facts would have entertained a reasonable doubt of his guilt.' " In other words, the habeas petitioner must show that there probably would be a reasonable doubt.

I think the standard for relief on the merits of an actual-innocence claim must be higher than the threshold standard for merely reaching that claim or any other claim that has been procedurally defaulted or is successive or abusive. I would hold that, to obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent. This standard is supported by several considerations. First, new evidence of innocence may be discovered long after the defendant's conviction. Given the passage of time, it may be difficult for the State to retry a defendant who obtains relief from his conviction or sentence on an actual-innocence claim. The actual-innocence proceeding thus may constitute the final word on whether the defendant may be punished. In light of this fact, an otherwise constitutionally valid conviction or sentence should not be set aside lightly. Second, conviction after a constitutionally adequate trial strips the defendant of the presumption of innocence.

In considering whether a prisoner is entitled to relief on an actual-innocence claim, a court should take all the evidence into account, giving due regard to its

reliability. Because placing the burden on the prisoner to prove innocence creates a presumption that the conviction is valid, it is not necessary or appropriate to make further presumptions about the reliability of newly discovered evidence generally. Rather, the court charged with deciding such a claim should make a case-by-case determination about the reliability of the newly discovered evidence under the circumstances. The court then should weigh the evidence in favor of the prisoner against the evidence of his guilt. Obviously, the stronger the evidence of the prisoner's guilt, the more persuasive the newly discovered evidence of innocence must be.

It should be clear that the standard I would adopt would not convert the federal courts into " 'forums in which to relitigate state trials.' " I believe that if a prisoner can show that he is probably actually innocent, in light of all the evidence, then he has made "a truly persuasive demonstration," and his execution would violate the Constitution. I would so hold.

Thus, there are two ways in which "actual innocence" might be raised: as a "gateway" to allow procedurally defaulted claims to be raised or as a "freestanding" basis for overturning a conviction. Herrera v. Collins is unclear as to whether the latter is allowed. There is only one case in which the Supreme Court ever has found a sufficient showing of actual innocence: House v. Bell. In it, the Court clarified and applied the standard for "actual innocence" as a "gateway" for raising procedurally defaulted claims and also discussed the standard for "freestanding" claims of innocence.

House v. Bell

547 U.S. 518 (2006)

Justice KENNEDY delivered the opinion of the Court.

Some 20 years ago in rural Tennessee, Carolyn Muncey was murdered. A jury convicted petitioner Paul Gregory House of the crime and sentenced him to death, but new revelations cast doubt on the jury's verdict. House, protesting his innocence, seeks access to federal court to pursue habeas corpus relief based on constitutional claims that are procedurally barred under state law. Out of respect for the finality of state-court judgments federal habeas courts, as a general rule, are closed to claims that state courts would consider defaulted. In certain exceptional cases involving a compelling claim of actual innocence, however, the state procedural default rule is not a bar to a federal habeas corpus petition. *See* Schlup v. Delo (1995). After careful review of the full record, we conclude that House has made the stringent showing required by this exception; and we hold that his federal habeas action may proceed.

I

We begin with the facts surrounding Mrs. Muncey's disappearance, the discovery of her body, and House's arrest. Around 3 P.M. on Sunday, July 14, 1985, two local residents found her body concealed amid brush and tree branches on an

embankment roughly 100 yards up the road from her driveway. Mrs. Muncey had been seen last on the evening before, when, around 8 P.M., she and her two children—Lora Muncey, age 10, and Matthew Muncey, age 8—visited their neighbor, Pam Luttrell. According to Luttrell, Mrs. Muncey mentioned her husband, William Hubert Muncey, Jr., known in the community as "Little Hube" and to his family as "Bubbie." As Luttrell recounted Mrs. Muncey's comment, Mr. Muncey "had gone to dig a grave, and he hadn't come back, but that was all right, because [Mrs. Muncey] was going to make him take her fishing the next day." Mrs. Muncey returned home, and some time later, before 11:00 P.M. at the latest, Luttrell "heard a car rev its motor as it went down the road," something Mr. Muncey customarily did when he drove by on his way home. Luttrell then went to bed.

Around 1 A.M., Lora and Matthew returned to Luttrell's home, this time with their father, Mr. Muncey, who said his wife was missing. Muncey asked Luttrell to watch the children while he searched for his wife. After he left, Luttrell talked with Lora. While Lora was talking, Luttrell recalled, "Matt kept butting in, you know, on us talking, and he said—sister they said daddy had a wreck, they said daddy had a wreck."

Lora testified that after leaving Luttrell's house with her mother, she and her brother "went to bed." Later, she heard someone, or perhaps two different people, ask for her mother.

Lora did not describe hearing any struggle. Some time later, Lora and her brother left the house to look for their mother, but no one answered when they knocked at the Luttrells' home, and another neighbor, Mike Clinton, said he had not seen her. After the children returned home, according to Lora, her father came home and "fixed him a bologna sandwich and he took a bit of it and he says—sissy, where is mommy at, and I said—she ain't been here for a little while." Lora recalled that Mr. Muncey went outside and, not seeing his wife, returned to take Lora and Matthew to the Luttrells' so that he could look further.

The next afternoon Billy Ray Hensley, the victim's first cousin, heard of Mrs. Muncey's disappearance and went to look for Mr. Muncey. As he approached the Munceys' street, Hensley allegedly "saw Mr. House come out from under a bank, wiping his hands on a black rag." Just when and where Hensley saw House, and how well he could have observed him, were disputed at House's trial. Hensley admitted on cross-examination that he could not have seen House "walking up or climbing up" the embankment; rather, he saw House, in "[j]ust a glance," "appear out of nowhere," "next to the embankment." On the Munceys' street, opposite the area where Hensley said he saw House, a white Plymouth was parked near a sawmill. Another witness, Billy Hankins, whom the defense called, claimed that around the same time he saw a "boy" walking down the street away from the parked Plymouth and toward the Munceys' home. This witness, however, put the "boy" on the side of the street with the parked car and the Munceys' driveway, not the side with the embankment.

Hensley, after turning onto the Munceys' street, continued down the road and turned into their driveway. "I pulled up in the driveway where I could see up toward Little Hube's house," Hensley testified, "and I seen Little Hube's car wasn't there, and I backed out in the road, and come back [the other way]." As he traveled up the road, Hensley saw House traveling in the opposite direction in the

white Plymouth. House "flagged [Hensley] down" through his windshield, and the two cars met about 300 feet up the road from the Munceys' driveway. According to Hensley, House said he had heard Mrs. Muncey was missing and was looking for her husband. Though House had only recently moved to the area, he was acquainted with the Munceys, had attended a dance with them, and had visited their home. He later told law enforcement officials he considered both of the Munceys his friends. According to Hensley, House said he had heard that Mrs. Muncey's husband, who was an alcoholic, was elsewhere "getting drunk."

As Hensley drove off, he "got to thinking to [him]self—he's hunting Little Hube, and Little Hube drunk—what would he be doing off that bank. . . ." His suspicion aroused, Hensley later returned to the Munceys' street with a friend named Jack Adkins. The two checked different spots on the embankment, and though Hensley saw nothing where he looked, Adkins found Mrs. Muncey. Her body lay across from the sawmill near the corner where House's car had been parked, dumped in the woods a short way down the bank leading toward a creek.

Around midnight, Dr. Alex Carabia, a practicing pathologist and county medical examiner, performed an autopsy. Dr. Carabia put the time of death between 9 and 11 P.M. Mrs. Muncey had a black eye, both her hands were bloodstained up to the wrists, and she had bruises on her legs and neck. Dr. Carabia described the bruises as consistent with a "traumatic origin," i.e., a fight or a fall on hard objects. Based on the neck bruises and other injuries, he concluded Mrs. Muncey had been choked, but he ruled this out as the cause of death. The cause of death, in Dr. Carabia's view, was a severe blow to the left forehead that inflicted both a laceration penetrating to the bone and, inside the skull, a severe right-side hemorrhage, likely caused by Mrs. Muncey's brain slamming into the skull opposite the impact. Dr. Carabia described this head injury as consistent either with receiving a blow from a fist or other instrument or with striking some object.

The county sheriff, informed about Hensley's earlier encounter with House, questioned House shortly after the body was found. That evening, House answered further questions during a voluntary interview at the local jail. Special Agent Ray Presnell of the Tennessee Bureau of Investigation (TBI) prepared a statement of House's answers, which House signed. Asked to describe his whereabouts on the previous evening, House claimed—falsely, as it turned out—that he spent the entire evening with his girlfriend, Donna Turner, at her trailer. Asked whether he was wearing the same pants he had worn the night before, House replied—again, falsely—that he was. House was on probation at the time, having recently been released on parole following a sentence of five years to life for aggravated sexual assault in Utah. House had scratches on his arms and hands, and a knuckle on his right ring finger was bruised. He attributed the scratches to Turner's cats and the finger injury to recent construction work tearing down a shed. The next day House gave a similar statement to a different TBI agent, Charles Scott.

In fact House had not been at Turner's home. After initially supporting House's alibi, Turner informed authorities that House left her trailer around 10:30 or 10:45 P.M. to go for a walk. According to Turner's trial testimony, House returned later—she was not sure when—hot and panting, missing his shirt and his shoes. House, Turner testified, told her that while he was walking on the road near her home, a vehicle pulled up beside him, and somebody inside "called him some

names and then they told him he didn't belong here anymore." House said he tried to ignore the taunts and keep walking, but the vehicle pulled in behind him, and "one of them got out and grabbed him by the shoulder . . . and [House] swung around with his right hand" and "hit something." According to Turner, House said "he took off down the bank and started running and he said that he—he said it seemed forever where he was running. And he said they fired two shots at him while he took off down the bank. . . ." House claimed the assailants "grabbed ahold of his shirt," which Turner remembered as "a blue tank top, trimmed in yellow," and "they tore it to where it wouldn't stay on him and he said—I just throwed it off when I was running." Turner, noticing House's bruised knuckle, asked how he hurt it, and House told her "that's where he hit." Turner testified that she "thought maybe my ex-husband had something to do with it."

Although the white Plymouth House drove the next day belonged to Turner, Turner insisted House had not used the car that night. No forensic evidence connected the car to the crime; law enforcement officials inspected a white towel covering the driver seat and concluded it was clean. Turner's trailer was located just under two miles by road, through hilly terrain, from the Muncey residence.

Law enforcement officers also questioned the victim's husband. Though Mrs. Muncey's comments to Luttrell gave no indication she knew this, Mr. Muncey had spent the evening at a weekly dance at a recreation center roughly a mile and a half from his home. In his statement to law enforcement—a statement House's trial counsel claims he never saw—Mr. Muncey admitted leaving the dance early, but said it was only for a brief trip to the package store to buy beer. He also stated that he and his wife had had sexual relations Saturday morning.

Late in the evening on Monday, July 15—two days after the murder—law enforcement officers visited Turner's trailer. With Turner's consent, Agent Scott seized the pants House was wearing the night Mrs. Muncey disappeared. The heavily soiled pants were sitting in a laundry hamper; years later, Agent Scott recalled noticing "reddish brown stains" he "suspected" were blood. Around 4 P.M. the next day, two local law enforcement officers set out for the Federal Bureau of Investigation in Washington, D.C., with House's pants, blood samples from the autopsy, and other evidence packed together in a box. They arrived at 2:00 A.M. the next morning. On July 17, after initial FBI testing revealed human blood on the pants, House was arrested.

II

The State of Tennessee charged House with capital murder. At House's trial, the State presented testimony by Luttrell, Hensley, Adkins, Lora Muncey, Dr. Carabia, the sheriff, and other law enforcement officials. Through TBI Agents Presnell and Scott, the jury learned of House's false statements. Central to the State's case, however, was what the FBI testing showed—that semen consistent (or so it seemed) with House's was present on Mrs. Muncey's nightgown and panties, and that small bloodstains consistent with Mrs. Muncey's blood but not House's appeared on the jeans belonging to House.

Regarding the semen, FBI Special Agent Paul Bigbee, a serologist, testified that the source was a "secretor," meaning someone who "secrete[s] the ABO blood group substances in other body fluids, such as semen and saliva"—a characteristic

shared by 80 percent of the population, including House. Agent Bigbee further testified that the source of semen on the gown was blood-type A, House's own blood type. As to the semen on the panties, Agent Bigbee found only the H blood-group substance, which A and B blood-type secretors secrete along with substances A and B, and which O-type secretors secrete exclusively. Agent Bigbee explained, however—using science an amicus here sharply disputed—that House's A antigens could have "degraded" into H. Agent Bigbee thus concluded that both semen deposits could have come from House, though he acknowledged that the H antigen could have come from Mrs. Muncey herself if she was a secretor—something he "was not able to determine,"—and that, while Mr. Muncey was himself blood-type A (as was his wife), Agent Bigbee was again "not able to determine his secretor status." Agent Bigbee acknowledged on cross-examination that "a saliva sample" would have sufficed to determine whether Mr. Muncey was a secretor; the State did not provide such a sample, though it did provide samples of Mr. Muncey's blood.

As for the blood, Agent Bigbee explained that "spots of blood" appeared "on the left outside leg, the right bottom cuff, on the left thigh and in the right inside pocket and on the lower pocket on the outside." Agent Bigbee determined that the blood's source was type A (the type shared by House, the victim, and Mr. Muncey). He also successfully tested for the enzyme phosphoglucomutase and the blood serum haptoglobin, both of which "are found in all humans" and carry "slight chemical differences" that vary genetically and "can be grouped to differentiate between two individuals if those types are different." Based on these chemical traces and on the A blood type, Agent Bigbee determined that only some 6.75 percent of the population carry similar blood, that the blood was "consistent" with Mrs. Muncey's (as determined by testing autopsy samples), and that it was "impossible" that the blood came from House.

A different FBI expert, Special Agent Chester Blythe, testified about fiber analysis performed on Mrs. Muncey's clothes and on House's pants. Although Agent Blythe found blue jean fibers on Mrs. Muncey's nightgown, brassier, housecoat, and panties, and in fingernail scrapings taken from her body (scrapings that also contained trace, unidentifiable amounts of blood), he acknowledged that, as the prosecutor put it in questioning the witness, "blue jean material is common material," so "this doesn't mean that the fibers that were all over the victim's clothing were necessarily from [House's] pair of blue jeans." On House's pants, though cotton garments both transfer and retain fibers readily, Agent Blythe found neither hair nor fiber consistent with the victim's hair or clothing.

As Turner informed the jury, House's shoes were found several months after the crime in a field near her home. Turner delivered them to authorities. Though the jury did not learn of this fact (and House's counsel claims he did not either), the State tested the shoes for blood and found none. House's shirt was not found.

The State's closing argument suggested that on the night of her murder, Mrs. Muncey "was deceived. . . . She had been told [her husband] had had an accident." The prosecutor emphasized the FBI's blood analysis, noting that "after running many, many, many tests," Agent Bigbee: "was able to tell you that the blood on the defendant's blue jeans was not his own blood, could not be his own blood. He told you that the blood on the blue jeans was consistent with every characteristic in every respect of the deceased's, Carolyn Muncey's, and that ninety-three (93%)

percent of the white population would not have that blood type. . . . He can't tell you one hundred (100%) percent for certain that it was her blood. But folks, he can sure give you a pretty good—a pretty good indication."

In addition the government suggested the black rag Hensley said he saw in House's hands was in fact the missing blue tank top, retrieved by House from the crime scene. And the prosecution reiterated the importance of the blood. "[D]efense counsel," he said, "does not start out discussing the fact that his client had blood on his jeans on the night that Carolyn Muncey was killed. . . . He doesn't start with the fact that nothing that the defense has introduced in this case explains what blood is doing on his jeans, all over his jeans, that is scientifically, completely different from his blood." The jury found House guilty of murder in the first degree.

The trial advanced to the sentencing phase. As aggravating factors to support a capital sentence, the State sought to prove: (1) that House had previously been convicted of a felony involving the use or threat of violence; (2) that the homicide was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (3) that the murder was committed while House was committing, attempting to commit, or fleeing from the commission of, rape or kidnaping. After presenting evidence of House's parole status and aggravated sexual assault conviction, the State rested.

[III]

As a general rule, claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error. The rule is based on the comity and respect that must be accorded to state-court judgments. The bar is not, however, unqualified. In an effort to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case," the Court has recognized a miscarriage-of-justice exception.

" '[I]n appropriate cases,' " the Court has said, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.' "

In *Schlup*, the Court adopted a specific rule to implement this general principle. It held that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." This formulation, *Schlup* explains, "ensures that petitioner's case is truly 'extraordinary,' while still providing petitioner a meaningful avenue by which to avoid a manifest injustice." In the usual case the presumed guilt of a prisoner convicted in state court counsels against federal review of defaulted claims. Yet a petition supported by a convincing *Schlup* gateway showing "raise[s] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error"; hence, "a review of the merits of the constitutional claims" is justified.

For purposes of this case several features of the *Schlup* standard bear emphasis. First, although "[t]o be credible" a gateway claim requires "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial," the habeas

court's analysis is not limited to such evidence. There is no dispute in this case that House has presented some new reliable evidence; the State has conceded as much. In addition, because the District Court held an evidentiary hearing in this case, and because the State does not challenge the court's decision to do so, we have no occasion to elaborate on *Schlup*'s observation that when considering an actual-innocence claim in the context of a request for an evidentiary hearing, the District Court need not "test the new evidence by a standard appropriate for deciding a motion for summary judgment," but rather may "consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." Our review in this case addresses the merits of the *Schlup* inquiry, based on a fully developed record, and with respect to that inquiry *Schlup* makes plain that the habeas court must consider " 'all the evidence,' " old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under "rules of admissibility that would govern at trial." Based on this total record, the court must make "a probabilistic determination about what reasonable, properly instructed jurors would do." The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.

Second, it bears repeating that the *Schlup* standard is demanding and permits review only in the " 'extraordinary' " case. At the same time, though, the *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence. A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.

The State also argues that the District Court's findings in this case tie our hands, precluding a ruling in House's favor absent a showing of clear error as to the District Court's specific determinations. This view overstates the effect of the District Court's ruling. Deference is given to a trial court's assessment of evidence presented to it in the first instance. Yet the *Schlup* inquiry, we repeat, requires a holistic judgment about " 'all the evidence,' " and its likely effect on reasonable jurors applying the reasonable-doubt standard. As a general rule, the inquiry does not turn on discrete findings regarding disputed points of fact, and "[i]t is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses." Here, although the District Court attentively managed complex proceedings, carefully reviewed the extensive record, and drew certain conclusions about the evidence, the court did not clearly apply *Schlup*'s predictive standard regarding whether reasonable jurors would have reasonable doubt. As we shall explain, moreover, we are uncertain about the basis for some of the District Court's conclusions—a consideration that weakens our reliance on its determinations.

With this background in mind we turn to the evidence developed in House's federal habeas proceedings.

DNA Evidence

First, in direct contradiction of evidence presented at trial, DNA testing has established that the semen on Mrs. Muncey's nightgown and panties came from her

husband, Mr. Muncey, not from House. The State, though conceding this point, insists this new evidence is immaterial. At the guilt phase at least, neither sexual contact nor motive were elements of the offense, so in the State's view the evidence, or lack of evidence, of sexual assault or sexual advance is of no consequence. We disagree. In fact we consider the new disclosure of central importance.

From beginning to end the case is about who committed the crime. When identity is in question, motive is key. The point, indeed, was not lost on the prosecution, for it introduced the evidence and relied on it in the final guilt-phase closing argument. Referring to "evidence at the scene," the prosecutor suggested that House committed, or attempted to commit, some "indignity" on Mrs. Muncey that neither she "nor any mother on that road would want to do with Mr. House." Particularly in a case like this where the proof was, as the State Supreme Court observed, circumstantial, we think a jury would have given this evidence great weight. Quite apart from providing proof of motive, it was the only forensic evidence at the scene that would link House to the murder.

Law and society, as they ought to do, demand accountability when a sexual offense has been committed, so not only did this evidence link House to the crime; it likely was a factor in persuading the jury not to let him go free. At sentencing, moreover, the jury came to the unanimous conclusion, beyond a reasonable doubt, that the murder was committed in the course of a rape or kidnaping. The alleged sexual motivation relates to both those determinations. This is particularly so given that, at the sentencing phase, the jury was advised that House had a previous conviction for sexual assault.

A jury informed that fluids on Mrs. Muncey's garments could have come from House might have found that House trekked the nearly two miles to the victim's home and lured her away in order to commit a sexual offense. By contrast a jury acting without the assumption that the semen could have come from House would have found it necessary to establish some different motive, or, if the same motive, an intent far more speculative. When the only direct evidence of sexual assault drops out of the case, so, too, does a central theme in the State's narrative linking House to the crime. In that light, furthermore, House's odd evening walk and his false statements to authorities, while still potentially incriminating, might appear less suspicious.

Bloodstains

The other relevant forensic evidence is the blood on House's pants, which appears in small, even minute, stains in scattered places. As the prosecutor told the jury, they were stains that, due to their small size, "you or I might not detect[,] [m]ight not see, but which the FBI lab was able to find on [House's] jeans." The stains appear inside the right pocket, outside that pocket, near the inside button, on the left thigh and outside leg, on the seat of the pants, and on the right bottom cuff, including inside the pants. Due to testing by the FBI, cuttings now appear on the pants in several places where stains evidently were found. (The cuttings were destroyed in the testing process, and defense experts were unable to replicate the tests.) At trial, the government argued "nothing that the defense has introduced in this case explains what blood is doing on his jeans, all over [House's] jeans, that is scientifically, completely different from his blood." House, though not disputing at

this point that the blood is Mrs. Muncey's, now presents an alternative explanation that, if credited, would undermine the probative value of the blood evidence.

Other evidence confirms that blood did in fact spill from the vials. It appears the vials passed from Dr. Carabia, who performed the autopsy, into the hands of two local law enforcement officers, who transported it to the FBI, where Agent Bigbee performed the enzyme tests. The blood was contained in four vials, evidently with neither preservative nor a proper seal. The vials, in turn, were stored in a styrofoam box, but nothing indicates the box was kept cool. Rather, in what an evidence protocol expert at the habeas hearing described as a violation of proper procedure, the styrofoam box was packed in the same cardboard box as other evidence including House's pants (apparently in a paper bag) and other clothing (in separate bags). The cardboard box was then carried in the officers' car while they made the 10-hour journey from Tennessee to the FBI lab. Dr. Blake stated that blood vials in hot conditions (such as a car trunk in the summer) could blow open; and in fact, by the time the blood reached the FBI it had hemolyzed, or spoiled, due to heat exposure. By the time the blood passed from the FBI to a defense expert, roughly a vial and a half were empty, though Agent Bigbee testified he used at most a quarter of one vial. Blood, moreover, had seeped onto one corner of the styrofoam box and onto packing gauze inside the box below the vials.

In addition, although the pants apparently were packaged initially in a paper bag and FBI records suggest they arrived at the FBI in one, the record does not contain the paper bag but does contain a plastic bag with a label listing the pants and Agent Scott's name—and the plastic bag has blood on it. The blood appears in a forked streak roughly five inches long and two inches wide running down the bag's outside front. Though testing by House's expert confirmed the stain was blood, the expert could not determine the blood's source. Speculations about when and how the blood got there add to the confusion regarding the origins of the stains on House's pants.

Faced with these indications of, at best, poor evidence control, the State attempted to establish at the habeas hearing that all blood spillage occurred after Agent Bigbee examined the pants. Were that the case, of course, then blood would have been detected on the pants before any spill—which would tend to undermine Dr. Blake's analysis and support using the bloodstains to infer House's guilt.

In sum, considering "'all the evidence,'" on this issue, we think the evidentiary disarray surrounding the blood, taken together with Dr. Blake's testimony and the limited rebuttal of it in the present record, would prevent reasonable jurors from placing significant reliance on the blood evidence. We now know, though the trial jury did not, that an Assistant Chief Medical Examiner believes the blood on House's jeans must have come from autopsy samples; that a vial and a quarter of autopsy blood is unaccounted for; that the blood was transported to the FBI together with the pants in conditions that could have caused vials to spill; that the blood did indeed spill at least once during its journey from Tennessee authorities through FBI hands to a defense expert; that the pants were stored in a plastic bag bearing both a large blood stain and a label with TBI Agent Scott's name; and that the styrofoam box containing the blood samples may well have been opened before it arrived at the FBI lab. Thus, whereas the bloodstains, emphasized by the prosecution, seemed strong evidence of House's guilt at trial, the record now raises substantial questions about the blood's origin.

A Different Suspect

Were House's challenge to the State's case limited to the questions he has raised about the blood and semen, the other evidence favoring the prosecution might well suffice to bar relief. There is, however, more; for in the post-trial proceedings House presented troubling evidence that Mr. Muncey, the victim's husband, himself could have been the murderer.

At trial, as has been noted, the jury heard that roughly two weeks before the murder Mrs. Muncey's brother received a frightened phone call from his sister indicating that she and Mr. Muncey had been fighting, that she was scared, and that she wanted to leave him. The jury also learned that the brother once saw Mr. Muncey "smac[k]" the victim. House now has produced evidence from multiple sources suggesting that Mr. Muncey regularly abused his wife.

Of most importance is the testimony of Kathy Parker and her sister Penny Letner. They testified at the habeas hearing that, around the time of House's trial, Mr. Muncey had confessed to the crime. Parker recalled that she and "some family members and some friends [were] sitting around drinking" at Parker's trailer when Mr. Muncey "just walked in and sit down." Muncey, who had evidently been drinking heavily, began "rambling off . . . [t]alking about what happened to his wife and how it happened and he didn't mean to do it." According to Parker, Mr. Muncey "said they had been into [an] argument and he slapped her and she fell and hit her head and it killed her and he didn't mean for it to happen." Parker said she "freaked out and run him off."

Other testimony suggests Mr. Muncey had the opportunity to commit the crime. According to Dennis Wallace, a local law enforcement official who provided security at the dance on the night of the murder, Mr. Muncey left the dance "around 10:00, 10:30, 9:30 to 10:30." Although Mr. Muncey told law enforcement officials just after the murder that he left the dance only briefly and returned, Wallace could not recall seeing him back there again. Later that evening, Wallace responded to Mr. Muncey's report that his wife was missing. Muncey denied he and his wife had been "a fussing or a fighting"; he claimed his wife had been "kidnapped."

In the habeas proceedings, then, two different witnesses (Parker and Letner) described a confession by Mr. Muncey; two more (Atkins and Lawson) described suspicious behavior (a fight and an attempt to construct a false alibi) around the time of the crime; and still other witnesses described a history of abuse.

The evidence pointing to Mr. Muncey is by no means conclusive. If considered in isolation, a reasonable jury might well disregard it. In combination, however, with the challenges to the blood evidence and the lack of motive with respect to House, the evidence pointing to Mr. Muncey likely would reinforce other doubts as to House's guilt.

Other Evidence

Certain other details were presented at the habeas hearing. First, Dr. Blake, in addition to testifying about the blood evidence and the victim's head injury, examined photographs of House's bruises and scratches and concluded, based on 35 years' experience monitoring the development and healing of bruises, that they were too old to have resulted from the crime. In addition Dr. Blake claimed that the injury on House's right knuckle was indicative of "[g]etting mashed"; it was not consistent with striking someone.

The victim's daughter, Lora Muncey (now Lora Tharp), also testified at the habeas hearing. She repeated her recollection of hearing a man with a deep voice like her grandfather's and a statement that her father had had a wreck down by the creek. She also denied seeing any signs of struggle or hearing a fight between her parents, though she also said she could not recall her parents ever fighting physically. The District Court found her credible, and this testimony certainly cuts in favor of the State.

Finally, House himself testified at the habeas proceedings. He essentially repeated the story he allegedly told Turner about getting attacked on the road. The District Court found, however, based on House's demeanor, that he "was not a credible witness."

Conclusion

This is not a case of conclusive exoneration. Some aspects of the State's evidence—Lora Muncey's memory of a deep voice, House's bizarre evening walk, his lie to law enforcement, his appearance near the body, and the blood on his pants—still support an inference of guilt. Yet the central forensic proof connecting House to the crime—the blood and the semen—has been called into question, and House has put forward substantial evidence pointing to a different suspect. Accordingly, and although the issue is close, we conclude that this is the rare case where—had the jury heard all the conflicting testimony—it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.

V

In addition to his gateway claim under *Schlup*, House argues that he has shown freestanding innocence and that as a result his imprisonment and planned execution are unconstitutional. In *Herrera*, decided three years before *Schlup*, the Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." House urges the Court to answer the question left open in *Herrera* and hold not only that freestanding innocence claims are possible but also that he has established one.

We decline to resolve this issue. We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it. To be sure, House has cast considerable doubt on his guilt—doubt sufficient to satisfy *Schlup*'s gateway standard for obtaining federal review despite a state procedural default. In *Herrera*, however, the Court described the threshold for any hypothetical freestanding innocence claim as "extraordinarily high." The sequence of the Court's decisions in *Herrera* and *Schlup*—first leaving unresolved the status of freestanding claims and then establishing the gateway standard—implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*. It follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera*.

House has satisfied the gateway standard set forth in *Schlup* and may proceed on remand with procedurally defaulted constitutional claims.

Chief Justice ROBERTS, with whom Justice SCALIA and Justice THOMAS join, concurring in the judgment in part and dissenting in part.

To overcome the procedural hurdle that Paul House created by failing to properly present his constitutional claims to a Tennessee court, he must demonstrate that the constitutional violations he alleges "ha[ve] probably resulted in the conviction of one who is actually innocent," such that a federal court's refusal to hear the defaulted claims would be a "miscarriage of justice." Schlup v. Delo (1995). To make the requisite showing of actual innocence, House must produce "new reliable evidence" and "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." The question is not whether House was prejudiced at his trial because the jurors were not aware of the new evidence, but whether all the evidence, considered together, proves that House was actually innocent, so that no reasonable juror would vote to convict him. Considering all the evidence, and giving due regard to the District Court's findings on whether House's new evidence was reliable, I do not find it probable that no reasonable juror would vote to convict him, and accordingly I dissent.

Because I do not think that House has satisfied the actual innocence standard set forth in *Schlup*, I do not believe that he has met the higher threshold for a freestanding innocence claim, assuming such a claim exists. *See* Herrera v. Collins (1993). I therefore concur in the judgment with respect to the Court's disposition of that separate claim.

I

Critical to the Court's conclusion here that House has sufficiently demonstrated his innocence are three pieces of new evidence presented to the District Court: DNA evidence showing that the semen on Carolyn Muncey's clothing was from her husband, Hubert Muncey, not from House; testimony from new witnesses implicating Mr. Muncey in the murder; and evidence indicating that Mrs. Muncey's blood spilled from test tubes containing autopsy samples in an evidence container. To determine whether it should open its door to House's defaulted constitutional claims, the District Court considered this evidence in a comprehensive evidentiary hearing. As House presented his new evidence, and as the State rebutted it, the District Court observed the witnesses' demeanor, examined physical evidence, and made findings about whether House's new evidence was in fact reliable. This fact-finding role is familiar to a district court. "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."

The State did not contest House's new DNA evidence excluding him as the source of the semen on Mrs. Muncey's clothing, but it strongly contested the new testimony implicating Mr. Muncey, and it insisted that the blood spillage occurred after the FBI tested House's jeans and determined that they were stained with Mrs. Muncey's blood.

At the evidentiary hearing, sisters Kathy Parker and Penny Letner testified that 14 years earlier, either during or around the time of House's trial, they heard Mr. Muncey drunkenly confess to having accidentally killed his wife when he struck her in their home during an argument, causing her to fall and hit her head. *Schlup* provided guidance on how a district court should assess this type of new evidence: The court "may consider how the timing of the submission and the likely credibility

of the affiants bear on the probable reliability of that evidence," and it "must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." Consistent with this guidance, the District Court concluded that the sisters' testimony was not credible. The court noted that it was "not impressed with the allegations of individuals who wait over ten years to come forward." It also considered how the new testimony fit within the larger web of evidence, observing that Mr. Muncey's alleged confession contradicted the testimony of the Munceys' "very credible" daughter, Lora Tharp, who consistently testified that she did not hear a fight in the house that night, but instead heard a man with a deep voice who lured her mother from the house by saying that Mr. Muncey had been in a wreck near the creek.

The District Court engaged in a similar reliability inquiry with regard to House's new evidence of blood spillage. At the evidentiary hearing, House conceded that FBI testing showed that his jeans were stained with Mrs. Muncey's blood, but he set out to prove that the blood spilled from test tubes containing autopsy samples, and that it did so before the jeans were tested by the FBI. The District Court summarized the testimony of the various witnesses who handled the evidence and their recollections about bloodstains and spillage; it acknowledged that House's expert, Dr. Cleland Blake, disagreed with FBI Agent Paul Bigbee about how to interpret the results of Agent Bigbee's genetic marker analysis summary; and it summarized the testimony of the State's blood spatter expert, Paulette Sutton. After reviewing all the evidence, the District Court stated: "Based upon the evidence introduced during the evidentiary hearing . . . the court concludes that the spillage occurred after the FBI crime laboratory received and tested the evidence."

Normally, an appellate court reviews a district court's factual findings only for clear error. The majority essentially disregards the District Court's role in assessing the reliability of House's new evidence. The majority's assessment of House's new evidence is precisely the summary judgment-type inquiry *Schlup* said was inappropriate. By casting aside the District Court's factual determinations made after a comprehensive evidentiary hearing, the majority has done little more than reiterate the factual disputes presented below. Witnesses do not testify in our courtroom, and it is not our role to make credibility findings and construct theories of the possible ways in which Mrs. Muncey's blood could have been spattered and wiped on House's jeans. The District Court did not painstakingly conduct an evidentiary hearing to compile a record for us to sort through transcript by transcript and photograph by photograph, assessing for ourselves the reliability of what we see. *Schlup* made abundantly clear that reliability determinations were essential, but were for the district court to make. We are to defer to the better situated District Court on reliability, unless we determine that its findings are clearly erroneous. We are not concerned with "the district court's independent judgment as to whether reasonable doubt exists," but the District Court here made basic factual findings about the reliability of House's new evidence; it did not offer its personal opinion about whether it doubted House's guilt. *Schlup* makes clear that those findings are controlling unless clearly erroneous.

I have found no clear error in the District Court's reliability findings. Not having observed Ms. Parker and Ms. Letner testify, I would defer to the District Court's determination that they are not credible, and the evidence in the record

undermining the tale of an accidental killing during a fight in the Muncey home convinces me that this credibility finding is not clearly erroneous. Dr. Alex Carabia, who performed the autopsy, testified to injuries far more severe than a bump on the head: Mrs. Muncey had bruises on the front and back of her neck, on both thighs, on her lower right leg and left knee, and her hands were bloodstained up to the wrists; her injuries were consistent with a struggle and traumatic strangulation. And, of course, Lora Tharp has consistently recalled a deep-voiced visitor arriving late at night to tell Mrs. Muncey that her husband was in a wreck near the creek.

I also find abundant evidence in the record to support the District Court's finding that blood spilled within the evidence container after the FBI received and tested House's jeans. Agent Bigbee testified that there was no leakage in the items submitted to him for testing. The majority's entire analysis on this point assumes the agent flatly lied, though there was no attack on his credibility below.

It is also worth noting that the blood evidently spilled inside the evidence container when the jeans were protected inside a plastic zip lock bag, as shown by the presence of a bloodstain on the outside of that bag. House's expert tested the exterior and interior of that plastic bag for bloodstains using an "extremely sensitive" test, and only the exterior of the bag tested positive for blood. The evidence in the record indicates that the jeans were placed in the plastic bag after they arrived at the FBI: FBI records show that the jeans arrived there in a paper bag, and the plastic bag has FBI markings on it.

II

With due regard to the District Court's reliability findings, this case invites a straightforward application of the legal standard adopted in *Schlup*. A petitioner does not pass through the *Schlup* gateway if it is "more likely than not that there is any juror who, acting reasonably, would have found the petitioner guilty beyond a reasonable doubt."

The majority states that if House had presented just one of his three key pieces of evidence — or even two of the three — he would not pass through the *Schlup* gateway. According to the majority, House has picked the trifecta of evidence that places conviction outside the realm of choices any juror, acting reasonably, would make. Because the case against House remains substantially unaltered from the case presented to the jury, I disagree.

Given the District Court's reliability findings about the first two pieces of evidence, the evidence before us now is not substantially different from that considered by House's jury. I therefore find it more likely than not that in light of this new evidence, at least one juror, acting reasonably, would vote to convict House. The evidence as a whole certainly does not establish that House is actually innocent of the crime of murdering Carolyn Muncey, and accordingly I dissent.

7. May the Federal Court Hold an Evidentiary Hearing?

Assuming that all of the above hurdles have been overcome, the issue then can arise as to whether a federal court may hold an evidentiary hearing or is limited to deciding the matter based on the record from the state court. This is addressed in 28 U.S.C. §2254(e), which states:

> **(1)** In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> **(2)** If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> **(A)** the claim relies on—
>
> **(i)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> **(ii)** a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> **(B)** the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

In Cullen v. Pinholster, the Court gave this a restrictive interpretation, which leaves open the issue of when, if ever, there can be an evidentiary hearing in federal court on habeas corpus.

Cullen v. Pinholster

563 U.S. 170 (2011)

Justice THOMAS delivered the opinion of the Court.

Scott Lynn Pinholster and two accomplices broke into a house in the middle of the night and brutally beat and stabbed to death two men who happened to interrupt the burglary. A jury convicted Pinholster of first-degree murder, and he was sentenced to death.

After the California Supreme Court twice unanimously denied Pinholster habeas relief, a Federal District Court held an evidentiary hearing and granted Pinholster habeas relief under 28 U.S.C. §2254. The District Court concluded that Pinholster's trial counsel had been constitutionally ineffective at the penalty phase of trial. Sitting en banc, the Court of Appeals for the Ninth Circuit affirmed. Considering the new evidence adduced in the District Court hearing, the Court of Appeals held that the California Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law."

I

On the evening of January 8, 1982, Pinholster solicited Art Corona and Paul David Brown to help him rob Michael Kumar, a local drug dealer. On the way, they stopped at Lisa Tapar's house, where Pinholster put his buck knife through her front door and scratched a swastika into her car after she refused to talk to him. The three men, who were all armed with buck knives, found no one at Kumar's

house, broke in, and began ransacking the home. They came across only a small amount of marijuana before Kumar's friends, Thomas Johnson and Robert Beckett, arrived and shouted that they were calling the police.

Pinholster and his accomplices tried to escape through the rear door, but Johnson blocked their path. Pinholster backed Johnson onto the patio, demanding drugs and money and repeatedly striking him in the chest. Johnson dropped his wallet on the ground and stopped resisting. Beckett then came around the corner, and Pinholster attacked him, too, stabbing him repeatedly in the chest. Pinholster forced Beckett to the ground, took both men's wallets, and began kicking Beckett in the head. Meanwhile, Brown stabbed Johnson in the chest, "'bury[ing] his knife to the hilt.'" Johnson and Beckett died of their wounds.

Pinholster was arrested shortly thereafter and threatened to kill Corona if he did not keep quiet about the burglary and murders. Corona later became the State's primary witness. The prosecution brought numerous charges against Pinholster, including two counts of first-degree murder.

The California trial court appointed Harry Brainard and Wilbur Dettmar to defend Pinholster on charges of first-degree murder, robbery, and burglary. Before their appointment, Pinholster had rejected other attorneys and insisted on representing himself. During that time, the State had mailed Pinholster a letter in jail informing him that the prosecution planned to offer aggravating evidence during the penalty phase of trial to support a sentence of death. The jury convicted Pinholster on both counts of first-degree murder.

Before the penalty phase, Brainard and Dettmar moved to exclude any aggravating evidence on the ground that the prosecution had failed to provide notice of the evidence to be introduced, as required. At a hearing on April 24, Dettmar argued that, in reliance on the lack of notice, he was "not presently prepared to offer anything by way of mitigation." The trial court asked whether a continuance might be helpful, but Dettmar declined, explaining that he could not think of a mitigation witness other than Pinholster's mother and that additional time would not "make a great deal of difference." Three days later, after hearing testimony, the court found that Pinholster had received notice while representing himself and denied the motion to exclude.

The penalty phase was held before the same jury that had convicted Pinholster. The prosecution produced eight witnesses, who testified about Pinholster's history of threatening and violent behavior, including resisting arrest and assaulting police officers, involvement with juvenile gangs, and a substantial prison disciplinary record. Defense counsel called only Pinholster's mother, Burnice Brashear. She gave an account of Pinholster's troubled childhood and adolescent years, discussed Pinholster's siblings, and described Pinholster as "a perfect gentleman at home." Defense counsel did not call a psychiatrist, though they had consulted Dr. John Stalberg at least six weeks earlier. Dr. Stalberg noted Pinholster's "psychopathic personality traits," diagnosed him with antisocial personality disorder, and concluded that he "was not under the influence of extreme mental or emotional disturbance" at the time of the murders.

After 2 1/2 days of deliberation, the jury unanimously voted for death on each of the two murder counts. On mandatory appeal, the California Supreme Court affirmed the judgment.

In August 1993, Pinholster filed his first state habeas petition. Represented by new counsel, Pinholster alleged ineffective assistance of counsel at the penalty phase

of his trial. He alleged that Brainard and Dettmar had failed to adequately investigate and present mitigating evidence, including evidence of mental disorders. Pinholster supported this claim with school, medical, and legal records, as well as declarations from family members, Brainard, and Dr. George Woods, a psychiatrist who diagnosed Pinholster with bipolar mood disorder and seizure disorders. Dr. Woods criticized Dr. Stalberg's report as incompetent, unreliable, and inaccurate. The California Supreme Court unanimously and summarily denied Pinholster's penalty-phase ineffective-assistance claim "on the substantive ground that it is without merit."

Pinholster filed a federal habeas petition in April 1997. He reiterated his previous allegations about penalty-phase ineffective assistance and also added new allegations that his trial counsel had failed to furnish Dr. Stalberg with adequate background materials. In support of the new allegations, Dr. Stalberg provided a declaration stating that in 1984, Pinholster's trial counsel had provided him with only some police reports and a 1978 probation report. Dr. Stalberg explained that, had he known about the material that had since been gathered by Pinholster's habeas counsel, he would have conducted "further inquiry" before concluding that Pinholster suffered only from a personality disorder. He noted that Pinholster's school records showed evidence of "some degree of brain damage." Dr. Stalberg did not, however, retract his earlier diagnosis. The parties stipulated that this declaration had never been submitted to the California Supreme Court, and the federal petition was held in abeyance to allow Pinholster to go back to state court.

In August 1997, Pinholster filed his second state habeas petition, this time including Dr. Stalberg's declaration and requesting judicial notice of the documents previously submitted in support of his first state habeas petition. His allegations of penalty-phase ineffective assistance of counsel mirrored those in his federal habeas petition. The California Supreme Court again unanimously and summarily denied the petition "on the substantive ground that it is without merit."

Having presented Dr. Stalberg's declaration to the state court, Pinholster returned to the District Court. In November 1997, he filed an amended petition for a writ of habeas corpus. The District Court concluded that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), did not apply and granted an evidentiary hearing.

The District Court granted habeas relief. Applying pre-AEDPA standards, the court granted the habeas petition "for inadequacy of counsel by failure to investigate and present mitigation evidence at the penalty hearing." After *Woodford v. Garceau* (2003), clarified that AEDPA applies to cases like Pinholster's, the court amended its order but did not alter its conclusion.

II

We first consider the scope of the record for a §2254(d)(1) inquiry. The State argues that review is limited to the record that was before the state court that adjudicated the claim on the merits. Pinholster contends that evidence presented to the federal habeas court may also be considered. We agree with the State.

As amended by AEDPA, 28 U.S.C. §2254 sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner. If an application includes a claim that has been "adjudicated on the merits in State court proceedings," §2254(d), an additional restriction applies. Under §2254(d), that application "shall not be granted with respect to [such a] claim . . . unless the

adjudication of the claim": "(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 (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." This is a "difficult to meet," and "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." The petitioner carries the burden of proof.

We now hold that review under §2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time *i.e.*, the record before the state court.

This understanding of the text is compelled by "the broader context of the statute as a whole," which demonstrates Congress' intent to channel prisoners' claims first to the state courts. "The federal habeas scheme leaves primary responsibility with the state courts. . . ."

Limiting §2254(d)(1) review to the state-court record is consistent with our precedents interpreting that statutory provision. Our cases emphasize that review under §2254(d)(1) focuses on what a state court knew and did. State-court decisions are measured against this Court's precedents as of "the time the state court renders its decision." To determine whether a particular decision is "contrary to" then-established law, a federal court must consider whether the decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. If the state-court decision "identifies the correct governing legal principle" in existence at the time, a federal court must assess whether the decision "unreasonably applies that principle to the facts of the prisoner's case." It would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court.

Pinholster's contention that our holding renders §2254(e)(2) superfluous is incorrect. Section 2254(e)(2) imposes a limitation on the discretion of federal habeas courts to take new evidence in an evidentiary hearing. Like §2254(d)(1), it carries out "AEDPA's goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review [a] claim, and to correct any constitutional violation in the first instance."[44]

Section 2254(e)(2) continues to have force where §2254(d)(1) does not bar federal habeas relief. For example, not all federal habeas claims by state prisoners fall within the scope of §2254(d), which applies only to claims "adjudicated on

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44. Justice Sotomayor's argument that §2254(d)(1) must be read in a way that "accommodates" §2254(e)(2) rests on a fundamental misunderstanding of §2254(e)(2). The focus of that section is not on "preserving the opportunity" for hearings, but rather on *limiting* the discretion of federal district courts in holding hearings. We see no need in this case to address the proper application of §2254(e)(2). [Footnote by the Court.]

the merits in State court proceedings." At a minimum, therefore, §2254(e)(2) still restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court.

Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so. Provisions like §§2254(d)(1) and (e)(2) ensure that "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state pro ceedings."

Accordingly, we conclude that the Court of Appeals erred in considering the District Court evidence in its review under §2254(d)(1). [The Court then considered and rejected Pinholster's claim of ineffective assistance of counsel.]

Justice Alito, concurring in part and concurring in the judgment.

Although I concur in the Court's judgment, I agree with the conclusion reached in Part I of the dissent, namely, that, when an evidentiary hearing is properly held in federal court, review under 28 U.S.C. §2254(d)(1) must take into account the evidence admitted at that hearing. As the dissent points out, refusing to consider the evidence received in the hearing in federal court gives §2254(e)(2) an implausibly narrow scope and will lead either to results that Congress surely did not intend or to the distortion of other provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, and the law on "cause and prejudice."

Under AEDPA evidentiary hearings in federal court should be rare. The petitioner generally must have made a diligent effort to produce in state court the new evidence on which he seeks to rely. If that requirement is not satisfied, the petitioner may establish the factual predicate for a claim in a federal-court hearing only if, among other things, "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." §2254(e)(2)(B).

Even when the petitioner does satisfy the diligence standard, a hearing should not be held in federal court unless the new evidence that the petitioner seeks to introduce was not and could not have been offered in the state-court proceeding.

In this case, I would hold that the federal-court hearing should not have been held because respondent did not diligently present his new evidence to the California courts.

Justice Sotomayor, dissenting.

Some habeas petitioners are unable to develop the factual basis of their claims in state court through no fault of their own. Congress recognized as much when it enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and permitted therein the introduction of new evidence in federal habeas proceedings in certain limited circumstances. See 28 U.S.C. §2254(e)(2). Under the Court's novel interpretation of §2254(d)(1), however, federal courts must turn a blind eye to new evidence in deciding whether a petitioner has satisfied §2254(d)(1)'s threshold obstacle to federal habeas relief—even when it is clear that the petitioner would be entitled to relief in light of that evidence. In reading the statute

to "compe[l]" this harsh result, the Court ignores a key textual difference between §§2254(d)(1) and 2254(d)(2) and discards the previous understanding in our precedents that new evidence can, in fact, inform the §2254(d)(1) inquiry. I therefore dissent from the Court's first holding.

The Court first holds that, in determining whether a state-court decision is an unreasonable application of Supreme Court precedent under §2254(d)(1), "review . . . is limited to the record that was before the state court that adjudicated the claim on the merits." New evidence adduced at a federal evidentiary hearing is now irrelevant to determining whether a petitioner has satisfied §2254(d)(1). This holding is unnecessary to promote AEDPA's purposes, and it is inconsistent with the provision's text, the structure of the statute, and our precedents.

To understand the significance of the majority's holding, it is important to view the issue in context. AEDPA's entire structure—which gives state courts the opportunity to decide factual and legal questions in the first instance—ensures that evidentiary hearings in federal habeas proceedings are very rare. See N. King, F. Cheesman, & B. Ostrom, Final Technical Report: Habeas Litigation in U.S. District Courts 35-36 (2007) (evidentiary hearings under AEDPA occur in 0.4 percent of noncapital cases and 9.5 percent of capital cases). Even absent the new restriction created by today's holding, AEDPA erects multiple hurdles to a state prisoner's ability to introduce new evidence in a federal habeas proceeding.

First, "[u]nder the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court." With certain narrow exceptions, federal courts cannot consider a claim at all, let alone accept new evidence relevant to the claim, if it has not been exhausted in state court. The exhaustion requirement thus reserves to state courts the first opportunity to resolve factual disputes relevant to a state prisoner's claim.

Second, the exhaustion requirement is "complement[ed]" by the standards set forth in §2254(d). Under this provision, a federal court may not grant habeas relief on any "claim that was adjudicated on the merits in State court proceedings" unless the adjudication "(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 (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. These standards "control whether to grant habeas relief." Accordingly, we have said, if the factual allegations a petitioner seeks to prove at an evidentiary hearing would not satisfy these standards, there is no reason for a hearing. In such a case, the district court may exercise its "discretion to deny an evidentiary hearing." This approach makes eminent sense: If district courts held evidentiary hearings without first asking whether the evidence the petitioner seeks to present would satisfy AEDPA's demanding standards, they would needlessly prolong federal habeas proceedings.

Third, even when a petitioner seeks to introduce new evidence that would entitle him to relief, AEDPA prohibits him from doing so, except in a narrow range of cases, unless he "made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." Thus, §2254(e)(2) provides: "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—(A) the claim relies on—(i) a new rule of

constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

The majority's interpretation of §2254(d)(1) finds no support in the provision's text or the statute's structure as a whole. Section 2254(d)(1) requires district courts to ask whether a state-court adjudication on the merits "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." Because this provision uses "backward-looking language"—*i.e.*, past-tense verbs—the majority believes that it limits review to the state-court record. But both §§2254(d)(1) and 2254(d)(2) use "backward-looking language," and §2254(d)(2)—unlike §2254(d)(1)—expressly directs district courts to base their review on "the evidence presented in the State court proceeding." If use of the past tense were sufficient to indicate Congress' intent to restrict analysis to the state-court record, the phrase "in light of the evidence presented in the State court proceeding" in §2254(d)(2) would be superfluous. The majority's construction of §2254(d)(1) fails to give meaning to Congress' decision to include language referring to the evidence presented to the state court in §2254(d)(2).

Unlike my colleagues in the majority, I refuse to assume that Congress simply engaged in sloppy drafting. The inclusion of this phrase in §2254(d)(2)—coupled with its omission from §2254(d)(2)'s partner provision, §2254(d)(1)—provides strong reason to think that Congress did not intend for the §2254(d)(1) analysis to be limited categorically to "the evidence presented in the State court proceeding."

The "'broader context of the statute as a whole,'" reinforces this conclusion. In particular, Congress' decision to include in AEDPA a provision, §2254(e)(2), that permits federal evidentiary hearings in certain circumstances provides further evidence that Congress did not intend to limit the §2254(d)(1) inquiry to the state-court record in every case.

We have long recognized that some diligent habeas petitioners are unable to develop all of the facts supporting their claims in state court. As discussed above, in enacting AEDPA, Congress generally barred evidentiary hearings for petitioners who did not "exercise diligence in pursuing their claims" in state court.

The majority charts a novel course that, so far as I am aware, no court of appeals has adopted: §2254(d)(1) continues to apply when a petitioner has additional evidence that he was unable to present to the state court, but the district court cannot consider that evidence in deciding whether the petitioner has satisfied §2254(d)(1). The problem with this approach is its potential to bar federal habeas relief for diligent habeas petitioners who cannot present new evidence to a state court.

Consider, for example, a petitioner who diligently attempted in state court to develop the factual basis of a claim that prosecutors withheld exculpatory witness statements in violation of *Brady v. Maryland* (1963). The state court denied relief on the ground that the withheld evidence then known did not rise to the level of materiality required under *Brady*. Before the time for filing a federal habeas petition has expired, however, a state court orders the State to disclose additional documents

the petitioner had timely requested under the State's public records Act. The disclosed documents reveal that the State withheld other exculpatory witness statements, but state law would not permit the petitioner to present the new evidence in a successive petition.

Under our precedent, if the petitioner had not presented his *Brady* claim to the state court at all, his claim would be deemed defaulted and the petitioner could attempt to show cause and prejudice to overcome the default. If, however, the new evidence merely bolsters a *Brady* claim that was adjudicated on the merits in state court, it is unclear how the petitioner can obtain federal habeas relief after today's holding. What may have been a reasonable decision on the state-court record may no longer be reasonable in light of the new evidence. Because the state court adjudicated the petitioner's *Brady* claim on the merits, §2254(d)(1) would still apply. Yet, under the majority's interpretation of §2254(d)(1), a federal court is now prohibited from considering the new evidence in determining the reasonableness of the state-court decision.

The majority's interpretation of §2254(d)(1) thus suggests the anomalous result that petitioners with new claims based on newly obtained evidence can obtain federal habeas relief if they can show cause and prejudice for their default but petitioners with newly obtained evidence supporting a claim adjudicated on the merits in state court cannot obtain federal habeas relief if they cannot first satisfy §2254(d)(1) without the new evidence. That the majority's interpretation leads to this anomaly is good reason to conclude that its interpretation is wrong.

The majority responds to this anomaly by suggesting that my hypothetical petitioner "may well [have] a new claim." This suggestion is puzzling. New evidence does not usually give rise to a new claim; it merely provides additional proof of a claim already adjudicated on the merits.

The majority's reading of §2254(d)(1) appears ultimately to rest on its understanding that state courts must have the first opportunity to adjudicate habeas petitioners' claims. I fully agree that habeas petitioners must attempt to present evidence to state courts in the first instance. Where I disagree with the majority is in my understanding that §2254(e)(2) already accomplishes this result. By reading §2254(d)(1) to do the work of §2254(e)(2), the majority gives §2254(e)(2) an unnaturally cramped reading. As a result, the majority either has foreclosed habeas relief for diligent petitioners who, through no fault of their own, were unable to present exculpatory evidence to the state court that adjudicated their claims or has created a new set of procedural complexities for the lower courts to navigate to ensure the availability of the Great Writ for diligent petitioners.

I fear the consequences of the Court's novel interpretation of §2254(d)(1) for diligent state habeas petitioners with compelling evidence supporting their claims who were unable, through no fault of their own, to present that evidence to the state court that adjudicated their claims.

8. May the Federal Court Grant the Habeas Corpus Petition?

Assuming the habeas petitioner makes it through the previous seven hurdles, the issue then becomes whether the federal court may grant the habeas petition. The Antiterrorism and Effective Death Penalty Act imposed a significant new

restriction on the ability of a federal court to grant relief to state prisoners. Section 2254(d) provides that a

> writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in a State court proceeding unless the adjudication of the claim:
>
> > **(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
> >
> > **(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.

As for the former, the most important case addressing this provision is *Williams v. Taylor*.[45] Terry Williams was convicted of murder and sentenced to death in Virginia state court. A state trial court on a motion for postconviction relief found that there was ineffective assistance of counsel, but the Virginia Supreme Court disagreed, finding that there was not sufficient prejudice. The federal district court on habeas corpus found that there was ineffective assistance of counsel, but the Fourth Circuit reversed. The Fourth Circuit found that §2254(d)(1) precluded habeas review unless the state court "decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists all would agree is unreasonable."

The Supreme Court reversed the Fourth Circuit and expressly rejected the Fourth Circuit's conclusion that a state court judgment is unreasonable only if all reasonable jurists would agree that the state court was unreasonable. The Court stated:

> But the statute says nothing about "reasonable judges," presumably because all, or virtually all, such judges occasionally commit error; they make decisions that in retrospect may be characterized as "unreasonable." Indeed, it is most unlikely that Congress would impose such a requirement of unanimity on federal judges. As Congress is acutely aware, reasonable lawyers and lawgivers regularly disagree with one another. Congress surely did not intend that the views of one such judge who might think that relief is not warranted in a particular case should always have greater weight than the contrary, considered judgment of several other judges.[46]

Justice O'Connor, writing for five justices, emphasized that "contrary to" and "unreasonable application" are independent bases for habeas relief. For a state court's decision to be reviewable because it is "contrary to" clearly established federal law the decision must be "substantially different" from the relevant Supreme Court precedent; "the word 'contrary' is commonly understood to mean 'diametrically different' or 'mutually opposed.'"[47] A state court decision is contrary to Supreme Court precedent if it contradicts that decision or reaches a different

45. 529 U.S. 362 (2000).
46. 529 U.S. at 377-378.
47. *Id.* at 405.

result on facts that are materially indistinguishable. As for the second phrase, in assessing whether a state court decision involves "an unreasonable application of . . . clearly established" federal law, the question is "whether the state court's application of federal law was objectively unreasonable."[48] Justice O'Connor stressed that "the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law."[49]

Justice Stevens, writing for the dissenting four justices, addressed the phrases "contrary to" and "unreasonable application of" federal law. He argued that "[t]he prevailing view in the Circuits is that the former phrase requires de novo review of 'pure' questions of law and the latter requires some sort of 'reasonability' review of so-called mixed questions of law and fact."[50] Justice Stevens said, though, that these two categories are not mutually exclusive and that "there will be a variety of cases, like this one, in which both phrases may be implicated."[51]

Justice Stevens wrote for the majority in finding that Williams was entitled to habeas corpus review. The Court concluded that the Virginia Supreme Court decision was both contrary to and an unreasonable application of clearly established federal law. The Court held that the state court failed to apply controlling Supreme Court precedent that clearly establishes that ineffectiveness of counsel deprives a defendant of rights accorded by the Constitution.

The Supreme Court reaffirmed its interpretation of §2254(d)(1) in Bell v. Cone.[52] The Court held that ineffectiveness of counsel in all cases, including capital cases, is to be evaluated based on Strickland v. Washington.[53] The Court restated its interpretation of §2254(d)(1):

> A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a different rule from the governing law set forth in our cases, or if it decides a case differently than we have done on a materially indistinguishable set of facts. The Court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decision but unreasonably applies it to the facts of the particular case. The focus of the latter inquiry is on whether the state court's application of clearly established law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one.[54]

In Lockyer v. Andrade, the Supreme Court again repeated and applied this standard.[55] Leandro Andrade was sentenced to life imprisonment with no

48. *Id.* at 409.
49. *Id.* at 410.
50. *Id.* at 384 (Stevens, J., dissenting).
51. *Id.* at 385-386.
52. 535 U.S. 685 (2002).
53. 466 U.S. 668 (1984).
54. 535 U.S. at 694.
55. 538 U.S. 63 (2003). I discuss this case in more detail in Erwin Chemerinsky, *The Conservative Assault on the Constitution* (2010).

possibility of parole for fifty years for stealing nine videotapes from Kmart stores in San Bernardino, California. He received this sentence under California's three strikes law even though he had never committed a violent felony.

After the California courts upheld his sentence, Andrade filed a petition for habeas corpus and argued that his sentence was cruel and unusual punishment in violation of the Eighth Amendment. The U.S. Court of Appeals for the Ninth Circuit ruled in his favor, but the Supreme Court, in a five-to-four decision, reversed.

Justice O'Connor, writing for the Court, focused on the standard under §2254(d). She said that the Supreme Court's decisions concerning cruel and unusual punishment "have not been a model of clarity" and "have not established a clear or consistent path for courts to follow."[56] Justice O'Connor said that the only "clearly established" doctrine is a "gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme case.' "[57] The Court said that there thus was not clearly established law.

The Court also rejected the argument that the state court decision was objectively unreasonable. The Court said that the Ninth Circuit used a "clear error" standard and that this was not the same as "objectively unreasonable."[58] The Court, however, did not clarify the differences between these two standards.

Nor was the Court amenable to the petitioner's argument that the state court decision was "contrary to" a Supreme Court decision. Earlier, in Solem v. Helm, the Court held that it was cruel and unusual punishment to sentence a person to life in prison with no possibility of parole for passing a bad check worth $100.[59] But in Lockyer v. Andrade, the Court said that *Solem* was distinguishable because in that case there was no possibility of parole, but Andrade was eligible for parole in the year 2046, when he would be 87 years old.[60]

In Renico v. Lett, the Court again discussed what is an "unreasonable" application of federal law for the purposes of §2254(d).[61] The issue was whether the state court had erred in deciding that a retrial did not violate the prohibition of double jeopardy. The Court emphasized the deference to be given to state court decisions on federal habeas corpus. Chief Justice Roberts, writing for the Court, stated: "It is important at the outset to define the question before us. That question is not whether the trial judge should have declared a mistrial. It is not even whether it was an abuse of discretion for her to have done so—the applicable standard on direct review. The question under AEDPA is instead whether the determination of the Michigan Supreme Court that there was no abuse of discretion was

56. *Id.* at 72.
57. *Id.* at 73.
58. *Id.* at 75.
59. 463 U.S. 277 (1983).
60. *See also* Yarborough v. Alvarado, 541 U.S. 652 (2004) (finding that the standard under §2254(d) was not met).
61. 559 U.S. 766 (2010).

'an unreasonable application of . . . clearly established Federal law.' "[62] The Court concluded that the state court decision could not be said to be "unreasonable" and therefore could not be overturned on habeas corpus. Chief Justice Roberts wrote, "AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts. Whether or not the Michigan Supreme Court's opinion reinstating Lett's conviction in this case was *correct*, it was clearly *not unreasonable*."[63]

Quite importantly, in Harrington v. Richter, the Supreme Court held that the deferential standard of §2254(d) applies even if the state court does not issue an opinion explaining its decision.[64] The California Supreme Court denied a constitutional claim in a one-sentence summary order. The Court held that relief could be granted only if the requirements of §2254(d) were met. Justice Kennedy, writing for the Court, explained, "[D]etermining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning."[65]

The Court then went on and found that habeas corpus relief was unwarranted because the state court decision was not an unreasonable application of clearly established federal law. The Court elaborated the analysis under §2254(d): "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[66] This seems to be similar to the standard that the Court rejected in Williams v. Taylor, where it rejected the Fourth Circuit's approach that habeas relief could be granted only if no reasonable jurist could come to the conclusion of the state court. Under Harrington v. Richter, relief can be granted only if it is an error where there is not the possibility for "fair-minded disagreement."

In the cases since *Harrington*, the Court has continued to adhere to this approach for defining when habeas relief is permissible under §2254(d). In White v. Woodall, the judge at the penalty phase of a capital case did not instruct the jury that it could not draw an adverse inference from the defendant's failure to testify at that stage.[67] The Sixth Circuit granted habeas relief, but the Supreme Court reversed. The Court quoted the language from Harrington v. Richter, that habeas relief can be granted only if a state prisoner "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." The Court stressed that it had never directly ruled that there is a right to such an instruction at the penalty phase and thus concluded that it could not be said that the state court decision was "beyond any possibility for fairminded disagreement."[68]

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62. *Id.* at 772-773.
63. *Id.* at 779.
64. 131 S. Ct. 770 (2011).
65. *Id.* at 784.
66. *Id.* at 787.
67. 134 S. Ct. 1697 (2014).
68. *Id.* at 1703.

The Court has acknowledged that this standard is "difficult to meet."[69] The question is whether the Court has adopted too restrictive a view of §2254(d), even in light of Congress's desire to restrict habeas corpus in enacting AEDPA.

C. STATUTES AND RULES GOVERNING HABEAS CORPUS

Federal statutes prescribe the availability of habeas corpus relief and define the procedures to be followed in federal habeas corpus proceedings. In addition, in 1977, the Rules Governing Section 2254 Cases in the United States District Courts went into effect. The statutes and rules describe many important aspects of federal habeas corpus litigation.

First, a writ of habeas corpus may be granted by "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. §2241(a). If a petition for a writ of habeas corpus is filed with the Supreme Court, a Supreme Court justice, or a federal court of appeals judge, the petition may be transferred to the district court having jurisdiction to entertain it.

Second, habeas corpus petitions must be in writing, signed, and verified by the person for whom relief is requested or by someone acting on his or her behalf. 28 U.S.C. §2242. The petition must describe the facts concerning the "applicant's commitment or detention," including the basis for requesting the writ. Because the writ, if granted, directs the person holding the petitioner to release him or her from custody, the petition should name the custodian—such as the warden—as the respondent.

Third, the person must be in "custody" in order to bring a habeas corpus petition. Over the last half century, the Court has broadly defined "custody." The Court has held that individuals may use habeas corpus petitions to challenge any restriction of liberty, such as parole; habeas petitions may be heard even if an individual will not necessarily be released because of consecutive or concurrent sentences; and habeas petitions should not be dismissed as moot even after a person is released from prison.

Jones v. Cunningham, 371 U.S. 286 (1963), which held that a person may present a habeas corpus petition while on parole, is a crucial case liberalizing the definition of "in custody." In *Jones*, an individual filed a habeas corpus petition while in prison but was paroled while the matter was pending in federal court. The United States Court of Appeals for the Fourth Circuit dismissed the petition because the individual was no longer in custody but, in fact, free on parole. The Supreme Court reversed. In an opinion by Justice Black, the Court observed that "[h]istory, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty." The Court catalogued the many restrictions on liberty suffered by a person on parole—ranging from limits on travel to required visits from and meetings with a parole officer. In fact, under the state's law, a person granted parole was " 'under the custody and control of the . . . Parole Board.' " The Court said that because parole imposes restraints "not shared by the public generally," a person on parole should be regarded as in custody.

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69. Metrish v. Lancaster, 133 S. Ct. 1781, 1786 (2013).

Similarly, the Court held in Hensley v. Municipal Court, 411 U.S. 34 (1973), that individuals could seek habeas corpus even when they were released on bail or on their own recognizance. The court of appeals, in accord with prior Supreme Court rulings, concluded that a person could not seek habeas corpus until incarceration began. The Supreme Court reversed and emphasized that because all appeals in the state court system had been exhausted, incarceration was imminent. The Court said that there was no reason to require a person to spend "[ten] minutes in jail" in order to file a habeas corpus petition. The Court explained that the petitioner's movement was restricted because he was required to appear at the demand of any competent court and the failure to appear was itself a crime.

Although the requirement for actual incarceration has been eliminated, habeas corpus petitions still must be brought to challenge restrictions on liberty. Habeas corpus may not be used to challenge the imposition of fines or payment of restitution as part of a sentence.

Fourth, courts have authority to grant habeas corpus to individuals held in custody "within their respective jurisdictions." 28 U.S.C. §2241(a). In Padilla v. Rumsfeld, 542 U.S. 426 (2004), the Court reaffirmed that a habeas petition must be brought in the judicial district where a person is detained. Jose Padilla was apprehended in Chicago's O'Hare Airport and detained as an enemy combatant on suspicion that he was planning to build and detonate a "dirty bomb." He was initially taken to New York, where he was held as a material witness. A habeas petition was filed on his behalf from there. He was transferred to a military prison in South Carolina, but the habeas petition continued to be litigated in the Southern District of New York and then the Second Circuit, which ruled in his favor.

The Supreme Court, in a 5-4 decision, reversed and held that the habeas petition needed to be brought in the federal district court in South Carolina, where the immediate custodian over his person was located.

Federal prisoners must file petitions pursuant to §2255 with the court that imposed the sentence. Previously, federal prisoners also could file petitions with courts located in the areas where they were confined. This proved inconvenient both for the courts and the prisoners. Courts in areas where federal prisons are located were deluged with petitions, whereas courts in areas without prisons received no petitions. Also, petitioners often were confined far from the court where the trial occurred and hence were removed from the witnesses and documents they might need for their habeas petition. Consequently, federal prisoners, pursuant to 28 U.S.C. §2255, must return to the court that sentenced them and thus have less of a choice as to where to file their habeas petitions.

Fifth, the federal statutes authorize the federal court in ruling on a habeas corpus petition to "dispose of the matter as law and justice require." 28 U.S.C. §2243. Generally, the federal court in granting a habeas corpus petition either orders the release of an individual from custody or, more commonly, orders the individual released unless a new trial is held within a reasonable amount of time.

Finally, in general, the final order of a judge in a habeas proceeding is subject to review on appeal by the court of appeals in the circuit where the federal district court is located. However, a major limitation on the right to appeal is that a state

prisoner whose petition for habeas corpus is denied may appeal only if the federal district court judge or a court of appeals judge issues a certificate of appealability.[70]

Before the Antiterrorism and Effective Death Penalty Act this was termed a certificate of probable cause. A court can issue a certificate of appealability only if "the applicant has made a substantial showing of the denial of a constitutional right." In other words, absent a certification of appealability, a state prisoner may not appeal the denial of habeas corpus. Although the text of the act seems to say that district court judges cannot issue such certificates, most courts have ruled to the contrary and concluded that either a district court or a court of appeals can authorize review.

In Miller-El v. Cockrell, 537 U.S. 322 (2003), the Supreme Court held that a certificate of appealability should be granted if "reasonable jurists could debate" whether the petition should have been granted. This "does not require a showing that the appeal will succeed." Nor is there to be full consideration of the merits. But the certificate should be granted if it presents a debatable issue for the court of appeals to consider. Similarly and more recently, in Buck v. Davis, 137 S. Ct. 759 (2017), the Court declared "We reiterate what we have said before: A 'court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,' and ask 'only if the District Court's decision was debatable.'"

D. HABEAS CORPUS AND THE WAR ON TERRORISM

Over the past two decades, there has been a major debate over whether federal courts should be able to exercise habeas corpus over those who are detained as part of the war on terrorism, especially those held in Guantánamo Bay, Cuba. After the United States government began to detain individuals there in January 2002, habeas corpus petitions were filed on their behalf. In Rasul v. Bush, the Supreme Court held that federal courts have jurisdiction to hear habeas petitions by those detained in Guantánamo.

Rasul v. Bush

542 U.S. 466 (2004)

Justice Stevens delivered the opinion of the Court.

These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention

70. Section 2253(c) provides:

(1) Unless>a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from — (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court; or (B) the final order is a proceeding under section 2255. (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right. (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

I

On September 11, 2001, agents of the al Qaeda terrorist network hijacked four commercial airliners and used them as missiles to attack American targets. While one of the four attacks was foiled by the heroism of the plane's passengers, the other three killed approximately 3,000 innocent civilians, destroyed hundreds of millions of dollars of property, and severely damaged the U.S. economy. In response to the attacks, Congress passed a joint resolution authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons." Acting pursuant to that authorization, the President sent U.S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it.

Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban. Since early 2002, the U.S. military has held them—along with, according to the Government's estimate, approximately 640 other non-Americans captured abroad—at the naval base at Guantanamo Bay. The United States occupies the base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the agreement, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]," while "the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas." In 1934, the parties entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in effect "[s]o long as the United States of America shall not abandon the . . . naval station of Guantanamo."

In 2002, petitioners, through relatives acting as their next friends, filed various actions in the U.S. District Court for the District of Columbia challenging the legality of their detention at the base. All alleged that none of the petitioners has ever been a combatant against the United States or has ever engaged in any terrorist acts. They also alleged that none has been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal.

Construing all [these] actions as petitions for writs of habeas corpus, the District Court dismissed them for want of jurisdiction. The court held, in reliance on our opinion in Johnson v. Eisentrager (1950), that "aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus." The Court of Appeals affirmed.

II

Congress has granted federal district courts, "within their respective jurisdictions," the authority to hear applications for habeas corpus by any person who

claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." Consistent with the historic purpose of the writ, this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace. The Court has, for example, entertained the habeas petitions of an American citizen who plotted an attack on military installations during the Civil War, Ex parte Milligan (1866), and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States, Ex parte Quirin (1942), and its insular possessions, In re Yamashita (1946).

The question now before us is whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."

III

Respondents' primary submission is that the answer to the jurisdictional question is controlled by our decision in *Eisentrager*. In that case, we held that a Federal District Court lacked authority to issue a writ of habeas corpus to 21 German citizens who had been captured by U.S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in the Landsberg Prison in occupied Germany. The Court of Appeals in *Eisentrager* had found jurisdiction, reasoning that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ." In reversing that determination, this Court summarized the six critical facts in the case: "We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." On this set of facts, the Court concluded, "no right to the writ of habeas corpus appears."

Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Not only are petitioners differently situated from the *Eisentrager* detainees, but the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' constitutional entitlement to habeas corpus. The Court had far less to say on the question of the petitioners'

statutory entitlement to habeas review. Its only statement on the subject was a passing reference to the absence of statutory authorization: "Nothing in the text of the Constitution extends such a right, nor does anything in our statutes."

IV

[R]espondents contend that we can discern a limit on §2241 through application of the "longstanding principle of American law" that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested. Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States. By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. Respondents themselves concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under §2241.

Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called "exempt jurisdictions," where ordinary writs did not run, and all other dominions under the sovereign's control.

In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. Section 2241, by its terms, requires nothing more. We therefore hold that §2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.

Justice KENNEDY, concurring in the judgment.

The Court is correct, in my view, to conclude that federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals held at the Guantanamo Bay Naval Base in Cuba. While I reach the same conclusion, my analysis follows a different course.

The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs. A faithful application of *Eisentrager*, then, requires an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts

presented. A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated.

The facts here are distinguishable from those in *Eisentrager* in two critical ways, leading to the conclusion that a federal court may entertain the petitions. First, Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. The opinion of the Court well explains the history of its possession by the United States. In a formal sense, the United States leases the Bay; the 1903 lease agreement states that Cuba retains "ultimate sovereignty" over it. At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.

The second critical set of facts is that the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status. In *Eisentrager*, the prisoners were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms. Having already been subject to procedures establishing their status, they could not justify "a limited opening of our courts" to show that they were "of friendly personal disposition" and not enemy aliens. Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.

In light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees, I would hold that federal-court jurisdiction is permitted in these cases. This approach would avoid creating automatic statutory authority to adjudicate the claims of persons located outside the United States, and remains true to the reasoning of *Eisentrager*. For these reasons, I concur in the judgment of the Court.

Justice Scalia, with whom The Chief Justice and Justice Thomas join, dissenting.

The Court today holds that the habeas statute, 28 U.S.C. §2241, extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts. This is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied, Johnson v. Eisentrager (1950). This is an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field. I would leave it to Congress to change §2241, and dissent from the Court's unprecedented holding.

Eisentrager's directly-on-point statutory holding makes it exceedingly difficult for the Court to reach the result it desires today.

In abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the habeas statute to the four corners of the earth. The consequence of this holding, as applied to aliens outside the country, is breathtaking. It permits an alien captured in a foreign theater of active combat to bring a §2241 petition against the Secretary of Defense. Over the course of the last century, the United States has held millions of alien prisoners abroad. A great many of these prisoners would no doubt have complained about the circumstances of their capture and the terms of their confinement. The military is currently detaining over 600 prisoners at Guantanamo Bay alone; each detainee undoubtedly has complaints—real or contrived—about those terms and circumstances. The Court's unheralded expansion of federal-court jurisdiction is not even mitigated by a comforting assurance that the legion of ensuing claims will be easily resolved on the merits.

Today's carefree Court disregards, without a word of acknowledgment, the dire warning of a more circumspect Court in *Eisentrager:* "To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation for shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States."

Departure from our rule of stare decisis in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation's conduct of a war. The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs. Congress is in session. If it wished to change federal judges' habeas jurisdiction from what this Court had previously held that to be, it could have done so. And it could have done so by intelligent revision of the statute, instead of by today's clumsy, countertextual reinterpretation that confers upon wartime prisoners greater habeas rights than domestic detainees. For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort. I dissent.

In 2005, in response to Rasul v. Bush, Congress enacted the Detainee Treatment Act, which provided that those held in Guantánamo shall not have access to federal courts via a writ of habeas corpus; they must go through military commissions and then seek review in the District of Columbia Circuit.[71] In Hamdan v. Rumsfeld, 548 U.S. 557 (2006), the Supreme Court ruled that this provision applies only prospectively, not retroactively, to those petitions that already were pending in federal court at the time that the law was enacted.

In the fall of 2006, Congress responded by enacting the Military Commissions Act of 2006, which makes clear that the restrictions on habeas corpus in the Detainee Treatment Act apply retroactively.[72] The act provides, "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."[73] The act is explicit about its retroactive application and says that it "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."[74]

In Boumediene v. Bush, the Supreme Court declared this unconstitutional as an impermissible suspension of the writ of habeas corpus.

Boumediene v. Bush

553 U.S. 723 (2008)

Justice Kennedy delivered the opinion of the Court.

Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. There are others detained there, also aliens, who are not parties to this suit.

Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, §9, cl. 2. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), that provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore §7 of the Military Commissions Act of 2006 (MCA), operates as an unconstitutional suspension of the writ. We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.

71. 119 Stat. 2739, codified at 10 U.S.C. §801.
72. Pub. L. No. 109-366, 120 Stat. 2600 (2006).
73. 28 U.S.C. §2241(e).
74. *Id.*

I

Under the Authorization for Use of Military Force (AUMF), the President is authorized "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

In Hamdi v. Rumsfeld (2004), five Members of the Court recognized that detention of individuals who fought against the United States in Afghanistan "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." After Hamdi, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo were "enemy combatants," as the Department defines that term. A later memorandum established procedures to implement the CSRTs. The Government maintains these procedures were designed to comply with the due process requirements identified by the plurality in Hamdi.

Interpreting the AUMF, the Department of Defense ordered the detention of these petitioners, and they were transferred to Guantanamo. Some of these individuals were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the United States. Each denies he is a member of the al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime that provided sanctuary for al Qaeda. Each petitioner appeared before a separate CSRT; was determined to be an enemy combatant; and has sought a writ of habeas corpus in the United States District Court for the District of Columbia.

The first actions commenced in February 2002. We granted certiorari and reversed, holding that 28 U.S.C. §2241 extended statutory habeas corpus jurisdiction to Guantanamo. See Rasul v. Bush (2004). After Rasul, petitioners' cases were consolidated and entertained in two separate proceedings. In the first set of cases, Judge Richard J. Leon granted the Government's motion to dismiss, holding that the detainees had no rights that could be vindicated in a habeas corpus action. In the second set of cases Judge Joyce Hens Green reached the opposite conclusion, holding the detainees had rights under the Due Process Clause of the Fifth Amendment.

While appeals were pending from the District Court decisions, Congress passed the DTA. Subsection (e) of §1005 of the DTA amended 28 U.S.C. §2241 to provide that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." Section 1005 further provides that the Court of Appeals for the District of Columbia Circuit shall have "exclusive" jurisdiction to review decisions of the CSRTs. Ibid.

In Hamdan v. Rumsfeld (2006), the Court held this provision did not apply to cases (like petitioners') pending when the DTA was enacted. Congress responded by passing the MCA.

II

As a threshold matter, we must decide whether MCA §7 denies the federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment. We hold the statute does deny that jurisdiction, so that, if the statute is valid, petitioners' cases must be dismissed.

As amended by the terms of the MCA, 28 U.S.C.A. §2241(e) now provides:

> **(1)** No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> **(2)** Except as provided in [§§1005(e)(2) and (e)(3) of the DTA] no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Section 7(b) of the MCA provides the effective date for the amendment of §2241(e). It states: "The amendment made by [MCA §7(a)] shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."

If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to Hamdan's holding that the DTA's jurisdiction-stripping provision had no application to pending cases. The Court of Appeals was correct to take note of the legislative history when construing the statute, and we agree with its conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.

III

In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, i.e., petitioners' designation by the Executive Branch as enemy combatants, or their physical location, i.e., their presence at Guantanamo Bay. The Government contends that noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause.

A

The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all

too often had been insufficient to guard against the abuse of monarchial power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.

That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, §9, cl. 2. The word "privilege" was used, perhaps, to avoid mentioning some rights to the exclusion of others. (Indeed, the only mention of the term "right" in the Constitution, as ratified, is in its clause giving Congress the power to protect the rights of authors and inventors. See Art. I, §8, cl. 8.) Surviving accounts of the ratification debates provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme.

In our own system the Suspension Clause is designed to protect against these cyclical abuses. The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance" that is itself the surest safeguard of liberty. The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.

B

The broad historical narrative of the writ and its function is central to our analysis, but we seek guidance as well from founding-era authorities addressing the specific question before us: whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protection. The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ. But the analysis may begin with precedents as of 1789, for the Court has said that "at the absolute minimum" the Clause protects the writ as it existed when the Constitution was drafted and ratified.

To support their arguments, the parties in these cases have examined historical sources to construct a view of the common-law writ as it existed in 1789—as have amici whose expertise in legal history the Court has relied upon in the past. Diligent search by all parties reveals no certain conclusions. In none of the cases cited do we find that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a standard like the one the Department of Defense has used in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control.

Both arguments are premised, however, upon the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us. There are reasons to doubt both assumptions. Recent scholarship points to the inherent shortcomings in the historical record. And given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not

have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on point. Cf. Brown v. Board of Education (1954) (noting evidence concerning the circumstances surrounding the adoption of the Fourteenth Amendment, discussed in the parties' briefs and uncovered through the Court's own investigation, "convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive").

IV

Drawing from its position that at common law the writ ran only to territories over which the Crown was sovereign, the Government says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention.

Guantanamo Bay is not formally part of the United States. And under the terms of the lease between the United States and Cuba, Cuba retains "ultimate sovereignty" over the territory while the United States exercises "complete jurisdiction and control." Under the terms of the 1934 Treaty, however, Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base.

The United States contends, nevertheless, that Guantanamo is not within its sovereign control. This was the Government's position well before the events of September 11, 2001. And in other contexts the Court has held that questions of sovereignty are for the political branches to decide. Even if this were a treaty interpretation case that did not involve a political question, the President's construction of the lease agreement would be entitled to great respect.

We therefore do not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay. But this does not end the analysis. Our cases do not hold it is improper for us to inquire into the objective degree of control the Nation asserts over foreign territory. Accordingly, for purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains de jure sovereignty over Guantanamo Bay. As we did in Rasul, however, we take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains de facto sovereignty over this territory.

Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that de jure sovereignty is the touchstone of habeas corpus jurisdiction. This premise, however, is unfounded. For the reasons indicated above, the history of common-law habeas corpus provides scant support for this proposition; and, for the reasons indicated below, that position would be inconsistent with our precedents and contrary to fundamental separation-of-powers principles.

A

The Court has discussed the issue of the Constitution's extraterritorial application on many occasions. These decisions undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where de jure sovereignty ends.

Practical considerations weighed heavily as well in Johnson v. Eisentrager (1950), where the Court addressed whether habeas corpus jurisdiction extended to enemy aliens who had been convicted of violating the laws of war. The prisoners were detained at Landsberg Prison in Germany during the Allied Powers' postwar occupation. The Court stressed the difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding. It "would require allocation of shipping space, guarding personnel, billeting and rations" and would damage the prestige of military commanders at a sensitive time.

True, the Court in Eisentrager denied access to the writ, and it noted the prisoners "at no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." The Government seizes upon this language as proof positive that the Eisentrager Court adopted a formalistic, sovereignty-based test for determining the reach of the Suspension Clause. We reject this reading for three reasons.

First, we do not accept the idea that the above-quoted passage from Eisentrager is the only authoritative language in the opinion and that all the rest is dicta. The Court's further determinations, based on practical considerations, were integral to Part II of its opinion and came before the decision announced its holding.

Second, because the United States lacked both de jure sovereignty and plenary control over Landsberg Prison, it is far from clear that the Eisentrager Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility. The Justices who decided Eisentrager would have understood sovereignty as a multifaceted concept. That the Court devoted a significant portion of Part II to a discussion of practical barriers to the running of the writ suggests that the Court was not concerned exclusively with the formal legal status of Landsberg Prison but also with the objective degree of control the United States asserted over it. Even if we assume the Eisentrager Court considered the United States' lack of formal legal sovereignty over Landsberg Prison as the decisive factor in that case, its holding is not inconsistent with a functional approach to questions of extraterritoriality. The formal legal status of a given territory affects, at least to some extent, the political branches' control over that territory. De jure sovereignty is a factor that bears upon which constitutional guarantees apply there.

Third, if the Government's reading of Eisentrager were correct, the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases' functional approach to questions of extraterritoriality. We cannot accept the Government's view. Nothing in Eisentrager says that de jure sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus.

B

The Government's formal sovereignty-based test raises troubling separation-of-powers concerns as well. The political history of Guantanamo illustrates the deficiencies of this approach. The United States has maintained complete and uninterrupted control of the bay for over 100 years. Yet the Government's view is that the Constitution had no effect there, at least as to noncitizens, because the

United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

Our basic charter cannot be contracted away like this. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is." Marbury v. Madison (1803).

These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

C

In addition to the practical concerns discussed above, the Eisentrager Court found relevant that each petitioner:

> (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

Based on this language from Eisentrager, and the reasoning in our other extraterritoriality opinions, we conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

Applying this framework, we note at the onset that the status of these detainees is a matter of dispute. The petitioners, like those in Eisentrager, are not American citizens. But the petitioners in Eisentrager did not contest, it seems, the Court's assertion that they were "enemy alien[s]." In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in Eisentrager, there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the Eisentrager trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial

process to test the legality of their detention. The Eisentrager petitioners were charged by a bill of particulars that made detailed factual allegations against them. To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses.

In comparison the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. Although the detainee is assigned a "Personal Representative" to assist him during CSRT proceedings, the Secretary of the Navy's memorandum makes clear that person is not the detainee's lawyer or even his "advocate." The Government's evidence is accorded a presumption of validity. The detainee is allowed to present "reasonably available" evidence, but his ability to rebut the Government's evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage. And although the detainee can seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings.

As to the second factor relevant to this analysis, the detainees here are similarly situated to the Eisentrager petitioners in that the sites of their apprehension and detention are technically outside the sovereign territory of the United States. As noted earlier, this is a factor that weighs against finding they have rights under the Suspension Clause. But there are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008. Unlike its present control over the naval station, the United States' control over the prison in Germany was neither absolute nor indefinite. Like all parts of occupied Germany, the prison was under the jurisdiction of the combined Allied Forces. Guantanamo Bay, on the other hand, is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.

As to the third factor, we recognize, as the Court did in Eisentrager, that there are costs to holding the Suspension Clause applicable in a case of military detention abroad. Habeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks. While we are sensitive to these concerns, we do not find them dispositive. Compliance with any judicial process requires some incremental expenditure of resources. Yet civilian courts and the Armed Forces have functioned along side each other at various points in our history. The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims. And in light of the plenary control the United States asserts over the base, none are apparent to us.

The situation in Eisentrager was far different, given the historical context and nature of the military's mission in post-War Germany. When hostilities in the European Theater came to an end, the United States became responsible for an occupation zone encompassing over 57,000 square miles with a population of 18 million. In addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy. In retrospect the post-War occupation may seem uneventful. But

at the time Eisentrager was decided, the Court was right to be concerned about judicial interference with the military's efforts to contain "enemy elements, guerilla fighters, and 'were-wolves.' "

Similar threats are not apparent here; nor does the Government argue that they are. The United States Naval Station at Guantanamo Bay consists of 45 square miles of land and water. The base has been used, at various points, to house migrants and refugees temporarily. At present, however, other than the detainees themselves, the only long-term residents are American military personnel, their families, and a small number of workers. The detainees have been deemed enemies of the United States. At present, dangerous as they may be if released, they are contained in a secure prison facility located on an isolated and heavily fortified military base.

There is no indication, furthermore, that adjudicating a habeas corpus petition would cause friction with the host government. No Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there. While obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be "impracticable or anomalous" would have more weight. Under the facts presented here, however, there are few practical barriers to the running of the writ. To the extent barriers arise, habeas corpus procedures likely can be modified to address them.

We hold that Art. I, §9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.

V

In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus.

The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional.

Our case law does not contain extensive discussion of standards defining suspension of the writ or of circumstances under which suspension has occurred. This simply confirms the care Congress has taken throughout our Nation's history to preserve the writ and its function. Indeed, most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it or to hasten resolution of prisoners' claims.

We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus. We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation" of relevant law. And the habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted.

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain.

To determine the necessary scope of habeas corpus review, therefore, we must assess the CSRT process, the mechanism through which petitioners' designation as enemy combatants became final. Whether one characterizes the CSRT process as direct review of the Executive's battlefield determination that the detainee is an enemy combatant—as the parties have and as we do—or as the first step in the collateral review of a battlefield determination makes no difference in a proper analysis of whether the procedures Congress put in place are an adequate substitute for habeas corpus. What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.

Petitioners identify what they see as myriad deficiencies in the CSRTs. The most relevant for our purposes are the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant. As already noted, at the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case against him. He does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order his detention. The detainee can confront witnesses that testify during the CSRT proceedings. But given that there are in effect no limits on the admission of hearsay evidence—the only requirement is that the tribunal deem the evidence "relevant and helpful," the detainee's opportunity to question witnesses is likely to be more theoretical than real.

Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry. Habeas corpus is a collateral process that exists, in Justice Holmes' words, to "cu[t] through all forms and g[o] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant.

Although we make no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must

have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting. Here that opportunity is constitutionally required.

The extent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage. We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release.

C

We now consider whether the DTA allows the Court of Appeals to conduct a proceeding meeting these standards. The DTA does not explicitly empower the Court of Appeals to order the applicant in a DTA review proceeding released should the court find that the standards and procedures used at his CSRT hearing were insufficient to justify detention. This is troubling. Yet, for present purposes, we can assume congressional silence permits a constitutionally required remedy.

The absence of a release remedy and specific language allowing AUMF challenges are not the only constitutional infirmities from which the statute potentially suffers, however. The more difficult question is whether the DTA permits the Court of Appeals to make requisite findings of fact. Assuming the DTA can be construed to allow the Court of Appeals to review or correct the CSRT's factual determinations, as opposed to merely certifying that the tribunal applied the correct standard of proof, we see no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings.

On its face the statute allows the Court of Appeals to consider no evidence outside the CSRT record. Under the DTA the Court of Appeals has the power to review CSRT determinations by assessing the legality of standards and procedures. This implies the power to inquire into what happened at the CSRT hearing and, perhaps, to remedy certain deficiencies in that proceeding. But should the Court of Appeals determine that the CSRT followed appropriate and lawful standards and procedures, it will have reached the limits of its jurisdiction. There is no language in the DTA that can be construed to allow the Court of Appeals to admit and consider newly discovered evidence that could not have been made part of the CSRT record because it was unavailable to either the Government or the detainee when the CSRT made its findings. This evidence, however, may be critical to the detainee's argument that he is not an enemy combatant and there is no cause to detain him.

By foreclosing consideration of evidence not presented or reasonably available to the detainee at the CSRT proceedings, the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete.

Although we do not hold that an adequate substitute must duplicate §2241 in all respects, it suffices that the Government has not established that the detainees' access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus. MCA §7 thus effects an unconstitutional suspension of the writ. In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.

VI

The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. The ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur. Certain principles are apparent, however. Practical considerations and exigent circumstances inform the definition and reach of the law's writs, including habeas corpus. The cases and our tradition reflect this precept.

In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody. If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time. Domestic exigencies, furthermore, might also impose such onerous burdens on the Government that here, too, the Judicial Branch would be required to devise sensible rules for staying habeas corpus proceedings until the Government can comply with its requirements in a responsible way. Here, as is true with detainees apprehended abroad, a relevant consideration in determining the courts' role is whether there are suitable alternative processes in place to protect against the arbitrary exercise of governmental power.

The cases before us, however, do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. Were that the case, or were it probable that the Court of Appeals could complete a prompt review of their applications, the case for requiring temporary abstention or exhaustion of alternative remedies would be much stronger. These qualifications no longer pertain here. In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. To require these detainees to complete DTA review before proceeding with their habeas corpus actions would be to require additional months, if not years, of delay. The detainees in these cases are entitled to a prompt habeas corpus hearing.

Our decision today holds only that the petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that the petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court. The only law we identify as unconstitutional is MCA §7. Accordingly, both the DTA and the CSRT process remain intact. Our holding with regard to exhaustion should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. The

Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition.

In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.

It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined. We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

Justice Souter, with whom Justice Ginsburg and Justice Breyer join, concurring.

I join the Court's opinion in its entirety and add this afterword only to emphasize two things one might overlook after reading the dissents.

Four years ago, this Court in Rasul v. Bush (2004) held that statutory habeas jurisdiction extended to claims of foreign nationals imprisoned by the United States at Guantanamo Bay, "to determine the legality of the Executive's potentially indefinite detention" of them. Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all. But no one who reads the Court's opinion in Rasul could seriously doubt that the jurisdictional question must be answered the same way in purely constitutional cases, given the Court's reliance on the historical background of habeas generally in answering the statutory question.

A second fact insufficiently appreciated by the dissents is the length of the disputed imprisonments, some of the prisoners represented here today having been locked up for six years. Hence the hollow ring when the dissenters suggest that the Court is somehow precipitating the judiciary into reviewing claims that the military (subject to appeal to the Court of Appeals for the District of Columbia Circuit) could handle within some reasonable period of time. These suggestions of judicial haste are all the more out of place given the Court's realistic acknowledgment that in periods of exigency the tempo of any habeas review must reflect the immediate peril facing the country. After six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today's decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation.

Chief Justice Roberts, with whom Justice Scalia, Justice Thomas, and Justice Alito join, dissenting.

Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law's operation. And to what effect? The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.

The majority is adamant that the Guantanamo detainees are entitled to the protections of habeas corpus—its opinion begins by deciding that question. I regard the issue as a difficult one, primarily because of the unique and unusual jurisdictional status of Guantanamo Bay. I nonetheless agree with Justice Scalia's analysis of our precedents and the pertinent history of the writ, and accordingly join his dissent. The important point for me, however, is that the Court should have resolved these cases on other grounds. Habeas is most fundamentally a procedural right, a mechanism for contesting the legality of executive detention. The critical threshold question in these cases, prior to any inquiry about the writ's scope, is whether the system the political branches designed protects whatever rights the detainees may possess. If so, there is no need for any additional process, whether called "habeas" or something else.

Congress entrusted that threshold question in the first instance to the Court of Appeals for the District of Columbia Circuit, as the Constitution surely allows Congress to do. But before the D.C. Circuit has addressed the issue, the Court cashiers the statute, and without answering this critical threshold question itself. The Court does eventually get around to asking whether review under the DTA is, as the Court frames it, an "adequate substitute" for habeas, but even then its

opinion fails to determine what rights the detainees possess and whether the DTA system satisfies them. The majority instead compares the undefined DTA process to an equally undefined habeas right—one that is to be given shape only in the future by district courts on a case-by-case basis. This whole approach is misguided.

It is also fruitless. How the detainees' claims will be decided now that the DTA is gone is anybody's guess. But the habeas process the Court mandates will most likely end up looking a lot like the DTA system it replaces, as the district court judges shaping it will have to reconcile review of the prisoners' detention with the undoubted need to protect the American people from the terrorist threat—precisely the challenge Congress undertook in drafting the DTA. All that today's opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.

I believe the system the political branches constructed adequately protects any constitutional rights aliens captured abroad and detained as enemy combatants may enjoy. I therefore would dismiss these cases on that ground. With all respect for the contrary views of the majority, I must dissent.

The majority's overreaching is particularly egregious given the weakness of its objections to the DTA. Simply put, the Court's opinion fails on its own terms. The majority strikes down the statute because it is not an "adequate substitute" for habeas review, but fails to show what rights the detainees have that cannot be vindicated by the DTA system.

Because the central purpose of habeas corpus is to test the legality of executive detention, the writ requires most fundamentally an Article III court able to hear the prisoner's claims and, when necessary, order release. Beyond that, the process a given prisoner is entitled to receive depends on the circumstances and the rights of the prisoner. After much hemming and hawing, the majority appears to concede that the DTA provides an Article III court competent to order release. The only issue in dispute is the process the Guantanamo prisoners are entitled to use to test the legality of their detention. Hamdi concluded that American citizens detained as enemy combatants are entitled to only limited process, and that much of that process could be supplied by a military tribunal, with review to follow in an Article III court. That is precisely the system we have here. It is adequate to vindicate whatever due process rights petitioners may have.

The Court reaches the opposite conclusion partly because it misreads the statute. The majority appears not to understand how the review system it invalidates actually works—specifically, how CSRT review and review by the D.C. Circuit fit together. After briefly acknowledging in its recitation of the facts that the Government designed the CSRTs "to comply with the due process requirements identified by the plurality in Hamdi," the Court proceeds to dismiss the tribunal proceedings as no more than a suspect method used by the Executive for determining the status of the detainees in the first instance.

The majority is equally wrong to characterize the CSRTs as part of that initial determination process. They are instead a means for detainees to challenge the Government's determination. The Executive designed the CSRTs to mirror Army Regulation 190-8, the very procedural model the plurality in Hamdi said provided the type of process an enemy combatant could expect from a habeas court. The CSRTs operate much as habeas courts would if hearing the detainee's collateral

challenge for the first time: They gather evidence, call witnesses, take testimony, and render a decision on the legality of the Government's detention. If the CSRT finds a particular detainee has been improperly held, it can order release.

The majority insists that even if "the CSRTs satisf[ied] due process standards," full habeas review would still be necessary, because habeas is a collateral remedy available even to prisoners "detained pursuant to the most rigorous proceedings imaginable." This comment makes sense only if the CSRTs are incorrectly viewed as a method used by the Executive for determining the prisoners' status, and not as themselves part of the collateral review to test the validity of that determination. The majority can deprecate the importance of the CSRTs only by treating them as something they are not.

In short, the Hamdi plurality concluded that this type of review would be enough to satisfy due process, even for citizens. Congress followed the Court's lead, only to find itself the victim of a constitutional bait and switch.

Given the statutory scheme the political branches adopted, and given Hamdi, it simply will not do for the majority to dismiss the CSRT procedures as "far more limited" than those used in military trials, and therefore beneath the level of process "that would eliminate the need for habeas corpus review." The question is not how much process the CSRTs provide in comparison to other modes of adjudication. The question is whether the CSRT procedures—coupled with the judicial review specified by the DTA—provide the "basic process" Hamdi said the Constitution affords American citizens detained as enemy combatants.

To what basic process are these detainees due as habeas petitioners? We have said that "at the absolute minimum," the Suspension Clause protects the writ " 'as it existed in 1789.' " The majority admits that a number of historical authorities suggest that at the time of the Constitution's ratification, "common-law courts abstained altogether from matters involving prisoners of war." If this is accurate, the process provided prisoners under the DTA is plainly more than sufficient—it allows alleged combatants to challenge both the factual and legal bases of their detentions.

Assuming the constitutional baseline is more robust, the DTA still provides adequate process, and by the majority's own standards. The DTA system—CSRT review of the Executive's determination followed by D.C. Circuit review for sufficiency of the evidence and the constitutionality of the CSRT process—meets these criteria.

All told, the DTA provides the prisoners held at Guantanamo Bay adequate opportunity to contest the bases of their detentions, which is all habeas corpus need allow. The DTA provides more opportunity and more process, in fact, than that afforded prisoners of war or any other alleged enemy combatants in history.

Despite these guarantees, the Court finds the DTA system an inadequate habeas substitute, for one central reason: Detainees are unable to introduce at the appeal stage exculpatory evidence discovered after the conclusion of their CSRT proceedings. The Court hints darkly that the DTA may suffer from other infirmities, but it does not bother to name them, making a response a bit difficult. As it stands, I can only assume the Court regards the supposed defect it did identify as the gravest of the lot.

If this is the most the Court can muster, the ice beneath its feet is thin indeed. As noted, the CSRT procedures provide ample opportunity for detainees

to introduce exculpatory evidence—whether documentary in nature or from live witnesses—before the military tribunals. And if their ability to introduce such evidence is denied contrary to the Constitution or laws of the United States, the D.C. Circuit has the authority to say so on review.

For all its eloquence about the detainees' right to the writ, the Court makes no effort to elaborate how exactly the remedy it prescribes will differ from the procedural protections detainees enjoy under the DTA. The Court objects to the detainees' limited access to witnesses and classified material, but proposes no alternatives of its own. Indeed, it simply ignores the many difficult questions its holding presents. What, for example, will become of the CSRT process? The majority says federal courts should generally refrain from entertaining detainee challenges until after the petitioner's CSRT proceeding has finished. But to what deference, if any, is that CSRT determination entitled?

There are other problems. Take witness availability. What makes the majority think witnesses will become magically available when the review procedure is labeled "habeas"? Will the location of most of these witnesses change—will they suddenly become easily susceptible to service of process? Or will subpoenas issued by American habeas courts run to Basra? And if they did, how would they be enforced? Speaking of witnesses, will detainees be able to call active-duty military officers as witnesses? If not, why not?

The majority has no answers for these difficulties. What it does say leaves open the distinct possibility that its "habeas" remedy will, when all is said and done, end up looking a great deal like the DTA review it rejects.

The majority rests its decision on abstract and hypothetical concerns. Step back and consider what, in the real world, Congress and the Executive have actually granted aliens captured by our Armed Forces overseas and found to be enemy combatants:

- The right to hear the bases of the charges against them, including a summary of any classified evidence.
- The ability to challenge the bases of their detention before military tribunals modeled after Geneva Convention procedures. Some 38 detainees have been released as a result of this process.
- The right, before the CSRT, to testify, introduce evidence, call witnesses, question those the Government calls, and secure release, if and when appropriate.
- The right to the aid of a personal representative in arranging and presenting their cases before a CSRT.
- Before the D.C. Circuit, the right to employ counsel, challenge the factual record, contest the lower tribunal's legal determinations, ensure compliance with the Constitution and laws, and secure release, if any errors below establish their entitlement to such relief.

In sum, the DTA satisfies the majority's own criteria for assessing adequacy. This statutory scheme provides the combatants held at Guantanamo greater procedural protections than have ever been afforded alleged enemy detainees—whether citizens or aliens—in our national history.

So who has won? Not the detainees. The Court's analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right,

followed by further litigation to resolve their particular cases, followed by further litigation before the D.C. Circuit—where they could have started had they invoked the DTA procedure. Not Congress, whose attempt to "determine—through democratic means—how best" to balance the security of the American people with the detainees' liberty interests, has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges.

Justice Scalia, with whom The Chief Justice, Justice Thomas, and Justice Alito join, dissenting.

Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war. The Chief Justice's dissent, which I join, shows that the procedures prescribed by Congress in the Detainee Treatment Act provide the essential protections that habeas corpus guarantees; there has thus been no suspension of the writ, and no basis exists for judicial intervention beyond what the Act allows. My problem with today's opinion is more fundamental still: The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely ultra vires.

I shall devote most of what will be a lengthy opinion to the legal errors contained in the opinion of the Court. Contrary to my usual practice, however, I think it appropriate to begin with a description of the disastrous consequences of what the Court has done today.

America is at war with radical Islamists. The enemy began by killing Americans and American allies abroad: 241 at the Marine barracks in Lebanon, 19 at the Khobar Towers in Dhahran, 224 at our embassies in Dar es Salaam and Nairobi, and 17 on the USS Cole in Yemen. On September 11, 2001, the enemy brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the Pentagon in Washington, D. C., and 40 in Pennsylvania. It has threatened further attacks against our homeland; one need only walk about buttressed and barricaded Washington, or board a plane anywhere in the country, to know that the threat is a serious one. Our Armed Forces are now in the field against the enemy, in Afghanistan and Iraq. Last week, 13 of our countrymen in arms were killed.

The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic. But it is this Court's blatant abandonment of such a principle that produces the decision today. The President relied on our settled precedent in Johnson v. Eisentrager (1950), when he established the prison at Guantanamo Bay for enemy aliens. Citing that case, the President's Office of Legal Counsel advised him "that the great

weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay]." Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, Office of Legal Counsel, to William J. Haynes II, General Counsel, Dept. of Defense (Dec. 28, 2001). Had the law been otherwise, the military surely would not have transported prisoners there, but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention. Those other facilities might well have been worse for the detainees themselves.

In the long term, then, the Court's decision today accomplishes little, except perhaps to reduce the well-being of enemy combatants that the Court ostensibly seeks to protect. In the short term, however, the decision is devastating. At least 30 of those prisoners hitherto released from Guantanamo Bay have returned to the battlefield. See S.Rep. No. 110-90, pt. 7, p. 13 (2007) (Minority Views of Sens. Kyl, Sessions, Graham, Cornyn, and Coburn) (hereinafter Minority Report). Some have been captured or killed. See also Mintz, Released Detainees Rejoining the Fight, Washington Post, Oct. 22, 2004, pp. A1, A12. But others have succeeded in carrying on their atrocities against innocent civilians. In one case, a detainee released from Guantanamo Bay masterminded the kidnapping of two Chinese dam workers, one of whom was later shot to death when used as a human shield against Pakistani commandoes. Another former detainee promptly resumed his post as a senior Taliban commander and murdered a United Nations engineer and three Afghan soldiers. Mintz, supra. Still another murdered an Afghan judge. It was reported only last month that a released detainee carried out a suicide bombing against Iraqi soldiers in Mosul, Iraq. See White, Ex-Guantanamo Detainee Joined Iraq Suicide Attack, Washington Post, May 8, 2008, p. A18.

These, mind you, were detainees whom the military had concluded were not enemy combatants. Their return to the kill illustrates the incredible difficulty of assessing who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection. Astoundingly, the Court today raises the bar, requiring military officials to appear before civilian courts and defend their decisions under procedural and evidentiary rules that go beyond what Congress has specified. As The Chief Justice's dissent makes clear, we have no idea what those procedural and evidentiary rules are, but they will be determined by civil courts and (in the Court's contemplation at least) will be more detainee-friendly than those now applied, since otherwise there would no reason to hold the congressionally prescribed procedures unconstitutional. If they impose a higher standard of proof (from foreign battlefields) than the current procedures require, the number of the enemy returned to combat will obviously increase.

But even when the military has evidence that it can bring forward, it is often foolhardy to release that evidence to the attorneys representing our enemies. And one escalation of procedures that the Court is clear about is affording the detainees increased access to witnesses (perhaps troops serving in Afghanistan?) and to classified information. During the 1995 prosecution of Omar Abdel Rahman, federal prosecutors gave the names of 200 unindicted co-conspirators to the "Blind Sheik's" defense lawyers; that information was in the hands of Osama Bin Laden within two

weeks. In another case, trial testimony revealed to the enemy that the United States had been monitoring their cellular network, whereupon they promptly stopped using it, enabling more of them to evade capture and continue their atrocities.

And today it is not just the military that the Court elbows aside. A mere two Terms ago in Hamdan v. Rumsfeld (2006), when the Court held (quite amazingly) that the Detainee Treatment Act of 2005 had not stripped habeas jurisdiction over Guantanamo petitioners' claims, four Members of today's five-Justice majority joined an opinion saying the following: "Nothing prevents the President from returning to Congress to seek the authority [for trial by military commission] he believes necessary."

Turns out they were just kidding. For in response, Congress, at the President's request, quickly enacted the Military Commissions Act, emphatically reasserting that it did not want these prisoners filing habeas petitions. It is therefore clear that Congress and the Executive—both political branches—have determined that limiting the role of civilian courts in adjudicating whether prisoners captured abroad are properly detained is important to success in the war that some 190,000 of our men and women are now fighting. As the Solicitor General argued, "the Military Commissions Act and the Detainee Treatment Act . . . represent an effort by the political branches to strike an appropriate balance between the need to preserve liberty and the need to accommodate the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."

But it does not matter. The Court today decrees that no good reason to accept the judgment of the other two branches is "apparent." "The Government," it declares, "presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims." What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless. Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.

Today the Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause, invoking judicially brainstormed separation-of-powers principles to establish a manipulable "functional" test for the extraterritorial reach of habeas corpus (and, no doubt, for the extraterritorial reach of other constitutional protections as well). It blatantly misdescribes important precedents, most conspicuously Justice Jackson's opinion for the Court in Johnson v. Eisentrager. It breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

The Nation will live to regret what the Court has done today. I dissent.

However, since *Boumediene*, the United States Court of Appeals for the District of Columbia Circuit has denied relief in every case. Following the Supreme Court's decision, federal district court judges in the District of Columbia granted relief to a number of Guantanamo detainees. But in each instance so far, the D.C. Circuit reversed, and then the Supreme Court denied review. 559 U.S. 1005.

For example, in Kiyemba v. Obama, a federal district court ordered the release of five Chinese Muslim (Uighur) detainees who had been cleared for release from Guantánamo. But the D.C. Circuit reversed, 561 F.3d 509 (D.C. Cir. 2009), and held that a federal judge lacks the power to order the transfer of Guantánamo detainees to the United States. Subsequently, in the same case, the D.C. Circuit, 605 F.3d 1046 (D.C. Cir. 2010), denied federal judges the power to regulate transfers of Guantánamo detainees to elsewhere in the world. The Supreme Court denied review.

In Latif v. Obama, 666 F.3d 746 (D.C. Cir. 2011), the D.C. Circuit ruled that federal district judges must "presume" that government intelligence reports used to justify detention are reliable and accurate. Adnan Farhan Abdul Latif, a Yemeni man, was picked up near the border between Afghanistan and Pakistan in December 2001. The government has relied on an intelligence report prepared at the time to justify holding him ever since. The district court ordered his release saying that the report was not sufficiently reliable to warrant keeping him imprisoned. But the D.C. Circuit, while acknowledging problems with the report, said that it was entitled to "a presumption of regularity." In dissent, D.C. Circuit Judge David Tatel said that this would mean that the government would win virtually every case and that "it is hard to see what is left of the Supreme Court's command in Boumediene." The Supreme Court denied certiorari. Indeed, the Supreme Court has denied certiorari in every Guantanamo case since *Boumediene* in 2008.