SUPREME COURT OF THE UNITED STATES

No. 90–1859

J. C. KEENEY, SUPERINTENDENT, OREGON STATE PENITENTIARY, PETITIONER *v.* JOSE TAMAYO-REYES

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

[May 4, 1992]

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE KENNEDY join, dissenting.

Under the guise of overruling ``a remnant of a decision,'' *ante*, at 5, and achieving ``uniformity in the law,'' *ante*, at 7, the Court has changed the law of habeas corpus in a fundamental way by effectively overruling cases decided long before *Townsend* v. *Sain*, 372 U. S. 293 (1963). I do not think this change is supported by the line of our recent procedural default cases upon which the Court relies: In my view, the balance of state and federal interests regarding whether a federal court will *consider* a claim raised on habeas cannot be simply lifted and transposed to the different question whether, once the court will consider the claim, it should hold an evidentiary hearing. Moreover, I do not think the Court's decision can be reconciled with 28 U. S. C. §2254(d), a statute Congress enacted three years after *Townsend*.

Jose Tamayo-Reyes' habeas petition stated that because he does not speak English he pleaded *nolo contendere* to manslaughter without any understanding of what ``manslaughter'' means. App. 58. If this assertion is true, his conviction was unconstitutionally obtained, see *Henderson*

v. *Morgan*, 426 U. S. 637, 644–647 (1976), and Tamayo-Reyes would be entitled to a writ of habeas corpus. Despite the Court's attempt to characterize his allegation as a technical quibble—``his translator had not translated accurately and completely for him the *mens rea* element of manslaughter,'' *ante*, at 2—this much is not in dispute. Tamayo-Reyes has alleged a fact that, if true, would entitle him to the relief he seeks.

Tamayo-Reyes initially, and properly, challenged the voluntariness of his plea in a petition for postconviction relief in state court. The court held a hearing, after which it found that ``[p]etitioner's plea of guilty was knowingly and voluntarily entered.'' App. 51. Yet the record of the postconviction hearing hardly inspires confidence in the accuracy of this determination. Tamayo-Reyes was the only witness to testify, but his attorney did not ask him whether his interpreter had translated ``manslaughter'' for him. Counsel instead introduced the deposition testimony of the interpreter, who admitted that he had translated ``manslaughter'' only as ``less than murder.'' *Id.*, at 27. No witnesses capable of assessing the interpreter's performance were called; the attorney instead tried to direct the court's attention to various sections of the interpreter's deposition and attempted to point out where the interpreter had erred. When the prosecutor objected to this discussion on the ground that counsel was not qualified as an expert wit-
ness, his ``presentation of the issue quickly disintegrated.'' 926 F. 2d 1492, 1499 (CA9 1991). The state court had no other relevant evidence before it when it determined that Tamayo-Reyes actually understood the charge to which he was pleading.

Contrary to the impression conveyed by this Court's opinion, the question whether a federal court should defer to this sort of dubious ``factfinding'' in addressing a habeas corpus petition is one with a

long history behind it, a history that did not begin with *Townsend* v. *Sain*.

The availability and scope of habeas corpus have changed over the writ's long history, but one thing has remained constant: Habeas corpus is not an appellate proceeding, but rather an original civil action in a federal court. See, *e. g.*, *Browder* v. *Director, Illinois Dept. of Corrections*, 434 U. S. 257, 269 (1978). It was settled over a hundred years ago that ``[t]he prosecution against [a criminal defendant] is a criminal prosecution, but the writ of habeas corpus . . . is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right.'' *Ex parte Tom Tong*, 108 U. S. 556, 559–560 (1883). Any possible doubt about this point has been removed by the statutory procedure Congress has provided for the disposition of habeas corpus petitions, a procedure including such nonappellate functions as the allegation of facts, 28 U. S. C. §2242, the taking of depositions and the propounding of interrogatories, §2246, the introduction of documentary evidence, §2247, and, of course, the determination of facts at evidentiary hearings, §2254(d).

To be sure, habeas corpus has its own peculiar set of hurdles a petitioner must clear before his claim is properly presented to the district court. The petitioner must, in general, exhaust available state remedies, §2254(b), avoid procedural default, *Coleman* v. *Thompson*, 501 U. S. ___ (1991), not abuse the writ, *McCleskey* v. *Zant*, 499 U. S. ___ (1991), and not seek retroactive application of a new rule of law, *Teague* v. *Lane*, 489 U. S. 288 (1989). For much of our history, the hurdles were even higher. See, *e. g.*, *Ex parte Watkins*, 3 Pet. 193, 203 (1830) (habeas corpus available only to challenge

jurisdiction of trial court). But once they have been surmounted—once the claim is properly before the district court—a habeas petitioner, like any civil litigant, has had a right to a hearing where one is necessary to prove the facts supporting his claim. See, *e. g.*, *Hawk* v. *Olson*, 326 U. S. 271, 278–279 (1945); *Holiday* v. *Johnston*, 313 U. S. 342, 351–354 (1941); *Walker* v. *Johnston*, 312 U. S. 275, 285–287 (1941); *Moore* v. *Dempsey*, 261 U. S. 86, 92 (1923). Thus when we observed in *Townsend* v. *Sain*, *supra*, at 312, that ``the opportunity for redress . . . presupposes the opportunity to be heard, to argue and present evidence,'' we were saying nothing new. We were merely restating what had long been our understanding of the method by which contested factual issues raised on habeas should be resolved.

Habeas corpus has always differed from ordinary civil litigation, however, in one important respect: The doctrine of res judicata has never been thought to apply. See, *e. g.*, *Brown* v. *Allen*, 344 U. S. 443, 458 (1953); *Darr* v. *Burford*, 339 U. S. 200, 214 (1950); *Waley* v. *Johnston*, 316 U. S. 101, 105 (1942); *Salinger* v. *Loisel*, 265 U. S. 224, 230 (1924). A state prisoner is not precluded from raising a federal claim on habeas that has already been rejected by the state courts. This is not to say that state court factfinding is entitled to no weight, or that every state prisoner has the opportunity to relitigate facts found against him by the state courts. Concerns of federalism and comity have pushed us from this extreme just as the importance of the writ has repelled us from the opposite extreme, represented by the strict application of res judicata. Instead, we have consistently occupied the middle ground. Even before *Townsend*, federal courts deferred to state court findings of fact where the federal district judge was satisfied that the state court had fairly considered the issues and the evidence and had reached a satisfactory result. See, *e. g.*, *Brown*,

supra, at 458, 465; *Frank* v. *Mangum*, 237 U. S. 309, 332–336 (1915). But where such was not the case, the federal court entertaining the habeas petition would examine the facts anew. See, *e. g.*, *Ex parte Hawk*, 321 U. S. 114, 116, 118 (1944); *Moore*, *supra*, at 92. In *Hawk*, for example, we stated that a state prisoner would be entitled to a hearing, 321 U. S., at 116, ``where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised . . . because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate.'' *Id.*, at 118. In *Brown*, we explained that a hearing may be dispensed with only ``[w]here the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented.'' 344 U. S., at 463.

Townsend ``did not launch the Court in any new directions,'' Weisselberg, Evidentiary Hearings in Federal Habeas Corpus Cases, 1990 B. Y. U. L. Rev. 131, 150, but it clarified how the district court should measure the adequacy of the state court proceeding. *Townsend* specified six circumstances in which one could not be confident that ``the state-court trier of fact has after a full hearing reliably found the relevant facts.'' 372 U. S., at 313. The Court held that a habeas petitioner is entitled to an evidentiary hearing on his factual allegations if

> ``(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier

> of fact did not afford the habeas applicant a full and fair fact hearing.'' *Ibid.*

That these principles marked no significant departure from our prior understanding of the writ is evident from the view expressed by the four dissenters, who had ``no quarrel with the Court's statement of the basic governing principle which should determine whether a hearing is to be had in a federal habeas corpus proceeding,'' but disagreed only with the Court's attempt ``to erect detailed hearing standards for the myriad situations presented by federal habeas corpus applications.'' *Id.*, at 326–327 (Stewart, J., dissenting). *Townsend* thus did not alter the federal courts' practice of holding an evidentiary hearing unless the state court had fairly considered the relevant evidence.

The Court expressed concern in *Townsend* that a petitioner might abuse the fifth circumstance described in the opinion, by deliberately withholding evidence from the state factfinder in the hope of finding a more receptive forum in a federal court. *Id.*, at 317. To discourage this sort of disrespect for state proceedings, the Court held that such a petitioner would not be entitled to a hearing. *Ibid.* The *Townsend* opinion did not need to address this concern in much detail, because a similar issue was discussed at greater length in another case decided the same day, *Fay* v. *Noia*, 372 U. S. 391, 438–440 (1963). The *Townsend* opinion thus merely referred the reader to the discussion in *Fay*, where a similar exception was held to bar a state prisoner from habeas relief where the prisoner had intentionally committed a procedural default in state court. See *Townsend*, *supra*, at 317.

Nearly 30 years later, the Court implies that *Fay* and *Townsend* must stand or fall together. *Ante*, at 3–5. But this is not so: The *Townsend* Court did *not* suggest that the issues in *Townsend* and *Fay* were identical, or that they were so similar that logic

required an identical answer to each. *Townsend* did not purport to rely on *Fay* as authority; it merely referred to *Fay*'s discussion as a shorthand device to avoid repeating similar analysis. Indeed, reliance on *Fay* as authority would have been unnecessary. *Townsend* was essentially an elaboration of our prior cases regarding the holding of hearings in federal habeas cases; *Fay* represented an overruling of our prior cases regarding procedural defaults. See *Coleman* v. *Thompson*, 501 U. S. ___, ___ (1991); *Wainwright* v. *Sykes*, 433 U. S. 72, 82 (1977).

As the Court recognizes, *ante*, at 3, we have applied *Townsend*'s analysis ever since. See, *e. g.*, *Vasquez* v. *Hillery*, 474 U. S. 254, 258 (1986); *Cuyler* v. *Sullivan*, 446 U. S. 335, 341–342 (1980); *Jackson* v. *Virginia*, 443 U. S. 307, 318 (1979); *LaVallee* v. *Delle Rose*, 410 U. S. 690, 693–694 (1973); *Boyd* v. *Dutton*, 405 U. S. 1, 3 (1972); *Procunier* v. *Atchley*, 400 U. S. 446, 451 (1971). But we have not, in my view, been unjustifiably clinging to a poorly reasoned precedent. While we properly abandoned *Fay* because it was inconsistent with prior cases that represented a better-reasoned balance of state and federal interests, the same cannot be said of *Townsend*.

The Court today holds that even when the reliability of state factfinding is doubtful because crucial evidence was not presented to the state trier of fact, a habeas petitioner is ordinarily not entitled to an opportunity to prove the facts necessary to his claim. This holding, of course, directly overrules a portion of *Townsend*, but more than that, I think it departs significantly from the pre-*Townsend* law of habeas corpus. Even before *Townsend*, when a habeas petitioner's claim was properly before a federal court, and when the accurate resolution of that claim depended on proof of facts that had been resolved against the petitioner in an unreliable state proceeding, the petitioner was entitled to his day in federal court. As Justice Holmes wrote for the Court,

in a case where the state courts had rejected—under somewhat suspicious circumstances—the petitioner's allegation that his trial had been dominated by an angry mob, ``it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.'' *Moore*, 261 U. S., at 92. The class of petitioners eligible to present claims on habeas may have been narrower in days gone by, and the class of claims one might present may have been smaller, but once the claim was properly before the court, the right to a hearing was not construed as narrowly as the Court construes it today.

Instead of looking to the history of the right to an evidentiary hearing, the Court simply borrows the cause and prejudice standard from a series of our recent habeas corpus cases. *Ante*, at 3–5. All but one of these cases address the question of when a habeas claim is properly before a federal court despite the petitioner's procedural default. See *Coleman* v. *Thompson*, *supra; Murray* v. *Carrier*, 477 U. S. 478 (1986); *Reed* v. *Ross*, 468 U. S. 1 (1984); *Engle* v. *Isaac*, 456 U. S. 107 (1982); *Wainwright* v. *Sykes*, 433 U. S. 72 (1977); *Francis* v. *Henderson*, 425 U. S. 536 (1976). The remaining case addresses the issue of a petitioner's abuse of the writ. See *McCleskey* v. *Zant*, 499 U. S. ___ (1991). These cases all concern the question whether the federal court will *consider* the merits of the claim, that is, whether the court has the *authority* to upset a judgment affirmed on direct appeal. So far as this threshold inquiry is concerned, our respect for state procedural rules and the need to discourage abuse of the writ provide the justification for the cause and prejudice standard. As we have said in the former context, ``the Great Writ imposes special costs on our federal system. The States possess primary authority for defining and

enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'' *Engle*, *supra*, at 128.

The question we are considering here is quite different. Here, the Federal District Court has already determined that it will consider the claimed constitutional violation; the only question is how the court will go about it. When it comes to determining whether a hearing is to be held to resolve a claim that is already properly before a federal court, the federalism concerns underlying our procedural default cases are diminished somewhat. By this point, our concern is less with encroaching on the territory of the state courts than it is with managing the territory of the federal courts in a manner that will best implement their responsibility to consider habeas petitions. Our adoption of a cause and prejudice standard to resolve the first concern should not cause us reflexively to adopt the same standard to resolve the second. Federalism, comity, and finality are all advanced by declining to permit relitigation of claims in federal court in certain circumstances; these interests are less significantly advanced, once relitigation properly occurs, by permitting district courts to resolve claims based on an incomplete record.

The Court's decision today cannot be reconciled with subsection (d) of 28 U. S. C. §2254, which Congress enacted only three years after we decided *Townsend*. Subsection (d) provides that state court factfinding ``shall be presumed to be correct, unless the applicant shall establish'' one of eight listed circumstances. Most of these circumstances are taken word for word from *Townsend*, including the

one at issue here; §2254(d)(3) renders the presumption of correctness inapplicable where ``the material facts were not adequately developed at the State court hearing.'' The effect of the presumption is to augment the habeas petitioner's burden of proof. Where state factfinding is presumed correct, the petitioner must establish the state court's error ``by convincing evidence''; where state factfinding is not presumed correct, the petitioner must prove the facts necessary to support his claim by only a preponderance of the evidence. *Sumner* v. *Mata*, 449 U. S. 539, 551 (1981).

Section 2254(d) is not, in the strict sense, a codification of our holding in *Townsend*. The listed circumstances in *Townsend* are those in which a hearing must be held; the nearly identical listed circumstances in §2254(d) are those in which facts found by a state court are not presumed correct. But the two are obviously intertwined. If a habeas petitioner fulfills one of the *Townsend* requirements he

will be entitled to a hearing, and by virtue of fulfilling a *Townsend* requirement he will necessarily have also fulfilled one of the §2254(d) requirements, so that at his hearing the presumption of correctness will not apply. On the other hand, if the petitioner has not fulfilled one of the *Townsend* requirements he will generally not have fulfilled the corresponding §2254(d) requirement either, so he will be entitled neither to a hearing nor to an exception from the presumption of correctness. *Townsend* and §2254(d) work hand in hand: Where a petitioner has a right to a hearing he must prove facts by a preponderance of the evidence, but where he has no right to a hearing he must prove facts by the higher standard of convincing evidence. Without the opportunity for a hearing, it is safe to assume that this higher standard will be unattainable for most petitioners. See L. Yackle, Postconviction Remedies 508–

509 (1981).

In enacting a statute that so closely parallels *Townsend*, Congress established a procedural framework that relies upon *Townsend*'s continuing validity. In general, therefore, overruling *Townsend* would frustrate the evident intent of Congress that the question of when a hearing is to be held should be governed by the same standards as the question of when a federal court should defer to state court factfinding. In particular, the Court's adoption of a ``cause and prejudice'' standard for determining whether the material facts were adequately developed in state proceedings will frustrate Congress' intent with respect to that *Townsend* circumstance's statutory analog, §2254(d)(3).

For a case to fit within this *Townsend* circumstance but none of *Townsend*'s other circumstances, the case will very likely be like this one, where the material facts were not developed because of attorney error. Any other reason the material facts might not have been developed, such as that they were unknown at the time or that the state denied a full and fair opportunity to develop them, will almost certainly be covered by one of *Townsend*'s other circumstances. See *Townsend*, 372 U. S., at 313. We have already held that attorney error short of constitutionally ineffective assistance of counsel does not amount to ``cause.'' See *Murray* v. *Carrier*, *supra*, at 488. As a result, the practical effect of the Court's ruling today will be that for a case to fall within *Townsend*'s fifth circumstance but no other—for a petitioner to be entitled to a hearing on the ground that the material facts were not adequately developed in state court but on no other ground—the petitioner's attorney must have rendered constitutionally ineffective assistance in presenting facts to the state factfinder.

This effect is more than a little ironic. Where the state factfinding occurs at the trial itself, counsel's ineffectiveness will not just entitle the petitioner to a

hearing—it will entitle the petitioner to a new trial. Where, as in this case, the state factfinding occurs at a postconviction proceeding, the petitioner *has* no constitutional right to the effective assistance of counsel, so counsel's poor performance can *never* constitute ``cause'' under the cause and prejudice standard. *Coleman* v. *Thompson*, 501 U. S., at ___. After today's decision, the only petitioners entitled to a hearing under *Townsend*'s fifth circumstance are the very people who do not need one, because they will have already obtained a new trial or because they will already be entitled to a hearing under one of the other circumstances. The Court has thus rendered unusable the portion of *Townsend* requiring hearings where the material facts were not adequately developed in state court.

As noted above, the fact that §2254(d)(3) uses language identical to the language we used in *Townsend* strongly suggests that Congress presumed the continued existence of this portion of *Townsend*. Moreover, the Court's application of a cause and prejudice standard creates a conundrum regarding how to interpret §2254(d)(3). If a cause and prejudice standard applies to §2254(d)(3) as well as *Townsend*'s fifth circumstance, then the Court has rendered §2254(d)(3) superfluous for the same reason this part of *Townsend* has become superfluous. While we may deprive portions of our own prior decisions of any effect, we generally may not, of course, do the same with portions of statutes. On the other hand, if a cause and prejudice standard does not apply to §2254(d)(3), we will have uncoupled the statute from the case it was intended to follow, and there will likely be instances where a petitioner will be entitled to an exception from the presumption of correctness but will not be entitled to a hearing. This result does not accord with the evident intent of Congress that the first inquiry track the second. Reconciliation of these two questions is now left to the district courts, who

still possess the discretion, which has not been removed by today's opinion, to hold hearings even where they are not mandatory. See *Townsend*, *supra*, at 318.

For these reasons, I think §2254(d) presumes the continuing validity of our decision in *Townsend*, including the portion of the decision that recognized a ``deliberate bypass'' exception to a petitioner's right to a hearing where the material facts were not adequately developed in the state court.

Jose Tamayo-Reyes alleges that he pleaded *nolo contendere* to a crime he did not understand. He has exhausted state remedies, has committed no procedural default, has properly presented his claim to a federal district court in his first petition for a writ of habeas corpus, and would be entitled to a hearing under the standard set forth in *Townsend*. Given that his claim is properly before the district court, I would not cut off his right to prove his claim at a hearing. I respectfully dissent.