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 KENNEDY, dissenting.

By definition, the cases within the ambit of the Court's holding are confined to those in which the factual record developed in the state-court proceedings is inadequate to resolve the legal question. I should think those cases will be few in number. *Townsend* v. *Sain,* 372 U. S. 293, 318 (1963), has been the law for almost 30 years and there is no clear evidence that this particular classification of habeas proceedings has burdened the dockets of the federal courts. And in my view, the concept of factual inadequacy comprehends only those petitions with respect to which there is a realistic possibility that an evidentiary hearing will make a difference in the outcome. This serves to narrow the number of cases in a further respect and to insure that they are the ones, as JUSTICE O'CONNOR points out, in which we have valid concerns with constitutional error.

Our recent decisions in *Coleman* v. *Thompson,* 501 U. S. ___ (1991), *McCleskey* v. *Zant,* 499 U. S. ___ (1991), and *Teague* v. *Lane,* 489 U. S. 288 (1989), serve to protect the integrity of the writ, curbing its abuse and insuring that the legal questions presented are ones which, if resolved against the State, can invalidate a final judgment. So we consider today only those habeas actions which present questions federal courts are bound to decide in order to

protect constitutional rights. We ought not to take steps which diminish the likelihood that those courts will base their legal decision on an accurate assessment of the facts. For these reasons and all those set forth by JUSTICE O'CONNOR, I dissent from the opinion and judgment of the Court.