SUPREME COURT OF THE UNITED STATES

No. 91–542

ELLIS B. WRIGHT, JR., WARDEN AND MARY SUE TERRY, ATTORNEY GENERAL OF VIRGINIA, PETITIONERS *v.* FRANK ROBERT WEST, JR.

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

[June 19, 1992]

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, concurring in the judgment.

I agree that the evidence sufficiently supported respondent's conviction. I write separately only to express disagreement with certain statements in JUSTICE THOMAS' extended discussion, *ante*, at 6–16, of this Court's habeas corpus jurisprudence.

First, JUSTICE THOMAS errs in describing the pre-1953 law of habeas corpus. *Ante*, at 6–7. While it is true that a state prisoner could not obtain the writ if he had been provided a full and fair hearing in the state courts, this rule governed the merits of a claim under the Due Process Clause. It was not a threshold bar to the consideration of *other* federal claims, because, with rare exceptions, there *were* no other federal claims available at the time. During the period JUSTICE THOMAS discusses, the guarantees of the Bill of Rights were not yet understood to apply in state criminal prosecutions. The only protections the Constitution afforded to state prisoners were those for which the text of the Constitution explicitly limited the authority of the States, most notably the Due Process Clause of the Fourteenth Amendment. And in the area of criminal procedure, the Due Process Clause was understood to guarantee no more than a full and fair hearing in the state courts. See, *e.g.*, *Ponzi* v. *Fessenden*, 258 U. S. 254, 260 (1922) ("One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than

that”).

Thus, when the Court stated that a state prisoner who had been afforded a full and fair hearing could not obtain a writ of habeas corpus, the Court was propounding a rule of constitutional law, not a threshold requirement of habeas corpus. This is evident from the fact that the Court did not just apply this rule on habeas, but also in cases on direct review. See, *e.g.*, *Snyder* v. *Massachusetts*, 291 U. S. 97, 107–108 (1934) ("the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only"); *Twining* v. *New Jersey*, 211 U. S. 78, 110–111 (1908) ("Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, and that there shall be notice and opportunity for hearing given the parties. Subject to these two fundamental conditions, . . . this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law") (citations omitted). As long as a state criminal prosecution was fairly conducted by a court of competent jurisdiction according to state law, no constitutional question was presented, whether on direct *or* habeas review. *Caldwell* v. *Texas*, 137 U. S. 692, 698 (1891); *Brown* v. *New Jersey*, 175 U. S. 172, 175 (1899).

The cases cited by JUSTICE THOMAS—*Moore* v. *Dempsey*, 261 U. S. 86 (1923), and *Frank* v. *Mangum*, 237 U. S. 309 (1915)—demonstrate that the absence of a full and fair hearing in the state courts was *itself* the relevant violation of the Constitution; it was not a prerequisite to a federal court's consideration of some other federal claim. Both cases held that a trial dominated by an angry mob was inconsistent with due process. In both, the Court recognized that the State could nevertheless afford due process if the state appellate courts provided a fair opportunity to correct the error. The state courts had provided such

an opportunity in *Frank*; in *Moore*, they had not. In neither case is the "full and fair hearing" rule cited as a deferential standard of review applicable to habeas cases; the rule instead defines the constitutional claim itself, which was reviewed *de novo*. See *Moore, supra*, at 91–92.

Second, JUSTICE THOMAS quotes Justice Powell's opinion in *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986), out of context. *Ante*, at 7. Justice Powell said only that the judgment of a committing court of competent jurisdiction was accorded "absolute respect" on habeas in the 19th century, when the habeas inquiry was limited to the jurisdiction of the court. *Kuhlmann*, *supra*, at 446 (opinion of Powell, J.). Justice Powell was not expressing the erroneous view which JUSTICE THOMAS today ascribes to him, that state court judgments were entitled to complete deference before 1953.

Third, JUSTICE THOMAS errs in implying that *Brown* v. *Allen*, 344 U. S. 443 (1953), was the first case in which the Court held that the doctrine of *res judicata* is not strictly followed on federal habeas. *Ante*, at 8. In fact, the Court explicitly reached this holding for the first time in *Salinger* v. *Loisel*, 265 U. S. 224, 230 (1924). Even *Salinger* did not break new ground: The *Salinger* Court observed that such had been the rule at common law, and that the Court had implicitly followed it in *Carter* v. *McClaughry*, 183 U. S. 365, 378 (1902), and *Ex parte Spencer*, 228 U. S. 652, 658 (1913). *Salinger*, *supra*, at 230. The Court reached the same conclusion in at least two other cases between *Salinger* and *Brown*. See *Waley* v. *Johnston*, 316 U. S. 101, 105 (1942); *Darr* v. *Burford*, 339 U. S. 200, 214 (1950). *Darr* and *Spencer*, like this case, involved the initial federal habeas filings of state prisoners.

Fourth, JUSTICE THOMAS understates the certainty with which *Brown* v. *Allen* rejected a deferential standard of review of issues of law. *Ante*, at 8–10.

The passages in which the *Brown* Court stated that a district court should determine whether the state adjudication had resulted in a "satisfactory conclusion," and that the federal courts had discretion to give some weight to state court determinations, *ante*, at 8, were passages in which the Court was discussing how federal courts should resolve questions of *fact*, not issues of law. This becomes apparent from a reading of the relevant section of *Brown*, 344 U. S., at 460–465, a section entitled "Right to a Plenary Hearing." When the Court then turned to the primary *legal* question presented—whether the Fourteenth Amendment permitted the restriction of jury service to taxpayers—the Court answered that question in the affirmative without any hint of deference to the state courts. *Id.*, at 467–474. The proper standard of review of issues of law was also discussed in Justice Frankfurter's opinion, which a majority of the Court endorsed. After recognizing that state court factfinding need not always be repeated in federal court, Justice Frankfurter turned to the quite different question of determining the law. He wrote: "Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, *the District Judge must exercise his own judgment* on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge." *Id.*, at 507 (emphasis added; citation omitted). Justice Frankfurter concluded: "The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." *Id.*, at 508.

Fifth, JUSTICE THOMAS incorrectly states that we have never considered the standard of review to apply to mixed questions of law and fact raised on federal

habeas. *Ante*, at 10. On the contrary, we did so in the very cases cited by JUSTICE THOMAS. In *Irvin* v. *Dowd*, 366 U. S. 717 (1961), we stated quite clearly that "`mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.' It was, therefore, the duty of the Court of Appeals to independently evaluate [the issue of jury prejudice]." *Id.,* at 723 (quoting *Brown* v. *Allen, supra*, at 507 (opinion of Frankfurter, J.). We then proceeded to employ precisely the same legal analysis as in cases on direct appeal. 366 U. S., at 723–728.

In *Townsend* v. *Sain*, 372 U. S. 293, 318 (1963), we again said that "[a]lthough the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently."

In *Neil* v. *Biggers*, 409 U. S. 188 (1972), we addressed *de novo* the question whether the state court pretrial identification procedures were unconstititutionally suggestive by using the same standard used in cases on direct appeal: ```a very substantial likelihood of irreparable misidentification.''' *Id*., at 198 (quoting *Simmons* v. *United States*, 390 U. S. 377, 384 (1968)).

In *Brewer* v. *Williams*, 430 U. S. 387 (1977), we reviewed *de novo* a state court's finding that a defendant had waived his right to counsel. We held that "the question of waiver was not a question of historical fact, but one which, in the words of Mr. Justice Frankfurter, requires `application of constitutional principles to the facts as found . . . .'" *Id*., at 403 (quoting *Brown* v. *Allen, supra*, at 507 (opinion of Frankfurter, J.)). We then employed the same legal analysis used on direct review. 430 U. S., at 404.

In *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), we

explicitly considered the question whether the Court of Appeals had exceeded the proper scope of review of the state court's decision. *Id.*, at 341. We concluded that because the issue presented was not one of historical fact entitled to a presumption of correctness under 28 U. S. C. §2254(d), the Court of Appeals was correct in reconsidering the state court's "application of legal principles to the historical facts of this case." *Id.*, at 342. Although we held that the Court of Appeals had erred in stating the proper legal principle, we remanded to have it consider the case under the same legal principles as in cases on direct review. *Id.*, at 345–350.

In *Strickland* v. *Washington*, 466 U. S. 668 (1984), we held that "[t]he principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. . . . [N]o special standards ought to apply to ineffectiveness claims made in habeas proceedings." *Id.*, at 697–698. We distinguished state court determinations of mixed questions of fact and law, to which federal courts should not defer, from state court findings of historical fact, to which federal courts should defer. *Id.*, at 698.

Finally, in *Miller* v. *Fenton*, 474 U. S. 104, 112 (1985), we recognized that "an unbroken line of cases, coming to this Court both on direct appeal and on review of applications to lower federal courts for a writ of habeas corpus, forecloses the Court of Appeals' conclusion that the `voluntariness' of a confession merits something less than independent federal consideration."

To this list of cases cited by JUSTICE THOMAS, one could add the following, all of which applied a standard of *de novo* review. *Leyra* v. *Denno*, 347 U. S. 556, 558–561 (1954); *United States ex rel. Jennings* v. *Ragen*, 358 U. S. 276, 277 (1959); *Rogers* v. *Richmond*, 365 U. S. 534, 546 (1961); *Gideon* v.

Wainwright, 372 U. S. 335, 339–345 (1963); *Pate* v. *Robinson*, 383 U. S. 375, 384–386 (1966); *Sheppard* v. *Maxwell*, 384 U. S. 333, 349–363 (1966); *McMann* v. *Richardson*, 397 U. S. 759, 766–774 (1970); *Barker* v. *Wingo*, 407 U. S. 514, 522–536 (1972); *Lego* v. *Twomey*, 404 U. S. 477, 482–490 (1972); *Morrissey* v. *Brewer*, 408 U. S. 471, 480–490 (1972); *Gagnon* v. *Scarpelli*, 411 U. S. 778, 781–791 (1973); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 222–249 (1973); *Manson* v. *Brathwaite*, 432 U. S. 98, 109–117 (1977); *Watkins* v. *Sowders*, 449 U. S. 341, 345–349 (1981); *Jones* v. *Barnes*, 463 U. S. 745, 750–754 (1983); *Berkemer* v. *McCarty*, 468 U. S. 420, 435–442 (1984); *Moran* v. *Burbine*, 475 U. S. 412, 420–434 (1986); *Kimmelman* v. *Morrison*, 477 U. S. 365, 383–387 (1986); *Maynard* v. *Cartwright*, 486 U. S. 356, 360–365 (1988); *Duckworth* v. *Eagan*, 492 U. S. 195, 201–205 (1989); *Estelle* v. *McGuire*, 502 U. S. ___ (1991) (slip op., at 5–6). There have been many others.

Sixth, JUSTICE THOMAS misdescribes *Jackson* v. *Virginia*, 443 U. S. 307 (1979). *Ante*, at 11–12. In *Jackson*, the respondents proposed a deferential standard of review, very much like the one JUSTICE THOMAS discusses today, that they thought appropriate for addressing constitutional claims of insufficient evidence. 443 U. S., at 323. We expressly rejected this proposal. *Ibid*. Instead, we adhered to the general rule of *de novo* review of constitutional claims on habeas. *Id.*, at 324.

Seventh, JUSTICE THOMAS mischaracterizes *Teague* v. *Lane*, 489 U. S. 288 (1989), and *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), as "question[ing] th[e] standard [of *de novo* review] with respect to pure legal questions." *Ante*, at 12. *Teague* did not establish a "deferential" standard of review of state court determinations of federal law. It did not establish a standard of review at all. Instead, *Teague* simply requires that a state conviction on federal habeas be judged according to the law in existence when the

conviction became final. *Penry*, *supra*, at 314; *Teague*, *supra*, at 301. In *Teague*, we refused to give state prisoners the retroactive benefit of new rules of law, but we did *not* create any deferential standard of review with regard to old rules.

To determine what counts as a new rule, *Teague* requires courts to ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by binding precedent at the time his state court conviction became final. Cf. *Mackey* v. *United States*, 401 U. S. 667, 695 (1963) (inquiry is “to determine whether a particular decision has really announced a `new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is *closely analogous to those which have been previously considered* in the prior case law”) (Harlan, J., concurring in judgments in part and dissenting in part) (internal quotation marks omitted, emphasis added). Even though we have characterized the new rule inquiry as whether “reasonable jurists” could disagree as to whether a result is dictated by precedent, see *Sawyer* v. *Smith*, 497 U. S. 227, 234 (1990), the standard for determining when a case establishes a new rule is “objective,” and the mere existence of conflicting authority does not necessarily mean a rule is new. *Stringer* v. *Black*, 503 U. S. ___, ___ (1992) (slip op., at 14). If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable.

So, while JUSTICE THOMAS says that we “defer” to state courts' determinations of federal law, the statement is misleading. Although in practice, it may seem only “a matter of phrasing” whether one calls the *Teague* inquiry a standard of review or not, “phrasing mirrors thought, [and] it is important that

the phrasing not obscure the true issue before a federal court." *Brown* v. *Allen*, 344 U. S., at 501 (opinion of Frankfurter, J.). As JUSTICE KENNEDY convincingly demonstrates, the duty of the federal court in evaluating whether a rule is "new" is not the same as deference; federal courts must make an independent evaluation of the precedent existing at the time the state conviction became final in order to determine whether the case under consideration is meaningfully distinguishable. *Teague* does not direct federal courts to spend less time or effort scrutinizing the existing federal law, on the ground that they can assume the state courts interpreted it properly.

Eighth, though JUSTICE THOMAS suggests otherwise, *ante*, at 14, *de novo* review is not incompatible with the maxim that federal courts should "give great weight to the considered conclusions of a coequal state judiciary," *Miller* v. *Fenton, supra*, at 112, just as they do to persuasive, well-reasoned authority from district or circuit courts in other jurisdictions. A state court opinion concerning the legal implications of precisely the same set of facts is the closest one can get to a "case on point," and is especially valuable for that reason. But this does not mean that we have held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.

Finally, in his one-sentence summary of respondent's arguments, *ante*, at 16, JUSTICE THOMAS fails to mention that Congress has considered habeas corpus legislation during 27 of the past 37 years, and on 13 occasions has considered adopting a deferential standard of review along the lines suggested by JUSTICE THOMAS. Congress has rejected each proposal. In light of the case law and Congress'

position, a move away from *de novo* review of mixed questions of law and fact would be a substantial change in our construction of the authority conferred by the habeas corpus statute. As JUSTICE THOMAS acknowledges, to change the standard of review would indeed be "far-reaching," *ante*, at 16, and we need not decide whether to do so in order to resolve this case.