SUPREME COURT OF THE UNITED STATES

No. 91–6382

ROBERT WAYNE SAWYER, PETITIONER *v.* JOHN WHITLEY, WARDEN

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

[June 22, 1992]

JUSTICE BLACKMUN, concurring in the judgment.

I cannot agree with the majority that a federal court is absolutely barred from reviewing a capital defendant's abusive, successive, or procedurally defaulted claim unless the defendant can show "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Ante*, at 1. For the reasons stated by JUSTICE STEVENS in his separate opinion, *post*, which I join, I believe that the Court today adopts an unduly cramped view of "actual innocence." I write separately not to discuss the specifics of the Court's standard, but instead to reemphasize my opposition to an implicit premise underlying the Court's decision: that the only "fundamental miscarriage of justice" in a capital proceeding that warrants redress is one where the petitioner can make out a claim of "actual innocence." I also write separately to express my ever-growing skepticism that, with each new decision from this Court constricting the ability of the federal courts to remedy constitutional errors, the death penalty really can be imposed fairly and in accordance with the requirements of the Eighth Amendment.

The Court repeatedly has recognized that principles of fundamental fairness underlie the writ of habeas corpus. See *Engle* v. *Isaac*, 456 U. S. 107, 126 (1982); *Sanders* v. *United States*, 373 U. S. 1, 17–18 (1963). Even as the Court has erected unprecedented and unwarranted barriers to the federal judiciary's review of the merits of claims that state prisoners failed properly to present to the state courts, or failed to raise in their first federal habeas petitions, or previously presented to the federal courts for resolution, it consistently has acknowledged that exceptions to these rules of unreviewability must exist to prevent violations of fundamental fairness. See *Engle*, 456 U. S., at 135 (principles of finality and comity "must yield to the imperative of correcting a fundamentally unjust incarceration"). Thus, the Court has held, federal courts may review procedurally defaulted, abusive, or successive claims absent a showing of cause and prejudice if the failure to do so would thwart the "ends of justice," see *Kuhlmann* v. *Wilson*, 477 U. S. 436, 455 (1986) (plurality opinion), or work a "fundamental miscarriage of justice." See *Murray* v. *Carrier*, 477 U. S. 478, 495–496 (1986); *Smith* v. *Murray*, 477 U. S. 527, 537–538 (1986); *Dugger* v. *Adams*, 489 U. S. 401, 412, n. 6 (1989); *McCleskey* v. *Zant*, 499 U. S. ___, ___ (1991) (slip op. 25).

By the traditional understanding of habeas corpus, a "fundamental miscarriage of justice" occurs whenever a conviction or sentence is secured in violation of a federal constitutional right. See 28 U. S. C. §2254(a) (federal courts "shall entertain" habeas petitions from state prisoners who allege that they are "in custody in violation of the Constitution or laws or treaties of the United States"); *Smith*, 477 U. S., at 543–544 (STEVENS, J., dissenting). Justice Holmes explained that the concern of a federal court

in reviewing the validity of a conviction and death sentence on a writ of habeas corpus is "solely the question whether [the petitioner's] constitutional rights have been preserved." *Moore* v. *Dempsey*, 261 U. S. 86, 88 (1923).

In a trio of 1986 decisions, however, the Court ignored these traditional teachings and, out of a purported concern for state sovereignty, for the preservation of state resources, and for the finality of state court judgments, shifted the focus of federal habeas review of procedurally defaulted, successive, or abusive claims away from the preservation of constitutional rights to a fact-based inquiry into the petitioner's innocence or guilt. See *Wilson*, 477 U. S., at 454 (plurality opinion) ("the `ends of justice' require federal courts to entertain [successive] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence"); *Carrier*, 477 U. S., at 496 ("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"); *Smith*, 477 U. S., at 537 (applying *Carrier* standard to constitutional error at sentencing phase of capital trial). See also *McCleskey*, 499 U. S., at ___ (applying *Carrier* standard in "abuse of the writ" context) (slip op. 25).

The Court itself has acknowledged that "the concept of `actual,' as distinct from `legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." *Smith*, 477 U. S., at 537. Undaunted by its own illogic, however, the Court adopted just such an approach in *Smith*. There, the Court was confronted with a claim that the introduction at sentencing of inculpatory statements made by Smith to a court-appointed psychiatrist violated the Fifth Amendment because Smith had not

been informed that his statements might be used against him or that he had the right to remain silent and to have counsel present. Although the Court assumed the validity of Smith's Fifth Amendment claim[1] and recognized the potential impact of the statement on the jury, which found the aggravating circumstance of "future dangerousness" satisfied, see *id.*, at 538, it nonetheless concluded, remarkably and summarily, that admission of the statement did not "pervert the jury's deliberations concerning the ultimate question whether *in fact* petitioner constituted a continuing threat to society" (emphasis in original). *Ibid.* Because Michael Smith could not demonstrate cause for his procedural default, and because, in the Court's view, he had not made a substantial showing that the alleged constitutional violation "undermined the accuracy of the guilt or sentencing determination," *id.*, at 539, his Fifth Amendment claim went unaddressed and he was executed on July 31, 1986.

In *Dugger* v. *Adams*, the Court continued to equate the notion of a "fundamental miscarriage of justice" in a capital trial with the petitioner's ability to show that he or she "probably is `actually innocent' of the sentence he or she received," 489 U. S., at 412, n. 6, but appeared to narrow the inquiry even further. Adams' claim, that the trial judge repeatedly had misinformed the jurors, in violation of the Eighth Amendment and *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), that their sentencing vote was strictly advisory in nature (when in fact Florida law permitted the judge to overturn the jury's sentencing decision only upon a clear and convincing showing that its

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[1]JUSTICE STEVENS explained in his dissenting opinion in *Smith*, 477 U. S., at 551–553, that the introduction of the inculpatory statement clearly violated Smith's rights as established in *Estelle* v. *Smith*, 451 U. S. 454 (1981).

choice was erroneous), surely satisfied the standard articulated in *Smith*: whether petitioner can make out a "substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination." 477 U. S., at 539. In a cryptic discussion relegated to a footnote at the end of its opinion, the Court in *Adams* rejected this obvious application of the *Smith* standard, apparently for no other reason than its belief that Adams' ability to demonstrate a "fundamental miscarriage of justice" in this case somehow would convert an "extraordinary" exception into an "ordinary" one. See 489 U. S., at 412, n. 6. In rejecting the *Smith* standard, the Court did not even bother to substitute another in its place. See *ibid.* ("We do not undertake here to define what it means to be `actually innocent' of a death sentence"). The Court refused to address Aubrey Adams' claim of constitutional error, and he was executed on May 4, 1989.

Just last Term, in *McCleskey* v. *Zant*, the Court again described the "fundamental miscarriage of justice" exception as a "`safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty,'" 499 U. S., at ___ (quoting *Stone* v. *Powell*, 428 U. S. 465, 491–492, n. 31 (1976)) (slip op. 27). Although the District Court granted relief to McCleskey on his claim that state authorities deliberately had elicited inculpatory admissions from him in violation of his Sixth Amendment right to counsel, see *Massiah* v. *United States*, 377 U. S. 201 (1964), and excused his failure to present the claim in his first federal habeas petition because the State had withheld documents and information establishing that claim, see 499 U. S., at ___ - ___ (slip op. 6–7), the Court concluded that McCleskey lacked cause for failing to raise the claim earlier. *Id.*, at ___ (slip op. 33). More important for our purposes, the Court concluded that the "narrow exception" by which federal courts may "exercise [their] equitable

discretion to correct a miscarriage of justice" was of "no avail" to McCleskey: the "*Massiah* violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination." *Ibid.* The Court refused to address Warren McCleskey's claim of constitutional error, and he was executed on September 24, 1991.

The Court today takes for granted that the foregoing decisions correctly limited the concept of a "fundamental miscarriage of justice" to "actual innocence," even as it struggles, by ignoring the "natural usage of those words" and resorting to "analog[s]," see *ante*, at 6, to make sense of "actual innocence" in the capital context. I continue to believe, however, that the Court's "exaltation of accuracy as the only characteristic of `fundamental fairness' is deeply flawed." *Smith*, 477 U. S., at 545 (STEVENS, J., dissenting).

As an initial matter, the Court's focus on factual innocence is inconsistent with Congress' grant of habeas corpus jurisdiction, pursuant to which federal courts are instructed to entertain petitions from state prisoners who allege that they are held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. §2254(a). The jurisdictional grant contains no support for the Court's decision to narrow the reviewing authority and obligation of the federal courts to claims of factual innocence. See also 28 U. S. C. §2243 ("The court shall . . . dispose of the matter as law and justice require"). In addition, the actual innocence standard requires a reviewing federal court, unnaturally, to "function in much the same capacity as the state trier of fact"; that is, to "make a rough decision on the question of guilt or innocence." *Wilson*, 477 U. S., at 471, n. 7 (Brennan, J., dissenting).

Most important, however, the focus on innocence assumes, erroneously, that the only value worth

protecting through federal habeas review is the accuracy and reliability of the guilt determination. But "[o]ur criminal justice system, and our Constitution, protect other values in addition to the reliability of the guilt or innocence determination, and the statutory duty to serve `law and justice' should similarly reflect those values." *Smith*, 477 U. S., at 545 (STEVENS, J., dissenting). The accusatorial system of justice adopted by the Founders affords a defendant certain process-based protections that do not have accuracy of truth-finding as their primary goal. These protections—including the Fifth Amendment right against compelled self-incrimination, the Eighth Amendment right against the imposition of an arbitrary and capricious sentence, the Fourteenth Amendment right to be tried by an impartial judge, and the Fourteenth Amendment right not to be indicted by a grand jury or tried by a petit jury from which members of the defendant's race have been systematically excluded —are debased, and indeed, rendered largely irrelevant, in a system that values the accuracy of the guilt determination above individual rights.

Nowhere is this single-minded focus on actual innocence more misguided than in a case where a defendant alleges a constitutional error in the sentencing phase of a capital trial. The Court's ongoing struggle to give meaning to "innocence of death" simply reflects the inappropriateness of the inquiry. See *Smith*, 477 U. S., at 537; *Adams*, 489 U. S., at 412, n. 6; *ante*, at 6. "Guilt or innocence is irrelevant in that context; rather, there is only a decision made by representatives of the community whether the prisoner shall live or die." *Wilson*, 477 U. S., at 471–472, n. 7 (Brennan, J., dissenting). See also Patchel, The New Habeas, 42 Hastings L. J. 941, 972 (1991).

Only by returning to the federal courts' central and traditional function on habeas review, evaluating

claims of constitutional error, can the Court ensure that the ends of justice are served and that fundamental miscarriages of justice do not go unremedied. The Court would do well to heed Justice Black's admonition: "it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution." *Brown* v. *Allen*, 344 U. S. 443, 554 (1953) (dissenting opinion).[2]

When I was on the United States Court of Appeals for the Eighth Circuit, I once observed, in the course of reviewing a death sentence on a writ of habeas corpus, that the decisional process in a capital case is "particularly excruciating" for someone "who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent." *Maxwell* v. *Bishop*, 398 F. 2d 138, 153–154 (1968), vacated, 398 U. S. 262 (1970). At the same time, however, I stated my then belief that "the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature." *Id.*, at 154. Four years later, as a member of this Court, I echoed those sentiments in my separate dissenting opinion in *Furman* v. *Georgia*, 408 U. S. 238, 405 (1972). Although I reiterated my personal distaste for the death penalty and my doubt that it performs any

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[2]Notwithstanding my view that the Court has erred in narrowing the concept of a "fundamental miscarriage of justice" to cases of "actual innocence," I have attempted faithfully to apply the "actual innocence" standard in prior cases. See, *e.g.*, *Dugger* v. *Adams*, 489 U. S. 401, 424, n. 15 (1989) (dissenting opinion). I therefore join JUSTICE STEVENS' analysis of the "actual innocence" standard and his application of that standard to the facts of this case. See *post*.

meaningful deterrent function, see *id.*, at 405–406, I declined to join my Brethren in declaring the state statutes at issue in those cases unconstitutional. See *id.*, at 411 ("We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision.").

My ability in *Maxwell*, *Furman*, and the many other capital cases I have reviewed during my tenure on the federal bench to enforce, notwithstanding my own deep moral reservations, a legislature's considered judgment that capital punishment is an appropriate sanction, has always rested on an understanding that certain procedural safeguards, chief among them the federal judiciary's power to reach and correct claims of constitutional error on federal habeas review, would ensure that death sentences are fairly imposed. Today, more than 20 years later, I wonder what is left of that premise underlying my acceptance of the death penalty.

Only last Term I had occasion to lament the Court's continuing "crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims" and its transformation of "the duty to protect federal rights into a self-fashioned abdication." *Coleman* v. *Thompson*, 501 U. S. ___, ___, ___ (1991) (dissenting opinion) (slip op. 1 and 4). This Term has witnessed the continued narrowing of the avenues of relief available to federal habeas petitioners seeking redress of their constitutional claims. See, *e.g.*, *Keeney* v. *Tamayo-Reyes*, ___ U. S. ___ (1992) (overruling *Townsend* v. *Sain*, 372 U. S. 293 (1963), in part). It has witnessed, as well, the execution of two victims of the "new habeas," Warren McCleskey and Roger Keith Coleman.

Warren McCleskey's case seemed the archetypal "fundamental miscarriage of justice" that the federal

courts are charged with remedying. As noted above, McCleskey demonstrated that state officials deliberately had elicited inculpatory admissions from him in violation of his Sixth Amendment rights and had withheld information he needed to present his claim for relief. In addition, McCleskey argued convincingly in his final hours that he could not even obtain an impartial clemency hearing because of threats by state officials against the pardons and parole board. That the Court permitted McCleskey to be executed without ever hearing the merits of his claims starkly reveals the Court's skewed value system, in which finality of judgments, conservation of state resources, and expediency of executions seem to receive greater solicitude than justice and human life. See *McCleskey* v. *Bowers*, ___ U. S. ___ (1991) (Marshall, J., dissenting from denial of stay of execution).

The execution of Roger Keith Coleman is no less an affront to principles of fundamental fairness. Last Term, the Court refused to review the merits of Coleman's claims by effectively overruling, at Coleman's expense, precedents holding that state court decisions are presumed to be based on the merits (and therefore, are subject to federal habeas review) unless they explicitly reveal that they were based on state procedural grounds. See *Coleman*, 501 U. S., at ___ - ___ (dissenting opinion) (slip op. 5–7). Moreover, the Court's refusal last month to grant a temporary stay of execution so that the lower courts could conduct a hearing into Coleman's well-supported claim that he was innocent of the underlying offense demonstrates the resounding hollowness of the Court's professed commitment to employ the "fundamental miscarriage of justice exception" as a "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." *McCleskey* v. *Zant*, 499 U. S., at ___ (internal quotation omitted) (slip op. 27). See *Coleman* v.

Thompson, ___ U. S. ___ (1992) (opinion dissenting from denial of stay of execution).

As I review the state of this Court's capital jurisprudence, I thus am left to wonder how the ever-shrinking authority of the federal courts to reach and redress constitutional errors affects the legitimacy of the death penalty itself. Since *Gregg* v. *Georgia*, the Court has upheld the constitutionality of the death penalty where sufficient procedural safeguards exist to ensure that the State's administration of the penalty is neither arbitrary nor capricious. See 428 U. S. 153, 189, 195 (1976) (joint opinion); *Lockett* v. *Ohio*, 438 U. S. 586, 601 (1978). At the time those decisions issued, federal courts possessed much broader authority than they do today to address claims of constitutional error on habeas review and, therefore, to examine the adequacy of a State's capital scheme and the fairness and reliability of its decision to impose the death penalty in a particular case. The more the Court constrains the federal courts' power to reach the constitutional claims of those sentenced to death, the more the Court undermines the very legitimacy of capital punishment itself.