**MCCLESKEY V. ZANT: A STRICTER STANDARD OF REVIEW FOR ABUSE OF THE WRIT OF HABEAS CORPUS INVOLVING SUCCESSIVE FEDERAL PETITIONS**

**INTRODUCTION**

The United States Supreme Court moved closer to Chief Justice William H. Rehnquist's goal of streamlining the federal review process with its *MCCleskey v. Zant* decision. In *MCCleskey*, the Court established a tougher standard of review for abuse of the writ of habeas corpus, making it more difficult for inmates to obtain relief when raising new claims in subsequent federal habeas petitions. The decision limits most federal reviews of state criminal convictions to one trip through the habeas system.

This Note focuses on the impact of the *MCCleskey* decision on the federal post-conviction review process—specifically examining the history of the doctrine of abuse of the writ of habeas corpus and the legal standard used to determine whether the inmate abused the writ by filing a successive federal petition that raises a new claim. These issues touch upon a broader spectrum of controversial subjects that are beyond the scope of this Note, such as the history of the writ itself, and an analysis of the 1991 Crime Control Act Habeas Corpus Reform provisions.

This Note discusses the *MCCleskey* decision—both Justice Kennedy’s majority opinion and Justice Marshall’s dissent. This Note then reviews the case law and statutory formulations of the abuse of writ doctrine, and the lineage of the procedural default case law leading up to the incorporation of this doctrine into abuse of writ jurisprudence in *MCCleskey*. The *MCCleskey* decision addressed a split in the circuits regarding the question of the proper standard to apply in determining abuse of the writ. The political context in which the decision was made is also discussed.

This Note concludes that, based upon an analysis of legal author-
ity, Justice Marshall's dissenting opinion presents a sounder view than does Justice Kennedy's majority opinion. This Note concludes by discussing the ramifications of the McCleskey decision on the habeas process, with particular emphasis on the effects of the decision on representation of capital petitioners.

FACTS AND HOLDING

Warren McCleskey and three other armed men robbed the Dixie Furniture Store in Atlanta, Georgia, on May 13, 1978. During the robbery, Officer Frank Schlatt entered the front of the store and was fatally shot in the face. No one actually witnessed the killing. After McCleskey's arrest in connection with another armed robbery, he confessed to the Atlanta hold-up, but denied shooting Officer Schlatt. However, direct and circumstantial evidence pointed to McCleskey as the triggerman. Before being moved to the common jail cell area, McCleskey was placed in solitary confinement in the Fulton County Jail.

On trial for robbery and murder, McCleskey took the stand and renounced his robbery confession. He denied any involvement with the crimes and offered an unsubstantiated alibi defense.

---

10. See infra notes 495-544 and accompanying text.
11. See infra notes 545-608 and accompanying text.
13. Id. at —, 263 S.E.2d at 148.
14. Brief for the Petitioner at 8, McCleskey v. Zant, 111 S. Ct. 1454 (1991) (89-7024). One robber entered the front of the store and three others entered from the rear loading dock. McCleskey, 245 Ga. at —, 263 S.E.2d at 148. While the thieves in the rear searched for money, the robber in front shunted the furniture store employees and customers to the rear and ordered them to lie down and close their eyes. McCleskey v. Kemp, 753 F.2d 877, 882 (11th Cir. 1985). Although some employees testified that they had heard one of the robbers step to the front of the store just prior to the firing of the fatal shot, no one told the police who shot the officer. Brief for the Petitioner at 8, McCleskey, 111 S. Ct. 1454.
15. McCleskey, 245 Ga. at —, 263 S.E.2d at 148.
16. McCleskey v. Zant, 580 F. Supp. 338, 345-46 (N.D. Ga. 1984). Officer Schlatt was killed with a white-handled .38 caliber Rossi revolver. Although the gun was never recovered, the prosecution established that McCleskey had stolen such a weapon two months earlier. Id. at 345. One witness testified that a man had fled the store soon after the robbery carrying the white-handled pistol, and a co-defendant, Ben Wright, testified that McCleskey was carrying such a weapon. However, conflicting testimony was presented as to which robber actually carried this weapon. Wright further testified that McCleskey had admitted shooting the police officer. McCleskey, 111 S. Ct. at 1458, 1488. Witnesses identified McCleskey as the bandit who entered and exited the front of the store. McCleskey's confession contained the admission that he was the robber who had entered the front of the store. McCleskey, 753 F.2d at 882.
17. Brief for the Petitioner at 8, McCleskey, 111 S. Ct. 1454.
18. McCleskey, 111 S. Ct. at 1458.
19. Id.
HABEAS CORPUS REVIEW

cent cell during McCleskey's incarceration.\textsuperscript{20} Evans testified that McCleskey had boasted "that he would have shot his way out of the store even in the face of a dozen policemen."\textsuperscript{21} McCleskey's defense counsel had filed a pre-trial motion "seeking all written and oral statements made by McCleskey to anyone, and all exculpatory evidence."\textsuperscript{22} The trial court held an in camera review of the prosecutor's file and denied the motion.\textsuperscript{23}

After convicting McCleskey of murder and robbery, the jury sentenced McCleskey to death.\textsuperscript{24} In December, 1978, McCleskey began a series of direct and collateral appeals that eventually led to the 1991 decision by the United States Supreme Court.\textsuperscript{25}

\textbf{SUBSEQUENT PROCEDURAL HISTORY}

\textit{First State Habeas Petition}

After an unsuccessful direct appeal to the Georgia Supreme Court, McCleskey filed the first state habeas petition.\textsuperscript{26} Among the twenty-three alleged constitutional violations was the \textit{Massiah v. United States} \textsuperscript{27} claim that inmate Evans, acting on behalf of the
state, improperly induced McCleskey's jail-house confession in violation of McCleskey's sixth amendment right to counsel.28

McCleskey's new volunteer habeas counsel conducted an investigation to find proof of the Massiah claim. He consulted cooperative Atlanta police officers who had advised him of the best way to uncover illegal jail-house informant relationships.29 Counsel interviewed numerous jailors who had been directly involved with Evans.30 In addition, counsel questioned Evans and the Assistant District Attorney who had prosecuted McCleskey.31 All of these people denied any relationship between the police and the informant.32 When counsel sought to obtain the prosecutor's file, an Assistant State Attorney General delivered the documents with an accompanying letter assuring counsel that he was receiving "a complete copy of the prosecutor's file" from the case.33 According to habeas counsel, "[w]e pursued every reasonable lead available regarding the Massiah violation and we came up empty-handed."34 Nevertheless, counsel included the Massiah claim in the first state habeas petition based solely on Evans's proximity to McCleskey's cell and Evans's later testimony on the State's behalf.35 The Georgia Supreme Court denied a certificate of probable cause and the United States Supreme Court denied certiorari.36

First Federal Habeas Petition

Habeas counsel filed the first federal habeas petition on McCleskey's behalf in December, 1981.37 Although counsel raised eighteen claims, he did not include the Massiah claim.38 According to counsel, "I looked at what we had been able to develop in support of the claim factually in the state habeas proceeding and made the judgment that we didn't have the facts to support the claim . . . [in] federal court."39 The United States District Court for the Northern District of Georgia

29. Id. at 12.
30. Id.
31. Id.
32. McCleskey, 111 S. Ct. at 1487.
33. Brief for the Petitioner at 12, McCleskey, 111 S. Ct. 1454.
35. Brief for the Petitioner at 11, McCleskey, 111 S. Ct. 1454.
37. Id.
38. McCleskey, 111 S. Ct. at 1459.
granted relief in 1984. However, in 1985, the United States Court of Appeals for the Eleventh Circuit reversed the grant of the writ.

Second Federal Habeas Petition

After a second unsuccessful state habeas petition, McCleskey took advantage of a subsequent change in Georgia law to further investigate the alleged Massiah violation. The Supreme Court of Georgia, in an unrelated case, ruled for the first time that police investigative files were subject to disclosure during habeas corpus proceedings under the Georgia Open Records Act. Habeas counsel immediately requested the original police files of the McCleskey investigation. Though reluctant to disclose the entire file, the police provided counsel with one document—a twenty-one page statement given by informant Evans in August, 1978, to Atlanta police. This written statement described that once in the adjacent cell, Evans had repeatedly lied to McCleskey to gain McCleskey's trust before systematically questioning McCleskey about the crime.

40. McCleskey, 580 F. Supp. at 402. The court ruled that the prosecutor had failed to disclose to the jury a promise of assistance made by the an investigating detective to informant Evans regarding federal charges pending against Evans, if Evans testified for the State. Id. at 380-384. The court held that this conduct violated McCleskey's due process rights as interpreted by the rule in Giglio v. United States, 405 U.S. 150 (1972) (holding that prosecutor's failure to disclose to the jury a promise to a co-conspirator of leniency in exchange for testimony against the defendant violated defendant's due process rights). McCleskey, 580 F. Supp. at 402.

41. McCleskey, 753 F.2d at 882. The United States Supreme Court upheld the reversal. The Court granted certiorari limited to the question of whether Georgia's capital sentencing procedures were constitutional. McCleskey claimed that Georgia's death penalty was administered in a racially discriminatory manner and offered statistical evidence ("the Baldus Study") that purportedly showed a disparity in the imposition of the death penalty along racial lines. The Court found that the Baldus Study failed to demonstrate unconstitutional discrimination. McCleskey v. Kemp, 481 U.S. 279, 280-83, 286-87, 290-99 (1987).

42. See infra notes 43-49 and accompanying text. McCleskey's second state habeas petition, filed in 1987, alleged five grounds for relief. After a hearing, the State trial court denied relief, and the Georgia Supreme Court denied a certificate of probable cause. McCleskey, 111 S. Ct. at 1459.


44. Brief for the Petitioner at 14 n.11, McCleskey, 111 S. Ct. 1454.

45. Id. at 9, 14. The police were reluctant to release the file because the Napper case was still pending on rehearing. Id. at 76.

46. McCleskey v. Zant, 890 F.2d 342, 348 (11th Cir. 1989). Evans described a long list of deceptions: how he had adopted a false name; had claimed to be co-defendant Ben Wright's uncle; and had told McCleskey that he, Evans, was supposed to participate in the robbery. Additionally, Evans told McCleskey that Evans had been involved in past robberies with Ben Wright; that Evans had seen Wright recently; that Wright believed McCleskey had shot the policeman. McCleskey v. Kemp, No. C87-1517A, slip op. at 80 (ND Ga. Dec. 23, 1987). Evans said to McCleskey, "Ben told me that you shot the man yourself," and asked McCleskey questions such as, "[j]ust what happened over
Recognizing that he had hard evidence to support the *Massiah* claim, McCleskey's counsel immediately filed a second federal habeas petition in July, 1987. During the hearing on this petition, when counsel attempted to develop the facts surrounding the taking of the statement, the names of a number of new witnesses surfaced—including that of Captain Worthy. This retired jailor later testified regarding the scheme to deliberately elicit incriminating statements from McCleskey.

After considering all the evidence, the district court concluded that the sequence of events had occurred as follows: Evans was moved to a cell adjacent to McCleskey pursuant to an official request "for the purpose of gathering incriminating information; Evans was probably coached in how to approach McCleskey and given critical facts unknown to the general public; Evans engaged McCleskey in conversations and eavesdropped on McCleskey's conversations with [another co-defendant]; . . . and that Evans reported what he had heard." The court concluded that a state agent had deliberately elicited McCleskey's statements in violation of McCleskey's sixth amendment right to counsel, as interpreted in the *Massiah* decision. Furthermore, the court held that the admission of Evans's testimony at McCleskey's trial was not harmless error.

In granting the writ of habeas corpus, the district court also concluded that McCleskey's failure to raise the *Massiah* claim in the first federal habeas petition did not constitute abuse of the writ. The court ruled that McCleskey did not intentionally abandon the *Massiah* claim, but "that the claim was dropped because it was obvious that it could not succeed given the then-known facts." The
court also held that counsel's failure to discover Evans's written statement or Worthy's testimony did not constitute "inexcusable neglect," because "reasonably competent counsel" would not have discovered the evidence prior to the first federal petition.\(^{55}\)

In 1989, the United States Court of Appeals for the Eleventh Circuit reversed the lower federal court.\(^{56}\) The appeals court held that the decision not to press the Massiah claim in the first federal petition "constitute[d] prima facie evidence of deliberate abandonment," and hence abuse of the writ.\(^{57}\) The panel faulted defense counsel's Massiah investigation as "somewhat lacking," and stated that the abuse of writ doctrine cannot be circumvented by inadequate investigation and a later assertion that there were insufficient facts to press the claim.\(^{58}\)

In 1990, the United States Supreme Court granted certiorari and asked the parties to address this question: "[m]ust the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?"\(^{59}\)

SUPREME COURT HOLDING AND RATIONALE

The United States Supreme Court held that McCleskey's assertion of the Massiah claim in his second federal habeas petition, after failing to include it in his first federal habeas petition, constituted abuse of the writ of habeas corpus.\(^{60}\) Although the Court presented a different analysis than the Eleventh Circuit, Justice Kennedy's ma-

---

55. **Id.** at 84. The district court observed, [t]he state has made no showing of any reason that petitioner or his counsel should have known to interview Worthy specifically with regard to the Massiah claim. The state argues that petitioner's counsel should have at least interviewed Detectives Harris and Dorsey and Deputy Hamilton. Given that all three denied any knowledge of a request to move Evans next to McCleskey, it is difficult to see how conducting such interviews would have allowed petitioner to answer this claim any earlier. 

**Id.** at 85.

56. **McCleskey,** 890 F.2d at 353.

57. **Id.** at 349, 353.

58. **Id.** at 349. According to the court of appeals, McCleskey presented no reason why counsel could not have tracked down Worthy in 1981, when McCleskey filed the first habeas petition in federal court. Nor had McCleskey shown that a more extensive effort would have been futile. **Id.** at 350. On rehearing, counsel noted that Worthy was one of hundreds of jailors at the county jail in 1978. Brief for Petitioner at 19, **McCleskey,** 111 S. Ct. 1454. The court of appeals also disagreed with the district court and held that use of the evidence tainted by the Massiah violation was harmless. **McCleskey,** 890 F.2d at 353.

59. **McCleskey,** 111 S. Ct. at 1485 n.9.

60. **Id.** at 1457.
The Justification of "Inexcusable Neglect"

Justice Kennedy first reviewed the history of the abuse of writ doctrine. The legal standard governing abuse of writ evolved from a long line of cases, which found expression in a federal habeas corpus statute, and the Rules Governing Habeas Corpus Proceedings promulgated in 1976. The statute and rules were interpreted by subsequent Court decisions.

The majority, in McCleskey, discussed the seminal case of Sanders v. United States, in which the Court ruled that if a subsequent petition raises previously unasserted grounds, then the district court must reach the merits of the petition unless the writ has been abused. Justice Kennedy noted that Sanders had measured abuse according to equitable principles, such that the petitioner's "deliberate abandonment," or withholding of a claim, forecloses relief on the second application. Furthermore, Sanders also established that the courts are duty bound to reach the merits of an abusive petition "if the ends of justice demand."

Justice Kennedy observed that the Court, in Sanders, had cited Townsend v. Sain for further guidance in determining abuse of the writ. Justice Kennedy noted that Townsend had established the principle of "inexcusable neglect" as grounds for denying the writ. "Inexcusable neglect" requires more than mere neglect or careless-

---

61. Id. Chief Justice Rehnquist, and Justices White, O'Connor, Scalia and Souter joined in the majority opinion. Id.
62. Id. at 1467.
63. Id. at 1461-67.
67. McCleskey, 111 S. Ct. at 1465 (quoting Sanders, 373 U.S. at 18).
68. Id.
69. Id.
71. McCleskey, 111 S. Ct. at 1465.
ness. In *Townsend*, defense counsel was held to have plainly erred by failing to fully develop crucial testimony from his own expert witness. However, such neglect was not held "inexcusable."

Justice Kennedy wrote, in *McCleskey*, that the "inexcusable neglect" standard exists independently from the "deliberate abandonment" standard. Although noting that inexcusable neglect is stricter than the other standard, the majority declared that the term "inexcusable neglect" had not been sufficiently defined to guide the lower courts in deciding abuse of writ cases. Within the framework of inexcusable neglect, the majority developed the new "cause and prejudice" standard.

According to Justice Kennedy, this clarification, or further development of the inexcusable neglect standard, is not precluded by either of the two statutes governing abuse of writ. Justice Kennedy noted that under 28 U.S.C. § 2244(b) ("§ 2244(b)"), a state prisoner must satisfy two conditions before a federal court must entertain a second or successive petition. First, the applicant must assert new grounds, factual or otherwise, in the subsequent petition. Second, the petitioner must satisfy the court that the new ground was not deliberately withheld earlier or that the petitioner did not "otherwise abuse[e] the writ." Justice Kennedy pointed out that the statute does not further define abuse of writ or otherwise limit district court discretion to hear abusive petitions. Justice Kennedy explained, in *McCleskey*, that this silence allows the Court to exercise its power to promulgate a new standard to determine abuse of the writ.

The second statute governing abuse of writ that the majority discussed was Rule 9(b) of the Rules Governing Habeas Corpus Pro-

73. Id. at 321-22.
74. Id. at 322.
75. *McCleskey*, 111 S. Ct. at 1467-68.
76. Id. at 1468.
77. See id. at 1468, 1470.
78. Id. at 1465-67.
79. Id. at 1466. See 28 U.S.C. § 2244(b) (1988). Section 2244(b) states in part: [A] subsequent application for a writ of habeas corpus ... need not be entertained by a court ... unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court ... is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

*Id.*
81. *Id.* Additionally, no other habeas errors must exist, such as nonexhaustion or procedural default. *Id.*
82. *Id.*
83. *Id.*
ceedings ("Rule 9(b)"). Under Rule 9(b), a court may dismiss a second or successive habeas petition alleging new and different grounds if "the judge finds that the failure of the petitioner to assert those grounds in a proper petition constituted an abuse of the writ." Rule 9(b) does not define the term "abuse of writ." However, Justice Kennedy cited the "Advisory Committee Notes" to Rule 9(b), which make clear that the Rule incorporates the principles from Sanders. A successive petition may be dismissed if the judge finds the petitioner's failure to have raised the claim in the prior petition "inexcusable." Acceptable excuses for failure to assert a prior claim include newly-discovered evidence and a retroactive change in the law.

Justice Kennedy provided examples of how the statute and rules have been applied in various cases since 1982 to support his reasoning that habeas principles continue to evolve. Justice Kennedy asserted that Congress did not intend the new statutes and rules governing abuse of writ to preempt judicial evolution of habeas principles.

Adoption of the "Cause-and-Prejudice" Standard to Determine Inexcusable Neglect

In giving content to the doctrine of inexcusable neglect, the majority adopted the same standard used to determine whether to excuse state procedural defaults, namely, the "cause and prejudice" standard. The majority noted that in the procedural default context, the inmate must first, in the federal petition, show cause why the claim was not raised in state court. Cause is defined as "some objective factor external to the defense impeded counsel's efforts" to raise the claim. The majority listed several objective factors, in-
cluding official interference rendering procedural compliance impracticable, or "a showing that the factual or legal basis for a claim was not reasonably available to counsel."95

The Court noted that the inmate must then show that "actual prejudice" resulted from the alleged errors.96 Such error must be of "constitutional dimensions" affecting the entire trial.97 Normally, both cause and prejudice must be demonstrated.98 The majority explained, however, that if the inmate fails to show cause for a state procedural default, the federal court may nonetheless exercise its equitable discretion to issue a writ of habeas corpus to correct a "fundamental miscarriage of justice."99 This narrow exception to the cause and prejudice standard exists where a constitutional violation probably caused the conviction of an innocent person.100

In one of the most important passages of the opinion, the majority described how this cause and prejudice analysis applies to an abuse of writ inquiry:

When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's. To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions. The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard. If petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim.101

95. Id.
96. Id.
99. McCleskey, 111 S. Ct. at 1470.
100. Id.
101. Id. The majority indicates that two habeas principles are not affected by its adoption of this new standard—retroactively applying new law to federal habeas claims is still prohibited; and, the new standard does not imply any constitutional right
Justice Kennedy then discussed the rationale for the application of the cause and prejudice standard in the abuse of writ context. First, he asserted that both procedural default jurisprudence and abuse of writ doctrine have similar structures and goals. Then, Justice Kennedy reasoned that the court should use the same standard for determining abuse in both contexts. In procedural default cases, the cause and prejudice standard already applies. Therefore, the majority concluded, the same standard should apply to determine if the inmate abused the writ through inexcusable neglect.

According to Justice Kennedy, both doctrines have similar structures. The state procedural default rules establish a presumption against federal habeas adjudication for claims not raised, and thus defaulted, in state court. Similarly, Justice Kennedy observed that the abuse of writ doctrine prohibits federal courts from subsequent habeas adjudication if the claim was not raised in the first federal habeas proceeding. Justice Kennedy stated that both doctrines focus on the petitioner's acts to determine if the petitioner has a legitimate reason for failing to raise the claim at the earlier time. Under each doctrine, the petitioner must reasonably comply with procedures designed to reduce baseless claims and support valid ones.

Justice Kennedy also stated that both doctrines implicate "nearly identical" goals. Both support the interest of the state in the finality of its judgments. Justice Kennedy noted that finality underlies the deterrent effect of the criminal law and enhances the reliability of criminal adjudication. He further asserted that both doctrines seek to lessen the injury to the state from federal readjudication of a state conviction. Justice Kennedy stated that a federal attack on a state conviction frustrates state sovereign power to enforce its laws by punishing offenders, and frustrates the good-faith attempts of the

to counsel in habeas proceedings in federal court. Id. at 1470-71 (citing Teague v. Lane, 489 U.S. 288 (1989); and Pennsylvania v. Finley, 481 U.S. 551 (1987)).

102. Id. at 1467-71.
103. Id. at 1468.
104. Id. at 1470.
105. Id.
106. Id.
107. Id. at 1468, 1469-70.
108. Id. at 1468. See infra note 354 and accompanying text.
110. Id.
111. Id. at 1469.
112. Id. at 1468.
113. Id. at 1469.
114. Id. at 1468.
115. Id. at 1470.
HABEAS CORPUS REVIEW

state to uphold federal constitutional rights. Additionally, he noted, both doctrines seek to limit abuse of the systems of judicial review. According to Justice Kennedy, such abuse wastes scarce judicial resources, threatens disposition of meritorious petitions, and perpetuates manipulation of and disrespect for the entire criminal justice system. Justice Kennedy argued that applying the cause and prejudice standard to successive petitions raising new claims would lessen abuse of the habeas process.

The majority noted that additional considerations of "certainty and stability" in the operation of the courts further support adoption of the new standard. The majority pointed out that case law defines the standard well, and federal courts are familiar with the standard. The majority asserted that the standard is objective and will better channel the federal courts' discretion in habeas matters.

Justice Kennedy announced that the new standard is consistent with the Supreme Court's major decisions in the abuse of writ lineage. He did not elaborate this point, but merely listed the seminal cases. Justice Kennedy also noted that many courts of appeals have applied the principle of inexcusable neglect in abuse of writ cases. Finally, he indicated that McCleskey had conceded this point in McCleskey's Brief.

Justice Kennedy further explained that the "fundamental miscarriage of justice" exception to the cause requirement of the new standard comports with the "otherwise unexplained 'ends of justice' inquiry mandated by Sanders." Justice Kennedy stated that although the present version of section 2244(b) contains no "ends of justice" language, this inquiry into the petitioner's innocence remains appropriate. That inquiry can now be made under the "miscar-

---

116. See id. at 1469.
117. Id.
118. Id.
119. Id. at 1471.
120. Id.
121. Id.
122. Id. (quoting Murray, 477 U.S. at 497).
123. Id.
125. Id. at 1468 (citing McCleskey v. Zant, 890 F.2d 342, 346-47 (11th Cir. 1990); Hall v. Lockhart, 863 F.2d 609, 610 (8th Cir. 1988); Miller v. Bordendircher, 764 F.2d 245, 250-52 (4th Cir. 1985); Jones v. Estelle, 722 F.2d 159, 163 (5th Cir. 1983)).
126. Id. at 1468. See Brief for Petitioner at 39-40, 45-48 McCleskey, 111 S. Ct. 1454.
127. McCleskey, 111 S. Ct. at 1468 (citing Sanders, 373 U.S. at 15-17).
128. Id. (quoting Stone v. Powell, 428 U.S. 452, 96 S.Ct. 2972, 49 L.Ed.2d 1067 (1976)). See infra notes 308-13, 341-49 and accompanying text. The 1948 version of section 2244 stated that the
riage of justice" exception to the cause requirement.129

Justice Kennedy stated that the adoption of the "cause and prejudice" standard "should curtail the abusive petitions that in recent years have threatened to undermine the integrity of the habeas corpus process."130 The stricter standard, according to Justice Kennedy, will therefore assure the continued efficacy of the writ.131

The Majority's Application of the New Standard to the Facts of the Case

The majority then applied the cause-and-prejudice standard to the facts of the McCleskey case.132 The district court granted the writ because of the Massiah violation of McCleskey's sixth amendment right.133 However, habeas relief would be denied if McCleskey abused the writ; that is, if he could not show cause for failing to bring the Massiah claim in the first federal habeas petition.134 McCleskey, attempting to show cause, argued that when he had filed his first federal habeas petition, the misconduct of the state had prevented him from knowing or discovering either the statement of informer Evans or the corroborating testimony by jailor Worthy, which supported the Massiah claim.135 Although the district court agreed with this argument, the majority disagreed.136

Justice Kennedy began with a review of the "cause" element of the new standard.137 Justice Kennedy stated that the petitioner must show that some external impediment prevented counsel from raising the claim.138 The majority stated that the abuse of writ doctrine focuses on petitioner's conduct:

[T]he question is whether petitioner possessed, or by
reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process . . . . [P]etitioner must conduct a reasonable and diligent investigation . . . . If what petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim.139

In analyzing whether cause existed, the majority focused first on Evans's written statement.140 McCleskey based his Massiah claim in his second federal petition solely on the newly released statement by informant Evans.141 However, Justice Kennedy doubted the district court's finding of fact that the statement was neither known to defense counsel nor reasonably discoverable when McCleskey filed his first federal petition.142 At a minimum, Justice Kennedy asserted, McCleskey had constructive knowledge of the facts contained in this document.143 Justice Kennedy explained that McCleskey's argument presupposed that he knew he confessed to the murder to Evans in jail, knew that Evans lied about his identity during the conversations, and knew that Evans had informed police.144 Justice Kennedy asserted that the trial record supported this knowledge on McCleskey's part, and contained other evidence that McCleskey was aware, or should have been aware, of the existence of Evans's written statement.145 According to Justice Kennedy, this knowledge put McCleskey on notice to assert the Massiah claim in his first state habeas petition—therefore, McCleskey should have raised the claim in the first federal petition as well.146

Next, the majority analyzed the role of Worthy's testimony.147 When McCleskey filed his second federal petition, he did not know about jailor Worthy.148 Because Worthy's identity and testimony were unnecessary to raise the Massiah claim in the second petition, the jailor's identity and testimony were also unnecessary for McCleskey to press the claim in the first petition.149 The majority argued that the case illustrated the reasons for requiring prompt and thor-

139. Id. (citations omitted).
140. Id.
141. Id. at 1473.
142. Id. at 1472 n.*.
143. Id. at 1473.
144. Id. at 1472-73.
145. Id. at 1472 n.*.
146. Id. at 1473.
147. Id. at 1473-74.
148. Id. at 1473.
149. Id.
ough investigation of habeas claims in the first petition. When McCleskey filed his first federal petition in 1981, Worthy's identity could have been discovered from prison records. The majority also noted that Worthy's testimony would have been less "inconsistent and confused" without the passage of time. The majority concluded that McCleskey's failure to assert the Massiah claim earlier, foreclosed those procedures best suited to disclose the facts necessary for a reliable determination.

From the majority's viewpoint, the State was not responsible for McCleskey's failure to raise the Massiah claim in the first federal habeas petition. The district court found that there was no misrepresentation or misconduct by the State in its failure to release the document prior to 1987. The majority asserted that McCleskey knew of the facts contained in the statement, and the Massiah claim should have been asserted. On this basis, the majority distinguished Amadeo v. Zant, relied on by McCleskey. The majority reasoned that because McCleskey had failed to show cause for not raising the Massiah claim earlier, the prejudice requirement of the new standard need not be addressed. Nor did the majority apply the "fundamental miscarriage of justice" exception, because McCleskey could not demonstrate that the conviction of an innocent person resulted from the alleged Massiah violation.

Thus, the majority held that McCleskey had abused the writ of habeas corpus by failing to raise the Massiah claim in the first federal habeas proceeding. In so holding, the majority equated the cause-and-prejudice standard from state procedural default jurisprudence with the inexcusable-neglect standard found in the abuse of writ doctrine. Under this analysis, McCleskey failed to show cause for failing to raise the claim earlier. Therefore, the majority affirmed the judgment of the Court of Appeals and denied McCleskey

150. Id. at 1473-74.
151. Id. at 1474.
152. Id.
153. Id.
154. Id. at 1487 (Marshall, J., dissenting).
155. Id. at 1474.
156. Id.
158. McCleskey, 111 S. Ct. at 1474. McCleskey attempted to analogize his case with the Amadeo decision. Brief for Petitioner at 36, McCleskey, 111 S. Ct. 1454. In Amadeo, the Court held that the government's concealment of evidence established cause for petitioner not to have raised a claim earlier. Amadeo, 486 U.S. at 221-23.
159. McCleskey, 111 S. Ct. at 1474.
160. Id. at 1474-75.
161. See supra notes 60-62 and accompanying text.
162. See supra notes 83-131 and accompanying text.
163. See supra notes 132-58 and accompanying text.
relief without considering the *Massiah* violation.\textsuperscript{164}

**JUSTICE MARSHALL'S DISSENT**

*The Radical Redefinition of Abuse of Writ Doctrine*

Justice Marshall wrote the dissent in *McCleskey*, joined by Justice Blackmun and Justice Stevens.\textsuperscript{165} According to Justice Marshall, the majority decision drastically departed from well-established precedent.\textsuperscript{166} Justice Marshall asserted that the majority had substituted the "strict-liability 'cause and prejudice' standard of *Wainwright v. Sykes*,\textsuperscript{167} for the good-faith 'deliberate abandonment' standard of *Sanders v. United States*,\textsuperscript{168} and thereby had "radically redefine[d]" the abuse of writ doctrine.\textsuperscript{169} According to Justice Marshall, the *Sanders* test was designed to deter two principle forms of abuse of writ: the deliberate abandonment of claims known to the inmate when he filed his first petition, and petitioner's use of the writ for improper purposes, that is, "to vex, harass, or delay."\textsuperscript{170} Thus, Justice Marshall argued, as long as the petitioner filed claims in good faith, the denial of a petition did not prohibit him from using "new or additional information," to support a new claim.\textsuperscript{171}

The dissent then described the tougher burden placed on habeas petitioners by the cause-and-prejudice standard.\textsuperscript{172} Cause, arising as it does from external factors which impede defense counsel's efforts, makes counsel's state of mind largely irrelevant.\textsuperscript{173} According to

\textsuperscript{164} See *supra* notes 60-62, 159-60 and accompanying text. Subsequently, McCleskey filed a state habeas corpus petition relying on the "newly discovered evidence" exception for successive petitions found in Georgia law. The superior court judge denied relief and the Georgia Supreme Court denied the application for a writ of probable cause. On Tuesday, September 24, the Georgia Board of Pardons and Paroles refused to commute McCleskey's death sentence. However, an eight-hour stay was granted to hear allegations that the Georgia Attorney General exerted improper influence on the Board of Pardons and allegations of prejudice by the Chairman of the Board of Pardons. While McCleskey spent the day with his family, his attorneys argued unsuccessfully until midnight before the district court. The Eleventh Circuit refused to grant any further stays. Although the United States Supreme Court granted two fifteen minute stays early Wednesday morning, the State finally carried out the death sentence. McCleskey was electrocuted at 3:08 a.m. on Wednesday, September 25, 1991.

\textsuperscript{165} *McCleskey*, 111 S. Ct. at 1477 (Marshall, J., dissenting).

\textsuperscript{166} Id.

\textsuperscript{167} 433 U.S. 72 (1977) (citation omitted).

\textsuperscript{168} 373 U.S. 1 (1963).

\textsuperscript{169} *McCleskey*, 111 S. Ct. at 1477 (Marshall, J., dissenting) (quoting *Sanders*, 373 U.S. at 18).

\textsuperscript{170} Id. at 1478 (quoting *Sanders*, 373 U.S. at 18).

\textsuperscript{171} Id.

\textsuperscript{172} Id. at 1478-79.

\textsuperscript{173} Id. at 1479.
Justice Marshall, in the absence of external impediments, even a reasonable perception that a claim is without adequate foundation does not excuse counsel's failure to raise the claim earlier.\textsuperscript{174} Hence, Justice Marshall asserted, the cause component of the new test creates a strict liability standard.\textsuperscript{175} Furthermore, under the Sanders test, the petitioner is not required to demonstrate prejudice once he shows the claim has merit.\textsuperscript{176} Rather, Justice Marshall argued the State should bear the burden of showing beyond a reasonable doubt that the constitutional error was harmless.\textsuperscript{177}

\textit{The Majority's Lack of Justification for the New Standard}

Justice Marshall gave two reasons why the majority's adoption of the new standard could not be justified on the basis of the Court's common-lawmaking discretion.\textsuperscript{178} First, Congress codified the Sanders test in 28 U.S.C. § 2244(b) and in Habeas Corpus Rule 9(b).\textsuperscript{179} This affirmative legislative act insulates the standard from judicial repeal.\textsuperscript{180} Moreover, Justice Marshall asserted the majority's reliance on the "or otherwise abused the writ" language of section 2244(b) to "engraft" the new standard into the abuse of writ doctrine is irreconcilable with congressional intent.\textsuperscript{181} Cause, the dissent argued, makes petitioner's mental state irrelevant; thus, the statutory language in § 2244(b) referring to "deliberate abandonment" would be superfluous.\textsuperscript{182} Additionally, Justice Marshall noted the Sanders test was designed to deter petitioner's bad-faith conduct.\textsuperscript{183} Justice Marshall stated that it is within this context of prohibiting intentional dilatory tactics that the "or otherwise abuse the writ" language should be construed.\textsuperscript{184}

Justice Marshall described the majority's equation of cause to inexcusable neglect as "unteachable."\textsuperscript{185} He acknowledged that the Court, in Sanders, had written that the inexcusable neglect formulation contained in Townsend should also govern in the abuse of writ context.\textsuperscript{186} However, Justice Marshall noted that Townsend ex-
pressly equated "inexcusable neglect" with the 'deliberate bypass' test from the *Fay v. Noia*\(^{187}\) decision.\(^{188}\) In addition, Justice Marshall asserted that inexcusable neglect is irreconcilable with the new strict liability standard because under the new test, "mere attorney negligence is never excusable."\(^{189}\)

According to the dissent, the second reason the majority failed in attempting to justify its new standard is that the cause-and-prejudice test applied in the abuse of writ context "subverts the policies underlying section 2244(b) and unfairly prejudices the petitioner in this case."\(^{190}\) Justice Marshall argued that the majority's reliance on finality in its rationale wars with the essence of habeas corpus.\(^{191}\) When a petitioner files a habeas petition alleging constitutional violations that threaten life or liberty, conventional ideas of finality have no place.\(^{192}\) According to Justice Marshall, the habeas jurisdiction conferred by Congress on district courts cannot be effectively stripped away with a new stricter procedural rule that severely limits the discretion of federal judges.\(^{193}\)

Justice Marshall focused on the purposes served by the abuse of writ doctrine and procedural default jurisprudence. Justice Marshall argued that the two operate independently, and do not "implicate nearly identical concerns" as the majority had suggested.\(^{194}\) According to the dissent, in the state procedural default setting, the stricter cause-and-prejudice test serves two purposes.\(^{195}\) First, the severity of this test promotes respect for the rules of the states.\(^{196}\) Second, the test forces petitioners to raise all legitimate constitutional claims in state forums initially, because, if they do not, the test will likely disallow raising the claims in a federal forum and will disallow obtaining federal relief.\(^{197}\)

Justice Marshall asserted that neither of these concerns arises in the abuse of writ context.\(^{198}\) The dissent asserted that the cause-and-


\(^{189}\) Id.

\(^{190}\) Id.

\(^{191}\) Id. See infra notes 224-35 and accompanying text.

\(^{192}\) *McCleskey*, 111 S. Ct. at 1482 (Marshall, J., dissenting) (quoting Sanders, 373 U.S. at 8).


\(^{194}\) Id. (quoting *McCleskey*, 111 S. Ct. at 1468).

\(^{195}\) Id.

\(^{196}\) Id.

\(^{197}\) Id. at 1483-84.

\(^{198}\) Id. at 1484. To support this proposition, Justice Marshall stated that: Because the abuse-of-writ doctrine presupposes that the petitioner has effectively raised his claim in state proceedings, a decision by the [federal] habeas
prejudice test destroys the delicate balance between review and finality in the federal context. The test "creates a near-irrebuttable presumption that omitted claims are permanently barred." Justice Marshall argued that this outcome clashes with congressional intent to allow petitioners to use newly-discovered evidence in a successive claim. Justice Marshall further argued that petitioners will assert every possible claim, regardless of merit to avoid this bar. He concluded that the result of the new standard will be to increase the number of "baseless claims" and defeat the majority's desire for increased efficiency.

The Prejudicial Impact of the New Standard on McCleskey's Case

Justice Marshall pointed out that the new stricter standard had not been in effect when McCleskey filed his first federal petition. McCleskey's habeas counsel could only have measured his investigatory efforts under the Sanders good-faith test. The majority, Justice Marshall stated, unjustly applied the new standard retroactively in this case without giving McCleskey fair opportunity to challenge its reasoning. Ordinarily, under such circumstances, the Court remands the case for lower court consideration so that the parties can adequately address the issues. Justice Marshall therefore concluded that, at a minimum, the majority should have remanded the case.

Justice Marshall's Analysis under the Cause-and-Prejudice Standard

Justice Marshall's final attack centered on the majority's independent review of the record, and he argued that, even under the court to entertain the claim notwithstanding its omission from an earlier [federal] habeas petition will neither breed disrespect for state-procedural rules nor unfairly subject state courts to federal collateral review in the absence of a state-court disposition of a federal claim.

id.
199. Id.
200. Id. at 1484-85.
203. Id.
204. Id.
205. Id.
206. Id. at 1485-86.
208. Id. at 1486, 1488-89.
cause-and-prejudice standard, the facts supported a finding that McCleskey did not abuse the writ.\textsuperscript{209} First, Justice Marshall addressed the cause component of the standard.\textsuperscript{210} The district court found the state had violated McCleskey's sixth amendment right to counsel as that right was interpreted by the \textit{Massiah} decision.\textsuperscript{211} Yet, in nine years of depositions and interviews, all the state actors denied misconduct by the State.\textsuperscript{212} Without Evans's written statement, and in light of the state court's rejection of a \textit{Massiah} claim, Justice Marshall concluded that counsel reasonably dropped the claim in the first federal petition.\textsuperscript{213} However, Justice Marshall noted, once the state released the statement containing previously unknown information on the \textit{Massiah} violation, then independent, credible evidence confirmed counsel's former suspicion.\textsuperscript{214} Furthermore, the statement led counsel to discover jailor Worthy, who corroborated key facts surrounding the violation.\textsuperscript{215} Justice Marshall concluded that the pattern of deceit by the State had misled counsel and essentially fulfilled the definition of cause.\textsuperscript{216} Justice Marshall characterized the majority's cause analysis as "dangerous" because it placed the blame on McCleskey's habeas counsel for failing to penetrate the state's veil of disinformation.\textsuperscript{217} Justice Marshall argued that this standard only rewards, and hence creates incentive for, official misconduct and deceit.\textsuperscript{218}

The dissent then concluded that McCleskey had been prejudiced by the \textit{Massiah} violation.\textsuperscript{219} Justice Marshall noted that the district court found Evans's testimony regarding McCleskey's incriminating admissions critical to the prosecutor's case.\textsuperscript{220} This testimony was the only evidence identifying McCleskey as the triggerman, beyond the

\begin{itemize}
\item \textsuperscript{209} \textit{Id.} at 1486-89.
\item \textsuperscript{210} \textit{Id.} at 1487-88.
\item \textsuperscript{211} \textit{Id.} at 1487.
\item \textsuperscript{212} \textit{Id.}
\item \textsuperscript{213} \textit{Id.} at 1487-88.
\item \textsuperscript{214} \textit{Id.} at 1488. According to Evans's written statement, "state officials were present when Evans made a phone call at McCleskey's request to McCleskey's girlfriend, a fact that McCleskey and his counsel had no reason to know and that strongly supports the district court's finding of an \textit{ab initio} relationship between Evans and the State." \textit{Id.} at 1487 (citation omitted).
\item \textsuperscript{215} \textit{Id.} at 1488.
\item \textsuperscript{216} \textit{See id.}
\item \textsuperscript{217} \textit{Id.}
\item \textsuperscript{218} \textit{Id.} at 1489. \textit{See also} Amici Curiae Brief for Petitioner at 8-9, McCleskey v. Zant, 111 S. Ct. 1454 (1991) (No. 89-7024) (describing impact on law enforcement and rights of the accused with the introduction of a stricter standard of review for abuse of writ).
\item \textsuperscript{219} \textit{McCleskey}, 111 S. Ct. at 1488.
\item \textsuperscript{220} \textit{Id.}
“easily impeachable” testimony of a co-defendant. According to Justice Marshall, a different verdict may have resulted without Evans’s testimony. Thus, Justice Marshall asserted that McCleskey's petition for the writ should have been considered even under the majority's test, or at minimum, that the Court should have remanded the case so the issues could be thoroughly addressed.

BACKGROUND

THE WRIT OF HABEAS CORPUS

To understand the problem that the abuse of writ doctrine attempts to cure, one must understand the purposes served by the writ of habeas corpus. The writ functions as a procedural safeguard protecting personal liberty. The writ provides

a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.

The writ was not designed to adjudicate a prisoner's guilt or innocence. Within the federal-state framework, federal habeas allows

---

221. Id.
222. Id. Evans's testimony occurred just prior to the jury deliberations. Brief for Petitioner at 15, McCleskey, 111 S. Ct. 1454.
225. Yackle, 60 N.Y.U. L. REV. at 998. Justice Brennan describes the nature of the writ:

Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner.

227. Id. at 424, n.34. According to Justice Brennan,
prisoners access to an independent federal civil proceeding to challenge the validity of their state court conviction under federal law.228 If successful, a prisoner may obtain an order for release, unless state officials cure the error in subsequent state proceedings.229 Although the scope of the writ has expanded and contracted over time, today the writ appears to extend to all properly presented, dispositive constitutional claims.230

The American writ of habeas corpus has its roots in the English common law.231 Although the United States Constitution, and the Federal Judiciary Act of 1867, authorized the writ, neither text explicitly defined its scope or procedures.232 Nineteenth century courts usually followed the English practice that res judicata did not apply to an adverse habeas ruling, and that unlimited successive petitions should be entertained.233 Because a denial of the writ could not be reviewed, successive petitions substituted for appeals.234 However, as the practice evolved and appellate review of such denials became available, confusion arose over the validity of allowing successive petitions and the possibilities for abuse of the writ.235

The writ of habeas corpus is a new suit brought by the petitioner to enforce a civil right, which he claims as against those who are holding him in custody. The proceeding is one instituted by himself for his liberty, and not by the government to punish for his crime. The judicial proceeding . . . is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act.

Id. (quoting 1 W. F. BAILEY, HABEAS CORPUS AND SPECIAL REMEDIES § 4 (1913)).

228. Yackle, 60 N.Y.U. L. REV. at 992-93.

229. Id. See 28 U.S.C. § 2244(b) (1988) (stating that habeas court is empowered to release prisoner from custody); Noia, 372 U.S. at 440, n.45 (noting that district courts typically issue orders for conditional release allowing states to rearrest and retry prisoners without permitting actual release).


233. See, e.g., In re Perkins, 2 Cal. 424, 430 (1852) (stating, "The statute never contemplated that a judgment upon one writ should be a bar to any further proceeding, but looks to a different result; and any prisoner may pursue his remedy of habeas corpus until he has exhausted the whole judicial power of the State"); In re Snell, 16 N.W. 692, 693 (Minn. 1883).


235. Id. See also Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV. L. REV. 441, 465-74.
Abuse of Writ Doctrine: Review of Case Law and Statutory Formulations

The Early Cases

The modern doctrine of abuse of the writ from successive petitions took form in the United States Supreme Court's Salinger v. Loisel\textsuperscript{236} decision. Salinger had successfully avoided removal from one federal district to another to face federal mail fraud charges.\textsuperscript{237} Federal district and circuit courts in New York and Louisiana had denied habeas relief before Salinger applied to the United States Supreme Court.\textsuperscript{238} While reaffirming that res judicata cannot bar successive petitions for habeas corpus, the Court modified the rule allowing endless applications.\textsuperscript{239} The Court held that successive petitions should be disposed of by the exercise of sound judicial discretion controlled by consideration of those matters that have a rational bearing on the appropriateness of the discharge sought, including a prior refusal to grant a like application.\textsuperscript{240}

In a contemporaneous deportation case, Wong Doo v. United States,\textsuperscript{241} the Court clarified the Salinger rule and dealt directly with the abuse of writ doctrine.\textsuperscript{242} Wong Doo had filed his first habeas petition challenging his custody on two grounds.\textsuperscript{243} The response of the government placed both grounds before the federal district court.\textsuperscript{244} However, at Wong Doo's initial hearing, he had presented evidence and had sought judgment only on the first ground.\textsuperscript{245} When the district court dismissed the petition, he filed a second federal habeas application, relying entirely on the abandoned second ground.\textsuperscript{246} The Supreme Court, though upholding the Salinger rule rejecting the application of res judicata to a later habeas claim, nonetheless affirmed the dismissal of the second petition.\textsuperscript{247} The Court exercised its discretion and gave controlling weight to the prior refusal.\textsuperscript{248} The Court noted that Wong Doo had every opportunity to offer proof of the sec-

\textsuperscript{236} 265 U.S. 224 (1924).
\textsuperscript{237} Id. at 225-26.
\textsuperscript{238} Id. at 228.
\textsuperscript{239} Id. at 230-31.
\textsuperscript{240} Id. at 231.
\textsuperscript{241} 265 U.S. 239 (1924).
\textsuperscript{242} See infra notes 243-50 and accompanying text.
\textsuperscript{243} Id. The two grounds for Wong Doo's application for habeas relief were: that the Secretary of State issued the deportation order without lawful jurisdiction, and that the administrative hearing that preceded the order was unfair and inadequate. Id. at 239-40.
\textsuperscript{244} Id. at 240.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{247} Id. at 240-41.
\textsuperscript{248} Id.
ond ground during the initial hearing because the proof was available then. The Court stated in conclusion: "To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of habeas corpus." The next significant habeas case, Price v. Johnson, arose two decades later. Price, after three unsuccessful habeas petitions, brought a fourth petition before the United States District Court for the Northern District of California alleging for the first time that the government had suborned perjury to convict him. Without a hearing, the lower court denied relief because, although the evidence appeared to have been available, the claim had not been raised earlier. The United States Supreme Court reversed and remanded the case, stating that the district court's dismissal without a hearing precluded proper development of the issue of alleged abuse of writ. The Court held that the petitioner must have been given an opportunity to either present new information supporting the claim or provide an excuse for not raising this ground earlier: "[I]f for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief." In Price, the Court also established the burdens each party bears in an abuse of the writ context. The Court explained that the government's claim that the prisoner has abused the writ of habeas corpus must be made with "clarity and particularity," while in his answer the prisoner bears the burden of proving that he has not abused the writ.

The First Legislative Formulation

The Supreme Court decided Price one month before Congress enacted a federal habeas statute, 28 U.S.C. § 2244 ("section 2244"), which was the first statute dealing with successive petitions. The statute stated:

No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the de-

249. Id. at 239.
250. Id.
251. 334 U.S. 266 (1948).
252. Id. at 275.
253. Id. at 276.
254. Id. at 293.
255. Id. at 290-91.
256. Id. at 292-93.
257. Id. at 292.
tention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such 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 petitioner presents no new ground not there-
tofores presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.\textsuperscript{259}

Judges and commentators had lobbied for a stronger provision that would have severely curtailed the increasing abuse of the system stemming from successive habeas petitions.\textsuperscript{260} The House Judiciary Committee, well aware of the abuse, noted "the practice of suing out successive, repetitious, and unfounded writs of habeas corpus imposes an unnecessary burden on the courts."\textsuperscript{261} However, the Committee thought the then-existing procedures were adequate to limit abuses.\textsuperscript{262} The Senate Judiciary Committee, rejecting the application of res judicata in federal habeas, ensured that under § 2244 a federal judge retained his equitable power to hear successive petitions "if in his discretion he thinks the ends of justice require its considera-
tion."\textsuperscript{263} But even after passage of § 2244, critics lobbied hard, though unsuccessfully, during the next eighteen years to narrow the scope of judicial discretion.\textsuperscript{264}

The Trilogy Cases

In 1963, the Supreme Court handed down a trilogy of decisions that clarified the federal courts' responsibilities in federal post-conviction proceedings.\textsuperscript{265} The first two cases, Fay v. Noia\textsuperscript{266} and Townsend v. Sain,\textsuperscript{267} addressed the governing principles where the inmate made a prior application for state court relief.\textsuperscript{268} In the third case,
HABEAS CORPUS REVIEW

Sanders v. United States,269 the Court focused solely on the problem of successive petitions for federal collateral relief.270 In either circumstance, the Sanders opinion directed lower courts to the contemporaneous rulings in Noia and Townsend because, according to the Court, the test developed in those cases governs in the abuse of writ context.271

Fay v. Noia

In Noia, petitioner Noia and two co-defendants were convicted of felony murder solely on the basis of their confessions.272 The two co-defendants appealed unsuccessfully in state court, but were ultimately released when it was found that all three confessions had been coerced.273 Subsequently, Noia applied to the state court for a review of his conviction.274 However, the court denied relief primarily because he had failed to file his request for direct state review before the procedural deadline.275 Noia then applied to United States District Court for the Southern District of New York for a writ of habeas corpus.276 Although the district court found the confession had been coerced, the court denied the petition, holding that Noia had failed to exhaust state remedies because he had not appealed in time.277 The Court of Appeals for the Second Circuit reversed this judgment, and the Supreme Court upheld the reversal.278

The Supreme Court, in Noia, ruled that a federal judge may exercise his discretion to deny relief to an applicant for habeas corpus who has "deliberately by-passed" the orderly state court procedures and has therefore forfeited his state-court remedies.279 The Court explained that deliberate by-pass should be measured according to the classic definition of waiver—"an intentional relinquishment or abandonment of a known right or privilege."280 "Deliberate-by-pass" analysis focuses on the prisoner's actual state of mind and probes whether the decision was made voluntarily, understandingly and knowingly.281 Justice Brennan, writing for the majority, concluded

---

270. Sanders, 373 U.S. at 23 (Harlan, J., dissenting).
271. Id. at 18.
273. Id. at 395-96.
274. Id. at 396 n.3.
275. Id. at 394.
276. Id. at 396-97 n.3.
277. Id. at 395-96.
278. Id. at 398.
279. Id. at 438.
280. Id. at 439 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
281. Id.
that Noia's reasons for not appealing did not constitute deliberate bypass of the state-court remedies. 282

Townsend v. Sain

In the second case of the trilogy, petitioner Townsend was convicted of murder in state court and sentenced to death. 283 Townsend had exhausted all state remedies before petitioning the United States District Court for the Northern District of Illinois for a writ of habeas corpus. 284 Townsend claimed that the police had illegally obtained his confession after administering "truth serum" to him. 285 The district court denied the petition without an evidentiary hearing, and the Court of Appeals for the Seventh Circuit dismissed an appeal. 286

The United States Supreme Court reversed, holding that Townsend should have been given a hearing to present proof of his allegations. 287 The Court listed circumstances that mandate a hearing, including: "[i]f, for any reason not attributable to the inexcusable neglect of petitioner, see Fay v. Noia, . . . evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing." 288 At Townsend's trial, Townsend produced medical testimony explaining the effect of the drug on him, but Townsend failed to fully bring out that the drug was a "truth serum" that might have produced the confession. 289 The Court reasoned that this missing information was crucial to the question of whether the confession was coerced. 290 However, Townsend's mistake did not rise to the level of inexcusable neglect. 291

Sanders v. United States

In the last case of the trilogy, Sanders, the Supreme Court established basic rules regarding abuse of writ and described the rationale for the doctrine. 292 In Sanders, the petitioner pleaded guilty to fed-

\[\text{References}\]

282. Id.
284. Id. at 296.
285. Id. at 297-98.
286. Id. at 296.
287. Id. at 321.
288. Id. at 312-18, 317 (citation omitted).
289. Id. at 321-22.
290. Id. at 321.
291. Id. at 322. The Court twice cited Noia as a reference to this standard. Id.
292. See infra notes 293-307 and accompanying text. The abuse of writ issue arose in connection with a motion for collateral review filed under 28 U.S.C. § 2255 (1948). Sanders, 373 U.S. at 2. However, the Court stated that the same principles apply to habeas petitions under § 2244. Id. at 14.
eral bank robbery. After receiving a fifteen-year sentence, Sanders filed a section 2255 motion for his release. When the District Court for the Northern District of California denied the motion without a hearing, Sanders filed a second section 2255 motion alleging different grounds. The district court denied the second motion, again without a hearing, stating that the petitioner had given no reason why the new ground could not have been raised in the first motion. The United States Supreme Court reversed and remanded the case, ruling that the district court should have held a hearing on the second motion.

The Supreme Court made three observations regarding section 2244. First, Congress did not intend the statute to foreclose the judicial evolution of habeas law. Second, section 2244 does not establish a rigid rule compelling a judge to dismiss successive petitions, but preserves judicial discretion to inquire into the merits if the "ends of justice" will be served. Third, the Court explained, in Sanders, that the existing statute governing successive applications, section 2244, addressed only successive habeas petitions based on grounds for relief previously heard and adversely adjudicated on the merits. The Court observed that the statute does not cover a second type of successive petition—one containing a different ground for relief, or a ground for relief presented earlier that was not decided on the merits. The Court concluded, therefore, that the statute did not address the problem of abuse of the writ. The Sanders fact pattern involved precisely the abuse of writ pattern that the statute "does not touch."

This second type of successive petition required a different analytical framework than that provided by the statute. The Court stated that "full consideration of the merits [of this second type of petition] can be avoided only if there has been an abuse of the writ."

294. Id. See supra note 292 and accompanying text.
295. Sanders, 372 U.S. at 5.
296. Id. at 5-6.
297. Id. at 6.
298. Id. at 11.
299. Id. at 12.
300. Id. See also supra notes 308-10 and accompanying text.
301. Sanders, 373 U.S. at 17.
302. Id. at 12.
303. Id. at 3-6. In holding that the lower court should have granted the hearing on the second application, the Court reasoned that the prior application had not been decided on the merits and the second application relied on facts outside the record of the first proceeding. Id. at 19-20.
304. Id. at 15-19.
305. Id. at 17.
To determine whether the claim is abusive, the district court’s judgment is to be guided by equitable principles, including “the principle that a suitor’s conduct in relation to the matter at hand may disentitle him to the relief he seeks.” The Court illustrated abuse of the writ:

Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one . . . he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in Wong Doe, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless, piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

The Second Legislative Formulation

In 1966 Congress amended section 2244, reorganizing it into three subsections. Subsection (b), tracking the distinction drawn by the Court in Sanders, addresses the second type of successive petition not covered by the prior statute. The amended statute allows the court to dismiss a successive petition unless the applicant alleges a new ground and has not deliberately withheld the new ground “or otherwise abused the writ.”

The House Judiciary Committee explained that the purpose of this provision was to create a qualified application of res judicata. The Senate Report, however, qualified the application of res judicata by identifying, as the target of the revision, those applications con-
taining identical allegations to those denied previously, or "predi-
cated upon grounds obviously well known to [the petitioner] when
they filed the preceding application." Following the amendment
of the statute, the federal courts applied section 2244(b) as suggested
by the Senate Report—precluding only those successive applications
that were deliberate or made in bad faith.

The Third Legislative Formulation

In 1976, Congress again addressed the appropriate standard gov-
erning successive federal petitions, prompted by the Supreme Court's
submission to Congress of proposed "Rules Governing Section 2254
Cases in the United States District Courts." Congress, in response
to sharp criticism of the rules, voted to delay the effective date to al-
low for review and amendment. As originally written, the Rule
would have permitted a district court to dismiss a second petition as-
serting "new and different grounds for relief if the judge found that
the failure to assert those grounds in a prior petition was not excusa-
ble." The principle draftsmen of the rule assured Congress that
this language was intended to be fully consistent with existing statu-
tory provisions and with the Sanders decision. However, critics
charged that the proposed language might constitute a stealthy at-
temt to reshape existing law by using the rule-making process,
thereby substituting an ill-defined standard for the deliberate-bypass
test announced in Noia and adopted in the Sanders decision.

The final version of Rule 9(b) states:

A second or successive petition may be dismissed if the judge
finds that it fails to allege new or different grounds for relief
and the prior determination was on the merits or, if new and
different grounds are alleged, the judge finds that the failure
of the petitioner to assert those grounds in a proper petition
constituted an abuse of the writ.

Admin. News 3664. The Senate Report attached a letter from the Judicial Conference
that had drafted the subsection, identifying as targets the same state prisoners who
had abused the writ in this way. Id. at 3666-67.
313. See, e.g., Smith v. Yeager, 399 U.S. 122, 125 (1968)(holding that inmate Smith's
failure to request an evidentiary hearing during his initial federal proceeding did not
constitute an abuse that would bar a hearing on the same claim in his second
application).
315. See Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the
318. Id. at 8.
319. Rules Governing Section 2254 Cases in the United States District Courts, 28
Congress made this amendment because, as the House of Representa-
tives noted, "the 'not excusable' language created a new and unde-
defined standard that gave a judge too broad a discretion to dismiss a
second or successive petition. . . . The abuse of writ standard brings
rule 9(b) into conformity with existing law." As the Court subse-
quently held in Rose v. Lundy, Congress acted in 1976 to codify the
judge-made principle set forth in Sanders when it enacted Rule
9(b).

Subsequent Cases in the Abuse of Writ Lineage

The parameters of the abuse of writ doctrine have been further
outlined by a number of more recent Supreme Court decisions. In
Woodard v. Hutchins, a condemned inmate asked for a last-min-
ute stay of execution and filed a successive habeas petition that raised
three new claims. The Supreme Court noted that there existed no
affirmative evidence that the new claims had been deliberately with-
held. However, although the inmate could have developed the
claim earlier, he had failed to explain why he had not done so. Re-
lying on section 2244(b) and Rule 9(b), a plurality of the Court con-
cluded that the claims were deliberately withheld and that Hutchins
had therefore abused the writ.

In Antone v. Dugger, the facts presented a similar pattern—a
condemned inmate filed a last-minute stay request and habeas peti-
tion. The United States District Court for the Middle District of
Florida denied Antone's second federal habeas petition. The court
concluded that the subsequent presentation of the new claims con-
stituted abuse of the writ because the inmate "showed 'inexcusable ne-
glect' in not having raised these claims in the first petition." The
United States Court of Appeals for the Eleventh Circuit agreed.

(1985).
& ADMIN. NEWS 2482.
322. Id. at 521 (stating that prisoners who split claims to pursue unexhausted
claims in state court and exhausted claims in federal court under the total exhaustion
rule runs risk of federal dismissal of subsequent petitions under Rule 9(b)).
324. Id. at 377-78.
325. Id. at 379.
326. Id.
327. Id. (Powell, J., concurring).
329. Id. at 201.
330. Id. at 204.
331. Id. (relying on 28 U.S.C. § 2254 Rule 9(b) in making its decision).
332. Id. at 201.
The United States Supreme Court upheld both lower courts, reasoning that because Antone had presented each claim to the state courts prior to the first federal habeas petition, Antone could not assert that these claims were unavailable to him then. Antone suggested that the claims were not presented in the first petition because his present counsel did not have time to become familiar with the case as he was appointed just prior to Antone's scheduled execution. The Court labeled this reason "meritless," because the execution order had been stayed pending consideration of the first habeas petition.

The last-minute successive habeas petition presented in Straight v. Wainwright raised the same legal claim as the inmate's prior petition, but alleged new facts in support. The United States District Court for the Middle District of Florida dismissed the second petition as successive under Rule 9(b), and abusive because the same claims plainly could have been asserted earlier. The United States Supreme Court held that the lower court's denial of the petition under Rule 9(b) was clearly correct. Writing for the majority, Justice Powell observed that Straight had offered no reason to relitigate the new claim, nor had he justified his previous failure to assert the new factual grounds.

In Kuhlmann v. Wilson, the inmate, Wilson, filed his first federal habeas petition alleging a Massiah v. United States violation, but the United States District Court for the Southern District of New York denied the writ. Subsequently, the United States Supreme Court decided a case that applied the Massiah test to suppress incriminating statements made to a jail-house informant. Relying on this new case, Wilson filed unsuccessfully for relief in state court before filing his second federal habeas petition asserting the same claim. Although the district court denied relief, the United States Court of Appeals for the Second Circuit granted the writ. The Second Circuit held that under the Sanders "ends of justice" excep-

333. Id. at 206.
334. Id. at 206 n.4.
335. Id. at 206 n.4, 207.
337. Id. at 1132-33.
338. Id. at 1133. The United States Court of Appeals for the Eleventh Circuit affirmed. Id.
339. Id.
340. Id.
344. Id. at 442 (applying United States v. Henry, 477 U.S. 264 (1980)).
345. Id.
346. Id. at 443.
tion, Wilson's successive petition should have been entertained because Wilson's right to counsel was violated by the statements "deliberately elicited" by the police.347 The Supreme Court ruled that the lower courts should have denied relief under section 2244(b) because the same claim was raised earlier and a final judgment had been entered in state court.348 The Court clarified that the "ends of justice" exception applies only where the petitioner supports the constitutional claim with a colorable demonstration of factual innocence.349

Finally, in the recent capital case of Delo v. Stokes,350 the United States Supreme Court held that the condemned petitioner's fourth federal habeas corpus petition clearly abused the writ.351 The Court, citing Rule 9(b), section 2244(b), and Woodard, stated that the claims in the fourth petition were not "novel" and could have been developed much earlier.352

ABUSE OF WRIT: LINEAGE OF THE CAUSE-AND-PREJUDICE STANDARD AS IT APPLIES TO PROCEDURAL DEFAULT CASES

The Early Cases

The application of the cause and prejudice standard to abuse of writ in McCleskey stems from a "torturous" line of decisions focusing on the conflict between rules governing state procedural default and the reviewability of federal claims.353 When a petitioner attempts to raise claims in a federal habeas adjudication that violate state procedural rules—for example, the claims were not preserved or presented in state proceedings—state prosecutors try to prevent review by asserting that the petitioner has defaulted on or waived the claim.354 The first principle case in this procedural default lineage was Brown v. Allen.355 Petitioner Daniels attempted to challenge his conviction

347. Id.
348. Id. at 455.
349. Id. at 454.
350. 110 S. Ct. 1880 (1990) (per curiam).
351. Id. at 1881.
352. Id.
355. 344 U.S. 443 (1953). The prior lineage of procedural default jurisprudence includes: Jennings v. Illinois, 342 U.S. 104 (1951); Darr v. Burford, 339 U.S. 200 (1950); Goto v. Lane, 265 U.S. 393 (1924); Frank v. Mangum, 237 U.S. 309 (1915); Ex parte Spencer, 228 U.S. 652 (1913); In re Lincoln, 202 U.S. 178 (1906); Davis v. Burke, 179
and death sentence on direct appeal based on federal constitutional grounds. However, his attorney filed the appeal papers with the state supreme court one day after the procedural sixty-day filing deadline. The state supreme court refused to review the merits of the petition, citing the state rule mandating timely filing. The United States Supreme Court upheld the state court ruling, concluding that Daniels's failure to obtain direct review barred the availability of federal habeas review. The United States Supreme Court stated that no interference or incapacity had excused the late filing.

However, the Court, in *Fay v. Noia*, overruled *Brown* ten years later. In *Noia*, the Court concluded that petitioner Noia's failure to appeal in state court might bar state relief, but he was entitled to raise the fifth amendment violation in federal habeas proceedings. The Court stated that:

Federal courts have power under the federal habeas statute to grant relief despite the applicant's failure to have pursued a state remedy not available to him at the time he applies; the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute. The decision in *Noia*, however, established that a federal court may, at its discretion, deny relief to a habeas petitioner who had deliberately by-passed state procedure and thereby forfeited the petitioner's state remedies. The Court held in *Noia*, however, that no deliberate by-pass had occurred, and thus granted relief.

The Supreme Court, in *Davis v. United States*, began to limit the broad *Noia* rule. Three years after Davis's federal bank robbery trial, Davis petitioned the district court under section 2255 to set aside the conviction because of unconstitutional discrimination in the

U.S. 399 (1900); Markuson v. Boucher, 175 U.S. 184 (1899); In re Wood, 140 U.S. 278 (1891).
357. *Id.* at 484.
358. *Id.* at 484-85.
359. *Id.* at 486.
360. *Id.* at 487.
364. *Id.*
365. *Id.* at 438.
366. *Id.* at 439.
composition of the grand jury that indicted him. The Federal Rules of Criminal Procedure provided that this type of claim may be raised solely by pre-trial motion and that failure to do so constitutes a waiver unless the defendant shows "cause." This pre-trial motion requirement allows the defect to be cured before the expense and burden of trial. Without this rule, a defendant could simply save the claim and later use it to overturn a valid conviction when retrial might be difficult. Because Davis had filed no such motion, the Court denied relief. Although the Federal Rules of Criminal Procedure do not normally apply in post-conviction proceedings, Congress had not addressed the waiver issue in the federal collateral relief statutes. In the absence of legislative direction, the Court held that the scope of this rule also governed post-conviction proceedings.

The decision, in Davis, established that a federal prisoner could not raise an issue in a federal collateral post-conviction proceeding when the claim was barred by a federal procedural rule, absent a showing of both cause for noncompliance and actual prejudice from the claimed constitutional violation. Davis had shown no "cause" for which the Court could grant relief, and he had offered no explanation for failing to make a timely objection in a pre-trial motion. The lower court also inquired whether Davis had shown actual prejudice resulting from the claimed error. As Davis had not met his burden of showing either "cause" or "actual prejudice," he was denied relief.

In a parallel case, Francis v. Henderson, the Court extended the Davis rule to a state prisoner who had violated a state procedural rule governing the same jury-composition issue. The United States

---

368. Id. at 234-35.
369. Id. at 236. The Court was referring to Federal Rule of Criminal Procedure 12(b)(2), since reorganized into 12(b)(2) and (f). FED. R. CRIM. P. 12(b)(2) and (f).
371. Id.
372. Id. at 243.
373. Id. at 241-42.
374. Id. at 242.
375. Wainwright, 433 U.S. at 84.
376. Davis, 411 U.S. at 243-44.
377. Id. at 244 (quoting Shotwell Mfg. Co. v. United States, 371 U.S. 341, 363 (1963)). In Shotwell Mfg. Co., the Court stated "[w]here, as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule." Shotwell Mfg. Co., 371 U.S. at 363.
378. Davis, 411 U.S. at 244-45.
380. Id. at 537.
Supreme Court held that the Louisiana law—essentially the same as Federal Rule of Criminal Procedure 12(b)—served the same purposes of judicial administration as the federal rule. However, the state rule, unlike the federal rule, did not contain the "cause" exception excusing noncompliance. However, the Court held that the cause and prejudice standard derived from the federal rule should apply. The majority reasoned that as the interest in finality is identical for both state and federal prisoners, procedural defaults in both state and federal courts should be given the same preclusive effect.

Justice Brennan wrote a vigorous dissent in Francis, defending the now rejected Noia test—which had allowed federal habeas relief unless there was a "deliberate bypass" of state procedures. He attacked the majority's reliance on the "vague concepts" of comity and federalism, and the application of the Davis cause and prejudice standard.

The Pivotal Case of Wainwright v. Sykes

The Supreme Court, in Wainwright v. Sykes, expanded the Davis test to another state procedural rule. The defendant, Sykes, had failed to object at trial to the admission of his own incriminating statements, and had failed again to object on appeal. He raised the objection in his first state habeas petition, challenging the admission of the statements that he contended were made in violation of his Miranda rights. The state courts refused to reach the merits because Sykes had failed to preserve the claim by raising a contemporaneous objection at trial, as was required by the Florida Rules of Criminal Procedure. However, both the United States District Court for the Middle District of Florida and the Court of Appeals for the Fifth Circuit ruled that Sykes's failure to comply with Florida's contemporaneous objection rule did not bar federal habeas review under the Noia deliberate-bypass test. The Supreme Court disagreed, holding that Sykes's failure to comply with the state procedural rule established an independent and adequate state procedural ground.

382. Wainwright, 433 U.S. at 84.
383. Francis, 425 U.S. at 542.
384. Id. at 541-42.
385. Id. at 543 (Brennan, J., dissenting).
386. Id. at 548-49, 551-52.
388. Id. at 75.
389. Id.
390. Id. at 74 (quoting FLORIDA RULE CRIM. PROC. 3.190(i)).
391. Wainwright, 433 U.S. at 75-77.
thereby preventing direct federal review. In so ruling, the Court again rejected the Noia test and applied the Francis cause and prejudice test to bar federal review. Justice Rehnquist's majority opinion did not further define "cause" and "prejudice" except to say that the test is "narrower than the standard set forth in dicta in Fay [v. Noia]." The Court rejected the Noia test in this context because the state procedural rules deserved greater respect, contributed to finality, and discouraged defense counsel's "sandbagging."

Subsequent Cases in the Lineage of the Cause-and-Prejudice Standard

The majority, in United States v. Frady, clarified the nature of the prejudice component of the Sykes test when the defendant had failed to object to jury instructions at trial. However, the Court left open for further development the nature of prejudice in other situations. The Court stated that the defendant "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." The Court found that, because Frady suffered no actual prejudice, it was unnecessary to reach the issue of cause.

The Court, in Murray v. Carrier, clarified the definition of "cause" as "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule." The Court listed three examples of objective factors: ineffective assistance of counsel, counsel's reasonable lack of a factual or legal foundation for a claim, and interference by state officials. While

---

392. Id. at 85-87.
393. Id. at 87-90.
394. Id. at 87.
395. Id. at 88-89. The court described "sandbagging" as a strategy in which defense lawyers withhold a federal constitutional claim from state court adjudication in hopes of an acquittal, and then present a dispositive claim in federal habeas court if the defendant loses the gamble. Id. at 89.
397. Id. at 168-70.
398. Id. at 168.
399. Id. at 170 (emphasis in original).
400. Id. at 168.
402. Id. at 488.
403. Id. A fourth example is found in Reed v. Ross, 468 U.S. 1 (1984), in which the Court held that the petitioner had cause for failing to raise a newly-established constitutional claim on an earlier appeal from his murder conviction because the legal basis of the right was not reasonably available. Id. at 14, 20. See Amadeo v. Zant, 486 U.S. 214 (1988) (finding that the district attorney's memo supporting the challenge to jury composition discovered while case was on direct appeal was not reasonably discovera-
affirming the definition of prejudice from Frady, the Court in Murray added that a showing of prejudice alone, without cause, would not permit relief.\textsuperscript{404}

**Political Context in Which McCleskey Was Decided**

*The Extent of the Problem of Abuse of Writ*

Prior to the 1966 amendment to section 2244, which for the first time codified the law prohibiting successive petitions, there is ample evidence of abuse of the writ.\textsuperscript{405} In a 1945 case, *Dorsey v. Gill*,\textsuperscript{406} the court engaged in extensive commentary on the unnecessary burden placed on the courts by repetitious, meritless petitions.\textsuperscript{407} The federal district court opinion presents some extreme examples of abuse of the writ: one prisoner had presented in the federal district court fifty habeas petitions within the five years prior to April 1944; another inmate had presented twenty-seven petitions; a third inmate, twenty-four; a fourth, twenty-two; and a fifth, twenty.\textsuperscript{408} One hundred nineteen persons accounted for 597 petitions, or an average of five petitions per inmate.\textsuperscript{409} Despite the amendment to section 2244, the total number of habeas petitions increased from 584 in 1949, to 11,747 in 1988.\textsuperscript{410} However, there is no breakdown given as to how many of these were legitimate petitions and how many were found to be abusive.\textsuperscript{411} According to one commentator, the increase in the rate of filing stems from civil rights actions rather than habeas petitions.\textsuperscript{412}

Some authorities suggest that the extent of the problem of abuse of writ in federal courts may not be as extensive as perceived.\textsuperscript{413} Some statistical evidence suggests that the actual number of federal habeas petitions began to decrease in the early 1970s, long before the

\textsuperscript{404} Murray, 477 U.S. at 494.


\textsuperscript{407} Id. at 864.

\textsuperscript{408} Id. at 862.

\textsuperscript{409} Id.


\textsuperscript{411} See id. The Source Book of Criminal Justice Statistics gave no breakdown regarding the number of abusive petitions. Id.


\textsuperscript{413} See infra notes 414-17 and accompanying text.
major court decisions and rules existed. According to the American Bar Association, "[t]he occasional, highly litigious prisoner stands out as the rarest exception." One commentator explains that most prisoners are interested in the earliest possible release, and only rarely will an inmate inexcusably neglect to raise every available issue in his first federal habeas petition. Accordingly, the purpose of the abuse of writ doctrine is to deter repetitious applications from those few bored, vindictive prisoners and to allow meritorious applications to receive more expeditious and comprehensive consideration.

The Impact of the Death Penalty on the Abuse of Writ Issue

Even so, federal habeas review appears to be both chaotic and protracted, especially in death penalty cases. The simplest case, where relief is denied at all stages, can appear before the United States Supreme Court at least three times, and before federal district and appellate courts a minimum of twice. Often, the courts must review and decide many complicated issues under extraordinary time constraints. In state and federal courts, this litigation produces a frantic pace of last-minute petitions, accompanied by complicated paperwork, procedural ambiguities resulting from simultaneous state and federal court proceedings, and quickly-convened

415. 28 U.S.C.A. § 2254, Rule 9(b) note (1977) (Original Committee Notes at 1139) (quoting ABA Standards Relating to Post-Conviction Remedies § 6.2, commentary at 92 (Approved Draft 1968)).
417. Id.
419. Id. Robbins notes,
The first petition for certiorari to the U.S. Supreme Court will typically follow affirmance of the conviction by the state's court of last resort. Following state post-conviction proceedings (including appeals within the state judicial system of lower state court denials of post-conviction relief, and perhaps including as well another petition for certiorari to the Supreme Court), a first federal habeas corpus petition will be filed in federal district court, where a full-scale hearing will often be held. An appeal will follow, which appeal will also be given full—not expedited—attention. Another petition for certiorari will be filed in the Supreme Court. Following Supreme Court review, if any, the case will become the subject of state executive-branch clemency proceedings. If clemency is denied, emergency post-conviction proceedings will be filed in both state and federal trial courts, with expedited proceedings in both, followed by expedited appeals to the state and federal intermediate and ultimate appellate courts.
420. Id. at 215 n.7.
hearings and conferences.\textsuperscript{421} None of the actors know, even until the end, when a telephone call may stay the execution.\textsuperscript{422} A uniquely high number of state death penalty cases are reversed by federal courts.\textsuperscript{423} The average length of time between conviction and execution is approximately eight years.\textsuperscript{424} In the last decade, the number of prisoners awaiting execution has mushroomed from 691 prisoners in 1980, to over 2300 prisoners as of May, 1990.\textsuperscript{425} Since 1976, when the Supreme Court upheld the constitutionality of state death penalty statutes, only 128 prisoners have been executed.\textsuperscript{426} Ninety percent of these executions took place in states located in the Fourth, Fifth and Eleventh Circuits.\textsuperscript{427} It is estimated that over ninety-five percent of the last-minute stays of execution—which most trouble federal courts and which are almost inevitably coupled with successive petitions—come from these three southern circuits.\textsuperscript{428}

\textit{The Split in the Circuits}

Prior to the Supreme Court's decision in \textit{McCleskey}, the federal circuit courts were split over the issue of the appropriate standard to apply to determine abuse of the writ in successive federal petitions.\textsuperscript{429} The Fourth, Fifth and Eleventh Circuits abandoned the more subjective, discretionary standard announced in \textit{Sanders} and codified in section 2244(b) and Rule 9(b) of the Rules Governing Section 2254 Cases.\textsuperscript{430} In its place, these circuits substituted the more objective, "non-excusable" or "inexcusable neglect" standard.\textsuperscript{431} Re-

\textsuperscript{421} Id.
\textsuperscript{422} Id.
\textsuperscript{426} Id. (citing The NAACP Legal Defense and Educational Fund's Death Row, U.S.A. report as of May 30, 1990).
\textsuperscript{428} Id. § 26.6 at 409 n.4.
\textsuperscript{429} Id. § 26.6 at 409, 222 (Cum. Supp. 1991).
\textsuperscript{430} Id. § 26.6 at 409. These circuits faced a disproportionate number of habeas petitions in relation to other circuits. Id.
\textsuperscript{431} Id. (citing McCorquodate v. Kemp, 832 F.2d 543 (11th Cir.), \textit{cert. denied}, 108 S. Ct. 32 (1987); Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986); Miller v. Bordenkircher, 764 F.2d 245 (4th Cir. 1985); Daniels v. Blackburn, 763 F.2d 705 (5th Cir. 1985) (per curiam)).
cently, the Eighth Circuit appears to have followed suit. The other circuits, however, did not widely follow this lead. The revisionist circuits adopted the stricter standard by emphasizing the “inexcusable neglect” language in Townsend, while ignoring the “deliberate bypass” definition given that language by the citation in Townsend, to Noia. Thus, these circuits extended the application of the abuse of writ doctrine beyond the traditional “deliberately withheld” standard to include cases where the client knew of the claim but did not knowingly and intelligently omit it. The Supreme Court granted certiorari in McCleskey to settle this conflict between the circuits regarding the proper legal standard.

Views of the Chief Justice on the Problem

The Justices of the Supreme Court have been among the most outspoken critics of the habeas system. Chief Justice Rehnquist has been the most vocal. He has lamented that the power of a single federal judge to overturn state court decisions on “tenuous” grounds discourages competent lawyers from serving as state judges. The Chief Justice has proposed limiting the availability of federal habeas relief “especially for prisoners pressing stale claims that were fully ventilated in state courts.” Eventually, Chief Justice Rehnquist appointed an Ad Hoc Committee of the Judicial Conference of the United States to investigate reform of the habeas system, particularly in capital murder cases. Chief Justice Rehnquist named retired United States Supreme Court Justice Lewis


433. 1 J. LIEBMAN, supra note 425, § 26.6 at 412 n.24 (citing Nell v. James, 811 F.2d 100 (2nd Cir. 1987) (questioning Eleventh Circuit reasoning); United States ex rel. Cyburt v. Lane, 612 F. Supp. 455 (N.D. Ill. 1984) (containing extensive criticism of the 5th Cir. view)). See Harris v. Pulley, 885 F.2d 1354 (9th Cir. 1988), cert. denied, 110 S. Ct. 854 (1990); Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989), cert. denied, 110 S. Ct. 1835 (1990); Robinson v. Fairman, 704 F.2d 368 (7th Cir. 1973) (reserving the question)).

434. 1 J. LIEBMAN, supra note 425, § 26.6 at 410.

435. Id. § 26.6 at 411 n.15 (citing Daniels v. Blackburn, 763 F.2d 705 (5th Cir. 1985); Young v. Kemp, 758 F.2d 514 (11th Cir. 1985)).


438. Id. at 993 n.13.


Powell, an outspoken critic of the existing habeas system, to chair the committee and appointed four federal judges from the Fifth and Eleventh Circuits to serve with Powell ("Powell Committee").

The Powell Committee Proposal and the American Bar Association Proposal

The Powell Committee, as it came to be called, presented a series of recommendations designed to give each defendant one full and fair review before ending litigation. The proposal would virtually eliminate successive petitions, unless extraordinary circumstances exist and the inmate presents "a colorable showing of factual innocence." However, the proposal did not specifically address the standard by which these were to be judged nor did it address procedural default in the federal review process. The Powell recommendations were subsequently incorporated into a reform bill introduced in Congress by Senator Strom Thurmond and supported by the Chief Justice and the Bush administration.

The American Bar Association ("ABA") also created a State-Federal Task Force to investigate habeas reform. The resulting ABA proposal not only focused on the last stage of the review process, but on the needs of the entire criminal justice process in capital cases. The ABA emphasized the need for competent counsel for petitioner at trial and throughout review if the scope of the writ was to be diminished. The ABA proposal contained a successive petition provision similar to the Powell proposal. However, the ABA also addressed procedural default in the federal review process.

444. Id. at 3241.
445. Id. at 3239-41.
446. Berger, 90 COLUM. L. REV. at 1676-77. See President Bush speech May 30, 1991:
Our comprehensive Violent Crime Control Act of 1991 will confront the terrifying spiral of lawlessness. It will strengthen our nation's criminal justice system, too often unfairly loaded against dedicated law enforcement officials. The Act has four major elements. First, habeas corpus reform. We're determined to free the courts from frivolous, repetitive delays, gimmicks and challenges from people who have already exhausted their legal appeals. Our bill will ensure that convicted felons will no longer evade punishment by drowning justice in a sea of legal challenges unrelated to guilt or innocence.
449. Id. at 1-3.
450. See Robbins, 73 JUDICATURE at 218.
451. Id.
Review would be allowed of federally defaulted claims that resulted from counsel's "ignorance or neglect" or if necessary to avoid a "miscarriage of justice." The ABA proposals were incorporated in a reform bill introduced by Senator Joseph Biden.

On July 17, 1991, the Senate passed The Biden-Thurmond Violent Crime Control Act of 1991, Title XI of which is the Habeas Corpus Reform Act of 1991. Many amendments were made to the habeas statutes, effectively limiting state prisoners to one federal habeas petition in most cases. A similar bill has been introduced in the House of Representatives as part of H.R. 1400.

ANALYSIS

In \textit{McCleskey v. Zant}, a six to three majority established a new, separate legal standard for determining abuse of the writ of habeas corpus by state prisoners pursuing a constitutional claim in a second or successive habeas corpus petition in federal court. In addition to "deliberate abandonment," the inmate can abuse the writ by having failed to raise the claim in the first federal proceeding through "inexcusable neglect." The majority defined "inexcusable neglect" by equating it with the "cause and prejudice" standard used.

---

452. \textit{Id.}
455. \textit{Id.} at Title XI. 28 U.S.C. § 2244 would be amended by the addition of a new subsection:

(d) A one-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. The limitation period shall run from the latest of the following times:

1. the time at which State remedies are exhausted;

2. the time at which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such state action;

3. the time at which the Federal right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

4. the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.

458. See supra notes 60-62 and accompanying text.
459. See supra notes 63-91 and accompanying text.
in the state procedural default context.460

Applying this standard to McCleskey, Justice Kennedy concluded that inmate McCleskey had abused the writ through "inexcusable neglect" by failing to show "cause" for his failure to raise the *Massiah v. United States*461 claim in his first federal habeas petition.462 The district court found that state officials had placed informant Evans in a jail cell adjacent to McCleskey to deliberately elicit his confession to the murder of a police officer during a robbery.463 Justice Kennedy observed that the State did not engage in wrongful conduct in withholding Evans's written statement for nine years.464 In addition, the narrow "ends of justice" exception to the cause-and-prejudice test was not appropriate because the evidence clearly confirmed McCleskey's guilt.465

The dissent accused the majority of radically redefining abuse of writ without justification.466 Justice Marshall argued that Congress had preempted the Court's discretion to redefine the legal standard because Congress had expressly ratified the "deliberate abandonment" test from *Sanders v. United States*467 when it enacted the statutes governing abuse of the writ.468 Justice Marshall predicted that the new standard would force petitioners to advance every conceivable claim, however frivolous, in their first federal petition, and would thereby increase the demands on the system, which the majority had sought to reduce.469 Finally, according to Justice Marshall, the decision rewarded the State for its *Massiah* violation and the pattern of deceit with which the State covered it up.470

This Analysis of the majority and dissenting opinions in *McCleskey* shows that Justice Marshall's reasoning finds better support from the authorities than Justice Kennedy's.471 This Analysis weighs the impact of the *McCleskey* decision on habeas review and concludes that the effect will be felt most acutely by condemned prisoners.472

\[
\begin{align*}
460. & \quad \text{See supra notes 92-131 and accompanying text.} \\
461. & \quad 377 U.S. 201 (1964). \quad \text{See supra note 27 and accompanying text.} \\
462. & \quad \text{See supra notes 132-58 and accompanying text.} \\
463. & \quad \text{See supra notes 50-55 and accompanying text.} \\
464. & \quad \text{See supra notes 154-58 and accompanying text.} \\
465. & \quad \text{See supra note 160 and accompanying text.} \\
466. & \quad \text{See supra notes 165-69 and accompanying text.} \\
467. & \quad 373 U.S. 1 (1963). \\
468. & \quad \text{See supra notes 170-71, 178-84 and accompanying text.} \\
469. & \quad \text{See supra notes 199-203 and accompanying text.} \\
470. & \quad \text{See infra notes 485-544 and accompanying text.} \\
471. & \quad \text{See infra notes 545-608 and accompanying text.}
\end{align*}
\]
A Perspective on the Conflict at the Heart of McCleskey

The conflict surrounding the use and abuse of the writ of habeas corpus reflects more than 200 years of debate in this country. Proponents of state sovereignty and domestic order clash with champions of the federal protection of national interests—in this case, constitutional criminal law. The volatile mixture of law and rhetoric surrounding the “Great Writ” reflects complex, divergent emotional and intellectual ideals of our society. In McCleskey, the abuse of writ issue acts as a lightning rod for these contrary positions. The McCleskey decision is one small piece in the historical mosaic of our evolving judicial system. But the decision represents, in microcosm, the conflict between today's competing legal ideologies.

The case law developing the abuse of writ doctrine defines these different views of justice and fairness in that setting. The line of decisions in Price v. Johnson, and the 1963 trilogy cases, Fay v. Noia, Townsend v. Sain, and Sanders v. United States, represent the Brennan-Marshall perspective. The federal courts are interposed between the states and the people as guardians of the people's federal rights, protecting them from unconstitutional state actions. Federal judicial discretion reached its zenith in this line of decisions, particularly when the Supreme Court expanded habeas review of state convictions under the subjective standard embodied in Noia.

The subsequent line of decisions on the related issue of procedural default—including Davis v. United States, Francis v. Henderson, and Wainwright v. Sykes—represents the advancing

474. Id.
476. See supra notes 60-223 and accompanying text.
477. See infra notes 482-94 and accompanying text.
478. 334 U.S. 266 (1948).
482. See supra notes 251-307 and accompanying text.
483. Noia, 372 U.S. at 401-02 and n.9.
Rehnquist-Kennedy perspective. These decisions champion state interests in the integrity of state rules and proceedings, the finality of state judgments, and the efficiency of the review system. These cases elaborated on procedural rules that effectively limit judicial discretion by imposing stricter standards of review.

These competing viewpoints collide in the McCleskey decision. Justice Kennedy's majority opinion advances the interest of the state while attempting "to define the doctrine of abuse of writ with more precision." Justice Marshall's dissent defends against "this unjustifiable assault on the Great Writ." The majority's reasoning is susceptible of a variety of criticisms, many of which Justice Marshall ably employs.

Authority Used to Justify the Application of the Inexcusable-Neglect Principle in the Abuse of Writ Context

Justice Kennedy's majority opinion asserts that abuse of the writ can occur in circumstances other than the petitioner's deliberate abandonment of a claim. Having opened the door, Justice Kennedy introduces the concept of inexcusable neglect to describe those circumstances, and justifies the application of this concept by relying on three principle sources of authority.

Justice Kennedy relies on United States Supreme Court case law as one source of authority. Justice Kennedy states that the cause-and-prejudice standard is consistent with precedent established in Salinger v. Loisel, Wong Doe v. United States, and Sanders. A review of these cases, and companion cases such as Noia and Townsend, does not support Justice Kennedy's assertion. Rather, these cases support Justice Marshall's conclusion that a "good-faith" standard should apply. Salinger and Wong Doe rejected the rigid appli-

488. See supra notes 367-95 and accompanying text.
489. See supra notes 367-95 and accompanying text.
490. See supra notes 367-95 and accompanying text.
492. Id. at 1467.
493. Id. at 1477 (Marshall, J., dissenting).
494. See infra notes 495-608 and accompanying text.
495. McCleskey, 111 S. Ct. at 1467.
496. Id. at 1468. The three sources of authority are: interpretations of the governing statutes; the application of inexcusable neglect in the abuse of writ context by the lower federal courts; and consistency with prior United States Supreme Court case law. Id. at 1468, 1471.
497. Id. at 1471.
498. 265 U.S. 224 (1924).
499. 265 U.S. 239 (1924).
500. McCleskey, 111 S. Ct. at 1471.
cation of res judicata principles to successive petitions. The Court focused only on whether the inmate had brought his successive claims in good faith without reserving available claims or evidence. Justice Kennedy refers to the Sanders citation of the "inexcusable neglect" language in Townsend as authority for the proposition that other principles govern abuse of writ inquiry. Justice Marshall criticizes the majority's reliance on this language, especially when inexcusable neglect is defined in terms of the cause-and-prejudice standard. As Justice Marshall observes and as a review of Townsend confirms, the Townsend opinion expressly equates the language of "inexcusable neglect" to the Noia "deliberate-bypass" test. There can be little doubt that the deliberate bypass test embraced by Noia is essentially a good-faith test.

Justice Marshall also observed that the Supreme Court had never relied on the language of "inexcusable neglect" in any abuse of writ decision prior to McCleskey. Furthermore, as Justice Marshall points out, the Court's recent abuse of writ decisions do not evince a trend toward the adoption of the cause-and-prejudice standard. A review of the three decisions cited in both the majority and dissenting opinions supports Justice Marshall's insight. In Woodard v. Hutchins, the Court ruled that the petitioner had deliberately withheld the new claims because the inmate failed to explain why the claims were not presented earlier. Relying on section 2244(b) and Rule 9(b), the Court concluded that Hutchins had abused the writ. Justice Marshall comments in McCleskey that, in Woodard, the petitioner had failed to carry his burden of disproving abuse by failing to explain why the successive petition was presented.

In Antone v. Dugger, the United States District Court for the Middle District of Florida found that the subsequent presentation of
the prisoner's new claims constituted abuse of the writ. The district court relied on the governing federal abuse of writ statutes and used the language of "inexcusable neglect" in its reasoning. The United States Supreme Court agreed that the writ had been abused. However, nowhere in its opinion did the Supreme Court rely on the language of "inexcusable neglect."

Finally, in the Court's brief analysis in Delo v. Stokes, the Court found that the petitioner had abused the writ when he failed to raise an available claim in an earlier petition. Again, "inexcusable neglect" language was not used; the Court simply cited section 2244(b), Rule 9(b) and Woodard for authority supporting its holding. Thus, review of these cases supports Justice Marshall's assertion that "the analysis in these decisions is as consistent with Sanders's deliberate-abandonment test as with Sykes's cause-and-prejudice test."

The second source of authority that Justice Kennedy relied on to justify the application of the inexcusable neglect concept is a set of lower federal courts of appeals decisions. The lower court decisions cited are from the Fourth, Fifth, Eighth and Eleventh Circuits. As noted above, these circuits adopted a stricter standard by emphasizing the "inexcusable neglect" language in Townsend while ignoring the "deliberate bypass" definition given that language by the citation in Townsend to Noia. The majority, in McCleskey, sought to extend the application of the abuse of writ doctrine by using the same strategy as the lower courts. A review of the trilogy cases does not support this interpretation.

Justice Kennedy referred to the Brief for Petitioner, in which McCleskey concedes that the writ may be abused through inexcusable neglect. Any reasonable petitioner from the Eleventh Circuit would couch his arguments, as McCleskey did, in the language used

515. See supra notes 328-31 and accompanying text.
516. See supra note 331 and accompanying text. The Court of Appeals for the Eleventh Circuit affirmed. See supra note 332 and accompanying text.
517. See supra notes 333-35 and accompanying text.
520. See supra notes 352-51 and accompanying text.
521. See supra notes 352, 308, 319 and accompanying text.
522. McCleskey, 111 S. Ct. at 1479 n.2.
523. See supra note 125 and accompanying text.
524. See supra note 125 and accompanying text.
525. See supra notes 429-36 and accompanying text.
526. See supra notes 70-77 and accompanying text.
527. See supra notes 265-307 and accompanying text.
by both the district and appellate courts to which he applied for relief.\textsuperscript{529} It must be remembered that a substantial portion of habeas case law comes from southern circuits, and language from the opinions of those circuits has inevitably begun to spread.\textsuperscript{530} Other circuits, which have only occasionally encountered the abuse question, have sometimes confused the subjective and objective standards.\textsuperscript{531} Regardless of who uses the inexcusable neglect language, Congress has expressly rejected this terminology in the governing statutes.\textsuperscript{532} Giving weight to this fact creates one of the strongest points of tension between the majority and dissenting opinions.

In discussing the governing statutes—Justice Kennedy's primary source of authority for his position—the majority observed that section 2244(b) does not define the term “abuse of writ.”\textsuperscript{533} A major theme in the majority opinion is that the Court possesses the freedom to reinterpret this doctrine.\textsuperscript{534} Justice Marshall argued that the Court cannot change the legal standard by exploiting Congress's silence because Congress affirmatively codified the Sanders good-faith test in both statutes.\textsuperscript{535}

A review of the legislative history supports Justice Marshall's position.\textsuperscript{536} The rule that the Supreme Court developed in the 1920s to govern new-claim successive habeas petitions was codified in 1948, authoritatively interpreted by the Court in 1963, and reiterated in the 1966 amendment to section 2244 and the 1976 enactment of Rule 9(b).\textsuperscript{537} Three times Congress acted to codify the existing standard, and three times Congress resisted pressure to impose more rigid strictures on relitigation of successive petitions.\textsuperscript{538} While it is true that “abuse of writ” was never defined by Congress, this legislative history simply does not support the majority's assertion that Congress was silent on this issue.\textsuperscript{539} Even the Habeas Corpus Reform Act of 1991, which places new limits on the use of the Writ, did not change the governing language of section 2244 or Rule 9(b) to recognize the application of the new standard.\textsuperscript{540}

\textsuperscript{530} See supra notes 429-36 and accompanying text.
\textsuperscript{531} 1 J. Liebman, supra note 529, § 26.6, at 412 n.24 (citing Barnes v. Housewright, 622 F. Supp. 82, 84 (D. Nev. 1985)).
\textsuperscript{532} See supra notes 308-22 and accompanying text.
\textsuperscript{533} See supra note 82 and accompanying text.
\textsuperscript{534} See supra notes 82-83 and accompanying text.
\textsuperscript{535} See supra notes 178-84 and accompanying text.
\textsuperscript{536} See infra notes 537-44 and accompanying text.
\textsuperscript{537} See supra notes 236-64, 292-322 and accompanying text.
\textsuperscript{538} See supra notes 258-64, 308-22 and accompanying text.
\textsuperscript{539} See supra notes 258-64, 308-22 and accompanying text.
A flaw exists in Justice Kennedy's reliance on the Advisory Committee Notes to Rule 9(b) in his attempt to justify the adoption of the inexcusable neglect standard.\textsuperscript{541} The Advisory Committee Notes must be read together with the Congressional Comments to ascertain the intent of the law.\textsuperscript{542} The Congressional Comments state that Congress specifically amended the Supreme Court's version of Rule 9 to prohibit the introduction of the language of inexcusable neglect.\textsuperscript{543} This Analysis and the dissenting opinion reveal that Justice Kennedy's reasoning for the proposition that inexcusable neglect exists as a separate, independent standard for determining abuse of writ rests on questionable authority.\textsuperscript{544}

\textbf{The Goals of State Procedural Default Jurisprudence Versus Those of the Abuse of Writ Doctrine}

Justice Marshall presented another major criticism of the new rule by focusing on the majority's use of the cause-and-prejudice standard as the test of inexcusable neglect.\textsuperscript{545} A major part of the majority's reasoning rested on the syllogism that, because the doctrines of procedural default and abuse of writ have similar structures and goals, the courts should use the same cause-and-prejudice test for determining abuse in both contexts.\textsuperscript{546} Justice Kennedy describes the efficiency-related goals linking the two doctrines—optimizing allocation of scarce federal resources, preserving state sovereignty in the criminal process, eliminating unwarranted delays, and promoting finality.\textsuperscript{547} However, with one exception, every prior case cited by the majority to support this proposition was within the procedural default lineage.\textsuperscript{548} Justice Kennedy's rationale focused almost exclusively on a narrow margin of procedural similarity without sufficiently acknowledging or addressing the dissimilar purposes served by the procedural default and abuse of writ doctrines.\textsuperscript{549} Justice Marshall attacked the major premise of the majority's reasoning by

\begin{itemize}
  \item 541. See infra notes 542-44 and accompanying text.
  \item 543. See supra notes 314-22 and accompanying text.
  \item 544. See supra notes 495-543 and accompanying text.
  \item 545. See supra notes 190-203 and accompanying text.
  \item 546. See supra notes 102-06 and accompanying text.
  \item 547. See supra notes 112-22 and accompanying text.
  \item 549. See supra notes 107-22 and accompanying text.
\end{itemize}
asserting that these doctrines serve different purposes. The abuse of writ doctrine serves a screening function independent from the state procedural default doctrine. A different set of incentives and disincentives operate on petitioners in the federal abuse of writ context. A different balance between finality and review must be struck, and the severity of the cause-and-prejudice test is inappropriate for review purposes.

An understanding of the purposes served by the writ of habeas corpus supports Justice Marshall’s view. The writ was designed to be broadly applied in defense of individual liberty. The severity of the cause-and-prejudice test in the successive-petition context will limit the availability of the writ to redress constitutional violations and government misconduct.

However, the McCleskey decision seems to imply that the majority is not interested in violations of the defendant’s constitutional rights raised in a successive petition unless, under the ends-of-justice exception, in “extraordinary instances,” an innocent person has been convicted. The thrust of the majority opinion is toward creating greater efficiency in the habeas process. Despite the problems with the majority’s application of procedural default jurisprudence in the abuse of writ context, the cause-and-prejudice bar will grease the skids of federal habeas review. The McCleskey decision is consistent with Chief Justice Rehnquist’s desire for habeas reform and with the proposals of the Powell Committee. Together with the likely passage of habeas reform bills presently before Congress, these developments will further restrict access to the Great Writ.

If federal habeas review is severely reduced in the interests of efficiency considerations, the state courts must be prepared to better address federal constitutional claims, especially in death penalty cases. Non-capital cases produce ninety-nine percent of federal habeas petitions. Justice Marshall noted that the stricter McCles-
key standard applies to all habeas petitioners, capital and non-capital. However, in non-capital cases the percentage of error is less than seven percent. Logically, the tougher McCleskey standard will therefore have only minor impact on these cases. But in capital cases, 144 judgments out of the 361 cases reviewed by the federal judiciary since July 1976—forty percent in the last fifteen years—were reversed because of prejudicial legal error, necessitating costly retrials and added appeals.

One perspective on the cause of delays plaguing the administration of capital punishment laws focuses on the prisoners and their lawyers. In this view, the opportunistic capital prisoner, with no incentive to move the process faster, files successive petitions to delay his execution. Such stories often fuel the political debate over habeas reform. In 1989, when Senator Thurmond introduced the habeas reform bill incorporating the Powell Committee proposals, he referred to one condemned prisoner who sat on death row for more than ten years as "a prime example of the obstruction of justice and inordinate delay surrounding these habeas corpus cases." The Senator failed to mention that the inmate's initial death sentence was reversed by the South Carolina Supreme Court because of constitutional errors. Another easy explanation for the abuse of the habeas system is that a significant number of unethical lawyers withhold claims in an attempt to sandbag the system. It may be true that both the prosecution and the defense occasionally use delay as a weapon. But many authorities agree that the deliberate withholding of a claim is a rare gamble by defense attorneys.

A second perspective on the lack of efficiency in habeas review focuses on the constitutional deficiencies in state trial and post-con-
viction proceedings. Delays in the review process are created by faulty state procedures, the absence of qualified counsel throughout the proceedings, and defenses raised by the state to benefit its own interests. In addition, there is the irrevocable nature of the death penalty itself. Many jurists have argued for more discretion in federal review and wider latitude with successive petitions precisely because of the finality of the death penalty.

The impact of the McCleskey decision will be felt most acutely by condemned prisoners. The incorporation of procedural default jurisprudence into the abuse of writ doctrine will promote efficiency in the habeas review system by creating stricter standards of review for successive petitions. It will thereby limit judicial discretion at the level of the lower federal courts, and make it harder for manipulative prisoners or their attorneys to engage in dilatory tactics. But the cost may grow increasingly intolerable. Recent federal legislation expanded the application of the death penalty. The 1991 Crime Control Act pending in Congress imposes death for an additional fifty crimes. However, the 1991 Act and the McCleskey standard will restrict the availability of the habeas remedy. Additionally, greater burdens will strain the meager resources of the regional legal resource centers, which often provide representation and support for habeas prisoners in capital cases. The inevitable net result: more and more prisoners will be executed despite serious governmental misconduct and trial error.

On the other hand, death penalty advocates, such as Alabama Assistant Attorney General Ed Carnes, a nationally known capital prosecutor, viewed the McCleskey ruling "as no reform at all." Carnes says, "[i]n capital cases, your second or later federal habeas
petition typically raises new issues and almost always is procedurally defaulted. We virtually always have the cause and prejudice requirement. . . . [The decision] is portrayed as a big victory for death penalty advocates; it just isn’t.”

There will be other side-effects stemming from the *McCleskey* decision. Recruitment of volunteer habeas counsel may be impeded by the stricter requirements of the *McCleskey* decision. For example, attorneys who might otherwise volunteer to represent a death row inmate may be more reluctant to do so because of the increased burden placed on them by the stricter standard. On one hand, there may be fewer legitimate claims to investigate and pursue under the cause requirement, with its emphasis on objective external factors. On the other hand, counsel may feel compelled to bring every possible claim into federal court, even those lacking foundation, or lose the right to assert the claim later. The decision, in *McCleskey*, would seem to indicate that counsel must exhaustively investigate and press each claim, even if there have been repeated representations that the claim is factually unsupportable, because of the possibility that substantiating facts—which may have been purposely concealed by the state—may be divulged. Even if the court denies the claims at the first federal habeas proceeding, and bars their relitigation, the claims might as well have been asserted—they would be lost anyway, even if they later proved meritorious. Yet counsel, as an officer of the court, may be troubled by this approach. Raising unsubstantiated claims runs contrary to the instincts promoting professionalism and credibility with the court. As a result of *McCleskey*, an attorney representing a death row petitioner will have to make a difficult decision between the risk of raising unsubstantiated claims or the risk of the cause and prejudice bar.

While habeas representation is demanding, complex, and time consuming, and the more stringent *McCleskey* standard may discourage some attorneys, there is more support available to counsel now as
compared to a decade ago. Several states have legal resource centers, and many state bars are more involved and responsive to the special needs of these practitioners. This fact alone might offset the impact of McCleskey on volunteer habeas attorneys.

Another troubling side-effect of McCleskey, which Justice Marshall discussed, concerns the disincentive it may provide to states to voluntarily comply with constitutional mandates. The district court, in McCleskey, found that the State had violated McCleskey's sixth amendment right, then withheld information relevant to a legitimate habeas claim for nine years, despite diligent and repeated requests by both trial and habeas counsel for information regarding the violation. The dissent argued that the State had been rewarded for its deception by a finding that petitioner had abused the writ. If the deterrent power of the writ of habeas corpus is reduced in this way, the McCleskey decision may promote unconstitutional police procedures in future criminal investigations.

Ironically enough, prisoners who have suffered constitutional violations but who are unable to raise their claims in successive federal habeas petitions may turn to the state courts for relief. The state rules on successive petitions may be less strict than the new federal standard. After the United States Supreme Court decision in his case, McCleskey appealed to the Georgia Supreme Court, pleading the newly discovered evidence of the Massiah violation unearthed in federal district court as the basis for habeas relief.

CONCLUSION

The decision of the United States Supreme Court, in McCleskey v. Zant, can be understood from divergent perspectives: as the next step in the larger trend towards streamlining habeas review, or

600. Id. For example, the capital representation resource centers in Alabama, Florida and Georgia submitted an Amici Curiae brief supporting McCleskey when McCleskey petitioned the United States Supreme Court for a writ of certiorari in this present action. Amici Curiae Brief for Petitioner, McCleskey, 111 S. Ct. 1454.
601. Id.
602. See supra notes 211-18 and accompanying text.
603. See supra notes 22, 23, 29-35, 38, 39, 42-52 and accompanying text.
604. See supra notes 204-18 and accompanying text.
605. See supra notes 204-18 and accompanying text.
607. Id.
as infringing on a sacred writ; as rectifying a split in the circuits or as sneaking a tougher standard in through a back door; as a triumph for state sovereignty, or as a defeat for individual liberty; as the guarantor of state finality interests or, in the case of the condemned prisoner, as a dangerous step closer to another form of finality. Regardless of one's perspective, one thing is certain: the majority's incorporation of the cause-and-prejudice test into the abuse of writ doctrine will make it more difficult for habeas petitioners to obtain relief in federal courts when raising new claims in subsequent federal habeas petitions.

Most commentators agree that the habeas system needs reform. But there are differing opinions as to the source of the problem of abuse of the writ. While the extent of writ abuse remains unclear, the percentage of state-created constitutional errors in capital cases, such as McCleskey, remains high. In short, the dimensions of the problem of abuse of writ may not be as significant as the damage done by the McCleskey solution.

Thomas S. Hall—'92