1992

"Reforming" Federal Habeas Corpus: The Cost of Federalism; the Burden for Defense Counsel; and the Loss of Innocence

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"REFORMING" FEDERAL HABEAS CORPUS: THE COST TO FEDERALISM; THE BURDEN FOR DEFENSE COUNSEL; AND THE LOSS OF INNOCENCE

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The political[1] and judicial outcry[2] for "reform" of federal habeas corpus practice has been mirrored in a series of recent Supreme Court decisions effectively streamlining the process for seeking federal relief from state court convictions.[3] Whether the trend toward limiting access to the

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1. The "political outcry" for limiting federal habeas corpus actions, particularly actions brought by or on behalf of state death-row inmates, is evident in the recent Congressional battles over the content of a new crime bill. Both the House Bill, H.R. 3371, 102d Cong., 1st Sess. (1991) and Senate version, S. 1241, 102d Cong., 1st Sess. (1991), provided for limitations upon access to federal courts by prisoners challenging state court convictions, as did the House/Senate Conference Committee Bill which emerged, but stalled in Congress. *See* H.R. REP. No. 405, 102d Cong., 1st Sess. (1991).

2. The "judicial outcry" for limitation on recourse to federal courts by inmates convicted in state trials is apparent in a number of recent decisions of the United States Supreme Court. For example, in Delo v. Stokes, 495 U.S. 320 (1990), the Court acted to lift a stay of execution granted pursuant to the filing of a successive federal habeas petition raising no new meritorious claims. Justice Kennedy concurred and encouraged prosecutors to challenge stays granted in such instances. Similarly, in Woodard v. Hutchins, 464 U.S. 377, 380 (1984), the Court rejected the argument that district courts are obligated to rule on every "11th hour" petition for federal habeas relief before denying a stay of execution (Chief Justice Rehnquist, concurring). Clearly, the problem is perceived as most acute in capital cases in which protracted post-conviction litigation has been utilized as a means of delaying executions. *See* Lewis F. Powell, *Capital Punishment*, 102 HARV. L. REV. 1035, 1039-40 (1989) (noting "burdensome increase in habeas corpus litigation").

For another perspective on the battle within the Court for changes in the writ, see Marcia Coyle, *Back to the Future: The Justices Re-examine the Habeas Corpus Writ*, 14 NAT'L L.J. 1, 52-53 (Feb. 17, 1992).

3. A comprehensive review of the post-conviction litigation process in capital cases was undertaken by the American Bar Association Criminal Justice Section's Project on Death Penalty Habeas Corpus, resulting in a substantial report authored by American University Law Professor Ira Robbins. The report, *Toward a More Just and Effective System of Review in State Death Penalty Cases* (1990), documents failings in the current system of review, particularly in terms of inadequacy of counsel which complicate the post-conviction relief system.

federal forum will be advanced legislatively or through decisions further narrowing the window of hope for state inmates, it appears clear that the remedy envisioned by some members of the Court and proponents of limitation[4] will alter the significance of federal habeas corpus as a remedy for constitutional error committed in state criminal trials.[5]

Review of state convictions in federal habeas actions represents an important step in the preservation of a federalized system of constitutional law precisely because it affords an independent forum for vindication of federally protected rights.[6] The Court's decision in *Michigan v. Long*[7] has firmly established the principle that federal courts are the ultimate determinors of federal rights violations.[8] Thus, state court pronouncements on issues of federal law are not binding on the Supreme Court or lower federal courts, but remain subject to review upon application for *certiorari* in the context of criminal appeals.[9] Unless *Michigan v. Long* stands for nothing more than the proposition that the Court asserted jurisdiction merely to reign-in zealous state court judges intent upon expanding rights of criminal defendants beyond bounds contemplated by the Constitution

4. The problem of finality is particularly acute in capital cases after imposition of the death penalty and has led to much of the criticism of federal habeas corpus as a remedy for state inmates challenging state court determinations. For example, in his concurring opinion to a *per curiam* order denying a stay of execution in Sullivan v. Wainwright, 464 U.S. 109 (1983), former Chief Justice Burger criticized the delay involved in capital cases, commenting that the argument that "capital punishment is cruel and unusual is dwarfed by the cruelty of 10 years on death row inflicted on this guilty defendant by lawyers seeking to turn the administration of justice into [a] sporting contest." *Id.* at 112.

Of course, had the petitioner disapproved of his counsel's efforts to obtain relief from the death penalty, he could well have terminated the lengthy appeals process himself, as the decisions in Gilmore v. Utah, 429 U.S. 1012, 1012-15 (1976) and Whitmore v. Arkansas, 495 U.S. 149, 154-67 (1990) unequivocally suggest, simply by discharging his attorneys and waiving further litigation. That he did not do so might suggest Chief Justice Burger's expression of empathy was not shared by the litigant. Counsel's interest in pursuing every arguable claim for relief may have reflected the "natural" interest in representing the capital client noted by the Court in Lambert v. Barrett, 159 U.S. 660, 662 (1895).

5. This term, the Court held in Brecht v. Abrahamson, 1993 WL 119795 (U.S., decided April 21, 1993), *aff'g in part and rev'g in part* 944 F.2d 1363 (7th Cir. 1991), that the proper standard for reversal of a state court conviction based on a claim of federal constitutional rights violation in a federal habeas corpus action includes proof that the violation "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 12. This standard requires the petitioner to carrry the burden of demonstrating prejudice in order to obtain federal habeas relief. In contrast the "harmless error" standard applicable to state appellate review of claims of federal constitutional error set forth in Chapman v. California, 386 U.S. 18, 20-21 (1967), required reversal unless the error could be shown to have been harmless beyond a reasonable doubt. For further discussion of *Brecht* and its potential impact in habeas corpus litigation *see* notes 80-86, *infra*, and accompanying text. *See also* Robinson v. Virginia, 414 S.E.2d 866, 868 (Va. Ct. App. 1992), *cert. denied*, 113 S. Ct. 967 (1993) (*cert* denied where petitioner sought review of state appellate court's disposition of claim of prophylactic rule violation based on argument that court below applied higher burden for reversal that *Chapman* harmless error standard where state court held improper comment on defendant's post-arrest silence did not "so infect" trial with unfairness as to constitute denial of due process).

6. *See* Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (holding federal habeas available to review claims based on "disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights").

7. 463 U.S. 1032 (1983).

8. *Id.* at 1041.

9. *E.g.*, Delaware v. Van Arsdall, 475 U.S. 673, 681-84 (1986) (reversing state court holding that a violation of the Sixth Amendment confrontation clause was not subject to application of harmless error analysis).

itself — as some cynical observers might well suggest — the decision clearly indicates the importance of both federal and state constitutional sources of protection for individual rights and liberties.[10]

Federal habeas review of state court dispositions on claims of federal rights violations remains the most credible means of ensuring that state courts will properly enforce those protections afforded criminal defendants by the national Constitution. In fact, federal habeas corpus persists as an attractive remedy for state inmates precisely because it traditionally has been a source of relief in so many instances.[11] Curtailment of access to federal court necessarily means that there will be no alternative forum to have complaints of state court error heard and, given the frequency of relief granted, necessarily means as well that many violations of federally protected rights will never be vindicated by the judicial system at any level.[12]

Recent decisions have served the purpose of the reform movement well while retaining jurisdiction in federal courts for the correction of state trial and prosecution errors which infringe on federal constitutional guarantees. For example, recent decisions of the Court have clarified the procedural limitations which are imposed upon federal habeas corpus applications in a number of significant contexts. State inmates are required to exhaust remedies in state proceedings, when available, before asserting these claims in federal actions, even when the federal application contains some claims which have been "exhausted" through prior litigation in state court.[13] Similarly, application of a state procedural bar by a state appellate court precludes federal habeas review of a claimed violation of a federally protected right.[14] Moreover, a federal habeas court is bound by state fact-

10. The decision rests on the significance attached by state appellate courts to their own sources of constitutional rights in deciding claims of violation. If the state appellate court relies on the state constitution as a basis for reversal where the same protection may be discerned in both the state and federal documents, the reference to this "adequate and independent state ground" insulates the state court's decision from further review by the Supreme Court. *See* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) (originally applying "adequate and independent grounds" approach to state decisions in FELA actions).

11. For example, one study of federal habeas dispositions in state death penalty cases showed that from July 1976 through March 1991 reversals based upon finding of constitutional error occurred in 136 of 345 capital judgments reviewed by federal courts. The reversal rate among all circuits averaged 39%, while reversal rates in the two most active circuits, the 5th and 11th, stood at 28% and 50%, respectively. Liebman, Memorandum to Senator Joseph Biden, Chairman, Senate Judiciary Committee, July 1, 1991, at 1-3 (copy on file with UMKC Law Review). Similarly, in dissenting in Barefoot v. Estelle, 463 U.S. 880, 915 (1983) Justice Marshall noted his opposition to expedited federal review in capital cases due to the high rate of success achieved by death row inmates in setting aside their sentences.

12. Criminal defendants retain the option of petitioning for review in the United States Supreme Court from an adverse decision of the highest court of a state on an issue of federal constitutional law, pursuant to 28 U.S.C. § 1257(3) (1988). Defendants, moreover, continue to gain relief from adverse state court determinations on *cert* following direct appeal. *See, e.g.*, Trevino v. Texas, 112 S. Ct. 1547, 1550 (1992) (defendant in pre-*Batson* [Batson v. Kentucky, 476 U.S. 79 (1986)] trial properly preserved *Batson* issue for consideration on appeal and is entitled to benefit of rule announced therein); Espinosa v. Florida, 112 S. Ct. 2926 (1992) (*per curiam* reversal of capital sentence based on sentencer's consideration of invalid aggravating circumstance).

13. *E.g.* Woodard v. Hutchins, 464 U.S. 377, 380 (1984) (applying exhaustion requirement in context of capital cases).

14. Coleman v. Thompson, 111 S. Ct. 2546, 2553-54 (1991) (overruling "deliberate bypass"

finding on an issue previously litigated, so that defective litigation of factual issues will not afford a basis for a new evidentiary hearing at the federal level, according to the Court's recent holding in *Keeney v. Tamayo-Reyes*.[15]

Finally, in *McCleskey v. Zant*,[16] the Court effectively held that a successive federal habeas petition could only be considered if the claim of rights violation was accompanied by a showing of the petitioner's factual innocence.[17]

Even a cursory review of the procedural reforms of the habeas corpus process implemented by the Court in its recent decisions demonstrates that many of the abuses traditionally associated with the writ have now been addressed. The state court defendant continues to enjoy the option of petitioning for relief from his state court conviction on federal constitutional grounds, but with limitations that would appear reasonable in the majority of cases: the inmate is essentially entitled to a single action, in which the federal court will consider only those claims which have been properly preserved in the state courts and upon which state avenues for relief have been fully litigated and exhausted.

The primary difficulty with imposing this procedurally refined and altogether more expeditious approach to post-conviction relief lies in the fact that at the same time as the Court sought to refine the remedy, it denied to indigent inmate litigants the right to effective assistance of counsel for post-conviction litigation.[18] Consequently, while imposing new conditions on the proper exercise of the statutory right to seek federal review, the Court has denied to many litigants the assistance of counsel as a matter of right — in theory the most significant factor in ensuring compliance with procedural rules.[19]

As in past years, the current term of the Supreme Court poses new concerns for the vitality of federal habeas corpus with regard to issues which may be resolved adversely to proponents of the writ as a means of

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standard of Fay v. Noia, 372 U.S. 391 (1963) and holding that state procedural default in presentation of claim of federal rights violation precludes federal review in habeas corpus action).

15. 112 S. Ct. 1715, 1721 (1992) (applying cause and prejudice standard as threshold for evidentiary hearing in federal habeas action unless fundamental miscarriage of justice would result from the failure to hold a hearing).

16. 111 S. Ct. 1454 (1991). McCleskey's prior petition to the United States Supreme Court had been granted and was the subject of a major decision holding that a statistical showing of apparent racial disparity in application of the death sentence was not sufficient to invalidate Georgia's capital sentencing procedures. McCleskey v. Kemp, 481 U.S. 279 (1987).

17. 111 S. Ct. at 1475. ("McCleskey cannot demonstrate that the alleged *Massiah* [Massiah v. United States, 377 U.S. 201 (1964)] violation caused the conviction of an innocent person.").

18. Pennsylvania v. Finley, 481 U.S. 551, 553-59 (1987) (no constitutional right to post-conviction assistance of counsel even though counsel may be provided by state statute or rule); Murray v. Giarratano, 492 U.S. 1, 3-9 (1989) (no constitutional right to assistance of counsel in state post-conviction proceedings in death penalty cases).

19. Of course, assistance of counsel does not ensure compliance with procedural rules, and where counsel's error deprives the accused of direct appellate review, this error provides a basis for relief. Evitts v. Lucey, 469 U.S. 387 (1985). But where the error on counsel's part is committed in the context of post-conviction representation, the lack of a constitutional guarantee of counsel has been held in Coleman v. Thompson, 111 S. Ct. 2546, 2560-68 (1991), to preclude relief because the lack of the basic right precludes any claim to effectiveness in counsel's assistance.

checking state court power in the disposition of claims of federal rights violations. The potentially most significant case, *Herrera v. Collins*,[20] presented the issue of whether a claim of the petitioner's actual innocence, standing alone, represents a "substantial claim for relief" cognizable in federal habeas corpus.[21]

The Court's movement toward a more restrictive view of the writ as a means for collateral attack upon state court judgments threatens the vitality of the criminal justice system in three significant respects. It threatens the *federalized* notion of civil rights relied on by the Court in *Michigan v. Long*; it imposes unfair burdens on defense counsel; and the posture taken by the Court in *Herrera* may threaten the integrity of the criminal justice system.

I. THE COST TO FEDERALISM

In *Michigan v. Long*,[22] the Court reiterated the existence of a dual series of constitutional guarantees or protections of individual rights and liberties found in the federal and state constitutions.[23] The Court noted that the primary vehicle for enforcement of federally protected rights of criminal defendants rests with state courts in state criminal prosecutions.[24]

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20. 113 S. Ct. 853 (1993). For a detailed discussion of the Court's decision in *Herrera*, see Part III, *infra*.

21. Herrera v. Collins, 954 F.2d 1029, 1033-34 (5th Cir. 1992) ("Herrera's 'actual innocence' claim does not allege a ground upon which habeas relief can be granted."). *Id.* at 1034.

22. 463 U.S. 1032 (1983). Earlier decisions had dealt with the problem posed by state court reliance on expressions of state law in determining the precise basis for a state appellate court judgment. *E.g.*, Delaware v. Prouse, 440 U.S. 648, 651-52 (1979) (Delaware Supreme Court held stop violated Fourth Amendment and comparable provision of state constitution; nevertheless, Supreme Court concluded that while the state ground might have been adequate, the state court did not intend to rest decision on state constitution independent of federal provision); Oregon v. Haas, 420 U.S. 714, 719-20 (1975) (concluding Oregon court relied on federal precedent in determining admissibility of confession because no sources of state law cited in opinion); Oregon v. Kennedy, 456 U.S. 667, 670-71 (1982) (declining to find state decision rested on adequate and independent state ground; state decision relied on earlier precedent interpreting federal constitutional provisions).

23. The *Long* Court noted:

> We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action."

463 U.S. at 1041 (quoting Minnesota v. National Tea Company, 309 U.S. 551, 557 (1940)).

24. The majority observed:

> The state courts handle the vast bulk of all criminal litigation in this country. In 1982, more than 12 million criminal actions (excluding juvenile and traffic charges) were filed in the 50 state court systems and the District of Columbia. 7 State Court Journal, No. 1, p. 18 (1983). By comparison, approximately 32,700 criminal suits were filed in federal courts during that same year. See Annual Report of the Director of the Administrative Office of the United States Courts 6 (1982). The state courts are required to apply federal constitutional standards, and they necessarily create a considerable body of 'federal law' in the process. It is not surprising that this Court has become more interested in the application and development of federal law by state courts in light of the recent significant expansion of federally created standards we have imposed on the States.

463 U.S. at 1042 n.8.

Where state courts decide questions arising under both federal and state constitutions, but do so on a basis that relies on state constitutional interpretation and authority, the Court indicated that it would be deprived of jurisdiction to invade the decision-making process.[25] Where a state court decision rests on its understanding of the commands of the federal constitution, the Court asserted presumptive jurisdiction to review the decision and impose its own understanding of federal guarantees.[26]

Critics of the Court's holding in *Long* might well suggest that the decision represents less a reasoned approach to differentiating between application of limited federal constitutional protections — and more expansive views of individual rights and liberties discerned from comparable state constitutional guarantees[27] — than a vehicle for intimidating state court judges in their resolution of constitutional claims of rights violations.[28]

Indeed, the Court's assertion of a presumptive right to review state court determinations in the absence of a "plain statement" of an adequate and independent state ground for relief[29] suggests that the *Long* majority's

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25. *Id.* at 1041 ("If the state court decision indicates clearly and expressly that it is alternatively based on *bona fide, separate, adequate and independent* grounds, we, of course, will not undertake to review the decision.") (emphasis added).

26. 463 U.S. at 1040-41. The majority concluded:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. The Court declined to remand *Long* for further explanation from the Michigan Supreme Court as to its reliance on the state constitution as a basis for decision, relying on Oregon v. Kennedy, 456 U.S. 667, 670-71 (1982) (state court's reliance on federal constitution as basis for decision *requires* Supreme Court to address issue on the merits).

27. The consequence of restriction of federal constitutional guarantees over the past twenty years in the decisions of the United States Supreme Court has been an active development of state constitutional law by state appellate courts. *See, e.g.*, Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 Sw. L.J. 951, 972-74 (1982) (selected bibliography of writings on state constitutional law); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); Alexander Williams, Jr., *The New Patrol for the Accused: State Constitutions as a Buffer Against Retrenchment*, 26 How. L.J. 1307, 1332-34 (1983). A leading proponent of the movement toward activist state appellate appreciation of state constitutional guarantees has been former Associate Justice William Brennan, who made an important contribution with his article, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977), while still a member of the Court.

28. *See* Stevens, J., dissenting in *Long*:

> I am thoroughly baffled by the Court's suggestion that it must stretch its jurisdiction and reverse the judgment of the Michigan Supreme Court in order to show "[r]espect for the independence of state courts." . . . Would we show respect for the Republic of Finland by convening a special sitting for the sole purpose of declaring that its decision to release an American citizen was based upon a misunderstanding of American law?

463 U.S. at 1072 (citation omitted). He noted that apart from numerous state court decisions already considered by the Court on application for review by the states themselves, some eighty more *cert* petitions filed by the states were pending disposition at the time of the decision in *Long*. *Id.* at 1070 n.3.

29. 463 U.S. at 1042.

underlying motivation was to justify an expansive notion of jurisdiction in reviewing state court judgments,[30] a posture criticized by Justice Blackmun in his concurring opinion.[31] This presumptive right of review effectively restrains only those state courts viewing federal constitutional protections as more expansive or generous toward criminal defendants than the more conservative Supreme Court. The problem posed for this federal duality of constitutional protections by recent decisions of the Supreme Court limiting habeas review lies in the consequent insulation of state court decision-making in the area of federal rights.[32] Clearly, *Long* demonstrates that the Supreme Court retains paramount interest in ensuring that state court interpretations of federal constitutional guarantees are consistent with its own view of the boundaries of the protections afforded by the federal constitution. But limitation on access to federal habeas courts threatens to undermine the balance which must exist to ensure that state courts will also accurately enforce existing parameters of federal guarantees, as determined by the Supreme Court.

The corollary to the rule of presumptive right of review by the Supreme Court was advanced by the Court in *Ylst v. Nunnemaker*.[33] There, the Court reversed a Ninth Circuit holding which rested on a presumption that denial of state habeas relief as to a federal ground of error without explicit reliance on state law grounds constitutes a rejection of the federal claim, affording a basis for review on federal habeas.[34] The Supreme Court, in rejecting the Ninth Circuit's decision, concluded that the ambiguous denial of relief by the California Supreme Court required reference to the last appellate expression of rationale for denied relief, a decision of the California Court of Appeals barring relief based on state procedural default.[35] Thus, the rule of *Harris v. Reed*, permitting application of the presumption of reviewability of the federal claim,[36] is limited to those cases in which the disposition of the federal claim on its merits, regardless of the possible application of a state procedural default rule, is apparent in the decision of the state court.[37] Consequently, regardless of the merits of a federal claim or its attractiveness, the legacy of *Long* does not reach to

30. *Id.* & n.8.

31. 463 U.S. at 1054. ("While I am satisfied that the Court has jurisdiction in this particular case, I do not join the Court . . . in fashioning a new presumption of jurisdiction over cases coming here from state courts.").

32. The Court's general position has crystallized: "Reexamination of state conviction on federal habeas corpus 'frustrate[s] . . . both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" Murray v. Carrier, 477 U.S. 478, 487 (1986) (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982)). "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them." McCleskey v. Zant, 111 S. Ct. 1454, 1469 (1991).

33. 111 S. Ct. 2590 (1991).

34. *Id.* at 2594 & n.2.

35. *Id.* at 2596.

36. 489 U.S. 255, 262-63 (1989).

37. 111 S. Ct. at 2593 ("If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available.") (citing Harris v. Reed, 489 U.S. 255, 262 (1989).

presumptively afford review when a state court decision does not purport to reach the merits of the federal claim based on application of a rule of state procedural default, and ambiguity in this context does not weigh in favor of federal review.

The decision in *Long* itself necessarily demonstrates that some further check on state court decision-making is essential to producing a correct and consistent national view of federal guarantees. Nevertheless, two potentially significant thrusts in the movement for further "reform" of federal habeas corpus threaten its continuing viability as a means of ensuring application of federally protected rights in state court proceedings.

A. The Issue of Deference to State Court Findings of Law

Federal habeas deference to state court fact finding is mandated by the statute defining the scope of the federal writ.[38] In *Tamayo-Reyes*, the Court this past term restricted the scope of right to an evidentiary hearing in the federal habeas court if an evidentiary hearing had previously resulted in fact-finding at the state level.[39] Despite the spirited argument between the majority and dissenting justices[40] the impact of the rule announced in *Tamayo-Reyes*, that a federal petitioner burdened with an inadequately developed factual record in state court will now have to demonstrate cause for the default and actual prejudice resulting from the failure, may practically be limited, as Justice Kennedy observed in his dissent.[41]

A greater threat to the continued vitality of the federal writ as a means of ensuring compliance with federally protected guarantees in state criminal trials is suggested by this past term's most critical habeas corpus

38. 28 U.S.C. § 2254(d) (1988) provides that state fact findings "shall be presumed to be correct" unless the petitioner can bring the case within a statutorily-defined exception that justifies further fact-finding.

39. Tamayo-Reyes v. Keeney, 112 S. Ct. 1715, 1721 (1992) (applying "cause and prejudice" test to claim of defective fact-finding at state court level warranting additional evidentiary hearing in the federal habeas court).

40. *See* 112 S. Ct. at 1721 (O'Connor, J., dissenting, joined by Blackmun, Stevens and Kennedy); *Id.* at 1727 (Kennedy, J., dissenting). Justice O'Connor noted that the petitioner's contention, if factually true, would require relief and argued that the majority disregarded the clear legislative intent of Congress in enacting 28 U.S.C. § 2254(d), incorporating the prior decision of the Court in Townsend v. Sain, 372 U.S. 293 (1963). In *Townsend*, the Court had concluded that where facts necessary for a resolution of a claim cognizable on federal habeas had not been fully developed in state court proceedings, an evidentiary hearing in the habeas court was appropriate unless the petitioner had deliberately bypassed orderly state court procedure. *Id.* at 317. The majority in *Tamayo-Reyes* voted to overrule the *Townsend v. Sain* use of the "deliberate bypass" standard as necessarily inconsistent with other recent habeas corpus decisions restricting access to federal relief in order to properly balance federal and state interests in the criminal justice system. 112 S. Ct. at 1718-19. In dissenting, Justice O'Connor stressed: "In my view, the balance of state and federal interests regarding whether a federal court will *consider* a claim raised on habeas cannot be simply lifted and transposed to the different question whether, once the court will consider the claim, it should hold an evidentiary hearing." *Id.* at 1721.

41. 112 S. Ct. at 1727. Justice Kennedy noted that typically the development of a factual record, regardless of adequacy, may have little impact on the disposition of the federal claim, while observing that there was little evidence that cases falling within the ambit of *Townsend v. Sain* have not been significant in terms of "burden[ing] the dockets of the federal courts." *Id.*

case, *Wright v. West*.[42] The case involved review of a conviction obtained pursuant to application of the permissive inference that exclusive and inadequately explained possession of recently stolen property is sufficient for proof of theft. The trial court had properly instructed the jury that the inference was permissible and that the State was nevertheless bound to prove the defendant's guilt by establishing every element of the offense beyond a reasonable doubt.[43]

The Fourth Circuit, reviewing the conviction and denial of habeas relief by the district court, concluded that the evidence adduced was insufficient to support conviction under the standards of proof and review announced in *Jackson v. Virginia*.[44] In agreeing to review the Fourth Circuit's conclusion, the Court expressly directed the parties to brief a question not raised in the petition for writ of certiorari:

> In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?[45]

The Court's directive suggested that not only might deference to state fact-finding, already a matter of statutory and judicial affirmation, be binding on federal habeas corpus, but that state determinations of law might similarly prove controlling in subsequent federal litigation.[46] Justice Thomas, joined by the Chief Justice and Justice Scalia, observed that while the Court had rejected a position of absolute deference to prior state court determinations in federal habeas litigation in *Brown v. Allen*,[47] Justice Frankfurter had written an "influential separate opinion"[48] in *Brown*, noting that the state court opinion might serve to guide a federal habeas court in making its decision.[49]

Justice Thomas ultimately declined to consider the merits of the issue the Court had specifically requested the parties to brief and argue, concluding that under either a deferential or *de novo* standard of review, the Fourth Circuit erred in finding the evidence insufficient to support conviction.[50]

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42. 112 S. Ct. 2482 (1992), *rev'g* West v. Wright, 931 F.2d 262 (4th Cir. 1991).

43. 112 S. Ct. at 2485 n.2 (applying the rule of *In re* Winship, 397 U.S. 358 (1970)).

44. 443 U.S. 307, 319 (1979) (evidence sufficient to support conviction if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

45. Wright v. West, 112 S. Ct. 672, 672 (1991). The order granting the writ was issued two days earlier, on December 16, 1991. 112 S. Ct. 656 (1991). Justices Blackmun and Stevens, while not dissenting from the order granting the writ, did dissent from the December 18, 1991, order for briefing of this issue.

46. In Brown v. Allen, 344 U.S. 443, 458 (1953) the Court rejected the position that a state court determination is not binding on a federal habeas court as to constitutional claims, even if the issue has been fully and fairly litigated in state court.

47. 344 U.S. 443, 458 (1953).

48. *Wright*, 112 S. Ct. at 2488-89.

49. *Brown*, 344 U.S. at 506-508.

50. *Wright*, 112 S. Ct. at 2492 ("[T]he claim advanced by the habeas petitioner must fail even assuming that the state court's rejection of it should be reconsidered *de novo*. Whatever the appropriate standard of review, we conclude that there was more than enough evidence to support West's conviction.").

However, he clearly iterated the position that *Brown v. Allen* does not foreclose application of a deferential standard of review,[51] apparently relying on Justice Frankfurter's observation in his concurring opinion that "there is no need for the federal judge, if he could, to shut his eyes to the State consideration" of the mixed question of fact and law.[52]

In finding support for application of a standard of deferential review, rather than *de novo* review, Justice Thomas finds Frankfurter's rejection of the principle of absolute deference less probative of the meaning of *Brown v. Allen* than the majority's requirement that the habeas court decide whether the state court determination resulted in a "satisfactory conclusion."[53] The question posed and not answered by Justice Thomas is whether this term might simply be construed to require that the habeas court defer to a state court judgment which is "reasonable," as opposed to "correct."[54]

Justice White concurred in the judgment, specifically finding the evidence sufficient to support conviction, and did not discuss the standard of review issue at all.[55] Justice O'Connor, joined by Justices Blackmun and Stevens, argued at length with Justice Thomas's historical analysis,[56] concluding that consideration of the state court opinion does not require deference in decision-making, and finally asserting unequivocally: "We have always held that federal courts, even on habeas have an independent obligation to say what the law is."[57] Justice Kennedy wrote separately[58] to reaffirm his support for the principle of *de novo* review of mixed questions of law and fact arising in the context of a constitutional claim, as expressly relied upon by the Court in *Miller v. Fenton*.[59]

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51. 112 S. Ct. at 2488 n.5 ("[W]e conclude not that Brown v. Allen establishes deferential review for reasonableness, but only that *Brown* does not squarely foreclose it.").

52. *Brown*, 344 U.S. at 508.

53. *Id.* at 463.

54. *Wright*, 112 S. Ct. at 2489 n.7.

55. *Id.* at 2493.

56. *Id.* at 2493-98.

57. *Id.* at 2497.

58. *Id.* at 2498. Justice Kennedy observed:

> On these premises, the existence of *Teague* [Teague v. Lane, 489 U.S. 288 (1989), limiting retroactive application of new constitutional rules of criminal procedure] provides added justification for retaining *de novo* review, not a reason to abandon it. *Teague* gives substantial assurance that habeas proceedings will not use a new rule to upset a state conviction that conforms to rules then existing. With this safeguard in place, recognizing the importance of finality, de *novo* review can be exercised within its proper sphere.

Id. at 2500. Nevertheless, at least one scholar has concluded that Justice Kennedy's opinion does not address the issue of *de novo* review in habeas proceedings. *See* Joseph L. Hoffman, *Starting from Scratch: Rethinking Federal Habeas Review of Death Penalty Cases*, 20 FLA. ST. U. L. REV. 133, 153 n.90 (1992).

59. 474 U.S. 104 (1985). In *Miller*, the Court held that the issue of admissibility of a confession in a state trial over objection of constitutional violation in its taking created a mixed question of law and fact requiring application of a standard of *de novo* review by a federal court considering the propriety of the state trial court's action in admitting the confession. The *Miller* Court held, as Justice O'Connor noted in her opinion in *Wright*, 112 S. Ct. at 2496, that "an unbroken line of cases, coming to this Court both on direct appeal and on review of applications to lower federal courts for a writ of habeas corpus, forecloses the Court of Appeals' conclusion that the 'voluntariness' of a confession merits something less than independent federal consideration." 474 U.S. at 112.

Finally, Justice Souter, declining to spar on the question of the standard of review,[60] relied on the "new rule" principle of *Teague v. Lane*,[61] to conclude that the petitioner could not rely on the principle set forth in *Jackson v. Virginia* governing sufficiency of the evidence in support of his claim for relief. He found that West's theory of attack was not clearly dictated by the holding in *Jackson*, even though that decision predated finality of his conviction in 1980.[62] Thus, for Justice Souter, disposition was required by application of the strict "new rule" policy of *Teague*, even though he admitted that the Virginia Supreme Court was bound by *Jackson* and its standard of proof and review in considering West's claims.[63] Since Justice Souter then reviewed the evidence and found conviction justified under the *Jackson* standard,[64] the predictive value of his discussion of *Jackson* and *Teague* is uncertain.[65]

The clear division in the current Court appears to favor eventual rejection of deferential review in favor of *de novo* review of constitutional questions, assuming the issue resurfaces. But the Court's own interest in having the issue expressly briefed and argued by the parties suggests that this will be a question of continuing interest.[66] Justices Kennedy, O'Connor, Blackmun and Stevens appear committed to the principle of *de novo* review, while Justice Thomas, joined by the Chief Justice and Justice Scalia, remain open to the idea of adopting a deferential standard of review in federal habeas actions. Justices White and Souter remain

60. 112 S. Ct. at 2500 n.1 ("Because my analysis ends the case for me without reaching historical questions, I do not take a position in the disagreement between Justice Thomas and Justice O'Connor.").

61. 489 U.S. 288, 310 (1989).

62. 112 S. Ct. at 2502. The Court of Appeals had concluded that West could benefit from the holding in *Jackson*, apparently generalizing that West's attack on the unexplained possession presumption fell within the ambit of *Jackson's* command regarding the appropriate burden of proof. West v. Wright, 931 F.2d 262, 265-67 (4th Cir. 1991). The court below had then relied on another unexplained possession presumption case, Cosby v. Jones, 682 F.2d 1373 (11th Cir. 1982), in arriving at its conclusion that the evidence was not sufficient to justify conviction predicated on reliance on the presumption where additional factors weighing in favor of a finding of guilt were not demonstrated on the facts adduced at West's state trial. 931 F.2d at 269-70. For Justice Souter, reliance on *Jackson* did not contemplate reliance on the far more specific formulation advanced by the *Cosby* Court. 112 S. Ct. at 2502-03. Moreover, he found the evidence sufficient when applying the *Jackson* standard to support conviction, particularly when viewed as supportive of the jury's prior determination. *Id.* at 2503 & n.3 (reiterating standard of review requiring evidence to be reviewed "in the light most favorable to the prosecution" (citing *Jackson*, 443 U.S. at 319)).

63. 112 S. Ct. at 2503 ("There can of course be no doubt that, in reviewing West's conviction, the Supreme Court of Virginia was not entitled to disregard *Jackson*, which antedated the finality of West's conviction.").

64. *Id.*

65. In fact, Justice Souter reached the merits of the issue under *Jackson* even after expressly stating that the issue was properly foreclosed by application of *Teague*, and that having reached that posture, he "would go no further." 112 S. Ct. at 2500.

66. In fact, the issue of deference to state determination of federal claims in federal habeas actions was presented to the Court again this term in Withrow v. Williams, 1993 WL 119753 (U.S., decided April 21, 1993). The Court declined to address the issue, despite preservation in the court of Appeals, *see* Williams v. Withrow, 944 F.2d 284, 288 (6th Cir. 1991), limiting its consideraton instead to the issue of preclusion of *Miranda*-based claims from federal habeas review. 1993 WL 119753, at 3, n.2. Justice Scalia, joined by Justice Thomas, wrote separately to argue for the same type of deference to state court determination of law on questions of federal rights violations that Justice Thomas had suggested in his opinion in *Wright*. *Id.* at 21-25.

uncommitted on this issue, as both reached their conclusions in *Wright v. West* on alternative theories of disposition that did not compel them to even discuss the question of standard of review.

For federal litigants, the ultimate disposition of this question may prove critical because a deferential standard of review, as suggested by Justice Thomas, would appear to permit acceptance of state court reasoning as seemingly co-equal with that which might be employed by the federal habeas court in reviewing the claim of constitutional violation.[67] Thus, a "reasonable" decision rendered by the state court would be entitled to deference, and might well prove dispositive in this sense, even though the habeas court were of the opinion that the state decision, while "reasonable," was nevertheless incorrect. Justice Kennedy specifically rejected this notion in his concurring opinion, while recognizing the inherent value of the principle of comity: "The comity interest is not, however, in saying that since the question is close the state court decision ought to be deemed correct because we are in no better position to judge. That would be the real thrust of a principle based on deference."[68]

The integrity of the federalized system of rights noted in *Michigan v. Long* demands continued federal *de novo* review to ensure that federal protections are properly afforded state court defendants.[69]

B. Further Limitation on Review by Subject of Claim

A second potential source of "reform" of federal habeas corpus lies in limitation upon a particular class of federal claims not subject to review by habeas corpus once fully and fairly litigated in state proceedings. This type of limitation is characterized by the Court's decision in *Stone v. Powell*,[70] which effectively precludes re-litigation of Fourth Amendment search and seizure claims once the accused has been afforded a "full and fair" hearing on those claims by state trial courts.[71] Withdrawal of any

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67. Justice O'Connor clearly rejected this approach, while conceding that state court opinions could be of value for a federal habeas court analyzing an issue:

> A state court opinion concerning the legal implications of precisely the same set of facts is the closest one can get to a "case on point," and is especially valuable for that reason. But this does not mean that we have held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, *or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.*

Wright, 112 S. Ct. at 2497 (emphasis added).

68. 112 S. Ct. at 2499. He then observed that this posture is exactly that required for deference to state fact-finding in the habeas context. *Id.*

69. That a "federalized" system of individual rights is consonant with continuing federal review of state court disposition of constitutional claims is perhaps best reflected in the position of Justice O'Connor, who authored the majority opinion in *Michigan v. Long* and a strong defense of *de novo* review in federal habeas actions in *Wright v. West*.

70. 428 U.S. 465 (1976).

71. *Id.* at 481-82. The decision in *Stone* did not totally foreclose federal review, of course, because significant questions of Fourth Amendment protection of privacy are still subject to litigation through application for the writ of *certiorari* in the United States Supreme Court to review final disposition of these claims by State appellate courts. What is apparent is that in the aftermath of

additional category of federal constitutional claims from federal review through habeas corpus[72] suggests an entirely unjustified overreaction in light of the underlying purpose of the remedy,[73] vindication of federally protected rights that serve to ensure fair trials in state courts.

This term, the Court rejected an effort to bring *Miranda*-based claims of federal rights violations within the rule of preclusion announced in *Stone v. Powell.* In *Withrow v. Williams,*[74] Justice Souter wrote for five members of the Court in distinguishing the interests requiring protection under *Miranda* which differ from those justifying preclusion of Fourth Amendment exclusion of evidence issues in *Stone v. Powell.* Essentially, these interests are not primarily concerned with the deterrence of future police misconduct, as is the application of the exclusionary rule to evidence

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Stone most Fourth Amendment questions ultimately resulting in resolution by the Supreme Court have been brought by prosecutors challenging the reasoning of state courts in ordering suppression of evidence determined to have been illegally seized. *E.g.*, Florida v. Bostick, 111 S. Ct. 2382 (1991) (upholding police request for consent to search luggage of passengers on bus on ground no seizure had occurred); California v. Acevedo, 111 S. Ct. 1982 (1991) (police may search unopened container found in vehicle); California v. Hodari, 111 S. Ct. 1547 (1991) (fleeing suspect not seized until caught and property disposed of by suspect not product of seizure, but abandoned); Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (sobriety checkpoints conducted pursuant to articulated standard upheld); Arizona v. Hicks, 480 U.S. 321 (1987) (inadvertence not required for valid seizure under plain view doctrine); Alabama v. White, 496 U.S. 325 (1990) (anonymous tip corroborated by observation of details sufficient to justify stop); Horton v. California, 496 U.S. 128 (1990); Maryland v. Buie, 494 U.S. 325 (1990) (officers may search areas of home of arrested suspect to extent necessary to protect against sudden attack); Florida v. Riley, 488 U.S. 445 (1989) (helicopter observation of defendant's property did not result in unconstitutional invasion of privacy); Michigan v. Chesternut, 486 U.S. 567 (1988) (suspect fleeing from police, who have taken no action to stop or arrest, not seized when he disposes of cocaine within view of officers); California v. Greenwood, 486 U.S. 35 (1988) (no expectation of privacy in opaque, plastic garbage bags left for pickup outside curtilage of home); Illinois v. Krull, 480 U.S. 340 (1987) (good faith exception to exclusionary rule extended to officers acting pursuant to state statute subsequently declared unconstitutional); Maryland v. Garrison, 480 U.S. 79 (1987) (reasonable belief in accuracy of address by officers obtaining search warrant based on inaccurate description excuses error and suppression of evidence not required); Colorado v. Bertine, 479 U.S. 367 (1987) (inventory search of closed container in impounded auto did not violate Fourth Amendment); California v. Carney, 471 U.S. 386 (1985) (motor home being used for travel is subject to automobile exceptions to warrant requirement); Florida v. Rodriguez, 469 U.S. 1 (1984) (consent to search not rendered invalid because suspect not advised he could refuse); Massachusetts v. Sheppard, 468 U.S. 981 (1984) (mistake by officers obtaining search warrant does not compel suppression); Florida v. Meyers, 466 U.S. 380 (1984) (right to search automobile stopped on highway continues despite impoundment); Illinois v. Lafayette, 462 U.S. 640 (1983) (search of suspect's shoulder bag as inventory pursuant to arrest upheld); Illinois v. Gates, 462 U.S. 213 (1983) (applying "totality of circumstances" test in determining lawfulness of search and seizure); New York v. Belton, 453 U.S. 454 (1981) (valid arrest of persons that were recently in vehicle affords grounds for search of passenger compartment); South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory search of auto impounded for traffic infraction proper to protect owner's property).

72. Federal habeas corpus petitioners challenging state court convictions proceed pursuant to 28 U.S.C. § 2254 (1988). Although the remedy is statutory in nature, the Court's jurisdiction to remove violations of prophylactic rules imposed upon state procedure by the Court itself from the ambit of federal habeas review has not drawn legislative reaction. *See* Brecht v. Abrahamson, 944 F.2d 1363, 1374-75 (7th Cir. 1991); *aff'd*, 1993 WL 119795 (U.S., decided April 21, 1993).

73. For example, in Duckworth v. Eagan, 492 U.S. 195, 205-14 (1989), Justice O'Connor, joined by Justice Scalia, argued that the rationale of *Stone v. Powell* should be extended to preclude recourse to federal habeas corpus for state defendants seeking suppression of "probative evidence" obtained in violation of the prophylactic rule announced in Miranda v. Arizona, 384 U.S. 436 (1966).

74. 1993 WL 119753 (U.S., decided April 21, 1993), *aff'g* 944 F.2d 284 (6th Cir. 1991).

seized in violation of the Fourth Amendment,[75] but are concerned with the vindication of the important constitutional privilege against self-incrimination.[76] Of course, exclusion of illegally seized evidence typically does not address the question of guilt or innocence directly. Indeed, most supression motions involve possessory or evidentiary issues where the actual guilt of the accused is not in serious question. Rather, the possession of the contraband or item of evidence is probative precisely because the defendant is factually guilty.[77].

In contrast, the concern originally giving rise to prophylactic rules regarding police interrogation arose from the perception that coerced confessions compromised the integrity,[78] though not necessarily the reliability,[79] of the fact-finding process. Nevertheless, a critical feature of coerced confessions is the inherent likelihood that some suspects will confess untruthfully, admitting culpability when none actually exists, simply to be freed of the physical or psychological coercion applied by their interrogators.[80]

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75. *Id.* at 7. The majority observed that application of the exclusionary rule "can do nothing to remedy the completed and wholly extrajudicial Fourth Amendment violation" because the illegal search or seizure has already occurred, citing *Stone*, 428 U.S. at 486.

76. *Withrow*, at 5-7. Exclusion of evidence seized in violation of *Miranda* is necessary because the assertion of the privilege is "a fundamental trial right" and because this trial right serves to ensure "correct ascertainment of guilt." *Id.* at 7.

77. This is a simplistic generalization, of course. For example, even when the question of possession of contraband forms the basis for prosecution, an accused objecting to an illegal search of the evidence might still have ample grounds for acquittal since he may not have been in either actual or joint possession of the contraband while having a valid claim that police acted illegally in seizing the substance. Similarly, seizure of a weapon or instrument used in the commission of a non-possessory crime, such as homicide, does not necessarily indicate that the accused objecting to the basis for the search is either factually or legally guilty. Nevertheless, as an imperfect generalization, Fourth Amendment violations typically do not involve litigation of claims of innocence, but focus instead on the protection of privacy interests of the person searched.

78. Fear that the Court is relaxing its traditional concern about police interrogation practices and the implications for the integrity of the criminal justice system — a posture which traditionally rendered the admission of a coerced confession at trial beyond harmless error analysis, Payne v. Arkansas, 356 U.S. 560 (1958) — may be traced to its more recent decision in Arizona v. Fulminante, 111 S. Ct. 1246 (1991), effectively holding that trial error in admitting a coerced confession may be subjected to harmless error analysis, applying the reasonable doubt standard in determining whether the confession contributed to the conviction.

79. Thus, in Jackson v. Denno, 378 U.S. 368, 376-77 (1964), the Court observed that the federal constitutional principle involved in excluding involuntary confessions rests on the impropriety in comprising the right not to give testimony against oneself, rather than specifically on a concern that an involuntarily induced confession might not be truthful in its admission of culpability.

80. The concern for the use of coerced confessions from criminal suspects did not magically arise during the tenure of former Chief Justice Earl Warren, as Justice Souter impliedly noted in tracing the court's long-held concern with coerced confessions. *Withrow* at 5. The classic case of Brown v. Mississippi, 297 U.S. 278 (1936), decided by a unanimous Court through then-Chief Justice Hughes, illustrates the long history of concern over the use of improper police procedures in procuring convictions of dubious accuracy. There, the record illustrated the police misconduct in unequivocal terms:

> The crime with which these defendants, all ignorant negroes, are charged, was discovered about one o'clock p.m. on Friday, March 30, 1934. On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the

Apart from total preclusion of a class of claims, such as those raising violations of the prophylactic rule of *Miranda*, modification of the standard of review or burden of proof on federal claims in habeas corpus may have the most impact on the system of enforcement of federal constitutionally protected rights. This term, in *Brecht v. Abrahamson*,[81] a majority of the Supreme Court concluded that the standard for reversal of state court convictions in federal habeas should be substanitally higher than on direct review of convictions in state appellate courts. Prior to *Brecht*, the "harmless error" standard of *Chapman v. California*[82] governed disposition of federal habeas claims. This standard requires reversal of state convictions upon a showing of a violation of federal constitutionally protected rights unless the error was harmless beyond a reasonable doubt when examined in light of the totality of the record of proceedings below.[83] The *Brecht* majority concluded that in a federal habeas action, a petitioner complaining of a state court conviction must demonstrate not only the existence of the violation of a right protected by the federal constitution, but that the violation "had substantial and injurious effect or influence in determining the jury's verdict."[84]

The Seventh Circuit had predicated its reliance of a standard incorporating proof of prejudice or harm in the advancement of the federal claim in habeas corpus on the fact that the issue in *Brecht* involved a violation of a prophylactic rule: an impermissible prosecutorial comment on the accused's post-arrest silence.[85] This comment infringes on the accused's right to exercise his Fifth Amendment privilege in remaining

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limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and returned with some difficulty to his home, suffering intense pain and agony. . . . A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the State of Alabama; and while on the way, in that State, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.

297 U.S. at 281-82 (quoting Brown v. State, 158 So. 339, 343-44 (Miss. 1935) (Anderson, J., dissenting)). Two other defendants, Brown and Shields, confessed in a similar manner:

On Sunday night, April 1, 1934, the said deputy, accompanied by a number of white men, one of whom was also an officer, and by the jailer, came to the jail, and the two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the same deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers.

Id. at 282. At trial, Deputy Dial admitted the beatings, as did other witnesses and participants in the beatings. *Id.* at 284-85.

81. 1993 WL 199795 (U.S., decided April 21, 1993), *aff'g* 944 F.2d 1363 (7th Cir. 1991).

82. 386 U.S. 18 (1967).

83. *Id.* at 24.

84. *Brecht*, at 12, approving of formulation applied by the Seventh Circuit in its opinion, 944 F.2d at 1370-74, and following Kotteakos v. United States, 328 U.S. 70, 776 (1946).

85. 944 F.2d at 1370-74.

silent, if he has previously been warned of his *Miranda* rights, because the court must presume that his silence reflects an innovation of the privilege, following *Doyle v. Ohio*.[86] The *Brecht* majority, however, discounted the distinction drawn between violations of prophylactic rules and fundamental rights, concluding that the violation constituted "trial error" implicating an important constitutional right which did not involve infringement on a prophylactic rule at all.[87] Thus, while the Seventh Circuit's formulation and application of a rule requiring a showing of prejudice was limited to its consideration of what it had assumed was a violation of a prophylactic rule, the Court rejected its analysis and applied the formulation generally to review of all claims involving trial error.[88]

The creation of a prejudice requirement results in two different problems for the dual system of enforcement of federal constitutional rights. First, state appellate courts are still required to apply the "harmless error" rule of *Chapman v. California*. Thus, a state appellate court may avoid enforcement of a federal claim when it appears that the violation did not contribute to conviction or impair the accused's right to a fair trial, or where the evidence against the accused was so overwhelming that the conviction demonstrates no prejudice to his interests. Doubt is to be resolved in favor of the accused, however, and an appellate court concerned about eventual federal review might well have been concerned that on federal review another court would consider its evaluation of the claim and application of the reasonable doubt standard erroneous, ultimately ordering the conviction vacated. Following *Brecht*, however, state appellate courts will certainly understand that in the absence of the statistically unlikely grant of *certiorari* for review in the United States Supreme Court,[89]

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86. 426 U.S. 610 (1976) (holding defendant's silence after being advised of warnings required by *Miranda* not proper subject of comment, even to impeach defendant's testimony at trial). *Doyle* was limited by the Court's later decision in Fletcher v. Weir, 455 U.S. 603 (1982), in which the Court held that in the absence of *Miranda* warnings, essentially advising the suspect of his right to remain silent, post-arrest silence could be the subject of cross-examination because the defendant's silence could not be presumed to have resulted from the exercise of the privilege about which he had not been advised. One might suppose that this approach, which runs contrary to the traditional presumption that citizens know the law — presumably including the law concerning their rights upon arrest, a routine feature of citizen/police encounters on television and in film — would cause some officers to simply withhold the warnings. The silent suspect would be subject to impeachment; the suspect deciding to offer an explanation would later learn during trial that he had, in fact, been advised of his rights prior to having waived them. *Doyle* imposes a prophylactic rule. *Brecht*, 944 F.2d at 1370.

87. *Brecht*, at 5-7: "Under the rationale of Doyle, due process is violated whenever the prosecution uses for impeachment purposes a defendant's post-Miranda silence. Doyle thus does not bear the fallmarks of a prophylactic rule." *Id.* at 7.

88. *Id.* at 7, defining "trial error" as error which "occur[s] during the presentation of the case to the jury" and which may be subjected to harmless error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." Arizona v. Fulminante, 111 S. Ct. 1246, 1264 (1991). *Compare* Mikes v. Borg, 947 F.2d 353 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3055 (1992) (standard for review of insufficient evidence claim same whether raised o direct appellate review or by habeas corpus).

89. *See, e.g.*, Withrow v. Williams, 1993 WL 119753 at 21, n.1 (Scalia, J., concurring in part and dissenting in part: "Of course a federal forum is theoretically available in this Court, by writ of certiorari. Quite obviously, however, this mode of review cannot be generally applied due to practical limitations.) *See* Sonte v. Powell, 428 U.S. 465, 526 (1976) (Brennan, J., dissenting).

the petitioner's burden in any subsequent federal habeas action will be far more difficult than it had been prior to *Brecht*. Consequently, state appellate judges less sensitive to enforcement of federal constitutional protections than their federal counterparts may find it tactically acceptable to affirm state court convictions, rather than reverse, even when a doubt as to harm exists.

Imposition of this higher threshhold for reversal in federal habeas rather than on direct appeal in state court may ultimately mean that state court errors in assessing harm or recognizing federal rights violations at all may be excused once the habeas court is required to ascertain whether the petitioning state inmate can demonstrate actual prejudice resulting from the alleged error. A claim not resulting in reversal under the more beneficial standard of "harmless error" analysis—the reasonable doubt standard—due to state appellate court error in analyzing the claim may eventually fail in federal habeas because the reviewing court concludes that the petitioner could not meet his burden of demonstrating that the complained-of error was substantial or injurious. Thus, the role of habeas in serving to check state court error in disposing of federal claims may ultimately be seriously undermined by the Court's adoption of the prejudice standard in *Brecht v. Abrahamson*.

Second, the imposition of a standard incorporating proof of prejudice will necessarily limit the success of many state inmates relying on federal habeas corpus for vindication of federal rights violations. Petitioners entitled to relief under the *Chapman* harmless error standard will invariably suffer the consequences in some cases of the requirement to demonstrate harm as well as violation of federally protected procedural rights. Counsel will be required to develop factual and theoretical bases for claims of prejudice, rather than relying on the presumption of prejudice inherent in *Chapman*'s requirement that harmlessness be shown beyond a reasonable doubt. The need to articulate and support a theory of prejudice will prove as critical to the success of the federal habeas petition as proof of the underlying violation itself.

Further restriction on availability of federal review would undoubtedly reduce the litigation workload in non-capital and capital cases alike and expedite executions in capital cases.[90] The limitation on inmate access to federal courts may also result in significant long term costs to the criminal justice system. These costs are not likely to be directly reflected in caseload or judicial time devoted to the conduct of evidentiary hearings, but in terms of the perception that the courts are failing to vindicate important rights which serve to protect the innocent from improperly being deprived of liberty through criminal conviction. The system of "federalized" individual rights relied upon by the Court in *Michigan v. Long* demands

90. *See, e.g.*, Woodard v. Hutchins, 464 U.S. 377 (1984) (vacating stay of execution where petitioner's claims could have been presented in a prior application for relief but were not).

continuing existence of a vital habeas corpus remedy at the federal level to ensure state enforcement of the minimal level of constitutional guarantees afforded by the federal constitution.[91]

II. THE BURDENS IMPOSED UPON DEFENSE COUNSEL

The Court's developing federal habeas law is particularly burdensome for defense counsel because it imposes such high standards of competence in order to ensure that basic claims of rights violations will ultimately be heard by federal habeas courts. This is not to suggest that high standards of both ethical and technical competence should not be demanded of defense counsel, but at a time when the criminal justice system is already stressed by the need for competent counsel, imposition of even higher standards ultimately weighs against involvement of interested attorneys in criminal practice.

The ratification this past term of a state procedural bar as an impediment to federal review of even substantial claims, in *Coleman v. Thompson*,[92] can serve only to discourage conscientious practitioners from assuming the burden of representing indigent criminal defendants.[93] Any error in representation, ranging from mere inadvertence to a failure to recognize a developing or novel theory of law demanding preservation,[94] will eventually call counsel's competence and dedication into question. At the same time that the Court supplanted the "deliberate bypass" standard[95] in favor of the "cause and prejudice" standard[96] for determining when a federal habeas court is barred from considering a constitutional claim arising in a state

91. Nor can one assume that state courts will implement federal directives as a matter of deference. In Anderson v. State, 701 S.W.2d 868, 873-74 (Tex. Crim. App. 1985) (en banc), for instance, the Texas Court of Criminal Appeals specifically rejected reliance on the Fifth Circuit's holding in Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), *cert. denied*, 458 U.S. 1111 (1982), for the proposition that the Texas capital sentencing scheme failed to adequately afford proper deference to the role of mitigating circumstances in the capital sentencing process. The court observed that it was not bound by the decisions of "lower federal courts." *Id.* Later, in Penry v. Lynaugh, 492 U.S. 302 (1989), the Supreme Court concluded that the Texas scheme was constitutionally defective in certain instances in failing to provide for an appropriate vehicle for consideration of mitigating circumstances in the sentencing process.

See also Thomas, J., concurring in Lockhart v. Fretwell, 113 S. Ct. 838, 846 (1993) (arguing state appellate courts are not bound by decisions of lower federal courts on matters of federal constitutional interpretation, but only upon decisions of United States Supreme Court, based on Supremacy Clause).

92. 111 S. Ct. 2546 (1991).

93. The shortage of attorneys willing to undertake death penalty representation has already reached the crisis stage. *See*, Talbot D'Alemberte, *The Heroism of Steve Bright*, 77 A.B.A. J. 8 (Sept. 1991) (documenting individual dedication of death penalty counsel); Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513 (1988); Lewis F. Powell, Jr., *Capital Punishment*, 102 HARV. L. REV. 1035, 1040 (1989).

94. For example, a deliberate failure by competent counsel not to raise an issue on direct appeal based on perception that the issue is not likely to be successful does not excuse procedural default on the claim. Smith v. Murray, 477 U.S. 527, 534-36 (1986).

95. Fay v. Noia, 372 U.S. 391 (1963) had imposed a standard of "deliberate bypass," *i.e.*, a strategic or tactical decision undertaken by the petitioner or counsel to circumvent state resolution of a federal claim by deliberately failing to raise it in the federal forum. In *Coleman*, the Court expressly buried this standard for ascertaining the impact of state procedural default in federal habeas. 111 S. Ct. at 2565.

96. Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (rejecting application of "deliberate bypass" standard for excusing state procedural default of federal constitutional claims).

trial,[97] the Court also reiterated that ineffective assistance of counsel — in the constitutional sense[98] — would satisfy the "cause" prong of the new test.[99]

One difficulty in applying the standard for ineffective assistance of counsel in the constitutional sense is that such a finding virtually requires a showing that but for counsel's errors, the defendant would not have suffered conviction.[100] Thus, unless the errors of counsel probably contributed to the conviction, the standard cannot be met, regardless of counsel's deficiency in performance.[101]

Consequently, counsel undertaking representation in criminal cases must be aware of two sources of extraordinary pressure imposed by the Court's latest pronouncements on federal habeas. First, counsel representing criminal defendants at trial and on direct appeal must recognize that any error in performance or judgment in the exercise of trial strategy — or, indeed, any perceived error — is likely to ultimately generate a claim of ineffectiveness. This is true even when the apparent error represents, for instance, merely an incorrect assessment of the likely merits of a point which might be raised on appeal. In *Smith v. Murray*,[102] defense counsel decided not to raise an issue relating to improper admission of expert

97. *Coleman*, 111 S. Ct. at 2565.

98. In Murray v. Carrier, 477 U.S. 478 (1986), the Court held that counsel's failure to properly preserve error in a state proceeding did not satisfy the "cause" prong of Wainwright v. Sykes, 433 U.S. 72 (1977) for procedural default. Only if the conviction is fundamentally unfair in that it likely resulted in the conviction of an innocent person, 477 U.S. at 495-96, or upon a showing of constitutionally ineffective assistance of counsel, *id.* at 492, could the federal court proceed to address the issue on the merits. A mere inadvertent failure by competent counsel or failure to recognize the existence of a legal issue of merit is insufficient to warrant relief. *Id.* at 487-88.

99. *Coleman*, 111 S. Ct. at 2566. Since Coleman had no right to effective assistance of counsel in the state post-conviction proceeding in which his attorney's inadvertence resulted in procedural bar to consideration of the federal claims, he could not rely on a claim of "constitutionally ineffective assistance" in showing "cause" for the state procedural default. *Id.*

100. The test for constitutional ineffectiveness was set forth by the Court in Strickland v. Washington, 466 U.S. 668 (1984). There, the Court observed: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. This standard does not impose a requirement that the accused prove that he was factually innocent of the crime, however, and relief is apparently available when the performance of trial counsel was so deficient as to contribute to the conviction of an individual who otherwise would probably not have suffered conviction. If *reliability* as a test rests on ensuring a fair trial to protect against an improper finding of guilt, regardless of the moral culpability of the accused, then *Strickland* does not require proof that the petitioner was, in fact, innocent in order to prevail on a claim of ineffective assistance.

101. Thus, prejudice to the defendant forms the second prong of the *Strickland* test for ineffectiveness under the Sixth Amendment. 466 U.S. at 687. This approach necessarily suggests that the Court has moved away from a posture in which the deficiency of performance requires relief to protect the integrity of the guarantee to one in which the reliability of the fact-finding process is paramount. For example, in Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993), the Court considered an ineffective assistance claim arising in a most unusual factual context. Counsel failed to preserve error in a state capital trial based on existing Eighth Circuit precedent which was ultimately overruled by the Supreme Court. Petitioner's ineffectiveness claim was predicated on counsel's failure to preserve error based on the then existing state of the law, asking for relief on his ineffectiveness claim when, in fact, he clearly would not have been entitled to relief on the merits had the state court failed to correctly apply the law. The Court held that, in this rare circumstance, counsel's error did not demonstrate prejudice because Fretwell could not demonstrate that the outcome would have been different had the state trial court complied with existing Eighth Circuit case law.

102. 477 U.S. 527 (1986).

psychiatric testimony[103] on direct appeal, resulting in a default under Virginia law as to that issue.[104] The Supreme Court concluded that failure to comply with state procedural rules relating to preservation and presentation of error resulting in bar likewise barred federal consideration of the claim.[105]

The problem in *Smith* lies not so much in its result, but in the implication of the exercise of judgment by defense counsel. In *Jones v. Barnes*,[106] a majority of the Court directed counsel to exercise professional judgment in determining which issues to include and argue in the brief on direct appeal, carefully advising: "A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions."[107] The majority expressly declined to hold that the accused's demand or preference that particular points be included in the brief had to be honored by appointed counsel, over a stinging dissent issued by Justice Brennan.[108]

Jones reinforces the proposition that it is counsel's expertise and professional judgment which should dominate the strategy to be pursued on appeal; *Smith* warns that an error in judgment in paring the points to be argued may have devastating impact on the client's future. Failure to raise a meritorious point may result in forfeiture of reliance on a new rule subsequently announced by the Supreme Court that might otherwise have been applicable to afford the client relief, pursuant to the holding in *Teague v. Lane*.[109] Thus, even when counsel's best exercise of legal judgment results in the default — as opposed to inadvertence or negligence such as the failure to timely file the petition for appeal in *Coleman*[110] —

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103. The testimony was arguably inadmissible because the psychiatrist examined the accused without first advising him of his right not to participate in the interview, as required by Estelle v. Smith, 451 U.S. 454 (1981).

104. 477 U.S. at 533. The Court's opinion notes that the petitioner had previously raised the issue in a state post-conviction proceeding, where the state procedural default rule was imposed to bar consideration of the claim on the merits. *Id.* at 531-32.

105. *Id.* at 534. The Court concluded that failure to raise the claim on direct appeal resulted in procedural default barring subsequent review of the claim by federal habeas:

> Our cases, however, leave no doubt that a deliberate, tactical decision not to pursue a particular claim is the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adhere to a State's legitimate rules for the fair and orderly disposition of its criminal cases.

Id.

106. 463 U.S. 745 (1983).

107. *Id.* at 753.

108. *Id.* at 755. ("The Court, subtly, but unmistakably adopts a different conception of the defense lawyer's role — he need do nothing beyond what the State, not his client, considers most important. In many ways, having a lawyer becomes one of the many indignities visited upon someone who has the ill fortune to run afoul of the criminal justice system. I cannot accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime."). *Id.* at 764.

109. 489 U.S. 288, 310 & n.2 (1989) (Unless falling within an exception, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

110. *Coleman*, 111 S. Ct. at 2546. The petition for appeal from a denial of state habeas corpus was filed three days late. Had this error occurred on the direct appeal — where effective assistance of counsel has been held mandated by the Supreme Court — the defendant would have been entitled

the defendant will suffer the consequences of the default unless the error rises to the level of constitutional ineffectiveness.

The net result of these decisions is that counsel undertaking representation must now understand that any failure of preservation or other strategic or tactical error in representation may now be subject to a claim of constitutional ineffectiveness. The second source of tension in discharging duties of representation lies in the overwhelming pressure to try all means to preserve appellate or habeas review, including a necessary pressure to raise ineffectiveness of counsel claims. For many attorneys, the type of after the fact judgment that comes into play in assessing another counsel's efforts at representation is unpalatable, just as it often is to reviewing courts.[111]

Nevertheless, a failure to raise a claim of ineffective assistance to show "cause" for procedural default at trial or on direct appeal most likely will mean that the claim will be forever lost, regardless of its merits. Moreover, post-conviction counsel's failure to properly evaluate procedural default in terms of ineffectiveness and raise the appropriate claim during state post-conviction proceedings will also result in a bar to eventual consideration of the claim, since *Coleman* holds that in the absence of a constitutional guarantee to assistance of counsel in post-conviction proceedings[112] a defect in state post-conviction representation will not excuse procedural default.

In addition to the need to raise claims of ineffectiveness in order to afford the client some prospect for eventual consideration of defaulted federal claims, counsel must also be prepared to raise such claims for consideration as fundamental error under state law. While an allegation of constitutional ineffectiveness may not be sustained in support of consideration of a procedurally defaulted point of error on the merits, state courts may nevertheless consider the claim as a matter of fundamental, jurisdictional or plain error. In *Sochor v. Florida*,[113] for instance, the Court considered the problem of failure of preservation and a plurality held that state application of its law of procedural default barred review of the claim on the merits.[114] However, Justice Stevens, joined by Justice Blackmun, argued that this type of claim was one of fundamental error under Florida law, which could be urged despite a lack of objection at trial,[115] and which they concluded had impliedly been considered and

to an appeal despite the procedural error in failing to file, pursuant to Evitts v. Lucey, 469 U.S. 387 (1985).

111. *See, e.g.*, Butler v. State, 716 S.W.2d 48 (Tex. Crim. App. 1986) (counsel's performance not to be assessed through hindsight).

112. Murray v. Giarratano, 492 U.S. 1 (1989) (no constitutional right to assistance of counsel in state post-conviction proceedings even when sentence of death imposed); Pennsylvania v. Finley, 481 U.S. 551 (1987) (no constitutional right to assistance of counsel in state post-conviction proceedings, although state law may provide for counsel; even so, counsel's performance in such proceedings not judged by constitutional standard).

113. 112 S. Ct. 2114 (1992). The Court considered a claim that an improper aggravating circumstance had been considered by the sentencing jury at Sochor's capital trial, resulting in an improper imposition of the death penalty.

114. *Id.* at 2119-20. The plurality opinion, authored by Justice Souter, joined in part by the Chief

rejected by the state court on the merits.[116] Thus, counsel faced with the problem of litigating an unpreserved claim must not only consider the need to argue ineffectiveness of counsel's assistance below, but the option of raising the claim as a matter of fundamental error as well.

The problem of procedural lapse is demonstrated by the Court's decision in *Caldwell v. Mississippi*.[117] There, trial counsel had objected to a prosecution argument suggesting to the capital sentencing jury that any error they might make in deliberations would be corrected on appellate review, but counsel on direct appeal did not present or urge the issue for consideration by the state supreme court.[118] Instead, the Mississippi Supreme Court raised the issue *sua sponte*, pursuant to its "plain error rule,"[119] and addressed the tenor of the argument in its opinion.[120] The Court considered the Eighth Amendment claim that this line of argument distorted the jury's function in determining the appropriate penalty, finding that no bar to review of the claim could be discerned from any application of a state rule of procedural default by the court below.[121] The majority, through Justice Marshall, concluded that the argument was constitutionally impermissible in undermining the reliability of the capital sentencing function.[122]

Thus, *Caldwell* demonstrates the value of raising even defaulted issues in the context of capital prosecutions when the bar of procedural default has not been explicitly imposed by the state appellate court. Clearly, had that bar been imposed, counsel's recourse would have been to make an allegation of constitutionally ineffective assistance, a more difficult hurdle

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Justice, Justices White, O'Connor, Kennedy, Scalia and Thomas, observed that the petitioner's claim that the aggravating circumstance — that the "capital felony was especially heinous, atrocious, or cruel," FLA. STAT. § 921-141(5)(h) (1991) — was disposed of by the state supreme court on the adequate and independent state ground of procedural default because the relevant instructions were not objected to at trial.

115. 112 S. Ct. at 2125-28 & nn.6-8. Instead, they specifically looked to Florida law of fundamental error to excuse the apparent procedural default, arguing that under state law error of the type urged by petitioner Sochor is reviewable in the absence of objection. Justice Stevens concluded: "Petitioner's failure to object to the instruction at trial did not deprive the Florida Supreme Court or this Court of the power to correct the obvious constitutional error." *Id.* at 2127.

116. *Id.* at n.7. Justice Stevens expressly observed in this footnote:

> The Florida Supreme Court's statement that none of the alleged errors in the jury instructions had been "preserved for appeal," 580 So.2d 595, 602 (1991), merely raised the question whether they should nevertheless be reviewed under the "fundamental error" exception. That question was answered by the court's statement that petitioner's claims "have no merit."

Moreover, Justice Stevens found probative the State's failure to plead procedural default in opposing Sochor's petition for writ of *certiorari* and arguing instead, on the merits, that the language of the aggravating circumstance was not unconstitutionally vague. 112 S. Ct. at 2127-28.

117. 472 U.S. 320 (1985).

118. *Id.* at 326.

119. *Id.* at 326-27.

120. Caldwell v. State, 443 So.2d 806, 807 (Miss. 1983). The dissenting state supreme court justice argued that the argument was so unfair as a matter of state law as to require that the death sentence be vacated. *Id.* at 815.

121. *Caldwell*, 472 U.S. at 327-28 (observing that the Mississippi Supreme Court had adopted policy of relaxing procedural default rule in capital cases).

122. *Id.* at 341.

to overcome since not only would the showing of error have been required, but arguably, a greater showing of prejudice in this context might have been required to have the issue even considered in the context of federal habeas corpus. Subsequent decisions have demonstrated the trap set for unwary counsel by the application of the procedural default and "new rule" rules in considering constitutional claims.

In *Dugger v. Adams*,[123] the Court rejected the petitioner's reliance on *Caldwell* for the proposition that a prosecutorial argument had improperly stressed the lack of finality attached to the jury's sentencing verdict under the Florida capital punishment statute, which provides for judicial override of jury sentences in limited circumstances. No objection was made to the argument at trial and the issue was not raised until the filing of a second post-conviction motion for relief, following the decision in *Caldwell*.[124] Ultimately, the claim was raised in a successor federal habeas petition, resulting in a finding by the Eleventh Circuit that *Caldwell* had produced a novel rule that could not have been anticipated at the time of trial, thus excusing the failure to comply with state procedural requirements.[125] The Supreme Court reversed, holding that the merits of the petitioner's *Caldwell* claim were not dispositive on the issue of procedural default.[126]

Similarly, in *Sawyer v. Smith*,[127] petitioner also sought to rely on *Caldwell* in support of his claim that the prosecutor had improperly stressed to his capital sentencing jury that it would not be the only decision-maker to consider the sentence and that it would be subject to review by other courts.[128] The Court concluded, however, that *Caldwell* did announce a "new rule" of procedure which could not be relied on by the petitioner, whose conviction became final before the decision was announced.[129]

Thus, *Dugger v. Adams* and *Sawyer v. Smith* can generally be read together to hold that failure to preserve error might be excused due to the novel nature of the claim, but that reliance on a subsequent decision recognizing a rule based on the novel nature of the claim is probably precluded by the application of *Teague's* "new rule" analysis. At best, then, *Caldwell* emerges as a case in which the petitioner was simply

123. 489 U.S. 401 (1989).

124. Adams v. State, 484 So.2d 1216, 1217, *cert. denied*, 475 U.S. 1103 (1986). The Florida Supreme Court held that the claim was procedurally barred by the petitioner's failure to preserve the claim by arguing it on direct appeal. *Id.*

125. Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), *modified*, 816 F.2d 1493 (11th Cir. 1987).

126. 489 U.S. at 408 n.4.

127. 497 U.S. 227 (1990).

128. *Id.* at 231-32. The prosecutor argued, in part:

> [I]t is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions.

Id.

129. *Id.* at 236. The Court held that since the holding in *Caldwell* was not "dictated by existing law at the time petitioner's conviction became final" it was subject to the restriction on application of new rules announced in Teague v. Lane, 289 U.S. 288, 301 (1989), and petitioner could not rely on the rule because it did not fall within the *Teague* exception of "watershed rules of criminal procedure that guarantee the accuracy of a criminal proceeding." *Sawyer*, 497 U.S. at 233.

fortunate to obtain a majority response to his improperly preserved constitutional claim. The two later cases demonstrate that claims which might have equivalent merit may suffer from a procedural bar due to counsel's failure to appreciate the potential success in a timely trial objection and preservation of trial error through the direct appeal.

The net effect of the Court's jurisprudence in this area is to heighten the stakes for criminal defendants who suffer the consequences of mistakes made by even the most conscientious counsel. Because these errors now rest in an environment of virtual non-forgiveness, counsel undertaking representation in criminal matters — particular capital cases in which the death penalty has been imposed — must realize that any error, whether strategic or negligent, may result in forfeiture of an otherwise meritorious claim. This demand for a heightened level of competence and lack of human error can only serve as a major source of disincentive for competent counsel to pursue representation in criminal cases.[130]

III. THE LOSS OF INNOCENCE

Perhaps the most perplexing problem confronting the Court this term involved the issue most fundamental to notions of due process, the conviction of an innocent defendant. In *Herrera v. Collins*,[131] a Texas death penalty case, the precise issue before the Court was whether a claim of actual innocence, essentially standing alone, is cognizable in federal habeas corpus. The Fifth Circuit, considering Herrera's successor petition, ruled that he had defaulted on all grounds asserted except the claim of actual innocence,[132] which was intertwined with a claimed *Brady*[133] violation. The circuit court concluded that the petitioner's factual pleading of the alleged *Brady* violation was wholly insufficient, however, to establish misconduct on the part of the prosecutor.[134]

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130. These pressures discourage career commitment to criminal practice at a time when resources have already strained the ability of defender systems to provide assistance of counsel to the majority of criminal defendants, who are indigent and unable to afford retained counsel. *See, e.g.*, Ruth Marcus, *So Many Defendants, So Little Time: Public Defenders, Impossible Caseloads*, WASH. POST NAT'L WKLY. ED., Mar. 1992, at 33 (documenting stress on individual public defenders in New Orleans resulting in imposition of restriction on defender caseloads by state court holding system of representation unconstitutional).

131. 113 S. Ct. 853 (1993), *aff'g* 954 F.2d 1029 (5th Cir. 1991). The history of this case is lengthy. Petitioner's capital murder conviction and sentence of death was affirmed by the Texas Court of Criminal Appeals in Herrera v. State, 682 S.W.2d 313 (Tex. Crim. App. 1984) (en banc), *cert. denied*, 471 U.S. 1131 (1985). Petitioner was denied state habeas corpus relief by the Texas Court of Criminal Appeals in *Ex parte* Herrera, 819 S.W.2d 528 (Tex. Crim. App. 1991) and subsequently sought federal habeas corpus relief. Denial of his first federal habeas petition was affirmed by the Court of Appeals in Herrera v. Collins, 904 F.2d 944 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 307 (1990). Denial of his second federal habeas petition was affirmed by Herrera v. Collins, 954 F.2d 1029 (5th Cir. 1991).

132. 954 F.2d 1029, 1032.

133. Brady v. Maryland, 373 U.S. 83 (1963) (requiring prosecution to provide defense with exculpatory evidence).

134. Herrera claimed that newspaper clippings and affidavits indicated that the prosecutor who had obtained his conviction and death sentence knew that his brother, Raul, had actually committed the capital murder for which he was convicted. The Fifth Circuit noted that nothing in the affidavits or clippings indicated that the prosecutor had this knowledge prior to petitioner's trial, or that the

Rather, the only claim before the habeas court which could be considered factually significant was the claim of Herrera's actual innocence on the murder charge, a claim the district court found sufficiently compelling to warrant issuance of a stay of execution.[135] The Fifth Circuit, however, found that "Herrera's claim of 'actual innocence' present[ed] no such substantial claim for relief" required to justify a stay of execution[136] pursuant to the Supreme Court's holding in *Delo v. Stokes*.[137] The circuit court found support for its conclusion that a claim of "actual innocence" is not cognizable in federal habeas corpus in *Townsend v. Sain*,[138] where the Supreme Court rejected federal habeas corpus as an appropriate vehicle for asserting a claim of innocence based on newly discovered evidence.[139] The Court concluded that "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."[140] The holding in *Herrera*, following the Court's language in *Townsend v. Sain*, certainly suggested that the Fifth Circuit correctly interpreted the current state of federal habeas law.

The circuit court also observed that, under Texas law, Herrera's claim of "actual innocence" would fail as a basis for state post-conviction relief.[141] In reviewing Texas case law, the Fifth Circuit panel correctly noted the holding in *Ex parte Binder*,[142] which precludes state habeas relief for newly discovered evidence. But as a political matter, the court ignored two other Texas decisions in which claims of "actual innocence" by death row inmates ultimately did result in state post-conviction relief.

In *Ex parte Adams*,[143] the Texas Court of Criminal Appeals ultimately granted relief in a capital case based on evidence of "actual innocence"

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information would not have been known to petitioner at the time of his trial. Raul was deceased at the time the issue was raised, but the affidavits included statements made both by Raul's son and former attorney that Raul had admitted the killing to them. Petitioner also attached an affidavit from Raul's son testifying that Raul, Jr. was present during the murder, that petitioner was not present, and that he had told a police officer this information, only to be told by the officer not to repeat the statement. 954 F.2d at 1032-33.

135. *Id.* at 1033.

136. *Id.*

137. 495 U.S. 320 (1990); *see also supra* note 2.

138. 372 U.S. 293 (1963). The Circuit Court had earlier followed *Townsend v. Sain* in rejecting another Texas inmate's claim of newly discovered evidence of actual innocence. Ellis v. Collins, 788 F. Supp. 317 (S.D. Tex. 1992), *aff'd*, 956 F.2d 76 (5th Cir.), *cert. and stay denied*, 112 S. Ct. 1285 (1992).

139. In *Townsend*, the Court held that the allegation of newly discovered evidence would support a claim for federal habeas relief only if it bore on the "constitutionality of the applicant's detention." 372 U.S. at 317.

140. *Id.*

141. Herrera v. Collins, 954 F.2d at 1034, citing *Ex parte* Binder, 660 S.W.2d 103, 104-06 (Tex. Crim. App. 1983) (en banc). The Fifth Circuit's reference to Texas law is significant because the district court, in granting the stay, had afforded Herrera an opportunity to raise his actual innocence claim in a state post-conviction relief application, thus fulfilling the exhaustion requirement and permitting the state trial court the necessary opportunity to conduct factfinding under TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 1965). Such factfinding would then bind the habeas court. In dissolving the stay, the Fifth Circuit concluded that petitioner Herrera had asserted no claim cognizable under state habeas corpus law.

142. 660 S.W.2d 103 (Tex. Crim. App. 1983) (en banc).

143. 768 S.W.2d 281 (Tex. Crim. App. 1989). Adam's capital murder conviction and sentence of

intertwined with a claim of prosecutorial misconduct in suppression of exculpatory evidence. The case had been the subject of extraordinary national publicity, including an award winning documentary movie, *The Thin Blue Line*.[144] And Clarence Lee Brandley won relief from a capital conviction and death sentence after the CBS national news program *Sixty Minutes* documented the flimsy evidence that had been marshaled to support his conviction.[145] The Texas court ultimately found the suppression of evidence by the prosecutor that another individual had confessed to the crime, and evidence that other witnesses had given perjured testimony, warranted relief in the case.[146]

The *Adams* and *Brandley* cases do not demonstrate that the Texas court would have overruled *Binder* and held that claims of "actual innocence" or "newly discovered evidence" are now proper matters for state habeas corpus. They do suggest, however, a certain sensitivity to the problem of executing innocent defendants. This might well have caused the state courts to treat differently the *Brady* claim which the Fifth Circuit rejected as factually insufficient.

The "actual innocence" issue presented a number of serious problems for a Court that might otherwise have been content to defer to the Fifth Circuit's correct application of *Townsend v. Sain*, not the least of which being that the vitality of that precedent has been questioned by the holding in *Keeney v. Tamayo-Reyes*,[147] albeit on different grounds.[148]

The most significant factor complicating reliance on *Townsend* to affirm the Fifth Circuit's holding lies in the fact that public and judicial support for the death penalty will likely erode in the face of the execution of an individual ultimately proved innocent of the capital crimes.[149]

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death was affirmed by the Texas Court of Criminal Appeals in Adams v. Texas, 577 S.W.2d 717 (Tex. Crim. App. 1979). However, the United States Supreme Court reversed the death sentence in Adams v. Texas, 448 U.S. 38 (1980). Upon reacquiring jurisdiction of the case and after the governor commuted the death sentence to that of life imprisonment, the Court of Criminal Appeals affirmed defendant's conviction and life sentence. Adams v. Texas, 624 S.W.2d 568 (Tex. Crim. App. 1981). Adams was eventually released as a result of state habeas corpus proceedings.

144. The conduct of the Dallas County, Texas District Attorney's Office also drew national attention. *See* Richard L. Fricker, *Crime and Punishment in Dallas*, 75 A.B.A. J. 52 (1989). Adams documented his struggle for freedom in ADAMS V. TEXAS (1991).

145. *Ex parte* Brandley, 781 S.W.2d 886 (Tex. Crim. App. 1989).

146. *Id.* at 888-89 & n.2.

147. 112 S. Ct. 1215 (1992); *see also supra* notes 15, 39-41, and accompanying text.

148. In fact, Justice Scalia's concurrence includes his observation that the Court's holding leaves intact the principle that actual innocence claims are not cognizable in federal habeas corpus, as the Court held in *Townsend v. Sain*, and thus, the reliance on that decision for this proposition by the circuit courts should be considered undisturbed by the majority's hypothetical consideration of a compelling actual innocence claim. *Herrera*, 113 S. Ct. at 875.

149. Of course, documentation of execution of innocent criminal defendants is not a new matter, having been the subject of studies undertaken by opponents of capital punishment. *See, e.g.*, MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1993). What makes *Herrera* such a potentially compelling matter is that the Supreme Court was forced to rule on the issue of actual innocence as a ground for federal habeas review, suggesting not that innocent defendants might be erroneously executed, but that the Court could hold that federal courts have no jurisdiction to even consider colorable actual innocence claims. This decision could prove particularly compelling, particularly given the Court's refusal to consider Roger Coleman's similar last minute plea for judicial relief from a Virginia execution based upon his claim of actual innocence. *See* Coleman

In fact, the Court's ultimate disposition of the actual innocence claim in *Herrera* neither expressly affirms the Fifth Circuit's rigid reliance on a rule of preclusion with respect to such claims, nor clearly affords comfort for those expecting the Court to conclude that actual innocence does present a theory for relief requiring federal habeas review. Chief Justice Rehnquist authored the Court's opinion, joined by Justices O'Connor, Scalia, Kennedy, and Thomas,[150] yet separate concurrences authored by Justices O'Connor[151] and Scalia,[152] and Justice White's separate opinion concurring in the judgment,[153] leave in some doubt the ultimate disposition of the issue presented by the Fifth Circuit's opinion.

Instead of confronting the question of habeas jurisdiction over claims of actual innocence standing alone, the *Herrera* majority simply reviewed the evidence offered in support of the petitioner's actual innocence claim.[154] The majority then concluded that the evidence was insufficient to meet even the threshold level of persuasiveness necessary to demonstrate a constitutional violation in execution of the death sentence imposed after a constitutionally error-free capital trial.[155] The Court noted that the evidence proffered by petitioner included affidavits containing factual inconsistencies generated in the eight years since the trial had concluded.[156]

The first exculpatory affidavit was given by petitioner's nephew, aged nine at the time of the murder, who testified that the nephew's father, rather than petitioner, had actually committed the murder of the police officer. The other affidavit was provided by former counsel for petitioner's deceased brother, who testified that the brother had admitted committing the murder.[157] In response to these belated statements exculpating petitioner Herrera, the majority noted the factual inconsistencies in the two affidavits concerning the precise circumstances under which the killing had occurred and contrasted them with the circumstantial evidence and eyewitness identifications offered at trial. Further, the Court discussed the handwritten

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v. Thompson, 112 S. Ct. 1845 (1992) (denying habeas relief where district court concluded that claim of innocence was not colorable). Coleman's case received extensive publicity, including a nationally televised interview from his cell shortly before his final plea for clemency was rejected.

150. 113 S. Ct. at 853.

151. *Id.* at 870. Justice Kennedy joined this concurrence.

152. *Id.* at 874. Justice Thomas joined this concurrence.

153. *Id.* at 875.

154. *Id.* at 869-70.

155. *Id.* at 870.

156. *Id.* at 869.

157. *Id.* In contrast to the majority's cursory dismissal of the affidavit offered by former counsel for Herrera's brother, identified as the actual killer in the affidavit of his own son, Justice Blackmun observed:

> In one of the affidavits, Hector Villarreal, a licensed attorney and former state court judge, swears under penalty of perjury that his client Raul Herrera confessed that he, and not petitioner, committed the murders. No matter what the majority may think of the inconsistencies in the affidavits or the strength of the evidence presented at trial, this affidavit alone is sufficient to raise factual questions concerning petitioner's innocence that cannot be resolved simply by examining the affidavits and the petition.

113 S. Ct. at 876, 884 (Blackmun, J., dissenting). Justices Stevens and Souter joined in this portion of the dissenting opinion.

note, apparently authored by petitioner, in which he admitted the killings.[158] The majority then concluded its review of the comparative weight of the affidavits and trial evidence: "That proof, even when considered alongside petitioner's belated affidavits, points strongly to petitioner's guilt."[159]

The majority embarked on this weighing of the available evidence after posing a hypothetical circumstance under which a claim of innocence might be sufficiently supported by credible evidence to raise a constitutional violation[160] under the Eighth[161] or Fourteenth Amendments.[162] In deciding the case based upon its rejection of the factual sufficiency of petitioner's proof by affidavits, the majority did not ultimately dispose of the question of federal habeas jurisdiction over actual innocence claims in state death penalty cases. This led to a spirited divergence of opinion among the justices in considering what principle should govern in the event the "extraordinary threshold" of proof is, indeed, met.

Justice O'Connor expressly adopted the position that a factual innocence claim could provide a proper basis for exercise of federal habeas jurisdiction, by opening her concurrence: "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."[163] However, her rationale for joining the majority was stated with equal clarity: "Petitioner is not innocent, in any sense of the word."[164] Her review of the evidence, focusing particularly on the inculpatory letter written by the petitioner and admitted into evidence at his trial, warranted her conclusion that petitioner could not meet any threshold reasonably set for habeas consideration of his actual innocence claim.[165]

Moreover, Justice O'Connor carefully assessed the relief actually ordered by the habeas court in entering its stay of execution. She observed that the district court had not asserted jurisdiction over the claim, but

158. 113 S. Ct. at 870. The text of the handwritten letter is included in the majority opinion. *Id.* at 857, n.1.

159. *Id.* at 869.

160. *Id.* Without deciding that such a circumstance could ever actually be demonstrated by a capital defendant seeking to avoid execution, the majority observed that avoidance of the burden upon the state for retrial would require an extraordinarily high threshold of proof.

161. Herrera relied on the Eighth Amendment prohibition against "cruel and unusual punishment" in arguing that execution of an innocent defendant would establish a federal constitutional claim absent any other procedural violation. 113 S. Ct. at 856-57. In capital cases, reliance on the Eighth Amendment as a source for indirect attack on the circumstances of imposition or execution of the death penalty has been successful, even though capital punishment, per se, does not offend the protections afforded by the amendment. *See* 113 S. Ct. at 876-77 (Blackmun, J., dissenting).

162. 113 S. Ct. at 864 (relying on guarantee of "due process of law"). The reliance on both the Eighth and Fourteenth Amendments as a source of potential relief is not inconsequential. As the concurring opinions of Justices O'Connor and White suggest, any liberalization of federal habeas law to accommodate actual innocence claims might be limited to situations in which the death penalty had been imposed. 113 S. Ct. at 870-71, 876, respectively. Thus, a claim might be cognizable under the Eighth Amendment because the case involved execution of a death sentence, whereas the Court might conclude that no due process violation under the Fourteenth Amendment would be implicated, denying non-capital defendants the option of pursuing actual innocence claims, standing alone, in federal habeas actions.

163. 113 S. Ct. at 870.

164. *Id.*

165. *Id.* at 872 (observing that petitioner's affidavits offered in support of his petition for habeas relief "pale when compared to proof at trial").

instead had merely directed petitioner to seek relief in the state courts.[166] She then concluded that Texas courts would not entertain such claims and that the factual insufficiency of petitioner's claim did not warrant exercise of federal jurisdiction.[167] Thus, while the Fifth Circuit had correctly applied Texas law in holding that newly discovered evidence of innocence is cognizable in the context of a new trial motion,[168] but not as a matter of state habeas corpus,[169] the Court might have held that Texas is required to provide a vehicle for litigation of such claims.[170]

In relying on the Texas procedural bar to newly discovered evidence claims not presented within thirty days of imposition of sentence, however, the Court failed to recognize that Texas has recognized the existence of an "out-of-time motion for new trial"[171] which might have afforded Herrera a vehicle for asserting his claim. Thus, while the majority, O'Connor concurrence, and circuit court all correctly referred to the general preclusion of untimely newly discovered evidence claims under Texas procedural rules, its deference to Texas law may well have been flawed by failure to recognize this alternative means of presenting new claims.

Although Justice O'Connor argued forcefully that even the majority opinion indicates that the Constitution would be offended by the execution of a factually innocent accused, she failed to indicate precisely the level of proof which would trigger federal intervention in the event state procedural rules barred untimely presentation of such claims.[172] The fact

166. *Id.* at 873. The majority opinion did not draw this distinction and instead, merely observed that Texas courts do not recognize claims of newly discovered evidence after the time for filing the motion for new trial. *Id.* at 860.

167. *Id.* at 873. Significantly, Justice O'Connor's opinion touches on one possible disposition that the Court did not take: that the Constitution would require state courts to provide a forum for review of actual innocence claims which would otherwise be barred by procedural rules of limitations. She noted: "Of course, the Texas courts would not be free to turn petitioner away if the Constitution required otherwise. But the District Court did not hold that the Constitution required them to entertain petitioner's claim. On these facts, that would be an extraordinary holding." *Id.*

168. *Id.* at 860, 873 (citing TEX. R. APP. PROC. 31(a)(1), requiring motions for new trial based on newly discovered evidence must be brought within 30 days after imposition or suspension of sentence).

169. Herrera v. Collins, 954 F.2d 1029, 1034 (5th Cir. 1992).

170. The Court could have, therefore, vacated the Fifth Circuit's order itself vacating the stay of execution entered by the habeas court, and permitted the case to be remanded for presentation of petitioner's claim in a state proceeding. If the state court, in fact, granted relief under Texas law, the matter would properly be resolved in state court, proving ultimately that the Fifth Circuit's intervention in the procedure complicated, rather than expedited, resolution of the claim. *But see supra* note 166, noting Justice O'Connor's observation that an order requiring Texas courts to consider the newly discovered evidence of innocence claim would have been "extraordinary."

171. Sambrano v. State, 754 S.W.2d 768 (Tex. Ct. App. 1988) (new trial warranted based on newly discovered evidence where key witness admitted perjury against defendant in subsequent trial while under oath); Jones v. State, 711 S.W.2d 35, 37 n.5 (Tex. Crim. App. 1986) (new trial warranted where newly discovered evidence would corroborate testimony of interested witness with that of disinterested witness); Buitureida v. State, 684 S.W.2d 133, 143-44 (Tex. Ct. App. 1984) (considering "out-of-time motion for new trial based on newly discovered evidence); Whitmore v. State, 570 S.W.2d 889 (Tex. Crim. App. 1976) (new trial required for newly available evidence where co-defendant asserting Fifth Amendment privilege at defendant's trial subsequently became available as a result of acquittal in severed trial).

172. *Herrera*, 113 S. Ct. at 874.

that the majority merely dealt with this proposition hypothetically,[173] moreover, demonstrates the lack of consensus on this precise point, despite Justice O'Connor's assurances that the Court's opinion does not mean that federal habeas jurisdiction could never be properly invoked to entertain an actual innocence claim standing alone.

Justice White's concurrence in the judgment[174] suffers less from what he failed to say than from what he did say. He rejected the factual sufficiency of Herrera's claim, concluding that in order to be entitled to relief he "would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [have found] proof of guilt beyond a reasonable doubt,'"[175] relying on *Jackson v. Virginia*[176] for this standard.

What is unclear, however, is whether Justice White's formulation is intended to provide a standard for review for district courts considering actual innocence claims, or whether the standard really expresses a threshold for assertion of jurisdiction by a federal habeas court. The difference is critical, of course, with respect to the right of the accused to petition for habeas review.

The difficulty with Justice White's standard is that it imposes an almost internally inconsistent test in gauging the sufficiency of the proffered evidence. *Jackson* held that the constitutional standard for sufficiency permits the reviewing court to view all facts in the light most favorable to the verdict, resolving conflicting testimony in favor of conviction.[177] If the trial record discloses sufficient evidence to establish all elements of the offense beyond a reasonable doubt, the conviction should be sustained if the reviewing court faithfully follows the *Jackson* principle. Consequently, in pressing for application of this standard, which requires deference to jury determinations in the resolution of conflicts in the evidence,[178] Justice White effectively advocates an exception to the core value of *Jackson* in requiring the reviewing court to assess whether any rational jury would have convicted if the newly discovered evidence had been available.

"Newly discovered" evidence of innocence necessarily suggests that the conviction has been supported by sufficient evidence and, thus, discovery of controverting evidence would never rise to a level sufficient to require reversal under *Jackson* because the trier of fact would have been

173. *Id.* at 869 (the majority discussed this issue "for the sake of argument" only).

174. *Id.* at 875 (White, J., concurring).

175. *Id.*

176. 443 U.S. 307, 324 (1979).

177. *Id.* at 318-19.

178. Of course, state appellate courts may engage in re-weighing evidence and reverse based upon the weight, rather than the sufficiency, of the evidence adduced at trial. Where reversal rests on a weighing determination by the appellate court, however, retrial is not precluded by the Double Jeopardy Clause. Tibbs v. Florida, 457 U.S. 31 (1982); Hudson v. Louisiana, 450 U.S. 40 (1981) (trial court's grant of new trial based on evidentiary insufficiency bars retrial, whereas new trial based on weighing of evidence does not).

positioned to reject that evidence anyway.[179] The only reasonable explanation for Justice White's analysis is that the newly discovered evidence must be such that it could not have been ignored by the trier of fact and would have necessarily compelled a different result, meaning that a "rational trier of fact" could not have convicted in light of the total record ultimately developed.

Even the majority recognized that evidence contained in Herrera's supporting affidavits could have created evidentiary conflicts requiring the jury to resolve them based upon assessments of credibility.[180] Yet under Justice White's approach, newly discovered evidence would not afford a basis for relief in any circumstance in which credibility assessment might have affected the outcome, based on his reference to the *Jackson* standard.

Essentially, Justice White's approach, while recognizing as constitutionally impermissible the execution of an innocent accused, would restrict habeas intervention to those actual innocence claims which rest on exculpatory evidence which could not have been reconciled with conviction. The most likely circumstances in which relief would be available would appear to involve discovery of a corroborated confession of the actual killer not implicating the defendant as an accomplice; proof that critical state's evidence was fabricated or the result of perjury;[181] or discovery of physical evidence exculpating the accused conclusively, such as newly available DNA testing ruling out the accused as the assailant.[182]

The majority opinion, as well as the concurrences authored by Justices O'Connor and White, rests on the willingness of appellate judges to engage in weighing of the evidence developed at trial and contained in the trial record and the newly discovered evidence, a process typically reserved for the trier of fact. Of course, no procedure could fairly and efficiently remand the cause for reconsideration of the trial evidence and assessment of the newly discovered evidence by the trial jury which convicted and imposed sentence. But that determination could properly have been made by the trial judge, who is vested with authority to make precisely such determinations on newly discovered evidence brought forward in a timely motion for new trial under Texas law.[183] This is precisely the process which the district court's order staying Herrera's execution would have permitted

179. The Court had held in *Jackson*: "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

180. *Herrera*, 113 S. Ct. at 870.

181. *See, e.g.*, Miller v. Pate, 386 U.S. 1 (1967) (knowing use of false evidence requires relief).

182. *See, e.g.*, United States v. Two Bulls, 918 F.2d 56 (8th Cir. 1990) (discussing standards for admissibility of DNA testing results against the accused); Ralph Spory, Note, *DNA Profiling Held Admissible Under the Relevancy Standard:* Prater v. State, 15 U. ARK. LITTLE ROCK L.J. 71 (1992). Exculpatory DNA test results would clearly be available to the defense as part of the disclosure obligation placed upon the prosecution by the Court in Brady v. Maryland, 373 U.S. 83 (1963) and in a jurisdiction accepting DNA test results as admissible in criminal trials, would afford the accused significant factual support for an actual innocence claim.

183. TEX. R. APP. PROC. 31(d) provides that a motion for new trial, including one asserting newly discovered evidence under Rule 30(b)(6), shall be heard and determined by the trial court.

had the state trial court agreed to consider the newly discovered evidence by granting leave to file an out-of-time motion for a new trial.[184]

Further, the position suggested by the majority in analyzing the hypothetical compelling actual innocence claims and expressly adopted by Justices O'Connor and White, that execution of an innocent accused would offend the Constitution, recognizes vaguely the existence of a right requiring remedy without setting forth articulable standards as to the showing of exculpatory proof necessary to justify federal habeas jurisdiction. The justices hint that at some point intervention by a federal habeas court would be appropriate — particularly if a clemency plea made to the governor had failed — but the fear that federal courts will be "deluged with frivolous claims of actual innocence"[185] apparently precluded elaboration of a threshold standard of proof required that would afford guidance to defense counsel or district courts in understanding the parameters of habeas jurisdiction in these circumstances.

In contrast to Justice O'Connor's position, Justice Scalia answered the question posed concerning habeas jurisdiction of actual innocence claims directly.[186] He concluded that the Constitution simply does not provide for review of such claims based on newly discovered evidence, not in "text, tradition, or even in contemporary practice."[187] He also observed that the "embarrassing question" would likely not again be presented to the Court, since the quantum of evidence necessary to trigger habeas jurisdiction, assuming the hypothetical circumstances discussed by the majority, would result in a grant of executive clemency.[188]

Certainly, the majority and concurring opinions rely on executive clemency as the alternative to judicial remedy to vindicate the claim of actual innocence sufficiently factually supported to justify relief.[189] In dissenting, Justice Blackmun, joined by Justices Stevens and Souter, countered that clemency is simply insufficient to preserve the constitutional interest in avoiding conviction and execution of an innocent defendant, arguing that the power of pardon is dependent upon "grace" rather than right.[190]

The Court's disposition in *Herrera* is troubling for any number of reasons. First, the opinions rejecting relief skirt the issue of the level of proof which would justify federal intervention. Second, the willingness of the justices to themselves rule on the credibility of the affidavits[191] offered

184. *See* cases cited, *supra* note 170.

185. *Herrera*, 113 S. Ct. at 874 (O'Connor, J., concurring).

186. *Id.* at 874-75 (Scalia, J., concurring).

187. *Id.* at 874. Further, Justice Scalia explained that he joined fully in the majority opinion precisely "because there is no legal error in deciding a case by assuming *arguendo* that an asserted constitutional right exists." *Id.* at 875.

188. *Id.* at 875.

189. *Id.* at 868 (The majority referred to executive clemency as the "fail safe" in the criminal justice system.); *Id.* at 874 (Justice O'Connor notes the "safeguards of clemency and pardon."); *Id.* at 875 (Justice Scalia looks to "executive pardon" to avoid re-litigation of the issue.).

190. *Id.* at 881.

191. This tendency to supplant the fact-finder's function is not limited to *Herrera*, however. For instance, in dissenting from the *per curiam* reversal ordered in *Dobbs v. Zant*, Justice Scalia, joined

in support of the habeas petition demonstrates the likely difficulty in convincing any lower court of the need to actually hold an evidentiary hearing to consider the credibility of the affiants.[192] Third, in deferring to the power of executive clemency, the majority avoids implementation of its general support for the proposition that the Constitution precludes execution of an innocent defendant by relying on the politically flimsy prospects for executive intervention in the most inflammatory criminal prosecutions.

Moreover, the Court's treatment of Herrera's theoretical bases for relief is equally troubling in light of two distinct trends in constitutional jurisprudence. First, as Justice Blackmun noted in dissent, the issue of actual innocence has already been intertwined with federal habeas jurisdiction over the past several terms.[193] For example, in both *McCleskey v. Zant*[194] and *Sawyer v. Whitley*[195] the Court held that a colorable allegation of actual innocence would excuse the bar of writ abuse and justify consideration of a successive petition on its merits. *McCleskey* involved application of this exception in the context of a claim of pure factual innocence,[196] while the Court in *Sawyer* applied a similar standard in the context of a capital case where the evidence of actual innocence bears on the suitability of the punishment imposed.[197] The exception to application of the bar of abuse of the writ[198] based on a showing of actual innocence — the necessary showing to meet the standard of "fundamental miscarriage of justice"[199] — effectively recognizes the significance of a claim of innocence within the federal system of protected rights.

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by Justice Thomas, argued against remand for consideration of likelihood that error resulted from the lower court's refusal to consider newly available portions of the trial record not previously included in the record on appeal due to the prosecution's representation that this portion of the transcript was unavailable. 113 S. Ct. 835, 836 (1993) (Scalia, J., dissenting). Justice Scalia stressed, based upon his review of the newly available portion of the transcript: "There is absolutely zero likelihood that counsel's misrecollection (or misconstruction) that he had made an 'impulsiveness' argument to the jury made the difference in the 1986 finding that his assistance was not ineffective." *Id.* at 837.

192. Justice Blackmun observed in his dissent that the district court might need to hold an evidentiary hearing to consider the credibility of affiants presenting newly discovered, exculpatory evidence, but that this would not require re-litigation of the entire trial. *Herrera*, 113 S. Ct. at 883.

193. *Id.* at 880-81 (Section II of the Blackmun dissent details recent reliance on actual innocence to excuse procedural default and abuse of writ claims in federal habeas actions.). *See generally* Part II of this article, *supra*, discussing the evolving habeas jurisdiction on the issue of procedural default.

194. 111 S. Ct. 1454 (1991). Avoidance of the bar imposed on a showing that the petitioner had abused the writ may be predicated on satisfaction of the "cause and prejudice" standard now generally imposed in habeas litigation. *Id.* at 1470-71. "Cause" for failure to raise claims in a timely fashion may be demonstrated by showing that the state or its agents acted to deprive the petitioner of a fair opportunity to litigate his claim, or when entitled to effective assistance of counsel, that the petitioner was deprived of effective representation under the Sixth Amendment.

195. 112 S. Ct. 2514 (1992).

196. 111 S. Ct. at 1470 ("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.").

197. 112 S. Ct. at 2520 ("The phrase 'innocent of death' is not a natural usage of those words, but we must strive to construct an analog to the simpler situation represented by the case of a non capital defendant.").

198. *See* Sanders v. United States, 373 U.S. 1, 10-11 (1963) (once government pleads abuse of the writ upon filing of successor habeas petition, burden shifts to petitioner to show that he has not abused the writ in seeking relief).

199. *McCleskey*, 111 S. Ct. at 1470. The Court observed that a "narrow class of cases" will

To reject actual innocence itself as a basis for relief while recognizing it as the source of the exception to the bar of abuse of the writ would effectively suggest that form, rather than substance, is of paramount importance in habeas litigation.[200] Of course, this is not an accurate view, since the innocence of the accused would serve only to support a higher degree of demonstrable prejudice for relief in the instance of a successor petition than that applicable when a claim of federal constitutional violation is addressed on direct appeal or in an initial application for federal habeas relief. Effectively, the "actual innocence" exception to application of the abuse of the writ bar serves to elevate the degree of harmfulness which must be demonstrated in order for reversal or vacation of the conviction to be warranted. Nevertheless, the superficial impression would almost necessarily be difficult to rebut: that claims of innocence are less meritorious in the eyes of the Court than claims of "technical" violations of the rights of an accused.

Second, it is not altogether clear that *Townsend* should have been relied on as a general bar to preclude review of claims of innocence standing alone[201] in light of the Court's traditional concern for innocence as a problem of due process. For example, the imposition of a constitutionally mandated standard of proof in criminal actions in *In re Winship*[202] and *Jackson v. Virginia*;[203] the application of the double jeopardy bar in cases of reversal based upon insufficient evidence which require acquittal in *Greene v. Massey*[204] and in certain death penalty cases to jury-imposed life sentences, *Bullington v. Missouri*;[205] and the concern over improper shifting of the burden of proof or relaxation of the prosecution's burden in *Sandstrom v. Montana*[206] and *Mullaney v. Wilbur*[207] all serve to suggest the fundamental importance of wrongful conviction of the innocent as an element of concern in the Court's interpretation of the guarantees of the Fifth, Sixth, Eighth and Fourteenth Amendments.

However, the Court's decision in *United States v. Williams*,[208] suggests the limits of the current Court's interest in innocence as an independent

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support habeas review despite procedural default, namely, "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." This situation qualifies for the "fundamental miscarriage of justice" exception earlier noted in Murray v. Carrier, 477 U.S. 478, 495 (1986).

200. In discussing the role of actual innocence as a basis for avoiding procedural bar and abuse of writ defenses, Chief Justice Rehnquist noted for the majority: "This is not to say that our habeas jurisprudence casts a blind eye towards innocence." *Herrera*, 113 S. Ct. at 862.

201. *Herrera*, 113 S. Ct. at 860 ("This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.").

202. 397 U.S. 358 (1970).

203. 443 U.S. 307 (1979). The *Herrera* majority observed that *Jackson* "comes as close to authorizing evidentiary review of a state court conviction on federal habeas as any of our cases." *Herrera*, 113 S. Ct. at 861.

204. 437 U.S. 19 (1978).

205. 451 U.S. 430 (1981).

206. 442 U.S. 510 (1979).

207. 421 U.S. 684 (1975).

208. 112 S. Ct. 1735, 1740 n.4 (1992).

proposition for federal review. The Court in *Williams* rejected a Tenth Circuit rule resting on case law which permitted dismissal of an indictment returned by a grand jury who had not been presented with exculpatory evidence in the government's possession.[209] The Court couched its reversal of the Tenth Circuit position on a distinction drawn between the authority of courts to fashion supervisory rules over conduct of litigation and the traditional autonomy of the grand jury in holding that imposition of a supervisory rule over action before the grand jury was not proper. Thus, the question of the accused's innocence was effectively subordinated to the Court's concern for an orderly, non-activist posture on the part of the judiciary.

Finally, the Court's treatment of *Herrera* is particularly distressful for capital defense counsel because of its reluctance to stay the execution in order to permit full litigation of the case. Although four justices voted to grant *certiorari* in the case,[210] no order for stay of execution of Herrera's death sentence was entered.[211] The fact that a capital case might both merit review but not warrant a stay of execution is not unique in the Court's death penalty habeas corpus history.[212] For instance, in *Hamilton v. Texas*[213] four members of the Court voted to grant review in a capital case, but the capital defendant was executed before the case could be heard due to the lack of a fifth vote to stay the inmate's execution. Justices Marshall[214] and Stevens,[215] joined by Justice Blackmun in each instance, filed special concurring opinions to the ultimate denial of the *certiorari* application after the inmate's execution, criticizing the Court's disposition of the case.[216]

The absence of a fifth vote to stay the execution in *Herrera* suggests nothing less than the willingness of the Court to elevate deference to the state's interest in execution above full litigation of the federal claim.[217]

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209. *Id.* at 1741-42.

210. 112 S. Ct. 1074 (1992) (No. A-604).

211. Herrera v. Texas, 112 S. Ct. 1074 (1992) (No. 91-7146). *See* Herrera v. Collins, 112 S. Ct. 1074 (1992) (No. A-604), denying application for stay of execution presented to Justice Scalia and then referred by him to the Court. Justices Blackmun, Stevens, O'Connor and Souter indicated that they would grant the application for the stay. *Id.* In fact, in Cause No. 91-7328, the *cert* petition was granted with the notation: "The order of this date denying the application for stay of execution of sentence is to remain in effect." 112 S. Ct. 1074 (1992) (No. 91-7328).

212. *See* Barefoot v. Estelle, 463 U.S. 880, 912-16 (1983) (Marshall, J., dissenting and criticizing the Court's endorsement of expedited procedures for disposing of habeas claims in capital cases).

213. 497 U.S. 1016, 1017-20 (1990) (Brennan, J., dissenting from denial of application for stay).

214. 111 S. Ct. 281 (1990).

215. *Id.* at 282.

216. *See Id.* at 282 (Marshall, J., documenting the change in Court policy from customarily providing fifth vote for stay where "Rule of Four" results in grant of review, quoting Brennan, J., dissenting from denial of stay in Straight v. Wainwright, 476 U.S. 1132, 1134-35 (1986), to ensure disposition prior to execution).

217. Herrera's execution was ultimately stayed by the Texas Court of Criminal Appeals with a majority of that court noting the perverse consequence of the failure of the Supreme Court to stay a petitioner's execution after agreeing to hear the case. *Ex parte* Herrera, 828 S.W.2d 8, 9 (Tex. Crim. App. 1992). The majority suggested that a "rule of five" would prevent the situation from reoccurring. *Id.*

This lack of stay is particularly troubling in light of the fact that a majority of the Court ultimately would have concluded that had Herrera met the threshold evidentiary requirement for federal relief, he would have been entitled to that relief.[218]

Finally, the court's disposition leaves intact the apparent prerogative of the states to preclude effective judicial remedies for newly discovered evidence establishing the innocence of the accused by imposing jurisdictional periods of limitation for presentation of such claims.[219] The majority opinion discusses at length the remedy afforded by many jurisdictions in providing for the filing of motions for new trial, including those asserting newly discovered evidence.[220] Nevertheless, the majority refused to hold "that Texas' refusal to entertain petitioner's newly discovered evidence eight years after his conviction transgresses a principle of fundamental fairness 'rooted in the traditions and conscience of our people.'"[221] Instead, the majority simply turned to the alternative remedy of executive clemency to afford relief for Herrera's claim.

Thus, the Court not only failed to expressly hold that federal habeas jurisdiction lies to consider factually sufficient claims of actual innocence, it failed to impose upon the states any constitutional duty to provide a forum for the litigation of these claims. The net result of the majority's failure to confront the actual innocence issue directly will eventually be to facilitate, rather than retard, the execution of a factually innocent capital defendant.[222] For proponents of capital punishment, the long term effect of failing to maintain standards for ultimate reliability in the judgement and sentencing decisions may well be reversal of public sentiment supporting the death penalty. For opponents and capital defense counsel *Herrera* represents yet another failed vehicle for assuring that public and prosecutorial support for the death penalty will not result in an erroneous exercise of that power.

CONCLUSION

Proponents of "reform" of federal habeas corpus have succeeded, primarily within the Supreme Court, in streamlining the federal remedy at the expense of access to federal district courts for state inmates. Significantly, much of the streamlining has occurred through implementation of

218. Justices Blackmun, Stevens and Souter dissented. Justices White and O'Connor concurred, with Justice Kennedy joining the latter concurrence. Upon a proper evidentiary showing, these six justices indicated their intent to find that a claim of actual innocence is cognizable in federal habeas corpus to prevent the execution of an innocent state defendant.

219. 113 S. Ct. at 865-66 nn.8-11 (noting that only nine states do not impose time limits on assertion of newly discovered evidence based motions for new trial, with other jurisdictions imposing time limits ranging from 60 days to three years).

220. *Id.* at 864-65. Chief Justice Rehnquist observed in opening his discussion of the new trial remedy that the "Constitution itself, of course, makes no mention of new trials." *Id.* at 864.

221. *Id.* at 866 (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

222. In fact, Justice Blackmun noted recent studies concluding that innocent capital defendants have already been executed. 113 S. Ct. at 876 n.1 (citing Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 36, 173-79 (1987) and MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE, 282-356 (1993)).

facially reasonable limitations on litigation, such as the requirement that inmates present exhausted federal claims in a single petition seeking relief from state convictions.

However, the policy of strict deference to state application of rules of procedural default, reflected in the Court's decisions in *Murray v. Carrier*[223] and *Coleman v. Thompson*,[224] clearly means that many colorable claims of federal constitutional rights violations will never be heard on their merits by either state or federal courts due to inadequacies in the performance of counsel. Further, state courts which have declined to bar claims procedurally in the past are now advised most clearly that the application of default principles will end litigation quickly and without federal intervention in the state court judgment, a realization which can only serve to discourage consideration of claims of even egregious improprieties.

Moreover, the Court's decisions which have limited the federal right to counsel through trial and direct appeal, even in capital cases in which the death penalty has been imposed, create serious problems for those state inmates who must negotiate the maze of harmless error and procedural default without guarantee of effective assistance of counsel.

The 1992 term of the Court includes significant potential threats to the continuing vitality of federal habeas corpus. Already, the Court has limited the discretion of federal appellate courts to address issues of importance on the merits,[225] and further limitation on the power of the federal judiciary to correct errors of constitutional magnitude made by state trial courts in criminal prosecutions[226] threatens the balance between enforcement of these rights by state and federal courts which the Court purportedly sought to implement with its decision in *Michigan v. Long*.

Instead, the Court's brinkmanship in habeas litigation, particularly exemplified by the denial of a stay of execution sought in *Herrera v. Texas*, demonstrates a "reform" movement within the Court which compromises enforcement of federal rights in state criminal trials and focuses on technical procedural flaws in lieu of addressing essential questions of innocence and substantial violations of federally protected basic rights. The ultimate costs to innocent and aggrieved litigants, counsel litigating in good faith, and the reliability and fairness of the criminal justice system cannot be ignored without subjecting the administration of justice to long

223. 477 U.S. 478 (1986).

224. 111 S. Ct. 2546 (1991).

225. *See* Gomez v. United States Dist. Court, 112 S. Ct. 1652, 1653 (1992) (dissolving stay of execution granted to consider state death row inmate's claim that California method of execution, gas chamber, constitutes cruel and unusual punishment, on grounds that untimely assertion of claim in fifth federal habeas petition constituted abuse of writ); Vasquez v. Harris, 112 S. Ct. 1713, 1714 (1992) ("No further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court.").

226. *See, e.g.*, Griffin v. Delo, 961 F.2d 793 (8th Cir.), *cert. denied*, 113 S. Ct. 296 (1992) (Eighth Circuit Court of Appeals remanded case for consideration of merits of constitutional claims not represented in state and federal habeas proceedings due to counsel's apparent failure to recognize claims in state death penalty case).

term loss of confidence within the bar, the public, the prisons[227] — of course — and state and federal trial and appellate courts.

227. The U.S. prison population constitutes a significant under-represented client base with thirty nine state prisons and the D.C. prison system now operating pursuant to federal court orders or consent decrees, in part as a result of substantial overcrowding. *See* Sharon LaFraniere, *Seeing No Evil, Fearing No Evil: And yet, in overcrowded prisons, much evil is done,* WASH. POST NAT'L WKLY. ED. March 9-15, 1992, at 31.