Supplementary Material

Chapter 10: The Reagan Era—Criminal Justice/Due Process and Habeas Corpus/Habeas Corpus

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McCleskey v. Zant II, 499 U.S. 467 (1991)

Warren McCleskey was arrested in 1978 and charged with murdering an off-duty police officer during an armed robbery of a furniture store. At his trial, Offie Evans, a fellow prisoner, testified that McCleskey bragged about committing the murder. The jury convicted McCleskey and sentenced him to death. That decision was affirmed by the Supreme Court of Georgia. In 1981, McCleskey filed a habeas corpus petition claiming that he had been unconstitutionally sentenced to death. All his claims were eventually rejected, including his claim that Georgia's capital sentencing procedure discriminated against persons of color (see McCleskey v. Kemp *[1987]). In 1987, McCleskey filed a second habeas corpus petition. That petition claimed that the state effort to induce his confession to Evans violated McCleskey's Sixth and Fourteenth Amendment rights. Georgia officials denied the allegation and contended that McCleskey had abused the writ of habeas corpus by not including this claim in his 1981 habeas corpus petition. The district court agreed with McCleskey and overturned the death sentence. The Court of Appeals for the Eleventh Circuit reversed that decision on the ground that McCleskey had abused the writ of habeas corpus. McCleskey appealed to the Supreme Court of the United States.*

The Supreme Court by a 6–3 vote ruled that McCleskey had abused the writ of habeas corpus. Justice Kennedy's majority opinion held that the standards for abusing the writ were the same as the court had announced for procedural default in Wainwright v. Sykes *(1977): cause and prejudice. McCleskey had no cause, Kennedy claimed, because his counsel was aware of the possible Sixth Amendment violation when the first habeas petition was filed. What justification did Kennedy give for the cause and prejudice standard? Why did Justice Marshall disagree? Who has the better of the argument? Based on your reading of the facts, should McCleskey have been allowed to have his second habeas corpus petition adjudicated on the merits?*

JUSTICE KENNEDY delivered the opinion of the Court.

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The parties agree that the government has the burden of pleading abuse of the writ, and that once the government makes a proper submission, the petitioner must show that he has not abused the writ in seeking habeas relief. . . .

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At common law, res judicata did not attach to a court's denial of habeas relief. "[A] refusal to discharge on one writ [was] not a bar to the issuance of a new writ." . . .

As appellate review became available from a decision in habeas refusing to discharge the prisoner, courts began to question the continuing validity of the common-law rule allowing endless successive petitions. . . .

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[T]he doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions. . . .

. . . Abuse of the writ is not confined to instances of deliberate abandonment. Sanders mentioned deliberate abandonment as but one example of conduct that disentitled a petitioner to relief. . . .

. . . [A] petitioner may abuse the writ by failing to raise a claim through inexcusable neglect. Our recent decisions confirm that a petitioner can abuse the writ by raising a claim in a subsequent petition

that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice. . . .

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The doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review. To begin with, the writ strikes at finality. One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. "Without finality, the criminal law is deprived of much of its deterrent effect." And when a habeas petitioner succeeds in obtaining a new trial, the "'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time," prejudice the government and diminish the chances of a reliable criminal adjudication.

Finality has special importance in the context of a federal attack on a state conviction. Reexamination of state convictions on federal habeas "frustrate[s] . . . 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" 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.

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Far more severe are the disruptions when a claim is presented for the first time in a second or subsequent federal habeas petition. If "[c]ollateral review of a conviction extends the ordeal of trial for both society and the accused," the ordeal worsens during subsequent collateral proceedings. Perpetual disrespect for the finality of convictions disparages the entire criminal justice system.

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We conclude from the unity of structure and purpose in the jurisprudence of state procedural defaults and abuse of the writ that the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts. We have held that a procedural default will be excused upon a showing of cause and prejudice. *Wainwright v. Sykes* (1977). We now hold that the same standard applies to determine if there has been an abuse of the writ through inexcusable neglect.

In procedural default cases, the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. Objective factors that constitute cause include "'interference by officials'" that makes compliance with the State's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." In addition, constitutionally "[i]neffective assistance of counsel . . . is cause." Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default. Once the petitioner has established cause, he must show "'actual prejudice' resulting from the errors of which he complains."

Federal courts retain the authority to issue the writ of habeas corpus in a further, narrow class of cases despite a petitioner's failure to show cause for a procedural default. These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime.

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

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. . . The requirement of cause in the abuse-of-the-writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition. If what petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim.

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The 21-page document unavailable to McCleskey at the time of the first petition does not establish that McCleskey had cause for failing to raise the *Massiah v. United States* (1974) claim at the outset. Based on testimony and questioning at trial, McCleskey knew that he had confessed the murder during jail-cell conversations with Evans, knew that Evans claimed to be a relative of Ben Wright during the conversations, and knew that Evans told the police about the conversations. Knowledge of these facts alone would put McCleskey on notice to pursue the *Massiah* claim in his first federal habeas petition as he had done in the first state habeas petition.

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We do address whether the Court should nonetheless exercise its equitable discretion to correct a miscarriage of justice. That narrow exception is of no avail to McCleskey. The *Massiah* violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination. The very statement McCleskey now seeks to embrace confirms his guilt. . . .

JUSTICE MARSHALL, with whom with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

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What emerges from [past precedent] is essentially a good-faith standard. [T]he principal form of bad faith that the "abuse of the writ" doctrine is intended to deter is the deliberate abandonment of a claim the factual and legal basis of which are known to the petitioner (or his counsel) when he files his first petition. . . . [S]o long as the petitioner's previous application was based on a good-faith assessment of the claims available to him, the denial of the application does not bar the petitioner from availing himself of "new or additional information" in support of a claim not previously raised.

. . . Equally foreign to our abuse-of-the-writ jurisprudence is the requirement that a petitioner show "prejudice." . . . If the petitioner demonstrates that his claim has merit, it is the State that must show that the resulting constitutional error was harmless beyond a reasonable doubt.

. . . Incorporation of the cause-and-prejudice test into the abuse-of-the-writ doctrine cannot be justified as an exercise of this Court's common-lawmaking discretion, because this Court has no discretion to exercise in this area. Congress has affirmatively ratified the . . . good-faith standard in the governing statute and procedural rules, thereby insulating that standard from judicial repeal.

The abuse-of-the-writ doctrine is embodied in 28 U.S.C. § 2244(b) and in Habeas Corpus Rule 9(b). . . .

> [A] subsequent application for a writ of habeas corpus . . . need not be entertained by a court . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court . . . is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

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To give content to "otherwise abus[e] the writ" as used in § 2244(b), we must look to [*Sanders v. United States* (1963)]. [T]he Court in *Sanders* identified two broad classes of bad-faith conduct that bar adjudication of a claim not raised in a previous habeas application: the deliberate abandonment or withholding of that claim from the first petition; and the filing of a petition aimed at some purpose other than expeditious relief from unlawful confinement, such as "to vex, harass, or delay." . . . [C]onsistent

with Congress' intent to codify Sanders' good-faith test, such elaborations must be confined to circumstances in which a petitioner's omission of an unknown claim is conjoined with his intentional filing of a petition for an improper purpose, such as "to vex, harass or delay."

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The majority premises adoption of the cause-and-prejudice test almost entirely on the importance of "finality." At best, this is an insufficiently developed justification for cause-and-prejudice or any other possible conception of the abuse-of-the-writ doctrine. For the very essence of the Great Writ is our criminal justice system's commitment to suspending "[c]onventional notions of finality of litigation . . . where life or liberty is at stake and infringement of constitutional rights is alleged." . . .

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Because the abuse-of-the-writ doctrine presupposes that the petitioner has effectively raised his claim in state proceedings, a decision by the habeas court to entertain the claim notwithstanding its omission from an earlier habeas petition will neither breed disrespect for state-procedural rules nor unfairly subject state courts to federal collateral review in the absence of a state-court disposition of a federal claim.

. . . A habeas petitioner's own interest in liberty furnishes a powerful incentive to assert in his first petition all claims that the petitioner (or his counsel) believes have a reasonable prospect for success. . . . At the same time, however, the petitioner faces an effective disincentive to asserting any claim that he believes does not have a reasonable prospect for success: the adverse adjudication of such a claim will bar its reassertion under the successive-petition doctrine, whereas omission of the claim will not prevent the petitioner from asserting the claim for the first time in a later petition should the discovery of new evidence or the advent of intervening changes in law invest the claim with merit

The cause-and-prejudice test destroys this balance. By design, the cause-and-prejudice standard creates a near-irrebuttable presumption that omitted claims are permanently barred. This outcome not only conflicts with Congress' intent that a petitioner be free to avail himself of newly discovered evidence or intervening changes in law, but also subverts the statutory disincentive to the assertion of frivolous claims. Rather than face the cause-and-prejudice bar, a petitioner will assert all conceivable claims, whether or not these claims reasonably appear to have merit. The possibility that these claims will be adversely adjudicated and thereafter be barred from relitigation under the successive-petition doctrine will not effectively discourage the petitioner from asserting them, for the petitioner will have virtually no expectation that any withheld claim could be revived should his assessment of its merit later prove mistaken. . . .

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Undaunted by the difficulty of applying its new rule without the benefit of any lower court's preliminary consideration, the majority forges ahead to perform its own independent review of the record. . . .

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[I]t is necessary to recall the District Court's central finding: that the State did covertly plant Evans in an adjoining cell for the purpose of eliciting incriminating statements that could be used against McCleskey at trial. Once this finding is credited, it follows that the State affirmatively misled McCleskey and his counsel throughout their unsuccessful pursuit of the *Massiah* claim in state collateral proceedings and their investigation of that claim in preparing for McCleskey's first federal habeas proceeding. McCleskey's counsel deposed or interviewed the assistant district attorney, various jailers, and other government officials responsible for Evans' confinement, all of whom denied any knowledge of an agreement between Evans and the State.

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The majority's analysis of this case is dangerous precisely because it treats as irrelevant the effect that the State's disinformation strategy had on counsel's assessment of the reasonableness of pursuing the *Massiah* claim. For the majority, all that matters is that no external obstacle barred McCleskey from finding Worthy [a witness who might have testified favorably to McCleskey]. But obviously, counsel's decision even to look for evidence in support of a particular claim has to be informed by what counsel reasonably perceives to be the prospect that the claim may have merit; in this case, by withholding the 21-

page statement and by affirmatively misleading counsel as to the State's involvement with Evans, state officials created a climate in which McCleskey's first habeas counsel was perfectly justified in focusing his attentions elsewhere. . . .

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Thus, as I read the record, McCleskey should be entitled to the consideration of his petition for habeas corpus even under the cause-and-prejudice test. The case is certainly close enough to warrant a remand so that the issues can be fully and fairly briefed.