HABEAS CORPUS—ABUSE OF THE WRIT—PETITIONER RAISING CLAIM IN SECOND OR SUBSEQUENT FEDERAL HABEAS CORPUS PETITION NOT ADVANCED IN PRIOR PETITION MUST SHOW CAUSE FOR FAILING TO BRING CLAIM PREVIOUSLY AND PREJUDICE THEREFROM—*McCleskey v. Zant*, 111 S. Ct. 1454 (1991).

Any person who claims to be held in custody by a state government in violation of the Constitution, laws or treaties of the United States may file an independent civil lawsuit in federal court seeking a writ of habeas corpus[1] contesting the validity of his detention.[2] There are a number of procedural requirements, however, that must be fulfilled by any prisoner seeking habeas relief.[3] One of the most basic of these obliges a petitioner to include all possibly meritorious federal constitutional claims of which he or she is aware in the first habeas corpus petition.[4] If a petitioner attempts in his second petition to raise claims that were either already adjudicated or not alleged in his first petition,[5] the judge may, in certain circumstances, dismiss the appli-

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[1] YALE KAMISAR ET. AL., MODERN CRIMINAL PROCEDURE 1546 (7th ed. 1990). The writ of habeas corpus is a judicial order that directs the person holding the petitioner to allow the court to consider the legality of the petitioner's conviction. *Id. See generally* Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985); Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748 (1987). Because the writ provides individuals with protection against wrongful and arbitrary imprisonment, it is natural that habeas has long been considered "the 'great writ of liberty.'" *Id.* at 749 (quoting WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 3 (1980)).

[2] Prisoners held in state custody can seek federal court relief pursuant to 28 U.S.C. section 2254. *Id.* at 1578. In referring to "the writ of habeas corpus" or to "the writ," this Note refers only to section 2254 proceedings. Section 2254(a) states:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (1988).

[3] *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.3 (1989 & Supp. I 1990). Procedural requirements mandate that the petitioner: (1) be held in custody in violation of federal law; (2) sign an application in writing and file it with any federal court; and (3) exhaust all state remedies before filing. See §§ 28 U.S.C. 2254, 2241, 2242 & 2254(b).

[4] 1 JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 9.5, at 129-30 (1988).

[5] *See* Steven M. Goldstein, *Application of Res Judicata Principles to Successive Federal Habeas Corpus Petitions in Capital Cases: The Search for an Equitable Approach*, 21 U.C. DAVIS L. REV. 45 (1987). The failure to assert a new ground in a second or subsequent petition amounts to an attempt to file successive petitions, or, what some

cation as an abuse of the writ.[6]

For some time, the abuse of the writ doctrine has come under attack for failing to prevent genuinely abusive petitions.[7] Dissatisfaction has increased in recent years because of perceived abuse of the writ by prisoners petitioning under a sentence of

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commentators refer to as "same-claim" successive petitions. *See id.* at 54 (distinguishing between petitions raising new claims and petitions raising claims previously resolved); Liebman, *supra* note 4, § 27, at 423 n.7 (new claim and same claim relitigation receive different treatment). This Note adopts the terminology of "same-claim" and "new-claim" successive petitions to distinguish between second and subsequent petitions alleging claims already presented and determined (same-claim), and those alleging claims not previously adjudicated (new-claim).

[6] *Goldstein, supra* note 5, at 70-73. Currently, two statutory provisions govern when second and subsequent petitions may be dismissed. *Id.* First, 28 U.S.C. section 2244(b) states:

> When after an evidentiary hearing on the merits . . . , a person in custody pursuant to the judgment of a State court has been denied . . . release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained . . . unless the application alleges and is predicated on a . . . ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

28 U.S.C. § 2244(b) (1976). Second, Rule 9(b) of the Rules governing proceedings arising under 28 U.S.C. section 2254 provides:

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

28 U.S.C. § 2254, Rule 9(b) (1976).

[7] *See, e.g.*, Price v. Johnston, 334 U.S. 266, 296 (1948) (Jackson, J., dissenting). Chief Justice Jackson dissented from the majority's holding that the prisoner's fourth petition was improperly dismissed by the district court. *Id.* at 286. The Justice emphasized:

> This is one of a line of cases by which there is being put into the hands of the convict population of the country new and unprecedented opportunities to re-try their cases, or to try the prosecuting attorney or their own counsel, and keep the Government and the courts litigating their cases until their sentences expire or one of their myriad claims strikes a responsive chord or the prisoner make [sic] the best of an increased opportunity to escape. I think this Court, by inflating the great and beneficent writ of liberty beyond a sound basis, is bringing about its eventual depreciation.

Id. at 301. *See also* Honorable Louis E. Goodman, Use and Abuse of the Writ of Habeas Corpus, Address Given at the 1947 Annual Conference of the Ninth Circuit, San Francisco, *in* 7 F.R.D. 313, (1947) ("The recent [Supreme Court] decisions, praiseworthy as they may be for safeguarding and broadening the right to the writ, nevertheless have stimulated the filing of unmeritorious successive petitions on behalf of penitentiary inmates.").

death.[8] Congress, however, rejected proposed amendments in 1990 that would have made second and subsequent petitions by death-row prisoners much more difficult to advance.[9] Recently, in *McCleskey v. Zant,* [10] the United States Supreme Court set forth

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[8] *See* H.R. REP. No. 681, 101st Cong., 2nd Sess. at 119 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6524 (suggesting that current abuse provisions have not satisfactorily prevented death row prisoners from filing second and subsequent petitions in attempting to extend litigation); Liebman, *supra* note 4, § 2.3, at 9 (Supp. 1991), (critics of habeas assert that filing of successive petitions to put off death results in abuse and manipulation of habeas remedy); *see also* Steven M. Goldstein, *Expediting the Federal Habeas Corpus Review Process in Capital Cases: An Examination of Recent Proposals*, 19 CAP. U. L. REV. 599 (1990) (detailing the reasons for the proposed changes advanced in 1989); S. 1760, 101st Cong., 1st Sess., 135 CONG. REC. S13480 (daily ed. Oct. 16, 1989) (statement of Sen. Thurmond) ("This Nation is facing a crisis in its criminal justice system . . . evidenced by the glut of habeas petitions . . ., many of which are frivolous and used as a delaying tactic."). *But cf.* Vivian Berger, *Justice Delayed or Justice Denied? — A Comment on Recent Proposals To Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1669 n.23 (1990):

> While the number of state prisoners has more than doubled in the past decade, the number of habeas petitions has remained about constant. In fiscal 1988 only 1.8% of all state prisoners filed habeas petitions and only a handful of these were in death penalty cases. Furthermore, only 11,747, or 4.9% of the 239,634 civil filings in the United States District Courts in fiscal year 1988 were habeas actions; of these, state prisoners initiated only 9,880 or 4.1% of the total.

Id. (citing Marsh & Harris, *The Right of Death Sentence Review*, INDIANAPOLIS STAR, Jan. 20, 1990, at A11, col.1; 1988 Director of the Administrative Office of the U.S. Courts Annual Report, App. I, Table C2, at 180, 182).

[9] *Final Votes in Congress on Key Measures*, N.Y. TIMES, Oct. 29, 1990, at B9, col. 2 (noting that October 28, 1990 Senate and House approved anticrime bill which deleted death penalty habeas reform); *Rehnquist is Still Hoping for Habeas 'Reform,'* NATIONAL L.J., Jan. 14, 1991, at 5, col. 2 ("During final negotiations on the 1990 omnibus crime bill, the habeas reform provisions were dropped, as were other controversial proposals, in a frenzied effort to enact some crime legislation before the elections."); Richard C. Reuben, *Justices Curtail Habeas Relief in U.S. Courts*, L.A. DAILY J., Apr. 17, 1991, at 1 ("Last year, Congress refused to adopt the recommendation of a commission appointed by Chief Justice William H. Rehnquist and chaired by retired Justice Lewis F. Powell that would have, in effect, limited state prisoners to one crack at federal habeas review."). The commission Reuben referred to was actually the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases appointed by Chief Justice Rehnquist in June 1988. Goldstein, *supra* note 8, at 600-01. With retired Associate Justice of the United States Supreme Court Lewis Powell as chairman, the Committee produced the Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. (BNA) 3239 (Sept. 27, 1989). *Id.* at 601 n.6. On November 27, 1989, the American Bar Association, Criminal Justice section, released the results of its study, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, Recommendations and Report of the ABA Task Force on Death Penalty Habeas Corpus (1989). Berger, *supra* note 8, at 1665-66 nn.3 & 9. These two reports competed for Congressional consideration, with the proposed Senate bill incorporating aspects of both and the House bill adopting the Powell Committee recommendations in their entirety. Liebman, *supra* note 4, § 2.3, at 18-20 (Cum. Supp. 1991).

[10] 111 S. Ct. 1454 (1991).

a clear standard for determining whether a petitioner who raises a claim in a second or subsequent petition that was not raised in a previous petition has abused the writ.[11] The Court enunciated that a petitioner must show cause for failing to raise the claim earlier and prejudice resulting therefrom to maintain a habeas petition in the federal courts.[12]

On May 13, 1978, Warren McCleskey was one of four armed men who robbed a furniture store in Atlanta, Georgia.[13] One of the four shot and killed a policeman who had entered the store during the commission of the crime, but no witness could determine who fired the gun.[14] Although McCleskey initially confessed to his participation in the robbery, he renounced his confession while on trial for both robbery and murder, and denied all involvement.[15]

In attempting at trial to rebut McCleskey's testimony of nonparticipation, the State called Offie Evans, who had occupied the jail cell next to McCleskey's, as a witness.[16] Evans testified that McCleskey confessed to him in jail about shooting an officer during the robbery.[17] Evans also provided a twenty-one page statement to the police, but this document was not introduced at trial.[18] Although McCleskey knew the subject matter of Evans's

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11 *See id.*

12 *McCleskey*, 111 S. Ct. at 1470. This test, known as the cause and prejudice standard, was first articulated by the Court in *Wainwright v. Sykes*, 433 U.S. 72 (1977), but was previously only applied to determine whether a petitioner's failure to comply with state procedural rules should bar federal habeas review. *McCleskey*, 111 S. Ct. at 1470.

13 McCleskey v. State, 263 S.E.2d 146, 147-48 (Ga. 1980).

14 *McCleskey*, 111 S. Ct. at 1458. An eyewitness testified that one of the robbers ran from the scene with a pearl-handled pistol. *Id.* Other witnesses testified that McCleskey stole a pearl-handled pistol of the same caliber used to kill the officer. *Id.* The district court, however, found the evidence surrounding the gun to be conflicting because of testimony that one of McCleskey's co-defendants was the only person to carry the gun after McCleskey stole it. *Id.* at 1488 (Marshall, J., dissenting).

15 *Id.* at 1458. At trial, McCleskey took the stand and offered an alibi defense. McCleskey v. Zant, 580 F. Supp. 338, 346 (N.D. Ga. 1984).

16 *McCleskey*, 111 S. Ct. at 1458. In return for Evans' cooperation and testimony, a detective promised to "speak a word" for Evans regarding charges that he escaped from a federal halfway house. McCleskey v. Kemp, 753 F.2d 877, 883 (11th Cir. 1985)(en banc). This agreement was not disclosed to McCleskey. *McCleskey*, 111 S. Ct. at 1458.

17 *Id.* Evans further testified that McCleskey even claimed that he would have killed a dozen policemen to get out of the store. *Id.*

18 *See id.* at 1459. Two weeks before the trial began in August 1978, Evans signed the 21 page statement and gave it to the Atlanta police department. *Id.* The written statement related conversations between McCleskey and Evans as well as conversations between McCleskey and another prisoner. *Id.* It also stated that

oral testimony, he and his counsel were unaware of Evans's written statement until after McCleskey filed his first federal petition nine years later.[19] McCleskey was convicted of murder and robbery in December 1978 and was given the death penalty.[20]

Affirming the jury verdict on direct appeal, the Supreme Court of Georgia overruled McCleskey's objection to the introduction of Evans's oral testimony at trial.[21] McCleskey argued that by deliberately withholding Evans's twenty-one page statement from the defense, the State violated his right of access to favorable evidence in the possession of the prosecution, thereby inhibiting his defense.[22] In denying McCleskey relief, the court acknowledged that the State did not provide Evans's statement to the defense,[23] but reasoned that because the evidence was not exculpatory, the denial did not cause McCleskey any material prejudice.[24] The United States Supreme Court then denied McCleskey's petition for certiorari.[25]

In January 1981, McCleskey filed a state habeas corpus petition reasserting that the prosecutor withheld favorable evidence[26] and further alleging that the admission of Evans'

Evans pretended he was the uncle of someone in whom McCleskey had confided. *Id.* at 1460. Additionally, the statement recounted the presence of state officials when Evans telephoned McCleskey's girlfriend for him. *Id.* at 1487. (Marshall, J., dissenting).

19 *See id.* at 1459. In 1987, the Georgia Supreme Court decided *Napper v. Georgia Television Co.*, 356 S.E.2d 640 (Ga. 1987), in which it held that "once the trial has been held, the conviction affirmed on direct appeal, and any petition or petitions for certiorari denied (including to the Supreme Court of the United States), the investigatory file in the case should be made available for public inspection." *Id.* at 647. This novel interpretation of the Georgia Open Records Act allowed McCleskey to obtain the statement from the Atlanta police. Eric M. Freedman, *Habeas Corpus Cases Rewrote the Doctrine*, NAT'L L. J., Aug. 19, 1991, at S6.

20 *McCleskey*, 111 S. Ct. at 1458.

21 McCleskey v. State, 263 S.E.2d 146, 152 (Ga. 1980).

22 *Id.* at 149-50. McCleskey based this claim on the Court's holding in *Brady v. Maryland*, 373 U.S. 83 (1963). *See McCleskey*, 263 S.E.2d at 150. In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

23 *McCleskey*, 263 S.E.2d at 150. The prosecutor provided the defense counsel with his file, but did not include Evans's statement. *See id.*

24 *McCleskey*, 263 S.E.2d at 150. In response to McCleskey's argument that he needed the evidence to prepare a proper defense, the Georgia Supreme Court stressed that the evidence sought was made up simply of statements made by McCleskey himself. *Id.* Thus, the Court found that the undisclosed evidence would not have reduced McCleskey's criminal liability. *Id.*

25 McCleskey v. Georgia, 449 U.S. 891 (1980).

26 McCleskey, 111 S. Ct. at 1458. McCleskey's amended petition challenged his

testimony at trial violated the proscription against the use of a defendant's confession obtained by the State in the absence of counsel.[27] Additionally, McCleskey claimed that the prosecution violated his due process rights by not disclosing its agreement with Evans to drop certain charges against him in exchange for his testimony.[28] The state court denied habeas relief on all of McCleskey's claims.[29]

In his first federal petition filed in December 1981, McCleskey reasserted that the State unconstitutionally withheld favorable evidence and failed to disclose its agreement with Evans, but he did not allege that his confession was unconstitutionally obtained in the absence of counsel.[30] After hearings in 1983, the district court held that McCleskey's due process rights had been violated through the non-disclosure of the State's agreement with Evans.[31] Because the district court believed that Evans's testimony at trial could have affected the jury's verdict, it granted habeas corpus relief.[32] The court of appeals reversed,

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murder conviction on 23 grounds. *Id.* Three of these claims involved Evans' testimony. *Id.*

[27] *Id.* at 1459. In raising this claim, McCleskey relied on the Supreme Court's decision in *Massiah v. United States*, 377 U.S. 201 (1964). *See McCleskey*, 111 S. Ct. at 1459. Under *Massiah*, a petitioner is denied the Sixth Amendment's right to counsel guarantee if, after indictment and in the absence of counsel, government agents deliberately elicit from the defendant incriminating statements which are used against the defendant at trial. *Massiah*, 377 U.S. at 206.

[28] *McCleskey*, 111 S. Ct. at 1458. McCleskey based this argument on *Giglio v. United States*, 405 U.S. 150 (1972), where the Court held that the jury must be made aware of any promises which induce the testimony of a key government witness. McCleskey v. Zant, 580 F. Supp. 338, 381 (N.D. Ga. 1984) (quoting United States v. Cawley, 481 F.2d 702, 707 (5th Cir. 1973), *rev'd*, 890 F.2d 343 (11th Cir. 1989), *aff'd*, 111 S. Ct. 1454 (1991)).

[29] *McCleskey*, 111 S. Ct. at 1459. Following this decision, the Georgia Supreme Court denied McCleskey's petition for a probable cause certificate and the United States Supreme Court denied his second petition for a writ of certiorari. *Id.* (citing McCleskey v. Zant, 454 U.S. 1093 (1981)).

[30] *Id.*

[31] McCleskey v. Zant, 580 F. Supp. 338, 384 (N.D. Ga. 1984), *rev'd*, 890 F.2d 343 (11th Cir. 1989), *aff'd*, 111 S. Ct. 1454 (1991). The district court found the statement made by the detective to Evans—that he would "speak a word" for him regarding the charges that he escaped from a federal halfway house—amounted to a promise of favorable treatment and the nondisclosure of that promise to McCleskey violated *Giglio*. *Id.* at 380-82. Although Evans denied at trial that any promises regarding those charges had been made, *id.* at 381, the prosecutor contacted federal authorities after the trial and the charges against Evans were dropped. McCleskey v. Kemp, 753 F.2d 877, 883 (11th Cir. 1985) (en banc).

[32] *McCleskey*, 580 F. Supp. at 384. A *Giglio* error will be deemed harmless unless there is a reasonable likelihood that the judgment of the jury was affected by the nondisclosure. *See* Giglio v. United States, 405 U.S. 150, 154 (1972). In this case, the district court described Evans' testimony as "highly damaging," and found that

holding that the State's promise to Evans did not amount to an infraction of due process[33] and, moreover, that any such error was harmless.[34] The United States Supreme Court granted certiorari and denied all relief.[35]

Finally, in July 1987, McCleskey filed his second federal habeas petition with the district court including a claim that the confession to Evans was unconstitutionally obtained in the absence of counsel.[36] McCleskey was prompted to file this second petition after learning of Evans's twenty-one page written statement in June 1987.[37] The State argued that allowing McCleskey to bring this claim in his second federal habeas petition would be an abuse of the writ.[38] The district court rejected the State's argument, finding that McCleskey had not deliberately abandoned the claim after alleging it in the first state habeas corpus proceeding.[39] The district court concluded that McCleskey's right to

"Evans' testimony was by far the most damaging testimony on the issue of malice." *McCleskey*, 580 F. Supp. at 381, 382. The district court concluded that "the jury may reasonably have reached a different verdict on the charge of malice murder had the promise of favorable treatment been disclosed." *Id.* at 383.

[33] McCleskey v. Kemp, 753 F.2d 877, 884 (11th Cir. 1985) (en banc). The court of appeals found that the detective's statement to Evans offered only a marginal benefit and would not have motivated a reluctant witness to testify. *Id.* Moreover, the court concluded that the statement would not have affected Evans's credibility with the jury. *Id.*

[34] *Id.* The court of appeals found that there was no reasonable likelihood that the nondisclosure affected the jury's decision. *Id.* at 885. Two jury members, however, have since come forward and stated that their ignorance of Evans's relationship with the police tainted their sentencing of McCleskey and that they no longer supported an execution. *Georgia Inmate is Executed After 'Chaotic' Legal Move*, N.Y. TIMES, Sept. 26, 1991, at A18, col. 1. Nevertheless, McCleskey was executed on September 25, 1991. *Id.*

[35] McCleskey v. Kemp, 481 U.S. 279 (1987). The Court granted certiorari to consider whether the capital sentencing procedures in Georgia were constitutional. *See id.* The Supreme Court upheld the Georgia capital punishment scheme as constitutional in the face of an equal protection challenge based upon the disproportionate imposition of death sentences upon blacks and upon persons who murder whites. *Id.* at 292. Rejecting powerful statistics of this disproportion developed by Professor Baldus, the Court posited: "to prevail under the Equal Protection Clause, [a defendant] must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* (emphasis in original). The Court also rejected McCleskey's Eighth Amendment claim, holding that the statistics generated by Professor Baldus did not establish a "constitutionally unacceptable risk" that racial prejudice affected the sentencing decision, given other safeguards built into the system. *Id.* at 313.

[36] McCleskey v. Zant, 111 S. Ct. 1454, 1459 (1991). *See supra* note 27 and accompanying text for a discussion of the *Massiah* claim.

[37] *Id.* at 1459. *See also supra* notes 18-19 and accompanying text.

[38] *McCleskey*, 111 S. Ct. at 1460.

[39] *Id.* The district court found that McCleskey had not attempted to reserve his proof or deliberately withhold the *Massiah* claim for the second petition. *Id.* The district court also determined that McCleskey did not know the Evans document

counsel was violated by the manner in which the State had obtained the confession and granted habeas relief.[40]

In reversing the district court, the Eleventh Circuit Court of Appeals held that the failure to dismiss McCleskey's claim as abusive of the writ constituted an abuse of discretion on the part of the district court.[41] The court of appeals found that by including the right to counsel claim in the state habeas petition, dropping it in the first federal petition, and reasserting it again in the second federal petition, McCleskey necessarily abandoned the claim deliberately.[42] The court further asserted that if any violation of McCleskey's right to counsel occurred, the error it caused was

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existed when he filed his first petition and that the failure to discover the document before 1987 could not be attributed to McCleskey's inexcusable neglect. *Id.* Moreover, the district court maintained that the *Massiah* claim had been dropped after the first state habeas corpus proceeding "because it was obvious that it could not succeed given the then-known facts." McCleskey v. Zant, 890 F.2d 343, 348-49 (11th Cir. 1989) (quoting McCleskey v. Kemp, No. C87-1517A (N.D.Ga. filed Dec. 23, 1987)).

[40] *McCleskey*, 111 S. Ct. at 1460. The district court's hearings focused on the jail-cell arrangements that had taken place in 1978. *See id.* The court noted that after obtaining the Evans document and filing the second petition, McCleskey's counsel contacted Ulysses Worthy, a jailer in whose office the police took Evans's 1978 statement. *Id.* Worthy testified that Evans was deliberately moved to be near McCleskey's cell. *See id.* The district court found that the Evans document contained a strong indication of an early relationship between Evans and the police. *Id.* Additionally, the district court reasoned that Worthy's testimony further suggested that the police used Evans to elicit incriminating statements from McCleskey. *Id.* The district court concluded that Evans had been placed next to McCleskey for the purpose of obtaining incriminating information from McCleskey, that Evans was given facts unknown to the public from the police and that Evans was coached by the police on how to approach McCleskey. *Id.*

[41] McCleskey v. Zant, 890 F.2d 343, 344 (11th Cir. 1989). In arguing that the district court abused its discretion, the court of appeals stated:

> Whether a second or subsequent petition is to be dismissed on abuse of the writ grounds is left to the sound discretion of the district court. Yet discretion in such matters is not unfettered, and its sound exercise will rarely permit a district court to hear a petition that clearly constitutes an abuse of the writ.

Id. at 347 (citations omitted).

[42] *Id.* at 349. The court of appeals concluded that the district court's finding that McCleskey was not aware of Evans's written statement until 1987 was not clearly erroneous. *Id.* at 348. The court of appeals, however, did find that McCleskey "made a knowing choice not to pursue the claim after having raised it previously. This constitutes prima facie evidence of deliberate abandonment." *Id.* at 349. Although the lawyer who represented McCleskey in the first federal habeas proceeding testified that he was not confident about the likelihood of success on a *Massiah* claim, *see id.* at 350, the court of appeals held that "abandoning a claim after initial investigatory efforts prove unsuccessful cannot insulate a petitioner from abuse of the writ." *Id.* Stressing that Evans's statement "was simply the catalyst that caused counsel to pursue the *Massiah* claim more vigorously," the court of appeals stated that "[i]t will only be possible to avoid piecemeal litigation if counsel

harmless.[43]

McCleskey petitioned the United States Supreme Court for certiorari.[44] The Court granted the petition and specifically asked the parties to consider whether a petitioner must deliberately abandon a claim to abuse the writ.[45] In affirming the decision of the court of appeals, the Court definitively stated that an abuse of the writ of habeas corpus exists where the petitioner, through inexcusable neglect, failed to raise the claim in the first petition.[46] The Court further explained that the petitioner has the burden of showing cause for not raising the claim earlier and prejudice resulting therefrom.[47] Concluding that McCleskey had not met this burden, the Court affirmed the court of appeals' ruling that he abused the writ.[48]

At early common law, there was virtually no limit to how many successive habeas petitions a prisoner could bring.[49] Even the doctrine of res judicata[50] did not prohibit the repeated review of the same claims by different tribunals.[51] This was permitted, at least in part, because prisoners at one time had no rights to

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is required to make a thorough investigation of the facts at the time of petitioner's first petition for habeas corpus." *Id.*

[43] *Id.* Relying heavily on its own previous discussion of harmless error in the *Giglio* context, the court of appeals concluded that "the jury would have convicted and sentenced McCleskey as it did even without Evans' testimony." *McCleskey*, 890 F.2d at 353. *See supra* notes 31-32 and accompanying text.

[44] McCleskey v. Zant, 111 S. Ct. 1454, 1461 (1991).

[45] McCleskey v. Zant, 110 S. Ct. 2585 (1990). The Court asked the parties to consider the following question: "Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?" *Id.*

[46] *McCleskey*, 111 S. Ct. at 1467-68.

[47] *Id.* at 1470.

[48] *Id.* at 1474.

[49] *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 5 (1980) ("The common law of England dealt with [the writ of habeas corpus] so liberally, that the decision of one court or magistrate to refuse to release the prisoner, was no bar to the issuing of a second, third, or additional writ by another court or magistrate having jurisdiction of the case.").

[50] *See* BLACK'S LAW DICTIONARY 1305 (6th ed. 1990). Res Judicata requires that a final judgment on the merits rendered by a court having competent jurisdiction be determininative as to the parties involved and be an absolute bar to any subsequent action which involves the same claim. *Id.*

[51] *See* Autry v. Estelle, 464 U.S. 1301, 1303 (1983) ("historically, res judicata has been inapplicable to habeas corpus proceedings"); Smith v. Yeager, 393 U.S. 122, 124-25 (1968) (per curiam) ("usual principles of *res judicata* are inapplicable to successive habeas corpus proceedings"); Sanders v. United States, 373 U.S. 1, 8 (1963) ("The inapplicability of res judicata to habeas . . . is inherent in the very role and function of the writ."). *See also* Liebman, *supra* note 4, § 26.3, at 390-91.

appeal habeas corpus decisions refusing their requests for discharge.[52] Moreover, the interest of protecting the prisoner from a wrongful deprivation of his constitutional life and liberty rights was more revered than the interests of achieving finality of judgments.[53] Thus, courts and judges exercised independent judgment on each successive habeas application, regardless of how many had been filed previously.[54]

As the right to appellate review of habeas decisions became available, however, courts began to question whether the spirit of habeas corpus required the permitting of endless petitions.[55] In 1923, the Supreme Court began limiting prisoners' access to successive habeas petitions in *Salinger v. Loisel*.[56] In *Salinger*, the

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52 DUKER, *supra* note 49, at 5-6 ("[I]t would have been intolerable for a person to have the legality of his custody determined by the first judicial body to hear the matter.").

53 *See* Chemerinsky, *supra* note 1, at 749 (the writ is the most important part of the Constitution protecting individual's right against wrongful imprisonment); Liebman, *supra* note 4, at 386 ("[H]abeas corpus inevitably subordinates the . . . finality policy underlying *res judicata* . . . to . . . the weightier policy of preserving life and liberty against lawless deprivation by the States."). Indeed, Justice Brennan has expressed:

> It has been suggested that [the inapplicability of res judicata to habeas decisions] derives from the fact that at common law habeas corpus judgments were not appealable. But its roots would seem to go deeper. Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.

Sanders v. United States, 373 U.S. 1, 8 (1963).

54 1 W.F. BAILEY, HABEAS CORPUS AND SPECIAL REMEDIES § 59, at 206 (1913).

55 McCleskey v. Zant, 111 S. Ct. 1454, 1462 (1991). Some courts actually rejected the common-law rule and did consider a denial of habeas corpus to be barred by res judicata. *Id.* (citing McMahon v. Mead, 139 N.W. 122, 123 (S.D. 1912); *Ex parte* Heller, 131 N.W. 991, 994 (Wis. 1911); Perry v. McLendon, 62 Ga. 598, 603-05 (1879)). Most courts, however, chose a middle ground between endless successive petitions and res judicata, giving effect to res judicata only when the case had been heard upon the same evidence and where the circumstances and facts remained the same, but permitting future applications based upon new facts and evidence. *See McCleskey*, 111 S. Ct. at 1463 (citing *Ex parte* Cuddy, 40 F. 62 (1889)).

56 265 U.S. 224 (1923). The *Salinger* Court characterized the motivation for its decision to place limits on habeas review:

> In early times when refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to appellate review was given, the reason for that practice ceased, and the practice came to be materially changed - just as, when a right to a comprehensive review in criminal cases was given, the scope of inquiry deemed admissible on habeas corpus came to be relatively narrowed.

Id. at 230-31.

Court held that when a prisoner raises issues in a second or subsequent petition that were considered and determined in a previous application, the prior adverse adjudication may be given "controlling weight" in deciding whether to entertain the second or subsequent petition.[57] By refusing to apply the strict doctrine of res judicata, the Court affirmed the privileged status of the writ of habeas corpus.[58] The Court recognized limits to this privilege, however, by permitting a judge to give controlling weight to a prior, thoroughly considered disposition by an authorized court.[59] Thus, the Court instituted a guard against abusive uses of the writ.[60]

The Court continued to limit successive habeas petitions to some extent in a case decided on the same day as *Salinger*: *Wong Doo v. United States*.[61] In *Wong Doo*, the Court considered whether a second petition could be dismissed for raising a ground that

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57 *Id.* at 231. In reaching its decision, the Court stated: "the officers before whom the second application is made may take into consideration the fact that a previous application had been made to another officer and refused; and in some instances that fact may justify a refusal of the second." *Id.* (quoting *Ex Parte* Cuddy, 40 F. 62 (1889)).

58 *Id.* at 232.

59 *See id.* The Court perceived a need to "accord to the writ of habeas corpus its recognized status as a privileged writ of freedom, and yet make against an abusive use of it." *Id.* The Court continued that to achieve this balance, it reserved the right to require habeas corpus applicants to disclose whether a prior application was made and what ruling was accorded thereto. *Id.*

60 *Id.* Congress, in the first legislation to address repetitive federal habeas petitions, enacted 28 U.S.C. section 2244(a) to address second and subsequent petitions raising claims that had been previously adjudicated. *Id.* This provision provided, in pertinent part:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the judge of court is satisfied that the ends of justice will not be served by such inquiry.

28 U.S.C. § 2244(a) (1948). Thus, Congress permitted a judge, convinced that justice would not be served by reaching the merits of a habeas application, to dismiss the petition if it failed to present grounds not previously presented and determined. *See id.* The Reviser's Note to Section 2244 clarified Congress's intent not to disturb the evolution of common law abuse of the writ principles. McCleskey v. Zant, 111 S. Ct. 1454, 1465 (1991). Therefore, although one could possibly surmise that congressional permission to dismiss petitions raising no new grounds necessarily implied a determination that petitions presenting new grounds could not be dismissed, the Court rejected this reading in its first authoritative interpretation of the statute. *See* Sanders v. United States, 373 U.S. 1, 12 (1963). For a discussion of *Sanders*, see *infra* notes 76-81 and accompanying text.

61 265 U.S. 239 (1923).

was alleged, but not decided, in a previous petition.[62] In denying the writ, the Court refused to allow the petitioner to postpone the resolution of the issue in the first habeas proceeding by failing to present proof of the claim at that time.[63] The Court explained that the petitioner had already advanced the same ground in the first petition, but he presented no evidence then for support.[64] The Court stressed that the petitioner had a full opportunity to proffer evidence at the first hearing and good faith demanded that he should have adduced the proof then.[65] The Court reasoned that to permit the reservation of proof for later petitions would effectively allow prisoners to postpone the execution of their convictions indefinitely.[66] Therefore, the Court held that the petitioner abused the writ.[67]

Twenty-three years later in *Price v. Johnston*,[68] the Court tempered the movement toward restricting successive habeas petitions by establishing that a petitioner is not necessarily required to raise *all* his allegations in the first habeas proceeding.[69] In *Price*, the Court addressed whether a claim raised for the first time in a subsequent petition was abusive of the writ.[70] The Court further delineated the scope of habeas corpus review by stating that a petitioner who presents justifiable reasons for not raising a claim in an earlier petition will be granted habeas relief.[71] The Court acknowledged the many problems caused by the increasing number of successive habeas petitions by prisoners,[72] but asserted that the need to prevent unjust imprisonment

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62 *See id.* at 241. While *Salinger* presented a claim which had been both alleged and decided in a prior petition, *Wong Doo* involved a claim that was alleged in the first petition but not decided.

63 *See id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *See id.*

68 334 U.S. 266 (1948).

69 *See id.*

70 *Id.* at 289. The Court distinguished *Salinger*, upon which the Ninth Circuit Court of Appeals had relied, reasoning that the *Salinger* holding applied only to successive habeas corpus petitions that raised the same issues. *Id.* The *Price* Court found that because the fourth petition raised an issue not raised previously, "three prior refusals to discharge [the] petitioner [could] have no bearing or weight on the disposition to be made of the new matter raised in the fourth petition." *Id.* (citing Waley v. Johnston, 316 U.S. 101 (1941)). The Supreme Court later contended in *McCleskey* that this portion of the *Price* decision was ignored in the Court's subsequent decisions.

71 *Price*, 334 U.S. at 291.

72 *Id.* at 293.

requires that prisoners be given the opportunity to obtain judicial relief in certain circumstances.[73] Because the petitioner in *Price* had not been given an opportunity to explain the reason for his delay, the Supreme Court remanded the case to the district court for this factual determination.[74]

After *Price*, however, the law remained unclear as to what constituted a "justifiable reason" for not bringing a claim in the first federal habeas petition.[75] Thus, in the seminal decision *Sanders v. United States*,[76] the Court sought to formulate basic rules for lower courts to follow in determining whether a successive petition is abusive of the writ[77] and articulated a standard for de-

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[73] *Id.* at 291. The Court reminded: "[t]he primary purpose of a *habeas corpus* proceeding is to make certain that a man is not unjustly imprisoned." *Id.*

[74] *Id.* at 291-93. Under *Price*, the government bears the initial burden of pleading abuse of the writ. *See id. Accord* McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991); Sanders v. United States, 373 U.S. 1, 10 (1963). However, some district courts have raised the issue of abuse of the writ *sua sponte*. *See, e.g.*, Jones v. Estelle, 692 F.2d 380 (5th Cir. 1982) (affirming magistrate's *sua sponte* dismissal); Thigpen v. Smith, 792 F.2d 1507, *reh'g denied*, 798 F.2d 1420 (11th Cir. 1986) (requiring district courts to raise issue of abuse of writ *sua sponte*). *But see* Jane A. Gordon, Comment, *Pleading Rule 9 of the Rules Governing Habeas Corpus: Sua Sponte Departure From Precedent and Congressional Intent*, 38 EMORY L.J. 489 (1989) (abuse of the writ should be viewed as affirmative defense which must be raised by state and not raised *sua sponte*).

[75] Then existing federal legislation only addressed same-claim successive petitions. *See supra* note 60. The Court considered whether 28 U.S.C. section 2255 (1948), which contained a provision similar to section 2244, might govern new-claim successive petitions. Sanders v. United States, 373 U.S. 1, 12-14 (1963). *See infra* notes 76-81 and accompanying text. Section 2255, which was passed to provide a more convenient mechanism to secure relief typically sought in habeas corpus proceedings, *See* United States v. Hayman, 342 U.S. 205, 219 (1952), provided that a district court could dismiss a second or subsequent petition seeking similar relief. *Sanders*, 373 U.S. at 12-13. Noting that a prisoner will almost always be seeking the same relief (i.e. release from imprisonment), the Court held that section 2255 had to be considered the equivalent of section 2244 if, in fact, it was to be constitutional and provide prisoners with the same rights as those offered in habeas proceedings. *Id.* at 14. A constitutional question was posed because the federal Constitution provides: "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Case of Rebellion or Invasion the public Safety may require it." *Id.* at 12 n. 6 (quoting U.S. CONST. art. I, § 9, cl. 2).

It is worth noting that under *Sanders*, a same-claim subsequent petition could be dismissed if "the ends of justice would not be served by reaching the merits of the application." *Id.* at 15. Under this test, a court was never obligated to dismiss a same-claim successive petition. Chemerinsky, *supra* note 3, at 702; Liebman, *supra* note 4, § 27.1, at 424-26. Subsequently in 1986, a plurality of the Court held in *Kuhlman v. Wilson*, 477 U.S. 436 (1986), that same-claim successive petitions may be entertained by the district court only if the petitioner supplements his constitutional claim with a "colorable showing of factual innocence." *Id.* at 454.

[76] 373 U.S. 1 (1963).

[77] *See id.* at 15. *See also* Goldstein, *supra* note 5, at 56-57; Liebman, *supra* note 4, § 26.3, at 390; Chemerinsky, *supra* note 3, at 701; Karen C. Lapidus, Note, *Rose v.*

termining whether a petitioner is entitled to habeas relief.[78] Justice Brennan, writing for the Court, stated that a petitioner who either "deliberately withholds" a claim from his first petition or "deliberately abandons" a claim that was raised in the first petition may be precluded from raising that claim in a subsequent petition.[79] The Court expressed that "needless piecemeal litigation . . . whose only purpose is to vex, harass, or delay," need not be tolerated.[80] Finally, the Court emphasized that trial judges

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Lundy and Rule 9(b): Will the Court Abuse the Great Writ, 49 BROOK. L. REV. 335, 349 (1983).

Sanders, together with *Townsend v. Sain*, 372 U.S. 293 (1963), and *Fay v. Noia*, 372 U.S. 391 (1963), was the third in a trilogy of decisions in which the Court attempted to guide lower courts in habeas proceedings. *Sanders*, 373 U.S. at 23 (Harlan, J., dissenting). The dissent in *Sanders* argued that these cases erred in ignoring principles of finality by permitting endless litigation. *Id.* (Harlan, J., dissenting). The *Sanders* Court stated:

> We need not pause over the test governing whether a second or successive application may be deemed an abuse by the prisoner of the writ or motion remedy. The Court's recent opinions in *Fay v. Noia*, and *Townsend v. Sain*, deal at length with the circumstances under which a prisoner may be foreclosed from federal collateral relief. The principles developed in those decisions govern equally here.

Id. at 18 (citations omitted). *Fay* held that a prisoner convicted in state court could raise issues in a federal habeas corpus proceeding even if those issues were not raised at trial, so long as he or she had not chosen deliberately to bypass the state procedures. Fay v. Noia, 372 U.S. 391, 438 (1963). *Townsend* held that federal courts have the power to conduct new factual hearings if facts are in dispute and the state court did not afford the defendant a full and fair hearing. Townsend v. Sain, 372 U.S. 293, 313 (1963).

Sanders' reference to *Townsend* has given some courts justification to adopt the "inexcusable neglect" language from *Townsend* in the abuse of the writ context. *See infra* notes 132 and 193 for a discussion of this topic.

Also, *Fay*'s deliberate bypass test, never codified by Congress, *see infra* note 193, no longer controls procedural defaults. *See* Wainwright v. Sykes, 433 U.S. 72 (1977) (rejecting *Fay*'s deliberate bypass test and adopting cause and prejudice test to determine whether district courts can entertain issues raised on habeas not raised at trial). The rejection of *Fay* in *Sykes*, coupled with *Sanders*' reference to *Fay*, has caused at least one court to conclude that *Sanders*' deliberate withholding test was replaced by a stricter standard. *See* Jones v. Estelle, 722 F.2d 159, 163 (5th Cir. 1983) (en banc), *cert. denied* 466 U.S. 976 (1984). For criticism of this view, *see* Liebman, *supra* note 4, at 392-93 n. 15. ("[T]he better view is that the combination of *Fay* and Congress' codification of *Sanders*' preserves the deliberate withholding rule in the successive petition context."); L. Yackle, *supra* note 1, at 563-64 (codification of *Sanders* in Rule 9(b) "would surely make any significant departure from present law difficult"); Goldstein, *supra* note 5, at 120 (adoption of *Sanders*' standard in § 2244(b) and Rule 9(b) "strongly suggests that *Sanders* must control. . . . When the Court overruled [*Fay v.*] *Noia* in *Sykes* and its progeny, it was not deviating from a decision the Congress subsequently endorsed. Such would be the case if the Court departed from *Sanders* in any significant way.").

78 *Sanders*, 373 U.S. at 17.

79 *Id.* at 18.

80 *Id.*

have the sole discretion in determining whether to dismiss a successive habeas petition.[81]

Three years later, Congress amended habeas corpus legislation governing successive petitions to explicitly address the *Sanders* issue: second and subsequent petitions raising new claims for relief.[82] According to this legislation, a second or subsequent habeas application need not be entertained unless it alleges a new ground for relief and the judge believes that the petitioner did not deliberately withhold the new ground or in some other way abuse the writ.[83] The statute provides that, if a petitioner meets these conditions, the application must be entertained;[84] but if the petitioner fails to meet either of these conditions, the judge may dismiss the petition.[85] Additionally, Rule 9(b) of the Rules Governing Habeas Corpus Proceedings, promulgated ten years after the revised version of Section 2244, was also enacted to formally incorporate the common law principles governing the abuse of the writ doctrine set forth in *Sanders*.[86]

In the years following the codification of the *Sanders* principles, the scope of habeas review became somewhat delineated through the denial of stay applications and petitions for certiorari, as well as through dicta, but the standard was still unclear.[87]

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[81] *Id.* The Court stressed that "the federal judge clearly has the power—and, if the ends of justice demand—the duty to reach the merits." *Id.* at 18-19. This concept, subsequently referred to as the "ends of justice inquiry," has been a source of controversy for the Court, McClesky v. Zant, 111 S. Ct. 1454, 1471 (1991), but recently has been interpreted to require a constitutional claim supplemented by a "colorable showing of factual innocence." *See supra* note 75. The *McCleskey* majority found that a federal judge can reach the merits of a claim using the "ends of justice inquiry" if the alleged constitutional violation has probably "caused the conviction of one innocent of the crime." *McCleskey*, 111 S. Ct. at 1470-71.

[82] *See* 28 U.S.C. § 2244(b) (1966). *See supra* note 6 for the full text of this provision. Although the legislative history to section 2244 does not mention *Sanders*, it has been universally accepted that this provision did indeed codify *Sanders*. *See infra* note 187.

[83] *See* 28 U.S.C. § 244(b) (1966).

[84] *McCleskey*, 111 S. Ct. at 1466. The application must be entertained provided that other habeas errors, such as procedural default or the non-exhaustion of state claims, are not present. For a basic discussion of procedural default, *see* Chemerinsky, *supra* note 3, at 694; for a discussion of the exhaustion requirement, *see id.* at 703.

[85] *Id.* Despite the permissive language of the statute, the *McCleskey* majority found that section 2244(b) does not provide any guidance for determining whether a district court has the power to entertain a petition that fails to meet either of these criteria. *Id. See supra* note 60.

[86] *McCleskey*, 111 S. Ct. at 1466-67. Both the majority, *id.*, and the dissent, *id.* at 1480-81, agreed that section 2244(b) and Rule 9(b) codified *Sanders*. For a discussion of the passage of Rule 9(b), *see* Gordon, *supra* note 74, at 500-06.

[87] *McCleskey*, 111 S. Ct. at 1461. *See also* Witt v. Wainwright, 470 U.S. 1039, 1043

The primary example of the Court's use of dicta to define the abuse of the writ standard is the plurality opinion of *Rose v. Lundy*.[88] In *Lundy*, Justice O'Connor held that a prisoner's habeas petition that raised some claims for which state remedies had not been exhausted and some for which state remedies had been exhausted[89] was abusive of the writ and dismissable in its entirety.[90]

More importantly, in dictum, Justice O'Connor continued that if a prisoner were to proceed with the exhausted claims in federal habeas while pursuing the unexhausted claims in state court, he would risk dismissal of a subsequent federal petition raising the newly exhausted claims.[91] Justice O'Connor recognized a need to lessen the burden on federal courts by requiring all claims to be brought in one single habeas petition.[92] A majority of the Court, however, did not agree with Justice O'Connor.[93] Justice Brennan dissented from this portion of Justice O'Connor's opinion, arguing that under *Sanders*, which the plurality conceded was adopted by Congress,[94] petitions should only be dismissed as abusive if the petitioner could have brought a claim in the first petition but chose not to in an attempt to have multiple habeas opportunities.[95]

(1985) (Marshall, J., dissenting) ("[T]he Court has had little occasion in full opinions to elaborate upon the contours of the abuse-of-the-writ doctrine. Instead, the doctrine develops *sub rosa* when this Court refuses to stay executions or to consider substantive claims raised in certiorari petitions that arise from second or later habeas petitions.").

88 455 U.S. 509 (1982). *See* Goldstein, *supra* note 5, at 78-79 (footnotes omitted) ("Subsequent to the adoption of the Habeas Corpus Rules, in only one decision, *Rose v. Lundy*, and then only indirectly, has the Supreme Court addressed the issue of successive federal habeas applications that raise new grounds.").

89 *See* 28 U.S.C. § 2254(d) (1988). A federal statute requires that federal courts not consider claims in habeas petitions for which state remedies have not yet been exhausted. *Id.* This section, however, does not discuss how a petition presenting exhausted and unexhausted claims (a mixed petition) should be treated. *See* Goldstein, *supra* note 5, at 79 n.156.

90 *Rose*, 455 U.S. at 520-21. The Court cautioned future defendants and their counsel: "before you bring any claims to federal court, be sure that you first have taken each one to state court." *Id.* at 520.

91 *Id.* Justice O'Connor cited Rule 9(b), *Sanders*, and *Wong Doo* to support this proposition. *See id.* at 521.

92 *See id.* at 520.

93 *See id.* at 532-38 (Brennan, J., concurring in part and dissenting in part). Four Justices disagreed with the result suggested by Justice O'Connor, and one dissenting Justice did not take a position on this specific issue. LIEBMAN, *supra* note 4, § 26.7, at 420 n.30; Goldstein, *supra* note 5, at 80 n.160.

94 *Rose*, 455 U.S. at 521 (Rule 9(b) incorporated the abuse of the writ principles set forth in *Sanders*).

95 *Id.* at 535-36 (Brennan, J., concurring in part and dissenting in part). Justice Brennan stated:

Two years later in *Stephens v. Kemp*,[96] a sharply divided Supreme Court once again demonstrated that the question of what constitutes an abuse of the writ remained unsettled.[97] In *Stephens*, a majority of the Supreme Court granted the stay of execution requested in the petitioner's second habeas application, but four dissenting Justices[98] argued that the petition should have been dismissed.[99] The dissenters posited that a petition should be denied if it raises issues that were not raised earlier because of the petitioner's inexcusable neglect.[100] Under this harsher standard, the dissent found that the petitioner did not adequately explain why the newly asserted claim had not been raised earlier.[101]

Three other stay decisions, further demonstrate the direction the Court has recently taken in its abuse of the writ jurisprudence.[102] In *Woodard v. Hutchins*,[103] the Court vacated a stay of execution, emphasizing that all three of the petitioner's claims presented for the first time in his second federal habeas petition "could and should have been raised" in the first habeas peti-

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> *Sanders* was plainly concerned with "a prisoner *deliberately* withhold[ing] one of two grounds" for relief "in the hope of being granted two hearings rather than one or for some other such reason." *Sanders* also notes that waiver might be inferred where "the prisoner *deliberately abandons* one of his grounds at the first hearing." Finally, *Sanders* states that dismissal is appropriate either when the court is faced with "*needless* piecemeal litigation" or with "collateral proceedings *whose only purpose is to vex, harass, or delay*." Thus *Sanders* made it crystal clear that dismissal for "abuse of the writ" is *only* appropriate when a prisoner was free to include all of his claims in his first petition, but *knowingly* and *deliberately* chose not to do so in order to get more than "one bite at the apple." The plurality's interpretation obviously would allow dismissal in a much broader class of cases than *Sanders* permits.

Id. (emphasis in original).

96 464 U.S. 1027 (1984).

97 *See id.*

98 *Id.* at 1028. Justice Powell was joined in dissent by Chief Justice Burger, Justice Rehnquist, and Justice O'Connor. *Id.*

99 *Id.* at 1029.

100 *Id.* at 1030. This inexcusable neglect standard first surfaced in the abuse of the writ context in *Potts v. Zant*, 638 F.2d 727, 747 (5th Cir. 1981), *cert. denied*, 454 U.S. 877 (1981). Goldstein, *supra* note 5, at 115 n.352. For criticism of the dissent's adoption of this inexcusable neglect standard in *Stephens*, see *id.* at 115-16 (inexcusable neglect standard inconsistent with *Sanders*, Rule 9(b), and section 2244(b)).

101 *Stephens*, 464 U.S. at 1031 ("Stephens simply failed to explain his failure to raise his claim in his first federal habeas petition, and therefore his case comes squarely within Rule 9(b)."). *Id.*

102 McCleskey v. Zant, 111 S. Ct. 1454, 1467 (1991).

103 464 U.S. 377 (1984).

tion.[104] The majority stressed that the federal courts should not tolerate petitions asserting claims that could have been presented previously, but that are actually presented only when execution is imminent.[105] Similarly, in *Antone v. Dugger*,[106] the Court denied a stay application presenting new claims in a second habeas petition.[107] The Court affirmed the district court's finding that the petitioner showed inexcusable neglect in failing to raise the new claims in the first petition,[108] emphasizing that all of the newly presented claims had been presented in state court prior to the filing of the first federal habeas petition.[109] Finally, in *Delo v. Stokes*,[110] the Court granted the State's motion to vacate a stay of execution,[111] finding that the petitioner's fourth federal habeas petition was abusive because the newly raised claims could have been raised or developed previously.[112]

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104 *Id.* at 379. Although the Court admitted that there was no affirmative evidence showing that the claims had been deliberately withheld, it stressed that Hutchins had counsel throughout the case, and no reasons had been given to explain why the claims were not raised earlier. *Id.* at 379 n.3. While this language suggests that the Court was basing its decision on the fact that the petitioner bears the burden of disproving abuse, Liebman, *supra* note 4, § 26.5, at 406, Justices White and Stevens argued:

> [T]he Court's opaque *per curiam* opinion vacating the stay comes very close to a holding that a second petition for habeas corpus should be considered as an abuse of the writ and for that reason need not be otherwise addressed on the merits. We are not now prepared to accept such a *per se* rule.

Hutchins, 464 U.S. at 383 (White, J., and Stevens, J., dissenting).

105 *Id.* at 380. The majority stated its policy rationale for dismissing the petition:

> A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion—only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate—even in capital cases—this type of abuse of the writ of habeas corpus.

Id.

106 465 U.S. 200 (1984).

107 *Id.* at 205-06. Justice Stevens, in a concurring opinion, argued that the claims presented in the second federal habeas petition were essentially the same as those raised in the first; he dismissed the second petition on this ground. *Id.* at 207 (Stevens, J., concurring).

108 *Id.* at 204.

109 *Id.* at 206.

110 110 S. Ct. 1880 (1990).

111 *Id.* at 1881. The majority opinion was in the form of a *per curiam*. *Id.* Justice Brennan, Justice Marshall, Justice Blackmun, and Justice Stevens dissented. *Id.* at 1882-84 (Brennan, J., dissenting). The majority reversed the district court, the Court of Appeals for the Eighth Circuit, and the same Court of Appeals sitting *en banc*. *Id.* at 1881. The lower courts had determined that the petitioner had not abused the writ. *Id.*

112 *Id.* The Court asserted that one of Stokes' claims could have been raised in

Additionally, the Fourth,[113] Fifth,[114] Eighth,[115] and Eleventh[116] Circuits have developed an abuse of the writ standard more strict than that articulated in *Sanders*—a more objectively defined inexcusable neglect standard.[117] These circuits[118] have

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the first federal habeas petition, and that the other could have been developed before the last minute attempt to secure a stay of execution. *Id.* The Court therefore held that the district court had abused its discretion in granting the stay of execution. *Id.* Justice Stevens argued that the district court and the court of appeals, especially when the latter was sitting *en banc*, were better able to determine whether the successive petitions constituted an abuse of the writ. *Id.* at 1884 (Stevens, J., dissenting). Justice Brennan further emphasized that abuse of the writ issues are and should be "addressed to the sound discretion of the federal trial judges." *Id.* at 1883 (Brennan, J., dissenting) (quoting Sanders v. United States, 373 U.S. 1, 18 (1963)).

113 *See, e.g.*, Miller v. Bordenkircher, 764 F.2d 245, 250-52 (4th Cir. 1985) (abuse found for deliberate withholding or for inexcusable neglect).

114 *See, e.g.*, Daniels v. Blackburn, 763 F.2d 705, 707 (5th Cir. 1985) (per curiam) (proper inquiry not whether petitioner intentionally waived claims but whether he lacked legal excuse for not bringing them initially); Jones v. Estelle, 722 F.2d 159, 163 (5th Cir. 1983) (en banc) (abuse if petitioner's failure to bring claim previously due to inexcusable neglect), *cert. denied*, 466 U.S. 976 (1984); Sockwell v. Maggio, 709 F.2d 341, 344 (5th Cir. 1983)(dismissal for abuse of writ if petitioner deliberately withheld claim or was inexcusably neglectful), *cert. denied*, 471 U.S. 1020 (1985).

115 *See, e.g.*, Fairchild v. Lockhart, 900 F.2d 1292, 1294 (8th Cir. 1990)("Our cases teach us that the procedural-bar 'cause' and 'prejudice' analysis of *Wainwright v. Sykes*, 433 U.S. 72 (1977), and the 'factual innocence' exception to that analysis also apply to a State's abuse-of-the-writ defense"), *cert. denied*, 111 S. Ct. 21 (1990); Hall v. Lockhart, 863 F.2d 609, 610 (8th Cir. 1988) (abuse of the writ analysis "governed by principles of deliberate bypass and inexcusable neglect").

116 *See, e.g.*, Moore v. Zant, 885 F.2d 1497, 1505 (11th Cir. 1989) (en banc) (abuse of writ when petitioner intentionally withheld or abandoned claims or inexcusably neglected to include them), *cert. denied*, 110 S. Ct 3255 (1990); Gunn v. Newsome, 881 F.2d 949, 957 (11th Cir. 1989) (en banc) (abuse of writ inquiry asks whether petitioner's conduct was result of inexcusable neglect), *cert. denied*, 110 S. Ct. 542 (1989); Demps v. Dugger, 874 F.2d 1385, 1391 (11th Cir. 1989) (to avoid dismissal, petitioner must show that failure to present claim earlier not attributable to intentional abandonment or withholding, or inexcusable neglect); Adams v. Wainwright, 804 F.2d 1526, 1530 (11th Cir. 1986) (district court may dismiss newly asserted claim as abusive if failure to assert previously resulted from intentional abandonment or withholding or inexcusable neglect).

117 *See* Liebman, *supra* note 4, § 26.6, at 409 (these circuits have adopted objective inexcusable neglect standard Congress explicitly rejected in 1976 when passing Rule 9(b)); Freedman, *supra* note 19, at S6 (long before *McCleskey*, these circuits had "invented 'objective' tests that attributed to petitioners the knowledge that courts decided their lawyers should have had"); *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 The Association of the Bar of the City of New York, Committee on Civil Rights 848, 858 (referring to adoption of objective standard by these circuits as an "outright refusal on the part of some courts to enforce the law").

118 *See* NAACP LEGAL DEFENSE FUND, INC. *Execution Update* (Sept. 25, 1991) (of the 155 involuntary executions that have taken place since 1976, 89.7%, or 139, have occurred in the Fourth, Fifth, Eighth, or Eleventh Circuits).

held that a district court may dismiss a second or subsequent petition that raises claims about which a petitioner reasonably should have known when the prior petition was filed, regardless of whether the petitioner was actually aware of the claim.[119] Under this standard, these circuits have effectively prevented petitioners from bringing a second or subsequent petition raising new claims unless justified by newly discovered facts, a change in the controlling law, or ineffective assistance of counsel.[120]

Recently, in 1990,[121] Congress considered whether to amend the legislation governing abuse of the writ determinations to adopt a more stringent standard than that developed in the southern circuits.[122] The proposal of these amendments reflected concern that the guidelines set forth in *Sanders* were not preventing death-row petitioners from attempting to delay their executions.[123] More specifically, the amendments proposed the dismissal of a death row prisoner's subsequent petition unless he raised a new claim founded upon facts that could not have been discovered by exercising reasonable diligence.[124] These amend-

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119 Liebman, *supra* note 4, § 26.6, at 410.

120 *Id.* at 411. Professor Liebman criticized the adoption of the objective inexcusable neglect standard as transforming the *Sanders* test into "the equivalent of the *res judicata* doctrine." *Id.* at 412 n.22. Professor Liebman continued:

> By sneaking *res judicata* notions in through the back door, the three death penalty circuits effectively have reversed Congress' and the Supreme Court's assignment of primacy to the writ's " 'purpose . . . to make certain that a man is not unjustly imprisoned' " and accorded finality the preferred status. That the southern circuits have accomplished this reversal by adopting a standard Congress expressly rejected the last time it passed legislation in the area and implicitly has rejected on numerous occasions since then by failing to pass legislation seeking the same result — and that those circuits have directed the new standard principally at a class of prisoners traditionally accorded legislative *exemption* from procedural preclusion rules — heightens the lawless character of the revision.

Id. at 412-13 (footnotes omitted).

121 *See supra* notes 8-9 and accompanying text for a discussion of the proposed legislation. The proposal and rejection of legislative changes in the abuse of the writ context was commonplace by the time of the proposed 1990 amendments. *See* Note, *Successive Chances for Life*: Kuhlman v. Wilson, *Federal Habeas Corpus, and the Capital Prisoner*, 64 N.Y.U. L. REV. 455, 471 (1989)("Congress has repeatedly resisted legislative proposals that were inconsistent with the *Sanders* decision or that would have otherwise restricted the availability of habeas corpus") (citing Sanders v. United States, 373 U.S. 1 (1963)); Berger, *supra* note 8, at 1667 (". . . bills on the subject of habeas have been introduced in every Congress since 1953") (footnote omitted).

122 *See* Liebman, *supra* note 4, § 2.3, at 18-20 (Cum. Supp. 1991); Goldstein, *supra* note 5; Berger, *supra* note 8.

123 *See supra* note 8.

124 H.R. REP. No. 681, 101st Cong., 2nd Sess. 1, 120 (1990), *reprinted in* 8 U.S.

ments were ultimately rejected,[125] and the abuse of the writ standard of *Sanders* continued to be the law, although not uniformly followed.[126]

Recognizing the need to announce a clear standard for determining when a subsequent habeas petition is abusive of the writ,[127] the United States Supreme Court granted McCleskey's petition for a writ of certiorari,[128] specifically commissioning the parties to address whether anything short of the deliberate abandonment of a claim constitutes an abuse of the writ.[129] Writing for the majority, Justice Kennedy[130] focused on the standards that have been applied for determining whether a petitioner has abused the writ, and suggested that deliberate abandonment had historically not been the sole measure of abuse.[131] The Justice

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CODE CONG. & ADMIN. NEWS 6472, 6525 (1990). Proposed Section 1303 would have prevented a petitioner from presenting newly discovered facts in a new-claim successive petition unless the petitioner could demonstrate that those facts "could not have been discovered previously by the exercise of reasonable diligence." *Id.*

125 *See supra* note 9.

126 *See* Liebman, *supra* note 4, § 26.7, at 417 (in circuits other than Fourth, Fifth, Eighth, and Eleventh, petitioner had to convince the district court that failure to raise claim sooner was not deliberate or in bad faith; in southern circuits, petitioner had to show that "omission was not objectively unreasonable given what the petitioner or counsel knew or should have known when the first petition was filed . . ."). For examples of decisions preceding McCleskey v. Zant, 111 S. Ct. 1454 (1991), that were faithful to the standard set forth in Sanders v. United States, 373 U.S. 1 (1963), *see, e.g.*, Harris v. Pulley, 885 F.2d 1354, 1369 (9th Cir. 1988) ("we must look to *Sanders* to determine what constitutes an abuse of the writ"), *cert. denied*, 110 S. Ct. 854 (1990); Deutsher v. Whitley, 884 F.2d 1152, 1156 (9th Cir. 1989) (no abuse of writ absent conscious decision to withhold claims); Nell v. James, 811 F.2d 100, 104-05 (2nd Cir. 1987) (requiring proof of actual knowledge, at time of first petition, of facts supporting newly raised claim); United States *ex rel.* Cyburt v. Lane, 612 F. Supp. 455, 458-60 (N.D. Ill. 1984) (criticizing 5th Circuit's objective standard); United States *ex rel.* Oliver v. Zimmerman, 587 F. Supp. 18, 20 (E.D. Pa. 1984) (employing *Sanders'* subjective test).

127 The Court quoted the words of Justice Frankfurter: "it is important . . . to lay down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State Courts." McCleskey v. Zant, 111 S. Ct. 1454, 1471 (1991) (quoting Brown v. Allen, 344 U.S. 443, 501-02 (1953)).

128 McCleskey v. Zant, 110 S. Ct. 2585 (1990).

129 *Id. See supra* note 45.

130 Justice Kennedy was joined in the majority opinion by Chief Justice Rehnquist, Justice White, Justice O'Connor, Justice Scalia, and Justice Souter. *McCleskey*, 111 S. Ct. at 1457.

131 *Id.* at 1467. After tracing the history of the abuse of the writ jurisprudence, Justice Kennedy concluded that "the 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." *Id.* at 1462-67. Although Justice Kennedy admitted that the Court's decisions in the area of abuse

emphasized that, in the past, a petitioner who failed to raise a claim in his first petition due to inexcusable neglect has been held to have abused the writ.[132] Finding the inexcusable neglect standard too vague to guide lower courts,[133] however, the majority continued to enunciate that a subsequent habeas petition raising new grounds for relief will be dismissed unless the petitioner demonstrates cause for not raising the claim earlier and prejudice resulting therefrom.[134]

The majority justified this application of the "cause and prejudice" standard, which was previously employed only in cases of procedural default, by pointing out the similarities between the procedural default and abuse of the writ doctrines.[135] Justice Kennedy compared the nature and purpose of the respective doctrines and noted that both impose procedural requirements for habeas review and focus on the petitioner's conduct in determining whether the requirements have been satisfied.[136] Furthermore, the Justice cited the numerous costs that habeas corpus inflicts on the judicial system, such as destroying the finality of judgments and burdening the scarce resources of the fed-

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of the writ were not easily synthesized, he determined that "one point emerges with clarity: Abuse of the writ is not confined to instances of deliberate abandonment." *Id.*

132 *Id.* at 1468. In support of this conclusion, Justice Kennedy cited to *Townsend v. Sain*, 372 U.S. 293 (1963). *McCleskey*, 111 S. Ct. at 1467-68. Because *Townsend* applied an inexcusable neglect standard, and because *Sanders* held that the principles in *Townsend* also governed in an abuse of the writ analysis, Justice Kennedy concluded that a petitioner could abuse the writ by not raising a claim due to inexcusable neglect. *Id.* at 1468. *See supra* note 77 for a discussion of *Sanders* and *Townsend*. In further support of this conclusion, the Court also cited a case from each of the four southern circuits that had adopted the objective standard. *McCleskey*, 111 S. Ct. at 1468 (citing McCleskey v. Zant, 890 F.2d 342, 346-47 (11th Cir. 1989); Hall v. Lockhart, 863 F.2d 609, 610 (8th Cir. 1988); Miller v. Bordenkircher, 764 F.2d 245, 250-52 (4th Cir. 1985)); Jones v. Estelle, 722 F.2d 159, 163 (5th Cir. 1983)). *See* notes 113-120 and accompanying text for a discussion of the adoption of the inexcusable neglect standard in these four circuits.

Justice Kennedy also emphasized that both section 2244(b) and Rule 9(b) provide that a petitioner can otherwise abuse the writ without attempting to catalogue the various ways in which this can occur. *McCleskey*, 111 S. Ct. at 1466 (citing 28 U.S.C. § 2244(b); 28 U.S.C. § 2254, Rule 9(b)).

133 *Id.* at 1468. Justice Kennedy explained that the Court had not previously given the inexcusable neglect standard the definition necessary to guide lower courts in their consideration of allegedly abusive habeas petitions. *Id.*

134 *Id.* at 1470. The so-called cause and prejudice standard is a very difficult standard to meet. Chemerinsky, *supra* note 3, at 707.

135 *McCleskey*, 111 S. Ct. at 1468-70.

136 *Id.* at 1468. The Court implied that one of the only differences between procedural default and abuse of the writ is that one involves default in state court and the other applies upon default in the first federal habeas petition. *See id.*

eral judiciary.[137] Justice Kennedy emphasized that abuse of the writ and procedural default jurisprudence have the common goal of minimizing these costs by weeding out baseless habeas claims.[138] Thus, the Justice concluded that "the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts."[139]

The majority then explained the cause and prejudice standard in greater detail.[140] The Court explained that to satisfy the "cause" requirement, the petitioner must present evidence of an external, objective factor that prevented the defense from raising the claim previously in state court.[141] The Court provided examples of possible causes for delay: conduct of officials that made compliance with state rules impracticable accompanied by proof that the claim's factual or legal basis was not available to the de-

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137 *Id.* at 1468-69. Justice Kennedy noted that all habeas review undermines the finality of judgments, a fundamental goal of the law. *Id.* To stress the importance of finality, Justice Kennedy discussed the problems that arise when repetitive litigation is permitted. *Id.* First, the Justice maintained that the deterrent effect of the criminal laws is almost eliminated when judgments are not final. *Id.* Additionally, the Justice asserted that when successful petitions result in new trials, the government is prejudiced by fading memories and the inability to relocate witnesses. *Id.* Furthermore, the Justice maintained that federal reexaminations of state court convictions offend the sovereign power of the states. *Id.* at 1469. Justice Kennedy emphatically reminded that "[o]ur 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." *Id.* Moreover, Justice Kennedy explained that federal habeas corpus review burdens the scarce resources of the federal courts. *Id.* Finally, the Justice cautioned that habeas review has the potential for giving prisoners an incentive to withhold claims and manipulate the court system. *Id.* All of these costs and disruptions are intensified further, the Justice charged, when a prisoner presents a new claim in a second or subsequent petition. *See id.*

138 *Id.* at 1469-70. Justice Kennedy recognized the need to overlook the costs and disruptions of habeas review and grant a federal habeas corpus petition when a petitioner presents meritorious constitutional claims. *Id.* at 1469. Both the procedural default doctrine and the abuse of the writ doctrine, the Justice explained, provide the necessary "procedural regularity" for distinguishing unfounded claims from valid ones. *Id.* Justice Kennedy advanced that both doctrines provide equitable principles to allow a petitioner to maintain a habeas claim if he legitimately failed to fulfill pleading and procedural requirements despite exercising reasonable diligence. *Id.* at 1469-70. Justice Kennedy, however, charged that both doctrines similarly operate to deny review to claims in the interest of "vindicat[ing] the State's interest in the finality of its criminal judgments." *Id.* at 1470.

139 *Id.* The Justice opined that there exists a "unity of structure and purpose in the jurisprudence of state procedural defaults and abuse of the writ." *Id.*

140 *Id.* at 1470-71.

141 *Id.* at 1470 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)). *See also* Daniel Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128 (1986) (discussing procedural default tests).

fense, or constitutionally ineffective assistance of counsel.[142] The Court continued, articulating that the prejudice requirement is fulfilled if the petitioner shows he will suffer actual prejudice if the alleged errors which resulted in his custody are not corrected.[143] Finally, the Court qualified the cause and prejudice standard by noting that if a petitioner fails to establish cause and prejudice, a court may still issue a writ of habeas corpus in extraordinary instances where there has been a "fundamental miscarriage of justice."[144]

Next, the majority described how the cause and prejudice standard should be applied in the abuse of the writ context.[145] The Court indicated that upon the filing of a second or subsequent petition, the government must plead abuse of the writ with clarity and particularity.[146] The petitioner then bears the burden of disproving abuse.[147] Justice Kennedy stated that for a court to find the petitioner's failure to raise the claim previously to be excusable, the petitioner must demonstrate cause and prejudice as defined in the procedural default jurisprudence.[148] Justice Kennedy further pointed out that the petitioner will not be granted an evidentiary hearing to support his claim if the district court determines that the standard cannot be satisfied as a matter of law.[149] The Court added, however, that the petitioner's failure to raise the claim earlier will be excused if it falls within the narrow miscarriage of justice exception.[150]

Justice Kennedy further justified the majority's holding on a variety of other grounds. First, Justice Kennedy suggested that the Court's decision is consistent with nearly all prior precedent.[151] Next, the Justice emphasized that the cause and preju-

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142 McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991) (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)). The majority stated that "[a]ttorney error short of ineffective assistance of counsel, however, does not constitute cause and will not constitute procedural default." *Id.* (citing *Murray*, 477 U.S. at 486-88).

143 *Id.* (citing United States v. Frady, 456 U.S. 152, 168 (1982)).

144 *Id.* (citing *Murray*, 477 U.S. at 485).

145 *Id.* at 1470-71.

146 *Id.* at 1470.

147 *Id.*

148 *Id.* *See supra* notes 140-44 and accompanying text.

149 *McCleskey*, 111 S. Ct. at 1470. This will be much more common now that those circumstances excusing the failure to previously assert a claim have been effectively narrowed to three objectively identifiable groups. Liebman, *supra* note 4, § 26.6, at 412.

150 *Id.* *See supra* note 138 and accompanying text.

151 *McCleskey*, 111 S. Ct. at 1471 (citations omitted). The majority added that the exception to the cause requirement for a fundamental miscarriage of justice defines the otherwise inexplicable "ends of justice" inquiry. *Id.* Consistent with the plural-

dice standard would bring certainty and stability to this area of the law, and asserted that it is already well-defined and familiar to district court judges.[152] Additionally, the objective nature of the cause and prejudice standard, the majority maintained, is consistent with the threshold nature of the abuse inquiry.[153] The Court further asserted that the cause and prejudice standard will channel the discretion of the federal habeas courts, thereby achieving greater national uniformity.[154] Finally, Justice Kennedy opined that the adoption of the cause and prejudice standard in the abuse of the writ context will curtail the abusive petitions which have "in recent years threatened to undermine the integrity of the habeas corpus process."[155] The Justice concluded that the Court's holding properly recognizes and balances the historic purposes and functions of the writ, while also preventing its abuse.[156]

In applying its newly adopted abuse of the writ standard to McCleskey's second petition, the Court first considered whether McCleskey had cause for not combining his first federal habeas petition with the claim that his confession had been unconstitutionally obtained in the absence of counsel.[157] The majority recalled that McCleskey advanced this claim in the second federal petition based solely upon the twenty-one page Evans statement.[158] The Court inferred that the document's absence must have been the reason for McCleskey's not raising the claim in the first petition.[159] Thus, the Court questioned whether McCleskey possessed or reasonably could have obtained a sufficient basis to raise the claim in the first petition.[160] The Court stressed that if McCleskey knew or should have known information that would

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ity opinion in *Kuhlman v. Wilson*, 477 U.S. 436, 454 (1986), *see supra* note 75, Justice Kennedy added, a petitioner who wishes to take advantage of this exception must supplement a constitutional claim with some "colorable showing of factual innocence." *Id.* (quoting *Kuhlman*, 477 U.S. at 454).

152 *Id.* In his dissent, Justice Marshall argued that the majority was incorrect in asserting that the prejudice component of this analysis is well-defined. *Id.* at 1479 n.3 (Marshall, J., dissenting).

153 *Id.* at 1471 (quoting Price v. Johnston, 334 U.S. 266, 287 (1948)).

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* at 1472. *See supra* note 27 and accompanying text.

158 *McCleskey*, 111 S. Ct. at 1472. Worthy, the jailer who testified for McCleskey at the district court hearing, *see supra* note 40, was unknown to McCleskey and his counsel when the second petition was filed. *Id.*

159 *Id.* (citing Amadeo v. Zant, 486 U.S. 214, 222 (1988) (cause found if unavailability of evidence was reason for default)). *Id.*

160 *See id.*

have supported the claim, his ignorance of the twenty-one page statement would be irrelevant.[161]

In determining the importance of the Evans document to the claim that McCleskey's confession had been unconstitutionally obtained, Justice Kennedy distinguished McCleskey's knowledge of the document itself from his knowledge of its contents.[162] The Court emphasized that the district court's finding of a *Massiah* violation rested wholly upon conversations in which McCleskey was a participant.[163] Because of this participation, the Court noted that McCleskey was always aware of the contents of Evans's statement relied on by the district court.[164] The majority concluded that the unavailability of the document should not have prevented McCleskey from alleging the *Massiah* violation in his first federal habeas petition, and its absence therefore could not constitute cause.[165]

Although the Court did not consider whether McCleskey would suffer prejudice by virtue of his not being able to raise the *Massiah* claim in his second petition,[166] it did address the miscarriage of justice exception.[167] The majority asserted that even assuming that a violation of McCleskey's right to counsel did occur because of the manner in which the confession was obtained, it resulted merely in truthful inculpatory evidence being admitted at trial and, therefore, determined that any such violation did not affect the reliability of McCleskey's conviction.[168] Justice Kennedy stated that McCleskey simply could not show that the alleged violation resulted in an innocent person being convicted.[169]

Finally, the Court reiterated that the long history of the

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161 *Id.*

162 *Id.*

163 *Id.* at 1473.

164 *Id.*

165 *Id.* Although Justice Kennedy based this conclusion upon the majority's assertion that McCleskey had knowledge of the information within the document, he claimed that the district court's finding that the document was not reasonably discoverable at the time of the first petition was "not free from substantial doubt." *Id.* at 1472. Justice Kennedy argued that strong evidence existed tending to prove that McCleskey knew or reasonably should have known about the Evans document prior to filing the first federal petition, but that he simply chose not to pursue it. *Id.* at 1473.

166 *Id.* at 1474 (citing Murray v. Carrier, 477 U.S. 478, 494 (1986) (showing of prejudice in the absence of cause does not permit relief)).

167 *Id.* at 1474-75.

168 *Id.*

169 *Id.* at 1475.

case,[170] exemplified by the State's having to defend against allegations not raised in the previous federal habeas proceeding, indicates why the abuse of the writ doctrine is so necessary.[171] Justice Kennedy offered assurance that the adoption of the cause and prejudice standard would provide ample consideration of constitutional errors in initial federal habeas proceedings, as well as in second and subsequent petitions under appropriate circumstances.[172]

In a caustic dissent, Justice Marshall[173] vehemently decried the adoption of the cause and prejudice standard in the abuse of the writ context as a marked departure from past precedent.[174] The dissenters argued that the majority usurped the function of the legislature,[175] formed a standard both unwise and unfair,[176] and misapplied the newly adopted standard.[177]

First, Justice Marshall rejected the majority's claim that it was merely clarifying the inexcusable neglect standard and maintained that the majority broke away from all prior abuse of the writ precedent.[178] Previously, claimed the dissent the abuse of the writ doctrine was governed by a good faith standard; a petitioner abused the writ only if he deliberately abandoned his claim[179] or used the writ tactically to harass or delay.[180] Accord-

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170 *Id.* at 1475-76. The majority included an appendix of McCleskey's many claims for relief at different stages of the litigation. *Id.*

171 *Id.* at 1475.

172 *Id.*

173 *Id.* at 1477 (Marshall J., dissenting). Justice Marshall was joined in dissent by Justices Stevens and Blackmun. *Id.* (Marshall, J., dissenting).

174 *Id.* at 1477-79 (Marshall, J., dissenting).

175 *Id.* at 1480-82 (Marshall, J., dissenting).

176 *Id.* at 1483-86 (Marshall, J., dissenting).

177 *Id.* at 1486-89 (Marshall, J., dissenting).

178 *Id.* at 1477 (Marshall, J., dissenting).

179 *Id.* (Marshall, J., dissenting). Justice Marshall claimed that the abuse of the writ doctrine primarily attempts to prevent a petitioner from deleting claims, known to have a legal and factual basis, from the first petition. *Id.* (Marshall, J., dissenting) (citing Wong Doo v. United States, 265 U.S. 239 (1924)). *Wong Doo* is discussed in *supra* notes 61-67 and accompanying text.

180 *McCleskey*, 111 S. Ct. at 1477. (Marshall, J., dissenting). While the majority interpreted the "or otherwise abuse the writ" language of section 2244(b) as an invitation to give content to the inexcusable neglect standard through the adoption of the cause and prejudice test, *id.* at 1466, Justice Marshall argued that established precedent already provided that a petitioner otherwise abused the writ if applications were filed for improper purposes—such as to harass or delay. *Id.* at 1478 (Marshall, J., dissenting). In 1988, Professor Liebman characterized the state of the law in the following manner:

> The rule governing new-claim successive habeas petitions that was developed in the 1920's, codified in 1948, authoritatively interpreted in 1963, and recodified in 1966 and 1976 is as follows: Successive peti-

ing to the dissent, prior precedent dictated that the petitioner's prior application must have a good faith basis to avoid abuses of the writ.[181]

The cause and prejudice standard, posited Justice Marshall, imposes a much stricter standard than any previously suggested in the abuse of the writ jurisprudence.[182] Justice Marshall pointed out that under this test, a counsel's reasonable but mistaken belief that a claim is without either a legal or factual basis will not justify the failure to raise the claim unless an objective, external impediment hindered the counsel's efforts.[183] Justice Marshall argued that, unlike the good faith standard of *Sanders* and its progeny, the cause and prejudice test establishes a strict liability standard.[184] Additionally, the dissent asserted that requiring a petitioner to prove prejudice was not traceable to any abuse of the writ case.[185]

After claiming that the majority's holding departed from established precedent, the dissent argued that the majority exceeded its judicial discretion to change the law.[186] Justice

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> tions presenting 'new or different grounds for relief' are permissible so long as they do not 'constitute[] an abuse of the writ.' Abuse of the writ occurs if the petitioner either (i) 'deliberately withheld the newly asserted ground' from an earlier petition, or (ii) 'otherwise abused the writ' because "his only purpose is to vex, harass, or delay."

Liebman, *supra* note 4, § 26.4, at 397 (footnotes omitted).

181 *McCleskey*, 111 S. Ct. at 1478 (Marshall, J., dissenting). Justice Marshall argued that the undoing of this good faith standard could not be justified by reliance on the Court's more recent abuse of the writ decisions. *Id.* at 1479 n.2 (Marshall, J., dissenting). The dissent contended that the cursory analysis in these opinions merely suggested that the petitioner failed to provide a credible explanation for not raising the claim previously, and were in principle consistent with the *Sanders* test. *Id.* (Marshall, J., dissenting).

182 *Id.* at 1478-79 (Marshall, J., dissenting). Justice Marshall pointed out that under the cause standard, the state of mind of the prisoner's counsel is largely irrelevant. *Id.* at 1479 (Marshall, J., dissenting).

183 *Id.* (Marshall, J., dissenting) (citing Smith v. Murray, 477 U.S. 527, 535-36 (1986)).

184 *Id.* (Marshall, J., dissenting).

185 *Id.* (Marshall, J., dissenting). Justice Marshall explained that under *Sanders*, if a petitioner provided a justifiable excuse for not having raised the newly asserted claim previously, that petitioner never had to prove any sort of prejudice for the court to consider the claim. *Id.* (Marshall, J., dissenting) (citing Sanders v. United States, 373 U.S. 1 (1963)). Indeed, asserted the dissent, prior to *McCleskey* the State bore the burden of proving beyond a reasonable doubt that a meritorious constitutional claim resulted merely in harmless error. *Id.* (Marshall, J., dissenting).

186 *Id.* at 1479-80 (Marshall, J., dissenting). The dissent argued that the Court lacked discretion to exercise in the abuse of the writ context insofar as Congress had insulated *Sanders*' good faith standard from judicial repeal in passing the governing procedural rules and statute. *Id.* at 1480 (Marshall, J., dissenting).

Marshall agreed with the majority that section 2244(b) and Habeas Corpus Rule 9(b) codified *Sanders*' good faith standard,[187] but rejected the majority's contention that Congress left the courts with broad discretion to interpret the phrase "or otherwise abuse the writ."[188] The dissent explained that the cause and prejudice standard completely subsumes the deliberate abandonment test to the extent it renders the petitioner's mental state, which was the focus in deliberate abandonment analysis, wholly irrelevant.[189] Therefore, the dissent accused the majority of unjustifiably reading the deliberate abandonment test out of the statute.[190] Justice Marshall argued that the phrase "or otherwise abused the writ" should be narrowly interpreted only to prevent a petitioner from intentionally filing a petition for some improper purpose.[191]

Moreover, Justice Marshall noted that the Court had never

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187 *Id.* at 1480-81 (Marshall, J., dissenting). In support of this conclusion, Justice Marshall analyzed the legislative history of section 2244(b), and pointed out that Congress' purpose was to prevent the hearing of second and subsequent petitions " 'predicated upon grounds *obviously well known to [the petitioner] when [he] filed the preceding application.*' " *Id.* at 1480 (Marshall, J., dissenting) (emphasis in original) (quoting S. REP. No. 1797, 89th Cong., 2d Sess. 2, (1976), *reprinted in* 1976 U.S.C.C.A.N. 3664). Moreover, the dissent pointed out that the legislative history to Rule 9(b) of the Rules Governing § 2254 cases expressly stated an intent to codify *Sanders*. *Id.* (Marshall, J., dissenting). *See* Rose v. Lundy, 455 U.S. 509, 521 (1982) ("The Advisory Committee to the Rules notes that Rule 9(b) incorporates the judge-made principle governing the abuse of the writ set forth in *Sanders* . . ."). Finally, to further buttress this conclusion, the dissent cited lower court opinions and scholarly commentary. *McCleskey*, 111 S. Ct. at 1480 (Marshall, J., dissenting) (citations omitted).

188 *Id.* at 1481 (Marshall, J., dissenting). The majority argued that because Congress did not attempt to catalogue all of the ways in which the writ could otherwise be abused, it had the authority to give content to this phrase. *Id.* at 1466. *See supra* note 132.

189 *McCleskey*, 111 S. Ct. at 1481 (Marshall, J., dissenting).

190 *Id.* (Marshall, J., dissenting). Justice Marshall pointed out that if a petitioner must prove that some external impediment prevented him from bringing the claim in the first petition, then the reference in § 2244(b) to *deliberate* withholding is necessarily rendered superfluous. *Id.* (Marshall, J., dissenting). Given that *Sanders* focused on such deliberate, bad faith petitioning on the part of the prisoner, and given Congress' intent to codify *Sanders*, Justice Marshall concluded that the Court lacked the power to read this element out of the statute. *Id.* at 1481 (Marshall, J., dissenting).

191 *Id.* at 1481 (Marshall, J., dissenting). Justice Marshall suggested that by distinguishing in section 2244(b) deliberate withholding from other abuses, Congress was tracking *Sanders*' identification of the two broad classes of petitions deserving of dismissal, namely, petitions asserting claims deliberately withheld, and petitions intended to harass or delay. *Id.* at 1481 (Marshall, J., dissenting). Thus, reasoned Justice Marshall, if Congress expected that courts would give content to the phrase "or otherwise abuse the writ," consistency requires that "such elaborations must be confined to circumstances in which a petitioner's omission of an unknown claim is

applied the inexcusable neglect standard in any abuse of the writ decision,[192] and argued that even if inexcusable neglect could constitute an independent abuse of the writ standard, giving it content by adopting the cause and prejudice test could not be defended.[193] Indeed, the dissent observed that the strict liability standard adopted by the majority never excused mere attorney negligence,[194] but requires constitutionally ineffective assistance of counsel.[195]

The dissent further pointed to the recent congressional rejection of proposed amendments to section 2244(b),[196] and declared that the majority was acting as a backup legislature.[197]

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conjoined with his *intentional* filing of a petition for an improper purpose, such as 'to vex, harass or delay.' " *Id.* (Marshall, J., dissenting).

192 *Id.* (Marshall, J., dissenting).

193 *Id.* at 1481-82 (Marshall, J., dissenting). The dissent acknowledged that *Sanders* did compare its analysis with the analysis in *Townsend v. Sain*, and further admitted that *Townsend* established that a habeas petitioner who inexcusably neglected to bring factual evidence in the state proceedings should be denied an evidentiary hearing by the district court. *Id.* (Marshall, J., dissenting). Justice Marshall emphasized, however, that the *Townsend* Court expressly equated the inexcusable neglect standard that it employed with the deliberate bypass test set forth in *Fay v. Noia*. *Id.* (Marshall, J., dissenting) (citing Fay v. Noia, 372 U.S. 391 (1963)). *See supra* note 77. Thus, *Sanders*' reference to *Townsend* incorporates an entirely subjective definition of inexcusable neglect in which deliberateness is still required. *See* Liebman, *supra* note 4, § 26.6, at 410 (criticizing southern circuits' reasoning in basing adoption of objective inexcusable neglect standard on *Sanders*' reference to *Townsend*'s inexcusable standard). *Accord* Goldstein, *supra* note 5, at 116 ("To the extent the inexcusable neglect standard may be premised on *Sanders*' reference to *Townsend*'s use of that phrase, this conclusion is misguided.") (footnote omitted). Moreover, Justice Marshall pointed out that in passing Rule 9(b) of the Rules Governing § 2254 Cases in 1976, Congress rejected a proposal that would have allowed a district court to dismiss a second or subsequent petition if it found that the failure to assert the ground previously was "not excusable." *McCleskey*, 111 S. Ct. at 1482 n.5 (Marshall, J., dissenting) (quoting H.R. REP. No. 94-1471, 94th Cong., 2nd Sess. 1, 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2478, 2481-82). The dissent explained that this formulation was rejected and brought into conformity with *Sanders* because it would have given judges "too broad a discretion" to dismiss a second or subsequent petition. *Id.* (quoting H.R. REP. No. 94-1471, 94th Cong., 2nd Sess. 1, 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2478, 2482).

194 *Id.* at 1482 (Marshall, J., dissenting). Under *Sanders*, mere negligence or the simple failure "due to lack of knowledge or inadvertence on the prisoner's part or some failing on counsel's part in which the petitioner did not 'knowingly and intelligently' concur" would not have constituted abuse of the writ. Liebman, *supra* note 4, § 26.4, at 398 (quoting Sanders v. United States, 373 U.S. 1 (1963)).

195 *McCleskey*, 111 S. Ct. at 1482 (Marshall, J., dissenting).

196 *Id.* (Marshall, J., dissenting). *See supra* notes 8-9.

197 *McCleskey*, 111 S. Ct. at 1482. (Marshall, J., dissenting). The dissent stated: "[i]t is axiomatic that this Court does not function as a backup legislature for the reconsideration of failed attempts to amend existing statutes." *Id.* (Marshall, J., dissenting) (citing Bowsher v. Merck & Co., 460 U.S. 824, 837 n.12 (1983); FTC v.

The proposed amendments, Justice Marshall explained, would have imposed a tougher "reasonable diligence" standard as a means of preventing death row prisoners from filing additional applications to extend litigation.[198] Justice Marshall accused the majority of repealing section 2244(b) on its own, despite Congress' decision to leave it unamended.[199]

Next, the Justice argued that even if the majority could have properly adopted the cause and prejudice standard without undoing the will of Congress, to do so was unwise.[200] The dissent dismissed the importance the majority placed upon finality, declaring that the very purpose of the writ of habeas corpus has always been to put conventional notions of finality aside if life or liberty are threatened due to the alleged infringement of constitutional rights.[201] The dissent also dismissed the majority's attempt to analogize the procedural default and abuse of the writ doctrines.[202] Justice Marshall asserted that the two functions served by the procedural default doctrine, promoting respect for state-procedural rules[203] and preserving the incentive for state courts to conduct criminal proceedings according to constitutional standards,[204] are simply not implicated in the abuse of the writ analysis.[205]

Ruberoid Co., 343 U.S. 470, 478-79 (1952); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 534-35 (1982)).

198 *Id.* (Marshall, J., dissenting). Justice Marshall noted that the rejected amendment would have only changed the standard for death row petitioners, while the majority's holding applies to all habeas petitioners. *Id.* at 1482 n.7 (Marshall, J., dissenting).

199 *Id.* at 1482 (Marshall, J., dissenting).

200 *Id.* at 1483 (Marshall, J., dissenting).

201 *Id.* (Marshall, J., dissenting). The dissent argued that to recognize the broad purpose of the writ is not to require endless petitioning, but to protect " 'the practical efficacy of a jurisdiction conferred by Congress on the District Courts.' " *Id.* (Marshall, J., dissenting) (quoting Brown v. Allen, 344 U.S. 443, 498-99 (1953)).

202 *Id.* (Marshall, J., dissenting).

203 *Id.* (Marshall, J., dissenting) (citing Engle v. Isaac, 465 U.S. 107, 129 (1982) (entertainment of claim in federal habeas that state court deemed procedurally barred undercuts ability of State to enforce its own procedural rules)).

204 *Id.* at 1483-84 (Marshall, J., dissenting) (citations omitted).

205 *Id.* (Marshall, J., dissenting). Justice Marshall emphasized that the strictness of the test applicable in the procedural default context has been justified based upon the theory, not applicable in the abuse of the writ context, that a defendant's procedural default is similar to an "independent and adequate state-law ground for the judgment of the conviction." *Id.* at 1484 (Marshall, J., dissenting) (quoting Wainwright v. Sykes, 433 U.S. 72, 81-83 (1977)). Moreover, Justice Marshall argued that because the abuse of the writ doctrine assumes that a petitioner effectively raised the newly asserted claims in the state proceedings, a habeas court's consideration of those claims manifests no disrespect for state procedural rules, and does not unfairly subject state courts to collateral review of claims that the state

Additionally, Justice Marshall maintained that the majority's holding destroyed the established balance between finality and proper habeas review.[206] First, the Justice noted that the petitioner's interest in liberty creates a powerful incentive to assert all meritorious claims in the first petition,[207] and further asserted that *Sanders'* bar on later bad faith claims sufficiently fortified this natural incentive.[208] The dissent also declared that the majority's holding upset the balance created by the successive petition doctrine, as petitioners will now assert all conceivable claims in the first petition, rather than face the near-irrebuttable presumption of the cause and prejudice standard.[209] Thus, the dissent contended, the majority's holding actually and unwisely promotes not efficiency, but the assertion of baseless claims.[210]

In addition to finding the adoption of the cause and prejudice standard unwise, the dissent argued that its application in the case at bar was wholly unfair.[211] Justice Marshall argued that the retroactive application of the new standard to McCleskey was

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court has not yet heard. *Id.* (Marshall, J., dissenting). Justice Marshall acknowledged that in many cases brought in a second or subsequent petition, the federal court will have new evidence or a new legal theory before it that postdates the state court proceedings, but he stressed that Congress expressly authorized petitioners to avail themselves of habeas relief under precisely these circumstances. *Id.* at 1484 n.8 (Marshall, J., dissenting).

206 *Id.* at 1484-85 (Marshall, J., dissenting). Justice Marshall emphasized that the abuse of the writ doctrine focuses on whether a federal habeas court should entertain a claim allegedly withheld from another such court, not a state court. *Id.* at 1485 (Marshall, J., dissenting). The proper balance between review and finality, the dissent contended, must be struck in that setting. *Id.* (Marshall, J., dissenting).

207 *Id.* at 1484 (Marshall, J., dissenting).

208 *Id.* (Marshall, J., dissenting).

209 *Id.* at 1484-85 (Marshall, J., dissenting). The dissent argued that prior to *McCleskey*, a petitioner faced a disincentive to asserting claims lacking a reasonable likelihood of success because the denial of such claims would make their reassertion barred under the successive-petition doctrine. *Id.* at 1484 (Marshall, J., dissenting). Thus, posited Justice Marshall, if new evidence invested the claim with merit, the petitioner could bring it in a second petition. *Id.* (Marshall, J., dissenting). Justice Marshall further advanced that under the cause and prejudice standard, however, a petitioner will be forced to bring all conceivable claims in the first petition because there will be virtually no expectation that a withheld claim might be brought later should the assessment of the claim's merit subsequently prove erroneous. *Id.* (Marshall, J., dissenting).

210 *Id.* (Marshall, J., dissenting). Justice Marshall surmised that because the possibility of adverse adjudication will be more appealing than never again being able to bring the claim in a subsequent petition, petitioners will be forced to advance claims they themselves do not find wholly meritorious. *Id.* (Marshall, J., dissenting).

211 *Id.* at 1485-86 (Marshall, J., dissenting). The dissent pointed out that the rule set out in *McCleskey* was not the governing standard when McCleskey filed his first federal habeas petition in 1981. *Id.* (Marshall, J., dissenting).

unjust, especially in light of the district court's express finding that McCleskey's counsel conducted a reasonable investigation before determining that the *Massiah* claim was without an adequate factual basis.[212]

Furthermore, the dissent asserted that McCleskey in fact satisfied the cause requirement.[213] Justice Marshall ridiculed the majority's reasoning in finding that because McCleskey participated in the conversations recounted in the disputed document, the document's absence could furnish no viable excuse.[214] Reiterating the central finding of the district court that the State did in fact covertly place Evans in a cell adjacent to McCleskey to elicit incriminating statements for use at trial,[215] Justice Marshall emphasized that the State misled McCleskey throughout all pursuit of the unconstitutional confession claim.[216] Stressing the importance of the actual existence of the document in backing up McCleskey's testimony concerning the violation of his right to counsel, Justice Marshall argued that without this evidence, and against the backdrop of the state habeas court's dismissal of the claim, McCleskey's counsel could have reasonably concluded that raising the claim in the first petition would have been futile.[217]

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212 *Id.* (Marshall, J., dissenting). Justice Marshall posited that prior to the majority's decision, the investigation and decision by McCleskey's counsel would have satisfied *Sanders'* good faith test. *Id.* at 1485 (Marshall, J., dissenting) (citing Sanders v. United States, 373 U.S. 1 (1963)). The dissent pointed out, moreover, that McCleskey did not have a fair opportunity to confront the reasoning of the majority because the applicability of the cause and prejudice standard was not litigated in the lower courts, the State never requested that the Court adopt this standard, and only the Criminal Justice Legal Foundation as *amicus curiae* advanced such an argument. *Id.* at 1485 n.10 (Marshall, J., dissenting). In this regard, Justice Marshall pointed out that the Court does not consider arguments made by *amicus* when, as here, the argument was not raised below and was not raised in the Supreme Court by the party for whose benefit it was being raised. *Id.* at 1485-86 n.10 (Marshall, J., dissenting) (citing United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 60 n.2 (1981); Bell v. Wolfish, 441 U.S. 520, 531 n.13 (1979); Knetsch v. United States, 364 U.S. 361, 370 (1960)).

213 *Id.* at 1486-88 (Marshall, J., dissenting). Before turning to the cause analysis, Justice Marshall argued that the majority should have remanded the case to the lower court because the application of the newly adopted standard required such a detailed, independent review of the record. *Id.* at 1486 (Marshall, J., dissenting).

214 *Id.* (Marshall, J., dissenting).

215 *See supra* note 40.

216 *McCleskey*, 111 S. Ct. at 1487 (Marshall, J., dissenting). The dissent emphasized that the State's presentation of its complete file to McCleskey's counsel failed to include the Evans statement. *Id.* at 1487 n.11 (Marshall, J., dissenting). Further, Justice Marshall noted, numerous state officials responsible for Evans' confinement denied knowledge of any agreement between the State and Evans. *Id.* at 1487 (Marshall, J., dissenting).

217 *Id.* (Marshall, J., dissenting). Justice Marshall declared that without the state-

Justice Marshall declared that the statement provided the credible and independent corroboration necessary to make McCleskey's claim that his confession had been unconstitutionally obtained in the absence of counsel worth pursuing.[218]

While acknowledging that no external obstacle totally barred McCleskey's counsel from pursuing this claim, Justice Marshall argued that the dishonesty of the state officials caused McCleskey's counsel to feel confident in focusing his attention on other claims.[219] Justice Marshall further asserted that by not including in its cause analysis any consideration of the effect that the State's dishonesty had upon the defense counsel's pursuit of the claim, the majority promoted the State's misconduct.[220]

Finally, the dissent concluded that because Evans's testimony was critical to the State's case,[221] McCleskey was clearly prejudiced by the presentation of Evans's unconstitutionally obtained statements.[222] Even under the cause and prejudice test, Justice Marshall concluded, McCleskey should have been permitted to bring his second petition and have the claim entertained.[223]

In *McCleskey v. Zant*, the Court was called upon to balance the need for finality in the criminal justice and death penalty

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ment, the only evidence supporting the *Massiah* violation was McCleskey's own testimony. *Id.* (Marshall, J., dissenting).

218 *Id.* at 1487-88 (Marshall, J., dissenting). Justice Marshall stressed that "the importance of the statement lay much less in what the statement said than in its simple existence." *Id.* at 1487 (Marshall, J., dissenting). The existence of the statement, added Justice Marshall, not only provided a reasonable expectation of success in pursuing the *Massiah* claim, but provided the clues that led to the discovery of Worthy, McCleskey's lead witness. *Id.* at 1488 (Marshall, J., dissenting).

219 *Id.* (Marshall, J., dissenting). The dissent stated:

> [B]y 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. The sum and substance of the majority's analysis is that McCleskey had no 'cause' for failing to assert the *Massiah* claim because he did not try hard enough to pierce the State's veil of deception.

Id. (Marshall, J., dissenting).

220 *Id.* (Marshall, J., dissenting).

221 *See supra* notes 16-24 and accompanying text.

222 *McCleskey*, 111 S. Ct. at 1488 (Marshall, J., dissenting). Justice Marshall contended that, without Evans' testimony, the jury could have easily reached a different verdict. *Id.* (Marshall, J., dissenting).

223 *Id.* (Marshall, J., dissenting). Justice Marshall argued that whether McCleskey satisfied the cause and prejudice standard was certainly a close enough question to warrant a remand to allow the parties to fully and fairly brief the issue. *Id.* at 1488-89 (Marshall, J., dissenting).

processes with the claim that notions of finality should be mitigated if not displaced when meritorious constitutional claims are presented and life is at stake.[224] In striking this balance, the Court failed to give effect to the governing statutes and its own precedent, and it also placed an unjustifiable and unnecessary burden on petitioners seeking the relief offered by the writ of habeas corpus, and in particular, on petitioner McCleskey.

Contrary to the suggestion of the majority,[225] the cause and prejudice standard as developed in the procedural default context is inconsistent with the standard set forth in *Sanders* and subsequently codified by Congress.[226] The *Sanders* standard required that a petitioner prove that a claim asserted in a new-claim successive petition had not been deliberately withheld, and that the claim had not been omitted to harass or delay the judicial process.[227] Under the cause prong of the newly-adopted standard, a petitioner must show that some objective factor made it impossible to bring the claim in the first petition.[228] Thus, a petitioner who in good-faith did not bring a claim that objectively could have been brought previously was permitted to bring the new claim under *Sanders* and its codification, but will not be able to bring the claim under *McCleskey* unless the significant hurdle of the cause standard is met.[229]

Reduced to its essence, the majority's argument offered two justifications for its new interpretation of *Sanders* and the governing statutes: the inexcusable neglect language of *Townsend* referred to in *Sanders*, and the supposedly open-ended "otherwise abuse the writ" language[230] of the statute.[231] These bases do not

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224 For differing viewpoints on the proper weight to be given these competing concerns, *see* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Yackle, *supra* note 1; Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

225 *See supra* note 135 and accompanying text.

226 *See supra* note 134-36 and accompanying text.

227 *See supra* notes 80, 95, 191 & 194 and accompanying text.

228 *See supra* note 151 and accompanying text.

229 *See supra* note 126 and accompanying text.

230 *See supra* note 132 and accompanying text.

231 The majority also discussed in some detail the similarity of the policies served by the cause and prejudice standard and the abuse of the writ jurisprudence in attempting to address the costs and disruptions of federal habeas review. *See supra* notes 141-54 and accompanying text. The better view of this debate is that the strictness of the standard applied in the procedural default context has been based upon a petitioner's default being analogous to an independent state-law ground for the judgment, a theory inapplicable in the abuse context. *See supra* note 205. Regardless, the point to be made is that a policy justification by the majority presup-

withstand scrutiny; indeed, upon close examination, the majority's argument reflects an utter and wholly result oriented intellectual dishonesty.[232]

In understanding the majority's first justification, it must be emphasized that the inexcusable neglect language in *Townsend*, which was consistent with *Fay* and *Sanders*, has almost universally been understood to refer to a petitioner's deliberate choice, not his or her negligent mistake.[233] Despite this, the majority simply takes the inexcusable neglect language from *Townsend*, and without explanation states that this standard demands more from a petitioner than the deliberate withholding standard.[234] Moreover, the majority's citation to four opinions by Circuit Courts of Appeals,[235] each of which offered explanations for adopting an objective inexcusable neglect standard as unsatisfying as its own,[236] cannot justify the departure.

The majority's second basis for its new interpretation, that Congress had not answered all of the questions regarding other types of abuse, is similarly unpersuasive. The majority failed to admit the implications of its admission that the governing statutes codified *Sanders*. This allowed it to exercise substantial discretion where it had previously been narrowly circumscribed.[237] In fact, *Sanders* and its progeny established that a petitioner otherwise abuses the writ when using it for an improper purpose, such as to harass or delay.[238] Although deliberateness is precisely what is proscribed by the *Sanders* standard, the cause and prejudice test renders an inquiry into the defendant's state of mind wholly superfluous.[239] It cannot be doubted that a significant percentage of new-claim successive petitions that would have been entertained under *Sanders* will be dismissed under *McCleskey*.

The Court's aggressive application of its newly adopted stan-

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poses that it had the power to alter the governing abuse of the writ standard. This presupposition was not adequately defended.

232 In the words of Justice Brennan: "[r]esult, not reason, propels the Court today." Butler v. McDellar, 110 S. Ct. 1212, 1219 (1990) (Brennan, J., dissenting).

233 *See supra* notes 77 & 132 and accompanying text.

234 *See id.*

235 *See supra* note 132 and accompanying text.

236 *See supra* 113-20 and accompanying text.

237 *See supra* notes 94 & 201 and accompanying text.

238 *See id.*

239 *See supra* note 189 and accompanying text.

dard was similarly unjustifiable.[240] Although the Court quoted extensively from the district court opinion,[241] it failed to include that court's finding that McCleskey dropped the claim that his confession had been unconstitutionally obtained in the absence of his counsel from his first habeas corpus petition "because it was obvious that it could not succeed given the then-known facts."[242] The Court eschewed this futility argument, however, and found that McCleskey was not *actually prevented* from bringing this claim.[243]

Thus, under the majority's holding, McCleskey could have brought the claim in the first petition, failed, gained access to the document, reasserted the previously adjudicated claim, and had it barred unless he could supplement it with a showing of factual innocence.[244] Or, McCleskey could have, as he did, omitted the claim from his first petition because of the lack of an adequate factual basis, gained access to the document, asserted the claim in a new-claim petition, and had it barred because he had not been absolutely prevented from bringing it previously.[245] Such a situation presents a defendant with no meaningful option, and places an unjustifiable burden on good-faith petitioner's seeking habeas relief.[246] Significantly, the very reason for this situation in McCleskey's case was the fact that the State did not disclose Evans' statement to the defense in its "complete" file.[247]

If the traditional purpose of the writ of habeas corpus was to ensure that individuals were not unjustly deprived of life or liberty, then *McCleskey v. Zant* surely signals the end of a tradition. The majority's motivation became apparent when it stated that its holding will inevitably curtail the abusive petitions which have "in recent years threatened to undermine the integrity of the habeas corpus process."[248] However, in an abuse of the writ that completely overshadows any engaged in by Mr. McCleskey, the majority curtailed a great deal more — good faith petitions alleging meritorious constitutional claims that for justifiable reasons, though not for "cause", could not have been brought previ-

240 *See* Freedman, *supra* note 19, at S6 ("Indeed, the saga of Warren McCleskey some day may come to symbolize criminal justice in the Rehnquist era.").
241 *See* McCleskey v. Zant, 111 S. Ct. 1454, 1460-61 (1991).
242 *See supra* note 39.
243 *See supra* notes 161-65 and accompanying text.
244 *See supra* note 75.
245 *See supra* note 165 and accompanying text.
246 *See supra* note 209-10 and accompanying text.
247 *See supra* note 23 and accompanying text.
248 *See supra* note 155 and accompanying text.

ously.[249] The Court should take note of Justice Frankfurter's warning issued almost forty years ago: "Under the guise of fashioning a procedural rule, we are not justified in wiping out the practical efficacy of a jurisdiction conferred by Congress on the District Courts."[250]

It must be urged that Congress should, in its recognition of the habeas corpus legislation, strike a better balance than did the Court. If the *Sanders* standard allowed too many generally abusive petitions to be entertained, the cause and prejudice standard will assuredly require the dismissal of too many petitions genuinely deserving review. A proper balance requires that a petitioner who asserts any new claims for relief in a second or subsequent petition prove that the newly asserted grounds had not been deliberately withheld, were not omitted to harass or delay the judicial process and did not exhibit reckless indifference to the orderly administration of justice.[251] Such a standard would maintain the essence of *Sanders*, preserve the traditional discretionary nature of the determination and allow a reasonable objective element to prevent against genuine abuse into the court's decision. If Congress were to create such a realistic burden, the writ would be preserved against potential abuse by both the Court and bad faith defendants.

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249 *See supra* note 212.

250 Brown v. Allen, 344 U.S. 443, 498-99 (1952).

251 The last part of this test was recommended by *Goldstein, supra* note 8, at 122 (footnote omitted). Congress' consideration of this issue should also come to terms with whether the same rules will apply to cases that involve the death penalty and cases that do not. Clearly, the incentive to extend litigation attributed to defendants under a sentence of death should not be transposed to other defendants. At the same time, however, strong arguments exist as to why defendants petitioning under a sentence of death should be held to a less demanding standard. *See, e.g. Goldstein, supra* note 8, at 120-22 (arguing that when "a person's life is in the balance," courts should take extraordinary care and consider the validity of the claims with greater scrutiny.).