July 10, 1991

CRIMINAL LAW ADVOCACY REPORTER

"The demise of the 'mere Constitutional violation': The role of factual innocence in federal habeas corpus attacks on criminal judgments."

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Anyone who has seen Peter Lorre in his starring role in the classic movie "M", cannot forget the scene in which Lorre, confronted by an angry mob intent on inflicting just (if somewhat excessive) punishment on him for his heinous crimes, looks straight into the camera and pleads, in plaintive and pitiful tones: "I'm innocent! I'm innocent!" This, alas, is now the cry that most prisoners will have to adopt if they expect the federal courts ever to reach the merits of their claims in second or subsequent habeas corpus petitions.

The move toward limiting habeas corpus review to those cases in which a colorable claim of factual innocence (and hence of a fundamental miscarriage of justice) supplements an alleged violation of constitutional rights -- a trend which culminated in a series of decisions by the United States

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Supreme Court within the last few years (with two important decisions rendered in the 1990 Term alone) -- actually began in earnest two decades ago. In 1970, the late Henry J. Friendly, then seated as one of the giants on the United States Court of Appeals for the Second Circuit, published an article entitled Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970). At the start of that landmark discourse, Judge Friendly set forth his postulate in unmistakably clear terms:

> My thesis is that, with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence. Id. at 142.

At the time, as Judge Friendly readily admitted, his habeas stance was greeted as virtual heresy by the legal world. However, Friendly asserted that there was no reason in either legal history or public policy to allow repeated attempts to upset criminal judgments, in the absence of a claim that a factually innocent defendant had been wrongly convicted.

Judge Friendly proposed legislation to restrict habeas corpus review -- including federal court review of both state and federal convictions, and state court review of state convictions -- to those instances "where a convicted defendant makes a colorable showing that an error, whether 'constitutional' or not, may be producing the continued punishment of an innocent man." Id. at 146, 160 (emphasis

added).

In 1976, criminal defense practitioners began to realize the fruits of the seed which had been planted by Judge Friendly. In Stone v. Powell, 428 U.S. 465 (1976), the Supreme Court held that search and seizure claims under the Fourth Amendment's exclusionary rule could not be raised by federal habeas corpus where there had been "an opportunity for full and fair litigation of a Fourth Amendment claim" in the state courts. Id. at 482.

The Stone Court's rationale was that since Fourth Amendment/exclusionary rule claims -- normally motions to suppress probative evidence of guilt -- involve questions of constitutional violations that do not implicate issues of factual guilt versus innocence, they should not be reviewable in a federal habeas corpus context. Writing for the majority, Justice Powell reasoned:

> The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding.

Id. at 489-490 (emphasis added).

The larger shoe dropped in 1986, however, with the Court's opinion in Kuhlmann v. Wilson, 477 U.S. 436 (1986). In Kuhlmann, the claim in a successive habeas petition was that the placing of a jailhouse informant in the same cell as the accused violated the petitioner's Sixth Amendment rights.

Wilson admitted to his cellmate that he had committed a particular robbery and murder. These damning confessions were later admitted into evidence through the informant.

The plurality opinion, alluding to the language of Sanders v. United States, 373 U.S. 1 (1963), held that the "ends of justice" did not require a hearing for Wilson's claim. Sanders, 373 U.S. at 15. The Kuhlmann Court reasoned that, by trying to exclude inculpatory evidence which had been illegally obtained, petitioner was attempting to suppress true facts; therefore, he could not reasonably claim that he was "actually innocent."

Thus, by 1986, the Court made clear that successive habeas petitions attacking state court judgments would be entertained only when required by the "ends of justice", which was defined as those situations in which "the prisoner supplements his constitutional claim with a colorable showing of factual innocence." Kuhlmann, 477 U.S. at 454.

The Kuhlmann Court announced the standard it deemed appropriate:

> The prisoner may make the requisite showing by establishing that under the probative evidence he has a colorable claim of factual innocence. The prisoner must make his evidentiary showing even though -- as argued in this case -- the evidence of guilt may have been unlawfully admitted. Id.

In a footnote, the Court cited Judge Friendly's article, thereby expressly embracing his formulation of the concept of "factual innocence":

> As Judge Friendly explained, a prisoner does not make a colorable showing of innocence "by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained." Friendly, supra, at 160. Rather, the prisoner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt." Ibid. Thus, the question whether the prisoner can make the requisite showing must be determined by reference to all probative evidence of guilt or innocence. Kuhlmann, 477 U.S. at 454, n.17 (emphasis in original).

Thus, the Supreme Court established and firmly rooted the principle that when "factual innocence" is under consideration, "all probative evidence" must be taken into account, including that which was wrongfully admitted or wrongfully excluded. Id.

Near the end of its 1990 Term, the Supreme Court commented on the importance of the "factual innocence" issue in overriding all other considerations. In McCleskey v. Zant, ___ U.S. ___, 111 S.Ct. 1454 (April 16, 1991), the Court reaffirmed that not only is the concept of "factual innocence" now firmly entrenched in the habeas corpus doctrine, but that it remains the paramount consideration in a case where a potential miscarriage of justice has occurred. The McCleskey Court held that questions of procedural default are irrelevant if the petitioner can demonstrate -- according

to the Friendly standard -- that he is "factually innocent":

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

McCleskey, 111 S.Ct. at 1470 (emphasis added).

The McCleskey Court stated emphatically that the possibility of "factual innocence" trumps all procedural objections by the government. When considered in tandem with the "fundamental miscarriage of justice" triumvirate -- Sanders v. United States, 373 U.S. 1 (1963), Murray v. Carrier, 477 U.S. 478 (1986), and Kuhlmann v. Wilson, 477 U.S. 436 (1986) -- and its progeny, McCleskey v. Zant creates an overwhelming presumption in favor of receiving, and even granting a petition for a new trial when "factual innocence" is at issue.

Shortly after McCleskey, the Court took a logical next step in Coleman v. Thompson, 59 U.S.L.W. 4789, 4796 (June 24, 1991), holding that review of habeas claims by federal courts would be barred where a prisoner "has defaulted his federal claims in state court pursuant to an independent and adequate state rule . . . ". In so doing, the Court rejected the "deliberate bypass" standard established in Fay v. Noia, 372 U.S. 391 (1963), which held that a procedural default of a

claim in state court would not bar subsequent habeas review of the claim in federal court unless the petitioner made a deliberate and intentional decision to bypass an opportunity for state court review. Coleman v. Thompson, 59 U.S.L.W at 4796.

In Coleman, the petitioner was held to have defaulted his federal claims in state court because his counsel failed to file a timely notice of appeal -- missing the deadline by only three days. Coleman, however, argued that there was good "cause" for not having filed a timely notice of appeal -- namely, that his counsel had been ineffective. The Court rejected this argument outright, holding that "[b]ecause Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court [could not] constitute cause to excuse the default in federal habeas." Id. at 4798. The Court further noted, that "'cause' under the cause and prejudice test must be something external to the petitioner, something that cannot be fairly attributed to him . . . ". Id. at 4797. Therefore, the Court reasoned, "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" Id. at 4797.[2]

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[2] Interestingly, just months earlier in McCleskey, which involved successive habeas petitions, the Court noted that "constitutionally 'ineffective assistance of counsel . .

Despite its complete evisceration of the "deliberate bypass" rule of Fay v. Noia, supra, and its narrowing of the situations in which ineffective assistance of counsel can constitute "cause", the Court reaffirmed that federal habeas claims will not be barred where a petitioner can demonstrate "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 59 U.S.L.W. at 4796 (emphasis added). Unfortunately, because Coleman -- in the words of the Court -- did "not argue . . . that federal review of his claims [was] necessary to prevent a fundamental miscarriage of justice, he [was] barred from bringing these claims in federal habeas." Id. at 4798.

The maxim which one gleans from the cases has by now become self-evident: If a prisoner expects so much as a federal court glance at the merits of his claim of a violation of constitutional rights in a second or subsequent habeas petition, the claim will have to be joined by a

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. is cause.'" McCleskey v. Zant, supra, ___U.S.___, 111 S.Ct. at 1470, quoting, Murray v. Carrier, supra, 477 U.S. at 488. In Coleman, the Court effectively narrowed the instances in which ineffectiveness can be offered as a ground for cause to those instances where the ineffectiveness claim involves a situation where the petitioner had a ("constitutional") Sixth Amendment right to effective assistance of counsel. Thus, after Coleman, the only habeas petitioners who will successfully be able to allege ineffectiveness as "cause" are those who are contesting attorney error which occurred at trial or on direct appeal.

colorable argument that the conviction constitutes a fundamental miscarriage of justice because the prisoner is factually innocent of the crime for which he was convicted.

It is important to note that "legal innocence" differs from the concept of "factual" or "actual innocence". In a case of "legal innocence", one is claiming that, had the trial court followed all of the requisite procedural rules, including the suppression of unlawfully seized evidence, and had the judge correctly instructed the jury, there is a fair probability that the jury would have returned a verdict of "not guilty". In a case of "factual innocence", the claim is that, with all probative evidence taken into account, a colorable claim of "actual" innocence is set forth.

Doubtless there will be much litigation seeking to define the parameters of factual innocence. In some cases factual innocence will be clear, while in others it will remain cloudy. A doctrinal continuum will evolve, with some claims at one end, some at the other, and many in between.

For example, the clearest sort of claim of factual innocence would be in a case where, after completion of direct appellate review and certiorari, and after the unsuccessful filing of a first habeas petition, the prisoner learned for the first time of the existence of evidence that would give him an airtight alibi, or that would prove that the crime never occurred.

There may well be a broad category of "factual

innocence" scenarios which swing at some point between the two ends of the pendulum. For example, consider a case in which the facts incriminate the defendant in a federal criminal case under the mail fraud statutes, but where evidence is discovered that the defendant did not use the mails. Is a claim of factual innocence set forth? And what about a claim that an important government eyewitness had poor eyesight?

The lesson to be learned here is that habeas applicants in the federal courts would do well to frame their petitions in terms of factual innocence, and where the petitioner does not obviously meet the Friendly standard, every effort should be made to cast his claim in such terms to the extent possible.

For example, in McCleskey, supra, the claim involved the prisoner's discovery, years later, that the prisoner occupying the cell next to his, and who testified at trial that McCleskey confessed the crime during a jailhouse conversation, had in fact been planted there by the prosecutor for the sole purpose of extracting a confession from McCleskey. If the alleged claim were true, it would have qualified as a Massiah violation. McCleskey, 111 S.Ct. at 1458. However, McCleskey might well have been able to frame his claim on habeas in terms of guilt versus innocence. A major issue in recent years in the criminal justice system has involved the reliability of testimony of "jailhouse"

confessions. Defendants and their lawyers well know how frequently prison inmates seek to curry favor with parole, police, and prison authorities, by offering to testify to supposed "confessions" by fellow prisoners who are about to stand trial.[3] Had McCleskey been able to raise doubts about the reliability of the inmate's testimony of his "confession", he might have saved his petition from dismissal.[4]

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[3] Indeed, a recent scandal in Los Angeles featured a prisoner who was responsible for obtaining convictions in a large number of cases, and who later admitted that his testimony of these jailhouse confessions was entirely bogus. In October of 1988 the prisoner/informant, Leslie Vernon White, demonstrated how he could gather enough information to fake a murder confession by another inmate through the use of a pay telephone in the jailhouse. For purposes of illustration, sheriff's deputies furnished White with the last name of an inmate whom he did not know personally. Posing over the telephone as a bail bondsman, deputy district attorney, sheriff's sergeant, and Los Angeles police sergeant, prisoner White was able to learn enough details about the inmate and the crime itself to style a fully credible (yet totally fabricated) "confession". The demonstration sent shock waves through the Los Angeles law enforcement community, whose members became concerned that innocent defendants may have been convicted of murders because of testimony fabricated by jailhouse informants. Officials then took the extraordinary step of initiating a review of every case in the last decade in which one inmate testified that another had confessed in jail. See "California Shaken Over An Informer", New York Times, February 17, 1989, at 1; and "Review Of Murder Cases Is Ordered/Jail-House Informant Casts Doubt on Convictions Based on Confessions", Los Angeles Times, October 25, 1988.

[4] The Supreme Court assumes that since the testimony of the confession was incriminatory, McCleskey was bringing a claim of constitutional violation unaccompanied by a colorable showing of innocence. A similar assumption was made in Kuhlmann v. Wilson, supra, 477 U.S. at 436, where the Court viewed the informant's testimony against the defendant as involving "incriminating statements". There, too, the

The tendency of courts to pay more attention to claims of factual innocence and miscarriages of justice, and less attention to "mere" claims of constitutional violations, as well as the concomitant willingness of courts to override technical objections to entertaining (and granting) a second or subsequent habeas petition upon an adequate demonstration of a possible injustice, is evidenced in an unpublished opinion of the Court of Appeals for the Fourth Circuit. In United States v. Haywood Williams, Jr., No. 90-7400, slip op. (4th Cir. June 21, 1991), rendered shortly after the McCleskey decision was announced, the appellate court reversed a conviction, in spite of the fact that the claim was brought before the Court in a successive habeas

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reliability of the testimony was not challenged. Yet in that case, the Supreme Court noted with approval Judge Friendly's formulation that guilt or innocence had to be judged, on habeas, on the basis of all evidence, including that illegally admitted, "but with due regard to any unreliability of it . . . ". Id. at 454, n. 17 (emphasis added). Indeed, the question of the reliability of this kind of testimony was featured in another important case during the 1990 Term, Arizona v. Fulminante, ___U.S.___, 111 S.Ct. 1246 (1991). In Fulminante, the Court held that the admission into evidence of a coerced confession might be considered "harmless error". The evidence at issue involved confessions supposedly made by Fulminante to a fellow inmate, and later to the inmate's wife. Justice White, in his dissent, evinced skepticism as to the reliability of such testimony of this brand of supposed "confession", id. at 1258-59, but the issue obviously had not been adequately developed below for the petitioner to have made an attack that implicated his innocence. Thus, the majority dealt with the case as if the petitioner were questioning only the constitutionality of the evidence admitted, and not its reliability.

petition.[5]

With nary a thought about McCleskey acting as a possible bar to consideration of the petition on the merits, the Fourth Circuit stated:

> A court possesses the power to change a prior decision which is in error and would result in substantial injustice. Edwards v. Johnston County Health Dept., 885 F.2d 1215, 1218, n.10 (4th Cir. 1989). This Court will not allow any law-of-the-case doctrine [to] prevent it from correcting a previous decision which resulted in substantial injustice.

United States v. Haywood Williams, Jr., No. 90-7400, slip op. at 5, n. 4 (4th Cir. June 21, 1991).

As with United States v. Haywood Williams, Jr., there may be many other unreported cases, now and in the future, in which courts grant habeas petitions on the basis of a perceived miscarriage of justice. Such cases may not always be reported, and hence the power of such assertions of miscarriage might not be readily apparent through the normal channels of legal research. What is absolutely clear, however, is that in order to get anything other than short shrift from federal habeas courts, henceforth petitioners will have to frame their moving papers in such a way as to cause their constitutional claims to be viewed through the prism of a colorable showing of factual innocence.

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[5] While factual innocence was not at issue in petitioner's habeas claim, in dicta the Court reaffirmed the importance of correcting a prior incorrect decision which would result in a "substantial injustice". United States v. Haywood Williams, Jr., No. 90-7400, slip op. at 5 (4th Cir. June 21, 1991).

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