

5-1-2007

## Killing Roger Coleman: Habeas, Finality, and the Innocence Gap

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## KILLING ROGER COLEMAN: HABEAS, FINALITY, AND THE INNOCENCE GAP

TODD E. PETTYS\*

### ABSTRACT

*For the past fifteen years, the execution of Roger Coleman has served as perhaps the most infamous illustration of the U.S. Supreme Court's determination to help the states achieve finality in their criminal cases. Convicted of rape and murder in 1982, Coleman steadfastly maintained his innocence and drew many supporters to his cause. In its 1991 ruling in Coleman v. Thompson, however, the Court refused to consider the constitutional claims raised in Coleman's habeas petition. The Court ruled that Coleman had forfeited his right to seek habeas relief when, in prior state proceedings, his attorneys mistakenly filed their notice of appeal one day late. Amidst international media attention, Virginia authorities executed Coleman the following year. Faced with continuing controversy about the case, the governor of Virginia ordered new DNA tests in January 2006—tests that confirmed Coleman's guilt and finally brought an end to a story that began with a young woman's death twenty-five years earlier.*

*In this Article, Professor Pettys argues that there are important lessons to be learned from the fact that finality was not achieved in Coleman's case until long after the Supreme Court declared the case closed. Although finality is a worthy goal, the Court has failed to account for the fact that finality is exceptionally elusive when the public fears that a person facing severe punishment was convicted of a crime he or she did not commit. Although the Court has said it will adjudicate the merits of a procedurally flawed habeas petition when a prisoner makes a persuasive showing of innocence, Professor Pettys*

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*argues that the Court's habeas jurisprudence suffers from an "innocence gap"—a gap between the amount of exculpatory evidence sufficient to thwart finality and the amount of exculpatory evidence sufficient to persuade a federal court to forgive a prisoner's procedural mistakes and adjudicate the merits of his or her constitutional claims. Professor Pettys concludes by arguing that Congress is harmfully widening that gap even further.*

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## INTRODUCTION

On May 20, 1992, authorities at Virginia's Greensville Correctional Center executed Roger Keith Coleman.<sup>1</sup> Ten years earlier, a Buchanan County jury had found Coleman guilty of raping and murdering Wanda McCoy, Coleman's sister-in-law.<sup>2</sup> In the years between Coleman's conviction and execution, however, Coleman's attorneys and supporters had galvanized the nation by amassing an impressive body of evidence that raised significant doubts about Coleman's guilt. In its issue dated May 18, 1992, *Time* magazine placed a photograph of Coleman on its cover with the headline, "This Man Might Be Innocent; This Man Is Due To Die."<sup>3</sup> *Newsweek* and *The New Republic*, ABC's *Nightline* and *PrimeTime Live*, NBC's *Today*, CNN's *Larry King Live*, the *Donahue* show, the *Washington Post*, the *New York Times*, *USA Today*, and numerous other media outlets featured Coleman's story, as well.<sup>4</sup> Pope John Paul II and thousands of Americans urged Virginia's Governor L. Douglas Wilder to grant Coleman clemency,<sup>5</sup> but Governor Wilder refused, based in part on Coleman's performance on a lie detector test administered the morning of his execution.<sup>6</sup> As the hour of Coleman's

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1. See Robert L. Jackson & David G. Savage, *Final Appeals Rejected, Killer Is Executed*, L.A. TIMES, May 21, 1992, at A16 (reporting Coleman's execution).

2. See *Coleman v. Commonwealth*, 307 S.E.2d 864, 865, 875 (Va. 1983).

3. See *14 Years Ago in Time*, TIME, Jan. 23, 2006, at 21 (reprinting the cover of its issue dated May 18, 1992); Jill Smolowe, *Must This Man Die?*, TIME, May 18, 1992, at 40 (providing a lengthy account of Coleman's case).

4. See JOHN C. TUCKER, MAY GOD HAVE MERCY: A TRUE STORY OF CRIME AND PUNISHMENT 232-33 (1997) (describing the media coverage); James Warren, *Major Legal, Media Blitz Fails To Halt Execution*, CHI. TRIB., May 21, 1992, at C1 (describing the media coverage of Coleman's case and reporting that, on the day before Coleman's execution, prison officials told at least one local reporter that Coleman "was now speaking only with national media").

5. See Warren Fiske, *Roger Keith Coleman Case; DNA Proves Executed Man Raped, Killed Sister-in-law*, VIRGINIAN-PILOT, Jan. 13, 2006, at A1 (recounting the Pope's involvement); see also John F. Harris, *Coleman Electrocutted as Final Appeals Fail; Supreme Court Rejects Stay in 7 to 2 Vote*, WASH. POST, May 21, 1992, at A1 (reporting that Governor Wilder "received more than 13,000 calls and letters on Coleman's case, many from overseas, the vast majority urging clemency").

6. See Sandra Evans, *Coleman Case Underscores Debate on Accuracy of Polygraphs*, WASH. POST, May 22, 1992, at C1 (reporting that the prominent criminal defense attorney F. Lee Bailey had urged Governor Wilder to give Coleman a lie detector test, and that the results

death approached, fifty television cameras and more than a dozen satellite trucks, representing at least six different countries, were stationed outside the prison while the Fuji blimp hovered overhead.<sup>7</sup> Having refused to address the merits of Coleman's federal habeas petition in 1991 because of a minor filing error Coleman's attorneys committed,<sup>8</sup> the U.S. Supreme Court declined Coleman's request for a last-minute stay of execution.<sup>9</sup> After Coleman was strapped into the electric chair, he spoke his final words: "An innocent man is going to be murdered tonight. When my innocence is proven, I hope Americans will realize the injustice of the death penalty as all other civilized countries have."<sup>10</sup> Coleman was pronounced dead a few minutes later.<sup>11</sup>

In the years following Coleman's execution, many insisted that Virginia had killed an innocent man. Kathleen Behan, one of Coleman's attorneys, predicted that "Roger's innocence [would] be proven"<sup>12</sup> and that "his case [would] be remembered as 'the Dred Scott of death penalty law.'"<sup>13</sup> Led by James McCloskey, Centurion Ministries worked tirelessly to prove that Coleman had neither raped nor murdered his sister-in-law.<sup>14</sup> John C. Tucker, formerly a criminal defense attorney in Chicago, joined those investigating

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of the test had "helped sway" the Governor's decision to withhold clemency).

7. TUCKER, *supra* note 4, at 316; *see also* Peter Applebome, *Virginia Executes Inmate Despite Claim of Innocence*, N.Y. TIMES, May 21, 1992, at A20 (stating that "a legal and public relations marathon ... brought the bespectacled former coal miner from obscurity to international attention"); Maria Glod & Michael D. Shear, *Warner Orders DNA Testing in Case of Man Executed in '92*, WASH. POST, Jan. 6, 2006, at A1 (stating that Coleman "maintained his innocence in a series of television and newspaper interviews that generated attention around the world").

8. *See* Coleman v. Thompson, 501 U.S. 722, 727 (1991); *see also infra* notes 85-92 and accompanying text (describing the filing error).

9. *See* Applebome, *supra* note 7 (describing the Court's final actions in Coleman's case).

10. TUCKER, *supra* note 4, at 328.

11. *Id.* at 329-30.

12. Harris, *supra* note 5.

13. *Capital Punishment; Coleman's Supporters Seek To Prove Innocence*, SEATTLE POST-INTELLIGENCER, May 22, 1992, at A3.

14. *See* James Dao, *DNA Ties Man Executed in '92 to the Murder He Denied*, N.Y. TIMES, Jan. 13, 2006, at A14 (describing the involvement of McCloskey and his organization). Centurion Ministries is a nonprofit organization based in New Jersey that investigates claims of wrongful conviction. *See* Centurion Ministries, Inc. Home Page, <http://www.centurionministries.org> (last visited Mar. 12, 2007) (describing the organization and its mission).

Coleman's claim of innocence, and in 1997 presented the group's findings in an engaging book titled *May God Have Mercy: A True Story of Crime and Punishment*.<sup>15</sup> In his book, Tucker presented a painstaking review of the evidence and identified numerous problems with the Commonwealth's case.<sup>16</sup> Following up on rumors that began to circulate even before Coleman was executed,<sup>17</sup> Tucker also presented plausible reasons to suspect that the man responsible for McCoy's death might actually have been one of McCoy's next-door neighbors.<sup>18</sup>

Long after Coleman was killed, Edward Blake—a forensic scientist who worked on Coleman's case—kept small samples of semen taken from McCoy's body following her murder.<sup>19</sup> Blake hoped that DNA technology would one day permit a conclusive determination of Coleman's guilt. Once Blake reported in the summer of 2000 that the necessary technology was available,<sup>20</sup> Coleman's supporters and a variety of media organizations tried to persuade Virginia officials to authorize new DNA tests to determine whether Coleman was wrongly convicted.<sup>21</sup> Four newspapers—the *Boston Globe*, the *Washington Post*, the *Virginian-Pilot*, and the *Richmond Times-Dispatch*—filed a lawsuit seeking to compel the Commonwealth to approve a new round of DNA testing; but the state courts refused, holding that the media had no legal entitlement to have the tests performed.<sup>22</sup> Those desiring the tests then turned their attention to Virginia's Governor Mark Warner,

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15. TUCKER, *supra* note 4.

16. See *infra* notes 64-77 and accompanying text.

17. See, e.g., TUCKER, *supra* note 4, at 232-33 (describing the highly publicized suspicion that a man other than Coleman was the real perpetrator).

18. See *infra* notes 78-83 and accompanying text.

19. Maria Glod, *Chance for Answer Secured in a Fridge; Scientist Guarded DNA in Va. Case After '92 Execution*, WASH. POST, Jan. 7, 2006, at A10 (describing Blake's decision to retain the evidence); see also John A. Farrell, *Scientist Vows To Safeguard DNA in Va. Murder Case*, BOSTON GLOBE, Sept. 16, 2000, at A1 (reporting Blake's contention that the evidence belonged to him because it was his work product); Frank Green, *Doctor Ready for Va. Fight*, RICHMOND TIMES-DISPATCH, Nov. 6, 2002, at B1 (reporting Blake's determination to keep the evidence for possible future testing absent a valid court order compelling him to surrender it to state authorities).

20. *Globe Newspaper Co. v. Commonwealth*, 570 S.E.2d 809, 811 (Va. 2002) (quoting a letter from Blake dated July 26, 2000).

21. *Id.*

22. *Id.* at 811-13.

relentlessly urging him to intervene.<sup>23</sup> Shortly before leaving office in early 2006, Governor Warner arranged for the tests to be performed by a DNA laboratory in Toronto.<sup>24</sup> Coleman's supporters were thrilled, convinced that Coleman finally would be vindicated.<sup>25</sup> Critics of capital punishment were equally elated, believing that conclusive proof of Coleman's wrongful execution would greatly bolster their efforts to abolish the death penalty.<sup>26</sup>

On January 12, 2006, Virginia officials announced the results of the DNA tests: the odds that semen found in McCoy's body came from a man other than Coleman were approximately one in nineteen million.<sup>27</sup> Coleman, in other words, was guilty.

Reactions to the DNA test results were immediate and intense. James McCloskey said that the news felt like "a kick in the stomach"<sup>28</sup> and that he was "mystified" that Coleman had allowed so

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23. See, e.g., Editorial, *Dithering on DNA*, WASH. POST, Dec. 29, 2004, at A18; Jerry Markon, *Warner Is Asked To Order DNA Test on Executed Man*, WASH. POST, Feb. 28, 2003, at B5; Editorial, *Take Off the Blindfold in the Roger Coleman Case*, VIRGINIAN-PILOT, Mar. 6, 2003, at B8; Editorial, *Test It Anyway*, WASH. POST, Nov. 4, 2002, at A18; Editorial, *Test It, Mr. Warner*, WASH. POST, Dec. 13, 2003, at A22; Editorial, *Three More Reasons*, WASH. POST, June 16, 2003, at A22; Editorial, *Warner Should Seek Coleman DNA Test*, VIRGINIAN-PILOT, Nov. 11, 2002, at B8; Editorial, *Why Not Know?*, WASH. POST, Mar. 5, 2003, at A20.

24. See Glod & Shear, *supra* note 7 (reporting Governor Warner's decision); see also *A Question of Guilt; Ontario Lab Will Decide if Virginia Executed a Coal Miner for a Murder He Didn't Commit*, TORONTO SUN, Jan. 8, 2006, at 13 (identifying the laboratory as the Centre of Forensic Sciences).

25. See, e.g., Glod & Shear, *supra* note 7 (quoting James McCloskey as saying that "the DNA tests will prove, once and for all, that Roger Coleman is a completely innocent man").

26. See Dao, *supra* note 14 (stating that many believed the DNA testing "would provide powerful momentum to death penalty abolitionists if it were to prove that an innocent man had been put to death"); Glod & Shear, *supra* note 7 (quoting a professor of criminal law who predicted that, if the DNA tests exonerated Coleman, it could provide "the biggest turning point in death penalty abolition"); Laurence Hammack, *DNA Confirms Guilt*, ROANOKE TIMES, Jan. 13, 2006, at A1 (stating that DNA testing in Coleman's case had long been "a potential Holy Grail for opponents of the death penalty").

27. See Dao, *supra* note 14 (reporting Virginia officials' announcement that "a new DNA test has found that [Coleman] was almost certainly the source of genetic material found in the body of his murdered sister-in-law"); Hammack, *supra* note 26 (reporting that, according to the DNA tests, the odds that the semen came from someone other than Coleman or one of his blood relatives were one in nineteen million); Steve Mills, *New DNA Tests Affirm Guilt of Executed Man; Virginia Case a Blow to Death Penalty Foes*, CHI. TRIB., Jan. 13, 2006, at C11 (reporting that the DNA tests "show [Coleman] was, in fact, guilty of the rape and murder of his sister-in-law").

28. Dao, *supra* note 14 (quoting McCloskey as saying that "[o]ur search for the facts can delude us into thinking that what we have found is gold, only to discover that it is in fact fool's gold").



many people to believe in his innocence.”<sup>29</sup> Tom Scott, one of Coleman’s prosecutors, told reporters that he was “euphoric”<sup>30</sup> and “felt like the weight of the entire world had been lifted from [his] shoulders.”<sup>31</sup> Peter Neufeld, cofounder of the Innocence Project, urged people to remember that confirmation of Coleman’s guilt did not mean that all others facing execution were similarly guilty.<sup>32</sup>

This Article relies on the extraordinary story of Roger Coleman’s case to draw important lessons about defects in the way that procedurally flawed habeas petitions are adjudicated today. Part I briefly tells the story of Coleman’s conviction for the rape and murder of Wanda McCoy. Part II.A describes the evidence that led many to believe Coleman was innocent. Part II.B discusses the Supreme Court’s 1991 decision in *Coleman v. Thompson*,<sup>33</sup> in which the Court seized on a minor procedural mistake made by Coleman’s attorneys and used it as an opportunity to overrule *Fay v. Noia*,<sup>34</sup> the landmark case in which the Warren Court declared that procedural errors inadvertently made during state court proceedings had no bearing on a state prisoner’s ability to secure federal habeas relief.

Part III.A places the Court’s ruling in *Coleman* in the context of the Court’s overarching campaign to reshape federal habeas law in a manner that emphasizes the importance of achieving finality in criminal cases. Part III.B, the heart of the Article, discusses the near futility of attempting to achieve a genuine sense of finality in criminal cases when the public believes that newly discovered

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29. Mills, *supra* note 27. McCloskey also told reporters that he felt betrayed by Coleman and that he did not understand how “somebody with such equanimity, such dignity, such quiet confidence” could falsely proclaim his innocence moments before his execution. Hammack, *supra* note 26.

30. *Morning Edition: DNA Test Backs Up Verdict in 1992 Execution* (NPR broadcast Jan. 13, 2006) (interview with Tom Scott).

31. Hammack, *supra* note 26.

32. See Fiske, *supra* note 5 (quoting Neufeld as saying that “[t]oday we got one answer, and one man cannot speak for the correctness of verdicts in a thousand other capital cases”). The Innocence Project is a nonprofit legal clinic that was founded in 1992 at the Benjamin N. Cardozo School of Law and that seeks to exonerate wrongly convicted individuals through DNA testing. See About the Innocence Project, <http://innocenceproject.org/about> (last visited Mar. 12, 2007); The Innocence Project, Mission, <http://innocenceproject.org/about/mission.php> (last visited Mar. 12, 2007).

33. 501 U.S. 722 (1991).

34. 372 U.S. 391 (1963).

evidence casts doubt on a prisoner's guilt. This Article contends that, when the public feels it has good reason to suspect a prisoner might be innocent, the Court is sorely mistaken in assuming that it can achieve finality by dismissing the prisoner's habeas petition on procedural grounds. Moreover, although the Court has long said it will overlook a prisoner's procedural mistakes if the prisoner can prove by a preponderance of the evidence that he or she is innocent, Coleman's case dramatically reveals that Americans grow deeply uncomfortable about an execution or a term of imprisonment when they are presented with far less exculpatory evidence than would be sufficient to meet the Court's preponderance standard. The Article contends that this is the "innocence gap" found in the United States today—a gap between the amount of exculpatory evidence sufficient to undercut finality by raising postconviction doubts in the mind of the public, and the amount sufficient to persuade a federal court to forgive a habeas petitioner's procedural mistakes and adjudicate the merits of his or her constitutional claims. The Article concludes by arguing that Congress is making the innocence gap even worse by demanding, in a growing range of settings, that a federal court dismiss a prisoner's procedurally flawed habeas petition unless the prisoner can prove by "clear and convincing evidence" that he or she is innocent.

### I. TRIAL IN GRUNDY

On March 10, 1981, in Grundy, Virginia, a small coal-mining town on the western slopes of the Appalachian Mountains,<sup>35</sup> Brad McCoy returned home from work at around 11:15 p.m. to find nineteen-year-old Wanda McCoy, his wife, murdered in their home.<sup>36</sup> McCoy's throat had been cut, she had been stabbed twice in the chest, and she had been sexually assaulted.<sup>37</sup> Investigators quickly focused their attention on twenty-two-year-old Roger Coleman, who lived less than two miles away, was married to McCoy's sixteen-year-old sister, and had been convicted of at-

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35. See TUCKER, *supra* note 4, at 3-7 (describing the geography and history of Grundy).

36. *Coleman v. Commonwealth*, 307 S.E.2d 864, 865 (Va. 1983).

37. *Id.* at 866.

tempted rape several years earlier.<sup>38</sup> Following a month-long investigation—during which Coleman served as one of McCoy's pallbearers<sup>39</sup>—Coleman was arrested and charged with rape and capital murder.<sup>40</sup> Two local attorneys, neither of whom had ever tried a murder case, were appointed to represent him.<sup>41</sup>

The Commonwealth presented its case at Coleman's trial in the spring of 1982. The medical examiner testified that McCoy died around 10:30 p.m.<sup>42</sup> One of the lead detectives testified that there were no signs of forced entry at McCoy's house, suggesting that the attacker was one of only a handful of men whom McCoy knew and would have allowed into her home late at night.<sup>43</sup> Elmer Gist, Jr., a forensic scientist, testified that hairs found on McCoy's body were consistent with hairs taken from Coleman.<sup>44</sup> Gist further testified that Coleman was a secretor with Type B blood, placing him in a small segment of the male population capable of producing the semen found at the scene.<sup>45</sup> Gist also stated that small amounts of blood had been found on the pants Coleman was wearing the night of the murder, and that the blood was Type O, the same as McCoy's blood.<sup>46</sup> Investigators told the jury that Coleman's pants had gotten wet on the bottom ten to twelve inches of each leg that night and that Slate Creek, near McCoy's home, measured approximately ten to twelve inches deep the following morning, suggesting that perhaps Coleman waded across the creek when approaching or fleeing McCoy's house.<sup>47</sup> Other witnesses' testimony indicated that,

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38. See TUCKER, *supra* note 4, at 19, 23-25, 33.

39. *Id.* at 47.

40. *Id.* at 55-56.

41. *Id.* at 57.

42. *Id.* at 70.

43. *Id.* at 72.

44. Coleman v. Commonwealth, 307 S.E.2d 864, 867 (Va. 1983).

45. See *id.* at 868. A "secretor" is a person whose blood type is revealed in other bodily fluids, such as semen, saliva, and tears. See *id.*

46. *Id.*

47. *Id.* at 867, 875-76. Long after the trial had ended, Coleman's supporters raised questions about the likely accuracy of those measurements, contending that Coleman's pants would have gotten much wetter if he had tried to wade across the fast-running creek. TUCKER, *supra* note 4, at 68-69. When pressed, the lead investigator admitted that the creek had not been measured the following morning and that he was mistaken when he testified to the contrary at trial. *Id.* at 66. Coleman almost certainly did not wade across the creek that night to reach or flee McCoy's house: in addition to getting his pants much wetter than they were,

on the night McCoy was killed, there was a period of more than half an hour, beginning at about 10:30 p.m., when Coleman had not been seen by others.<sup>48</sup> The prosecution closed with the testimony of Roger Matney, a convicted felon who had been incarcerated with Coleman in the county jail. Matney testified that Coleman had told him that Coleman and another man sexually assaulted McCoy, and that the other man killed her.<sup>49</sup>

Coleman testified in his own defense.<sup>50</sup> In an effort to show that he did not have time to rape and murder his sister-in-law, he described his activities the night the crimes occurred. On Coleman's account, he went to a store at about 9:00 p.m., drove to work at a local coal mine, discovered that his shift had been canceled, talked with co-workers and then with a friend until 10:30 p.m., picked up an audio tape at another friend's house at 10:45 p.m. (a claim inconsistent with the testimony of the friend, who placed Coleman's brief visit at 10:20 p.m.), took a shower at 10:50 p.m. at a local bathhouse frequently used by coal miners, and then arrived home at 11:05 p.m.<sup>51</sup> Coleman testified that he did not know why blood had been found on his pants, but speculated that it might have come from someone who had gotten cut while working with him at the coal mine or from someone who had been scratched by his cat.<sup>52</sup> He said that his pants had probably gotten wet that night when he

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approaching the house via the creek likely would have consumed time that Coleman could not afford and would have required Coleman to park his vehicle on a public highway, where it likely would have been seen by others. *Id.* at 68-69.

48. *Coleman*, 307 S.E.2d at 868-69.

49. *See id.* at 868.

50. *Id.* at 869-70.

51. *Id.* Coleman's grandmother, with whom Coleman and his wife lived, similarly testified that Coleman arrived home that night at about 11:05 p.m. *Id.* at 869. Initially, however, she told investigators that he returned home at 11:30 p.m., just as the televised evening news was ending—testimony that, if true, would have given Coleman a longer period of time in which to clean up after the murder. *See TUCKER, supra* note 4, at 37. At trial, however, his grandmother said that she had gotten things “mixed up” when she initially spoke with investigators. *Coleman*, 307 S.E.2d at 869. Although Coleman's wife initially told investigators that Coleman arrived home at 11:05 p.m., she testified at trial (by which time she had turned against Coleman) that she could not remember when he came home. *TUCKER, supra* note 4, at 82-83.

52. *TUCKER, supra* note 4, at 84-85.

went to the bathhouse and put his clothes on the floor of the shower.<sup>53</sup> He denied confessing his guilt to Matney.<sup>54</sup>

It did not take the jury long to reach its verdict. After only three-and-a-half hours of deliberation, the jury declared Coleman guilty of rape and murder.<sup>55</sup>

At the sentencing proceedings the following day, the prosecution worked to establish that Coleman was eligible for the death penalty both because he posed a continuing threat to society and because his crimes had been "outrageously or wantonly vile."<sup>56</sup> With respect to the continuing threat that Coleman posed, a woman named Brenda Rife testified that Coleman attempted to rape her in April 1977; Rife's accusations had led to Coleman's conviction in July 1977 and Coleman had been sentenced to three years in prison.<sup>57</sup> Coleman called two ministers to testify on his behalf, though neither man knew Coleman well.<sup>58</sup> Coleman himself took the stand and said that his fate was now "up to the Lord."<sup>59</sup> On March 19, less than twenty-four hours after finding Coleman guilty of the underlying charges, the jury returned with a recommendation that Coleman be executed.<sup>60</sup> The trial judge accepted the jury's recommendation the following month.<sup>61</sup> On direct appeal, the Supreme Court of Virginia affirmed Coleman's conviction and sentence.<sup>62</sup>

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53. *Coleman*, 307 S.E.2d at 870.

54. *Id.*

55. See TUCKER, *supra* note 4, at 87. After the jury retired to begin its deliberations, the Commonwealth offered to give Coleman a life sentence in exchange for a guilty plea. His attorneys encouraged him to accept the offer, but Coleman refused. *Id.* at 228.

56. *Coleman*, 307 S.E.2d at 876 & n.4 (citing VA. CODE ANN. § 19.2-264.4(C)).

57. *Id.* at 870-71. Coleman served approximately twenty months of that sentence. TUCKER, *supra* note 4, at 25.

58. See *Coleman*, 307 S.E.2d at 871.

59. *Id.*

60. See TUCKER, *supra* note 4, at 87-88.

61. See *id.* at 89.

62. *Coleman*, 307 S.E.2d at 877. In his direct appeal, Coleman argued that the trial court abused its discretion when it denied his request for a change of venue and when it admitted certain photographs of McCoy's body, *id.* at 871-73; that the court erred when it admitted statements Coleman made to investigators before he was given his *Miranda* warnings, *id.* at 872-73 (discussing the application of *Miranda v. Arizona*, 384 U.S. 436 (1966)); that investigators had exceeded the scope of Coleman's consent to a body search, *id.* at 874; that prosecutors had improperly cross-examined Coleman regarding the blood found on his pants, *id.* at 874-75; that the jury instructions had been improper, *id.* at 875; and that the evidence presented by the Commonwealth was legally insufficient to sustain a guilty verdict, *id.* at 875-

## II. QUESTIONING THE EVIDENCE, CLOSING THE COURTS

The mere fact that Coleman insisted he was innocent certainly did not make his case unique. American prisons are full of individuals who claim they had nothing to do with the crimes of which they were convicted. Some of those individuals undoubtedly are telling the truth, but few of them win the same degree of national—indeed, international—attention that Coleman drew in the months leading up to his 1992 execution, and that he continued to draw in the years after his death.<sup>63</sup>

Apart from the unflagging energies of those convinced of Coleman's innocence, two sets of forces helped to make Coleman's case so compelling. First, the facts underlying Coleman's claim of innocence were difficult to ignore. Second, many believed that the U.S. Supreme Court's rationale for refusing to hear the merits of Coleman's constitutional claims in 1991 represented an astonishingly inhumane departure from the norms that had animated the Court's habeas jurisprudence in earlier years.

### A. *The Case for Coleman's Innocence*

Coleman's supporters based their belief in Coleman's innocence on several key pieces of evidence. First, even on the Commonwealth's own theory of the case, Coleman had less than forty-five minutes to visit a friend, drive to the McCoys' house, gain access to the home, rape and kill his sister-in-law, and then flee the scene before Brad McCoy arrived home after his shift ended a short distance away.<sup>64</sup> As James McCloskey would remark after release of the damning DNA test results in January 2006, Coleman "had to be a ninja to do it."<sup>65</sup>

Second, Coleman's ability to commit those crimes within such a narrow timeframe seemed even more unlikely once the pathologist

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76. The Supreme Court of Virginia rejected each of those contentions. *Id.* at 871-76.

63. See *supra* notes 3-8, 12-27 and accompanying text.

64. TUCKER, *supra* note 4, at 78, 247 (briefly describing the murder timelines set out by both the prosecution and defense).

65. Mills, *supra* note 27.

who performed McCoy's autopsy revealed that McCoy had been subjected to both vaginal *and* anal intercourse, with semen found in both locations.<sup>66</sup> It seemed probable that two men, rather than one, were responsible for McCoy's rape and murder. The Commonwealth, however, never presented any evidence that Coleman acted with another man. The two-assailant theory gained even more credence when DNA tests performed in 1990—using DNA technology that was more sophisticated than the technology available at the time of Coleman's trial, but less sophisticated than the technology available today—indicated that sperm from two different men had been present in McCoy's body.<sup>67</sup> Although the Commonwealth would later suggest that McCoy's husband was the second source,<sup>68</sup> Coleman's supporters argued that it had been established earlier that Brad and Wanda had not had sexual relations in the days prior to her death.<sup>69</sup> In the eyes of Coleman's advocates, the most plausible theory was that McCoy had been attacked by two men, not one.

Third, in the estimation of the trial judge, the evidence that had the most powerful effect on the jurors was Elmer Gist's testimony about the similarities between hairs found on McCoy and hairs taken from Coleman's body.<sup>70</sup> Jurors had "exchanged glances and settled back in their seats" after Gist stated that it was "possible, but unlikely" that the hairs came from someone other than Coleman.<sup>71</sup> Yet Coleman's attorneys failed to tell the jury about scientific studies indicating that such hair analyses were far from precise.<sup>72</sup>

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66. TUCKER, *supra* note 4, at 49, 234-35.

67. *See id.* at 179-80, 199; *see also id.* at 179 (stating that, to Coleman's discredit, the tests also placed Coleman within a very small segment of the male population—about two percent—believed to be capable of producing the sperm). The DNA tests performed in January 2006 confirmed yet again that semen collected from McCoy's body had come from two different men. Telephone Interview with John C. Tucker, Author of *May God Have Mercy* (Jan. 19, 2006).

68. TUCKER, *supra* note 4, at 205.

69. *Id.* at 180.

70. *Id.* at 75-76.

71. *Id.* at 76.

72. *See id.* at 77; Clive A. Stafford Smith & Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?*, 27 COLUM. HUM. RTS. L. REV. 227, 231 (1996) ("If the purveyors of this dubious science cannot do a better job of validating hair analysis than they have done so far, forensic hair comparison analysis should be excluded altogether from criminal trials.").

Fourth, with respect to Roger Matney's account of Coleman's alleged jailhouse confession, Matney's mother-in-law told Coleman's investigators that she had asked Matney about his testimony in Coleman's case. Matney reportedly replied by saying, "[i]f you use your head for something more than a hat rack, you can avoid a lot of jail time."<sup>73</sup> When she asked Matney whether Coleman really had confessed to him, Matney reportedly stated that Coleman had not.<sup>74</sup>

Fifth, Coleman's supporters made much of the fact that, in a report detailing his examination of the crime scene, the Commonwealth's lead detective indicated that he saw a "pry mark" on the molding around the house's front door.<sup>75</sup> This was significant because it suggested that, contrary to the prosecution's theory, McCoy might not have known her attacker (or attackers).<sup>76</sup> The detective later said that the mark easily could have been caused by something other than a man trying to force his way into the house.<sup>77</sup> But if it was indeed a "pry mark," as the detective initially said that it was, this would help to undercut one of the Commonwealth's theories for focusing the investigation on Coleman in the first place—namely, that Coleman was one of the few men whom McCoy knew and would have welcomed into her home.

Finally, numerous pieces of evidence suggested that the man responsible for McCoy's rape and murder might have been Donald Ramey, who lived with his brother and parents in the house directly behind the McCoy's.<sup>78</sup> A woman named Teresa Horn told Coleman's team that Ramey attempted to sexually assault her in 1987 and that, during the attack, he threatened to "do [her] like he did that girl on Slate Creek."<sup>79</sup> Another woman told investigators that Ramey sexually assaulted her in 1983.<sup>80</sup> Yet another woman said

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73. TUCKER, *supra* note 4, at 131.

74. *Id.* Matney later denied making those statements and attributed his mother-in-law's story to the fact that she had opposed her daughter's marriage to Matney. *Id.* at 204.

75. *Id.* at 31. The parties disputed whether this evidence had been properly provided to Coleman's attorneys at the time of trial. *Id.* at 128, 130, 134.

76. *See id.* at 72, 247.

77. *Id.* at 182-83.

78. *See id.* at 148-49.

79. *Id.* at 148-51 (alteration in original). Ms. Horn died in March 1992 due to a drug overdose, a death that some of Coleman's proponents regarded as a possible homicide. *See id.* at 221-24.

80. *Id.* at 165-66.



that Ramey threatened her with a knife and tried to sexually assault her in 1982 or 1983.<sup>81</sup> In the weeks prior to Coleman's execution, others told Coleman's investigators that Ramey had confessed to McCoy's murder.<sup>82</sup> The day of Coleman's execution, a woman named Pat Daniels reported that Ramey's mother came to Daniels's hair salon soon after McCoy's death and said that, on the night of the crime, her sons and husband got into a terrible fight—the sons left the house and did not return until midnight, and when they finally came home, "she could feel 'murder in the air.'"<sup>83</sup>

In short, the evidence of Coleman's innocence was far from negligible. Many feared that Virginia had sent an innocent man to his grave—a possibility made even more unpalatable by the reception Coleman received from the federal courts when he filed his first petition for habeas relief.

### *B. The Consequences of Appealing One Day Late*

By any reasonable account, Coleman's inexperienced, court-appointed attorneys did a poor job of representing him at his trial. They did not prepare well for crucial motions; they failed to thoroughly investigate all of the available exculpatory evidence; they presented a remarkably weak opening statement; and their questioning of the witnesses was frequently unfocused and ineffective.<sup>84</sup> The efforts of Coleman's trial attorneys, however, are not what made Coleman's case so notorious. Rather, the attorney-created problem that would draw so much public scrutiny occurred after Coleman began state post-conviction proceedings under the pro bono representation of attorneys from Arnold & Porter, one of the most prestigious firms in the nation.

In the fall of 1984, Coleman's new legal team filed papers in Buchanan County's circuit court, seeking state post-conviction relief on Coleman's behalf.<sup>85</sup> They argued, among other things, that

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81. *Id.* at 170-71.

82. *Id.* at 240-45. Many of these sources refused to sign affidavits accusing Ramey, however, and some later recanted their accusations altogether—ostensibly out of fear for their safety and that of their loved ones. *See id.* at 242, 244.

83. *Id.* at 308-09.

84. *See id.* at 59-60, 62-88 (describing Coleman's pretrial and trial representation).

85. *Id.* at 110-11.

Coleman's trial attorneys failed to provide constitutionally adequate representation, that the Commonwealth breached its constitutional obligation to provide the defense with exculpatory evidence in its possession, and that the trial judge should have granted Coleman a change of venue.<sup>86</sup> In an order signed on September 4, 1986, and formally entered into the court's records on September 9, the court denied Coleman's petition on the merits.<sup>87</sup> The rules of the Supreme Court of Virginia gave Coleman thirty days to file his notice of appeal.<sup>88</sup> Apparently calculating the filing deadline from the date the order was entered, rather than the date the order was signed, Coleman's attorneys placed the notice of appeal in the mail on October 6. The notice was received at the courthouse the following day.<sup>89</sup>

The Commonwealth argued that the period for filing Coleman's notice of appeal began to run on September 4, that the thirtieth day after that date was October 4, a Saturday, and that the notice was thus due the following Monday, October 6. They reasoned that because the notice was not received until October 7, it was one day late.<sup>90</sup> In the view of the Commonwealth's attorneys, Coleman had procedurally defaulted and his appeal had to be dismissed.<sup>91</sup> In an unpublished opinion dated May 19, 1987, apparently agreeing with the Commonwealth's calculations, the Supreme Court of Virginia dismissed Coleman's appeal in a brief, three-paragraph opinion.<sup>92</sup>

Innocuous though it might seem to a casual observer, the fact that Coleman filed his notice of appeal one day late would have tremendous consequences for his efforts to obtain habeas relief from the federal courts. If the federal judiciary had still been operating

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86. *Id.* at 110 (describing Coleman's petition for state post-conviction relief).

87. *Coleman v. Thompson*, 501 U.S. 722, 727 (1991) (describing Coleman's failed effort to secure state post-conviction relief); TUCKER, *supra* note 4, at 114.

88. *See* VA. SUP. CT. R. 5:9(a) (requiring that an appellant's notice of appeal be filed "within 30 days after the entry of final judgment").

89. *See* TUCKER, *supra* note 4, at 114-15 (describing Arnold & Porter's handling of the notice).

90. *Id.*

91. *See Coleman*, 501 U.S. at 727 (briefly recounting the Commonwealth's argument); TUCKER, *supra* note 4, at 114-15 (providing additional details regarding the filing's timing).

92. *See Coleman*, 501 U.S. at 727-28 (reproducing the Supreme Court of Virginia's unpublished opinion). Coleman's attorneys would later argue—to no avail—that the Supreme Court of Virginia's ruling was not clearly based on state procedural grounds. *See id.* at 735-44 (rejecting this argument).

under the rules laid down by the Warren Court in *Fay v. Noia*,<sup>93</sup> Coleman would have had little to fear. In *Fay*, a New York prisoner convicted of murder claimed that his confession was coerced and that the trial court violated his federal due process rights when it admitted that confession into evidence.<sup>94</sup> Because the prisoner did not file a timely appeal after his trial, however, New York's appellate courts refused to consider his federal constitutional claim.<sup>95</sup> When New York officials argued that the prisoner's procedural default should also bar him from receiving federal habeas relief, the Supreme Court vehemently disagreed. After describing the "extraordinary prestige of the Great Writ" and its importance in British and American history,<sup>96</sup> the Court broadly declared that a federal court's habeas jurisdiction "is not defeated by anything that may occur in the state court proceedings."<sup>97</sup> Justice Brennan, writing for the majority, reasoned that "[s]urely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison" simply because they inadvertently failed to obey a state's procedural rules.<sup>98</sup> The Court explained that a procedural default in state proceedings could have adverse consequences for a federal habeas petitioner only when the petitioner himself or herself, and not merely his or her attorney, knew about the procedural rules' requirements and deliberately decided to ignore them.<sup>99</sup> Even then, the Court held, the decision whether to dismiss the habeas petition would be committed to the discretion of the federal judge.<sup>100</sup>

Between the time *Fay* was decided in 1963 and the time Roger Coleman sought habeas relief in the late 1980s, the Court slowly chipped away at *Fay* by increasingly deferring to states' procedural rules. In *Francis v. Henderson*,<sup>101</sup> for example, the Court held that a state prisoner ordinarily cannot obtain habeas relief based on the

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93. 372 U.S. 391 (1963).

94. *Id.* at 394-95.

95. *Id.* at 395-96.

96. *Id.* at 399-426.

97. *Id.* at 426.

98. *Id.* at 441.

99. *See id.* at 438-39.

100. *See id.*

101. 425 U.S. 536 (1976).

illegal composition of the grand jury that indicted him, if the prisoner failed to obey a state rule requiring that all grand jury challenges be raised before trial.<sup>102</sup> In *Wainwright v. Sykes*,<sup>103</sup> the Court similarly held that, if a prisoner failed to obey a state's contemporaneous-objection rule, which requires that evidentiary objections be made in a timely fashion at trial, then the prisoner ordinarily cannot obtain habeas relief based on that evidence's unlawful admission.<sup>104</sup> While "leav[ing] for another day" the question of whether *Fay* remained good law for untimely appeals,<sup>105</sup> the *Sykes* Court declared that, like the state procedural rule at issue in *Francis*, a state's "contemporaneous-objection rule ... deserves greater respect than *Fay* gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right."<sup>106</sup>

Coleman's habeas petition required the Court to confront the question it had avoided in *Sykes*—namely, whether *Fay*'s forgiving standard would continue to apply to prisoners who failed to file timely appeals during state proceedings. Coleman's habeas petition articulated eleven different claims, four of which Coleman's trial attorneys had properly raised on direct appeal, but seven of which (including, most notably, his claim that he received ineffective assistance of counsel at trial) he raised for the first time in state post-conviction proceedings—proceedings that now were clouded by his pro bono attorneys' failure to file a timely notice of appeal.<sup>107</sup> Both the district court and the United States Court of Appeals for the Fourth Circuit refused to hear the seven claims Coleman raised for the first time in state post-conviction proceedings, holding that *Sykes*, rather than *Fay*, provided the governing law.<sup>108</sup> "Even in a capital case," the Fourth Circuit wrote, "procedural default justifies

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102. *Id.* at 541-42.

103. 433 U.S. 72 (1977).

104. *See id.* at 81-88.

105. *Id.* at 88 n.12.

106. *Id.* at 88.

107. *See Coleman v. Thompson*, 895 F.2d 139, 141-42 (4th Cir. 1990) (describing Coleman's first federal habeas petition), *aff'd*, 501 U.S. 722 (1991). Under Virginia law, Coleman was required to wait until state post-conviction proceedings to claim that his trial counsel's performance had been deficient. *See Coleman v. Thompson*, 501 U.S. 722, 755 (1991).

108. *See Coleman*, 895 F.2d at 142-44 (describing the district court's unpublished reasoning and affirming the lower court ruling).

a federal habeas court's refusal to address the merits of the defaulted claims."<sup>109</sup>

Writing for the Court in *Coleman v. Thompson*, Justice O'Connor opened with a sentence that could not have been more ominous for Coleman: "This is a case about federalism."<sup>110</sup> The Court stated that, although the writ of habeas corpus is an important remedy for unlawful detentions, it also forces the states to incur "significant costs."<sup>111</sup> Hoping to make those costs less onerous, the Court declared that the time had come to overrule *Fay* and adopt a new, overarching standard governing the availability of federal habeas relief in all cases involving procedural defaults in prior state proceedings:

We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner 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. *Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules.... We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.<sup>112</sup>

The Court stated that an attorney's mistake in state post-conviction litigation—even if that mistake is grossly negligent—is not "cause" sufficient to excuse a procedural default.<sup>113</sup> Even in capital cases, a prisoner is not constitutionally entitled to the assistance of an attorney in state post-conviction proceedings;<sup>114</sup>

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109. *Id.* at 143 (citing *Smith v. Murray*, 477 U.S. 527 (1986)).

110. *Coleman*, 501 U.S. at 726.

111. *Id.* at 747-48 (quoting *Engle v. Isaac*, 456 U.S. 107, 126 (1982)).

112. *Id.* at 750.

113. *See id.* at 752-54.

114. *Id.* at 752 (citing *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987)). *But see* Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079 (2006) (arguing that, in fact, there is a constitutional right to counsel in state post-conviction proceedings).

consequently, the Court concluded, a prisoner seeking state post-conviction relief must personally bear the risk of attorney error.<sup>115</sup> Although it would have been a long shot, Coleman's attorneys could have argued that the thirty-day rule was not an "adequate state procedural rule" because, as applied in Coleman's case—a case where Coleman had filed a document just one day late, under circumstances where calculating the filing deadline was possibly confusing and where the document was of a nature that the Court itself described as "purely ministerial"<sup>116</sup>—the rule did not serve legitimate state interests.<sup>117</sup> In their petition for certiorari, however, Coleman's attorneys did not question the state interests purportedly served by the rule's application to Coleman.<sup>118</sup> Nor did Coleman's attorneys argue that refusing to hear Coleman's procedurally defaulted claims would result in a "fundamental miscarriage of justice."<sup>119</sup> As a result, the Court held, Coleman was ineligible for habeas relief on each and every one of his seven procedurally defaulted claims.<sup>120</sup>

Coleman's fate was sealed. As the day of his execution drew near, Coleman filed a second habeas petition, in which he argued that he was actually innocent of McCoy's rape and murder and that denying

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115. See *Coleman*, 501 U.S. at 752-54. But see *The Supreme Court, 1990 Term: Leading Cases*, 105 HARV. L. REV. 177, 336-37 (1991) [hereinafter *Leading Cases*] (arguing that the Coleman Court's reasoning on this point was based on a mistaken understanding of the Court's own precedent).

116. *Coleman*, 501 U.S. at 742.

117. Cf. *Lee v. Kemna*, 534 U.S. 362, 366-67 (2002) (holding that a prisoner's failure to obey a state procedural rule requiring that a motion for a continuance be made in writing, rather than merely orally, was not an "adequate" state ground precluding federal review because no legitimate state interests were served by the rule's application in the case at bar).

118. *Coleman*, 501 U.S. at 744 ("Coleman contends ... that the procedural bar was not adequate to support the judgment. Coleman did not petition for certiorari on this question ...").

119. *Id.* at 757 ("Coleman does not argue in this Court that federal review of his claims is necessary to prevent a fundamental miscarriage of justice."). See generally *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."). Although Coleman's attorneys did not make this argument before the Court, they had made that argument before the United States Court of Appeals for the Fourth Circuit, and the Fourth Circuit rejected it in a four-sentence discussion of the facts. See *Coleman v. Thompson*, 895 F.2d 139, 144 (4th Cir. 1990), *aff'd*, 501 U.S. 722 (1991). For a detailed discussion of the miscarriage-of-justice exception, see *infra* Part III.B.

120. See *Coleman*, 501 U.S. at 757 (summarizing the Court's holding).

him habeas relief would thus result in a miscarriage of justice.<sup>121</sup> Eight days before Coleman's execution, however, the district court dismissed Coleman's last-minute request, finding that he had not made "even a colorable showing of 'actual innocence.'"<sup>122</sup> Six days later, the Fourth Circuit affirmed in an unpublished, two-paragraph opinion.<sup>123</sup> Just minutes before Coleman was electrocuted, with Chief Justice Rehnquist and Justice Kennedy communicating from a late-night dinner with the President and others at the Canadian embassy,<sup>124</sup> the Supreme Court denied Coleman's request that the Court stay his execution pending review of the Fourth Circuit's ruling.<sup>125</sup>

The Court's dramatic rejection of *Fay*, in a case involving a document filed just one day late by a death-row inmate whom many feared was innocent, certainly did not escape notice.<sup>126</sup> Justices Blackmun, Marshall, and Stevens filed a powerfully worded dissent, accusing their colleagues in the majority of continuing the Court's "crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims" and of "creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights."<sup>127</sup> In blistering editorials, the *New York Times* and the *Boston*

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121. *Coleman v. Thompson*, 798 F. Supp. 1209, 1216 (W.D. Va. 1992).

122. *Id.* at 1217.

123. *See Coleman v. Thompson*, No. 92-4005, 1992 U.S. App. LEXIS 11440 (4th Cir. May 18, 1992).

124. *See Applebome, supra* note 7.

125. *See Coleman v. Thompson*, 504 U.S. 188 (1992) (per curiam).

126. The *Washington Post* and the *New York Times*, for example, prominently featured detailed accounts of the Court's ruling, emphasizing that Coleman's notice of appeal had missed the deadline only by one day and that the Court's decision would have significant consequences for all habeas petitioners whose attorneys made inadvertent errors in state court proceedings. *See Linda Greenhouse, Court Again Curbs Federal Appeals by State Inmates; 1963 Decision Reversed; Almost Any Failure To Follow States' Rules Will Forfeit Right to U.S. Hearing*, N.Y. TIMES, June 25, 1991, at A1; Ruth Marcus, *Tardiness Bars Appeal from Death Row; New Hurdle Blocks Federal Court Access*, WASH. POST, June 25, 1991, at A5.

127. *Coleman v. Thompson*, 501 U.S. 722, 758-59 (1991) (Blackmun, J., dissenting); *see John Paul Stevens, The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 17-18 (1992) (stating that the Court's ruling in *Coleman* was a "blatant exercise of law-making power marching under the banner of federalism" and that the Court "completely rewrote the procedural rules governing post-conviction proceedings to foreclose judicial review of even meritorious constitutional claims in capital cases"); *see also Leading Cases, supra* note 115, at 338 ("Forcing these possibly innocent people to serve long prison sentences or face execution because of their attorneys' incompetence is unjust.").

*Globe* agreed. The *Times* called the ruling “bizarre,” saying that it had “produced a terrible injustice” and was based on “a cramped distortion of federalism’s scheme of justice under the Constitution.”<sup>128</sup> The *Globe* described the decision as “perverse[],” “cavalier[],” and “moral[ly] bankrupt[]”; it condemned the Court for “penaliz[ing Coleman] for a mistake of his lawyers”; and it concluded that “[t]he role of the federal courts as a last recourse in the nation’s judicial system is contorted and diminished by the ruling.”<sup>129</sup> In its cover story two days before Coleman’s execution, *Time* magazine stated that “the courts have so far failed Coleman miserably,” that Coleman was “the victim of a justice system so bent on streamlining procedures and clearing dockets that the question of whether or not he actually murdered Wanda McCoy has become a subsidiary consideration,” and that “the Supreme Court seems more concerned with finality than fairness.”<sup>130</sup>

The Court’s actions also drew the attention of John Tucker. It was the *Coleman* decision that inspired him to investigate Coleman’s claim of innocence<sup>131</sup> and write the book that eventually would help persuade Virginia’s Governor Warner to order new DNA tests in January 2006<sup>132</sup>—tests that, to the astonishment of Coleman’s advocates and the relief of Virginia officials, would confirm that Coleman had indeed raped and murdered Wanda McCoy twenty-five years earlier.

### III. THE ILLUSION OF FINALITY IN CASES OF SUSPECTED INNOCENCE

#### A. *The New Emphasis on Finality*

When Roger Coleman’s federal habeas petition prompted the Supreme Court to declare that it “now recognize[d] the important interest in finality served by state procedural rules,”<sup>133</sup> those who

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128. Editorial, *Federalism, Despoiled*, N.Y. TIMES, June 27, 1991, at A28.

129. Editorial, *Contorting the Federal Courts*, BOSTON GLOBE, June 29, 1991, at 22.

130. Smolowe, *supra* note 3, at 42.

131. Telephone Interview with John C. Tucker, *supra* note 67.

132. See Thomas Frisbie, *Chicago Lawyer’s 1997 Book Faces a New Plot Twist: DNA To Determine Guilt of Book Subject, Executed in ’92*, CHI. SUN-TIMES, Jan. 8, 2006, at A12 (reporting that James McCloskey, of Centurion Ministries, believed Tucker’s book helped convince Governor Warner to order the tests); see also *supra* notes 19-32 and accompanying text (describing the results of the 2006 tests).

133. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); see also *supra* text accompanying



closely followed the Court's habeas rulings could not have been surprised. The writings of two men—Professor Paul M. Bator, of the Harvard Law School, and Judge Henry M. Friendly, of the United States Court of Appeals for the Second Circuit—had already begun to push the Court toward imposing new restrictions on the availability of federal habeas relief, with the aim of helping the states more rapidly achieve finality in their criminal cases.

In a 1963 article in the *Harvard Law Review*, Bator urged the Court to place the need for finality at the very heart of its habeas jurisprudence by sharply limiting prisoners' ability to relitigate issues that they were given a full and fair opportunity to litigate in prior state proceedings.<sup>134</sup> Seven years later, in an article "draw[ing] heavily" from Bator's work, Friendly reemphasized the importance of finality and argued that, with only limited exceptions, the Court should restrict habeas relief to those prisoners who—in addition to raising meritorious constitutional claims—could make a "colorable claim of innocence."<sup>135</sup> Believing that state prisoners were finding it too easy to drag the states through frivolous and repetitious federal habeas litigation,<sup>136</sup> Bator and Friendly identified numerous reasons that federal courts should be reluctant to allow habeas petitioners to challenge their convictions or sentences after the completion of direct review. Achieving finality in criminal cases is necessary, they argued, in order to conserve scarce judicial resources,<sup>137</sup> preserve the

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note 112.

134. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451-63 (1963); see also James S. Liebman, *Apocalypse Next Time? The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2041 (1992) ("Professor Bator's article now dominates habeas corpus jurisprudence and scholarship."). Bator wrote his article in response to the Court's habeas-expanding ruling in *Brown v. Allen*, 344 U.S. 443 (1953). See Bator, *supra*, at 463-523 (providing a detailed historical analysis of habeas corpus jurisdiction and critique of *Brown*).

135. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142, 146 n.15 (1970); see also Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939, 943 (1991) (noting some of the ways in which Bator's and Friendly's articles have been "extremely influential").

136. See Bator, *supra* note 134, at 444 (stating his intent to challenge the prevailing wisdom that a state prisoner should "automatically obtain federal district court collateral review of the merits of all federal ... questions, no matter how fully and fairly these have been litigated in the state-court system"); Friendly, *supra* note 135, at 143-44 (noting an exponential increase in habeas corpus petitions in the seventeen years following the decision in *Brown v. Allen*, and suggesting that a large proportion of the habeas cases filling federal courts' dockets were repetitious and frivolous).

137. See Bator, *supra* note 134, at 451; Friendly, *supra* note 135, at 148-49.

morale of state judges by assuring them that their decisions will not be second-guessed routinely by their federal counterparts;<sup>138</sup> reinforce the deterrent function of the law by making it clear that violators will face prompt and certain punishment;<sup>139</sup> bolster the rehabilitative function of incarceration by helping prisoners shift their focus from winning release to improving their own lives and conduct;<sup>140</sup> ensure that a case's relevant facts are adjudicated at a time when events are still vivid in witnesses' memories;<sup>141</sup> and permit citizens eventually to enjoy a sense of "[r]epose" in each criminal case prosecuted in their names—a sense "that we have tried hard enough and thus may take it that justice has been done."<sup>142</sup>

When Coleman's petition for certiorari arrived at the Court in the fall of 1990, Bator's and Friendly's arguments had already achieved results.<sup>143</sup> In *Stone v. Powell*,<sup>144</sup> for example, the Court largely foreclosed the possibility of federal habeas relief for prisoners who allege that evidence obtained in violation of the Fourth Amendment was admitted at their trials.<sup>145</sup> Similarly, in a plurality opinion later

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138. See Bator, *supra* note 134, at 451 ("I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."); see also Calderon v. Thompson, 523 U.S. 538, 555 (1998) (quoting this passage); Engle v. Isaac, 456 U.S. 107, 128-29 n.33 (1982) (same).

139. See Bator, *supra* note 134, at 452.

140. See *id.*; Friendly, *supra* note 135, at 146.

141. See Friendly, *supra* note 135, at 147-48; see also Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 384 (1964) (stating that both state and federal collateral review pose a threat to the reliable adjudication of facts).

142. Bator, *supra* note 134, at 452; see Friendly, *supra* note 135, at 149 (stating that habeas law should accommodate "the human desire that things must sometime come to an end").

143. See, e.g., *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (stating that, among other things, achieving finality in criminal cases reinforces the law's deterrent effects and ensures that facts are conclusively decided at a time when witnesses' memories are still fresh); *Mackey v. United States*, 401 U.S. 667, 690-91 (1971) (Harlan, J., concurring in part and dissenting in part) (arguing that finality is necessary in order to preserve the law's deterrent and rehabilitative functions, conserve resources, and spare states from having to retry cases after witnesses' memories have faded).

144. 428 U.S. 465 (1976).

145. See *id.* at 481-82 (holding that habeas relief would be available for such a claim only if the petitioner had not had an opportunity to litigate the claim in prior state proceedings); see also Friendly, *supra* note 135, at 161 ("[M]y proposal would almost always preclude collateral attack on claims of illegal search and seizure."); Patchel, *supra* note 135, at 961 ("The *Stone* holding results from an amalgam of Friendly's focus on innocence and Bator's test

approved by a majority of the Court, Justice O'Connor concluded in *Teague v. Lane*<sup>146</sup> that "underlying considerations of finality" of the sort outlined by Bator and Friendly weighed strongly in favor of limiting the retroactive application of new rules of constitutional law to cases on collateral review.<sup>147</sup> As previously noted, the Court was also steadily distancing itself from *Fay v. Noia*'s forgiving stance toward violations of states' procedural rules.<sup>148</sup>

When the Court declared in *Coleman* that it intended to show greater respect for states' procedural requirements and the desire for finality that animates those requirements,<sup>149</sup> therefore, the Court was clearly in pursuit of an overarching, finality-driven reform agenda. The Court determined that Virginia's thirty-day deadline for filing notices of appeal was intended "to set a definite point of time when litigation should be at an end, unless within that time the prescribed [notice of appeal] has been made; and if it has not been, to advise prospective appellees that they are freed of the appellant's demands."<sup>150</sup> If a prisoner could not show good cause for his failure to abide by the Commonwealth's rule, and if he could not demonstrate that failing to consider the merits of his constitutional claims would result in a fundamental miscarriage of justice, then the Court concluded that it should help the Commonwealth achieve finality by foreclosing the possibility of federal habeas relief.<sup>151</sup>

Bator's and Friendly's arguments bore fruit in other cases as well, both in the same Term that the Court decided *Coleman* and in the years immediately thereafter.<sup>152</sup> In *McCleskey v. Zant*,<sup>153</sup> decided two

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for finality.").

146. 489 U.S. 288 (1989).

147. See *id.* at 309-10 (plurality opinion). A majority of the Court adopted the *Teague* plurality's analysis in *Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989); see also *O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997) (explaining the proper way to conduct the *Teague* analysis).

148. See *supra* notes 93-106 and accompanying text.

149. See *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *supra* note 112 (quoting *Coleman*).

150. *Coleman*, 501 U.S. at 751 (quoting *Browder v. Director*, 434 U.S. 257, 264 (1978)).

151. *Id.* at 757.

152. In addition to the cases cited above, see *Brecht v. Abrahamson*, 507 U.S. 619, 635-37 (1993) (finding that states have a strong "interest in the finality of convictions that have survived direct review within the state court system," and holding that, to obtain federal habeas relief for a constitutional error that occurred at trial, a petitioner must demonstrate "actual prejudice" resulting from that error).

153. 499 U.S. 467 (1991).

months prior to *Coleman*, the Court cited finality as a basis for imposing new restrictions on prisoners' ability to file successive or abusive federal habeas petitions.<sup>154</sup> Following Friendly's lead, the *McCleskey* Court stressed that the new limits on successive and abusive petitions would not apply in those "extraordinary instances" in which a prisoner could make a showing of innocence sufficiently persuasive to demonstrate that failing to entertain his or her constitutional claims would result in "a fundamental miscarriage of justice."<sup>155</sup> In *Keeney v. Tamayo-Reyes*,<sup>156</sup> decided the following Term, the Court reiterated that "[t]he writ [of habeas corpus] strikes at finality of a state criminal conviction,"<sup>157</sup> and declared that habeas petitioners who failed to develop the facts underlying their constitutional claims in prior state proceedings ordinarily would not be granted a federal evidentiary hearing.<sup>158</sup> An exception would be made, however, if a prisoner could demonstrate that failing to hold an evidentiary hearing would result in a "fundamental miscarriage of justice."<sup>159</sup> In its 1993 ruling in *Herrera v. Collins*,<sup>160</sup> the Court stated that "the need for finality in capital cases" should make the federal courts exceedingly reluctant to adjudicate a death row inmate's freestanding claim of actual innocence.<sup>161</sup>

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154. See *id.* at 490-91. A "successive" habeas petition is one in which a prisoner "raises grounds identical to those raised and rejected on the merits on a prior petition." *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6 (1986) (plurality opinion). An "abuse of the writ" is a habeas petition in which a prisoner "rais[es] grounds that were available but not relied upon in a prior petition, or engages in other conduct" that leads a court to think the prisoner should be disqualified from seeking habeas relief. *Id.* Both kinds of petitions are primarily governed today by federal legislation. See 28 U.S.C. § 2244(b) (2000); see also *infra* notes 222-28 and accompanying text (discussing the statute).

155. See *McCleskey*, 499 U.S. at 494-95. *McCleskey* sent ambiguous signals with respect to how persuasive the prisoner's proof of innocence would have to be, indicating at one point that a prisoner would have to demonstrate that he or she was "probably" innocent, *id.* at 494, then indicating two paragraphs later that the prisoner would have to make a "colorable showing of factual innocence," *id.* at 495 (quoting *Kuhlmann*, 477 U.S. at 454). The Court's statements on the matter were dicta, however, because the Court ultimately concluded that the evidence and issues Warren McCleskey had placed before the Court had no tendency to demonstrate that he was innocent. See *id.* at 502-03. For a more detailed discussion of the standard of proof for the miscarriage-of-justice exception, see *infra* Part III.B.2.

156. 504 U.S. 1 (1992).

157. *Id.* at 7.

158. See *id.* at 10-12.

159. *Id.* at 12. The *Keeney* Court did not elaborate on the requirements a prisoner would have to meet in order to qualify for the exception. See *id.* at 11-12.

160. 506 U.S. 390 (1993).

161. *Id.* at 417; see also *infra* notes 213, 215 and accompanying text (discussing *Herrera*).

## B. *The Innocence Gap*

### 1. *The Elusiveness of Finality*

No one can dispute that finality is a value that both the Court and Congress ought to consider when determining the conditions under which federal habeas relief will be available. Judicial resources are indeed scarce; the morale of state judges should not be needlessly undermined; the law's deterrent and rehabilitative functions are important; facts are optimally determined when the evidence is freshest; and the system serves a repose-seeking citizenry well when it gives citizens good cause to believe that the actors in a criminal case have done their best to do justice, and that the time has come to move on.<sup>162</sup> For those cases in which the public believes it has reason to suspect the Court has convicted a prisoner of a crime he or she did not commit, however, the Court has done a poor job of shaping its habeas jurisprudence in a manner that will effectively secure finality and its benefits.<sup>163</sup>

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162. See *supra* notes 134-42 and accompanying text (presenting these arguments); see also *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 640 (1991) (reciting finality's benefits).

163. The Court's emphasis on finality has already been the target of criticism. See, e.g., Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485, 491-92 (1995) (lamenting that "[f]inality and federalism, preservation of judicial resources, and fairness—in that order—are the priorities the Court has set for itself"); Patchel, *supra* note 135, at 1025-62 (identifying numerous costs associated with a habeas regime built on a desire to achieve finality). Professor Friedman has argued, for example, that even if one accepts that finality is as important as the Court says that it is, the Court has done a poor job of achieving it. He charges that the Court's habeas reforms "have generated unwarranted doctrinal complexity, directed judicial inquiry from the merits to procedural issues, produced uncertainty, and increased litigation—all to the detriment of finality." Friedman, *supra*, at 485. Coleman's case illustrates Friedman's point. In Coleman's federal habeas proceedings, attorneys representing both Coleman and the Commonwealth devoted countless hours to constructing arguments aimed not at the merits of Coleman's constitutional claims, but rather at procedural questions: whether Coleman filed his notice of appeal on time in his state post-conviction proceedings, whether the Supreme Court of Virginia relied on Coleman's late filing when it dismissed his request for post-conviction relief, and whether Coleman's late filing necessitated the dismissal of his federal habeas petition. See *supra* notes 107-20 and

The Justices appear to believe that achieving finality in any given case is the almost inevitable consequence of foreclosing the possibility of federal habeas relief, and that one's only task when shaping habeas law is thus to determine how the need for finality stacks up against objectives that weigh in favor of making habeas relief available. If the Court believes that finality outweighs the competing values in a particular case, then it closes the doors of the federal courthouse; if it believes finality must give way to other concerns, then it leaves the doors open. In either case, the Court treats finality as the predictable result of refusing to consider the merits of a prisoner's federal habeas petition.

As the twenty-five-year story of Roger Coleman's case<sup>164</sup> poignantly demonstrates, however, the Court has significantly overestimated the extent to which a rapid denial of habeas relief on procedural grounds can assure a state and its citizens of finality when there is reason to suspect that the prisoner might be innocent. When citizens have cause to question a prisoner's guilt, notwithstanding the prisoner's prior conviction by a jury of his or her peers, a genuine sense of repose is far more elusive than the Court has acknowledged, the deterrent and rehabilitative functions of the law are not easily advanced, and the state's financial and judicial resources may be repeatedly spent on litigation brought by organizations and individuals who are determined to come to the pris-

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accompanying text (discussing Coleman's habeas litigation). The *Coleman* Court's decision to overrule *Fay* did clear up one matter: we now know that, as a general rule, all state procedural defaults are fatal in federal habeas proceedings. See *supra* note 112 and accompanying text (discussing *Coleman's* rejection of *Fay*). But the Court's ruling simply redirects parties' energies to a new set of complex procedural questions: whether a state's procedural rules serve legitimate state interests and thus are "adequate" to foreclose habeas review, and, if so, whether a habeas petitioner can qualify for an exception to the ban on procedurally defaulted claims either by showing good cause for his or her failure to abide by the state's procedural rules or by persuading the court that refusing to consider the merits of his or her constitutional claims would result in a fundamental miscarriage of justice. See *supra* notes 113-19 and accompanying text (identifying these exceptions); *infra* Part III.B.2 (discussing the miscarriage-of-justice exception in greater detail). After examining the entire sweep of the Court's habeas reforms, Friedman concludes that, "[d]espite the high priority the Court has accorded the value of finality, there still is not much good to be said about the Court's efforts to achieve it. Procedural litigation may simply have replaced substantive litigation." Friedman, *supra*, at 534.

164. See *supra* notes 1-32 and accompanying text (discussing the twenty-five-year story of Coleman's case).

oner's aid.<sup>165</sup> Indeed, far from securing finality and reinforcing a state's legal regime, the perceived moral authority of the criminal justice system is compromised, and the public's confidence in the courts tested, when judges refuse to consider a prisoner's legal claims notwithstanding the prisoner's presentation of significant evidence that he or she might actually be innocent.

In the final eight days of Coleman's life, both the district court and the Fourth Circuit quickly processed Coleman's final habeas petition, and the Supreme Court rejected his last-minute request for a stay of execution.<sup>166</sup> Both the district court and the Supreme Court began their analyses by disparagingly noting that Coleman had already petitioned the courts for relief twelve times before.<sup>167</sup> The courts' rapid-fire efforts to terminate Coleman's judicial proceedings, however, did little to bring a sense of closure to Coleman's case. If anything, the speed with which the courts disposed of Coleman's final arguments, and the courts' continued refusal to consider the merits of his claims, only fed the perception that a man whose constitutional rights may have been violated, and whose guilt remained in question, was being pushed relentlessly toward the electric chair, and the federal courts were refusing to do anything about it, based on his attorneys' minor filing error.<sup>168</sup> The courts surely would have achieved a much greater sense of finality if they had simply agreed to adjudicate the merits of Coleman's constitutional claims. Federal adjudication of those claims would not have resolved the public's doubts about Coleman's guilt, but it would have addressed the public's fear that one of the chief reasons Coleman was on death row in the first place was that the Commonwealth of Virginia had violated his constitutional rights.

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165. See *supra* notes 1-26 and accompanying text (discussing how a multitude of organizations, people, and the news media came to Coleman's aid and compelled government action).

166. See *supra* notes 121-25 and accompanying text (recounting those proceedings).

167. See *Coleman v. Thompson*, 504 U.S. 188, 188 (1992) (*per curiam*) (beginning by stating that "this is now the 12th round of judicial review in a murder case which began 11 years ago"); *Coleman v. Thompson*, 798 F. Supp. 1209, 1212 (W.D. Va. 1992) (beginning the court's analysis with the same observation).

168. In her cover story for *Time* magazine dated May 18, 1992, for example, Jill Smolowe stated that "the courts have so far failed Coleman miserably" and that Coleman was "the victim of a justice system so bent on streamlining procedures and clearing dockets that the question of whether or not he actually murdered Wanda McCoy has become a subsidiary consideration." Smolowe, *supra* note 3, at 42.

Not even Coleman's execution brought the sense of finality that the Court said it coveted on the Commonwealth's behalf.<sup>169</sup> "Repose," in the sense that Bator and Friendly used the term,<sup>170</sup> is hardly the word one would choose to describe the state of affairs as the hour of Coleman's electrocution drew near. To the contrary, the international media scrutiny of Coleman's conviction and execution, the investigations that for many years fueled fears that Virginia may have executed an innocent man, and the litigation and public appeals that eventually culminated in Governor Warner's decision to order a final round of DNA tests—*twenty-five years* after Wanda McCoy's death—all powerfully demonstrate that finality is exceptionally difficult to achieve in the face of reasonable suspicions of innocence.<sup>171</sup> Genuine finality was not achieved in Coleman's case until January 2006, when new DNA tests showed that there was only a one-in-nineteen-million chance that semen recovered from the scene of McCoy's murder came from a man other than Roger Coleman, and the "weight of the entire world" was finally lifted from the shoulders of Coleman's prosecutors.<sup>172</sup> If a conscientious forensic scientist had not insisted on keeping DNA samples long after the courts tried to put the case to rest,<sup>173</sup> Grundy would continue to be the focus of rumors and suspicions today.

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169. See *supra* note 112 and accompanying text (discussing the Court's goal of finality).

170. See *supra* note 142 and accompanying text.

171. See *supra* notes 1-26 and accompanying text (discussing the events mentioned).

172. Hammack, *supra* note 26; see *supra* note 31 and accompanying text. To my mind, the only question that remains in Coleman's case is the identity of the second source of sperm found in McCoy's body. The 2006 DNA tests reconfirmed the presence of sperm from two men, see *supra* note 67 and accompanying text, but the second source still has not been identified. The Commonwealth has long claimed that McCoy's husband was the second source. See *supra* note 68 and accompanying text. As John Tucker said in a telephone interview, it is indeed exceptionally difficult to imagine that Coleman was able to join the company of another man and jointly carry out the terrible crimes in the exceptionally short window of time that was available. Nor is it apparent, in the small town of Grundy, that there was anyone Coleman knew who would have been willing to commit those acts with him. Telephone Interview with John C. Tucker, *supra* note 67. Nevertheless, if the trial testimony of convicted felon Roger Matney were to be believed, Coleman did confess to his cellmate that he and another man carried out the crimes together. See *supra* note 49 and accompanying text.

173. See *supra* notes 19-20 and accompanying text.



## 2. *The Poorly Calibrated Miscarriage-of-Justice Exception*

One might expect to find the tension between finality and suspected innocence resolved by the Court's repeated assurances that, when refusing to adjudicate a habeas petitioner's constitutional claims would result in a "fundamental miscarriage of justice," the Court will make an exception to its tough stance against prisoners' procedural failings.<sup>174</sup> If properly framed and calibrated, the miscarriage-of-justice exception could ensure that procedural mistakes would not foreclose a merits-focused adjudication of a prisoner's constitutional claims when dismissing the prisoner's petition on procedural grounds would do little to advance the cause of finality. As it has taken shape over the past twenty years, however—first at the hands of the Court, and then more recently at the hands of Congress—the miscarriage-of-justice exception has become woefully inadequate to ensure that, when doubts about a prisoner's guilt will thwart finality, the federal courts will consider the merits of the prisoner's procedurally flawed habeas petition. In short, there is a sizable "innocence gap" today—a gap between the amount of exculpatory evidence sufficient to undermine finality and the amount sufficient to trigger the federal courts' willingness to forgive a prisoner's procedural mistakes and address the merits of his or her constitutional claims.

### a. *The Court's Original Formulation*

In his influential 1970 article, Judge Friendly proposed that the Court restrict habeas relief to those prisoners who are able to make a "colorable claim of innocence."<sup>175</sup> Elaborating only briefly on what he meant by that phrase, Friendly argued that, with limited exceptions, a habeas petitioner should be required to

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

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174. See *supra* notes 112, 155-59 and accompanying text.

175. Friendly, *supra* note 135, at 142.

trial, the trier of the facts would have entertained a reasonable doubt of his guilt.<sup>176</sup>

Friendly's proposal found its first stirrings of life in two decisions handed down by the Supreme Court on the same day in 1986. In *Kuhlmann v. Wilson*,<sup>177</sup> a plurality of the Court endorsed using Friendly's standard to identify those instances in which a prisoner would be permitted to bring a successive habeas petition seeking to relitigate a constitutional claim that had been adjudicated and rejected in prior federal habeas proceedings.<sup>178</sup> The plurality believed that, in those circumstances, Friendly's standard would strike the appropriate balance between the state's interest in finality and the prisoner's interest in achieving "the ends of justice."<sup>179</sup> In *Murray v. Carrier*,<sup>180</sup> after focusing primarily on what might constitute "cause" sufficient to excuse a habeas petitioner's procedural default,<sup>181</sup> the Court noted in dictum that there might be occasions in which it would agree to adjudicate a prisoner's procedurally defaulted claims even if the prisoner failed to justify his or her violation of the state's procedural rules.<sup>182</sup> "[W]e think," the Court wrote, "that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."<sup>183</sup> Friendly's formulation of the standard of proof, endorsed by the *Kuhlmann* plurality, appeared less demanding than the standard articulated in *Carrier*: Friendly spoke of a "colorable claim" and of a "fair probability,"<sup>184</sup> while *Carrier* spoke of an outright probability.<sup>185</sup> Despite those differences, however, both *Kuhlmann* and *Carrier* signaled the Court's inclination to respond sensibly when confronted with doubts about a prisoner's guilt.

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176. *Id.* at 160.

177. 477 U.S. 436 (1986) (plurality opinion).

178. *See id.* at 452-54.

179. *Id.* at 451-54.

180. 477 U.S. 478 (1986).

181. *See id.* at 485-97.

182. *See id.* at 495-96.

183. *Id.* at 496.

184. *Kuhlmann*, 477 U.S. at 454 & n.17 (citing Friendly, *supra* note 135, at 160).

185. *Carrier*, 477 U.S. at 496.

For several years, it appeared that *Kuhlmann* and *Carrier* established the parameters for framing the miscarriage-of-justice exception.<sup>186</sup> The analytic possibilities became more complex, however, when the Court issued its 1992 ruling in *Sawyer v. Whitley*.<sup>187</sup> In *Sawyer*, a death row inmate filed a successive habeas petition alleging that his sentencing proceedings were infected by constitutional error.<sup>188</sup> The prisoner did not argue that he was actually innocent of the murder of which he had been convicted. Rather, he argued that his eligibility for the death penalty had been unconstitutionally determined and that refusing to adjudicate the merits of his second petition would thus result in a miscarriage of justice.<sup>189</sup> The Court declared that it would not consider the merits of the prisoner's second petition unless the prisoner could "show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."<sup>190</sup>

After *Sawyer*, it was not clear which standard of proof the courts would apply when habeas petitioners sought to avoid procedural obstacles by claiming they were innocent of the crimes of which they were convicted: the standards variously described in *Kuhlmann* and *Carrier*, which would require, at most, a showing of probable innocence, or the more demanding standard applied in *Sawyer*, where the prisoner was required to make the requisite showing by "clear and convincing evidence." The Court of Appeals for the Eighth Circuit concluded, for example, that *Sawyer* provided the standard for all applications of the miscarriage-of-justice exception.<sup>191</sup> The issue would remain in doubt until the Court finally clarified the exception's requirements in its 1995 ruling in *Schlup v. Delo*.<sup>192</sup>

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186. See, e.g., *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991) (citing the formulations in *Kuhlmann* and *Carrier* and acknowledging the possible differences between the two); see also *supra* note 155 (describing *McCleskey's* ambiguous treatment of the miscarriage-of-justice exception).

187. 505 U.S. 333 (1992).

188. *Id.* at 335-36.

189. See *id.* at 347-48.

190. *Id.* at 336 (emphasis added).

191. See *Schlup v. Delo*, 11 F.3d 738, 740 (8th Cir. 1993), *rev'd*, 513 U.S. 298 (1995); *McCoy v. Lockhart*, 969 F.2d 649, 651 (8th Cir. 1992).

192. 513 U.S. 298 (1995).

In *Schlup*, the Court explained that the miscarriage-of-justice exception should be cast in a manner that recognizes the states' strong interest in finality, while still ensuring that habeas relief remains available for those who are "truly deserving."<sup>193</sup> The Court concluded that, although *Sawyer* would continue to apply to prisoners who claimed they were ineligible for the death penalty, "a somewhat less exacting standard of proof" would apply to prisoners who claimed they were innocent of any crime.<sup>194</sup> Returning to the Court's dictum in *Carrier*, the Court held that, when a habeas petitioner seeks to avoid a procedural bar by claiming actual innocence, he or she must show that, in light of all the available evidence, "it is more likely than not that no reasonable juror would have found [the] petitioner guilty beyond a reasonable doubt."<sup>195</sup>

The Court identified two primary reasons for its conclusion. First, "challenges to the propriety of imposing a sentence of death are routinely asserted in capital cases," while claims of actual innocence remain rare; claims of innocence are made only in those uncommon instances when a petitioner has obtained "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial."<sup>196</sup> Claims of innocence thus "pose less of a threat to scarce judicial resources and to principles of finality and comity" than claims of ineligibility for the death penalty; consequently, the Court reasoned, a less demanding standard of proof should be applied in the former category of cases than in the latter.<sup>197</sup>

Second, the Court concluded that, because "[t]he quintessential miscarriage of justice is the execution of a person who is entirely innocent," a prisoner claiming actual innocence should be required to satisfy a standard that is less demanding than the standard

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193. *Id.* at 321.

194. *Id.* at 325.

195. *Id.* at 327. The Court stated that, when making this determination, a federal court is not bound by the rules of evidence. *Id.* Moreover, the Court stressed that "[i]t is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.* at 329.

196. *Id.* at 324.

197. *Id.*; see also *id.* at 322 ("Explicitly tying the miscarriage of justice exception to innocence ... accommodates both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the extraordinary case." (internal quotation marks omitted)).

facing a prisoner who merely claims "that his sentence is too severe."<sup>198</sup> Quoting Justice Harlan's concurring opinion in *In re Winship*—the landmark case in which the Court confirmed that criminal guilt must be proven beyond a reasonable doubt<sup>199</sup>—the Court stressed that "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."<sup>200</sup> Because it is of "paramount importance" that society "avoid[] the injustice of executing one who is actually innocent," the Court held that prisoners seeking to avoid a procedural bar with a claim of actual innocence should be required to establish their innocence by a preponderance of the evidence, rather than by evidence that a federal court finds "clear and convincing."<sup>201</sup>

To one who worries about the execution or incarceration of innocent people, the *Schlup* standard initially looks fairly appealing, especially when viewed against the backdrop of the far more stringent standard applied in *Sawyer*. Even under *Schlup*, however, there is a significant gap between the amount of exculpatory evidence sufficient to generate a profound sense of public discomfort with a prisoner's punishment and the amount sufficient to trigger the Court's willingness to forgive a prisoner's procedural failings and adjudicate the merits of his or her constitutional claims.

Consider, once again, the case of Roger Coleman. When presented with Coleman's second habeas petition just days before his scheduled execution, the district court was asked to determine whether Coleman qualified for an exception to the general ban on successive petitions.<sup>202</sup> At that point, of course, neither *Sawyer* nor *Schlup* had been decided. After reviewing the opinions in *Kuhlmann* and *Carrier*, however, the district court concluded that Coleman was required to make "a colorable showing of 'actual innocence.'"<sup>203</sup> The court did not say precisely what it understood that standard to

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198. *Id.* at 324-25.

199. 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.")

200. *Schlup*, 513 U.S. at 325 (quoting *Winship*, 397 U.S. at 370 (Harlan, J., concurring)).

201. *Id.* at 325-26.

202. *See Coleman v. Thompson*, 798 F. Supp. 1209, 1214-16 (W.D. Va. 1992).

203. *Id.* at 1216.

require, but it is clear that the court was unimpressed by Coleman's evidence. The exculpatory evidence gathered by that point consisted primarily of Teresa Horn's claim that Donald Ramey had confessed to Wanda McCoy's murder; evidence that Roger Matney had lied when he testified regarding Coleman's alleged jailhouse confession; affidavits of experts raising questions regarding recent DNA tests and the second source of sperm found at the murder scene; and the pry mark that the lead detective originally reported seeing on the McCoy's door frame during his investigation.<sup>204</sup> The court determined that "[a]ll of Coleman's evidence which he claims is new and shows his 'actual innocence' does nothing more than attack the credibility of witnesses and evidence at the original trial."<sup>205</sup> The most that could be said about Coleman's evidence, the court concluded, was that if it had been presented at trial, the jury might have—but need not have—rendered a different verdict.<sup>206</sup> The court declared itself "satisfied that no 'fundamental miscarriage of justice' is occurring."<sup>207</sup> The Fourth Circuit summarily affirmed.<sup>208</sup> While Coleman spent his final moments waiting to be placed into the electric chair, the Supreme Court refused to intervene.<sup>209</sup>

Let us suppose that the district court would have reached precisely the same conclusion if it had had the benefit of the Supreme Court's clarifying ruling in *Schlup*—after all, if the district court believed Coleman's evidence was inadequate to make "a colorable showing of actual innocence," it surely would not have found the evidence sufficient to establish that it was "more likely than not that no reasonable juror would have found [Coleman]

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204. *Id.* at 1216-17; *see also supra* Part II.A (briefly describing some of the key pieces of exculpatory evidence that Coleman's team had gathered).

205. *Coleman*, 798 F. Supp. at 1216.

206. *Id.* at 1217.

207. *Id.* at 1218; *see also id.* at 1217 (stating that, according to one expert, DNA tests that had recently been conducted put Coleman in a group of possible perpetrators that consisted of only two-tenths of one percent of the population at large).

208. *See Coleman v. Thompson*, No. 92-4005, 1992 U.S. App. LEXIS 11440, at \*1 (4th Cir. May 18, 1992) (per curiam) ("[W]e find no error in the district court's conclusion that petitioner has not established a colorable claim of factual innocence ....").

209. *See Coleman v. Thompson*, 504 U.S. 188, 188 (1992) (per curiam) ("[D]espite having had 11 years to produce exculpatory evidence, Coleman has produced what, in the words of the District Court, does not even amount to a colorable showing of actual innocence." (internal quotation marks omitted)).

guilty beyond a reasonable doubt.”<sup>210</sup> The defects in the *Schlup* standard are revealed by the fact that the district court’s refusal to consider Coleman’s constitutional claims did precious little to advance the cause of finality. The media firestorm that accompanied Coleman’s execution, the investigations that continued to stir up fears that Virginia had executed an innocent man, and the litigation and public appeals preceding Governor Warner’s decision to authorize new DNA tests, all make it plain that the federal courts’ procedure-focused handling of Coleman’s case did not bring the desired sense of closure. Even in January 2006, doubts about Coleman’s guilt and public discomfort with the way Coleman’s case had been handled remained sufficiently strong to persuade Governor Warner to conduct a final round of tests in order, as he put it, to “follow the available facts to a more complete picture of guilt or innocence.”<sup>211</sup>

The miscarriage-of-justice exception’s failure to help the courts achieve finality in Coleman’s case should hardly be surprising. Suppose that the best a death row prisoner can show with new evidence is that there is a fifty-fifty chance that no reasonable juror would have convicted him. A federal court applying the *Schlup* standard would refuse to forgive any procedural defects that had saddled the prisoner’s efforts to secure habeas relief, and would refuse to adjudicate the merits of the prisoner’s constitutional claims. Yet a large segment of the public undoubtedly would feel profoundly disquieted if they believed there was a fifty-fifty chance that a person whose constitutional rights may have been violated, and who was about to be executed, was actually innocent of any crime. Indeed, the constitutional requirement that a person’s guilt be proven at trial beyond a reasonable doubt is based, in part, on the need to assure the public that those who have been convicted are deserving of punishment:

[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that

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210. *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

211. See Glod & Shear, *supra* note 7.

leaves people in doubt whether innocent men are being condemned.<sup>212</sup>

The fact that doubts about a person's guilt arise *after* someone has been convicted is a matter that, while historically of great significance to the legal profession, should be expected to have comparatively little significance in the eyes of the public. Judges have grown accustomed in criminal cases to viewing individuals through two very different sets of lenses: one set for the pre-conviction period, during which a person is entitled to a presumption of innocence, and another set for the post-conviction period, after a person's guilt has been proven beyond a reasonable doubt and he or she thus stands as guilty in the eyes of the law regardless of any new evidence that comes to light.<sup>213</sup> So far as the courts are concerned, a criminal trial is "a decisive and portentous event"<sup>214</sup> and "the paramount event for determining the guilt or innocence of the defendant."<sup>215</sup> The fact that the courts have found it necessary to compartmentalize the legal status of individuals in this way, however, certainly does not mean that ordinary citizens are equally prepared to disregard newly discovered evidence that casts doubt on the accuracy of a verdict. Indeed, when exculpatory evidence comes to light following a conviction, it is only reasonable to expect the public to desire reassurance that the prisoner's punishment is just. The author of the *Time* magazine cover story published just two days before Coleman's execution surely was not voicing an anomalous view when she asked why the courts were in such a rush to terminate Coleman's judicial proceedings: "[A]dditional time is not too much to ask," she wrote, "if there is a reasonable doubt that he is guilty."<sup>216</sup> Perhaps the public's discomfort need not compel the federal courts to go into the business of re-adjudicating the guilt and innocence of state prisoners.<sup>217</sup> But one should not be surprised to

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212. *In re Winship*, 397 U.S. 358, 364 (1970).

213. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 398-99 (1993) (stating that "[a] person when first charged with a crime is entitled to a presumption of innocence," but a person loses that presumption after his or her guilt has been proven "beyond a reasonable doubt").

214. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

215. *Herrera*, 506 U.S. at 416.

216. *Smolowe*, *supra* note 3, at 44.

217. *See infra* notes 236-46 and accompanying text (discussing the Court's reluctance to grant habeas relief based solely on the strength of a prisoner's proof of innocence).



find citizens dissatisfied when newly surfaced evidence creates a troubling measure of uncertainty about a prisoner's guilt, and the federal courts refuse even to consider the prisoner's claim that his or her basic constitutional rights were violated.

It is impossible to define the precise point at which exculpatory evidence becomes sufficiently weighty to undermine the public's sense of finality about a case—though it seems telling that *Time's* reporter felt disturbed by evidence that, in her judgment, raised “a reasonable doubt” about Coleman's guilt.<sup>218</sup> Yet one need not precisely identify that threshold in order to learn a powerful lesson from Coleman's case: the gap between the amount of exculpatory evidence sufficient to undercut finality and the amount sufficient to satisfy the Court's formulation of the miscarriage-of-justice exception is too large to permit the exception effectively to serve the purposes for which it was intended. A miscarriage-of-justice exception that does not account for the public's response to newly discovered exculpatory evidence is poorly calculated to assure the public that “the ends of justice”<sup>219</sup> have been achieved and that habeas relief has been extended to those who are “truly deserving.”<sup>220</sup> When doubts about a prisoner's guilt are sufficiently strong to undercut finality, but insufficiently strong to satisfy the miscarriage-of-justice exception, we will find ourselves confronted with the very kind of spectacle that we witnessed in Coleman's case.<sup>221</sup> Specifically, in cases where doubts about a prisoner's guilt will plainly make finality highly elusive, we will nevertheless see courts blithely citing finality as the principal rationale for refusing to adjudicate the merits of a prisoner's constitutional claims.

*b. Congress's New Formulation*

If one believes *Schlup* did a poor job of calibrating the miscarriage-of-justice exception, one will find post-*Schlup* developments nothing short of alarming. Beginning with legislation enacted in

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218. Smolowe, *supra* note 3, at 44.

219. *Kuhlmann v. Wilson*, 477 U.S. 436, 451 (1986) (plurality opinion); *see supra* notes 177-79 and accompanying text (discussing *Kuhlmann*).

220. *Schlup v. Delo*, 513 U.S. 298, 321 (1995); *see supra* notes 192-201 and accompanying text (discussing *Schlup*).

221. *See supra* notes 3-7, 11-26 and accompanying text.

1996, and continuing with a bill introduced in 2005, Congress has undertaken to replace *Schlup*'s "more likely than not"<sup>222</sup> formulation with the very same "clear and convincing"<sup>223</sup> standard that the *Schlup* Court believed did not accurately reflect "the degree of confidence our society thinks [a federal court] should have" when evaluating a habeas petitioner's claim of innocence.<sup>224</sup>

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>225</sup> Congress addressed two areas of habeas law in which the Court had recognized the miscarriage-of-justice exception—successive petitions and federal evidentiary hearings. With respect to successive petitions, AEDPA mandates the dismissal of all claims that have already been adjudicated in prior federal habeas proceedings.<sup>226</sup> Claims presented in a successive petition that have not yet been federally adjudicated must also be dismissed, unless the petitioner is either relying on a new, retroactively applicable rule of constitutional law<sup>227</sup> or relying on facts that he or she could

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222. *Schlup*, 513 U.S. at 327.

223. *Id.* at 323.

224. *Id.* at 325 (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

225. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C. §§ 2244, 2253-2255, 2261-2266 (2005)). President Bill Clinton signed the legislation one year after the April 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City. See Statement by President William J. Clinton upon Signing S. 735, 1996 U.S.C.C.A.N. 961-1 (Apr. 24, 1996). AEDPA ushered in a wide range of habeas reforms aimed at reducing the impact of federal habeas proceedings on states' efforts to punish those convicted of crimes. For example, AEDPA imposed a one-year statute of limitations on habeas petitions, see 28 U.S.C. § 2244(d) (2000); further restricted prisoners' ability to file successive habeas petitions, see *id.* § 2244(b); made it more difficult for prisoners to obtain federal evidentiary hearings, see *id.* § 2254(e)(2); mandated a strong measure of deference to state courts' applications of law to fact, see *id.* § 2254(d); and—for those states that provide competent counsel to indigent prisoners challenging their capital convictions or sentences in state post-conviction proceedings—imposed strict deadlines on habeas petitioners and federal courts alike in order to shorten the time between conviction and execution, see *id.* §§ 2261-66.

226. See *id.* § 2244(b)(1) (stating that claims "presented in a prior application shall be dismissed"); see also *Stewart v. Martinez-Villareal*, 523 U.S. 637, 642-45 (1998) (stating that a claim was not "presented" in a prior habeas petition within the meaning of the statute unless it was adjudicated on the merits).

227. See 28 U.S.C. § 2244(b)(2)(A) (2000). Ordinarily, when the Court declares a new rule of constitutional law, that rule is applicable only to cases that still are pending on direct review. In rare instances, however, the Court will declare that a newly created rule applies even to prisoners who have already completed direct review and who now are seeking either state or federal collateral relief. See *Teague v. Lane*, 489 U.S. 288, 307-10 (1989) (O'Connor, J., plurality opinion) (distinguishing between direct and collateral review and introducing the

not reasonably have discovered earlier and those facts, taken together with all of the other available evidence, “establish by *clear and convincing evidence* that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”<sup>228</sup>

AEDPA also places a daunting obstacle in the path of a habeas petitioner who fails to develop the facts underlying his or her constitutional claims in state court proceedings. The prisoner will be denied a federal evidentiary hearing unless he or she is relying on either a new, retroactively applicable rule of constitutional law or facts that he or she could not reasonably have discovered earlier; and in either case, the prisoner must also persuade the court that the facts underlying his or her claim “establish by *clear and convincing evidence* that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”<sup>229</sup> Even when a prisoner seeks the benefit of a constitutional rule that the Supreme Court has held is retroactively applicable to cases on collateral review,<sup>230</sup> therefore, the prisoner will be denied an evidentiary hearing unless the prisoner can prove his or her innocence by clear and convincing evidence.

In 2005, companion bills were introduced in Congress that would have extended the same extraordinarily demanding standard to the third area in which the Court has applied the miscarriage-of-justice exception: procedural defaults of the sort that doomed Roger Coleman’s efforts to obtain federal habeas relief.<sup>231</sup> In an effort to narrow still further the availability of habeas relief for petitioners who violate a state’s procedural rules, the Streamlined Procedures Act of 2005 would have barred a federal court from granting habeas relief on any procedurally defaulted claim unless the applicant could

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retroactivity analysis that the Court continues to apply today).

228. 28 U.S.C. § 2244(b)(2)(B)(ii) (2000) (emphasis added). In their dissenting opinions in *Schlup*, Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, and Justice Thomas voiced their preference for the “clear and convincing” standard of proof. See *Schlup v. Delo*, 513 U.S. 298, 339-42 (1995) (Rehnquist, C.J., dissenting, joined by Kennedy and Thomas, JJ.); *id.* at 355 (Scalia, J., dissenting, joined by Thomas, J.).

229. 28 U.S.C. § 2254(e)(2) (2000) (emphasis added); see also *Williams v. Taylor*, 529 U.S. 420, 429-37 (2000) (discussing the statute’s requirements).

230. See *supra* notes 146-47 and accompanying text (briefly referencing the Court’s retroactivity jurisprudence).

231. See Streamlined Procedures Act of 2005, S. 1088, H.R. 3035 109th Cong. § 4 (2005).

“establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”<sup>232</sup>

We have drifted a very long way from Judge Friendly’s suggestion that the habeas remedy be restricted to those prisoners who can make “a colorable showing of innocence” by demonstrating that, in light of newly discovered evidence, there is “a fair probability that ... the [jury] would have entertained a reasonable doubt of his guilt.”<sup>233</sup> Under AEDPA and the proposed Streamlined Procedures Act, Congress is revealing a preference for a standard of proof that is a different animal altogether. Many in Congress have apparently concluded that, even when a prisoner can prove that he or she is probably innocent, Americans are content to have the federal courts ignore the prisoner’s constitutional claims and allow the prisoner to be punished—even executed—if the prisoner’s attorneys did not obey all of the applicable procedural rules and if the prisoner’s exculpatory evidence is not quite clear and convincing. To those familiar with Roger Coleman’s case, it is impossible to agree with that appraisal of the American public. In cases in which citizens suspect a prisoner is innocent, Congress’s reformulated miscarriage-of-justice exception is simply incapable of distinguishing between those cases in which doubts about a prisoner’s guilt will frustrate judicial efforts to give the public a sense of closure and those in which the dismissal of a prisoner’s habeas petition on procedural grounds will deliver genuine finality.

### *c. Other Problems with Congress’s Standard*

If Congress’s “clear and convincing” standard had virtues that counterbalanced its failure to advance the cause of finality in the face of doubts about a prisoner’s guilt, perhaps the case for its retention would be stronger. Unfortunately, the standard has additional significant faults.

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232. See *id.* § 4(a) (incorporating by reference 28 U.S.C. § 2254(e)(2) (2000)). The bill also would deny habeas relief on procedurally defaulted claims “unless the denial of such relief is contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” *Id.* § 4(a)(2)(B)(5).

233. Friendly, *supra* note 135, at 160; see *supra* note 135 and accompanying text (introducing Friendly’s argument).

Suppose that a prisoner files a procedurally flawed habeas petition and, after applying Congress's "clear and convincing" standard, the district court declares that the prisoner has established his or her innocence by clear and convincing evidence. Suppose, further, that when the court proceeds to consider the prisoner's constitutional claims, the court concludes that those claims lack merit. The district court is then in the extraordinarily uncomfortable position of having to permit the execution or continued incarceration of a person whom the court has said is clearly and convincingly innocent. That is hardly a state of affairs calculated to bring credit to the courts, and it certainly is not a state of affairs calculated to advance the cause of finality. To the contrary, it is difficult to imagine a scenario with greater power to undermine the public's confidence in the judiciary than one in which a court has said that it is convinced of a prisoner's innocence, but that it will nevertheless refuse to prevent that prisoner's execution or continued imprisonment. Indeed, federal judges themselves would presumably find it profoundly demoralizing to be compelled to take that course of action—and if preserving the morale of *state* judges is one of the concerns that ought to shape federal habeas law,<sup>234</sup> then surely it is appropriate to consider the morale of *federal* judges, as well.

One might respond by arguing that either (1) clear and convincing proof of innocence ought itself to be sufficient to entitle a prisoner to federal habeas relief even when the prisoner's trial and sentencing proceedings were free of constitutional violations, or (2) a prisoner who can produce clear and convincing evidence of his or her innocence will surely be granted executive clemency,<sup>235</sup> so that questions of federal habeas relief will become moot. Both responses are problematic.

In *Herrera v. Collins*,<sup>236</sup> the Court expressed a deep reluctance to recognize innocence as an independent basis for habeas relief. Leonel Herrera was an inmate on Texas's death row who claimed that he was innocent of the murder of which he had been convicted and that it would violate both the Eighth Amendment and the Fourteenth Amendment to execute an innocent man.<sup>237</sup> The Justices'

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234. See *supra* note 138 and accompanying text.

235. See *infra* notes 250-60 and accompanying text.

236. 506 U.S. 390 (1993).

237. *Id.* at 396-97; see also U.S. CONST. amend. VIII (banning "cruel and unusual

various opinions sent conflicting signals about the viability of such a claim. One group constituting a majority expressed a willingness to consider such an argument in extraordinary circumstances,<sup>238</sup> while another group constituting a majority stressed that Herrera's evidence fell far short of the measure of persuasiveness that would be required for such an argument to succeed.<sup>239</sup> Still another majority, however, expressed reservations about *ever* granting habeas relief on a claim of actual innocence when there is a "state avenue open to process such a claim," such as the possibility of executive clemency.<sup>240</sup> Clemency, this group of Justices wrote, "is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."<sup>241</sup>

In the wake of *Herrera*, the lower federal courts are reaching differing conclusions about whether a highly persuasive demonstration of innocence can itself serve as the basis for habeas relief.<sup>242</sup> The Eighth Circuit has indicated that the habeas remedy may be awarded in such circumstances, but has emphasized that the petitioner must satisfy "an 'extraordinarily high' standard. In fact,

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punishments"); *id.* amend. XIV, § 1 (banning a state from depriving a person "of life, liberty, or property, without due process of law").

238. *See Herrera*, 506 U.S. at 417 ("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."); *id.* at 419 (O'Connor, J., concurring, joined by Kennedy, J.) (stating that "the execution of a legally and factually innocent person would be a constitutionally intolerable event"); *id.* at 429 (White, J., concurring in the judgment) ("I assume that a persuasive showing of 'actual innocence' made after trial ... would render unconstitutional the execution of petitioner in this case."); *id.* at 430 (Blackmun, J., dissenting, joined by Stevens and Souter, JJ.) ("Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent." (internal citations omitted)).

239. *See id.* at 417 (majority opinion) (concluding that Herrera's evidence of innocence was unpersuasive); *id.* at 419 (O'Connor, J., concurring, joined by Kennedy, J.) (stating that Herrera "is not innocent, in any sense of the word"); *id.* at 429 (White, J., concurring in the judgment) (stating that Herrera had fallen "far short" of the required evidentiary showing).

240. *See id.* at 417 (majority opinion); *see also id.* at 400 ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."); *id.* (stating that "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact").

241. *Id.* at 411-12.

242. *See Edwards v. United States*, No. 05-CV0017(NG), 2005 U.S. Dist. LEXIS 12700, at \*10 & n.4 (E.D.N.Y. June 27, 2005) (noting the conflict).

the petitioner must show new facts unquestionably establishing his innocence."<sup>243</sup> The Fifth Circuit, on the other hand, "has rejected this possibility and held that claims of actual innocence are not cognizable on federal habeas review."<sup>244</sup> The Fifth Circuit has concluded that those prisoners who are demonstrably innocent must turn either to their state courts for appropriate relief or to their state's executive for clemency.<sup>245</sup> Congress, meanwhile, has shown no inclination to weigh in on the matter.<sup>246</sup>

When a district court is convinced that a state prisoner is innocent but that the prisoner's trial and sentencing proceedings were constitutionally unobjectionable, therefore, it is not at all clear that the Supreme Court would permit the district court to award the habeas remedy on the strength of the prisoner's innocence alone. If the Court did indeed refuse to permit habeas relief in those circumstances, then Congress's demand that the federal courts find a prisoner clearly and convincingly innocent before evaluating his or her constitutional claims would have helped to put the courts in a deeply untenable position.

Nor can the federal courts or the public readily take comfort in the belief that, if a prisoner can clearly and convincingly establish his or her innocence, the state's executive will award the prisoner clemency and so the courts will not have to worry about how to dispose of the prisoner's federal habeas petition. Prisoners and executive officials alike typically wait until judicial proceedings have been exhausted before focusing their energies on the possibility of clemency.<sup>247</sup> In Roger Coleman's case, for example, Governor

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243. *Whitfield v. Bowersox*, 324 F.3d 1009, 1020 (8th Cir. 2003).

244. *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003).

245. *See id.*

246. *Herrera* has, however, been the subject of scholarly debate. Compare Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims After Herrera v. Collins*, 71 TEMP. L. REV. 489 (1998) (arguing that it is the job of the states, not the federal courts, to correct factually inaccurate verdicts), with Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943, 948-50 (1994) (arguing that state prisoners should be deemed to have a constitutional right to file a motion for a new trial based on newly discovered evidence at any time, even though states often impose strict time limits on such motions), and Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121, 122 (2005) (criticizing *Herrera's* reluctance to entertain actual-innocence claims).

247. *See Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) (stating that clemency "is the historic remedy for preventing miscarriages of justice where judicial process has been

Wilder did not reject Coleman's clemency petition until the very day of the execution.<sup>248</sup> Consequently, a court presented with a procedurally flawed habeas petition ordinarily must dispose of the petition before either the court or the public learns how the executive will respond to the prisoner's plea for clemency. If the public suspects the prisoner is innocent but the court denies the prisoner's request for habeas relief on procedural grounds, the court still risks being discredited in the eyes of the public, even if the executive later comes to the prisoner's aid. The federal courts were excoriated for their handling of Coleman's first habeas petition long before anyone knew how Governor Wilder would respond to Coleman's clemency plea.<sup>249</sup>

Moreover, there is no guarantee that a prisoner who is clearly and convincingly innocent in the eyes of a federal judge will be awarded clemency.<sup>250</sup> The power to grant clemency "is in many respects the most unencumbered power enjoyed by" a state's executive branch;<sup>251</sup> the executive is free to apply virtually any standards and criteria that it deems appropriate.<sup>252</sup> One can imagine, for example, that an executive might refuse to grant clemency unless a prisoner can prove his or her innocence beyond a reasonable doubt—a standard that is even more demanding than the rigorous "clear and convinc-

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exhausted"); Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 241 (2003) ("[A] clemency petition is usually a defendant's final plea for relief from state execution.").

248. See *supra* note 6 and accompanying text.

249. See *supra* notes 126-30 and accompanying text.

250. Cf. Heise, *supra* note 247, at 253 (stating that "clemency's record as a 'fail-safe' backstop against innocent defendants being put to death by the state is the subject of debate") (footnote omitted).

251. Richard F. Celeste, *Executive Clemency: One Executive's Real Life Decisions*, 31 CAP. U. L. REV. 139, 139 (2003). There is wide variation in the ways in which states structure their clemency processes; in some states the governor possesses the sole power to grant clemency, in some states that power is held by a clemency board, and in many states the governor and a clemency board share the responsibility for evaluating clemency petitions. See Heise, *supra* note 247, at 242, 255 (describing the different clemency regimes).

252. See Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307, 1326-27 (2004) (emphasizing the executive's broad discretion to grant or deny clemency for virtually any reason whatsoever); see also *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280-81 (1998) (plurality opinion) (stating that clemency is awarded "as a matter of grace" and that executives may "consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations").



ing” standard that Congress prefers in the habeas context.<sup>253</sup> Even if an executive were to apply the very same “clear and convincing” standard that the federal court had already deemed met, the executive might disagree with the court’s appraisal of the evidence and refuse to award clemency. Indeed, by declaring that habeas relief will remain available to a prisoner whose procedurally flawed petition is accompanied by clear and convincing proof of the prisoner’s innocence, Congress itself is presumably manifesting the judgment that there may be occasions when a clearly innocent person will need to turn to the federal judiciary for help. After all, why tether the availability of habeas relief to convincing proof of a prisoner’s innocence, if one is certain that those with convincing proof of their own innocence will eventually be granted clemency and thus will not stand in need of the judiciary’s intervention?

Finally, if a federal court believes it should deny a prisoner’s procedurally flawed habeas petition because the exculpatory evidence is not quite “clear and convincing,” but the court fears a public backlash due to widespread doubts about the prisoner’s guilt, the court might be tempted to try to mitigate the public’s discomfort by exaggerating the weaknesses of the prisoner’s exculpatory evidence and declaring that the prisoner’s evidentiary showing falls far short of meeting the “clear and convincing” standard of proof. By downplaying the strength of the prisoner’s evidence, the court might hope to persuade the public that justice has been done and that the case is not worthy of further scrutiny. In Coleman’s case, for example, the district court probably overstated the matter when it declared, just eight days before Coleman’s execution, that the evidence of Coleman’s guilt was stronger than ever<sup>254</sup>—a view eagerly echoed by the Supreme Court the day of Coleman’s death.<sup>255</sup> That certainly was not the judgment of those who continued to press

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253. See *Addington v. Texas*, 441 U.S. 418, 422 (1979) (stating that the “clear and convincing” standard of proof is an intermediate standard that falls between “preponderance of the evidence” and “beyond a reasonable doubt”).

254. *Coleman v. Thompson*, 798 F. Supp. 1209, 1218-19 (W.D. Va. 1992) (“After a review of the alleged ‘new evidence,’ this court finds the case against Coleman as strong or stronger than the evidence adduced at trial.”).

255. *Coleman v. Thompson*, 504 U.S. 188, 188 (1992) (per curiam) (“[D]espite having had 11 years to produce exculpatory evidence, Coleman has produced what, in the words of the District Court, does not even amount to a colorable showing of actual innocence.” (internal quotation marks omitted)).

for new DNA tests long after Coleman was executed in 1992,<sup>256</sup> nor was it necessarily the judgment of Governor Warner when he arranged for the new tests to be conducted in January 2006.<sup>257</sup>

Exaggerating the weaknesses of a prisoner's exculpatory evidence not only undermines the integrity of the judicial process, but it may also make it more difficult for the prisoner to obtain clemency. Once a court declares that the "clear and convincing" standard has not been met, a governor fearful of controversy may find it irresistibly tempting to take cover behind the court's declaration and say that he or she, like the court, finds the prisoner's exculpatory evidence unconvincing. It certainly would not be the first time that a governor presented with a difficult clemency petition has sought shelter behind a court's refusal to grant the prisoner's request for relief.<sup>258</sup>

The irony is unmistakable. Over the past twenty years, the Supreme Court and Congress have worked hard to help states achieve finality in criminal cases by developing ever-tougher procedural rules that make it more difficult for state prisoners to obtain federal habeas relief, even when newly discovered evidence suggests the prisoner might be innocent.<sup>259</sup> By placing an extraordinarily strong emphasis on the importance of procedural regularity, however, today's habeas regime makes finality more difficult to achieve in cases of suspected innocence, and may make executive clemency—the remedy that the Court has told us is "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted"<sup>260</sup>—harder to obtain.

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256. See *supra* notes 20-23 and accompanying text.

257. See Glod & Shear, *supra* note 7.

258. See, e.g., Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J.L. & POL. 669, 671-73 (2001) (arguing that governors frequently sidestep responsibility by deferring to the courts; when George W. Bush was governor of Texas, for example, he frequently explained his rejection of pleas for clemency by stating that the courts had already examined the given case carefully).

259. See *supra* notes 101-20, 225-30 and accompanying text.

260. *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993); see *supra* notes 236-41 and accompanying text (discussing *Herrera*).

## CONCLUSION

Both Congress and the Court have done an exceptionally poor job of devising a habeas regime that takes account of the elusiveness of finality when the public feels it has reason to doubt a prisoner's guilt. The miscarriage-of-justice exception had the potential to resolve the tension between finality and suspected innocence. The exception could have been crafted in a manner that would ensure that, when there were reasonable suspicions that a person had been found guilty of a crime he or she did not commit, the federal courts would evaluate the merits of the prisoner's constitutional claims and either grant or deny habeas relief accordingly. Instead, the amount of exculpatory evidence required to satisfy the miscarriage-of-justice exception is now so great that it vastly exceeds the amount of exculpatory evidence sufficient to thwart finality by giving citizens reason to fear that justice has not been done.<sup>261</sup> In the name of finality, therefore, a federal court today will dismiss a habeas petition on procedural grounds even when doubts about the prisoner's guilt will make finality exceptionally difficult to achieve.

Cases like Roger Coleman's do not come along every day.<sup>262</sup> Few prisoners are able to attract the degree of national and international attention that Coleman drew in the months leading up to his execution, and few executions are second-guessed as persistently as Coleman's was until the results of new DNA tests were announced in January 2006. An unusual convergence of powerful forces made Coleman's case particularly newsworthy: the evidence of Coleman's innocence struck many observers as far from negligible; a young man who lived right next door to the victim was rumored to have confessed to the crime; Coleman eloquently maintained his innocence right until the moment of his electrocution; the Supreme Court used Coleman's case as the occasion for announcing a new level of respect for state procedural rules<sup>263</sup> despite the fact that Coleman's procedural error seemed extraordinarily minor; a forensic scientist stubbornly insisted on preserving physical evidence until DNA technology would permit a conclusive determination of

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261. See *supra* Part III.B.1.

262. See *supra* notes 1-32 for an overview of Coleman's case.

263. See *Coleman v. Thompson*, 501 U.S. 722 (1991).

Coleman's guilt; and Coleman had the benefit of attorneys and supporters willing to devote tremendous energy to vindicating his claim of innocence, even long after his death. It is hardly surprising that Coleman's case proved so resistant to closure.

Even if a number of those extraordinary features had been absent, however, finality still would have been very difficult to achieve. Although the rest of the world undoubtedly would have shifted its attention elsewhere long ago, the town of Grundy would have remained the site of rumors and speculations long after Coleman's execution, with some insisting that Coleman was guilty and others insisting that the true murderer had escaped punishment and allowed Coleman to go to the electric chair in his place. Even absent the national spotlight, the dismissal of Coleman's habeas petition on procedural grounds would have sorely tested the Grundy community's confidence in the criminal justice system, and a genuine sense of repose would have arrived in that town only with the passing of many years.<sup>264</sup> For a case to resist finality, one does not need the relentless attention of the national media. All one needs is a community that fears it has been the site of a gross miscarriage of justice. By adjudicating the merits of Coleman's procedurally defaulted constitutional claims, the federal courts admittedly would not have been able to resolve the ultimate question of Coleman's guilt. But merits-focused federal habeas proceedings would have bolstered the public's confidence that the courts had pursued justice the best that they could.

Finality in criminal cases is indisputably a worthy goal—criminal convictions should not be second-guessed without end. Procedural rules, moreover, have an important role to play in ensuring that criminal litigation proceeds steadily toward closure. Indeed, we adopt and enforce procedural rules to ensure that disputes are resolved in a manner that is fair, efficient, and ultimately worthy of respect. But when procedural requirements are so rigorously enforced that the public is given good cause to believe that courts ascribe greater value to procedural impeccability than to substantive justice, citizens justifiably lose confidence in the integrity of the criminal justice system. At that point, it is only the rhetoric—and not the reality—of finality that has triumphed.

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264. *Cf. supra* notes 134-42 and accompanying text (discussing the components of finality).