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McCLESKEY v. ZANT 111 S. Ct. 1454 (1991)

McCLESKEY v. ZANT

111 S. Ct. 1454 (1991)
United States Supreme Court

FACTS

A jury convicted Warren McCleskey of murder and two related robbery counts and sentenced him to death on the basis of the testimony of a fellow inmate and other evidence. *McCleskey v. Zant*, 111 S. Ct. 1454, 1458 (1991).

In January 1981, following the Supreme Court of Georgia's affirmation of his conviction and the United States Supreme Court's denial of certiorari, McCleskey filed a petition for state habeas corpus relief. Of the 23 challenges to his murder conviction and death sentence contained in McCleskey's amended petition, three concerned the testimony of Offie Evans, the occupant of the jail cell next to McCleskey's. *McCleskey v. Zant*, 111 S. Ct. at 1458 (1991). Of those three, two would eventually result in temporary relief for McCleskey.

First, McCleskey argued that the State violated his due process rights under *Giglio v. United States*, 405 U.S. 150 (1972) by failing to disclose its agreement to drop pending escape charges against Evans in return for his cooperation and testimony. *Id.* While Giglio's appeal was pending, defense counsel discovered new evidence that the U.S. Government had failed to disclose an alleged promise made to its key witness that the witness would not be prosecuted if he testified for the Government. Relying on *Brady v. Maryland*, 373 U.S. 83 (1963), the Court held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. 83, 87.

Second, McCleskey alleged that his statements to Evans were elicited in a situation created by the State to induce him to make incriminating statements without the assistance of counsel, in violation of the sixth amendment right to counsel as construed in *Massiah v. United States*, 377 U.S. 201 (1964). *McCleskey v. Zant*, 111 S. Ct. at 1459. In *Massiah*, damaging testimony was elicited from the defendant by another defendant who had agreed to cooperate with the government in the continuing investigation of the activities in which both defendants had allegedly been involved. The Court held that the defendant's sixth amendment right to counsel had attached even though he was out on bail when the state, through the use of the cooperative defendant, questioned him. McCleskey's first state habeas petition was unsuccessful.

Subsequently, in December 1981, McCleskey filed his first federal habeas corpus petition, which reasserted the *Giglio* and other claims but failed to allege the *Massiah* claim raised in the first state habeas petition. *McCleskey v. Zant*, 580 F. Supp. 338, 380-384 (N.D. Ga. 1984). The District Court granted relief on the basis of *Giglio*, but the Court of Appeals ultimately reversed. *McCleskey v. Kemp*, 753 F.2d 877 (C.A. 11 1985). The U.S. Supreme Court granted certiorari on the issue of whether Georgia's capital sentencing procedures were constitutional, and denied relief. *McCleskey v. Kemp*, 481 U.S. 279 (1986).

McCleskey filed another unsuccessful state habeas corpus petition in 1987, part of which centered on Evans' testimony, again alleging the State had an agreement with Evans that it had failed to disclose. The Supreme Court of Georgia denied McCleskey's application for a certificate of probable cause.

One month before he filed his second federal petition, McCleskey obtained a 21-page statement made by Evans to the Atlanta police department two weeks before the trial began. *McCleskey v. Zant*, 111 S. Ct. at 1454. The existence and not the content of the document supported the supposed relationship between Evans and the police. It suggested that the State covertly planted Evans in an adjoining cell for the purpose of eliciting incriminating statements that could be used against McCleskey at trial. *McCleskey v. Zant*, 111 S. Ct. at 1487. McCleskey had not had the benefit of this document when he raised his first *Massiah* claim. The statement related pretrial jailhouse conversations that Evans had allegedly had with McCleskey, including one in which Evans had posed as a co-defendant's uncle and claimed that he, Evans, was supposed to participate in the robbery. *Id.* at 1472. On the basis of this document, McCleskey found a witness, Ulysses Worthy, a jailer where McCleskey had been confined pretrial, who ultimately testified that "someone at some time requested permission to move Evans near McCleskey's cell." *Id.* at 1460. The newly discovered statement also recounted that Evans had posed as an uncle of one of McCleskey's co-defendants during conversations with McCleskey. All of this evidence strengthened McCleskey's *Massiah* claim—which he raised in the second federal petition but had not raised in the first federal petition—that Evans was working in direct concert with state officials during the conversations and that the authorities deliberately elicited inculpatory statements from McCleskey while he was without counsel. *Id.*

In December 1987, the United States District Court agreed in *McCleskey v. Kemp*, No. C87-1517A (N.D. Ga. Dec. 23, 1987), that the Evans statement contained a "strong indication of an *ab initio* relationship between Evans and the authorities," and granted McCleskey relief based on *Massiah*. *Id.* The District court rejected the State's claims that McCleskey's assertion of the *Massiah* claim for the first time in his second federal petition constituted an abuse of the writ, ruling that McCleskey did not deliberately abandon the claim after raising it in his first state habeas petition. *Id.* Significantly, when McCleskey filed his first federal petition, he did not know about the Evans document or the identity of the jailer, and his failure to discover this evidence previously "was not due to [McCleskey's] inexcusable neglect." *Id.*, (quoting *McCleskey v. Kemp*, No. C87-1517A). The Eleventh Circuit reversed, ruling that the district court should have dismissed McCleskey's *Massiah* claim as an abuse of the writ, principally because he raised a *Massiah* claim in state habeas and did not pursue it in his first federal habeas petition. *McCleskey v. Zant*, 890 F.2d 342 (C.A. 11 1989).

McCleskey then filed a petition for a writ of certiorari with the United States Supreme Court. In granting certiorari, the Court asked the parties to address specifically whether the State must demonstrate that a claim was deliberately abandoned in a earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ. *McCleskey v. Zant*, 496 U.S. ___, 110 S. Ct. 2585 (1990).

This Supreme Court decision is concerned mainly with whether a claim under *Massiah*, raised for the first time in a petitioner's second federal habeas petition, will be dismissed without consideration of the merits as a violation of federal habeas rules prohibiting "abuse of the writ."

HOLDING

The Supreme Court, in a 6 to 3 opinion, held that when a prisoner files a second or subsequent habeas petition, the government bears the burden of pleading abuse of the writ. If the government so pleads, the burden shifts to the petitioner to excuse his failure to raise the claim earlier by showing cause as well as actual prejudice or by showing fundamental miscarriage of justice.

McCleskey failed to demonstrate cause for his failure to raise the *Massiah* claim in his first federal habeas petition, which constitutes "inexcusable neglect," an abuse of the writ. According to the Court, this

finding of a failure to satisfy the first part of the test made it unnecessary to consider whether he was prejudiced by his inability to raise the alleged *Massiah* violation. The Court also determined that there was no fundamental miscarriage of justice where the alleged *Massiah* violation resulted in the admission at trial of inculpatory evidence. The Court held that this alleged violation did not affect the reliability of the guilt determination. Marshall wrote a dissent in which Blackmun and Stevens joined.

ANALYSIS / APPLICATION IN VIRGINIA

The Supreme Court denied McCleskey relief on the basis of abuse of the writ because he failed to raise the *Massiah* violation claim until his second federal habeas petition, a failure which constitutes inexcusable neglect. The Court found it significant that McCleskey had included a *Massiah* violation claim in his first **state** habeas petition. The court did not find it persuasive that the evidence supporting each *Massiah* claim were entirely different and the State had deliberately withheld the 21-page Evans statement on which McCleskey relied for his federal petition until two weeks before its filing and denied any agreement with Evans.

The Court's decision revolved around the conflicting concerns of finality of decisions and the availability of habeas corpus relief. In making its determination, the Court relied on precedent, especially *Sanders v. United States*, 373 U.S. 1 (1963), and statutory history, especially 28 U.S.C. § 2244 and § 2255 and Rule 9(b) of the Rules Governing Habeas Corpus Proceedings.

Section 2244, in its original form, addressed the issue of repetitive federal habeas corpus petitions but did not specifically discuss what would constitute an abuse of the writ. In *Sanders*, the Court held that "Congress' silence on the standard for abuse of the writ involving a new claim was 'not intended to foreclose judicial application of the abuse-of-writ principle....'" *McCleskey*, 111 S. Ct. at 1465 (quoting *Sanders*, 373 U.S. at 11-12). The *Sanders* Court took it upon itself to address the definition of and rationale for the doctrine of abuse of the writ. "Equitable principles govern abuse of the writ, including 'the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks,' and that these principles must be applied within the sound discretion of district courts.'" *McCleskey v. Zant*, 111 S. Ct. at 1465 (quoting *Sanders*, 373 U.S. at 17-18). "Thus, for example, if a prisoner **deliberately withholds** one of two grounds for federal collateral relief **at the time of filing his first application**, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. *Sanders*, 373 U.S. at 18. The same may be true if... the prisoner **deliberately abandons** one of his grounds at the first hearing...." *McCleskey v. Zant*, 111 S. Ct. at 1465 (quoting *Sanders*, 373 U.S. at 18)(emphasis added). Alternatively, "*Sanders* established that federal courts **must** reach the merits of an abusive petition if '**the ends of justice demand.**'" *Id.* (emphasis added).

Three years after *Sanders*, Congress amended the habeas corpus statute § 2244 in order to "alleviate the increasing burden on federal courts caused by successive and abusive petitions by 'introducing a greater degree of finality of judgments in habeas corpus proceedings.'" *McCleskey v. Zant*, 111 S. Ct. at 1465 (quoting *S. Rep. No. 1797, 89th Cong., 2d Sess., 2* (1966)). Subparagraph (b) provides in pertinent part: "a subsequent application for a writ of habeas corpus on behalf of [a person in custody pursuant to the judgment of a State court] need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless that court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."
28 U.S.C. § 2244(b).

Under the current version, federal courts need not entertain a second or subsequent habeas petitions "unless" the prisoner satisfies two conditions. *McCleskey v. Zant*, 111 S. Ct. at 1466. First, the petitioner must allege a new ground for relief. Second, the applicant must satisfy the judge that he did not deliberately withhold the ground earlier or "otherwise abuse the writ." *Id.* at 1466. Section 2244 does not define what would satisfy the alternative ground. Section 2244 is the heart of the matter of this case.

In 1976, the Advisory Committee Notes to Rule 9 of the Rules Governing Habeas Corpus Proceedings made it clear that a "new claim in a subsequent petition should not be entertained if the judge finds the failure to raise it earlier inexcusable." *Id.* at 1467 (quoting Advisory Committee Notes to Rule 9, 28 U.S.C. § 2254, pp. 426-27). Notably, however, the Notes went no further to explain what constituted "inexcusable" action on the part of the petitioner or what activity might somehow "otherwise abuse the writ." Also, the Notes stated that newly discovered evidence represented an acceptable excuse for failing to raise the claim earlier. *Id.*

In McCleskey's case, the Eleventh Circuit denied McCleskey relief on the basis of what it considered deliberate abandonment. Although the Supreme Court affirmed, it focused on the standard for "inexcusable neglect." The Court decided that "the same standard used to determine whether to excuse state procedural defaults should govern the determination of inexcusable neglect in the abuse of the writ context." *Id.*

The Court held that because a procedural default will be excused upon a showing of **cause and prejudice**, *Wainright v. Sykes*, 433 U.S. 72 (1977), the Court will apply the same standard to determine if there has been an abuse of the writ through inexcusable neglect. *McCleskey v. Zant*, 111 S. Ct. at 1470. In procedural default cases, the "cause" standard requires a showing of some "objective factor external to the defense [which] impeded counsel's efforts" to raise the claim in state court. *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). A specific example of an objective causal factor includes "'interference by officials' that makes compliance with the state's procedural rule impracticable.'" *Id.*

The Court condemned the heavy costs to finality, resources, and the system associated with habeas review and claimed that these disruptions are far more severe when the petitioner raises a claim for the first time in a second or subsequent federal habeas petition. *McCleskey*, 111 S. Ct. at 1469. At the same time, the Court acknowledged that the federal writ of habeas corpus overrides all concerns about finality, resources, and jurisprudence when "a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition." *Id.*

The Court attempted to apply the *Wainright* cause and prejudice standard to the facts of this case. The Court acknowledged that McCleskey based his *Massiah* claim in his second federal habeas petition solely on the 21-page Evans document not available to him until after the filing of the first federal petition. However, the Court focused only on the fact that McCleskey did not show cause for failure to raise the claim as opposed to his showing of cause for failure to collect evidence in support of it. *Id.* at 1472. Although the Court accepted the District Court finding that the document itself was neither known nor reasonably discoverable at the time of the first federal petition, the Court nevertheless held that the fact "[t]hat McCleskey did not possess or could not reasonably have obtained certain evidence fails to establish cause if other known or discoverable evidence could have supported the claim in any event. . . . For cause to exist, the external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented [the] petitioner from raising the claim." *Id.* In the Court's view, because the Evans statement recounted discussions in which McCleskey had participated and because, during questioning at trial, McCleskey admitted knowledge of other facts contained in the Evans document, McCleskey was on

notice to pursue the *Massiah* claim in his first federal habeas petition, as he had done in his first state petition. *Id.* at 1473.

In its installation of the cause and prejudice standard, the Court also dispensed with the argument that the State's withholding of the Evans statement was misconduct. Because the State turned over the 21-page document upon request in 1987, the District Court had found no wrongful conduct in the State's failure to hand it over earlier, and the "document [was] not critical to McCleskey's **notice** of a *Massiah* claim anyway." *Id.* at 1474 (emphasis added).

In response to this decision, it is appropriate to raise on habeas **every** federal claim **remotely** suggested by the trial evidence or subsequent investigation in hopes that further investigation will strengthen it. Second, the trial record should show detailed inquiry concerning the existence of *Massiah* relationships, as well as *Giglio* and *Brady* materials. If possible, the Commonwealth's attorney should be required to deny on the record the existence of any such evidence.

Summary and analysis by:
Anne E. McInerney

LANKFORD v. IDAHO

111 S. Ct. 1723 (1991)
United States Supreme Court

FACTS

In 1983, Lankford was convicted as an aider and abettor to a robbery and double murder under Idaho's felony-murder statute. At his arraignment, the judge had informed Lankford that the maximum punishment he could receive if convicted was either life imprisonment or the death penalty.

Prior to his sentencing hearing Lankford requested, and the trial court ordered, that the State give notice of whether it intended to seek the death penalty and, if so, what aggravating circumstances the State would offer in support of the death penalty. The State responded that it would not seek the death penalty. Lankford proceeded to file numerous motions with the trial court. The court failed to mention the possibility of imposing the death penalty at all proceedings after the arraignment.

At the sentencing hearing, Lankford was represented by a new attorney who was denied access to the trial transcript that included the arraignment. The prosecutor offered no evidence, relied on the trial record, and explained why he had not recommended the death penalty. Lankford's counsel made no reference to the death penalty. The trial judge stated that he found Lankford's testimony to be unworthy of belief and that the State's recommendation of an indeterminate life sentence was too lenient. Following a weekend recess, the trial judge sentenced Lankford to death.

Lankford appealed on the grounds that the trial court had violated due process by not giving notice that it intended to consider the death penalty despite the State's notice that it would not ask for the death penalty. The trial court responded that Lankford was provided notice through the Idaho Code and that the prosecutor's intent not to seek the death penalty was not controlling. The Idaho supreme court affirmed and the United States Supreme Court granted certiorari.

HOLDING

The Supreme Court reversed the Idaho court's holding and remanded. The Court held that "the sentencing process in this case violated the Due Process clause of the Fourteenth Amendment because at the time of the sentencing hearing, Lankford and his counsel did not have adequate notice that the judge might sentence him to death." 111 S.Ct. 1723, 1724 (1991). The Court held that lack of notice to Lankford created an impermissible risk that the adversary process may have malfunctioned.

The Court found that the notice provided by the Idaho statute and the arraignment did not survive the State's response to the court order because the order limited the issues in further proceedings.

The Court further found that the trial judge's silence following the State's response to the order "had the practical effect of concealing from the parties the principal issue to be decided at the hearing." *Id.* at 1723.

ANALYSIS / APPLICATION IN VIRGINIA

The Supreme Court began its reasoning by stating that the issue in this case was one of procedure rather than one of substantive power. Therefore, pursuant to Idaho's substantive law, a trial judge's power to disregard a prosecutor's recommendation as to sentencing is not limited by this decision.

The Court stated that the trial court's presentencing order was analogous to a pretrial order limiting the issues to be tried in that it ordered the parties to state the aggravating and mitigating factors on which they intended to rely at the penalty hearing.

Lack of notice to Lankford, the Court found, also inhibited his counsel from presenting evidence of mitigating factors unique to imposition of the death penalty. For example, Lankford had taken two polygraph tests before the trial which tended to support his contention that he did not do the actual killing. Under *Lockett v. Ohio*, 438 U.S. 586 (1978), Lankford argued, these tests would have been admissible at the penalty phase of his trial since they would have shown that his degree of participation was not that of the actual killer. This evidence, the Court held, might have influenced the trial court's deliberations as to whether to impose the death penalty. Therefore, *Lankford* recognizes the continued validity of cases such as *Green v. Georgia*, 442 U.S. 95 (1979) (holding that some evidence is admissible at the penalty stage of a capital murder trial that would not be admissible under ordinary rules of evidence) and *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that in some circumstances the death penalty may not be constitutionally imposed on an accomplice). These issues arise **only** in the context of a capital penalty trial. It is imperative that Virginia defense counsel know what issues are to be litigated at the penalty stage in order to meet prosecution evidence in aggravation and to offer mitigating evidence to the sentencer. Notice of the issues to be litigated also allows defense counsel to make use of favorable law relevant to the presentation of mitigating evidence at the sentencing hearing.

Although the Court noted that the presentencing order "did not expressly place any limits on counsel's preparation," 111 S. Ct. at 1729, the question is whether "counsel had adequate notice of the critical issue that the judge was actually debating." *Id.* at 1729. The Court quoted Justice Frankfurter: "The validity and moral authority of a conclusion largely depend on the mode by which it was reached ... No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

It is well established that one vital function of the adversarial process of the guilt phase of a capital trial is truth-seeking. To reiterate the equivalency of the sentencing hearing to the guilt phase as far as counsel