California Western Law Review

Volume 30 | Number 2 Article 4

1994

# SCHOLARLY OPINION: Unintended Consequences: The United States Supreme Court's Mission to Restrict Remedies for State Prisoners Backfires

Andrea D. Lyon

# SCHOLARLY OPINION

## UNINTENDED CONSEQUENCES: THE UNITED STATES SUPREME COURT'S MISSION TO RESTRICT REMEDIES FOR STATE PRISONERS BACKFIRES

ANDREA D. LYON*

### INTRODUCTION

Anyone reading the United States Supreme Court pronouncements on federal habeas corpus for state prisoners can see there is one recurrent theme: keep away. The prosecutorial attack on the "Great Writ" has been sustained and largely successful in the courts; a series of roadblocks taking the form of procedural barriers and technical rules[1] make it increasingly difficult for a state prisoner to take a case to federal court when he or she alleges a violation of the United States Constitution.

There are so many procedural hurdles to leap over that a federal district court finds it difficult to reach the central issue in the case: is this man innocent? Does it matter if he is innocent?[2] Should he have gotten the death penalty? Should we do something about the fact that his confession

---

* Andrea D. Lyon is the Director of the Illinois Capital Resource Center, an agency which recruits, trains and gives litigation support to a panel of attorneys representing indigent death row inmates on collateral review in state and federal courts, as well as providing direct representation. Ms. Lyon is a graduate of the Antioch School of Law and Rutgers University. She is the former Chief of the Cook County Public Defender's Homicide Task Force. She is a nationally recognized expert on death penalty litigation, is on the faculty of the National Criminal Defense College, and lectures throughout the country on capital, appellate and trial advocacy. Ms. Lyon is an instructor in Appellate Advocacy at the Loyola School of Law.

Ms. Lyon wishes to thank attorney Dan Pisani who has been volunteering with the Illinois Capital Resource Center for his assistance with research for this opinion.

1. These procedural barriers and technical rules take many forms, one being the jurisprudence of the "new rule". The Supreme Court has held that although all decisions of the United States Supreme Court will be held to apply retroactively to cases still on direct appeal, they will not apply to habeas corpus cases on collateral review, unless the Supreme Court decision is determined not to constitute a "new rule". *See* Teague v. Lane, 489 U.S. 288 (1989). *See also* McCleskey v. Zant, 499 U.S. 467 (1991); Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992); Brecht v. Abrahamson, 113 S. Ct. 1710 (1993); JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (1991 update); Marshall J. Hartman, *To Be or Not To Be a "New Rule:" The Non-Retroactivity of Newly Recognized Constitutional Rights After Conviction,* 29 CAL. W.L. REV. 53 (1992).

2. *See* Herrera v. Collins, 113 S. Ct. 853, 869-70 (1993) (holding that affidavits supporting a defendant's claim of actual innocence were insufficient to entitle him to federal habeas corpus relief from a death sentence). *See also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgements,* 38 U. CHI. L. REV. 142 (1970).

was the product of coercion or torture by the police?[3] These central questions are often not reached at all by the courts, however, because a series of decisions by the United States Supreme Court do not allow them to.[4]

Prosecutorial agencies and lobbyists have worked hard to get this result, and for good reason. While the number of cases where relief of some sort is given to the prisoner (or death row inmate) in state appellate courts is somewhat less than 23%,[5] the percentage in the federal courts particularly in the politically volatile area of capitally sentenced state prisoners, has been greater than 45%.[6] In other words, the defense was winning too much when the merits of the case got discussed, even in front of primarily Republican Reagan-Bush appointees to the federal bench.[7]

This opinion examines the intended and unintended effects of this assault on the "Great Writ." First it briefly traces a history of the writ of habeas corpus in the United States, then analyzes the increasing numbers of procedural roadblocks erected by the United States Supreme Court in recent years, and finally examines the unintended consequences of this assault: the increased complexity and scope of litigation it now engenders.

## I. THE WRIT OF HABEAS CORPUS

The Writ of Habeas Corpus, has a long and detailed history, possibly dating as far back as the Roman Empire.[8] The "Great Writ" came to our country by way of English Common Law,[9] and is given explicit recognition in the United States Constitution.[10] The reach and power of the writ in American courts coincided with two great events in U.S. history.[11]

The first event was in 1867, immediately following the Civil War, when

---

3. *See* Fay v. Noia, 372 U.S. 391 (1963).

4. *See supra* note 1.

5. For example, for the period from 1973-1991, 185 people were sentenced to death in the state of Illinois. Of those 185 convicted murderers, 42 had their sentences or convictions overturned. This is approximately a 22.7% reversal rate. *See Capital Punishment 1991*, Bureau of Justice Statistics, United States Department of Justice, page 2.

6. *See* Wright v. West, 112 S. Ct. 2482 (1992). In a 1991 study documenting the final outcomes of capitally sentenced petitioners' habeas corpus challenges, 404 state-court capital judgements between July 1, 1976 and May 31, 1991 were examined. A total of 191 reversible constitutional violations were found in these cases, making the violation rate an astonishing 47%. Brief for Appellant, Wright v. West, 112 S. Ct. 2482 (1992) (Appendix B).

7. President Reagan appointed 389 federal judges between 1981 and 1989. President Bush appointed 195 federal judges between 1989 and 1992. *See* THE HISTORY OF THE AUTHORIZATION OF FEDERAL JUDGESHIPS, Statistics Division of the U.S. Government, table 8, page 149.

8. *See* Albert S. Glass, *Historical Aspects of Habeas Corpus*, 9 ST. JOHN'S L. REV. 55 (1934).

9. Blackstone called it "the most celebrated writ in the English Law." Fay v. Noia, 372 U.S. 391, 400 (1963) (quoting 3 WILLIAM BLACKSTONE COMMENTARIES 129).

10. U.S. CONST., art. 1, § 9, cl. 2

11. *See generally* Marshall J. Hartman & Shelvin Singer, *Requiem For Habeas Corpus*, THE CHAMPION, March 1994, at 12.

the writ was extended to state court defendants. This allowed Federal Courts to monitor State Court proceedings for the first time, thus insuring that the Constitutional rights of defendants were not violated.[12]

The second event was a series of decisions handed down by the Warren Court during the 1960's extending the protections of the Bill of Rights to defendants in state courts.[13] In 1963, the Supreme Court decided three landmark cases dealing with Federal Habeas Corpus, namely *Fay v. Noia*,[14] *Townsend v. Sain*,[15] and *Sanders v. United States*.[16]

The defendant in *Fay v. Noia*[17] was convicted of felony murder largely because of a coerced confession. Even though the state conceded that the confession was coerced, a federal court denied relief because Noia failed to file a timely appeal, holding that this failure constituted an independent state ground for the decision thus precluding Federal review.[18]

The Court of Appeals for the Second Circuit reversed, with one dissenting judge, finding exceptional circumstances excused the statutory requirement.[19] In an opinion by Justice Brennan, the Supreme Court affirmed the reversal by the Second Circuit, and after an exhaustive discussion of the history of the "Great Writ," the court held that such a procedural failure should not deny a petitioner federal habeas relief unless the state procedures were "deliberately bypassed".[20]

In *Townsend v. Sain*[21] the Supreme Court applied the same test for when an evidentiary hearing on a petition from a state prisoner was mandatory, that is, habeas petitioners were entitled to a complete evidentiary hearing on their constitutional claims in federal court, unless they "deliber-

12. *See generally* SHELVIN SINGER & MARSHALL J. HARTMAN, CONSTITUTIONAL CRIMINAL PROCEDURE HANDBOOK ch. 1 (1986) (discussing Congress' legislative intent that the Fourteenth Amendment make the Bill of Rights obligatory on the States).

13. Prior to these cases, The Supreme Court held that the protections guaranteed by the Bill of Rights applied only in Federal Court. They refused to hold these protections applicable to the States. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring the appointment of counsel to the criminally accused in state court); Miranda v. Arizona, 384 U.S. 436 (1966) (requiring the recitation of one's right to remain silent and to consult with an attorney while being questioned in state custody).

14. 372 U.S. 391 (1963).

15. 372 U.S. 293 (1963).

16. 373 U.S. 1 (1963).

17. 372 U.S. 391 (1963).

18. *Id.* at 395-96. The United States District Court for the Southern District of New York held that Noia's failure to perfect his appeal meant he must be denied relief under 28 U.S.C. § 2254 which says in part that "[a]n application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." *Id.* at 396.

19. *Id.* at 396-97.

20. *Id.* at 398-99, 439 (emphasis added).

21. 372 U.S. 293 (1963).

ately bypassed" the orderly procedure of the state courts.[22] The *Townsend* court was concerned that a constitutionally fair review of the facts occur, and that a petitioner would not be deprived of this review merely because some minimal review had occurred in state court.[23] In the aggregate, this case cut through the procedural thicket of state and federal comity, and mandated federal relief from unconstitutional state court action in criminal cases.

In *Sanders v. United States*,[24] the Supreme Court enunciated the test for whether a second or successive petition constituted an abuse of the writ and therefore required dismissal. One reason for dismissal depends on whether or not a claim had been "deliberately abandoned" at the first hearing.[25] *Sanders* applied that test to cases where counsel lacked factual or legal knowledge of a specific constitutional claim when the petitioner's first habeas corpus petition was filed. Relief would be granted to a successor petition unless counsel had such knowledge and deliberately failed to raise the claim.[26]

In 1977, the Supreme Court, under Chief Justice Burger, modified *Fay v. Noia*,[27] and substituted the "cause and prejudice" test to resolve questions of state procedural default in *Wainwright v. Sykes*.[28] Under the *Sykes* test, the petitioner had to show "cause" as to why he had not raised the claim properly in the state court, as well as the "prejudice" resulting to him from the alleged constitutional violation.[29]

*Sykes* began the endless inquiries into what was cause, what constituted prejudice, and what had been procedurally defaulted. It is in this context that the series of cases restricting access to federal courts beginning with *McCleskey v. Zant*,[30] to *Keeney v. Tamayo-Reyes*,[31] and culminating in *Brecht v. Abrahamson*[32] were handed down by the United States Supreme Court.

---

22. *Id.* at 317. That test was essentially a good faith test which required habeas relief unless a petitioner or his counsel had "deliberately" failed to raise a claim in state court of which they had factual or legal knowledge at the time. This decision did not purport to limit when a federal district judge could hold a hearing, only when he or she must hold such a hearing. *Id.* at 317-19.

23. *Id.*

24. 373 U.S. 1 (1963).

25. *Id.* at 18 (emphasis added).

26. *Id.* at 17.

27. 372 U.S. 391 (1963).

28. 433 U.S. 72, 90-91 (1977).

29. *Id. See generally* Marshall J. Hartman & Shelvin Singer, *Supreme Court Compendium: A Critique of Constitutional Criminal Cases Decided by the United States Supreme Court*, presented at the 1993 annual conference of the National Legal Aid and Defender Association.

30. 499 U.S. 467 (1991).

31. 112 S. Ct. 1715 (1992).

32. 113 S. Ct. 1710 (1993).

## II. PROCEDURAL BARRIERS AND UNINTENDED CONSEQUENCES

Before a state prisoner can go to federal court to complain about constitutional violations, he or she must "exhaust" state remedies.[33] Simply put, the state prisoner must give the state courts a chance to correct what is wrong. As cited above, there is a greater than 45% reversal rate in federal court.[34] The state courts, apparently, often fail to correct these wrongs. Before the *McCleskey* decision, the burden on a state prisoner was to tell the state courts about the federal constitutional wrong as soon as he or she was in a position to prove it.

In *McCleskey*, Warren McCleskey suspected that a jail house snitch named Evans, who testified against him at trial, had in fact been an agent of the prosecution. McCleskey believed that Evans was planted there to question him.[35] Since McCleskey had a lawyer, it would be improper for a state agent to question him without first notifying the lawyer, and without warning McCleskey that he was speaking with an agent.[36]

The prosecution had a duty to disclose whether or not this snitch was an agent.[37] Once disclosed, the defense would have had the opportunity to try to suppress that evidence,[38] and if that were not successful, to at least reveal to the jury the witness's true role, and the fact that this role might affect Evans' credibility, since he would have a motive to fabricate for financial gain, for the possibility of an early release, or some other benefit.[39]

At any rate, McCleskey suspected this was the case, and he made such a claim in his first state habeas petition, but as he had no proof, that petition was denied.[40] He filed a federal habeas petition alleging other grounds which was denied.[41]

Six years later, McCleskey's lawyer received a copy of a twenty-one

---

33. *Ex Parte* Royal, 117 U.S. 241 (1886); Vasquez v. Hillery, 474 U.S. 254 (1986); Picard v. Connor, 404 U.S. 270 (1971).

34. *See supra* note 6.

35. *McCleskey,* 499 U.S. at 472.

36. *See* Massiah v. United States, 377 U.S. 201 (1964) (holding that statements deliberately elicited after defendant's indictment and retention of counsel to his codefendant acting for the police were not admissible); United States v. Henry, 447 U.S. 264 (1980) (holding that the right to counsel was violated where an informant was placed in the same cell block with an indicted defendant, was asked to listen, but not initiate conversations or question the defendant, and was paid for providing information and testifying at trial); Maine v. Moulton, 474 U.S. 159 (1985) (holding that once adversary proceedings have been brought against defendant, the right to counsel under the 6th Amendment is violated when the state knowingly exploits the opportunity to record the statements of the accused made without his counsel present to the codefendant who was acting as a police agent).

37. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (finding the prosecution is required to turn over any material favorable to the defense); Giglio v. United States, 405 U.S. 150, 154-55 (1972) (finding the prosecution is required to present all material evidence to the jury).

38. Edwards v. Arizona, 451 U.S. 477 (1981).

39. *See* Giglio v. United States, 405 U.S. 150 (1972).

40. *McCleskey,* 499 U.S. at 472.

41. *Id.*

page document given to the prosecutor before trial which seemingly demonstrated that Evans was in fact working in concert with the Atlanta police to eavesdrop on McCleskey and question him.[42] A month after he received this document which had been in the control of the prosecution, and was utterly unavailable to him, he filed a second federal habeas petition.[43]

The district court granted relief,[44] but was reversed by the Eleventh Circuit.[45] This reversal was upheld by the United States Supreme Court, finding an abuse of the writ for filing a second habeas petition on a ground *abandoned* by McCleskey before he filed his first petition.[46] Remember now that this information was within the control of the prosecution,[47] should have been turned over by them,[48] and McCleskey had lost in state court because he lacked proof the prosecution had.[49]

The intended result of this decision was to make it virtually impossible to go to federal court a second time. It has had that result in cases all over the country, and Warren McCleskey was executed.

*McCleskey,* however, has had an unintended consequence. Those defending capital cases, recognizing another burden that must be shouldered, are forced to presume bad faith on the part of the prosecution and/or the police. They must, therefore, raise good faith claims which allege misconduct and request extensive discovery in order to adequately investigate those claims. This discovery includes production of the prosecution and police files, interrogatories, depositions, employment records of police officers involved in the case, and many motions which must be litigated regarding these and other items.[50]

This extensive discovery must be done not because defense attorneys believe that most of the prosecutorial actors in the system abuse it, but because defense counsel cannot wait six years to see if one of them has. The client may be dead by that time.

Thus, the United States Supreme Court has insured enormously more complex and costly litigation in the majority of criminal cases when it is probably only necessary a small percentage of the time. If the Supreme

---

42. *Id.* at 474.

43. *Id.*

44. *Id.* at 475.

45. *Id.* at 476.

46. *Id.* at 498-503 (emphasis added).

47. *Id.* at 499-500.

48. *See Brady*, 373 U.S. at 87.

49. This result occurred even in the face of an obvious *Brady* violation. In Brady v. Maryland, the United States Supreme Court held: "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

50. The right of discovery has been found to be applicable to collateral attacks as well. *See* People *ex rel.* Daley v. Fitzgerald, 526 N.E.2d 131 (Ill. 1988) where the Illinois Supreme Court held that it is within a trial court's discretion, in a post-conviction proceeding, to allow discovery depositions to be taken of people involved in the original criminal proceeding. *Id.* at 133.

Court is truly concerned about "scarce judicial resources" as they say they are,[51] would it not be more cost-effective to allow the relatively small number of second petitions that might get filed to be litigated as opposed to forcing every case to become a "federal case"?

Another unintended consequence occurred in *Keeney v. Tamayo-Reyes*.[52] In *Tamayo-Reyes*, the petitioner had raised all of his issues in state court as required.[53] However, he had not presented each fact or witness to support that petition in state court, and so he lost in the United States Supreme Court, having "waived" or given up his right to present any fact not previously presented.[54]

Until *Tamayo-Reyes* the requirement to get your case heard (not won now, just *heard*) was that you plead every claim in state court.[55] Tamayo-Reyes, a Cuban immigrant, was charged with murder after he stabbed a man in a bar. He was provided with defense counsel who suggested that he plead to manslaughter. Since the defendant spoke little English, an interpreter explained his rights to him and the consequences of his plea. The court accepted his plea to manslaughter.[56]

Later, Tamayo-Reyes filed a collateral attack in state court on the grounds that he did not understand the *mens rea* element of manslaughter.[57] A hearing was held, but the petitioner's counsel did not ask him whether his interpreter had translated "manslaughter" for him.[58] Nor did his counsel employ a language expert to assess the interpreter's performance, or whether Tamayo-Reyes could understand the translation.[59] The only evidence the counsel introduced, other than the petitioner's testimony, was an affidavit by the interpreter stating that he had translated manslaughter as "less than murder."[60] The state court dismissed the petition. The State Court of Appeals affirmed the dismissal, and the State Supreme Court denied review.[61]

Tamayo-Reyes then filed a petition for a writ of habeas corpus in the Federal District Court. He contended that the material facts concerning the translation were not adequately developed at the state court hearing and,

---

51. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (Powell, J., concurring); McCleskey v. Zant, 499 U.S. 467 (1991).

52. 112 S. Ct. 1715 (1992).

53. *Id.* at 1716-17.

54. *Id.* at 1721.

55. Townsend v. Sain, 372 U.S. 293 (1963), adopted the reasoning of Fay v. Noia, 372 U.S. 391 (1963), and held that habeas petitioners were entitled to a complete evidentiary hearing on their constitutional claims in federal court, unless they "deliberately bypassed" the orderly procedure of the state courts. 372 U.S. at 312-13.

56. *Tamayo-Reyes,* 112 S. Ct. at 1716.

57. *Id.*

58. *Id.*

59. *Id.* at 1722 (O'Connor, J., dissenting).

60. *Id.*

61. *Id.* at 1717.

citing *Townsend v. Sain*,[62] sought a federal evidentiary hearing.[63] The District Court denied relief, but the Ninth Circuit Court of Appeals held that the failure to develop the critical facts was due to the negligence of defense counsel.[64] It then went on to hold that the counsel's negligence did not constitute a "deliberate bypass" by the petitioner. Therefore, Tamayo-Reyes was entitled to an evidentiary hearing in Federal Court.[65] The United States Supreme Court reversed the Ninth Circuit, holding that the "deliberate bypass" standard of *Townsend v. Sain*,[66] was no longer the correct standard for determining whether a petitioner who fails to develop a material fact in state court was entitled to an evidentiary hearing in federal court.[67]

In overruling that portion of *Townsend v. Sain*,[68] Justice White held that the same standard that was used to determine the claims of a petitioner who has procedurally defaulted in state court or "abused the writ" by failing to raise an issue in his first federal habeas petition, should also be used to determine if that petitioner was entitled to an evidentiary hearing in federal court.[69] This would ensure uniformity with the holdings of the Supreme Court in *McCleskey v. Zant*,[70] and *Wainwright v. Sykes*.[71] According to Justice White, having a stricter standard for hearing a defaulted claim considered in federal court made no sense.[72]

Justices O'Connor, joined by Kennedy, Blackmun, and Stevens dissented. O'Connor believed that there was a difference between having the federal court consider a claim, and having the court conduct a full evidentiary hearing on that claim.[73]

What this means in practical terms is that now one must fact plead as well as claim plead. This requirement will have the intended result of

---

62. 372 U.S. 293 (1963).

63. *Tamayo-Reyes*, 112 S. Ct. at 1717.

64. *Id.*

65. *Id.*

66. 372 U.S. 293 (1963).

67. *Tamayo-Reyes*, 112 S. Ct. at 1717-18.

68. 372 U.S. 293 (1963).

69. *Tamayo-Reyes*, 112 S. Ct. at 1719.

70. 499 U.S. 467 (1991).

71. 433 U.S. 72 (1977).

72. *Tamayo-Reyes*, 112 S. Ct. at 1720. That is, whether a petitioner can show "cause and prejudice," for any default, while the standard for having an evidentiary hearing in federal court when evidence was not fully developed in state court, was whether the petitioner "deliberately bypassed" the required state procedure. *Id.* (emphasis added).

73. *Id.* at 1722-23 (O'Connor, J., dissenting). It is interesting to note that Justices O'Connor and Kennedy were with the majority in overruling the "deliberate bypass" standard as it applied to "abuse of the writ" cases in McCleskey v. Zant, 499 U.S. 467. However, when it comes to holding evidentiary hearings on claims being considered by the Federal Court, they leave their former colleagues. Justice O'Connor argues for the dissent that once one has overcome all the hurdles of having the federal court consider a claim—exhausting state remedies, avoiding procedural default, not seeking retroactive application of a new rule of law, and not abusing the writ—one should have a right to a hearing to prove the facts supporting his claim. *Tamayo-Reyes*, 112 S. Ct. at 1722. *See generally* Hartman & Singer, *supra* note 29, at 28.

barring some claims in federal court. But it is having the unintended consequence of forcing the defense bar to plead every conceivable fact which might support a claim in state court. Again this requires extensive and invasive discovery,[74] encouraging counsel to be repetitive and over-inclusive in order to avoid what might be a fatal mistake.

Finally in *Brecht v. Abrahamson*,[75] the court has added a new layer to the burden the defense has to satisfy once they have established a constitutional error. Before *Brecht*, a constitutional wrong required reversal (and usually a new trial) unless the prosecution could show that the error was "harmless beyond a reasonable doubt,"[76] that the error did not affect the outcome. That remains the burden during a direct appeal, but if one established a constitutional wrong on collateral review (which allows you to go outside the record and look at facts that should have been in the trial but were not, such as the twenty-one page statement of the witness in *McCleskey*[77]), the defense now has to show that the wrong "had a substantial and injurious effect or influence in determining the jury's verdict".[78]

*Brecht* will have the intended result of denying relief to many state prisoners who are now in federal court. It will also have, however, the unintended consequence of encouraging interviews of the jurors on the cases in question to discover their opinions regarding the outcome had the constitutional wrong been righted. In a judge sentencing, the deposition of that judge may be necessary. It may necessitate the hiring of experts on juror comprehension, legal experts, ethics experts, and a myriad of other investigatory acts are needed to be able to satisfy the burdens placed on the defense bar by the United States Supreme Court.

## CONCLUSION

Litigating whether one has waived or given up an issue in a case, whether constitutional error had a "substantial and injurious effect on a jury's verdict", and laying the foundation for and litigating through motions all of which require extensive discovery on every conceivable issue and fact takes a considerable amount of time. The consequence is the diversion of scarce judicial resources towards those "technicalities" which the press has erroneously labeled as assisting the defense and away from the merits of the case.

---

74. *See* text accompanying *supra* note 50.

75. 113 S. Ct. 1710 (1993).

76. Chapman v. California, 386 U.S. 18 (1967). Prior to 1967, a constitutional error found in a case on review resulted in automatic reversal. But in *Chapman*, the Supreme Court held that a conviction could be upheld, even in light of a constitutional error, as long as the prosecution could establish that the errors were harmless beyond a reasonable doubt. *See also* Hartman & Singer, *supra* note 11, at 12; JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (1988).

77. McCleskey v. Zant, 499 U.S. 467, 497 (1991).

78. 113 S. Ct. at 1722.

All this leads one to ask the question: what is the Supreme Court afraid of? Why don't prosecutors want us to get to the merits, the bottom line, the central issues of the case? As Justice Brennan suggested in his dissent in *McCleskey v. Kemp*:[79] could it be everyone is afraid of too much justice?

79. 482 U.S. 920 (1987). The Supreme Court considered massive amounts of evidence that Warren McCleskey had gathered showing the racially biased imposition of the death penalty in Georgia. The Supreme Court denied McCleskey relief because he had not shown that this pattern of racial basis had been specifically or intentionally applied to him. McCleskey returned to the Supreme Court, was denied relief in McCleskey v. Zant, 499 U.S. 467 (1991), and was ultimately executed.