SUPREME COURT OF THE UNITED STATES

No. 93–7901

LLOYD SCHLUP, PETITIONER *v.* PAUL K. DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January 23, 1995]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

A federal statute entitled "Finality of Determination"—to be found at §2244 of Title 28 of the United States Code—specifically addresses the problem of second and subsequent petitions for the writ of habeas corpus. The reader of today's opinion will be unencumbered with knowledge of this law, since it is not there discussed or quoted, and indeed is only cited *en passant*. See *ante*, at 19, 21. Rather than asking what the statute says, or even what we have said the statute says, the Court asks only what is the fairest standard to apply, and answers that question by looking to the various semi-consistent standards articulated in our most recent decisions— minutely parsing phrases, and seeking shades of meaning in the interstices of sentences and words, as though a discursive judicial opinion were a statute. I would proceed differently. Within the very broad limits set by the Suspension Clause, U. S. Const., Art. I, §9, cl. 2, the federal writ of habeas corpus is governed by statute. Section 2244 controls this case; the disposition it announces is plain enough, and our decisions contain nothing that would justify departure from that plain meaning.

Section 2244(b) provides:

> "When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has

> been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained 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 the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."

A long sentence, but not a difficult one. A federal district court that receives a second or subsequent petition for the writ of habeas corpus, when a prior petition has been denied on the merits, "need not . . . entertai[n]" (*i.e.* may dismiss) the petition unless it is neither (to use our shorthand terminology) successive nor abusive. See also Habeas Corpus Rule 9(b) ("A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief . . . "). Today, however, the Court obliquely but unmistakably pronounces that a successive or abusive petition *must* be entertained and may *not* be dismissed so long as the petitioner makes a sufficiently persuasive showing that a "fundamental miscarriage of justice" has occurred. *Ante*, at 17 ("if a petitioner such as Schlup presents [adequate] evidence of innocence . . . the petitioner should be allowed to pass through the gateway and argue the merits"), *ante,* at 20–22.[1] That conclusion

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[1]The claim that "the Court does not, and need not, decide whether the fundamental miscarriage of justice exception is a discretionary remedy," *ante*, at ___ (O'CONNOR, J., concurring), is not in my view an accurate description of what the Court's opinion says. Of course the concurrence's merely making the claim causes it to be an

flatly contradicts the statute, and is not required by our precedent.

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accurate description of what the Court today *holds*, since the narrower ground taken by one of the Justices comprising a five–Justice majority becomes the law. *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

Our earliest cases, from an era before Congress legislated rules to govern the finality of habeas adjudication, held that successive or abusive petitions were "to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought," and that when weighing those considerations the district court could give "controlling weight" to "a prior refusal to discharge on a like application." *Salinger* v. *Loisel*, 265 U. S. 224, 231 (1924) (successive petition); see also *Wong Doo* v. *United States*, 265 U. S. 239, 240–241 (1924) (abusive petition). In *Salinger* the Court particularly noted: "Here the prior refusal to discharge [the prisoner] was by a court of coordinate jurisdiction and was affirmed in a considered opinion by a Circuit Court of Appeals. Had the District Court disposed of the later applications on that ground, its discretion would have been well exercised and we should sustain its action without saying more." 265 U. S., at 232. Section 2244 is no more and no less than a codification of this approach. It is one of the disheartening ironies of today's decision that the Court not merely disregards a statute, but in doing so denies district judges the very discretion that the Court itself freely entrusted to them before Congress spoke.

In 1948 Congress for the first time addressed the problem of repetitive petitions by enacting the predecessor of the current §2244, which provided as follows:

> "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the

> petition presents no new ground not theretofore presented and determined, *and the judge or court is satisfied that the ends of justice will not be served by such inquiry*." 28 U. S. C. §2244 (1964 ed.) (emphasis added).

This provision was construed in *Sanders* v. *United States*, 373 U. S. 1 (1963), and (with unimpeachable logic) was held to mean that "[c]ontrolling weight may be given to a denial of a prior application for federal habeas corpus [under 28 U. S. C. §2254] only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Id.*, at 15. Thus there appeared for the first time in our decisions the notion that a habeas court has "*the duty*" to reach the merits of a subsequent petition "if the ends of justice demand," *id.*, at 18–19—and it appeared for the perfectly good reason that the statute, as then written, imposed such a duty. And even as to that duty the *Sanders* Court added a "final qualification" that the Court today would do well to remember:

> "The principles governing . . . denial of a hearing on a successive application are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits." *Id.*, at 18.

Three years after *Sanders*, however, Congress amended §2244 to establish different finality rules for federal prisoner petitions (filed under §2255) and state prisoner petitions (filed under §2254). Section 2244(a), which addresses petitions by federal prisoners, retains the "ends of justice" proviso from

the old statute; but §2244(b) omits it, thus restricting the district courts' *obligation* to entertain petitions by state prisoners to cases where the petition is neither successive nor abusive. One might have expected that this not-so-subtle change in the statute would change our interpretation of it, and that we would modify *Sanders* by holding that a district court could exercise its discretion to give controlling weight to the prior denial—which was of course precisely what *Salinger* envisioned.

Yet when the new version of §2244(b) was first construed, in *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986), a plurality of the Court announced that it would "continue to rely on the reference in *Sanders* to the `ends of justice,'" 477 U. S., at 451, and concluded that "the `ends of justice' require federal courts to entertain [successive] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Id.*, at 454. That conclusion contains two complementary propositions. The first is that a habeas court may *not* reach the merits of a barred claim *unless* actual innocence is shown; this was the actual judgment of the opinion (one cannot say the holding, since the opinion was a mere plurality). See *id.*, at 455 (stating that the District Court and Court of Appeals should have dismissed the successive petition because the petitioner's claim of innocence was meritless). The second is that a habeas court *must* hear a claim of actual innocence and reach the merits of the petition if the claim is sufficiently persuasive; this was the purest dictum. It is the Court's prerogative to adopt that dictum today, but to adopt it without analysis, as though it were binding precedent, will not do. The *Kuhlmann* plurality opinion lacks formal status as authority, and, as discussed below, no holding of this Court binds us to it. A decision to follow it must be justified by reason, not simply asserted by will.

And if reasons are to be given, justification of the

Kuhlmann opinion will be found difficult indeed. The plurality's central theory is that "the permissive language of §2244(b) gives federal courts discretion to entertain successive petitions under some circumstances," so that "[u]nless [the] `rare instances' [in which successive petitions will be entertained] are to be identified by whim or caprice, district judges must be given guidance for determining when to exercise the limited discretion granted them by §2244(b)." See 477 U. S., at 451. What the plurality then proceeds to do, however, is not to "guide" the discretion, but to eliminate it entirely, dividing the entire universe of successive and abusive petitions into those that *must not* be entertained (where there is no showing of innocence) and those that *must* be entertained (where there is such a showing). This converts a statute redolent of permissiveness ("*need not* entertain") into a rigid command.[2]

The *Kuhlmann* plurality's concern about caprice is met—as it is met for all decisions committed by law to the discretion of lower courts—by applying traditional "abuse of discretion" standards. A judge who dismisses a successive petition because he misconceives some question of law, because he detests the petitioner's religion, or because he would rather play golf, may be reversed. A judge who dismisses a successive petition because it is the petitioner's twenty-second, rather than his second, because its "only purpose is to vex, harass, or delay," *Sanders*, 373 U. S., at 18, or because the constitutional claims can be seen to be frivolous on

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[2]The present case does not, of course, present the question
whether the *Kuhlmann* plurality was wrong to identify a category of petitions that *must not* be entertained—a disposition that is at least compatible with the text of §2244(b).

the face of the papers—for any of the numerous considerations that have "a *rational* bearing on the propriety of the discharge sought," *Salinger*, 265 U. S., at 231 (emphasis added)—may not be commanded to reach the merits because "the ends of justice" require. Here as elsewhere in the law, to say that a district judge may not abuse his discretion is merely to say that the action in question (dismissing a successive petition) may not be done without considering relevant factors and giving a "justifying reason," *Foman* v. *Davis*, 371 U. S. 178, 182 (1962). See also *American Dredging Co.* v. *Miller*, 510 U. S. ___, ___ (1994). It is a failure of logic, and an arrogation of authority, to "guide" that discretion by holding that what Congress authorized the district court to do may not be done at all.

The Court's assumption that the requirement imposed by the *Kuhlmann* plurality should be taken as law can find no support in our subsequent decisions. To be sure, some cases restate the supposed duty in the course of historical surveys of the area. See, *e.g., McCleskey* v. *Zant,* 499 U. S. 467, 495 (1991) ("*Kuhlmann* . . . required federal courts to entertain successive petitions when a petitioner supplements a constitutional claim with a `colorable showing of factual innocence'"). But if we are to lavish upon the verbiage of our opinions the detailed attention more appropriately reserved for the statute itself, more of the cases (and some of the *same* cases) have described the miscarriage-of-justice doctrine as a rule of permission rather than a rule of obligation. See, *e.g., Sawyer* v. *Whitley*, 505 U. S. ___, ___ (1992) (slip op., at 4) ("[*Kuhlmann* held that] the miscarriage of justice exception would *allow* successive claims to be heard"); *McCleskey,* 499 U. S., at 494 ("[f]ederal courts retain the *authority* to issue the writ [in cases of fundamental miscarriage of justice]"); *id.*, at 494–495 ("[i]f petitioner cannot show cause, the failure to raise the claim in an earlier

petition *may* nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim"); *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986) ("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") (emphasis added in all quotations).

Of course the latter cases provide as much or as little authority for the right reading of the statute as the former provide for the wrong reading. The truth is that there is simply nothing in this scattering of phrases, this handful of silences and assumptions, by which even the conscience most scrupulous in matters of *stare decisis* could count itself bound either way; for in no case after *Kuhlmann* has the question whether §2244(b) creates an *obligation* to entertain successive or abusive petitions been necessary to the decision. In both *Sawyer* and *McCleskey* the Court affirmed the judgments of lower courts that had dismissed the petition. See *Sawyer, supra,* at ___; *McCleskey, supra,* at 503. Those decisions could not, and did not, announce *as a holding* that refusal to entertain a petition can be reversible error.

Rather than advancing a different reading of the statute, the Court gives in essence only one response to all of this: that the law of federal habeas corpus is a product of "the interplay between statutory language and judicially-managed equitable considerations." *Ante*, at 20, n. 35. This sort of vague talk might mean one of two things, the first inadequate, the second unconstitutional. It might mean that the habeas corpus statute is riddled with gaps and ambiguities that we have traditionally filled or clarified by a process of statutory interpretation that shades easily into a sort of federal common law. See, *e.g., Brecht* v. *Abramson*, 507 U. S. ___, ___

(1992) (slip op., at 12). That is true enough. There assuredly are, however, many legal questions on which the habeas corpus statute is neither silent nor ambiguous; and unless the question in this case is one on which the statute *is* silent or ambiguous (in which event the Court should explain why that is so), the response is irrelevant. On the other hand, the Court's response might mean something altogether different and more alarming: that even where the habeas statute does speak clearly to the question at hand, it is but one "consideratio[n]," *ante*, at 20, n. 35, relevant to resolution of that question. Given that federal courts have no inherent power to issue the writ, *Ex parte Bollman*, 4 Cranch 75, 94–95 (1807), that response would be unconstitutional. See U. S. Const., Art. VI, cl. 2.

There is thus no route of escape from the Court's duty to confront the statute today. I would say, as the statute does, that habeas courts need not entertain successive or abusive petitions. The courts whose decisions we review declined to entertain the petition, and I find no abuse of discretion in the record. (I agree with THE CHIEF JUSTICE that they were correct to use *Sawyer* v. *Whitley, supra,* as the legal standard for determining claims of actual innocence. See *ante*, at ___.)[3] Therefore, "we should sustain [their] action without saying more." *Salinger*, 265

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[3]Even if they were wrong in that, it would not be correct to conclude that the *judgment* must necessarily be reversed. See *ante*, at ___ (O'CONNOR, J., concurring). Our habeas cases have not so held. See *Wong Doo* v. *United States,* 265 U. S. 224, 241 (1924) (affirming even though "the courts below erred in applying the inflexible doctrine of *res judicata*" to dismiss an abusive petition, because "it does not follow that the judgment should be reversed; for it plainly appears that the situation was one where, according to a sound judicial discretion, controlling weight must have been given to the prior refusal").

U. S., at 232.

For these reasons, I respectfully dissent.