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HEADLINE: Justices Stress Inmate's Right To Press Appeal

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BODY:

The Supreme Court ordered a new hearing for a Texas death row inmate today in a surprisingly broad 8-to-1 decision that warned the federal courts of appeals against shutting the door prematurely on state prisoners who seek to present constitutional challenges to their convictions or sentences.

The court said that to gain a hearing, an inmate appealing a denial of habeas corpus need not present a winning case, but only a plausible one. The decision could have a substantial effect, reopening federal courthouse doors that some appellate judges have closed through stringent interpretations of new limits on habeas corpus review that Congress adopted in 1996.

In an opinion by Justice Anthony M. Kennedy, the Supreme Court sharply criticized both the Texas courts and the lower federal courts for ignoring strong evidence of racial bias in the selection of the nearly all-white jury that found a black Texas man, Thomas Miller-El, guilty of murder 17 years ago.

Without resolving the merits of Mr. Miller-El's discrimination case, the majority said today that in appealing the denial of his habeas corpus petition, he had presented evidence of bias substantial enough to entitle him to a hearing. The United States Court of Appeals for the Fifth Circuit misapplied both the facts and the law in refusing to permit the appeal, the justices said.

The lone dissenter was Justice Clarence Thomas, who said Mr. Miller-El had not met even the relatively low threshold that the majority emphasized today. "The simple truth" is that proof of racial bias is circumstantial at best, lacking "anything remotely resembling clear and convincing evidence of purposeful discrimination," Justice Thomas said.

The majority opinion instructed the appeals court, based in New Orleans, to grant Mr. Miller-El the "certificate of appealability" necessary for him to present to that court his constitutional challenge to the composition of his jury. The prosecution had used its peremptory strikes to remove 10 of 11 black potential jurors.

While not resolving Mr. Miller-El's particular case, the justices today did something with potentially greater systemwide effect in warning the federal appeals courts not to abdicate their responsibility to scrutinize state-court criminal proceedings for constitutional error.

Justice Kennedy said that while it was true that Congress had rewritten the habeas corpus statute to require greater deference by federal judges to state-court determinations, "deference does not imply abandonment or abdication of judicial review."

"Deference," he added, "does not by definition preclude relief."

As a formal legal matter, the case framed and answered a single technical question: How are the federal appeals courts to exercise the gatekeeping function that Congress gave them in the 1996 law, the Antiterrorism and Effective Death Penalty Act?

The purpose of that law was to streamline the federal courts' handling of habeas corpus petitions, which are challenges to the constitutionality of a conviction or sentence. Under the 1996 law, an inmate whose habeas corpus petition fails in a federal district court cannot move up the appellate ladder without a "certificate of appealability."

In a 2000 decision interpreting that prerequisite, *Slack v. McDaniel*, the Supreme Court set a rather low threshold for inmates to meet. They need only demonstrate, the court said then, that the district court disposed of a substantial constitutional claim in a manner that was open to disagreement among reasonable judges. In other words, in order to be eligible to appeal, an inmate had to present not necessarily a winning case but simply one that was arguably plausible.

The practice of the Fifth Circuit, however, along with some other federal appellate circuits, has been to collapse into a single inquiry the appealability issue and the actual merits of the appeal. That was what happened in Mr. Miller-El's case, and that was the error that the justices used his case to correct today.

In denying the certificate of appealability in August 2001, the appeals court said Mr. Miller-El had failed to demonstrate that the Texas courts' earlier rejection of his appeal was both unreasonable and "contrary to clearly established federal law as determined by the Supreme Court." But that test is intended for the ultimate determination of a habeas corpus petition's merits, not for the appealability stage, Justice Kennedy said in his opinion, *Miller-El v. Cockrell*, No. 01-7662.

He said the certificate of appealability determination "is a separate proceeding, one distinct from the underlying merits."

Referring to the certificate by its initials, C.O.A., Justice Kennedy continued: "The court of appeals should have inquired whether a 'substantial showing of the denial of a constitutional right' had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a C.O.A. The question is the debatability of the underlying constitutional claim, not the resolution of that debate."

Lawyers who specialize in habeas corpus and the death penalty said the result of the decision would almost certainly be to grant more hearings to state inmates, both on and off death row. The court's holding was not limited to death penalty cases, but could prove particularly significant in that context, said Diann Rust-Tierney, director of the American Civil Liberties Union's Capital Punishment Project.

"This needed to happen," Ms. Rust-Tierney said. "It's a reminder that for the system to have any integrity, courts have to get to the merits of these claims."

The Fifth Circuit's handling of habeas corpus cases has been of great concern to those with qualms about the death penalty because that circuit, which covers Texas, Louisiana and Mississippi, oversees the most active death row in the country. From 1992 to 2002, Texas alone carried out 247 executions, accounting for 37 percent of all executions in the country; 8 of the 12 executions so far in 2003 have been in Texas. Nearly every execution is preceded by an effort to obtain habeas corpus review in the federal courts.

Eric M. Freedman, a habeas corpus expert at Hofstra University Law School, said today that an inmate's ability to get a hearing on the merits of a habeas corpus petition was "absolutely critical."

Professor Freedman called the decision "a very welcome reaffirmation of the importance of independent federal scrutiny of the underlying facts before coming to a legal conclusion," and added: "The message has to be, Judging is what judges are paid to do."

The majority opinion examined at length the evidence of racial bias that Mr. Miller-El, who was convicted of killing a Dallas hotel clerk during a robbery, had tried to present.

Criticizing the appeals court's interpretation of the evidence as "dismissive and strained," Justice Kennedy said Mr. Miller-El had clearly shown that the evidence of bias was at least debatable. Not only did the prosecution remove most black prospective jurors, but black members of the panel were subjected to more searching questioning on their views of the death penalty in what Justice Kennedy said could fairly be seen as an effort to build a record justifying their removal.

In a concurring opinion, Justice Antonin Scalia said he regarded the case as "a close rather than a clear" one for granting the certificate of appealability.