Justice Scalia Claims "Insignificant" Risk of Executing An Innocent Person In U.S.

In *Kansas v. Marsh*, No. 04-1170 (U.S. 06/26/2006), the U.S. Supreme Court approved by a 5-4 margin, Kansas' statutory scheme that when during the sentencing phase of a capital case the jury finds the aggravating and mitigating factors for imposing a death sentence are balanced, the defendant "shall be sentenced to death."[1]

Justice Souter wrote in his dissent regarding Kansas' "tie breaker" scheme for imposing a capital sentence, "A law that requires execution when the case for aggravation has failed to convince the sentencing jury is morally absurd."[2] Souter explained that a reason for objecting to Kansas' sentencing scheme that places "a 'thumb [on] death's side of the scale,'"[3] was that it removed a hurdle to the execution of an innocent person. He wrote in part,

> A few numbers from a growing literature will give a sense of the reality that must be addressed. When the Governor of Illinois imposed a moratorium on executions in 2000, 13 prisoners under death sentences had been released since 1977 after a number of them were shown to be innocent, … During the same period, 12 condemned convicts had been executed. Subsequently the Governor determined that 4 more death row inmates were innocent. … Illinois had thus wrongly convicted and condemned even more capital defendants than it had executed, but it may well not have been otherwise unique; … Another report states that "more than 110" death row prisoners have been released since 1973 upon findings that they were innocent of the crimes charged, and "[h]undreds of additional wrongful convictions in potentially capital cases have been documented over the past century." … the total shows that among all prosecutions homicide cases suffer an unusually high incidence of false conviction, … probably owing to the combined difficulty of investigating without help from the victim, intense pressure to get convictions in homicide cases, and the corresponding incentive for the guilty to frame the innocent …"[4]

Souter explained, "false verdicts defy correction after the fatal moment, the Illinois experience shows them to be remarkable in number…"[5] In his final paragraph Souter summarized his argument, "In the face of evidence of the hazards of capital prosecution, maintaining a sentencing system mandating death when the sentencer finds the evidence pro and con to be in equipoise is obtuse by any moral or social measure."[6]

Souter's concerns about the possibility an innocent person could be executed due to Kansas' weighted sentencing scheme struck a raw nerve in Justice Scalia. While Souter wrote approximately 600 words in this comments about the risk of executing an innocent person, in his concurring opinion Scalia wrote over 4,300 words trying to convince the reader that no innocent person has been executed in the U.S. He also intimated the protections built into the legal process since *Furman v. Georgia*, 408 U.S. 238 (1972)

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Justice:Denied Editorial

Reality Undermines Justice Scalia's Lack Of Concern About Wrongful Convictions

Justice Scalia emphatically takes the position in his concurring opinion in *Kansas v. Marsh*, No. 04-1170 (U.S. 06/26/2006) that the United States' legal system is so reliable that the likelihood of an innocent person being executed is "insignificant," and those who disagree are out of the mainstream of society. (See, Justice Scalia Claims "Insignificant" Risk of Executing An Innocent Person In U.S., on p. 34 of this *JD* issue.)

Scalia takes pains to emphasis that technically a conviction's reversal is based on the prosecution's inability "to meet its burden of proof," not a defendant's innocence.[1] What he neglects to mention is that a defendant's presumption of innocence is restored by a reversal, which means that legally that person is as innocent of the alleged crime as is Justice Scalia. In the absence of proof, the prosecution's belief a person committed a crime is based on a combination of suspicion, innuendo and prejudice, which experience has shown is what a judge or jury rely on all too often to convict an actually innocent person.

Scalia derides Justice Souter for opposing as arbitrary, the imposition of a death sentence on a person the prosecution can't even prove by a preponderance of evidence is "the worst of the worst," and who may in fact be innocent. Scalia considers that objection to be a "second-guessing of the judgment" of the majority of adults in the U.S. favoring capital punishment.[2] Yet four weeks before the opinion in *Kansas v. Marsh*, "A May 2006 Gallup Poll examining American opinion about the death penalty found that when given a choice between the sentencing options of life without parole and the death penalty, only 47% of respondents chose capital punishment."[3] That is less than a majority.

Additionally, Scalia's infers his opinion that there is an "insignificant" possibility an innocent person has been executed is representative of the majority of adults. Yet contrary to Scalia's assertion, almost two-thirds of adults, "63% of those polled believe that an innocent person has been executed in the past 5 years."[4]

Scalia also asserts that "The American people have determined that the good to be derived from capital punishment – [is] in deterrence…"[5] Yet that same Gallup Poll found that only one-third of adults, "34% believe it does deter," while "64% of those polled stated that it does not."[6]

So underlying Scalia's attack on Souter for suggesting that laws providing for death as a penalty should cautiously be imposed only when there is the highest certainty that a person is "the worst of the worst," is Scalia's false claim that his opinions represent mainstream America. He is wrong. Unlike Scalia the majority of Americans believe that when given the choice life in prison should be imposed instead of a death sentence. Unlike Scalia the majority of Americans believe that innocent people are executed. Unlike Scalia the majority of Americans believe that the death penalty doesn't deter crime. Scalia's pomposity doesn't change the reality that in regards to the death penalty he and his ideological brethren, Justices Thomas, Roberts and Alito, are amongst the minority of American society. Public attitudes do fluctuate, but Scalia misrepresented what it was at the time he wrote his *Kansas v. Marsh* opinion.

Countering Scalia's claim that there is an "insignificant" likelihood an innocent person can or has been executed, are the many indisputably actually innocent people among the many hundreds of defendants in recent decades who have had their status of being presumed innocent restored by way of a reversal of their conviction, or dismissal of their charges, or an executive pardon.

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preclude the likelihood an innocent person can be executed. He also argues that exonerations are proof of how effectively the system self-corrects its few errors.[7]

For denigration, Scalia particularly singles out Hugo Adam Bedau and Michael L. Radelet, authors of a well-known 1987 Stanford Law Review article that suggested at least 23 innocent people were executed in the U.S. from 1901 to 1987.[8] He writes, "The 1987 article's obsolescence began at the moment of publication." He complains that in spite of its "dubious methodology" Bedau and Radelet's article has been cited hundreds of times, and even several times in Supreme Court opinions.[9]

Scalia also complains about "inflation of the word "exoneration,"[10] and the "distorted concept of what constitutes exoneration."[11] He cites an opinion of the Illinois Supreme Court, "While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent. . . . A not guilty verdict expresses no view as to a defendant's innocence. Rather, [a reversal of conviction] indicates simply that the prosecution has failed to meet its burden of proof."[12]

Not even Souter was safe from Scalia's criticism. He wrote about Souter's dissent, "Of course even in identifying exonerees, the dissent is willing to accept anybody's say-so. It engages in no critical review, but merely parrots articles or reports that support its attack on the American criminal justice system."[13]

Scalia concluded by first making a modest concession, and then continuing with more of his hard boiled rhetoric, "Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum. … The American people have determined that the good to be derived from capital punishment – in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes – outweighs the risk of error. It is no proper part of the business of this Court, or of its Justices, to second-guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution."[14] (See, *Justice:Denied* Editorial, on p. 34 of this *JD* Issue.)

Endnotes:
1 *Kansas v. Marsh*, No. 04-1170 (U.S. 06/26/2006); 2006.SCT.0000124 ¶28 < http://www.versuslaw.com>
2 *Id.* at ¶125 < http://www.versuslaw.com>
3 *Id*. at ¶124
4 *Id.* at ¶128
5 *Id.* at ¶129
6 *Id.* at ¶130
7 *Id.* at ¶92 ("Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out.")
8 Miscarriages of Justice in Potentially Capital Cases, Hugo Adam Bedau & Michael L. Radelet, *Stanford Law Review*, November, 1987, Vol. 40, pp. 21-179.
9 *Kansas v. Marsh*, supra at ¶91 <http://www.versuslaw.com>
10 *Id.* at ¶98 < http://www.versuslaw.com>
11 *Id*. at ¶99
12 *Id*. at ¶94 (citing, People v. Smith, 185 Ill. 2d 532, 545; 708 N. E. 2d 365, 371 (1999))
13 *Id*. at ¶92
14 *Id*. at ¶103

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Furthermore, Scalia's claim that no proof exists that an innocent person has been executed, particularly since 1972, is disingenuous because he emphasizes elsewhere in his opinion that the prosecution's inability "to meet its burden of proof" [7] is the determinant of when a defendant's presumption of innocence is preserved (acquittal or a hung jury after a trial) or restored (post-conviction). Yet Scalia erects a barrier of his own – provable actual innocence – as the standard to judge the legal system's efficacy, and he crows that no one has met his personal standard. However, when applying the legal standard of proof beyond a reasonable doubt (as opposed to Scalia's personal standard), at least four cases have been publicized in the last year or so of an executed person who would in all likelihood be acquitted if retried today on the basis of new evidence their jury did not consider. Those people are: Frances Newton (executed in Texas in 2005)[8]; Ruben Cantu (executed in Texas in 1993)[9]; Cameron Todd Willingham (executed in Texas in 2004)[10]; and Larry Griffin (executed in Missouri 1995)[11] Justice Souter pointed out in his *Kansas v. Marsh* dissent, "False verdicts defy correction after the fatal moment."[12] Those four people, and they may be just the tip of the iceberg, don't have the opportunity to be legally cleared after a retrial because the State killed them.

Scalia's mindset of approving the near-unrestrained exercise of governmental power has imbued him with mental blinders that make his position in cases involving an individual's claim of governmental over-reaching or error much more predictable than flipping a coin. Contrary to Scalia's belief that the conviction of an innocent person is only minutely possible because of the legal system's design, the known cases of wrongful conviction reveal his trust is misplaced because their exposure has typically been due to some aberrant stroke of good fortune, such as the fortuitous discovery of exonerating evidence by a defendant's friend or relative, or a reporter, or even law or journalism students.

Scalia describes Souter's approach to applying the death penalty with a cautionary eye toward the possibility a defendant is innocent as an "attack on the American criminal justice system."[13] No, it is a recognition that the system is not very effective at correcting cases of wrongful conviction without the intervention of people unassociated with the police, prosecution or courts, and who are able through an extraordinary effort to ferret out "new" evidence undermining the soundness of the conviction.

Scalia's agenda in writing his opinion is unknown, but it may have been to place a person concerned about avoiding the system's worst possible error – the execution of an innocent person – into the category of being considered a tin foil hat wearing wingnut. If Scalia had chosen to rely more on facts and sound reasoning and less on hyperbolic verbiage, he could have meaningfully contributed to elevating the discussion about the legal system's unreliableness. Instead he chose to derogate legitimate concerns about wrongful convictions, and in doing so he revealed his arguments are based on bluster, not reality.

Endnotes:
1 *Kansas v. Marsh*, No. 04-1170 (U.S. 06/26/2006); 2006.SCT.0000124 ¶94 <http://www.versuslaw.com>
2 *Id*. at ¶103
3 New Gallup Poll Reveals Growing Number of Americans Favors Life Without Parole, Gallup News Service, June 1, 2006, http://www.deathpenaltyinfo.org/newsanddev.php?scid=23.
4 *Id*.
5 *Kansas v. Marsh*, ¶103 <http://www.versuslaw.com>
6 New Gallup Poll Reveals Growing Number of Americans Favors Life Without Parole, *supra*.
7 *Kansas v. Marsh*, ¶94 <http://www.versuslaw.com>
8 Without Evidence: Executing Frances Newton, *Austin Chronicle*, September 9, 2005; and, New Evidence of Frances Newton's Innocence Ignored By Courts And Texas Governor, *Justice:Denied*, Issue 29, Summer 2005, p.4.
9 Did Texas execute an innocent man, by Lise Olsen, *Houston Chronicle*, November 20, 2005
10 Report: Inmate wrongly executed, by Maurice Possley, *Chicago Tribune*, May 3, 2006; and, Texas man executed on disproved forensics, by Steve Mills and Maurice Possley, *Chicago Tribune*, December 9, 2004.
11 Was the wrong man executed?, by Terry Ganey, *St. Louis Post-Dispatch*, July 11 2005.
12 *Kansas v. Marsh*, ¶129 <http://www.versuslaw.com>
13 *Id*. at ¶92