escape the bar on successive petitions by demonstrating "actual innocence" of the death penalty by showing by clear and convincing evidence that no reasonable juror would have found the prisoner eligible for the death penalty under applicable state law.[1383]

Even if the subsequent petition alleges new and different grounds, a *habeas* court may dismiss the petition if the prisoner's failure to assert those grounds in the prior, or first, petition constitutes "an abuse of the writ." [1384] Following the 1963 trilogy and especially *Sanders*, the federal courts had generally followed a rule excusing the failure to raise claims in earlier petitions unless the failure was a result of "inexcusable neglect" or of deliberate relinquishment. In *McClesky v. Zant*,[1385] the Court construed the "abuse of the writ" language to require a showing of both "cause and prejudice" before a petitioner may allege in a second or later petition a ground or grounds not alleged in the first. In other words, to avoid subsequent dismissal, a petitioner must allege in his first application all the grounds he may have, unless he can show cause, some external impediment, for his failure and some actual prejudice from the error alleged. If he cannot show cause and prejudice, the petitioner may be heard only if she shows that a "fundamental miscarriage of justice" will occur, which means she must make a "colorable showing of factual innocence." [1386]

Fifth, the Court abandoned the rules of *Fay v. Noia*, although it was not until 1991 that it expressly overruled the case.[1387] *Fay*, it will be recalled, dealt with so-called procedural-bar circumstances; that is, if a defendant fails to assert a claim at the proper time or in accordance with proper procedure under valid state rules, and if the state then refuses to reach the merits of his claim and rules against him solely because of the noncompliance with state procedure, when may a petitioner present the claim in federal *habeas*? The answer in *Fay* was that the federal court always had power to review the claim but that it had discretion to deny relief to a *habeas* claimant if it found that the prisoner had intentionally waived his right to pursue his state remedy through a "deliberate bypass" of state procedure.

[1383] Sawyer v. Whitley, 505 U.S. 333 (1992). Language in the opinion suggests that the standard is not limited to capital cases. Id. at 339.

[1384] The standard is in 28 U.S.C. § 2244(b), along with the standard that, if a petitioner "deliberately withheld" a claim, the petition can be dismissed. *See also* 28 U.S.C. § 2254 Rule 9(b) (judge may dismiss successive petition raising new claims if failure to assert them previously was an abuse of the writ).

[1385] 499 U.S. 467 (1991).

[1386] 499 U.S. at 489–97. The "actual innocence" element runs through the cases under all the headings.

[1387] Coleman v. Thompson, 501 U.S. 722, 744–51 (1991).