Supreme Court rules against New Orleans' frame-up victim, upholds religious school credits

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Two particularly heartless and reactionary rulings over the last few weeks, each decided by the same 5-4 lineup—with the four ultra-rightwing justices and Associate Justice Anthony M. Kennedy ruling for the majority—have brought to an abrupt end any speculation that the Supreme Court under the leadership of Chief Justice John G. Roberts, Jr. might be drifting to the so-called political center.

The decision that has attracted the most attention is Justice Clarence Thomas' first majority opinion of the current term, *Connick v. Thompson*. The decision overturned the $14 million jury verdict awarded to John Thompson, a man who spent 18 years in prison—14 on Louisiana's death row where he came within weeks of execution—because prosecutors deliberately hid the evidence proving his innocence.

Perhaps more far-reaching, however, is the opinion by Kennedy—joined by Roberts, Thomas and Justices Antonin Scalia and Samuel A. Alito, Jr.—in *Arizona Christian School Tuition Organization v. Winn*. The decision for all practical purposes eliminates taxpayer standing to challenge government subsidies of religion. This reactionary, antidemocratic ruling tracks exactly the position urged by the Obama administration's solicitor general in his *amicus curiae* "friend of the Court" oral argument last fall. (See "Obama lawyers oppose suits enforcing separation of church and state")

The *Thompson* decision is bone chilling in its callous disregard for the rights of a man wrongfully accused, framed and sentenced to die.

John Thompson was arrested in January 1985 for a murder committed during a New Orleans holdup. When his photograph was published, victims in another crime claimed Thompson had robbed them as well.

The Orleans Parish District Attorney's office made sure that Thompson was tried and convicted of the second robbery before his trial for murder, even though the crimes occurred in the reverse order. That strategy prevented Thompson from testifying in his own defense at the murder trial; if he did, the robbery conviction would have been introduced into evidence for impeachment. Then, after being convicted of murder, Thompson's prior robbery conviction insured that he received the death penalty.

Over the next 14 years, court after court rejected Thompson's claims of due-process violations and factual innocence. In a moving op-ed piece published in Sunday's *New York Times*, Thompson described how he learned from his lawyers in late April 1999 that his execution was scheduled to take place on May 20, and that "it would take a miracle to avoid this execution." Thompson recounted, "I told them it was fine—I was innocent, but it was time to give up."

That same day, however, a private investigator discovered while searching investigatory files that the police had recovered and tested a bloodstain left by the perpetrator of the first robbery. The blood type did not match Thompson's, exonerating him for the robbery and casting doubt on his murder conviction and death sentence. The execution was cancelled pending further proceedings.

The discovery of the blood evidence triggered a cascade of revelations. A former attorney with the District Attorney's office revealed that five years before the scheduled execution one of the prosecutors in the robbery case, while dying of cancer, admitted to him that the exculpatory blood evidence was deliberately suppressed to secure Thompson's false conviction on the robbery case so that he would be sentenced to die for the murder.

Then a recording surfaced proving that Thompson was initially fingered for the murder by a criminal informant seeking a reward, contrary to the testimony given at trial.

Finally, police reports were uncovered showing that a reliable eyewitness had described the murderer as tall and shorthaired. Thompson is short and wore his hair long at the time. The prosecution's primary witness against Thompson, however, matched the description given by the eyewitness.

Both the robbery and murder convictions were overturned.

Orleans Parish District Attorney Harry Connick initiated a grand jury investigation into his prosecutors' suppression of evidence, but terminated it after one day. He then retried Thompson on the original murder charge. Thompson testified in his own defense at the second trial, and the jury acquitted him after deliberating only 35 minutes.

Thompson could not sue the prosecutors directly responsible for framing him because prior Supreme Court case law gives prosecutors absolute immunity for decisions made during criminal prosecutions. Thompson was forced to sue Connick for his failure to insure that his prosecutors turn over exculpatory evidence such as the blood specimen to criminal defendants, a due-process right established decades ago in the case of *Brady v. Maryland*.

The Supreme Court majority overturned the jury's verdict, awarding Thompson $1 million for each year he spent on death row, a finding that had been affirmed by the generally conservative Fifth Circuit Court of Appeals. Despite the involvement of five different prosecutors in hiding the exculpatory evidence from Thompson, the existence of four other Orleans Parish convictions overturned because of similar evidence suppression, and the fact that Connick himself had been investigated for failing to turn over evidence during his days as prosecutor, Thomas characterized Thompson's case as a single, isolated incident of misconduct that cannot support a failure-to-train claim.

Justice Ruth Bader Ginsburg wrote a dissent, joined by Stephen G. Breyer, Sonia M. Sotomayor and Elena Kagan, detailing Thompson's sordid odyssey through the filth of the New Orleans legal system. Ginsburg read her dissent from the bench, the first time she has done so this term, underscoring the degree of her disagreement with the majority.

Scalia penned a vitriolic concurrence, joined by Alito. He taunted Ginsburg's "lengthy excavation of the trial record," labeling it "a puzzling exertion." Scalia's comments are bizarre, and demonstrate how unmoored he has become from the most basic principles of jurisprudence. Appellate courts are charged precisely with the responsibility to review all the evidence before the lower court, and must uphold jury verdicts when there is sufficient evidence to support them.

In the other recent decision, *Arizona Christian School Tuition Organization v. Winn*, taxpayers challenged a state scheme allowing a dollar-for-dollar income tax credit—up to $500 per person and $1,000 per married couple—for payments directly to "school tuition organizations." Such "STOs" have paid over $300 million that otherwise would have gone into the Arizona budget directly to religious schools.

Kennedy's majority ruling did not directly uphold Arizona's diversion of tax dollars to fund religious education. Instead, the case holds that the Arizona taxpayers who brought the suit to challenge the law lacked "standing" because they did not suffer an "injury in fact."

To reach this result, Kennedy had to eviscerate the 1968 Supreme Court decision in *Flast v. Cohen*, which recognized taxpayer standing to challenge governmental expenditures that allegedly violate the establishment clause. Kennedy purported to distinguish *Flast* on the basis that "when Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers." This is pure sophistry because taxes due are not the taxpayers' "own money," but funds that would have to be paid to the state in income tax if not paid to the STO.

Kagan wrote the dissent. She identified 20 lower court rulings and five Supreme Court decisions since *Flast* in which taxpayers were given standing to challenge laws similarly diverting tax payments from the government to religious institutions. Kagan highlighted that Neal Katyal, her successor as Obama's Solicitor General, claimed at oral argument that each of those cases was wrongly decided.

Upholding the Arizona scheme "devastates taxpayer standing in Establishment Clause cases," Kagan concluded. "The Court's opinion thus offers a roadmap—more truly, just a one-step instruction—to any government that wishes to insulate its financing of religious activity from legal challenge.... And by ravaging *Flast* in this way, today's decision damages one of this Nation's defining constitutional commitments."

Damage to the United States' constitutional commitments, not only from the actions of the rightwing Supreme Court majority, but from the Obama administration itself, will continue as the present social crisis deepens.