Application of Res Judicata Principles to Successive Federal Habeas Corpus Petitions in Capital Cases: The Search for an Equitable Approach

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Courts that review successive federal habeas corpus petitions in capital cases face two seemingly irreconcilable concerns. On the one hand, that no individual who has a meritorious legal claim be executed and on the other hand, that absent finality in the death penalty process, the integrity of the criminal justice system will be undermined. In attempting to balance these competing concerns, courts are hampered by confusion surrounding the proper standards of review to apply to successive federal habeas corpus petitions. This Article attempts to resolve that confusion and to articulate a framework within which federal courts can resolve competing concerns that arise when reviewing successive federal habeas corpus petitions in capital cases.

INTRODUCTION

The federal courts are often the courts of last resort for those facing execution as a result of state court judgments.[1] Individuals sentenced to

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[1] Currently, 36 states have statutes authorizing the death penalty. As of August 1, 1987, 1911 individuals were facing execution as a result of state court judgments. The states with the largest death row populations are Florida (267), Texas (248), California (200), Illinois (109), and Georgia (108). NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. DEATH ROW, U.S.A. (Aug. 1, 1987) (unpublished compilation).

While one person is facing execution as a result of a military proceeding, no person is presently facing execution as a result of a federal court judgment. Although 18 U.S.C. § 1111(b) authorizes the death penalty for first degree murder, the statute provides no standards for determining whether the death penalty should be imposed. It simply states that "[w]hoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment' in

death can invoke the jurisdiction of the federal courts by the statutory remedy of federal habeas corpus.[2] Usually a person sentenced to death files a federal habeas corpus petition after state appeals, a petition for certiorari to the United States Supreme Court, and any state collateral post conviction remedies[3] are exhausted. More than ten years after the Supreme Court upheld the constitutionality of certain state death penalty statutes,[4] it is now evident that no one will be executed without having an opportunity to litigate any federal constitutional claims in a federal habeas corpus proceeding.[5]

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which event he shall be sentenced to imprisonment for life." 18 U.S.C. § 1111(b) (1982). The absence of any governing standards renders this statutory death penalty scheme unconstitutional. Furman v. Georgia, 408 U.S. 238 (1974) (holding that the decision to impose the death penalty could not constitutionally be left to the unguided discretion of the jury or court); *see also* United States v. Freeman, 380 F. Supp. 1004 (D.N.D. 1974); cases cited *infra* note 4. Selected federal statutes also authorize the death penalty as a possible punishment. *See, e.g.*, 18 U.S.C. § 2113(e) (1982) (death resulting from the commission or attempted commission of a bank robbery); 49 U.S.C. § 1472(i)(1)(b) (1982) (death resulting from the commission or attempted commission of the crime of air piracy). However, none of the statutes cited above set out standards to determine whether death is the appropriate punishment. Thus, in the absence of such standards, the imposition of a death sentence would be unconstitutional.

[2] *See* 28 U.S.C. §§ 2241-2254 (1982).

[3] The phrase "collateral post conviction remedies" refers to proceedings that are at least theoretically separate and independent from the actual criminal proceeding. They are often considered to be civil remedies. Such proceedings are not part of the appellate review process of the criminal conviction. *See* 3 W. LaFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 27.1 at 283-384 (1984) [hereafter LaFAVE & ISRAEL].

[4] In Gregg v. Georgia, 428 U.S. 153 (1976), Proffitt v. Florida, 428 U.S. 242 (1976), and Jurek v. Texas, 428 U.S. 262 (1976), the Supreme Court rejected a broad based eighth amendment challenge to certain state capital punishment statutes. In these decisions, the Court upheld the so-called guided discretion statutes that limit and channel the discretion afforded those responsible for determining if death is an appropriate penalty, whether those responsible be the judge, a jury, or both. At the same time, the Court also held that mandatory death penalty statutes are unconstitutional. *See* Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Green v. Oklahoma, 428 U.S. 907 (1976); *see also* Sumner v. Shuman, 107 S. Ct. 2716 (1987) (holding unconstitutional a mandatory death sentence for a prisoner who committed murder while serving a life sentence without possibility of parole).

The *Gregg*, *Proffitt*, and *Jurek* decisions effectively reinstated the death penalty. Prior to these decisions, the constitutionality of the death penalty was suspect given the Court's 1972 decision in *Furman*.

[5] The experience in Florida is illustrative. As of August 1, 1987, 16 individuals have been executed in Florida subsequent to the *Gregg*, *Proffitt*, and *Jurek* decisions. None of these individuals was executed without having an opportunity to pursue federal constitutional claims in a federal habeas corpus proceeding.

A petitioner can be foreclosed from raising certain federal constitutional claims either

The insistence on ensuring that those facing death have a meaningful opportunity to present their claims in a federal forum[6] through the habeas remedy[7] partly explains why the number of executions since the 1976 *Gregg*, *Proffitt*, and *Jurek* decisions has been less than many predicted.[8] It also helps explain the resulting backlog on death rows.[9] However, as federal courts act on initial habeas petitions and reject the constitutional claims that they raise, the pace of executions will probably quicken. Also, it is probable that those facing execution will file a second, or more generally, a successive federal habeas corpus petition designed to block their executions. These petitions may seek to raise the same claims that were advanced and resolved in an earlier petition by arguing that events of a factual or legal nature warrant reversal of that earlier decision. Further, the petitions may raise new claims that could

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because they are generally not cognizable in federal habeas corpus proceedings, *e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (state prisoner's fourth amendment claims are not cognizable in federal habeas proceedings unless he did not have a full and fair opportunity to litigate the claims in state court), or because they were not raised in accordance with reasonable state procedural rules, *e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977). For a discussion of *Sykes* and its progeny, see *infra* notes 191-274 and accompanying text.

[6] The opportunity to present a claim through the Supreme Court certiorari jurisdiction does not provide an individual facing death with a meaningful opportunity to have his claim considered in a federal forum. Generally, the Court's certiorari jurisdiction is reserved for cases that raise issues in which either the courts of appeals and/or the highest state courts are in conflict, or cases involving matters of nationwide importance. It is not perceived as being available simply to correct errors, no matter how outrageous. *See* Sup. Ct. Rev. 17; R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 221-24 (6th ed. 1986). This partly explains why a denial of certiorari has no precedential value. United States v. Carver, 260 U.S. 482, 490 (1923); R. STERN & E. GRESSMAN, *supra*, at 269-73. In this context, *compare* Coleman v. Balkcom, 451 U.S. 949 (1981) (Stevens, J., concurring) *with Coleman*, 451 U.S. at 956 (Rehnquist, J., dissenting).

[7] *But see* Amsterdam, *The Supreme Court and Capital Punishment*, 14 HUM. RTS. 14 (Winter, 1987) (questioning how meaningful that opportunity will be in light of decisions like Barefoot v. Estelle, 463 U.S. 880 (1983), which held that an expedited federal appellate review process is permissible when considering habeas petitions in capital cases).

[8] As of August 1, 1987, 86 individuals had been executed since the *Gregg*, *Proffitt*, and *Jurek* decisions. Eleven of these individuals essentially acquiesced to their executions by not pursuing available legal remedies to challenge their conviction or sentence. NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW, U.S.A. (Aug. 1, 1987).

[9] The backlog on death row is not simply attributable to the availability of the federal habeas corpus remedy. In fact, it is primarily due to the time consumed in the state appellate and federal habeas corpus review process which often exceeds five years. However, such delay is not necessarily unwarranted or inappropriate.

have been raised in the first petition or which may have been unavailable at that time.

Dealing with successive petitions in death cases will pose difficult questions for the federal courts. When asked to entertain them, courts will seek to guard against abuse of the judicial process.[10] Judges know that, absent some reasonable degree of finality in the judicial process afforded death sentences, the deterrent and retributive purposes of the death penalty will be significantly undermined.[11] Thus, judges are likely to be skeptical of successive petitions. However, despite the desire to protect the integrity of the judicial process and achieve some finality in death cases, federal courts will want to avoid giving short shrift to a possibly meritorious legal claim, even if that claim is raised in a successive federal habeas corpus petition.[12] Therefore, the courts must deter-

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[10] *See, e.g.*, Woodard v. Hutchins, 464 U.S. 377, 377-80 (1984) (per curiam) (Powell, J., concurring). In his concurring opinion, Justice Powell observed:

> This is another capital case in which a last-minute application for a stay of execution and a new petition for habeas corpus relief have been filed with no explanation as to why the claims were not all raised earlier or why they were not raised in one petition. It is another example of abuse of the writ.
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> A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward — often in a piecemeal fashion — only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate — even in capital cases — this type of abuse of the writ of habeas corpus.

Id. at 377-78, 380 (footnote omitted).

[11] *See, e.g.*, Coleman v. Balkcom, 451 U.S. 949, 959 (1981) (Rehnquist, J., dissenting). Justice Rehnquist observed:

> What troubles me is that this Court, by constantly tinkering with the principles laid down in the five death penalty cases decided in 1976, together with the natural reluctance of state and federal habeas judges to rule against an inmate on death row, has made it virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes. When society promises to punish by death certain criminal conduct, and then the courts fail to do so, the courts not only lessen the deterrent effect of the threat of capital punishment, they undermine the integrity of the entire criminal justice system.

Id.; *see also* Amsterdam, *supra* note 7, at 50-52 (quoting remarks of Justice Powell to the Eleventh Circuit Judicial Conference).

[12] *See* Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring). Justice Harlan stated:

> So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for . . . procedural fairness . . . . I do not concede that whatever process is "due" an offender faced with a fine or a prison

mine what res judicata effect to give to the denial of a prior federal habeas corpus petition when one facing execution files a successive petition. To make this determination, courts must reconcile two seemingly irreconcilable and equally weighty concerns: on the one hand, that no individual who has a meritorious legal claim be executed and on the other hand, that absent finality in the judicial review process, the integrity of the criminal justice system will be compromised and the death penalty, although available in theory, will be unavailable in practice.

In balancing these competing considerations, federal courts are not without statutory guidance. Although no specific provision addresses this issue in the death penalty context, the statutory framework[13] and the United States Supreme Court Rules that govern federal habeas corpus proceedings[14] provide guidelines for determining the res judicata effect to give to the denial of a prior federal habeas corpus application. However, the Supreme Court has not made a definitive ruling on either the relevant statutory provision or the Habeas Corpus Rules. As a result, considerable confusion now exists about the meaning and significance of these provisions.[15] Much of the confusion involves the interrelationship between these provisions and the 1963 Supreme Court decision in *Sanders v. United States*,[16] which preceded them.

In *Sanders*, which was not a capital case, the Court addressed the question of what res judicata effect to give to the denial of a prior federal habeas corpus petition. The Court examined the two contexts in which this question might arise. First, how to treat a successive application that raises the same claim previously resolved on the merits. Second, how to treat a successive petition that raises a new claim or a claim raised in an earlier application, but not resolved on the merits. *Sanders* provided specific guidelines for treating each context. The current confusion centers around the meaning and continued viability of *Sanders* in light of two events: first, the subsequent enactment of the statutory provision and Habeas Corpus Rules that address these same

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> sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel . . . nor is it negligible, being literally that between life and death.

Id.

[13] *See* 28 U.S.C. § 2244(b) (1982).

[14] Rule 9(b), *Rules Governing Section 2254 Cases in the United States District Courts* (1982) [hereafter Rule 9(b)].

[15] *See, e.g.*, Kuhlman v. Wilson, 106 S. Ct. 2616 (1986); Rose v. Lundy, 455 U.S. 509 (1982); Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987) (en banc); Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983) (en banc), *cert. denied*, 104 S. Ct. 2356 (1984).

[16] 373 U.S. 1 (1963).

questions;[17] and second, the overruling of *Fay v. Noia*,[18] which *Sanders* incorporated in its standards governing successive petitions.

Since federal courts will be confronted with an increasing number of successive federal habeas corpus petitions in capital cases, any confusion regarding the proper standards that courts should apply when assessing successive applications must be resolved. This Article attempts to resolve that confusion. The Article first examines the evolution of the congressional standards designed to govern successive petitions. It next identifies the problems that have arisen in interpreting these standards. It then addresses whether the courts should give special consideration to successive applications filed on behalf of individuals facing execution. This discussion is followed by an examination of the Supreme Court's attempts to apply the relevant governing principles in capital cases. Finally, the Article articulates a framework within which the federal courts can resolve the competing concerns that arise when successive federal habeas corpus petitions are filed in capital cases.

I. The Evolution of the Congressional Standards That Govern Successive Habeas Corpus Petitions

At common law, traditional res judicata principles did not apply when courts considered successive habeas corpus petitions.[19] The rationale for this rule was that courts should give res judicata effect only to judgments subject to appellate review, and at common law habeas judgments were not appealable.[20] However, in *Salinger v. Loisel*,[21] the Supreme Court recognized that the rationale for the common-law rule was no longer applicable since habeas corpus judgments were now subject to appellate review.[22] Accordingly, the Court held that the denial of a prior habeas corpus petition was a relevant consideration in determining how to treat a successive petition.[23] However, the Court was

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[17] 28 U.S.C. § 2244(b) went into effect on November 2, 1966, and Rule 9(b) became effective February 1, 1977.

[18] 372 U.S. 391 (1963).

[19] *See Sanders*, 373 U.S. at 7-8; L. Yackle, Post Conviction Remedies § 151, at 551 (1982); *see also* Kelley, *Finality and Habeas Corpus: Is the Rule that Res Judicata May Not Apply to Habeas Corpus or Motion to Vacate Still Viable?*, 78 W. Va. L. Rev. 1, 9-11 (1975).

[20] L. Yackle, *supra* note 19, § 151, at 551-52; LaFave & Israel, *supra* note 3, § 27.5, at 353.

[21] 265 U.S. 224 (1924).

[22] *Id.* at 230-31. Today, habeas judgments are subject to appellate court review. *See* 28 U.S.C. § 2253 (1982).

[23] *Salinger*, 265 U.S. at 230-31.

unwilling to apply the full panoply of traditional res judicata principles to successive petitions. Instead, the Court adopted an equitable approach. It relied on the language of the federal habeas corpus statute that required a court to dispose of the matter "as law and justice may require."[24] This approach permits lower courts to exercise their discretion in determining how much weight to give to the denial of a prior habeas corpus petition.[25] The Court identified several relevant considerations: whether the claim being raised was the same claim denied in the prior petition; the fullness of the consideration given the claim; and the character of the court that considered the initial habeas petition.[26] It suggested that in an appropriate case it is within a court's discretion to refuse to consider the merits of a successive petition.

Salinger did not explain why traditional principles of res judicata should not control in habeas corpus proceedings. However, its decision apparently was premised on valuing an individual's liberty over the need for finality.[27]

Salinger involved a successive application that raised the same claim previously rejected on the merits in an earlier petition. In *Wong Doo v. United States*,[28] a companion case to *Salinger*, the Court adhered to *Salinger*'s equitable approach when it considered a successive petition that raised a claim previously raised but not resolved on the merits because the petitioner abandoned the claim by not presenting any evidence. Finding no reason why evidence concerning the claim could not have been adduced in the first habeas proceeding, the Court affirmed

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[24] *Id.* at 231.

[25] *Id.*

[26] *Id.* at 231-32. The Court also stated that when considering successive federal habeas corpus petitions filed *prior* to any conviction, the existence of another remedy in which one could raise a claim was a relevant consideration. *Id.* at 231.

[27] *Id.* at 232 ("In practice the rules we here have outlined will accord to the writ of *habeas corpus* its recognized status as a privileged writ of freedom, and yet make against an abusive use of it."). The Court explicitly recognized this rationale in Sanders v. United States, 373 U.S. 1, 8 (1963), when the Court observed:

> Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment, access to the courts on habeas must not be thus impeded. The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ.

Id. (citations omitted); *see also id.* at 24 (Harlan, J., dissenting) ("The consequences of injustice — loss of liberty and sometimes loss of life — are far too great to permit the automatic application of an entire body of technical rules whose primary relevance lies in the area of civil litigation.").

[28] 265 U.S. 239 (1924).

the dismissal of the second habeas petition, concluding that raising the claim in the second proceeding was "an abusive use of the writ of habeas corpus."[29]

Twenty-four years after *Salinger* and *Wong Doo*, the Supreme Court, in *Price v. Johnston*,[30] addressed the successive petition question in the context of a claim that had not been raised in an earlier application.[31] Applying an equitable approach, the Court held that the lower courts erred when they refused to entertain the claim without first giving the petitioner an opportunity to establish: (1) that he lacked knowledge of the facts necessary to state the claim; or (2) if he had such knowledge, whether he had an excuse for not asserting the claim in an earlier petition.[32] The Court distinguished *Wong Doo* on the ground that there the claim raised in the successive petition was raised in the initial petition and the petitioner, despite an opportunity to present evidence on that claim, failed to do so.[33]

Salinger, *Wong Doo*, and *Price* reflect a judicially defined equitable approach to the question of the res judicata effect a court should give to the denial of a prior habeas corpus petition in three contexts: when the successive petition raises (1) a new claim (*Price*), (2) a claim previously resolved on the merits (*Salinger*), and (3) a claim raised earlier, but not resolved on the merits (*Wong Doo*).[34] These decisions reflect an attempt

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[29] *Id.* at 241.

[30] 334 U.S. 266 (1948).

[31] The petitioner claimed that the government knowingly used perjured testimony at his trial. In his earlier habeas corpus petitions, the petitioner stated that a key witness changed his testimony in mid-trial after speaking with the prosecutor. However, the petitioner never specifically alleged that the prosecution knowingly used perjured testimony. Although this change of testimony was the basis of the perjured testimony claim, the Court concluded that this claim was being raised for the first time when raised in the petitioner's fourth petition. *Id.* at 288.

[32] *Id.* at 291-92. The Court did not state what might constitute a justifiable reason for not raising a claim when the claim's factual basis was known at the time of an earlier application. The Court stated that a court should not refuse to review a petitioner's claim "if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts." *Id.* at 291. This suggests that the petitioner's lack of understanding of the legal significance of the facts known to him might justify not previously asserting a claim.

[33] *Id.* at 289-90.

[34] *See also* Waley v. Johnson, 316 U.S. 101, 105 (1942) (holding that res judicata principles do not preclude a court from entertaining a federal habeas corpus petition after an earlier writ of *coram nobis* was denied, at least when a different claim is raised and the earlier application was denied without a hearing for insufficiency on its face). The scope of the writ of *coram nobis* is uncertain. It is generally thought to provide a remedy when new facts come to the petitioner's attention subsequent to his trial and, if

to balance the concern that a person not be unjustly imprisoned against the concern that absent finality, the authority and orderly administration of the criminal justice system will be undermined.

These cases reflected the law until 1948, when Congress first addressed this question as part of a general revision of the Judicial Code and the habeas corpus provisions in particular. As a result, Congress enacted 28 U.S.C. section 2244,[35] which specifically addressed the problem of successive federal habeas corpus petitions.[36] This legislation was prompted by an increasing concern over the effect on the orderly administration of justice of repetitious petitions[37] that resulted from the Supreme Court's expansion of the habeas corpus remedy.[38]

As originally proposed in the Judicial Conference of the United

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previously known, would have produced a different result. *See* United States v. Morgan, 346 U.S. 502, 507-08 (1954); L. YACKLE, *supra* note 19, §§ 35-39, at 162-74.

[35] Section 2244 provided:

> 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 presented 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 an inquiry.

28 U.S.C. § 2244 (1948).

[36] The legislation also made other changes in the statutory law of habeas corpus. The most noteworthy addition was made in 28 U.S.C. § 2254. It required that a court should not grant a writ of habeas corpus on behalf of a state prisoner until the petitioner exhausted his state remedies unless such remedies were either unavailable or ineffective to protect his rights. Congress designed this provision to codify an exhaustion requirement for state prisoners that the Supreme Court first established in *Ex Parte* Royall, 117 U.S. 241 (1886). For a complete discussion of this and the other statutory changes, see Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407, 415-24 (1953); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1948).

[37] *See* Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1947). To illustrate the problem, Judge Goodman describes a petitioner who alleged in his initial application that he was not advised of his right to counsel and then alleged in a subsequent application that he requested the court to appoint counsel for him, but the court, without cause, refused to do so. *Id.* at 315-16. *See also* Parker, *supra* note 36, at 174; Speck, *Statistics on Federal Habeas Corpus*, 10 OHIO ST. L.J. 337, 352 (1949).

[38] *See, e.g.*, Waley v. Johnson, 316 U.S. 101 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938); Moore v. Dempsey, 261 U.S. 86 (1923). In *Waley*, the Court rejected the notion that the scope of the federal habeas corpus remedy was limited to attacks on the jurisdiction of the sentencing court. *Waley*, 316 U.S. at 104-05.

States,[39] section 2244 would have denied the federal courts power to entertain a successive habeas corpus petition if the previous petition was denied and the later application did not present a new ground.[40] Instead, the legislation essentially codified *Salinger*'s equitable approach. It specifically allowed federal courts to entertain a successive petition when the "ends of justice" dictated further review.[41] Interestingly, the legislation did not address how to treat successive petitions that raised new claims or claims raised earlier, but not resolved on the merits. However, given the continued discretion afforded federal courts when considering successive petitions raising the same claim previously denied on the merits, it is unlikely that Congress intended to limit the federal courts' discretion in these other contexts. As the Revisers' Notes indicate, section 2244 was not intended to modify the law on successive petitions, but to codify the rules adopted by the courts to deal with successive "nuisance" applications that lacked merit.[42]

Thus, section 2244 was not intended to make traditional res judicata principles applicable to habeas corpus proceedings. Rather, it simply gave the federal courts power to reject a successive petition if the claim raised had been previously denied and the ends of justice did not re-

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[39] The Judicial Conference of the United States is a group consisting of the Chief Justice of the United States Supreme Court and the chief justices of the courts of appeals. Congress established the Judicial Conference in 1922 to examine the courts of the United States and to make recommendations for legislation to Congress. *See* United States v. Hayman, 342 U.S. 205, 214 n.19 (1952). In 1942 it authorized the Chief Justice to appoint a committee to study habeas corpus. *Report of the Judicial Conference*, Sept. Sess., 1942, at 18. Its work ultimately led to the enactment of 28 U.S.C. § 2244 and the other statutory habeas corpus changes made in 1948. *See* S. REP. NO. 1559, 80th Cong. 2d Sess. 9 (1948); *Report of the Judicial Conference*, 17 Sept. Sess. (1947); *Report of the Judicial Conference*, 21 Oct. Sess. (1946); *Report of the Judicial Conference*, 22-24 Sept. Sess. (1943).

[40] S. REP. NO. 1559, 80th Cong., 2d Sess. 9 (1948).

[41] *See* 28 U.S.C. § 2244 (1948).

[42] *See id.*, Historical and Revision Notes. The Revisers' Notes also referred to the decision in Dorsey v. Gill, 148 F.2d 857 (D.C. Cir. 1945), in which the court wrote:

> [P]etitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions, a third 24, a fourth 22, a fifth 20. One hundred nineteen persons have presented 597 petitions — an average of 5.

Id. at 862; *see also Sanders*, 373 U.S. at 11; Beverly, *Federal-State Conflicts in the Field of Habeas Corpus*, 41 CALIF. L. REV. 483, 496 (1953).

quire reconsideration. Of course, this was a power the courts already possessed.

At the same time Congress adopted section 2244 it also created a new federal post conviction remedy for federal prisoners: 28 U.S.C. section 2255. This remedy gave federal prisoners the right to petition their sentencing court to vacate, set aside, or correct their sentence if they believed it was unlawfully imposed. Congress created the section 2255 remedy to resolve the problems that arose because federal habeas corpus proceedings could only be brought in the district where the petitioner was confined.[43] In many cases, the trial record was either not readily available or, when available, was silent or ambiguous on the questions raised in the habeas corpus proceeding.[44] Thus, the habeas corpus court was required to hold a hearing and witnesses were forced to travel long distances to testify.[45] Further, section 2255 provided that a federal prisoner authorized to seek relief under it could not pursue a federal habeas corpus remedy if he did not seek relief under 2255 or if such relief was denied. However, the habeas corpus remedy was available if the petitioner showed that the section 2255 remedy was inadequate.[46] Anticipating the same problems that prompted section 2244, Congress included a provision in section 2255 that addresses the question of successive applications.[47] As with section 2244, it gave the federal courts power to refuse to entertain a successive petition, but did not require them to do so.

As Professor Yackle noted,[48] a comparison of the language and reach of these two provisions presented several questions. The most signifi-

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[43] *See* Ahrens v. Clark, 335 U.S. 188 (1948).

[44] For example, this could occur when a petitioner seeks to challenge a guilty plea on the grounds that it was involuntary and supports his claim with factual allegations that are neither reflected nor clearly refuted in the plea proceeding record.

[45] *See* United States v. Hayman, 342 U.S. 205, 213-14 (1952) (in-depth discussion of the rationale for the § 2255 remedy and its legislative history); *see also* Hill v. United States, 368 U.S. 424 (1962).

[46] Section 2255 provides in part:

> [A]n application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255 (1982).

[47] This provision reads: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." *Id.*

[48] *See* L. YACKLE, *supra* note 19, § 151, at 554-55.

cant question involved post conviction proceedings filed by federal prisoners. Specifically, section 2255 allowed a federal court to refuse to entertain a successive application if it sought "similar relief" on behalf of the same prisoner. However, section 2244 only precluded successive habeas corpus petitions that did not raise a "new ground." Unlike section 2244 then, section 2255 appeared to authorize a court to dismiss a successive application even if it raised a new ground since a successive application conceivably could be seeking "similar relief."[49] This ambiguity raised the question of whether Congress intended to enact different "res judicata" provisions for successive section 2255 applications and successive section 2244 habeas corpus petitions. In addition, if section 2255 was construed more restrictively than section 2244, yet did not render the section 2255 remedy inadequate, thus making the federal habeas corpus remedy unavailable to a federal prisoner, then section 2255 could be an unconstitutional suspension of the writ of habeas corpus.[50] However, if this construction made the section 2255 remedy inadequate, making available federal habeas corpus, then the section 2255 "res judicata" provision would be meaningless assuming the scope of the habeas corpus remedy would be as extensive as the section 2255 remedy.

Despite these questions, it is important to emphasize that although Congress adopted both provisions to guide courts when considering successive post conviction applications, neither was designed to limit existing judicial discretion. Section 2255's "res judicata" provision became extremely important in understanding the reach of section 2244 when the Supreme Court, for the first time subsequent to the 1948 revisions, addressed the successive petition issue in *Sanders v. United States*.[51]

Sanders was one of three major Supreme Court decisions handed down during the 1962 Term that adopted an expansive reading of the federal habeas corpus remedy.[52] In *Sanders* the Court held that the

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[49] *See* Note, *Section 2255 of the Judicial Code: The Threatened Demise of Habeas Corpus*, 59 YALE L.J. 1183, 1188 n.24 (1950).

[50] U.S. CONST. art I, § 9, cl. 2 provides: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." *See* United States v. Hayman, 187 F.2d. 456 (9th Cir. 1950) (arguing that if the § 2255 remedy is less expansive than the habeas corpus remedy it violates the suspension clause of the Constitution because it precludes the habeas remedy); *see also* Note, *supra* note 49.

[51] 373 U.S. 1 (1963).

[52] The two other decisions are Fay v. Noia, 372 U.S. 391 (1963) and Townsend v. Sain, 372 U.S. 293 (1963). For a discussion of these decisions, see *infra* text accompanying notes 70-83.

federal district court erred in refusing to hold a hearing prior to dismissing the petitioner's second section 2255 application.[53] In so holding, the Court discussed in depth both section 2244, its section 2255 counterpart, and their interplay.

Despite the differing language of section 2244 and section 2255,[54] the Court held that Congress did not intend that different "res judicata" principles govern when courts consider successive section 2255 applications and successive section 2244 federal habeas corpus petitions.[55] The Court reached this conclusion for three reasons.[56] First, nothing in the legislative history surrounding the 1948 legislation indicated an intent to treat the situations differently and no logical or practical basis existed for doing so. Second, the Court implied that if the section 2255 "res judicata" provision was more restrictive than section 2244, it would conceivably make the section 2255 remedy inadequate. This would make the habeas corpus remedy available and render the section 2255 "res judicata" provision ineffectual, assuming the scope of the habeas corpus remedy was equivalent to the section 2255 remedy. Finally, the Court suggested that if a restrictive reading of section 2255's "res judicata" provision did not render the section 2255 remedy inadequate, this could create constitutional problems because the habeas corpus remedy would be precluded in violation of the suspension clause.[57]

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[53] In his first § 2255 application, filed pro se, the petitioner alleged that his indictment was invalid, that he was denied his sixth amendment right to adequate assistance of counsel, and that the trial court allowed him to be coerced into entering a plea without counsel and knowledge of the charges against him. The district court denied the motion without a hearing, finding that the allegations were solely conclusory and that the case files and records completely refuted these allegations. No appeal was taken. In his second § 2255 application, also filed pro se, the petitioner alleged that at the time of his trial and sentence, he was mentally incompetent because of drugs he was receiving while in jail pending trial. The district court again denied the application without a hearing. It concluded that the "res judicata" provision of § 2255 gave it the discretion to refuse to entertain the application. The court found no reason as to why the factual allegations of mental incompetency were not raised in the first application. It also found that the allegations were meritless. On appeal, the Ninth Circuit affirmed, holding that the district court had discretion to refuse to entertain the second application without a hearing. *Sanders*, 373 U.S. at 5-6.

[54] For a discussion of §§ 2244 and 2255, see *supra* text accompanying notes 35-50.

[55] *Sanders*, 373 U.S. at 14 ("We therefore hold that the 'similar relief' provision of § 2255 is to be deemed the material equivalent of § 2244.").

[56] *See id.* at 14-15.

[57] *But see id.* at 29 (Harlan, J., dissenting) (rejecting the notion that any limitation on the scope of the federal habeas corpus remedy, even those of a procedural nature, necessarily created constitutional problems under the suspension clause). For a discus-

Concluding that different res judicata principles should not govern when courts consider successive 2255 applications and successive habeas corpus petitions, the Court held that the principles contained in section 2244 should control successive petitions.[58] The Court initially noted that the legislative history of section 2244 did not indicate an intent to change the judge-made law that had evolved regarding the treatment of successive petitions.[59] However, the Court emphasized that the language of section 2244 and therefore section 2255's "res judicata" provision was not intended to codify *all* judge-made law regarding successive petitions. Rather, Congress intended only to address situations similar to *Salinger*, in which the successive petition raised a "ground"[60] previously decided on the merits. The Court construed section 2244 as not addressing situations in which a "ground" was raised for the first time or when the ground was not previously resolved on the merits.[61] Instead, the Court cited *Wong Doo*, *Price*, *Noia*, and *Townsend v. Sain* as providing the governing principles for determining whether a successive petition that raises a new claim or one not previously resolved on the merits should be entertained.[62] The Court's reference to *Noia* and

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sion of the limits, if any, that Congress may place on the federal habeas corpus remedy, see L. YACKLE, *supra* note 19, § 17, at 77-80. The basic question is whether the suspension clause was intended to prevent Congress from limiting *state* habeas corpus remedies and therefore any federal remedy is solely statutory in origin or whether the suspension clause mandates a federal habeas corpus remedy and thus any legislative restrictions on it must be examined in light of this clause. The Supreme Court has never directly resolved this issue. *See* United States v. Hayman, 342 U.S. 205 (1952); L. YACKLE, *supra* note 19, § 17, at 79-80.

[58] *Sanders*, 373 U.S. at 14. This conclusion is not surprising considering the Court's concerns with the potential constitutional problems that could arise from a restrictive reading of § 2255. In addition, the Court held in an earlier case that Congress intended § 2255 to provide the sentencing court with a remedy commensurate to the habeas corpus remedy. Hill v. United States, 368 U.S. 424, 429 n.4 (1962).

[59] *Sanders*, 373 U.S. at 11.

[60] The Court defined a ground as "a sufficient legal basis for granting the relief" and noted that "identical grounds may often be proved by different factual allegations . . . or legal arguments." *Id.* at 16. Thus, a legal claim based on different factual allegations would not be a new ground.

[61] *Id.* at 12. The Court rejected the argument, advanced by Justice Harlan in his dissenting opinion, that the phrase "new ground" in § 2244 was intended only to encompass those grounds that could not have been reasonably known at the time of the initial application. *See id.* at 26-27 (Harlan, J., dissenting). However, since the drafters of § 2244 were undoubtedly aware of *Wong Doo* and *Salinger* and the problems caused by successive petitions raising new claims, it seems strange that they would only seek to address the problems caused by successive petitions raising claims previously raised and decided.

[62] *Id.* at 12, 18.

Townsend later proved to be problematic.

Regarding successive petitions that raised grounds previously resolved on the merits, the Court held that section 2244 permitted but did not compel a court to refuse to entertain a successive application if the "ends of justice" did not mandate further consideration.[63] The Court described two situations in which the "ends of justice" might warrant reconsideration, but emphasized that these examples were not exhaustive.[64] First, a successive petition that involved factual allegations should be entertained if the petitioner establishes that the evidentiary hearing held in conjunction with his prior application was not full and fair.[65] Second, if the petition raises a purely legal issue, an intervening change in the law or some other justification for not raising an argument regarding that claim in the prior application might warrant reconsideration.[66] *Sanders* then essentially held that Congress intended section 2244 and therefore section 2255's "res judicata" provision to codify the Court's holding in *Salinger*.[67]

The Court cited *Wong Doo*, *Price*, *Noia*, and *Townsend* as providing

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[63] *Id.* at 12.

[64] *See id.* at 17 ("[T]he foregoing enumeration is not intended to be exhaustive; the test is 'the ends of justice' and it cannot be too finely particularized."). The Court also noted that the petitioner bore the burden of establishing that the "ends of justice" required further consideration. However, the Court did not specify the nature of this burden. *Id.* at 17.

[65] *Id.* at 16-17. The Court referred to Townsend v. Sain, 372 U.S. 293 (1963), for guidance regarding when an evidentiary hearing held in conjunction with a federal habeas corpus proceeding is not full and fair. *Townsend* specified that a petitioner would not have received a full and fair hearing unless: (1) the merits of the factual dispute were resolved; (2) the factual determination was supported by the record as a whole; (3) the fact finding procedures employed were adequate; (4) there was no substantial allegation of newly discovered evidence; and (5) the material facts were adequately developed at the earlier proceeding. *Id.* at 312-13.

[66] *Sanders*, 373 U.S. at 17. An intervening change in the law is beneficial to the petitioner only if applied retroactively. The law is unsettled with regard to when decisions should be retroactive to cover claims made by those whose convictions are already final. In Griffith v. Kentucky, 107 S. Ct. 708 (1987), the Court held that new rulings apply to all criminal cases not yet final, but left unresolved the question of the retroactive application of decisions to cases in collateral post conviction proceedings. *Id.* at 716 (Powell, J., concurring); *see also* Mackey v. United States, 401 U.S. 667 (1971). *Sanders*' reference to other justifications for not raising a point or argument relevant to a legal claim might include the situation in which the petitioner was unaware of the importance or significance of the point or argument. In Price v. Johnston, 334 U.S. 266 (1948), the Court held that a petitioner's unawareness of the legal significance of certain facts might excuse the failure to raise a claim in an earlier petition. For a discussion of *Price*, see *supra* text accompanying notes 30-33.

[67] 265 U.S. 224 (1924).

the governing standards for successive petitions that raised new grounds or grounds raised in an earlier application but not decided on the merits. Although the Court's reference to *Wong Doo* and *Price* is not surprising,[68] its reference to *Noia* and *Townsend* has led to much of the current confusion concerning the appropriate treatment for successive applications that raise new claims or claims not previously resolved on the merits.[69]

The issue in *Noia* was whether a claim brought by a state prisoner was cognizable in a federal habeas corpus proceeding when the petitioner lost his opportunity to present the claim during his state criminal prosecution because he failed to comply with a reasonable state procedural rule governing the raising of the claim. This problem was analogous to the question of whether a federal court should entertain a successive application that raises a claim that could have been raised in an earlier federal habeas corpus proceeding. In both situations the issue is whether a claim should be considered on the merits in a federal habeas proceeding when the claim could have been raised in a prior judicial proceeding, that is, during the state criminal prosecution or an earlier federal habeas proceeding. *Noia* held that the federal habeas court should entertain the procedurally defaulted claim as long as the petitioner had not deliberately bypassed the opportunity to have the claim considered in the course of the state criminal prosecution.[70] Thus, *Noia*

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[68] *See Sanders*, 373 U.S. at 12 (stating that "§ 2244 was obviously not intended to foreclose judicial application of the abuse-of-writ principle as developed in *Wong Doo* and *Price*."). However, as Justice Harlan points out, could *Price* have played any role in Congress' deliberations when it was decided only one month before the passage of the legislation? *Id.* at 28 n.3 (Harlan, J., dissenting).

[69] *See infra* notes 70-83 and accompanying text.

[70] Fay v. Noia, 372 U.S. 391, 439 (1963). *Noia*'s deliberate bypass approach specifically rejected application of the adequate and independent state law doctrine to federal habeas corpus proceedings when the state law rationale for precluding review is premised on procedural grounds. *Id.* (Harlan, J., dissenting). Under the adequate and independent state law doctrine, the Supreme Court will not review federal questions raised in state court proceedings if the state court judgment can be supported by an adequate and independent state law ground. *See* NAACP v. Alabama, 357 U.S. 449 (1958); Herb v. Pitcairn, 324 U.S. 117, *reh'g denied*, 325 U.S. 893 (1945); Murdock v. Memphis, 87 U.S. 590 (1875). The rationale for this doctrine is that if the state court judgment rests on an adequate and independent state law ground, the federal question is moot. Thus, if the Supreme Court addressed the issue, it would result in an advisory opinion. *Noia*, 372 U.S. at 429-30. Although it may seem anomalous that Supreme Court review is precluded, while review by the federal district court through federal habeas corpus is generally not, a number of reasons explain this apparent inconsistency. First, implicit in Supreme Court direct review is the idea that the Court is reviewing a lower court judgment. However, federal habeas corpus is not part of the

demonstrates that the federal interest in ensuring that a petitioner have an opportunity to litigate his federal claims in a federal forum outweighs any state interest in enforcing its reasonable procedural rules. To show deliberate bypass, the Court required (1) that the decision not to pursue the claim was voluntary and knowing; and (2) that the petitioner concurred in the decision, that is, it was not his counsel's decision.[71] Applied to a successive petition raising new claims or claims not previously resolved on the merits, *Noia* implicitly represents a philosophy that absent bad faith by the petitioner — an intentional desire to manipulate the system for forum shopping or other tactical reasons — the court should entertain the successive petition.

In practice, the deliberate bypass approach makes it highly unlikely that a court would foreclose consideration of successive petitions. It is difficult to conceive of a situation in which a petitioner would voluntarily and knowingly fail to raise a claim if he had any basis for believing that it might be meritorious.[72] Further, if *Noia*'s adoption of the

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appellate review process, but rather involves an independent determination of the legality of the detention. Thus, the failure to present a claim in the state criminal prosecution, although relevant to the scope of direct review of the process, is irrelevant to the availability of federal habeas corpus. *Id.* at 430-31. Second, if the purpose of precluding federal habeas corpus review is to ensure compliance with state procedural rules related to the raising of claims, sufficient deterrence is achieved because the petitioner forfeits his state remedies, as well as direct review by the United States Supreme Court. Put another way, the state's interests when the adequate and independent state law ground is substantive is greater than when it is procedural in nature. *Id.* at 432-34. As such, there is less reason to preclude federal habeas corpus review. Third, given the exhaustion requirement in 28 U.S.C. § 2254, it is strange to require federal courts to grant a second review of federal issues when the state has already granted one, but to deny any review when the state has refused to give one. *See* Brown v. Allen, 344 U.S. 443, 552 (1957) (Black, J., dissenting). For further discussion of the application of the adequate and independent state law doctrine to federal habeas corpus proceedings, see L. YACKLE, *supra* note 19, §§ 71, 74, at 298-300, 305-08; Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961).

[71] *Noia*, 372 U.S. at 439 (asserting that it is applying "[t]he classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464 — 'an intentional relinquishment or abandonment of a known right or privilege' " to the question of whether a petitioner had deliberately bypassed state remedies). *Noia* held that the petitioner's failure to pursue his appellate remedies was not a deliberate bypass since he feared that the death penalty might be imposed if he was successful on appeal and retried. In this regard, the Court emphasized that Noia's fears were not insubstantial in light of the trial judge's comments at his sentencing. *Id.* at 396 n.3, 439, 440.

[72] *See, e.g.*, Harris v. Brewer, 434 F.2d 166 (8th Cir. 1970) in which the court observed:

Johnson v. Zerbst[73] standard for determining whether a petitioner has waived a constitutional right is read literally, it makes it even more difficult for *Noia*'s deliberate bypass approach to foreclose consideration of a successive petition. *Zerbst* suggests that to find a waiver, the accused must forfeit a substantive right such as the right to counsel or the right to remain silent. An accused may forfeit these rights believing it is in his best interest. For example, a petitioner may believe that by cooperating with law enforcement he will receive a better disposition. If *Noia* requires that the petitioner must knowingly and voluntarily forfeit not only his right to raise a claim, but also a claim he knows is meritorious, such a decision is even more unlikely. Unlike the *Zerbst* context of preverdict waivers, a petitioner has little incentive to knowingly forfeit a meritorious claim after he is convicted.[74] Thus, *Noia*'s adoption of *Zerbst* is best understood as simply requiring that the petitioner knowingly and voluntarily forego his right to raise a claim, without requiring that he know that the claim is meritorious.

Sanders also cited *Townsend v. Sain*[75] as providing standards regarding the abuse of the writ determination. *Townsend* discussed the circumstances under which a federal habeas court was required to hold an evidentiary hearing on a petition filed by one in state custody.[76] To the extent *Townsend* may require an evidentiary hearing to resolve factual disputes that could have been resolved in the state criminal prosecution or in state post conviction collateral proceedings, it is relevant to the abuse of the writ question. That is, if an evidentary hearing should be held, then a successive petition should be entertained. However, *Sanders*' reference to *Townsend* indicates that *Sanders* probably intended nothing more than to apply the *Noia* deliberate bypass approach

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> It seems virtually inconceivable that a prisoner who seeks his liberty will not allege every ***known*** basis which might support his release. This is undoubtedly why so many frivolous grounds are alleged in post-conviction petitions since the prisoner, unschooled in law, seeks his freedom on every ground he can imagine. It is in the prisoner's self-interest to allege all constitutional infirmities, not because of procedural forfeiture, but because of continued imprisonment.

Id. at 169 (emphasis in original).

[73] 304 U.S. 458 (1938).

[74] Interestingly, *Noia* provides an example of when the petitioner might have an incentive to give up a meritorious claim. For example, if the petitioner believed incorrectly that the death penalty could be imposed if his appeal was successful and he was retried. *But see* Bullington v. Missouri, 451 U.S. 430 (1981) (precluding imposition of the death penalty on retrial).

[75] 372 U.S. 293 (1963).

[76] *See supra* note 65.

to successive petitions premised on factual evidence not previously presented. In the only page of *Townsend* to which *Sanders* refers,[77] the Court discusses when a federal habeas court must conduct an evidentiary hearing if the petitioner asserts he has newly discovered evidence. *Townsend* first held that an evidentiary hearing must be conducted if the newly discovered evidence was not previously reasonably available.[78] Observing that this standard was too restrictive, the Court further held that a hearing should be conducted when, for "reason[s] not attributable to the inexcusable neglect of petitioner," the evidence was not developed in the state proceeding.[79] *Townsend* then suggests that a successive petition should not be precluded if it is based on new ground even if the factual basis for the ground was previously reasonably available, unless the failure to present the factual evidence was due to petitioner's "inexcusable neglect."

In allowing a court to entertain a successive petition that raises a new claim based on factual evidence not previously reasonably available, *Townsend* is certainly not inconsistent with *Noia*'s deliberate bypass approach.[80] However, *Townsend*'s "inexcusable neglect" language is more problematic. Contrary to *Noia*, it suggests that a successive petition premised on additional factual evidence that raises a new ground or one not previously resolved on the merits might be precluded even absent petitioner's knowing and voluntary decision not to raise the claim or have it resolved in his initial application. However, a careful reading of *Townsend* indicates that the Court intended the phrase "inexcusable neglect" to be coextensive with *Noia*'s deliberate bypass language. This is evidenced by the fact that the "inexcusable neglect" standard permits a hearing even when the claim's factual basis was previously reasonably available, thus negating a negligence standard. Further, the phrase "inexcusable neglect" in *Townsend* is followed immediately by a citation to *Noia*.[81] This citation is followed by the statement that *Noia* provides the appropriate standard for determining whether an evidentiary hearing is required when the petitioner alleges that evidence crucial to his claim was not developed in the state proceeding.[82] Clearly, *Sanders* intended *Noia* to be the crucial reference in

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[77] *Sanders*, 373 U.S. at 18 (citing *Townsend*, 372 U.S. at 317).

[78] *Townsend*, 372 U.S. at 317.

[79] *Id.*

[80] In fact, this is one of the justifications set out in *Price* for allowing a successive petition. Price v. Johnson, 334 U.S. 266, 289-92 (1948).

[81] *Townsend*, 372 U.S. at 317.

[82] *Id.*

providing the principles for assessing successive petitions that raise new claims or claims not previously resolved on the merits.[83] Therefore, no reason exists for applying different standards when a court determines whether to entertain successive petitions that raise new claims premised on "new" factual evidence as contrasted with successive petitions that raise new claims in general.

In 1966, three years after *Sanders*, Congress again addressed the question of the res judicata effect to give to the denial of a prior federal habeas corpus petition. The legislation that ultimately emerged was part of a package of changes to the federal statutory remedy of habeas corpus.[84] The legislation, including those provisions addressing the suc-

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[83] *See* LAFAVE & ISRAEL, *supra* note 3, § 27.5, at 357 n.17:

> The [*Sanders*] Court also cited its discussion in *Townsend v. Sain*, but the reference was to a page in *Townsend* which adopted the standard of inexcusable neglect set down in *Fay v. Noia*, in determining petitioner's right to an evidentiary hearing on previously undisclosed evidence. Thus, since *Townsend* had relied on *Noia*, the critical reference in Sanders was to the discussion in *Noia*.

Id.

[84] In addition to the changes related to successive habeas petitions, the legislation added two other provisions designed to deal with the increased number of habeas corpus applications. First, § 2254(d) provided for a presumption of correctness to factual determinations made in the course of state proceedings unless the petitioner showed that he did not receive a full and fair hearing. 28 U.S.C. § 2254(d) (1982). Congress believed that such a provision would encourage states to provide adequate post conviction remedies and to keep records of evidentiary hearings in criminal and post conviction proceedings. Proponents argued that this would increase the protections afforded the constitutional rights of criminal defendants. *See* S. REP. NO. 1797, 89th Cong., 2d Sess. 3, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3665. The provision seems clearly designed to track *Townsend* although the Senate Report accompanying the legislation does not refer to *Townsend* and the House Report does so only to attribute the increase in habeas petitions filed by state prisoners partly to the *Townsend* decision. H.R. REP. NO. 1892, 89th Cong., 2d Sess. 6 (1966). Nevertheless, the reliance on *Townsend* is evident from the fact that § 2254(d) tracks comparable language in *Townsend* in identifying a number of circumstances when the presumption of correctness would not apply because the petitioner would not have received a full and fair hearing. *Compare* 28 § 2254(d) (1982) *with Townsend*, 372 U.S. at 313-18.

Section 2254(d) also provided that if the presumption of correctness was to apply, and an evidentiary hearing was held, the prisoner would have to establish by "convincing evidence" that the state court factual determination was erroneous. Although *Townsend* suggested that a federal habeas court could deny an evidentiary hearing on a disputed factual issue if the prisoner had previously received a full and fair hearing, § 2254(d) does not expressly incorporate that suggestion. However, given the legislative concern about the effect of the increased number of habeas petitions on the orderly administration of justice, Congress probably did not intend to preclude federal courts from denying an evidentiary hearing if the prisoner had previously received a full and

cessive petition issue, was clearly designed to deal with the increasing number of habeas corpus petitions brought by individuals in state custody[85] and their effect on the orderly administration of justice.[86] Con-

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fair hearing. The addition of the "convincing evidence" burden of proof provision was undoubtedly added to reflect *Townsend*'s admonition that the court always has the power to conduct an evidentiary hearing if it deemed it appropriate. *Townsend*, 372 U.S. at 310-12; LAFAVE & ISRAEL, *supra* note 3, § 27.6, at 366-67.

Congress also enacted § 2244(c) to address the problem of the increasing number of habeas applications. This provision basically provides that if an individual in state custody seeks review of the state court criminal judgment in the United States Supreme Court, then any Supreme Court judgment that adjudicates an issue of fact or law is conclusive in any subsequent federal habeas corpus proceeding. However, Congress provided an exception if the applicant could establish that a material and controlling fact did not appear in the Court's record and its absence was not due to the applicant's failure to exercise reasonable diligence.

Section 2244(c) only comes into play when the "prior judgment of the Supreme Court . . . has been on an appeal or . . . a writ of certiorari . . . of the decision of *such* state court." 28 U.S.C. § 2244(c) (1982). It does not apply to a successive habeas corpus application if the Supreme Court rendered a decision on the merits in reviewing an earlier federal habeas corpus proceeding. In such a situation, the prior judgment of the Supreme Court would not be an appeal or review "of the decision of the such state court." Thus, § 2244(c) does not come into play in the successive petition context. The legislative history indicated that § 2244(c) intended to provide "for a qualified application of the doctrine of res judicata." S. REP. NO. 1797, 89th Cong., 2d Sess. 2, 4, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3664, 3666. Its practical significance is limited since, to satisfy the exhaustion requirement of 28 U.S.C. § 2254(d), a habeas petitioner need not seek a writ of certiorari with the Supreme Court or when he has a right of direct appeal, he need not seek to invoke the Court's appellate jurisdiction. *See* Coleman v. Balkcom, 451 U.S. 949 (1986) (Rehnquist, J., dissenting); County Court of Ulster County v. Allen, 442 U.S. 140 (1979); *Noia*, 372 U.S. at 434-35; L. YACKLE, *supra* note 19, § 51, at 250-51. As a result, whether § 2244(c) will come into play is essentially left to the discretion of the applicant. In addition, it only applies if a Supreme Court ruling constitutes a decision on the merits. As to whether a Supreme Court decision is an actual adjudication on the merits of an issue of fact or law, see Neil v. Biggers, 409 U.S. 188 (1972). For a complete discussion of the questions posed by § 2244(c), see L. YACKLE, *supra* note 19, § 156, at 566-77.

[85] This increase was partly attributed to the Supreme Court decisions in *Noia*, *Townsend*, Brown v. Allen, 344 U.S. 443 (1953), and Gideon v. Wainwright, 372 U.S. 335 (1963). *See* H.R. REP. NO. 1892, 89th Cong., 2d Sess. 5-6 (1966). In *Brown* the Court made explicit that all federal constitutional violations were cognizable in federal habeas proceedings. *Brown* also held that the prior denial of certiorari to review a state criminal judgment was without precedential value in a federal habeas corpus proceeding, and that the federal habeas court was not necessarily bound by state factual findings and could conduct an evidentiary hearing when appropriate. In *Gideon* the Court held that the sixth amendment right to counsel was applicable to state criminal prosecutions. It is difficult to see how *Gideon*, unlike the decisions in *Noia*, *Townsend* and *Brown*, is relevant to the increase in federal habeas petitions brought by state prisoners.

[86] The Senate report accompanying the legislation stated that in 1941 only 134 fed-

gress believed that the vast majority of these petitions were without merit and that many successive applications raised claims previously considered or claims that should have been raised in an earlier application.[87] The legislation was not directed at federal prisoners' post conviction petitions. Apparently, Congress believed that the number of section 2255 applications was not overly burdensome and that section 2244 and section 2255's res judicata provision were sufficient to deal with any successive application problems.

The 1966 legislation divided 28 U.S.C. section 2244 into three subsections. The new section 2244(a)[88] exactly tracked section 2244 except

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eral habeas corpus petitions were filed in the federal district courts by those in state custody. By 1957 the number had increased to 814. It noted that 1692 applications were filed by state court prisoners in fiscal 1963; 3248 applications in fiscal 1964; 4845 applications in fiscal 1965; and 3773 applications in the first nine months of fiscal 1966. *See* S. REP. NO. 1797, 89th Cong., 2d Sess. 1, 2, 8, 9, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3663-64, 3670-71; *see also* H.R. REP. NO. 1892, 89th Cong., 2d Sess. 6-7 (1966).

Legislation to deal with the problem of the increasing number of federal habeas petitions that state prisoners were filing was first introduced in the 84th Congress, soon after *Brown*. Similar legislation was introduced in the 85th, 86th, 87th, and 88th sessions of Congress, before legislation addressing this concern was enacted by the 89th Congress. *See* H.R. REP. NO. 1892, 89th Cong., 2d Sess. 3-4 (1966). Although not mentioned in the legislative reports accompanying the 1966 legislation, the legislative reports accompanying the earlier legislation indicated that the increased number of habeas petitions filed by state prisoners was particularly problematic because of comity concerns. These legislative reports emphasized the resentment created when a single federal district court judge was able to overrule a state's highest court. Additionally, they reported problems with the states' ability to enforce their criminal judgments, especially in capital cases, because of the increased number of habeas petitions. *See* H.R. REP. NO. 1384, 88th Cong., 1st Sess. 5, 15 (1964); H.R. REP. NO. 548, 86th Cong., 1st Sess. 6, 12, 15-16 (1959); S. REP. NO. 2228, 85th Cong., 2d Sess. 3, 5 (1959); H.R. REP. NO. 1293, 85th Cong., 2d Sess. 3, 4, 6 (1958); H.R. REP. NO. 1200, 84th Cong., 1st Sess. 3, 4, 6 (1955).

[87] The Senate report accompanying the legislation said that more than 95% of the petitions were without merit. S. REP. NO. 1797, 89th Cong., 2d Sess. 2, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3664. Congress did not document, in any analytic fashion, whether some of these were successive petitions. *See* Leighten, *Federal Supremacy and Federal Habeas Corpus*, 12 ST. LOUIS U.L.J. 74, 90-91 (1967).

[88] Section 2244(a) provides:

> (a) 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 judgment of a court of the United States 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 heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served

that Congress deleted the language making the provision applicable to individuals detained pursuant to a state court judgment. Thus, section 2244(a) only governed successive applications filed by those in federal custody.[89] Congress added section 2244(b)[90] to address the res judicata question of successive applications filed by individuals in state custody.

Section 2244(b) differed from its predecessor section 2244 and the new section 2244(a) in four significant respects. First, the "ends of justice" language contained in section 2244 and retained in section 2244(a) was deleted from section 2244(b). Taken literally, this meant that a federal court should not entertain a successive application filed by one in state custody that raises the same ground previously decided on the merits even if the "ends of justice," as defined in *Sanders*,[91] dictate to the contrary. However, it is difficult to believe that Congress intended this result. First, the language of section 2244(b) authorizes a court to not entertain a successive petition, but does not require it to do so. This suggests that the court is free to consider equitable considerations in deciding whether to entertain a successive petition.[92] Second, an

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by such inquiry.

28 U.S.C. § 2244(a) (1982).

[89] However, under *Sanders*, § 2244(a) also governs successive § 2255 applications. But since § 2255 makes habeas corpus unavailable to federal prisoners when the § 2255 remedy is adequate, § 2244(a) would directly apply only to those in federal custody who seek to challenge executive rather than judicial actions. *See* L. YACKLE, *supra* note 19, § 153, at 560; Note, *Developments in the Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1151 n.66 (1970) [hereafter Note, *Developments*].

[90] Section 2244(b) provides:

> (b) 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.

28 U.S.C. § 2244(b) (1982).

[91] *See Sanders*, 373 U.S. at 16-17.

[92] *See* Kuhlman v. Wilson, 106 S. Ct. 2616, 2625-26, 2635 (1986); Walker v. Lockhart, 726 F.2d 1238, 1242 n.10 (8th Cir.) (en banc), *cert. denied*, 466 U.S. 958 (1984); Bailey v. Oliver, 695 F.2d 1323 (11th Cir. 1983); Sinclair v. Blackburn, 599 F.2d 673 (5th Cir. 1979); St. Pierre v. Helgenoe, 545 F.2d 1306 (1st Cir. 1976); Cancino v. Craven, 467 F.2d 1243 (9th Cir. 1972); United States *ex rel.* Schnitzler v. Follette, 406

earlier version of section 2244(b), initially proposed in 1959 and which the House passed but the Senate failed,[93] provided that "a subsequent application . . . *shall not be entertained.*"[94] The deletion of the mandatory language further evidences Congress' desire not to preclude a court from considering equitable factors in determining whether to entertain a successive petition that raises a claim previously resolved on the merits. However, the absence of the "ends of justice" language may, as has been suggested,[95] indicate some discomfort with its open-ended nature.

The second difference between section 2244(b), its predecessor section 2244, and section 2244(a) relates to the question of successive petitions asserting new grounds for relief. In *Sanders* the Supreme Court held that section 2244 did not address this question. Rather, it concluded that *Wong Doo*, *Price*, *Noia*, and *Townsend* provided the controlling principles for determining whether a court should entertain a successive petition raising a new ground.[96] Unlike section 2244 and section 2244(a), section 2244(b) specifically addresses this question. It provides that a successive petition that raises a new ground need not be entertained unless the court "is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."[97] In light of *Sanders* and *Noia*, Congress' choice of the phrases "deliberately withheld" and "otherwise abused the writ" does not seem inadvertent, despite the lack of any reference in the legislative history to *Sanders* and given that the only reference to *Noia* is in the House Report, which partly attributes the increase in habeas petitions to that decision.[98] Nevertheless, the language seems to reflect an intent to have the *Sanders* and *Noia* principles govern successive petitions filed by those in state custody. This is further evidenced by the fact that the earlier version of section 2244(b) provided that "a subsequent application . . . shall not be entertained

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F.2d 319 (2d Cir. 1969); L. YACKLE, *supra* note 19, § 154, at 561.

[93] *See* H.R. REP. NO. 1892, 89th Cong., 2d Sess. 4 (1966); Note, *Developments*, *supra* note 89, at 1151-52 n.168.

[94] H.R. REP. NO. 1384, 88th Cong., 2d Sess. 1 (1964); H.R. REP. NO. 548, 86th Cong., 1st Sess. 1 (1959).

[95] *See* Note, *Developments*, *supra* note 89, at 1151-52 n.168. In this context it also must be asked whether it is reasonable to believe, for comity reasons or because of the number of habeas petitions filed by state prisoners, that Congress intended different standards to govern successive applications filed by state and federal prisoners.

[96] *See supra* text accompanying note 62.

[97] 28 U.S.C. § 2244(b) (1982).

[98] *See* H.R. REP. NO. 1892, 89th Cong., 2d Sess. 6 (1966).

. . . except on any factual or other ground not presented . . . and then only on a showing of a *reasonable excuse* for failure to present such . . . ground . . . on the earlier application."[99] The deletion of the "reasonable excuse" language also indicates an intent to incorporate *Sanders* and *Noia*.

The third difference between section 2244(b), its predecessor section 2244, and section 2244(a) relates to the definitional question of whether a successive petition raises a new ground. *Sanders* held that a ground was "a sufficient legal basis for granting the relief sought" and noted that the same claim could be supported by different factual allegations.[100] Under *Sanders* a successive petition presenting a legal claim raised earlier but premised on a different factual basis does not raise a new ground. Thus, the equitable principles reflected in section 2244's "ends of justice" language govern. However, section 2244(b) states that a successive application premised on a "factual . . . ground not adjudicated" would be a new ground.[101] Therefore, a court should entertain a successive application that raises such a ground unless it can be established that the petitioner "deliberately withheld" the new factual ground or "otherwise abused the writ."[102] As noted earlier, section 2244(b)'s legislative history does not refer to *Sanders* much less its definition of a claim. Thus, the significance of the outlined distinction depends on whether a court would reach different results if it treated a successive petition that raises a new factual basis for a claim as a petition that raises a new ground or one which does not. Given *Sanders*' reference to *Townsend* as to when the "ends of justice" might warrant reconsideration of a claim previously resolved on the merits[103] and *Townsend*'s reference to *Noia* when the claim involves new evidence,[104] arguably it is of no practical significance whether or not a court treats a successive petition premised on new facts as raising a new ground. Further, considering the rationale for the legislative changes, it is difficult to believe that Congress intended section 2244(b)'s "factual or other ground" language to relax the res judicata effect given to the denial of a prior habeas application.

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[99] *See* H.R. REP. NO. 1384, 88th Cong., 2d Sess. 1 (1964); H.R. REP. NO. 548, 86th Cong., 1st Sess. 1 (1959).

[100] *See supra* note 60 and accompanying text.

[101] 28 U.S.C. § 2244(b) (1982).

[102] *See* Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 49-50 n.216 (1977).

[103] *See supra* note 65.

[104] *See supra* text accompanying notes 81-82.

The fourth difference in section 2244(b) is less significant. The language of section 2244(b) suggests that a court is only permitted to refuse to entertain a successive petition that presents a factual question if an evidentiary hearing directed to the merits of the factual question was held during the first federal habeas proceeding.[105] However, *Sanders* held that when a factual matter was at issue, a decision on the merits occurs when either a ruling is made after an evidentiary hearing, or an examination of the record conclusively resolves the issue.[106] If section 2244(b) is read to be inapplicable absent a finding after an evidentiary hearing, it would be less restrictive than section 2244 or section 2244(a). Once again, considering the expressed rationale for the legislation,[107] it is unlikely that Congress intended this result.

Despite the differences between section 2244(a), section 2244(b), and their predecessor section 2244, and the absence of any reference to *Sanders* in the legislative history, it seems clear that Congress did not intend that either section 2244(a) or section 2244(b) depart from the *Sanders* principles. Specifically, equitable considerations, as reflected in section 2244(a)'s "ends of justice" language, determine whether a successive petition that raises the same ground previously decided on the merits should be entertained. For petitions that raise new grounds or grounds not previously decided on the merits, *Noia*, *Townsend*, *Wong Doo*, and *Price* control. Judicial decisions subsequent to the 1966 changes reflect this perception of congressional intent.[108]

In 1976 Congress again addressed the question of successive petitions when it approved "Habeas Corpus" rules and model forms promulgated by the United States Supreme Court.[109] The rules were designed to govern in proceedings that arise under both section 2254 and section 2255.[110] Rule 9(b) specifically addressed the successive petition ques-

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[105] *See* L. YACKLE, *supra* note 19, § 154, at 561; Williamson, *Federal Habeas Corpus: Limitations on Successive Applications from the Same Prisoner*, 15 WM. & MARY L. REV. 265, 273 (1973); *see also* Bass v. Wainwright, 675 F.2d 1204 (11th Cir. 1982); Hutchinson v. Craven, 415 F.2d 278, 280 (9th Cir. 1969).

[106] *Sanders*, 373 U.S. at 16.

[107] *See supra* notes 84-87 and accompanying text.

[108] *See* Papaskar v. Estelle, 612 F.2d 1003 (5th Cir. 1980), *cert. denied*, 449 U.S. 885 (1981); L. YACKLE, *supra* note 19, § 154, at 560; Clinton, *supra* note 102, at 37-38.

[109] *See* H. REP. NO. 94-1471, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2478, 2485 (1976).

[110] The rules were promulgated pursuant to the Rules Enabling Acts. *See* 18 U.S.C. §§ 3771-3772 (1982) (authorizing the Court to promulgate rules regarding criminal proceedings); 28 U.S.C. § 2072 (1982) (authorizing the Supreme Court to promulgate rules governing civil actions). The rules were transmitted to Congress on April 26,

tion. Its meaning is clear from the advisory committee's notes and the legislative history surrounding the adoption of the rule since it is one of the few provisions that Congress significantly modified.[111]

As transmitted to Congress, Rule 9(b) read as follows:

> (b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition is not excusable.[112]

Similar to section 2244(b), the proposed rule addressed the situation in which the successive application either raised a ground previously resolved on the merits or raised a new claim.[113]

In regard to successive applications that raised claims previously re-

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1976, and became effective, as amended, on February 1, 1977. They were prompted by a concern that a comprehensive set of procedural rules was needed to govern habeas proceedings. As Professor Clinton noted, since the habeas remedy is considered a civil proceeding yet clearly involves matters of criminal law and procedure, it was unclear whether the *Federal Rules of Civil Procedure* should govern. Additionally, existing federal statutory provisions governing habeas matters were either incomplete or out of date. In Harris v. Nelson, 394 U.S. 286 (1969), when addressing the question of whether the *Federal Rules of Civil Procedure* that govern discovery should apply to habeas proceedings, the Court observed the need for rulemaking in this area. *See* Clinton, *supra* note 102, at 17-22.

[111] The rules that govern successive applications under 28 U.S.C. §§ 2254, 2255 are identical. Congress changed only four of the eleven rules that comprised the proposed Habeas Rules: Rules 2, 8, 9, and 10. The only changes of any significance, other than the amendment to Rule 9(b), were the changes made to Rule 9(a). This provision dealt with delayed habeas applications. It provided that a petition could be dismissed if the state established that the delay in filing prejudiced its ability to respond to the application unless the petitioner established that he did not have knowledge of his claim despite the exercise of reasonable diligence prior to when the circumstances prejudicial to the state occurred. Rule 9(a) also provided that if the petition was filed more than five years after the judgment or act being challenged, a rebuttable presumption was created that the state was prejudiced. Congress deleted any reference to the presumption in the final rule, finding it improper to require the petitioner to overcome a presumption of prejudice. It left intact the general language that, under some circumstances, delay in filing could result in the dismissal of the petition. *See* H. REP. NO. 94-1471, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2478, 2485.

[112] *See* H. REP. NO. 94-1471, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2478, 2485.

[113] If read literally, the proposed rule does not address the situation in which the claim raised in the successive petition was raised in an earlier application but not resolved on the merits. However, the advisory committee's notes make clear that a successive petition that raises a claim previously raised but not resolved on the merits was to be controlled by the same standards that govern successive applications raising new claims. *See* Rule 9(b) advisory committee's notes.

solved on the merits, the proposed rule's language essentially tracked section 2244(b), rather than section 2244(a) as section 2244(a)'s "ends of justice" language was omitted. However, the proposed rule's permissive language and the advisory committee's specific reference to *Sanders* and its "ends of justice" language clearly suggest that the proposed rule did not intend to depart from the *Sanders* standard.[114] Proposed Rule 9(b) was not designed to preclude a court from considering a successive petition that raised the same claim previously resolved on the merits if the "ends of justice"[115] warranted further review.

However, the proposed rule's treatment of successive petitions that raised new claims[116] was more problematic and ultimately resulted in congressional action to amend the rule. The problem revolved around the proposed rule's use of the phrase "not excusable" to define the governing standard for successive petitions that raised a new claim. Although the advisory committee's notes implicitly suggested it intended that *Sanders* provide the governing standards, the specific references to *Sanders* were selective and did not mention that *Sanders* incorporated *Noia*'s deliberate bypass approach.[117] Therefore, the comments suggested that the rule was intended to give courts greater discretion to dismiss a successive petition.[118] As a result, Congress became uncomfortable with the "not excusable" language,[119] and consequently, amended the rule by substituting the phrase "constituted an abuse of

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[114] Congress' intent to make this section of Rule 9(b) consistent with *Sanders* is reflected by the scant attention devoted to this section when Congress considered the Rules. *See* Clinton, *supra* note 102, at 30. This lack of attention should be contrasted with the attention given that part of the Rule dealing with new claims. *See infra* notes 116-21 and accompanying text. Also, two of the three cases the advisory committee cited with approval on the question of successive petitions that raised the same claim adopted *Sanders*' ends of justice approach. *See* Brown v. Peyton, 435 F.2d 1352, 1354 (4th Cir. 1970); Gains v. Allgood, 391 F.2d 692, 696 (5th Cir. 1965). The third case, Hutchinson v. Craven, 415 F.2d 278 (9th Cir. 1969), does not address this question because the court concluded that the successive petition should have been entertained for other reasons. Finally, in discussing Rule 9(b) generally, the advisory committee's notes state: "The bar set up . . . is not one of rigid application, but rather is within the discretion of the courts on a case by case basis." Rule 9(b) advisory committee's notes.

[115] *See supra* notes 51-108 and accompanying text.

[116] This includes claims not previously resolved on the merits. *See supra* text accompanying note 112.

[117] *See* Rule 9(b) advisory committee's notes.

[118] Clinton, *supra* note 102, at 38-39.

[119] *See* H. REP. NO. 94-1471, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2478, 2482 (suggesting that the "not excusable" language "created a new and undefined standard that gave a judge too broad a discretion to dismiss a second or successive petition").

the writ" for the "not excusable" language. The Senate Report accompanying the change stated that its purpose was to bring "Rule 9(b) into conformity with existing law."[120] This implicitly meant *Sanders*, *Noia*, and the res judicata provisions of section 2244 and section 2255.[121]

If any ambiguity existed over Congress' intent in 1966, its approval of the Habeas Corpus Rules in 1976 made clear its decision to adopt the *Sanders* principles regarding reviews of successive federal habeas corpus petitions.[122] To date, Congress has not addressed this issue again.

II. Successive Petitions: Problem Areas

In examining the problems that have arisen in interpreting the legislative standards governing successive petitions, it is helpful to differentiate between successive applications that raise a claim previously resolved on the merits and petitions that raise new claims or claims raised earlier but not resolved on the merits. Problems have arisen in both contexts.

A. Successive Petitions That Raise the Same Claim

Questions that arise regarding successive applications that raise claims previously resolved on the merits center primarily around determining what circumstances are sufficient to warrant reconsideration of a claim. Prior to the recent Supreme Court decision in *Kuhlman v. Wilson*,[123] courts adhered to *Sanders*' essentially open-ended approach.[124] However, in *Wilson* a plurality of the Court asserted that

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[120] *Id.*

[121] There is no indication that the Rule was intended to be inconsistent with existing statutory res judicata provisions governing successive applications. *See* Clinton, *supra* note 102, at 50-51 n.25; *see also* 28 U.S.C. § 2244(b) (1982); H. Rep. No. 94-1471, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 2478, 2482. Assuming an inconsistency exists, the Rule would govern as long as it does not "abridge, enlarge or modify any substantive right." *See* 28 U.S.C. § 2072 (1982); *see also* Clinton, *supra* note 102, at 51-77.

[122] *See* Clinton, *supra* note 102, at 50-51; *see also* Rose v. Lundy, 455 U.S. 509, 521 (1982); Passman v. Blackburn, 797 F.2d 1335, 1341 (5th Cir. 1986). Interestingly, at the time the Habeas Corpus Rules were adopted in 1976, the continuing viability of *Noia* was suspect. *See infra* notes 169-99 and accompanying text. However, the legislative history of Rule 9(b) gives no indication that Congress intended to reject *Sanders*' adoption of the deliberate bypass approach.

[123] 106 S. Ct. 2616 (1986).

[124] *See, e.g.*, Fleming v. Kemp, 794 F.2d 1478, 1481-82 (11th Cir. 1986); Richmond v. Ricketts, 774 F.2d 957, 960 (9th Cir. 1985); Young v. Kemp, 758 F.2d 514, 517,

this approach was too broad and suggested a more restrictive standard.

In *Wilson* the habeas petitioner argued that a Supreme Court decision, decided subsequent to the ruling on his initial habeas application, warranted reconsideration of his claim.[125] Citing *Sanders*' "ends of justice" language, the Second Circuit Court of Appeals agreed.[126] Finding the facts of the subsequent Supreme Court decision indistinguishable from Wilson's case, the court of appeals set aside his conviction.[127]

The Supreme Court reversed, a majority holding that the subsequent Supreme Court decision upon which the court of appeals relied did not warrant reversal. As to the successive petition issue, four members of the Court (Justices Powell, Rehnquist, O'Connor, and Chief Justice Burger) concluded that successive petitions that raise the same claim previously rejected on the merits should not be entertained unless the applicant "supplements his constitutional claim with a colorable showing of factual innocence."[128] This required establishing a fair probability, in light of all probative evidence, including evidence alleged to be illegally admitted and evidence discovered subsequent to trial, that the trier of fact would have entertained a reasonable doubt of guilt.[129]

In reaching its conclusion, the plurality purported to rely on *Sanders*, 28 U.S.C. section 2244(b) and Rule 9(b). It rejected the state's argument that the absence of the "ends of justice" language in section

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518 (11th Cir. 1985); Bass v. Wainwright, 675 F.2d 1204, 1206-08 (11th Cir. 1982); Potts v. Zant, 638 F.2d 727, 740 (5th Cir. 1981); McKeldin v. Rose, 631 F.2d 458, 459 (6th Cir. 1980); Sinclair v. Blackburn, 599 F.2d 673, 675 (5th Cir. 1979); St. Pierre v. Helgemoe, 545 F.2d 1306, 1307-08 (1st Cir. 1976). In *Bass* the court held that a "plain error" by the court in the first habeas proceeding would satisfy the ends of justice standard, thus warranting a reconsideration of the same claim in a successive petition. The successive petition question arises in this context when the petitioner does not seek appellate review of the first habeas court's plain error ruling. *Bass*, 675 F.2d at 1206-08. *See also* Bailey v. Oliver, 695 F.2d 1323 (11th Cir. 1983); Cancino v. Craven, 467 F.2d 1243, 1246 (9th Cir. 1972).

[125] The claim presented in both Wilson's first and second habeas application was whether his sixth and fourteenth amendment right to counsel was violated when a cellmate testified to incriminating statements he made to the cellmate. Unknown to Wilson, his cellmate was a police informant. Wilson argued that the Supreme Court decision in United States v. Henry, 447 U.S. 264 (1980), decided subsequent to his initial application, warranted a second look at this claim.

[126] Wilson v. Henderson, 742 F.2d 741, 743 (2d Cir. 1984).

[127] *Id.*

[128] *Wilson*, 106 S. Ct. at 2627. The Court adopted a standard proposed some 16 years earlier as a prerequisite for federal habeas review. *See* Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

[129] *Wilson*, 106 S. Ct. at 2627 n.17.

2244(b) precluded a court from entertaining a successive petition raising the same claim rejected on the merits in an earlier petition.[130] However, the plurality noted that *Sanders* provided very little guidance on this issue,[131] and that the history surrounding section 2244(b) and Rule 9(b) showed a heightened concern with repetitious petitions.[132] Finally, the plurality stated that the Court had previously defined the scope of the habeas remedy by balancing the interests at issue and not simply "by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error."[133] In balancing these interests, the plurality emphasized the importance of finality in the administration of the criminal justice system. The plurality stated that finality served the goals of deterrence, rehabilitation, punishment, and federalism.[134] Consistent with these interests, the plurality believed that its approach effectuated "the clear intent of Congress that successive federal habeas review should be granted only in rare cases, but that it should be available when the ends of justice so require."[135]

Justice Brennan, in an opinion joined by Justice Marshall, disagreed sharply with the view that successive petitions that raise a claim previously resolved on the merits should be dismissed unless the claim is coupled with an assertion of factual innocence.[136] Contrary to the plurality's assertions, Justice Brennan emphasized that the Court's earlier decisions did not suggest that the availability of habeas relief was dependent on a balancing of the prisoner's interest in freedom from unconstitutional restraint against any legitimate state interest in the administration of its criminal laws.[137] Brennan viewed those decisions

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[130] *Id.* at 2625-26.

[131] *Id.* at 2624.

[132] *Id.* at 2624-26.

[133] *Id.* at 2624.

[134] *Id.* at 2626-27.

[135] *Id.* at 2627.

[136] *Id.* at 2632 (Brennan, J., dissenting). Although Justice Stevens did not join in Justice Brennan's opinion, he agreed that a colorable claim of innocence was not a condition precedent to entertaining a successive petition that raised a claim previously rejected. *Id.* at 2639 (Stevens, J., dissenting). Justices White and Blackmun joined the plurality opinion on the merits of the petitioner's claim, but did not join that part of the opinion that addressed the successive petition question. *Id.* at 2618-19.

[137] *Id.* at 2632-33 (Brennan, J., dissenting) ("Contrary to the plurality's assertions, the Court has never delineated the general scope of the writ by weighing the competing interests of the prisoner and State."). The cases which the plurality relied on for its balancing propostion: the procedural default cases, *Noia* and its progeny, and Stone v. Powell, 428 U.S. 465 (1976), which held that fourth amendment claims were not cognizable in federal habeas if the petitioner received a full and fair hearing on his claim

limiting the scope of the remedy[138] as exceptions to the general rule that federal habeas is available to inquire into any alleged constitutional error. Although the difference between the plurality and Justice Brennan may seem more a matter of semantics than substance,[139] their disagreement reflects a fundamental difference concerning the reach of the federal habeas remedy. This dispute concerns whether the habeas remedy should be viewed as an integral part of the judicial review process of criminal convictions or whether it should be seen as an extraordinary remedy designed only to correct clear miscarriages of justice.[140]

Justice Brennan also found fault with the plurality's analysis of the legislative history accompanying section 2244(b) and Rule 9(b). He saw a clear intent by Congress to codify *Sanders*.[141] As discussed earlier, *Sanders* did not limit review to cases in which the petitioner coupled his claim with a showing of factual innocence. Rather, *Sanders* emphasized that the ends of justice test "cannot be too finely particularized."[142] Further, *Sanders* specifically identified an intervening change in the law as one example of when the ends of justice might warrant further consideration of a claim.[143] This is arguably what occurred in *Wilson*. Finally, although Justice Brennan agreed that section 2244(b) and Rule 9(b) were prompted by a concern over meritless and vexatious successive petitions, he saw no indication that they were designed

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in the state court system, were distingished as exceptions to the general rule that habeas corpus review is available to inquire into any alleged constitutional violation. *Id.* at 2632 (Brennan, J., dissenting).

[138] *See supra* note 137.

[139] The plurality observed "[w]hether one characterizes these decisions as carving out an 'exception' to federal habeas jurisdiction, as the dissent apparently prefers to do, . . . or as concerning the scope of that jurisdiction, the result is the same, and was reached under a framework of analysis that weighed the pertinent interests." *Wilson*, 106 S. Ct. at 2624 n.8.

[140] *See* Barefoot v. Estelle, 463 U.S. 880 (1983). In *Barefoot* the Court observed:

> [I]t must be remembered that direct appeal is the primary avenue for review of a conviction or sentence . . . . When the process of direct review — which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari — comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.

Id. at 887. In this context *compare* Stone v. Powell, 428 U.S. 465 (1976) *with* Kimmelman v. Morrison, 106 S. Ct. 2574 (1986); *see generally* Friendly, *supra* note 128.

[141] *Wilson*, 106 S. Ct. at 2635 (Brennan, J., dissenting).

[142] *Sanders*, 373 U.S. at 17.

[143] *Id.*

to preclude successive petitions filed by a "guilty" person raising a claim previously resolved, regardless of the reasons advanced for reconsideration.[144]

Justice Brennan has the better argument. The plurality's assertion that its standard effectuates "the clear intent of Congress" is remarkable considering that Congress clearly intended Rule 9(b) to codify *Sanders* and at a minimum, intended that equitable considerations govern in section 2244(b). The plurality's position is even more remarkable as it admitted this was Congress' intent with regard to Rule 9(b) in *Rose v. Lundy*.[145] Even if some ambiguity exists regarding this question, no indication exists that Congress intended to limit successive petitions that raise claims previously resolved to those which could make a showing of factual innocence. The plurality approach simply reflects a judge-made determination of the reach of the habeas remedy that has little connection to any evidence of congressional intent.

After *Wilson* the considerations relevant to determine whether a successive application should be entertained when it raises a claim previously decided on the merits remains unresolved.[146] Obviously, the positions that Justices White, Blackmun, Scalia, and Kennedy take will be crucial. Unless the Court is willing to ignore the seemingly unequivocal evidence of congressional intent on this question,[147] the plurality's view in *Wilson* should be rejected.

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[144] *Wilson*, 106 S. Ct. at 2636 (Brennan, J., dissenting). Justice Brennan also noted what he termed "significant instititional problems" with the plurality approach. He argued that the factual innocence standard required the federal habeas court to function like a state trier of fact, diverting the court's attention from its primary purpose of determining whether the prisoner's detention was unlawful. He also noted that it was unclear how the standard would apply to errors in the penalty phase of a capital case in which the issue was not guilt or innocence. *Id.* at 2636 n.7 (Brennan, J., dissenting).

[145] 455 U.S. 509 (1982); *see infra* text accompanying notes 153-65.

[146] *See, e.g.*, Evans v. McCotter, 805 F.2d 1210, 1215 (5th Cir. 1986) ("Assuming, without deciding, that an intervening change in the law would qualify under the 'ends of justice' exception to the successive petitions rule, Rule 9(b) . . . *but see Kuhlmann v. Wilson*"); *see also* Moore v. Blackburn, 806 F.2d 560 (5th Cir. 1986).

[147] In this context, consider the following remarks by Justice Rehnquist in Wainwright v. Sykes, 433 U.S. 72 (1977): "The foregoing discussion . . . is pertinent here only as it illustrates this Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." *Id.* at 81.

B. Successive Petitions That Raise New Claims or Claims Not Previously Resolved on the Merits

In the context of successive petitions that raise new claims or claims not previously resolved on the merits, the problems that arise principally flow from the overruling of *Noia*'s deliberate bypass approach.[148] *Noia*'s deliberate bypass approach was replaced by a cause and prejudice standard. Under this standard, a state prisoner's procedurally defaulted claim is not cognizable in a federal habeas proceeding unless he establishes cause for the default and that prejudice resulted from the failure to pursue the claim in the appropriate manner.[149] This approach is essentially a 180-degree turn from *Noia*, which created a presumption that federal courts would entertain the claim except when the petitioner deliberately chose to bypass available state remedies. In contrast, the cause and prejudice standard seems to create a presumption against the court considering such a claim absent extraordinary circumstances.[150]

Noia's overruling and its replacement with a more restrictive approach gives rise to two principal questions regarding successive petitions that raise new claims or claims not previously resolved on the merits. First, is a court free to depart from the governing principles set out in *Sanders* and *Noia* given their codification in 28 U.S.C. section 2244(b) and Rule 9(b)? Although a court can overrule or deviate from an earlier decision when Congress has not acted to ratify the decision, can the court deviate from a decision when Congress has seemingly codified that decision into statutory law?[151] Second, assuming a court is free to depart from *Sanders* and *Noia*, what should the governing principles be? Should the *Sanders* holding that the same standards govern in determining whether a procedurally defaulted claim should be heard in a federal habeas proceeding and whether a successive petition should be entertained be followed given the overruling of *Noia*?

Subsequent to the adoption of the Habeas Corpus Rules, in only one decision, *Rose v. Lundy*,[152] and then only indirectly, has the Supreme

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[148] *See infra* notes 169-200 and accompanying text.

[149] *See infra* notes 191-99 and accompanying text.

[150] *See infra* notes 206-74 and accompanying text.

[151] In this context, contrast the following comments of Justice Brennan with those of Justice Rehnquist in note 147: "For while Congress did leave the federal courts considerable latitude to shape the availability of the writ, Congress did not issue this Court a mandate to sharpen its skills at ad hoc legislating." Murray v. Carrier, 106 S. Ct. 2661, 2679 (1986) (Brennan, J., dissenting).

[152] 455 U.S. 509 (1982).

Court addressed the issue of successive federal habeas applications that raise new grounds.[153] Although the decision was rendered some five years after the Court cast serious doubt on the continued viability of *Noia*,[154] the Justices' opinions did not state that *Noia*'s demise was relevant to the resolution of the issues posed by successive petitions that raise new grounds. The courts of appeals, however, as will be discussed later, have questioned whether *Sanders*' adoption of *Noia*'s deliberate bypass approach should continue to control[155] given the overruling of *Noia*.

Lundy addressed the issue of whether a federal district court should entertain a state prisoner's habeas petition that raised some claims for which state judicial remedies were exhausted and some for which state remedies were not pursued.[156] The Court concluded that these petitions should be dismissed in their entirety, rejecting the argument that the exhausted claims should be entertained.[157] Under *Lundy* a petitioner who has filed a "mixed petition" has two options. First, he can amend the petition to delete the unexhausted claims and then proceed on the exhausted claims. Alternatively, he can defer proceeding on the exhausted claims until after he returns to state court to exhaust all the claims. *Lundy*, in dicta, addressed the problem of successive petitions when the petitioner simply deletes the unexhausted claims, proceeds on the exhausted claims and then later files another petition.

Four Justices, O'Connor, Rehnquist, Powell, and Chief Justice Burger, in an opinion authored by Justice O'Connor, cited Rule 9(b), *Sanders*, *Wong Doo*, and the advisory committee's notes to Rule 9(b). The opinion stated that "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims

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[153] The Supreme Court has also addressed this issue in a number of death penalty cases when the petitioner seeks a stay of execution. *See infra* notes 345-72 and accompanying text.

[154] *See infra* notes 169-99 and accompanying text.

[155] *See infra* notes 276-315 and accompanying text.

[156] *Lundy*, 455 U.S. at 516; *see also supra* note 84. 28 U.S.C. § 2254(d) provides that a federal court should not consider a claim in a habeas petition for which state judicial remedies had not been exhausted. However, § 2254(d) does not address the question of how mixed petitions should be treated.

[157] *Lundy*, 455 U.S. at 518-21. The court relied upon comity concerns, a desire to minimize piecemeal habeas litigation, and the difficulty of determining when exhausted and unexhausted claims are related to support its holding. It also emphasized that its decision would not necessarily impair a prisoner's right to speedy federal relief since he could always delete his unexhausted claims and proceed on his exhausted ones. *Id.* at 520-22.

risks dismissal of subsequent federal petitions."[158] Clearly, the opinion was concerned with the problem of piecemeal habeas litigation. It reasoned that *Lundy* would have no practical significance unless it assessed some penalty against a petitioner for deleting his unexhausted claims or for not raising them in his initial application.[159]

Justice Brennan, in an opinion joined by Justice Marshall, took issue with the assertion that a successive petition might be dismissed as an abuse of the writ if it raised claims deleted from an earlier petition because state judicial remedies had not been exhausted for these claims.[160] Justice Brennan agreed with Justice O'Connor's assessment that Congress adopted the *Sanders* abuse of the writ principles in the Habeas Corpus Rules.[161] However, he disagreed with her application of those principles. Specifically, he did not believe that the failure to raise a claim that could not be raised in the initial petition by reason of law could constitute an abuse of the writ when raised in a successive petition, assuming the petitioner had a right to speedy federal relief on his exhausted claims.[162] Additionally, he did not understand how the failure to raise the unexhausted claim could be considered "inexcus-

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[158] *Id.* at 521. Justice O'Connor noted that Congress intended Rule 9(b) to incorporate the judge-made abuse of the writ principles set forth in *Sanders*. *Id.* at 520-23. Thus, the plurality was not saying that a successive petition raising such claims should or must be dismissed as an abuse of the writ. It is also unclear whether Justice O'Connor was suggesting that a successive petition might be dismissed as an abuse of the writ when it raises claims that were unexhausted when the first petition was filed if those claims were not included in the first petition. Given the facts of *Lundy*, Justice O'Connor's "abuse of the writ" discussion would not necessarily govern that situation. *Id.* at 521 n.13. However, if it did not, her position would have little significance, assuming petitioners were able to comply with *Lundy* by simply not filing mixed petitions. If limited to the *Lundy* fact situation, then the abuse of the writ concern would only come into play for those ignorant of *Lundy*, an anomalous result. Justice O'Connor's quotation of certain language from *Sanders* also suggests that her comments were intended to govern when claims raised in a successive petition were not exhausted and not included in the first petition. *Id.* at 521-22.

[159] The plurality was clearly concerned about claims either raised or reasonably available at the time the initial federal habeas application was filed but for which state judicial remedies were not exhausted. It is doubtful that the plurality was suggesting that claims not reasonably available at the time of the initial habeas application should be precluded if a successive petition was filed.

[160] Although they did not join in Justice Brennan's opinion, Justice White and Justice Blackmun reached a similar conclusion. *See id.* at 538 (White, J., concurring and dissenting) (explicitly); *Id.* at 522 (Blackmun, J., concurring) (implicitly). Justice Stevens did not address this question. *Id.* at 538 (Stevens, J., dissenting).

[161] *Id.* at 533-34 (Brennan, J., dissenting).

[162] *See id.* at 537 (Brennan, J., dissenting).

able" even within the meaning of the proposed Rule 9(b), a standard Congress rejected because it gave courts too broad a discretion to dismiss a successive petition.[163] To Justice Brennan, *Sanders* should only preclude a successive petition when the petitioner "was free to include all of his claims in his first petition, but ***knowingly*** and ***deliberately*** chose not to do so in order to get more than 'one bite at the apple.' "[164]

Although both Justices O'Connor and Brennan recognized that the *Sanders* principles governed, neither made an explicit reference to *Noia*. Justice O'Connor simply omitted *Noia* in her discussion of Rule 9(b). Justice Brennan also did not refer to *Noia*, although he did speak in terms of whether the petitioner had knowingly and deliberately chosen not to raise his claim earlier. The omission of any reference to *Noia* may be attributed to the fact that *Noia*'s continued viability was clearly suspect at the time of *Lundy*.[165] Nevertheless, *Lundy*'s endorsement of *Sanders* suggests that *Noia* should continue to control despite subsequent decisions that cast doubt on its precedential value. But admittedly Justice O'Connor's discussion in *Lundy* suggests a reading of *Sanders* that is inconsistent with *Noia*.

Assuming *Noia*'s deliberate bypass approach controls, it defies logic to say that a petitioner knowingly and voluntarily is choosing not to pursue any unexhausted claims when he files an initial application that excludes or deletes these claims after he becomes aware of the mixed petition problem. For one, the law precludes a petitioner from raising the unexhausted claims in the first petition. More significantly, to defer going forward would mean to forfeit one's right to a speedy resolution of the exhausted claims, thus implicitly lengthening the time of incarceration. Further, individuals facing execution often must file a habeas petition to obtain a stay of execution.[166] To suggest that a later petition should be precluded from raising claims that legally could not be raised in the initial application makes even less sense. In *Noia* the Court concluded that the petitioner's failure to appeal did not constitute a deliberate bypass because he feared that the death penalty might be imposed on a retrial if the appeal was successful.[167] Similarly, a petitioner's failure to raise unexhausted claims in an initial application because of a

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[163] *Id.* at 534 (Brennan, J., dissenting).

[164] *Id.* at 536 (Brennan, J., dissenting) (emphasis in original).

[165] *See infra* notes 169-99 and accompanying text.

[166] *See* Morris, *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 YALE L.J. 371, 379-82 (1985) (refers to the filing of a successive petition when this occurs as a "procedurally forced successive petition" and argues that courts should acknowledge this when deciding whether to entertain the application).

[167] *Noia*, 372 U.S. at 439-40.

desire to shorten his incarceration or to escape execution should not constitute an abuse of the writ if those claims are raised in a successive petition.

Although *Lundy* did not explicitly address the significance of *Noia*'s continued viability in the successive petition context, the Fifth and Eleventh Circuit Courts of Appeals cases have addressed this issue.[168] These decisions are particularly important in the death penalty context because most of the individuals on death row are incarcerated within these two circuits.

Before discussing these decisions, it is instructive to trace *Noia*'s demise and the evolution of its replacement: the cause and prejudice approach. This not only will help in understanding the courts of appeals rulings, but will also assist in determining whether the cause and prejudice standard should govern when a court decides whether to entertain a successive petition that raises a new claim or one not previously resolved on the merits.

The first clear signal that *Noia* was in jeopardy occurred in *Davis v. United States*.[169] In *Davis* the petitioner, in a section 2255 proceeding,

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[168] *See* Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987) (en banc); Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983) (en banc), *cert. denied*, 466 U.S. 976 (1984).

[169] 411 U.S. 233 (1973). Professor Yackle suggests that the Court began to cast doubt on *Noia*'s personal participation prong, at least with regard to procedural defaults prior to a verdict, in Henry v. Mississippi, 379 U.S. 443, *reh'g denied*, 380 U.S. 926 (1965). Although *Henry* involved certiorari review of a state criminal conviction, rather than federal habeas review, certain language in the decision suggested that, absent exceptional circumstances, a federal habeas petitioner could be bound by the decision of his counsel not to raise a claim in the state proceedings assuming that decision constituted a deliberate bypass. L. YACKLE, *supra* note 19, § 78, at 314-18. As to *Noia*'s substantive prong, Professor Yackle wrote that the "initial blows against Fay v. Noia were landed in a trilogy of guilty plea cases decided in 1970." These decisions are Brady v. United States, 397 U.S. 742 (1970), McMann v. Richardson, 397 U.S. 759 (1970), and Parker v. North Carolina, 397 U.S. 790 (1970). L. YACKLE *supra* note 19, § 77, at 319-23. The issue presented in each case was whether a guilty plea would foreclose federal habeas corpus review of an alleged constitutional violation when the violation arguably was a but for cause of the guilty plea. The Court held that the guilty pleas foreclosed federal habeas corpus review of the antecedent constitutional violation, assuming that the plea was voluntary and knowing in the sense that the accused was aware of what he was giving up by pleading guilty. However, the Court did hold that the plea could be set aside if the defendant established that he received incompetent legal advice. Although Professor Yackle acknowledges that the rationale for these decisions is unclear, he suggests that, at one level, they cast doubt on *Noia*'s substantive standard since they could permit a forfeiture of claims absent a showing that counsel and her client voluntarily and knowingly chose not to pursue available state remedies for raising the claims by pleading guilty. This is because conceivably certain claims might be forfeited because counsel was either unaware of them or was negligent or

sought to raise a claim that the grand jury that indicted him was illegally constituted because blacks had been systematically excluded.[170] Davis did not raise this claim prior to trial.[171] At the time, Rule 12(b)(2) of the *Federal Rules of Criminal Procedure* precluded the trial court or any court on direct appeal from considering such a claim absent cause.[172] In his section 2255 application, Davis argued that Rule 12(b)(2) was inapplicable. He sought to excuse his failure to raise the claim earlier by arguing that his section 2255 remedy should not be foreclosed absent a finding that he had deliberately bypassed an opportunity to pursue the claim.[173] Davis relied on *Kaufman v. United States*,[174] which held that *Noia* applied to section 2255 proceedings involving claims not previously raised in a federal criminal prosecution.

The Supreme Court rejected Davis' argument. It held that Rule 12(b)(2)'s cause standard applied equally to the collateral proceedings and the actual criminal proceeding.[175] Since the Rule's purpose was to cure any errors in the initiation of the prosecution prior to trial, the majority found it inconceivable that Congress intended for a more liberal rule to govern in regard to whether a court could entertain a claim not previously raised in a section 2255 proceeding as contrasted with

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mistaken about their persuasiveness or her ability to establish them, yet this would not constitute ineffective assistance. *Id.* at 322-23. Professor Yackle also suggested that the demise of *Noia*'s substantive prong was foreshadowed by another pre-*Davis* decision, Murch v. Mottram, 409 U.S. 41, *reh'g denied*, 409 U.S. 1119 (1972). Although *Mottram* is arguably consistent with *Noia*, Yackle suggests that it permits a forfeiture of a claim when the reason the claim was not pursued was due to counsel's negligence or mistake in believing the claim could still be pursued even though not raised in an initial postconviction proceeding. Thus, the claim would be foreclosed even though counsel did not intend to forfeit the claim. L. YACKLE, *supra* note 19, § 80, at 320. *See also* LAFAVE & ISRAEL, *supra* note 3, § 27.4, at 336; Rosenberg, *Jettisoning* Fay v. Noia: *Procedural Defaults by Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341 (1978). Although Professor Yackle's observations possess obvious merit, in neither the guilty plea cases or *Mottram* did any Justice affirmatively suggest that these decisions might cast doubt on *Noia*'s substantive prong.

[170] *Davis*, 411 U.S. at 235.

[171] *Id.*

[172] *Id.* At the time of Davis' trial, the rule provided that claims based on the institution of the prosecution or the indictment could be raised only before trial and that a failure to present the claim would constitute a waiver, which could not be excused absent cause. Rule 12(b)(2) now provides that claims must be raised prior to trial. *See* FED. R. CRIM. P. 12(b)(2).

[173] *Davis*, 411 U.S. at 236.

[174] 394 U.S. 217 (1969). Like *Noia*, *Kaufman* involved a claim raised at trial but not raised on appeal.

[175] *Davis*, 411 U.S. at 242.

the actual criminal proceeding.[176] The Court distinguished *Kaufman* on the ground that no provision comparable to Rule 12(b)(2) addressed the claim raised in *Kaufman*.[177] Finally, the Court made clear that a petitioner could not establish cause simply by showing the absence of a deliberate bypass, and that the absence of actual prejudice was relevant to the cause determination.[178]

Given *Davis*' treatment of *Kaufman* and considering that the application of *Kaufman* and *Noia* in *Davis*' factual context would significantly undermine Rule 12(b)(2), perhaps *Davis* is best explained as a case of "statutory" construction in which the Court was simply trying to effectuate its perception of congressional intent.[179] If explained in this way, then *Davis* does not necessarily implicitly signal *Noia*'s demise.

However, in *Francis v. Henderson*,[180] decided three years after *Davis*, it became clear that the Court had serious doubts about *Noia*'s continued viability.[181] *Francis* involved the same issue addressed in *Da-*

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[176] *Id.*

[177] *Id.* at 240.

[178] *Id.* at 243-44.

[179] *See* LAFAVE & ISRAEL, *supra* note 3, § 27.4, at 338; L. YACKLE, *supra* note 19, § 80, at 326-27; Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050, 1055 (1978).

[180] 425 U.S. 536 (1976).

[181] *See also* Estelle v. Williams, 425 U.S. 501 (1976) (decided on the same day as *Francis*). The substantive question presented in *Williams* was whether trying an individual in identifiable prison clothing violates due process or equal protection when the petitioner did not object to being tried in jail garments. Williams raised this issue in a federal habeas proceeding after exhausting his state judicial remedies. The Supreme Court rejected his claim, finding that compulsion was an essential ingredient of the claim and that the absence of an objection was sufficient to negate the compulsion necessary to establish a constitutional violation. *Id.* at 511. The Court believed that an accused might purposely choose to wear jail garments in the hope of eliciting sympathy. *Id.* at 508. It is unclear whether *Williams* intended to question the continued viability of *Noia*. Since the Court did not emphasize that the issue was raised in a federal habeas proceeding, and because the state probably never raised the procedural default issue, the decision may simply reflect a determination that an objection is an element of the constitutional right not to be tried in identifiable jail clothing. L. YACKLE, *supra* note 19, § 81, at 328. However, the Court referred to the concept of waiver and suggested that a waiver of the right not to be tried in jail garments could be found absent a knowing and voluntary waiver by the accused himself. *Williams*, 425 U.S. at 508 n.3. If the Court simply meant that it would find a waiver of some constitutional rights absent a knowing and voluntary decision then its decision would not be relevant to *Noia*. However, if such an approach governed in determining whether a petitioner forfeited or waived his right to have that claim considered, rather than relinquishing the claim itself, then its relevance to *Noia* is obvious. As Justice Powell observed in a concurring opinion: "It is my view that a tactical choice or procedural default of the

vis except that in *Francis* it was a state prisoner who sought in a federal habeas proceeding to raise the claim that the grand jury that indicted him was illegally constituted.[182] As in *Davis*, the petitioner had not raised the claim prior to trial,[183] and there was a state rule of procedure analogous to Federal Rule 12(b)(2). The state rule provided that if an objection to the composition of the grand jury was not raised before trial it was waived.[184] Not surprisingly, Francis argued that the court should entertain his claim absent a finding that he had deliberately bypassed his opportunity to raise the claim. The state argued that the *Davis* principles should govern.

The Supreme Court, citing comity and federalism considerations,[185] held that *Davis* should control. It concluded that Francis' claim was foreclosed absent a showing of cause and actual prejudice.[186] Although the Court stated that it was applying *Davis*, by requiring both cause and prejudice to excuse the failure to raise the claim earlier, it deviated from *Davis* in not treating the prejudice question as part of the cause determination.[187] Ironically, the Court's only reference to *Noia* was for the proposition "that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forego the exercise of its habeas corpus power."[188]

It is difficult to reconcile *Francis* with *Noia*. Nevertheless, given the absence in *Francis* of any substantial discussion of *Noia*, or any language that indicated an intent to overrule it,[189] and the emphasis on comity, the question remained whether *Francis* intended to replace *Noia*'s deliberate bypass approach with a cause and prejudice standard.

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nature of that involved here ordinarily should operate, as a matter of federal law, to preclude the later raising of the substantive right." *Id.* at 514-15 (Powell, J., concurring) (footnotes omitted); *see also id.* at 523-28 (Brennan, J., dissenting) (suggesting that in this context *Williams* might be of some relevance to *Noia*).

[182] *Francis*, 425 U.S. at 537-38.

[183] *Id.* at 538.

[184] *Id.* at 537.

[185] *Id.* at 541-42. In light of these considerations, the Court thought it anomalous to give "greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants." *Id.* at 542 (quoting Kaufman v. United States, 394 U.S. 217, 228 (1969)).

[186] *Id.* at 542.

[187] *Compare Davis*, 411 U.S. at 243-44 *with Francis*, 425 U.S. at 551 n.3 (Brennan, J., dissenting).

[188] *Francis*, 425 U.S. at 539.

[189] In his dissent in *Francis*, Justice Brennan chastised the majority for not squarely addressing the issue of *Noia*'s continued viability. *Francis*, 425 U.S. at 547 (Brennan, J., dissenting).

In addition, although *Francis* did not focus on the nature of the constitutional right at issue, it was suggested that perhaps it indicated an intent to limit *Noia* to only selected constitutional claims that went to the integrity of the fact-finding process because of the strong federal interest when these claims are raised.[190]

If a substantial discussion of *Noia* was conspicuously absent in *Francis*, this was not the case in *Wainwright v. Sykes*,[191] which the Court decided in the following Term. Although some ambiguity remained after *Sykes*, it clearly signalled a retreat from *Noia*'s expansive interpretation of the habeas remedy.

Sykes addressed the issue of whether a court should hear a state prisoner's federal habeas petition that raised a constitutional claim challenging the admission of his statements when the petitioner failed to raise the claim in accordance with a state procedural rule.[192] Faced with the question of whether *Noia* or *Francis* should control, the Court opted for *Francis*, holding that Sykes' constitutional claim was forfeited absent cause for not raising it earlier and actual prejudice.[193] The Court provided several reasons for rejecting *Noia*'s "sweeping language."[194] These reasons related to comity concerns and the legitimate interests that the state procedural rule furthered.[195] The Court believed that these interests outweighed the petitioner's interest in having his federal claim reviewed in the federal habeas forum. These interests included: (1) the opportunity to correct errors prior to a verdict when recollections are freshest, thus contributing to the goal of finality and reducing needless litigation; (2) the prevention of sandbagging;[196] (3) not provid-

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[190] *Id.* at 547, 552 n.4 (Brennan, J., dissenting).

[191] 433 U.S. 72 (1977).

[192] *Id.* at 75. Sykes first raised the claim unsuccessfully in state post conviction proceedings.

[193] *Id.* at 86-87.

[194] *Id.* at 87-89.

[195] *Id.*

[196] In dissent, Justice Brennan argued that it was simply implausible to believe that a deviation from *Noia* was necessary to protect against sandbagging. *Id.* at 104 n.5 (Brennan, J., dissenting). "Sandbagging" involves deliberately withholding a constitutional claim, taking a chance on receiving a not guilty verdict, and then raising the claim if a guilty verdict is rendered. Justice Brennan argued that if counsel did so, she could increase the likelihood of conviction because arguably inadmissible evidence would be admitted. Further, subject to any plain error rule, the defendant would forfeit all state review and remedies regarding the claim. In addition, to have the claim entertained in a federal habeas proceeding, the petitioner would have to deceive the court about whether he had deliberately bypassed state procedures.

ing a disincentive for state courts to honor their procedural rules;[197] and (4) ensuring that the trial is perceived as the main event in the criminal process, rather than a secondary one.[198]

Although *Sykes* clearly opted for *Francis'* cause and prejudice approach, the extent of its departure from *Noia* was unclear. Clearly, *Sykes* marked the end of any requirement that the petitioner must concur in the decision not to raise a claim, at least with regard to procedural defaults prior to any verdict.[199] But while the Court intended its "new" standard to be substantively narrower than *Noia*,[200] how much "narrower" is not clear. This ambiguity is attributed primarily to the Court's decision not to define cause and prejudice. Given the Court's specific application of the cause and prejudice standard in *Sykes*,[201] arguably it did not intend a significant departure from *Noia*, at least with regard to its substantive as contrasted with its procedural prong. It is for this reason that Justice Stevens' concurrence stated that the holding was not inconsistent with the way federal courts were applying *Noia*.

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[197] As Professor Yackle noted, *Noia* opted for an expansive approach to whether a procedurally defaulted claim should be heard to encourage states to reach the merits of federal claims, while *Sykes* retreated from "the deliberate bypass rule because it discourages the states from establishing and enforcing forfeiture provisions that foreclose consideration of those very claims." L. YACKLE, *supra* note 19, § 83, at 336.

[198] *Sykes*, 433 U.S. at 89-90.

[199] *Id.* at 92 n.14; *see also* Murray v. Currier, 106 S. Ct. 2639, 2644 (1986). In a concurring opinion in *Sykes*, Chief Justice Burger argued that *Noia*'s deliberate bypass standard was designed to cover only claims involving rights that could not be given up absent the defendant's consent, such as the right to appeal or to proceed without counsel. *Sykes*, 433 U.S. at 92 (Burger, C.J., concurring). To Chief Justice Burger, *Noia* was not, as a general rule, intended to be applicable to errors made prior to or during trial when the decision whether to raise a claim is entrusted to the accused's counsel. *Id.* at 92-93 (Burger, C.J., concurring). Even Justice Brennan, the author of the majority opinion in *Noia*, retreated from the proposition that a claim cannot be precluded in federal habeas unless the petitioner concurred in the decision not to raise the claim. Rather, Brennan stated that the "client's knowing and intelligent participation" was only mandated "where possible." *Id.* at 117 (Brennan, J., dissenting).

[200] *Sykes*, 433 U.S. at 88.

[201] *Id.* at 91. The Court simply said as to cause that "the respondent has advanced no explanation whatever for his failure to object at trial." *Id.* This statement is not inconsistent with a finding of deliberate bypass particularly if the burden of proof is on the petitioner. *See also id.* at 97-98 (Stevens, J., concurring) (suggesting that the decision not to raise the claim may have been a tactical one). As to prejudice, the Court wrote, "[t]he other evidence of guilt presented at trial, moreover, was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement." *Id.* at 91. This is not inconsistent with a harmless error standard, which would govern even if the claim was entertained. *Id.* at 98-100 (White, J., concurring).

In addition, Justice Brennan's dissent observed that the decision left unanswered the crucial question of "[h]ow should the federal habeas court treat a procedural default that is attributable purely and simply to the error or negligence of a defendant's trial counsel?"[202]

In addition to the question of how much more restrictive the cause and prejudice standard would be than *Noia*'s deliberate bypass approach, *Sykes* left another question unresolved. Since the interests furthered by *Sykes*' more restrictive approach seem most compelling in the context of procedural defaults prior to a verdict,[203] it was argued that *Noia* might continue to control in regard to claims that were procedurally defaulted on appeal.[204] In this situation, the federal interest in ensuring that a federal forum is available to resolve constitutional claims, and the interest in avoiding any unconstitutional restraint, might warrant *Noia*'s more liberal approach.[205]

After *Sykes* the question of the cause and prejudice standard's content and its application to postverdict procedural defaults remained unresolved. By the conclusion of the 1986-1987 Term, the Supreme Court had rendered five decisions[206] that addressed these questions.[207] The

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[202] *Id.* at 100 (Brennan, J., dissenting).

[203] As noted previously, *Sykes* emphasized the contribution to finality when a court has an opportunity to correct an error prior to any verdict and the importance of not de-emphasizing the trial. *See supra* notes 195-98 and accompanying text.

[204] Further, since the constitutional issue in *Sykes* did not go to the reliability of the verdict because it involved a question of whether the petitioner waived his Miranda rights, conceivably *Sykes* could be limited to such claims.

[205] *See* L. YACKLE, *supra* note 19, § 83, at 338-39.

[206] Murray v. Carrier, 106 S. Ct. 2639 (1986); Smith v. Murray, 106 S. Ct. 2661 (1986); Reed v. Ross, 468 U.S. 1 (1984); Engle v. Issac, 456 U.S. 104 (1982); United States v. Frady, 456 U.S. 150 (1982).

[207] In addition, as Professor Yackle noted, in Estelle v. Smith, 451 U.S. 454 (1981), the Court approved the Fifth Circuit's rationale for rejecting the state's argument that the claim was not cognizable in a federal habeas proceeding because no objection was made at trial. *Smith*, 451 U.S. at 468 n.12. The Fifth Circuit concluded that, notwithstanding *Sykes*, the petitioner's claim was not foreclosed, partly because under state law at the time, it would have been futile to object, and the petitioner's counsel was genuinely surprised at the witness' testimony, which formed the basis for the claim. Consequently, the court of appeals believed it was unreasonable to fault counsel for not raising the claim. Smith v. Estelle, 602 F.2d 694, 708 n.19; *see also* L. YACKLE, *supra* note 19, § 84, at 178-79 (1985 Supp.). Given the Supreme Court's cursory treatment of this issue and the Fifth Circuit's reliance on the fact that the state did not promptly raise the default question or present the waiver argument in its petition for certiorari, it would be a mistake to read too much into the *Smith* footnote. In Engle v. Issac, 456 U.S. 104 (1977), when the petitioner argued that futility should constitute cause within the meaning of *Sykes*, the Court simply cited *Smith* for the proposition that "[i]n some cases a state's plea of default may come too late to bar consideration of the prisoner's

first two decisions, *Engle v. Issac*[208] and *United States v. Frady*,[209] were decided on the same day. While the primary focus in *Issac* was on *Sykes*' cause prong, *Frady*'s focus was on the prejudice prong.

Issac addressed the issue of whether a habeas court should entertain a claim that the petitioner was denied due process because his jury was instructed that he had the burden of establishing the defense of self-defense when the petitioner made no objection to the instruction at trial. The Court concluded that the claim should not be entertained. It first rejected the argument that *Sykes*' cause and prejudice standard should be limited to determining whether constitutional claims that do not affect the reliability of the trial verdict should be heard.[210] The Court then rejected Justice Brennan's suggestion in his dissent in *Francis*, that the ruling evidenced a desire to limit *Noia* to cases that raise claims which impact on the integrity of the fact-finding process.[211] The Court next turned to the question of whether the petitioner established cause for the failure to raise the claim earlier. In discussing this issue the Court began to identify the difference between its application of the *Sykes* and *Noia* standards.

In *Issac* the petitioner presented two reasons for not objecting to the self-defense jury instruction.[212] First, he argued that it was futile to raise the claim; and second, that he was unaware of the claim.[213] The Court quickly rejected the argument that futility alone could constitute cause. It noted that even under *Noia* review might be foreclosed since a decision not to raise a claim based on futility represents an intentional

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constitutional claim." *Issac*, 456 U.S. at 124-25 n.26.

[208] 456 U.S. 104 (1982).

[209] 456 U.S. 150 (1982).

[210] *Issac*, 456 U.S. at 129. The Court noted that the cost of allowing federal habeas review did not depend on the nature of the claim. However, it added that the type of claim may affect the determination of cause and prejudice.

[211] *Id.* In dissent, Justice Brennan argued:

> In my view, the *Sykes* standard is misguided and insupportable in any context. But if it is to be suffered to exist at all, it should be limited to the arguable peripheries of the trial process: It should not be allowed to insulate from all judicial review all violations of the most fundamental rights of the accused.

Id. at 151 (Brennan, J., dissenting).

[212] *Id.* at 130.

[213] *Id.* In some cases, it would appear to be inconsistent to argue that the petitioner was unaware of a claim and believed it would be futile to raise the claim. To argue that it would be futile to raise a claim suggests that the petitioner was aware of the claim. However, a petitioner may be unaware of a claim and, after being made aware of it, also believe it would be futile to raise it. This is somewhat circular since it may be that the perceived futility of raising a claim makes the petitioner unaware of it.

and deliberate decision to forfeit state remedies.[214] However, assuming the claim is meritorious then the decision would not be knowledgeable, as a literal reading of *Noia* and *Zerbst* might require. Particularly if the petitioner's belief that to raise the claim would be futile is reasonable, it is unfair to preclude subsequent federal habeas corpus review. If such review is foreclosed, counsel would be forced to raise any conceivable constitutional claim in the state criminal proceeding, thus increasing the burden on the state courts without creating any corresponding benefits, assuming the assessment of futility is reasonable. Interestingly, the argument that the futility of raising a claim should constitute cause is actually the converse of the argument that petitioner's failure to be aware of a claim should constitute cause when the claim is truly novel.[215]

As to the petitioner's assertion that his unawareness of the claim should constitute cause, the Court did not rule out the possibility that the novelty of a claim could never establish cause.[216] However, the Court did not address this question because it believed that the basis of the constitutional claim was available and that other counsel had litigated it.[217] Thus, even if the petitioner in good faith was unaware of the claim, the failure to raise the claim did not constitute cause.

The Court's treatment of petitioner's novelty argument indicates a significant difference between the cause and prejudice standard and *Noia*'s deliberate bypass approach. *Noia*'s adoption of *Zerbst* suggests that the petitioner must be aware of the claim and voluntarily choose not to assert it before the claim can be foreclosed. However, after *Issac* a claim can be foreclosed even if the petitioner is unaware of the claim, at least when the basis of the claim was available and other individuals have asserted it. This is a substantial departure from *Noia* in which the standard for determining whether the petitioner forfeited the right to raise a claim in a federal habeas proceeding is identical to the standard for determining whether he chose to waive the substantial right.[218]

Issac provided little or no guidance concerning *Sykes*' prejudice prong. The Court found that because of the absence of cause, it did not

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[214] *Id.* at 131 n.36.

[215] *See supra* note 213.

[216] *Issac*, 456 U.S. at 131. The court noted that it was hesitant to adopt a rule that would require counsel either to have extraordinary vision or to object to every aspect of the trial. But it noted that the later discovery of a constitutional error unknown at the time of the trial does not necessarily render the proceedings fundamentally unfair.

[217] *Id.* at 134.

[218] *See Sykes*, 433 U.S. at 108-09 (Brennan, J., dissenting).

need to determine whether the petitioner suffered actual prejudice.[219] However, in response to the argument that substantial prejudice in and of itself should excuse any default, the Court emphasized that *Sykes*' cause and prejudice standard was defined in the conjunctive and it did not see any reason to deviate from that position.[220] Finally, the Court rejected an argument, more fully developed in *Frady*, that a plain error inquiry should replace or supplement *Sykes*' cause and prejudice standard.[221] The Court believed that the plain error approach would not be responsive to comity concerns and would not recognize the distinction in terms of finality between a direct appeal and federal habeas review.[222] Finally, it noted that such an inquiry was not needed to supplement *Sykes* because in appropriate cases, a rigid application of comity and finality principles "must yield to the imperative of correcting a fundamentally unjust incarceration."[223] Although the Court did not define what this exception meant, it made clear that it should not be defined in terms of a state plain error rule.[224]

In *United States v. Frady*,[225] the companion case to *Issac*, the Court focused on *Sykes*' prejudice prong in the context of a section 2255 proceeding. As with an analogous argument in *Issac*, the *Frady* Court first rejected the contention that the federal plain error rule, as codified in Rule 52(b) of the *Federal Rules of Criminal Procedure*, should replace or supplement the *Sykes* cause and prejudice standard. Relying on *Davis v. United States*,[226] the court of appeals stated that if Frady's claim was plain error then it was cognizable in a section 2255 proceeding, even though it was not advanced during his criminal prosecution.[227]

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[219] *Issac*, 456 U.S. at 134 n.43.

[220] *Id.*

[221] *Id.* at 135.

[222] *Id.* at 134.

[223] *Id.* at 135.

[224] *Id.* n.44 ("Certainly we should not rely upon a state plain-error rule when the state has refused to apply that rule to the very sort of claim at issue."). The Court stated that if the state, pursuant to its plain error rule, excused the default and considered the claim, then no barrier to federal review would exist since precluding such review would not be necessary to further the state's interest in enforcing its procedural rules. *Id.*; *see also* L. YACKLE, *supra* note 19, § 85, at 181-85 (1985 Supp.).

[225] 456 U.S. 150 (1982).

[226] 411 U.S. 233 (1973). For a discussion of *Davis*, see *supra* notes 169-78 and accompanying text.

[227] Frady argued that the jury instructions used in his murder prosecution were unconstitutional because they implicitly relieved the prosecution of its burden to prove malice beyond a reasonable doubt. Specifically, he argued that the instructions, by equating intent with malice and allowing malice to be inferred from the use of a

The Supreme Court rejected this argument. As in *Issac*, the Court emphasized the difference between a direct appeal and a section 2255 proceeding.[228] The Court thought that if the plain error rule applied equally to direct appeals and section 2255 proceedings,[229] it would be tantamount to allowing a collateral remedy to function as an appeal.[230] It distinguished *Davis* by asserting that while section 2255 review could not be more expansive than that available on direct appeal, it need not be as expansive.

After the Court rejected Frady's plain error argument, it applied *Sykes'* cause and prejudice standard to determine whether the court should have entertained Frady's claim. The Court's discussion of *Sykes'* prejudice prong was general and partly unclear because it defined prejudice in the context of an arguably erroneous jury instruction. The Court stated that the petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[231] In its subsequent discussion of whether the evidence was sufficient to establish malice[232] and its analysis of whether the jury instructions misled the jury on the malice issue,[233] the Court made clear that to establish prejudice the petitioner must show that, but for the error, the outcome would have been different. Although it is unclear what burden is on the

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weapon, permitted malice to be presumed if other facts were established. *Frady*, 456 U.S. at 158.

[228] *Id.* at 164-65.

[229] The Court did not say that the plain error rule did not govern in reviewing the decisions of courts in § 2255 proceedings, but only that it alone could not excuse a failure to raise the claim during the original criminal prosecution. *Id.* at 166 n.15.

[230] *Id.* at 164. The Court, in commenting on the court of appeals decision, stated: "[i]n effect, the court allowed Frady to take a second appeal 15 years after the first was decided." *Id.*

[231] *Id.* at 170. The Court cited its earlier decision, Henderson v. Kibbe, 431 U.S. 145 (1977), for the proposition that the issue is " 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' not merely whether 'the instruction is undersirable, erroneous or even universally condemned.' " *Frady*, 456 U.S. at 169 (quoting Henderson v. Kibbe, 437 U.S. 145, 154 (1977)).

[232] *Frady*, 456 U.S. at 172 ("We conclude that the strong uncontradicted evidence of malice in the record, coupled with Frady's utter failure to come forward with a colorable claim that he acted without malice, disposes of his contention that he suffered such actual prejudice that reversal of his conviction 19 years later could be justified.").

[233] The Court noted that a jury which had found premeditation and deliberation was unlikely to have found the presence of passion and provocation necessary to negate the malice required for a murder conviction. *Id.* at 174.

petitioner to establish this fact,[234] the Court clearly did not intend to apply the harmless error approach that Justice White suggested might be appropriate in *Sykes*.[235]

Issac and *Frady* marked the beginning of the Court's attempt to define how *Sykes*' approach would differ from *Noia*'s deliberate bypass standard. The next step in this definitional process was the Court's decision in *Reed v. Ross*.[236]

In *Ross* the Court addressed the issue of whether the petitioner could satisfy *Sykes*' cause prong by establishing that the failure to raise his claim[237] was attributable to the fact that the claim was not reasonably available at the time he failed to raise it as required by state law. Since the procedural default in *Ross* occurred on appeal[238] rather than prior to any verdict, the Court was also faced with the question of whether the *Sykes* standard applied equally to claims procedural defaulted on appeal.

Justice Brennan's majority opinion did not explicitly address the argument that *Noia* rather than *Sykes* should govern because the state interests furthered by not permitting habeas review of claims defaulted on appeal were less compelling than when the procedural default occurred prior to a verdict. Rather than engage in any balancing process, the Court found that the state interests, which would be adversely affected if federal review was permitted, were sufficiently strong to justify

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[234] *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 694 (1984) (requiring a petitioner claiming ineffective assistance of counsel to establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). *But see* Kimmelman v. Morrison, 106 S. Ct. 2574, 2593-95 (1986) (Powell, J., concurring) (suggesting that there should be no finding of prejudice unless the error impacts on the factual reliability of the verdict).

[235] *See supra* text accompanying note 231. At a minimum, the Court's definition of prejudice differed from the harmless error standard in that the burden of proof was placed on the petitioner.

[236] 468 U.S. 1 (1984).

[237] Ross wished to argue that he was denied due process in his murder prosecution because through the operation of a presumption, the state was relieved of its burden of establishing that the killing was unlawful and done with malice. State law in North Carolina, where Ross was prosecuted, provided that if the state established beyond a reasonable doubt that the defendant had intentionally assaulted the deceased with a deadly weapon and that the assault resulted in death, then it could be presumed that the killing was both unlawful and done with malice unless the defendant could convince the jury to the contrary. The jury instructions given at Ross' trial reflected this statement of North Carolina law. *Id.* at 7.

[238] North Carolina law at the time did not require a contemporaneous objection at trial to preserve for review a question involving a jury instruction. However, exceptions had to be made after trial if they were to be preserved for appellate review. *Id.* at 8.

application of *Sykes*' cause and prejudice standard.[239]

As to the issue left unanswered in *Issac*, the Court held that the failure to raise a claim that was not reasonably known could constitute cause.[240] It emphasized that a contrary ruling was unlikely to serve any functional purpose. It reasoned that if counsel's decision not to raise the claim was reasonable, it was also reasonable to assume that a state court would not rule in petitioner's favor.[241] In addition, the Court noted that a contrary ruling might have a negative impact on the orderly administration of justice since it would encourage counsel to raise any conceivable constitutional claim, thus increasing the burden on state appellate courts.[242]

Ross' discussion of cause is not particularly instructive in delineating the differences in practice between the application of the *Sykes* and *Noia* approaches. Certainly, *Ross* is not inconsistent with *Noia*'s approach. In fact, most of the majority's discussion of the rationale behind *Sykes* is equally consistent with *Noia*.[243] However, the Court did not resolve the more fundamental question of whether the failure to raise a claim due to ignorance or inadvertence could constitute cause.[244]

In its two most recent decisions, *Murray v. Carrier*[245] and *Smith v. Murray*,[246] the Supreme Court has clearly delineated the difference in its application of *Sykes* and *Noia*. In these decisions, the Court explicitly addressed the question of whether the failure to raise a claim due to ignorance or inadvertence constitutes cause and whether procedural

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[239] *See id.* at 10 (stating that requiring a defendant to raise an issue on appeal rather than in a collateral proceeding "affords the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal.").

[240] *Id.* at 9.

[241] *Id.* at 15.

[242] *Id.*

[243] The Court noted that the policy considerations underlying the cause requirement were designed to preclude counsel from making a tactical decision to forego raising a claim and then, when he discovered that the tactic has been unsuccessful, pursue an alternative strategy in federal court. *Id.* at 14. It also stated that "the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests." *Id.* This language prompted Justice Rehnquist to caution that the majority did not intend to resurrect *Noia*. *Id.* at 21 n.1 (Rehnquist, J., dissenting).

[244] As to *Sykes*' prejudice prong, the Court noted that the state conceded that Ross suffered actual prejudice if the jury instructions were erroneous. It went on to add that but for "the fact that Ross was required to bear the burden of proving lack of malice and self-defense, he might not have been convicted of first-degree murder." *Id.* at 12.

[245] 106 S. Ct. 2639 (1986).

[246] 106 S. Ct. 2661 (1986).

defaults on appeal should be governed by a different standard than procedural defaults prior to a verdict. In addition, *Smith v. Murray* is particularly relevant since it involved federal habeas review in a death penalty case.

In *Carrier* the petitioner wished to raise a claim[247] in his federal habeas proceeding that was not raised in his petition for direct appeal of his state court conviction. State law provided that errors not assigned in the petition for appeal would not be reviewed.[248] The Fourth Circuit concluded that "cause" for failure to raise the claim could be established if the failure resulted from ignorance or inadvertence rather than from a deliberate tactical decision.[249] The court of appeals did not mean ignorance of the claim itself since the petitioner raised the claim before trial and when the notice of appeal was filed. Assuming that the petitioner knew of the claim, the court defined the issue in terms of whether he decided not to raise the claim because he either mistakenly but reasonably misjudged its merit or negligently misjudged its merit. The issue in *Carrier* was not analogous to the question presented in *Issac* or *Ross* since those decisions focused on whether the petitioner was aware of the claim and not on his assessment of its merits. However, the issue posed in *Carrier* was related to the question of whether futility could constitute cause for not raising a claim procedurally defaulted on appeal since neither situation focuses on the petitioner's knowledge of the claim but rather on his assessment of its merits. A petitioner's assessment of the futility or merits of a claim might be reasonable or unreasonable. But, as noted earlier, *Issac* did not draw this distinction between knowledge of a claim and knowledge of its merits. As to its alternative conclusion that an inadvertent failure to raise a claim should constitute cause, the Fourth Circuit was undoubtedly suggesting that a habeas court should not foreclose a claim that was not raised due to an oversight.

On appeal, the Supreme Court reversed the court of appeals, concluding that *Issac* was dispositive unless a different standard governs claims defaulted on appeal and those defaulted prior to a verdict.[250] The Court noted that unless the counsel's representation was constitutionally ineffective, cause should not turn on whether counsel had erred or

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[247] The petitioner wished to argue that, in his rape and abduction prosecution, the court's failure to require the state to provide him with the victim's statements to the police denied him due process. *Carrier*, 106 S. Ct. at 2642.

[248] *Id.* at 2642-43.

[249] *See* Carrier v. Hutto, 724 F.2d 396, 401 (4th Cir. 1983).

[250] *Carrier*, 106 S. Ct. at 2645-47.

the type of error counsel made.[251] Rather, it believed that the existence of cause should turn on whether the petitioner could show some factor external to the defense that impacted on counsel's efforts to comply with the state's procedural rule.[252]

The Court also held that procedural defaults on appeal and prior to a verdict should not be treated differently. Although the Court recognized that the state interests were heightened when the procedural default was prior to a verdict,[253] it nevertheless found that a different standard was unwarranted. Citing its earlier discussion in *Ross*, the Court concluded that the importance of respecting state procedural rules that govern appeals[254] was sufficient to justify applying the same cause and prejudice standard to claims defaulted on appeal as to those defaulted prior to a verdict.[255] Finally, in response to the argument that it was exalting form over substance, the Court identified two additional safeguards against an application of the *Sykes* standard that would result in a miscarriage of justice. First, it reiterated its holding in *Issac* that "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.' "[256] However, unlike *Issac*, it seemingly confined this "safeguard" to situations "where a constitutional violation has probably resulted in the conviction of one who is actually innocent."[257] Second, the Court noted that the right to the effective assis-

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[251] *Id.* at 2645-46.

[252] *Id.* In this regard, the following were given as examples when this might be the case: when the factual or legal basis of the claim was not reasonably available to counsel or when some interference by officials made compliance impossible. *Id.* at 2646; *see also* LAFAVE & ISRAEL *supra* note 3, § 23.5, at 36 (1986 Supp.) (questioning whether the lack of financial resources to develop a claim should be sufficient). The Court also rejected an argument, advanced by Justice Stevens, that the cause and prejudice standard be considered within a framework that would balance the nature and strength of the constitutional claim raised against the nature and strength of the procedural rule violated. The Court believed that in practice such an approach would render the cause prong of *Sykes* superfluous. *Carrier*, 106 S. Ct. at 2648.

[253] *Carrier*, 106 S. Ct. at 2645-47.

[254] *Id.* at 2647. *See also supra* text accompanying notes 236-42; Reed v. Ross, 468 U.S. 1, 8 (1984).

[255] We likewise believe that the standard for cause should not vary depending on the timing of a procedural default or on the strength of an uncertain and difficult assessment of the relative magnitude of the benefits attributable to the state procedural rules that attach at each successive stage of the judicial process.

Carrier, 106 S. Ct. at 2647.

[256] *Id.* at 2650 (quoting *Issac*, 456 U.S. at 135).

[257] *Id.*

tance of counsel provided a safeguard against the cause and prejudice standard causing a miscarriage of justice.[258]

In *Smith v. Murray*,[259] a death penalty case, the petitioner also wished to raise in his federal habeas proceeding a claim that was not properly raised on appeal.[260] However, unlike *Carrier*, it was clear that the claim was not raised because the petitioner's counsel thought the law would not support the claim.[261] The Fourth Circuit affirmed the denial of the federal habeas petition, but found it unnecessary to rely on *Sykes* and its progeny or to address the claim's merits since it concluded that any error was harmless.[262] The Supreme Court granted certiorari to consider the claim's merits and to review the court of appeals' conclusion that any error was harmless.[263]

The Court affirmed, holding that the failure to raise the claim on direct appeal precluded federal habeas review.[264] It first noted that counsel's deliberate and tactical decision not to raise the claim was the antithesis of the type of circumstance that would warrant excusing the failure to raise the claim earlier.[265] It viewed the issue as analogous to the question raised in *Issac* regarding whether perceived futility alone could constitute cause.[266] Relying on *Carrier* and *Issac*,[267] the Court rejected the argument that although the decision was deliberate, since it was made in ignorance of the claim's merit, this should constitute cause. Once again, the Court did not distinguish between an error as to the existence of a claim and one relating to an assessment of the claim's merits. It also found that the claim's novelty could not establish cause since the claim was reasonably available.[268]

After the Court concluded that the petitioner failed to satisfy the cause prong of *Sykes*, it asked whether the "fundamentally unjust incarceration" exception of *Issac* and *Carrier* was applicable. Although not-

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[258] *Id.*

[259] 106 S. Ct. 2661 (1986).

[260] Petitioner wished to raise a claim that he was denied his fifth and fourteenth amendment rights when a psychiatrist who had interviewed him was permitted to testify at the sentencing phase of his capital trial about the interview even though, before being questioned, the petitioner was not told of his fifth amendment rights. *Id.* at 2663-64.

[261] *Id.* at 2664.

[262] *Id.* at 2665.

[263] *Id.*

[264] *Id.*

[265] *Id.* at 2666.

[266] *Id.*

[267] *Id.* at 2667.

[268] *Id.*

ing the difficulty of applying *Carrier*'s "actual innocence" standard to the sentencing phase of a capital case, it concluded that the refusal to hear the claim would not result in a fundamental miscarriage of justice since the alleged error did not impact on the decision's reliability.[269] Specifically, it did not result in the admission of false or misleading testimony or preclude the development of true facts. Finally, the Court rejected Justice Stevens' suggestion that since this was a death case that should be a factor when determining whether to entertain a claim. It stated that the *Sykes* principles should not apply differently depending on the nature of the penalty imposed.[270]

Carrier and *Smith* illustrate the differences in application between the *Noia* and *Sykes* standards governing whether claims not raised in accordance with state procedural law should be heard in federal habeas proceedings. The *Carrier* and *Smith* definition of cause makes clear that a court should not entertain a claim if counsel solely asserts that the failure to raise it was inadvertent or due to ignorance of the claim's existence or merits. Rather, if counsel asserts that she was unaware of a claim, she must establish that her ignorance was reasonable in that the legal basis of the claim was not reasonably available. Similarly, the same principles should probably govern when counsel errs with regard to her assessment of a claim's merits. Such an error constitutes cause only if coupled with a showing that the error was reasonable. However, if the failure to raise the claim is due to counsel's negligence regarding the claim's existence or its merit, then the claim is foreclosed. When this occurs, the petitioner must satisfy the "unjust incarceration" exception, which requires a showing of a probability of innocence, or must raise an ineffective assistance of counsel claim. Finally, *Smith* makes clear that the fact that the setting of the federal habeas proceeding is a death case is irrelevant. However, both *Smith* and *Carrier* were 5-4 decisions, in which Chief Justice Burger and Justice Powell were in the majority. Obviously, Justices Scalia's and Kennedy's positions will be crucial to both decisions' discussion of *Sykes*' cause prong and whether the *Sykes* standard should be relaxed in death cases.

After *Issac*, *Frady*, *Carrier*, and *Smith*, it is evident that the *Noia* principles will not be applied under the guise of the *Sykes* cause and prejudice standard. Not only will consideration of a claim in a federal

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[269] *Id.* at 2668.

[270] *Id. Cf.* Batey, *Federal Habeas Corpus Relief and the Death Penalty: Finality with a Capital F*, 36 U. FLA. L. REV. 252 (1984); Catz, *Federal Habeas Corpus and the Death Penalty: Need for a Preclusion Doctrine Exception*, 18 U.C. DAVIS L. REV. 1177 (1985).

habeas proceeding[271] be foreclosed irrespective of whether the petitioner concurred in the decision not to raise the claim earlier, but also the state will no longer be required to establish that the petitioner's decision not to pursue the claim was voluntary and knowing. Even if the decision not to raise a claim was made in ignorance or was inadvertent, the petitioner will not necessarily be able to raise the claim later in a federal habeas proceeding.[272] And, even if the petitioner can establish "cause" for not raising the claim, he also must show "prejudice" as *Frady* defined that term. Thus, *Issac*, *Frady*, *Carrier*, and *Smith* illustrate the Supreme Court's belief that comity concerns[273] and the interests furthered by enforcing reasonable state procedural rules related to the raising of claims, outweigh any interest in having federal constitutional claims heard in a federal forum.[274]

Sykes and its progeny clearly present the question of *Noia*'s continued viability as the governing standard for determining whether claims not previously raised or resolved on the merits should be entertained in a successive petition. This question presents two issues. First, is a court free to depart from *Sanders*' incorporation of *Noia* in light of separation of powers concerns that arise from Congress' adoption of these decisions in section 2244(b) and Rule 9(b) of the Habeas Corpus Rules? Second, assuming a court is free to depart from *Sanders*, should it apply the *Sykes* cause and prejudice principles to resolve this question?

As discussed earlier, *Rose v. Lundy* was the only Supreme Court decision that even implicitly addressed the question of whether successive habeas petitions should consider claims not raised or resolved on the merits in an earlier application. In *Lundy* no Justice suggested that *Noia*'s deliberate bypass approach was suspect in light of *Sykes* and its progeny. Similarly, the Court implicitly suggested that it was bound by *Sanders*' incorporation of *Noia* given *Sanders*' codification in Rule 9(b), although the comments of four Justices were not consistent with *Noia*.[275] Although the Supreme Court has not addressed this issue, it

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[271] Given *Frady*, these same principles are equally applicable to § 2255 proceedings when a petitioner seeks to assert a claim he did not raise in his federal criminal prosecution.

[272] However, *Ross* held that ignorance of the existence of a claim, if reasonable, does establish cause for failing to raise it. *Ross*, 468 U.S. at 16. Similarly, ignorance as to the merits of a claim, if reasonable, should also constitute cause.

[273] Obviously, comity concerns are not important when this issue arises in a § 2255 proceeding.

[274] This consideration is also not important when the issue arises in a § 2255 proceeding.

[275] *See supra* text accompanying notes 156-64.

has surfaced in the opinions of the federal courts of appeals, most notably in *Jones v. Estelle*[276] and *Moore v. Kemp*.[277]

In *Jones* the Fifth Circuit, sitting en banc, concluded that a court should not entertain a successive habeas petition that raises new claims unless the petitioner could establish that: (1) his counsel in the earlier proceeding was ineffective;[278] or (2) subsequent to the earlier proceeding, new facts relevant to the claim, which previously were not reasonably available, were uncovered; or (3) his counsel was unaware of the new claim at the time of the earlier proceeding.[279] The court then rejected in great part *Noia*'s principles, which required that for a claim to be foreclosed the decision not to raise the claim in the earlier proceeding be voluntary and knowing and that the petitioner concurred in that decision.

In rejecting the *Noia* personal participation prong, the court observed that with some limited exceptions,[280] criminal defendants are bound by the actions of their counsel, assuming the representation they receive is not constitutionally ineffective.[281] The court saw no indication that Congress intended to depart from this standard when it enacted Rule 9(b) given Congress' concern with the threat that successive applica-

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[276] 722 F.2d 162 (5th Cir. 1983) (en banc), *cert. denied*, 466 U.S. 976 (1984).

[277] 824 F.2d 847 (11th Cir. 1987) (en banc). Not all courts of appeals have struggled with this question; *see, e.g.*, Richmond v. Ricketts, 774 F.2d 957, 961 (9th Cir. 1985) ("Previously unadjudicated claims must be decided on the merits unless the petitioner has made a conscious decision deliberately to withhold them, is pursuing 'needless piecemeal litigation,' or has raised the claim only to 'vex, harass, or delay.' ") (citing Sanders v. United States, 373 U.S. 1, 18 (1983)).

[278] The court stated that while no constitutional right to the effective assistance of counsel exists in federal habeas proceedings, the ineffectiveness standard partly provided an appropriate measure for determining whether to entertain the claim. *Jones*, 722 F.2d at 167.

[279] *Id.* at 165-69. As to when ignorance of a claim might justify failing to raise it, the court clearly meant ignorance attributable to changes in the law. In this context, it cited *Issac* regarding counsel's duty to anticipate the law but left open the question of "whether the *Engle* duty extends to a habeas petitioner attempting to explain omitted claims." *Id.* at 165 n.5. However, it seems unlikely that the court would find an intervening change in the law sufficient to justify the failure to raise a claim unless that change was not reasonably foreseeable. A contrary result would be inconsistent with its understanding that criminal defendants generally are bound by the decisions of their lawyers, unless the lawyer is constitutionally ineffective.

[280] These exceptions involve situations in which the defendant essentially gives up the protections of the adversary system, such as the decision to plead guilty or to proceed without a lawyer. To be binding, such decisions must be made by the defendant himself. *Id.* at 165.

[281] *Id.*

tions posed to the orderly administration of justice.[282] Although it noted that "a cramped reading of Rule 9(b)'s antecedents in Supreme Court caselaw,"[283] that is, *Sanders*' adoption of *Noia*, might dictate a contrary result, the court emphasized that at the time Congress adopted Rule 9(b), the Supreme Court had already cast serious doubt on the continued viability of *Noia*'s process prong.[284] Somewhat paradoxically, the court added that even if Congress believed that *Sanders* and *Noia* limited the representative role of counsel, this limitation was not necessarily encompassed in Rule 9(b) if to so hold would "undercut the efficacy" of the Rule.[285]

The court did not rely on *Sykes*, *Issac*, or *Frady*, each of which had been decided at the time of its ruling, in rejecting the substantive prong of *Noia* and replacing it essentially with an ineffective assistance of counsel standard. Rather, it noted that the ineffective counsel standard "vindicates the competing values of facilitating judicial review of meritorious claims and finality of criminal convictions in habeas cases."[286]

Finally, although Jones' successive petition did not seek to raise new claims that were unexhausted at the time of his earlier application, which was the issue addressed in dicta in *Lundy*, the court chose sua sponte to address this question.[287] The court held that the sole fact that new claims were unexhausted at the time an earlier application was heard would not by itself excuse their omission.[288] Echoing the concerns of Justice O'Connor in *Lundy*, it reasoned that if the unexhausted status of the claims could justify their omission from an initial application, then *Lundy* would be of little practical consequence.[289] It thus implicitly rejected the argument that the right to a prompt federal disposition of exhausted claims justifies the failure to raise unexhausted claims in an initial application. As to whether claims that were not exhausted at the time of an initial application should be entertained in a successive petition, the court believed that the petitioner would have to establish

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[282] *Id.* at 166. The court believed that the congressional purpose behind Rule 9(b) would be severely undermined if it was read to preclude only those successive petitions in which the petitioner concurred in the decision not to raise the claim earlier.

[283] *Id.* at 166 n.7.

[284] *Id.* (citing Henry v. Mississippi, 379 U.S. 443 (1965)); *see also supra* note 170.

[285] *Jones*, 722 F.2d at 166 n.7.

[286] *Id.* at 167. Earlier, the court defined the problem in terms of resolving "the tension between the need to consider all nonfrivolous claims and the need to prevent manipulation and obstruction of judicial proceedings by successive petitions." *Id.* at 164.

[287] *Id.* at 167-68.

[288] *Id.* at 168.

[289] *Id.*

some reason why the claim was not reasonably available at the time of the initial application.

Jones illustrates that the Fifth Circuit does not believe itself precluded by separation of powers concerns from departing from *Noia* in the successive petition context.[290] Although it did not rely on *Sykes*, *Issac*, and *Frady* to define the principles governing whether successive petitions that raise new claims should be entertained, its controlling standards are remarkably similar to those set out by the Supreme Court in *Carrier* and *Smith* regarding whether procedurally defaulted claims should be heard in federal habeas proceedings. While the court would not require a showing of prejudice if the claim was not reasonably available, the only other difference is that the Fifth Circuit made no reference to the fundamentally unjust incarceration exception initially set out in *Issac*. However, given the way *Carrier* limited this exception, it is unlikely that the Fifth Circuit would refuse to entertain a successive petition that establishes facts to support this exception. Finally, the Fifth Circuit's treatment of *Lundy* in *Jones* illustrates a distaste for successive petitions, which is obviously inconsistent with *Noia*.

Like *Jones*, the Eleventh Circuit's treatment of the successive petition question in *Moore v. Kemp* reflects the tension concerning *Noia*'s continued viability. The Eleventh Circuit panel decision concluded that the new claims Moore wished to raise in his successive petition should not be entertained.[291] Unlike *Jones*, however, the court[292] based its decision in part on *Sykes* and its progeny, most particularly *Issac*, in holding

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[290] Interestingly, in Passman v. Blackburn, 797 F.2d 1335 (5th Cir. 1986), a three judge panel emphasized that the legislative history of Rule 9(b) evidenced Congress' intent to codify *Sanders* and *Noia* regarding the successive petition question. *Id.* at 1341-42. It concluded that when the petitioner was not represented by counsel in the earlier habeas proceeding, that is, when *Jones* did not control, then a successive petition raising a new claim would not be foreclosed absent a showing that the petitioner had actual knowledge of the claim. Thus, *Passman* suggests that *Noia* mandates the rejection of a constructive knowledge standard.

[291] Moore v. Zant, 734 F.2d 585 (11th Cir. 1984). The petitioner alleged nine claims not previously raised or resolved. He argued that four were not raised because they were dependent on changes in the law, and one was not raised because it was premised on the development of new facts. The petitioner alleged that he tried to raise three of the claims in his first application by seeking to amend the habeas petition but that the court had denied the amendment. He attributed the failure to raise the ninth claim to a conflict with his counsel and counsel's unfamiliarity with relevant facts and legal principles. *Id.* at 592.

[292] The *Moore* panel decision was not a unanimous one. The dissenting judge believed that at least some of the claims should have been entertained. *Id.* at 601 (Kravitch, J., dissenting). Interestingly, the majority, rather than authoring its own opinion, adopted, in its entirety, the district court's decision.

that the claims should not be entertained.[293] The court also relied on *Lundy*. The Eleventh Circuit, sitting en banc, in part reversed.[294] Although it held that some of the claims should have been entertained, the court did not endorse, rely upon, or, somewhat remarkably, even mention *Noia*. Instead, it implicitly rejected *Noia*'s personal participation prong and left open the question of whether it considered itself bound by *Noia*'s deliberate bypass approach.[295]

Regarding *Noia*'s personal participation prong, the court adhered to the rationale set out in *Jones*. It concluded that since Moore was represented by counsel when he filed his first petition, counsel's knowledge of the basis of the claims was chargeable to Moore.[296] Absent a showing that counsel was ineffective,[297] the court stated that, in determining whether to entertain a claim not raised in an earlier petition, it was simply irrelevant whether Moore concurred in the decision not to pursue a claim.

The Eleventh Circuit's treatment of *Noia*'s deliberate bypass standard is not particularly helpful regarding *Noia*'s continued viability and is in part confusing. The confusion is attributable to the court's application of the standards governing claims previously resolved on the merits to a claim not previously resolved.

Before the en banc court Moore argued that five claims not previously raised or resolved in his first federal habeas corpus petition should have been entertained in his second petition. He argued that two of these claims should be heard since they were dependent on changes in the law.[298] As to the remaining three claims, he asserted that the

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[293] *Id.* at 594-95. The court held that "the analysis of the 'new law' claims found in the procedural default cases (*Engle*) constitutes an appropriate basis for evaluation of the . . .'new law' claim in this case." *Id.* at 595.

[294] Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987) (en banc). The court split 7-5. Five members of the court would have affirmed the panel decision in its entirety. *Id.* at 887 (Tjoflat, J., concurring & dissenting); *id.* at 877 (Hill, J., dissenting).

[295] As noted, the majority opinion never mentioned *Noia*. Thus, the following discussion of its treatment of *Noia* is by definition by implication.

[296] *Id.* at 851 ("[Moore] is chargeable with counsel's actual awareness of the factual and legal bases of the claim at the time of the first petition and with the knowledge that would have been possessed by reasonably competent counsel at the time of the first petition.").

[297] Assuming counsel to be ineffective, it is unclear whether a claim could be foreclosed if a reasonable person would have raised the claim or whether a showing that the petitioner himself refused to raise the claim is required. *Compare Moore*, 824 F.2d at 862 n.16 (Tjoflat, J., concurring & dissenting) *with Jones*, 722 F.2d at 163, 164 n.3. *See also supra* note 290.

[298] These claims were premised on Estelle v. Smith, 451 U.S. 454 (1981) and Prof-

court should consider them because (1) he had tried to raise one claim, albeit unsuccessfully, by seeking to amend his first petition;[299] (2) he had premised another claim on the development of new facts;[300] and (3) a conflict with counsel prevented him from raising his last claim.[301]

As to Moore's new law claims, the court first noted that "[a]bsent deliberate withholding or intentional abandonment of a claim in the first federal petition, the inquiry into whether a petitioner has abused the writ in raising a new law claim must consider the petitioner's conduct and knowledge at the time of the preceding federal application."[302] The lack of any reference to *Noia* and the statement that an abuse

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fitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), *modified*, 706 F.2d 311 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983). In *Smith* the Court held that statements made to a psychiatrist during an interview to determine the accused's competency to stand trial were inadmissible, on fifth and sixth amendment grounds, in the sentencing phase of a capital trial unless the statements were preceded by a Miranda warning. *Smith*, 451 U.S. at 461-71. Moore argued that statements he made to a probation officer in connection with preparation of the presentence report, which report was introduced at the sentencing phase of his trial, were inadmissible under *Smith*. *Moore*, 824 F.2d at 850.

In *Proffitt* the Eleventh Circuit held that the sixth amendment accorded a capital defendant the right to confront and cross-examine a psychiatrist whose report of a presentence examination of the defendant was considered by the trial court in its sentencing determination. *Proffitt*, 685 F.2d at 1251-55. Moore argued that, in violation of *Proffitt*, hearsay testimony was included in his presentence report. *Moore*, 824 F.2d at 854. Moore filed his first federal habeas petition on November 22, 1978. The Supreme Court decided *Smith* on May 18, 1981. The ruling in *Proffitt* was entered on September 10, 1982. *Id.* at 849, 850, 854.

[299] Moore argued that he was not given a meaningful opportunity to review, correct, or supplement the presentence report considered by the trial court in his case, as required by Gardner v. Florida, 430 U.S. 349 (1977). Although he raised this claim in his first state habeas petition, Moore did not raise it in his first federal habeas application. In October 1980 he sought to raise this claim by amending his petition. The court denied leave to amend. *Moore*, 824 F.2d at 855.

[300] Relying on a recent study, the Baldus study, Moore argued that the death penalty was being applied in a racially discriminatory manner. This study was not available at the time of his first petition. In McClesky v. Kemp, 107 S. Ct. 1756 (1986), the Supreme Court rejected this argument on the merits. Given *McClesky*, the court of appeals saw no need to address whether the claim should have been entertained. *Moore*, 824 F.2d at 857.

[301] Moore asserted that his counsel was ineffective during the sentencing phase of his trial. He argued that this claim was omitted from his first federal habeas petition because of differences with his counsel. The court summarily concluded that the claim was foreclosed because the issue had been examined in detail in the order denying the first state habeas petition and because Moore never sought to amend his federal petition to include this claim. *Moore*, 824 F.2d at 857.

[302] *Id.* at 851.

finding might be appropriate in the absence of "deliberate withholding or intentional abandonment," suggest that the court is opting for an essentially open-ended equitable approach.[303] If this is the court's intent, it certainly represents a departure from *Noia*. However, it remains unclear whether the court would go so far as to embrace the approach of *Sykes* and its progeny.

The court's application of its equitable approach to Moore's new law claims provides little insight into whether the court intends to deviate significantly from *Noia*'s deliberate bypass approach. In determining whether to entertain the new law claims, the court found it necessary to focus only on whether reasonably competent counsel would have raised the claim. Finding that such counsel could not have been expected to raise the claims, it concluded that the new law claims should be heard.[304] The court's application then of its equitable approach is not particularly helpful in determining the continued viability of *Noia*'s deliberate bypass standard, just as the Supreme Court's holding in *Reed v. Ross*[305] did not clearly distinguish between *Sykes*' cause and prejudice

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[303] The court cited *Sanders* for the proposition "that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Id.* (citing Sanders v. United States, 373 U.S. 1, 17 (1983)).

[304] The court, in the context of the *Smith* claim, relied on the fact that *Smith* was handed down three weeks after the district court ruled on Moore's first federal habeas petition and over two and one half years after the petition was filed. It emphasized that prior to *Smith*, a lack of clear guidance existed regarding whether constitutional protections available to an accused at trial were equally applicable to the capital sentencing phase. Specifically, it referred to the fact that the decisions cited in *Smith* regarding this question were either handed down after Moore filed his first federal habeas petition or were unclear on this issue. The court also noted that even after *Smith*, a question remained about its applicability to death penalty sentencing schemes, such as the one applicable to *Moore*, which required only consideration of aggravating and mitigating circumstances and did not require proof of a particular additional fact as was the case in *Smith*. *Id.* at 850-54.

In regard to the *Proffitt* claim, the court noted that the decision was rendered some 17 months after the district court ruling on Moore's first federal habeas petition and almost four years after the petition was filed. It also emphasized the lack of guidance regarding the applicability of constitutional protections available at trial to the capital sentencing phase. *Id.*

Justices Tjoflat and Vance, in dissent, felt that reasonably competent counsel would have anticipated *Smith* and *Proffitt* and thus, raised both claims. *Id.* at 858, 869-77.

In this context, it is instructive to contrast the Supreme Court's discussion of the analogous issue in the procedural default context in *Engle* and *Ross* with the resolution of this question by the en banc court; see also the panel decision's approach to this issue at 734 F.2d at 592-95, 598.

[305] 468 U.S. 1 (1984).

standard and *Noia*'s deliberate bypass approach.[306] Clearly, it is possible to conclude that if reasonably competent counsel would not have raised the claim, then no knowing and voluntary relinquishment of the claim has occurred within the meaning of *Noia*. Whether the court's open-ended equitable approach will differ from the deliberate bypass standard depends on how it is applied to claims not previously raised or resolved on the merits when the failure to raise the claim was unreasonable. Only then will it be clear whether the court intends to depart from *Noia* in regard to new law claims.

The court's treatment of the claim Moore unsuccessfully tried to add to his initial petition illustrates the confusion surrounding the treatment of successive applications. The court first noted that since Moore premised the claim, which related to the presentence report, on a decision handed down prior to the filing of his first petition, he could not assert that the claim was not reasonably available.[307] The court also noted that its previous affirming of the district court's decision denying Moore's motion for leave to amend was not dispositive because "the standards applied by a district court in considering amendment are not coterminous with the standards for abuse of the writ."[308] Rather, this was only one factor to consider. The court then concluded that since Moore raised this claim in his first state habeas petition and since his first federal habeas application referred explicitly to the presentence report, the district court did not err in refusing to entertain the claim.[309] If the court had stopped at this point its treatment of the claim would not be particularly unusual. Given Moore's apparent knowledge of the claim, it is certainly conceivable that the court could have concluded that the decision not to raise the claim was knowing and voluntary. However, the court continued and held that even if the failure to raise the claim constituted an abuse of the writ, the claim should still be entertained if the ends of justice required consideration.[310] The court then cited *Kuhlmann v. Wilson*[311] and *Smith v. Murray*[312] as providing

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[306] *See supra* notes 236-44 and accompanying text.

[307] *Moore*, 824 F.2d at 855.

[308] *Id.*

[309] *Id.* at 856.

[310] *Id.* The court relied partly on the decision in Potts v. Zant, 638 F.2d 727 (5th Cir. Unit B), *cert. denied*, 454 U.S. 877 (1981). In *Potts* the court held that equitable considerations might warrant a federal habeas court entertaining a claim not previously raised even if the failure to raise it earlier was knowing and intentional. *Potts*, 638 F.2d at 745.

[311] 106 S. Ct. 2616 (1986).

[312] 106 S. Ct. 2661 (1986).

guidance regarding whether the ends of justice warranted further consideration of a claim dealing with the sentencing phase of a capital trial.[313] It concluded that since the lower court record was sufficiently ambiguous as to whether the alleged error precluded the development of true facts or resulted in the admission of false ones that the district court should reconsider whether to entertain the claim.[314] Thus, the court applied the standards for determining whether to entertain claims previously decided on the merits to a claim that had not been resolved earlier. Perhaps this is not surprising considering the court's open-ended equitable approach to determining whether to entertain new law claims and the fact that the error may have impacted upon the reliability of the fact finding process. Or perhaps the court was simply applying its own version of the "fundamentally unjust incarceration" exception initially set out in *Issac*. Nevertheless, the court's use of standards the Supreme Court has applied to claims previously resolved on the merits to claims not previously addressed is confusing.

Like *Jones*, the Eleventh Circuit ruling reflects the tension surrounding *Noia*'s continued viability in the successive petition context.[315] Given its specific holding, however, it remains to be seen how far the court will go in departing from *Noia*.

III. Successive Petitions in Capital Cases: Should Death Make a Difference?

The foregoing discussion of successive federal habeas corpus petitions has not addressed whether any special or different consideration should apply to a successive application filed on behalf of one facing execution. Specifically, should the same principles that govern outside of the death penalty context control, and if not, to what extent should they reflect the fact that a person's life is at issue?[316]

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[313] The court declined to decide whether, as suggested by the plurality in *Wilson*, a colorable showing of factual innocence was a condition precedent to the ends of justice requiring reconsideration.

[314] *Moore*, 824 F.2d at 857.

[315] Three of the dissenters in *Moore* went so far as to conclude, citing *Wilson*, that successive petitions raising new claims should not be entertained absent a colorable showing of factual innocence or in death cases, a showing that the accused was innocent of an aggravating circumstance needed to impose the death penalty. *Id.* at 878 (Hill, J., dissenting).

[316] *See, e.g.*, Batey, *supra* note 270, at 272 (arguing that abuse of the writ principles should be inapplicable in death case to ensure that procedures available to petitioner to challenge his conviction are "beyond constitutional reproach") (quoting Price v. Johnson, 334 U.S. 266, 291 (1948).

The Supreme Court has repeatedly emphasized the qualitative difference between the death penalty and other criminal punishments.[317] It has consequently recognized "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[318] Its insistence on a heightened degree of reliability when death is imposed has resulted, at least arguably, in its giving careful scrutiny to process and substantive concerns in death cases.[319] This has led to results in death cases that might not have been mandated in an ordinary case.[320] The emphasis on reliability appears to indicate that the Court would want lower courts, when determining whether to entertain successive petitions, to consider that the question has arisen in a death case.[321]

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[317] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And, it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."); Woodson v. North Carolina, 428 U.S. 280, 305 (1970) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.").

[318] Eddings v. Oklahoma, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring).

[319] Catz, *supra* note 270, at 1197; *see also* Caldwell v. Mississippi, 472 U.S. 320 (1985) (the trial court must not significantly diminish the jury's responsibility in the sentencing decision when explaining the review process involved in capital cases); Lockett v. Ohio, 438 U.S. 586 (1978) (statutes that seek to limit the mitigating circumstances that can be considered at the sentencing phase of a capital trial are invalid); Gardner v. Florida, 430 U.S. 349 (1977) (in a capital case, the defendant must be given notice of, and an opportunity to respond to, a presentence report and any other information used by the sentencing judge). *But cf.* McClesky v. Kemp, 107 S. Ct. 1756 (1987) (risk that the race of the victim or defendant plays an impermissible role in the death penalty decision making process is not sufficient to overturn a capital sentence absent proof that it played a role in the petitioner's case).

[320] *See, e.g.*, Green v. Georgia, 442 U.S. 95 (1979) (error not to permit one facing a death sentence to introduce certain mitigating evidence that was excluded on hearsay grounds); Gardner v. Florida, 430 U.S. 349 (1977) (full presentence report must be made part of the record on appeal).

[321] The fact that successive petition questions arising in death cases deserve special treatment is perhaps best illustrated by the case of Arthur Goode. In his second federal habeas petition, Goode sought to raise a claim that he was presently insane and that the Constitution precluded the execution of an insane person. The Eleventh Circuit refused to consider the claim, finding that even if such a right existed, Goode was "barred from raising it . . . because of abuse of the writ." Goode v. Wainwright, 731 F.2d 1482, 1483 (11th Cir. 1984). Goode was subsequently executed on April 14, 1984, 10 days after the Eleventh Circuit decision. Approximately six weeks later, in a proceeding initiated by the filing of a successive habeas petition, the Eleventh Circuit granted a

However, as a general rule,[322] the Court's willingness to carefully scrutinize both procedural and substantive concerns relevant to the decision to impose death appears limited to the trial and direct appeal context.[323] In regard to collateral review and, specifically, federal habeas review, some Justices have expressed increasing displeasure with the perceived snail's pace of the death penalty review process.[324]

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stay of execution to Alvin Ford. Ford v. Strickland, 734 F.2d 538 (11th Cir. 1984). The Supreme Court refused to vacate the stay. Wainwright v. Ford, 407 U.S. 1220 (1984). The stay, granted by the Eleventh Circuit, was partly premised on the same claim that Goode had raised. As to whether Ford should be precluded from raising the claim since it had not been raised earlier, the court distinguished *Goode* on the ground that in earlier state court proceedings, Goode had contested his competency whereas Ford had never previously raised incompetency or insanity as an issue. *Ford*, 734 F.2d at 540. The Supreme Court ultimately found the claim raised by Ford to be meritorious. *See* Ford v. Wainwright, 106 S. Ct. 2595 (1986) (holding that the eighth amendment prohibition against cruel and unusual punishment precludes the execution of the insane and that the procedures the state of Florida used to determine sanity violated due process). Thus, as a result of an application of abuse of the writ principles, Arthur Goode was unable to raise a claim subsequently found to be meritorious.

[322] In Barefoot v. Estelle, 463 U.S. 880, 893 (1983), the Court held that the nature of the penalty — a death sentence — is a relevant consideration in determining whether to issue a certificate of probable cause to appeal a final order in a federal habeas proceeding brought by a state prisoner. Further, § 2253 mandates that an appeal may not be taken from a final order in a habeas proceeding brought by a state prisoner unless a certificate of probable cause is issued. 28 U.S.C. § 2253 (1982). *Barefoot* held that a certificate of probable cause requires a petitioner to make a "substantial showing of the denial of [a] federal right . . . [that is,] that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.' " *Barefoot*, 463 U.S. at 893 n.4.

[323] *See Barefoot*, 463 U.S. at 896.

[324] *See supra* notes 10-11 and accompanying text. In Stephens v. Kemp, 464 U.S. 1027 (1983), Justice Powell observed:

> That Stephens is innocent of the brutal, execution-style murder, after kidnaping [sic] and robbing his victim, is not seriously argued. This is a contest over the application of capital punishment — a punishment repeatedly declared to be constitutional by this Court. In the nearly nine years of repetitive litigation by state and federal courts there has been no suggestion that the death sentence would not be appropriate in this case. Indeed, if on the facts here it was not appropriate, it is not easy to think of a case in which it would be so viewed. Once again, as I indicated at the outset, a typically "last minute" flurry of activity is resulting in additional delay of the imposition of a sentence imposed almost a decade ago. This sort of procedure undermines public confidence in the courts and in the laws we are required to follow.

Id. at 1031-32 (Powell, J., dissenting); *see also* Sullivan v. Wainwright, 464 U.S. 109 (1983); Alabama v. Evans, 461 U.S. 230, 234 (1983) (Burger, C.J., concurring); Wain-

The recognition that counsel for one facing execution will inevitably explore any legal avenue[325] has led some members of the Court to not express a heightened concern about reliability in questions relating to the federal habeas review process for those sentenced to death.[326] This is perhaps most evident in the Supreme Court's decision in *Barefoot v. Estelle*.[327]

In *Barefoot* the Supreme Court sanctioned the use of an expedited appeals process when federal courts of appeals are asked to review decisions in federal habeas proceedings that involve death cases. This holding was contingent on counsel being given an "adequate opportunity to address the merits" and knowledge by counsel "that he is expected to do so."[328] The Court offered three reasons for its decision that are relevant to whether the principles governing whether to entertain successive petitions should in some way reflect the fact that the issue has arisen in a death case.

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wright v. Spinkellink, 442 U.S. 901 (1979) (Rehnquist, J., dissenting). *But see* Autry v. McKaskle, 465 U.S. 1085, 1085 (1984) (Marshall, J., dissenting) ("Unfortunately, this case is not an aberration but is part of a pattern of recent decisions in each of which the Court has shown an unseemly desire to bring litigation in a capital case to a fast and irrevocable end.").

[325] *See Barefoot*, 463 U.S. at 888 (" 'It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts.' ") (quoting Lambert v. Barrett, 159 U.S. 660, 662 (1895)).

[326] This segment of the Court would argue that limiting the scope and availability of the federal review process, through habeas corpus, does not necessarily decrease the likelihood that the sentence of death is reliable. *See* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 447 (1963) (arguing that providing another avenue of judicial review does not necessarily provide a more reliable result, if the term reliable is defined to mean a correct result); *see also* Friendly, *supra* note 129, at 146.

[327] 463 U.S. 880 (1983); *see also* Smith v. Murray, 106 S. Ct. 2661, 2666 (1986) (principles of *Sykes* and its progeny govern in determining whether claims procedurally defaulted should be entertained in a federal habeas proceeding irrespective of whether the issue arises in a death case); Autry v. McKaskle, 465 U.S. 1090 (1984) (refusing to adopt a rule granting an automatic stay, regardless of the merits, when the applicant in a death case is seeking review in the Supreme Court of the denial of his first federal habeas petition).

[328] *Barefoot*, 463 U.S. at 894. As Justice Marshall put it, "The Supreme Court has authorized the reviewing courts to put these proceedings on fast-forward." Marshall, *Remarks on the Death Penalty made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 6 (1986); *see also* Amsterdam, *supra* note 7, at 54 ("[a] death sentenced appellant . . . can have his appeal decided on the merits . . . without the full-time for briefing, argument, and judicial deliberation that would be permitted in a five dollar tax case or a two dollar social security case.").

First, the Court emphasized that the role of federal habeas review, while significant in ensuring that constitutional rights are observed, is secondary and limited since the direct appeal provides the primary avenue for review in all cases including death cases.[329] A majority[330] asserted "[w]hen the process of direct review — which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari — comes to an end, a presumption of finality and legality attaches to the conviction and sentence."[331]

As reflected in *Barefoot*, the Court's view of the federal habeas remedy indicates, at a minimum, that the abuse of the writ principles will play some role in determining whether to hear successive petitions brought by one under a death sentence. It of course can be argued persuasively that the Court's implicit emphasis that certiorari provides a federal forum within which federal constitutional rights can be vindicated is misplaced.[332] However, in the context of successive petitions, when one has already had an opportunity to pursue a remedy in a federal habeas forum, the same criticism is not as compelling. The positions of Justices Scalia and Kennedy will be crucial[333] in resolving this issue and other questions relating to the availability of the federal habeas remedy in death cases.[334] Although their views are impossible to predict with any certainty, Scalia's initial decisions on substantive concerns involving the death penalty[335] suggest that he will join the major-

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[329] *Barefoot*, 463 U.S. at 887.

[330] The decision was 5-4, with Justices Rehnquist, O'Connor, Powell, and Chief Justice Burger joining Justice White who authored the majority opinion. Justices Brennan, Marshall, Stevens, and Blackmun dissented over the propriety of permitting an expedited appellate review process in capital cases.

[331] *Barefoot*, 463 U.S. at 887.

[332] *See supra* note 6. In particular, contrast the opinions of Justice Stevens and Justice Rehnquist in Coleman v. Balcom, 451 U.S. 949 (1981). *See also* Amsterdam, *supra* note 7, at 54 (the Court's "calculated implication — that certiorari is the primary federal judicial protection against state court capital trials, so that federal habeas corpus can be regarded as merely 'secondary' — is unprecedented in law and untrue in fact").

[333] *See supra* note 330 and accompanying text.

[334] *See also* Smith v. Murray, 106 S. Ct. 2661 (1986) (a 5-4 decision in which Chief Justice Burger joined the majority).

[335] In two recent cases, Justice Scalia has joined Justices Powell, O'Connor, White, and Chief Justice Rehnquist in upholding death sentences. *See* McClesky v. Kemp, 107 S. Ct. 1756 (1987); Tison v. Arizona, 107 S. Ct. 3201 (1987). In *McClesky* the Court rejected a challenge premised on the argument that the race of the victim played an impermissible role in the death penalty selection process. In *Tison* the Court concluded that an intent to kill was not required before a death sentence could be constitutionally imposed. Rather, a reckless indifference to life when coupled with major participation

ity in *Barefoot.*

The two other reasons the *Barefoot* majority offered essentially overlap and further indicate that the Court will not find abuse of the writ principles totally inapplicable in death cases. First, the Court noted that counsel would naturally pursue any legal remedy available to prevent her client's execution.[336] Second, it emphasized that unlike other sentences, a death sentence cannot be carried out while legal questions remain outstanding.[337] The Court was suggesting that a carefully tailored expedited federal appellate review process was warranted to ensure that federal habeas was not used to indefinitely prevent execution of state court judgments of death. Professor Amsterdam, in criticizing this reasoning, argued that a similar rationale might justify an expedited appeals process, for example, in welfare cases in which recipients are denied desperately needed monies to which they are legally entitled.[338] He suggests that the *Barefoot* majority's concern about expeditiously effectuating judgments simply reflects their priorities and values to effectuate death sentences — priorities and values Amsterdam finds aberrant.[339]

Barefoot, as well as the Court's holding in *Smith* that *Sykes* and its progeny should not be applied differently in death penalty cases, sug-

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in a felony during which death occurs can be sufficient.

[336] *Barefoot*, 463 U.S. at 888.

[337] *Id.*

[338] Amsterdam, *supra* note 7, at 54.

[339] *Id.* Professor Amsterdam also argues that it should make no

> earthly difference to anybody but the condemned inmate whether the death sentence, if finally held valid, is executed three or four years rather than, say, two years after imposition . . . since during the interim, the death sentence inmate is neither at large and dangerous nor unpunished; he is securely housed in a maximum security facility . . . and when the last review in his case is over, he is still there for the state to execute at its convenience.

Id. at 52. Although there is obvious logic to this argument, many still believe that substantial delays in effectuating of death sentences pose a significant threat to the integrity of the criminal justice system. *See supra* notes 10-11 and accompanying text. *But see* Coleman v. Balcom, 451 U.S. 949, 952 (1981) (Stevens, J., concurring) (suggesting that imprisonment during the period of time when a death sentence is being reviewed is a significant form of punishment and that "the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself."). Regarding Justice Stevens' observations, consider the plight of James Autry who at one point was "strapped to a gurney for over an hour with an intravenous needle in his arm, waiting to be put to death" before he received a stay at the last minute. Autry v. McKaskle, 465 U.S. 1090, 1091 (1984) (Brennan, J., dissenting). Autry was later executed.

gests that the Court's concern with reliability in death penalty decisions will not spill over to process decisions that relate to the scope and availability of the federal habeas remedy. Nevertheless, although *Barefoot* and *Smith* clearly indicate that abuse of the writ principles should play a role in death cases, the fact that the successive petition is brought by one facing a death sentence should not be irrelevant.[340] The qualitative difference between death and all other criminal punishments, and the relative interests of the state and the petitioner when the issue is not whether the defendant should be executed, but rather how quickly he will or will not be executed,[341] suggest that the fact that the successive petition arises in a death case should be relevant in determining whether to hear the application. Even *Barefoot*'s majority recognized this when it discussed the question of when a certificate of probable cause to appeal should be granted in a death case.[342] Contrary to its general reluctance to apply heightened reliability concerns to the federal habeas review process in death cases, the Court noted that although "the severity of the penalty does not in itself suffice to warrant the automatic issuance of a certificate" that "in a capital case, the nature of the penalty is a proper consideration."[343] This should be the proper approach in the successive petition context as well. Admittedly, it is difficult to define how consideration of the fact that a person's life is at stake should manifest itself in the successive petition context. But at a minimum, it should require that the burden of establishing that the successive application not be entertained be placed on the state and that the state be required to show by clear and convincing evidence that the petition should not be heard,[344] and as discussed in Part V, it should

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[340] *See* Potts v. Zant, 638 F.2d 727, 747 (5th Cir. Unit B), *cert. denied*, 454 U.S. 877 (1981) (stating that the fact that a man's life is at stake is relevant to the resolution of the successive petition question).

[341] In McClesky v. Kemp, 107 S. Ct. 1756 (1987), Justice Brennan argued that:

> [T]he relative interests of the state and the defendant differ dramatically in the death penalty context. The marginal benefits accruing to the state from obtaining the death penalty rather than life imprisonment are considerably less than the marginal difference to the defendant between death and life in prison.

Id. at 1792 (Brennan, J., dissenting).

[342] *See supra* note 322.

[343] *Barefoot*, 463 U.S. at 893.

[344] As to whether the state should be required to satisfy its burden by a preponderance of the evidence as contrasted with requiring clear and convincing evidence, compare Nix v. Williams, 467 U.S. 431 (1984) with United States v. Wade, 388 U.S. 218 (1967). In *Williams* the Court held that if the state could establish by a preponderance of the evidence that information obtained in violation of the sixth amendment would inevitably have been discovered by lawful means, then the fact that its discovery was

also require a showing that the petitioner intended to frustrate the orderly administration of justice or exhibited reckless indifference to the same before it refuses to entertain the application.

IV. The Supreme Court's Treatment of Successive Petitions in Capital Cases

The Supreme Court has yet to fully address the questions posed by successive federal habeas corpus petitions in capital cases.[345] However, it has summarily considered this subject when addressing requests for stays of execution. A clear standard regarding the treatment of successive petitions cannot be extracted from these decisions. If anything, they evidence the need for the Court to fully consider this question.

Illustrative of these decisions are *Stephens v. Kemp*,[346] *Woodard v. Hutchins*,[347] and *Antone v. Duggar*.[348] In *Stephens*, by a 5-4 vote, the Court granted a stay of execution sought in connection with a successive habeas corpus application.[349] The summary opinion granting the stay did not refer to the fact that the petitioner's habeas application was a successive one. It simply granted a stay pending the Eleventh Circuit's en banc decision in a case that presented substantially the same question the petitioner wished to raise.[350] The dissent (Justices Powell,

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hastened by a constitutional violation would not preclude its admission into evidence. *Williams*, 467 U.S. at 444. In *Wade* the Court held that the prosecution must establish by clear and convincing evidence that an in-court identification was not the fruit of an earlier identification made in violation of the sixth amendment. *Wade*, 388 U.S. at 241-42. In the successive petition context, when the death penalty is involved, the clear and convincing evidence standard should be used.

[345] A number of capital cases provided the Court with an opportunity to do so, but to date they have refused to fully address this question. *See, e.g.*, Witt v. Wainwright, 470 U.S. 1039, 1043 (1985) (Marshall, J., dissenting):

> [T]he Court has had little occasion in full opinions to elaborate upon the contours of the abuse-of-the-writ doctrine. Instead, the doctrine develops *sub rosa* when this Court refuses to stay executions or to consider substantive claims raised in certiorari petitions that arise from second or later habeas petitions. . . . [L]ower courts, as well as the public, are entitled to guidance as to what standards this Court is employing when it refuses to reach the merits of what are clearly substantial issues in the administration of the death penalty.

[346] 464 U.S. 1027 (1984) (granting an application for a stay of execution).

[347] 464 U.S. 377 (1984).

[348] 465 U.S. 200 (1984).

[349] *Stephens*, 464 U.S. at 1027-28.

[350] *Id.* at 1028. The case that arguably presented the same question was Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983). The issue was whether the Georgia death penalty statute was being administered in an unconstitutional fashion because of the impact

Rehnquist, O'Connor, and Chief Justice Burger) argued that the issue was not just whether Stephens raised an issue identical to a claim then pending before the Eleventh Circuit, but also whether "Stephens is guilty of having abused the writ of habeas corpus."[351] In this context, it adopted the Eleventh Circuit standard put forth by the *Stephens* panel that "to constitute abuse, presentation of such issues must result from (1) the intentional withholding or intentional abandonment of those issues on the initial petition or (2) inexcusable neglect."[352] Applying this standard, the dissent found that Stephens had not offered a sufficient explanation for why he failed to raise the claim in his first federal habeas petition. Although Stephens argued that the factual information necessary to establish the claim was unavailable at the time of his first habeas petition,[353] the dissent noted that the claim was available since other petitioners had raised the claim prior to the filing of Stephens' first petition.[354]

The dissent's approach in *Stephens* is problematic. Although the intentional withholding or intentional abandonment language would seem to be consistent with the *Sanders* and *Noia* principles[355] codified in Rule 9(b) of the Habeas Corpus Rules and 28 U.S.C. section 2244(b),[356] the inexcusable neglect standard is not. It would preclude

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the race of the victim and defendant had on the death penalty decision making process. This claim was ultimately rejected by the Eleventh Circuit in an en banc decision. *See* McClesky v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc); *see also* McClesky v. Kemp, 107 S. Ct. 1756 (1987).

[351] *Stephens*, 464 U.S. at 1029 (Powell, J., dissenting). More specifically, the dissent believed that the issue was whether the district court had abused its discretion when it found that Stephens had abused the writ.

[352] *Id.* at 1030 (Powell, J., dissenting). This standard initially surfaced in Potts v. Zant, 638 F.2d 727, 747 (5th Cir. Unit B), *cert. denied*, 454 U.S. 877 (1981). The dissent also noted, as had the court of appeals, that no disagreement existed between the parties as to the governing standard. *Stephens*, 464 U.S. at 1031 (Powell, J., dissenting).

[353] Stephens specifically referred to a study by Dr. David Baldus, which the petitioner asserted was not made available to the public until 1982. *Stephens*, 464 U.S. at 1030 (Powell, J., dissenting).

[354] The dissent noted that the petitioner in *Spencer*, who arguably raised the same issue that Stephens wished to raise, had advanced this claim prior to the filing of Stephens' first federal habeas petition. *Id.* at 1032 (Powell, J., dissenting).

[355] This assumes that the word "intentional" encompasses both a voluntary and knowing act. The standard adopted by the *Stephens* dissent does not refer to the *Noia* requirement that the decision not to raise the claim be explicitly concurred in by the petitioner.

[356] *See supra* text accompanying notes 90-122; *see also* Witt v. Wainwright, 470 U.S. 1039, 1043-44 (1985) (Marshall, J., dissenting) ("Moreover, while the Court has

consideration of a claim if the petitioner was negligent in not raising it earlier. To the extent the inexcusable neglect standard may be premised on *Sanders*' reference to *Townsend*'s use of that phrase,[357] this conclusion is misguided. Further, although the dissent did not explicitly refer to *Issac*, it seemed to borrow from the *Issac* standard when it emphasized that petitioner's unavailability argument should be rejected because other counsel had raised the claim. The dissent's position takes on even greater significance since approximately eleven months after it entered the stay, the Court vacated it when Stephens' certiorari petition was denied.[358] Although the Court gave no reason for its decision, since the issue that initially prompted it was still pending before the Eleventh Circuit,[359] the order must have been premised on a finding that abuse of the writ principles precluded consideration of the claim unless the Court decided that the issue before the Eleventh Circuit was not worthy of review regardless of the Eleventh Circuit's decision. However, given the nature of the claim, this possibility is unlikely to have been the case.

Woodard v. Hutchins further illustrates the Court's problematic approach to the successive petition question. In *Hutchins*, the Court, in another 5-4 decision, vacated a stay of execution granted by the lower court to consider a successive petition. The majority (Justices Powell, Rehnquist, O'Connor, Blackmun, and Chief Justice Burger) seemed more concerned about expressing its displeasure with the snail's pace of the death penalty review process[360] than with offering a reasoned explanation why Hutchins' claim should not be entertained. Although the Court referred to section 2244(b) and Rule 9(b), it did not refer to *Sanders* or any other judicial decision. Rather, after noting that "[s]uccessive petitions . . . that raise claims deliberately withheld from prior petitions constitute an abuse of the writ," the Court concluded that Hutchins' petition should not be entertained since all of his claims "could and should have been raised in his first petition."[361] Although it conceded that no affirmative evidence existed that the claims were de-

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abandoned *Fay*'s deliberate bypass standard in some contexts and required petitioners to show cause and prejudice for their delay in presenting issues, see *Wainwright v. Sykes* . . ., it is clear that the deliberate bypass standard of *Sanders* still governs dismissal of successive habeas petitions.").

[357] *See supra* text accompanying notes 75-83.

[358] Stephens v. Kemp, 469 U.S. 1043 (1984). Stephens was executed approximately three weeks after the entry of this order.

[359] *Id.* at 531 (Brennan, J., dissenting).

[360] *See supra* note 10.

[361] Woodward v. Hutchins, 464 U.S. 377, 379 (1984).

liberately withheld, the Court emphasized that Hutchins had counsel throughout and that he offered no explanation why the claims were not raised earlier.[362]

Hutchins is not necessarily inconsistent with *Sanders* in that the Court's use of the phrase "deliberately withheld" may indicate an intent to rely on *Sanders* as well as 28 U.S.C. section 2244(b). Further, since the petitioner did not offer an explanation for his failure to raise the claims earlier, the Court may simply have been saying that the burden to establish the absence of a deliberate bypass is on the petitioner and Hutchins failed to meet this burden. In this regard, the advisory committee notes to Rule 9(b) indicate that while the burden of pleading abuse of the writ is on the government, the burden of proof is on the petitioner.[363] However, given the tone of the concurring opinion, this reading of *Hutchins* is clearly subject to dispute particularly since the opinion failed to mention *Sanders* or *Noia*. The opinion's ambiguity prompted Justices White and Stevens to write in dissent:

> It also seems to us that the Court's opaque *per curiam* opinion vacating

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[362] *Id.* at 379 n.3.

[363] "The burden is on the government to plead abuse of the writ . . . . Once the government has done this, the petitioner has the burden of proving that he has not abused the writ." Rule 9(b), advisory committee notes. Despite the advisory committee notes, some confusion exists regarding the burden of proof issue. In Price v. Johnston, 334 U.S. 266 (1948), the Court clearly placed the burden of pleading abuse of the writ on the government, stating:

> And so if the Government chooses not to deny the allegation or to question its sufficiency and desires instead to claim that the petitioner has abused the writ of *habeas corpus*, it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause.

Id. at 292. However, *Price* also placed the burden of proof on the petitioner: "[o]nce a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ." *Id.*

Sanders reiterated that the burden of pleading the abuse issue rested with the government, and that the burden of proof was on the petitioner with regard to petitions raising claims previously resolved on the merits. However, the decision was sufficiently ambiguous on this issue, particularly regarding petitions raising new claims, that Justice Harlan observed that "[t]he court today, however, leaves the crucial question of burden of proof up in the air." *Sanders*, 373 U.S. at 29 (Harlan, J., dissenting). Subsequently, it has been argued that *Sanders*' adoption of *Noia* places the burden of proof on the government since the *Zerbst* standard, incorporated in *Noia*, requires the government to establish that an individual has voluntarily and knowingly waived a constitutional right. *See* Clinton, *supra* note 102, at 39-40; L. YACKLE, *supra* note 19, § 155, at 564. Finally, *Wilson* cites *Sanders* for the proposition that the burden of proof is on the petitioner to establish that a claim previously resolved on the merits warrants reconsideration. Kuhlmann v. Wilson, 106 S. Ct. 2616, 2622 (1986).

> the stay comes very close to a holding that a second petition for habeas corpus should be considered as an abuse of the writ and for that reason need not be otherwise addressed on the merits. We are not now prepared to accept such a *per se* rule.[364]

Antone is equally problematic. In a per curiam opinion joined by six Justices,[365] the Court affirmed lower court decisions that refused to entertain Antone's successive petition because they found it to be an abuse of the writ. In his successive application, Antone raised both claims previously resolved on the merits and new claims.[366] He argued that the Court, in determining whether to entertain his petition and particularly as to his new claims, should consider that his counsel in the first federal habeas proceeding did not accept the case until execution was imminent.[367] He suggested that this explained the failure to raise certain claims previously and also prevented him from obtaining a full and fair hearing earlier. The Court disagreed. The Court noted that since his allegedly new claims were presented to the state courts prior to his first federal habeas petition, Antone could not contend that he was unaware of the claims.[368] It also found that the ends of justice did not warrant reconsideration of the previously litigated claims.[369] Finally, the Court rejected Antone's assertion that it should hear the petition because his first habeas counsel was unable to adequately familiarize himself with the case.[370] Specifically, it noted that Antone did not offer an explanation as to why almost two years passed between the time the Florida Supreme Court affirmed his conviction and the filing of his first motion for post conviction relief.[371] Further, it emphasized that it appeared that Antone was represented by counsel throughout this period and that his initial federal habeas petition was not conducted under the pressures of

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[364] *Hutchins*, 464 U.S. at 383 (White & Stevens, JJ., dissenting).

[365] Although Justice Stevens did not join the Court's per curiam opinion, he concurred in the result because he believed that the essence of Antone's claims had been raised in the earlier federal habeas proceeding, and he found no reason to justify permitting Antone to relitigate these claims. Antone v. Dugger, 465 U.S. 200, 207 (1984) (Stevens, J., concurring). Justice Brennan and Justice Marshall dissented because they believed that the death penalty is unconstitutional under all circumstances. They did not address the abuse of the writ question. *Id.* (Brennan, J., dissenting).

[366] Whether Antone had really raised any new claims was unclear. *Id.* (Stevens, J., concurring). However, the Court was apparently willing to assume that some of his claims should be treated as new claims. *Id.* at 205.

[367] *Id.* at 206 n.4.

[368] *Id.* at 206.

[369] *Id.* at 204.

[370] *Id.* at 206 n.4.

[371] *Id.*

an imminent execution since the Eleventh Circuit had issued a stay pending consideration of the petition.[372]

At first reading, *Antone* sounds reasonable. The Court referred to whether the ends of justice warranted further consideration of the claims previously resolved and indicated that Antone was aware of the new claims when he filed his first petition. To preclude consideration of such claims in a successive petition is not necessarily inconsistent with *Sanders* and *Noia*. However, *Antone*'s problem lies in the Court's refusal to realistically assess the circumstances under which initial federal habeas petitions are filed on behalf of those facing execution. Contrary to the Court's assertions about the availability of counsel, with some very limited exceptions, "[u]ntil an execution date is set, and the situation becomes urgent, capital defendants simply have been unable to secure counsel."[373] This is attributable partly to the fact that indigents facing execution have no constitutional right to counsel[374] in federal habeas proceedings and to the stress, demands, and complexity of capital representation.[375] To ignore or unrealistically assess the circumstances that surround the filing of an initial habeas petition by one facing death when determining whether to entertain successive petitions is to shield oneself from an unpleasant, yet real part of the death penalty review process. Unless states provide counsel to those facing execution in federal habeas proceedings,[376] courts should not ignore the circumstances, including the availability of counsel, that surround the filing of the initial petition when they consider whether to entertain successive petitions. A review of these circumstances may indicate that

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[372] *Id.*

[373] Marshall, *supra* note 328, at 5.

[374] *Id.*; *see also* Hooks v. Wainwright, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 107 S. Ct. 313 (1986); Ross v. Moffitt, 417 U.S. 600 (1974); Palmes v. Wainwright, 540 F. Supp. 652 (M.D. Fla. 1982).

[375] In a recent American Bar Association survey of private attorneys who have done post conviction death penalty work, one attorney remarked:

> I have been involved, both as plaintiff's counsel and defense counsel in major, protracted litigation of several different types . . . . No case I have ever handled compares in complexity with my Florida death penalty case. The death penalty jurisprudence is unintelligible; it is inconsistent and, at times, irrational. In addition, it is evolving . . . . In short, there is nothing more difficult, more time consuming, more expensive, and more emotionally exhausting than handling a death penalty case after conviction.

Quoted in The Spangenberg Group, *A Caseload/Workload Formula for Florida's Office of the Capital Collateral Representative*, Feb. 1987, at 12.

[376] *See* FLA. STAT. ANN. §§ 27.7001-.708 (West Supp. 1987). However, such steps will be inadequate unless sufficient funding is provided.

equities dictate that the successive petition be entertained.

Stephens, *Hutchins*, and *Antone* illustrate the Supreme Court's lack of clarity in its treatment of successive petitions in capital cases. These rulings illustrate the need for the Court to address the questions posed by successive applications and to clearly define the principles that are to govern in light of 28 U.S.C. section 2244(b), Rule 9(b), *Sanders*, and any other relevant judicial decisions. When a person's life is at stake, imprecision is inexcusable.

V. Resolving the Problem

A threshold question to determine is whether courts have the authority to deviate from the *Sanders* standards in assessing whether to entertain successive petitions in death cases. Although the Supreme Court has indicated a willingness to overturn or modify earlier decisions that address the scope of the habeas remedy even when the language in the federal habeas statute remains unchanged,[377] the legislative history that surrounds the adoption of 28 U.S.C. section 2244(b) and Rule 9(b) of the Habeas Corpus Rules strongly suggests that *Sanders* must control. As Professor Yackle noted, "the congressional endorsement of the *Sanders* approach in Rule 9(b) would surely make any significant departure from present law difficult."[378] In this regard, the evolution of the law that relates to successive petitions differs from the development of the law that governs whether procedurally defaulted claims should be heard in federal habeas proceedings. When the Court overruled *Noia* in *Sykes* and its progeny, it was not deviating from a decision that Congress subsequently endorsed. Such would be the case if the Court departed from *Sanders* in any significant way.

Assuming that courts will not consider themselves bound by *Sanders*, what principles should govern successive petitions in death cases? As to claims previously resolved on the merits, the *Wilson* plurality view that such claims should be foreclosed unless coupled with a showing of a reasonable probability of factual innocence[379] should not apply when a person's life is at stake. Rather, a court should entertain a petition if the petitioner offers a reasonable explanation for why the claim should

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[377] *See supra* notes 147, 151 and accompanying text.

[378] L. Yackle, *supra* note 19, § 155, at 563-64.

[379] *See* Wainwright v. Sykes, 433 U.S. 72 (1977). Interestingly, this approach is similar to the principles set out in *Sykes* and its progeny for determining whether procedurally defaulted claims should be entertained. This approach essentially tracks the "fundamentally unjust incarceration" exception portion of *Sykes* and its progeny without referring to its cause and prejudice prongs.

be heard. A reasonable explanation could include an intervening change in the law that is or should be retroactive or any factor that casts doubt on the fullness or fairness of the claim's initial consideration. Such factors should include the unavailability of counsel until the last moment, making it virtually impossible to fully and fairly present the claim or the lack of financial resources, which makes it difficult to fully develop the claim. In determining whether to hear the claim, courts should be governed by relevant equitable considerations, remembering that a person's life is in the balance. And, considering the relative interests of the state and the individual at this stage,[380] the burden of proof should be on the state to establish that the claim should not be reheard.[381]

In regard to new claims, continued application of *Noia* is unwarranted. The primary rationale for *Noia* was that the federal interest in ensuring that a petitioner had an opportunity to litigate his federal claims in a federal forum counterbalanced any state interest in enforcing its reasonable procedural rules. This rationale is inapplicable in the context of successive federal habeas applications since the petitioner already has had at least one opportunity to raise claims in a federal forum.[382] The *Noia* standard is also unwarranted because, as discussed previously,[383] its application is unlikely to ever foreclose a successive petition that raises new claims. It is virtually inconceivable that a petitioner would voluntarily and knowingly fail to raise a claim in a death case when he had any conceivable basis for believing it might be meritorious.

Although *Noia*'s application is not warranted in death cases, neither are the principles of *Sykes* and its progeny: *Issac*, *Frady*, *Carrier*, and *Smith*. The fact that a person's life is at stake should make a difference even in the context of the federal habeas review process. A more appropriate standard than *Sykes* and its progeny would reflect the relative interests at stake when a person facing death files a successive petition that raises a new claim. This standard would only foreclose a claim when the state could establish that the petitioner, by failing to raise the

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[380] *See supra* note 341 and accompanying text.

[381] *See supra* note 344 and accompanying text.

[382] However, it should be noted that the comity concerns, which in part prompted *Sykes* and its progeny, are of less relevance in the successive federal habeas application context because there has already been one opportunity for federal review. In the successive petition context, there is also no incentive to raise the claim in the first proceeding similar to the incentive flowing from the fact that if the claim is not raised pursuant to the state procedural rule, direct appellate review is foreclosed.

[383] *See supra* text accompanying notes 70-74.

claim earlier, either intended to frustrate the orderly administration of justice or exhibited a reckless indifference to it.[384] The unavailability of counsel until late in the process and the lack of financial resources to develop claims should also be relevant considerations in making this determination.

Of course, if courts adopt the principles outlined above, then executions are unlikely to occur with the frequency that are likely if the *Wilson* plurality view and the principles of *Sykes* and its progeny are adopted. However, the frequency of executions is not the issue. Rather, the primary focus in defining governing principles should be their effect on the integrity of the criminal justice system and the orderly administration of justice. In this regard, no reason exists that suggests that courts would be powerless to prevent the principles recommended above from being abused. Further, lest any doubt exists regarding on which side one should err on this question, the following observations of Circuit Judge Goldberg should be kept in mind:

> I submit that capital cases demand special consideration, both at trial and on appellate review, because of the exceptional and irrevocable nature of the penalty involved. In pronouncing the ultimate sentence, our enunciation must be positive, definite, unconditional, and without prefix, for once the words are pronounced there is no suffix. Surely, when a life hangs in the balance, extraordinary care and rigorous scrutiny are not too much to ask.[385]

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[384] I am not suggesting here that the personal participation prong of *Noia* should be resurrected. Rather, absent extraordinary circumstances, the petitioner should be bound by the acts of his counsel. *See also* Oregon v. Kennedy, 456 U.S. 667 (1981), in which, admittedly in a different context, Justice Rehnquist observed:

> [A] standard that examines the intent of the prosecutor, through certainly not entirely free from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system.

Id. at 675.

[385] Bass v. Estelle, 696 F.2d 1154, 1160 (5th Cir. 1983) (Goldberg, J., concurring).