Federal Habeas Corpus and the Death Penalty: Need for a Preclusion Doctrine Exception

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If indeed capital punishment represents a doubtful example and an unsatisfactory justice, we must agree with its defenders that it is eliminative. The death penalty definitively eliminates the condemned man. That alone, to tell the truth, ought to exclude, for its partisans especially, the repetition of risky arguments which, as we have just seen, can always be contested.[1]

INTRODUCTION

The long-dormant death penalty has reemerged, both as a means of punishment and as a subject of debate and controversy. Since 1977, when Gary Gilmore faced the firing squad in Utah,[2] thirty-seven more executions have occurred throughout the country, with twenty-seven of these since the beginning of 1984.[3] Hundreds of death row inmates cur-

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[1] Camus, *Reflections on the Guillotine*, in RESISTANCE, REBELLION AND DEATH 210, 211 (1960).

[2] For a useful history of executions occurring after Furman v. Georgia, 408 U.S. 238 (1972), see Streib, *Executions Under the Post-*Furman *Capital Punishment Statutes: The Halting Progression From "Let's Do It", to "Hey, There Ain't No Point in Pulling So Tight"*, 15 RUTGERS L.J. 443 (1984).

[3] N.Y. Times, Apr. 19, 1985, at 8, col. 4; *id.*, Jan. 31, 1985, at 12, col. 1; *see also* NAACP LEGAL DEFENSE FUND, INC., DEATH ROW, U.S.A. (Mar. 1, 1984) (unpublished compilation). For recent discussions of the debate over the death penalty, see e.g., H. BEDAU, THE COURTS, THE CONSTITUTION AND CAPITAL PUNISHMENT (1977); Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Forst, *Capital Punishment and Deterrence: Conflicting Evidence*, 74 J. CRIM. L. & CRIMINOLOGY 927

rently await uncertain fates as their cases proceed through the long appellate and post-conviction review process. Many appeals are close to exhaustion, and executions have become commonplace.[4]

While the legitimacy of the death penalty as an appropriate form of punishment will continue to be debated for many years, what should be less open to disagreement is the need, when a life is at stake, to safeguard the individual's constitutional rights and to minimize the possibility of premature or unwarranted execution.[5] The death penalty long has been recognized as qualitatively unique[6] in terms of its severity and finality.[7] The procedure governing the capital defendant's case is distinct from the administration of all other felony trials. A capital defendant's trial consists of two separate hearings, one for assessing guilt, and another, following conviction, to decide whether the totality of the circumstances warrants execution.[8] Courts frequently have overturned death sentences for constitutional error during either proceeding. Ap-

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(1983).

[4] For a discussion of the status of death penalty litigation, see generally Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980); Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908 (1982).

[5] *But see* Sullivan v. Wainwright, 104 S. Ct. 450, 452 (1983) (Burger, C.J., concurring) (denial of stay of execution; arguing for more summary executions and criticizing attorneys for using post-conviction remedies to delay the condemned prisoner's day of reckoning).

[6] [F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.

Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (referring to Justices Brennan, Stewart, Marshall, Powell, and Stevens) (citations omitted).

[7] Furman v. Georgia, 408 U.S. 238 (1972).

> Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction . . . . No other punishment has been so continuously restricted, . . . nor has any state yet abolished prisons, as some have abolished this punishment.

Id. at 286 (Brennan, 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.

Id. at 306 (Stewart, J., concurring).

[8] Gregg v. Georgia, 428 U.S. 153, 195 (1976) (plurality opinion); *see* Note, *The Two-Trial System in Capital Cases*, 39 N.Y.U. L. REV. 50 (1964).

pellate courts have reversed death sentences even after a finding of guilt if constitutional error prevented the jury during the sentencing phase from considering fully the defendant's case.[9]

Given the uniqueness of the punishment, the obligation of the capital defendant's attorney to safeguard the client's interests and ensure that the defendant receives a fair trial seems evident. Unfortunately, that is often a hollow expectation.[10] Chief Justice Warren Burger has suggested that fully one-third to one-half of all trial lawyers are inadequately prepared for trial.[11] Though the attorney's performance may satisfy the minimal constitutional standards of effectiveness, ignorance of legal developments might influence her conduct and ultimately jeopardize the client's case.[12] The civil client may sue the neglectful attorney for malpractice. For the convicted defendant facing execution, however, this opportunity is neither practical nor useful.[13]

For these reasons, federal post-conviction relief must remain available in capital cases to protect constitutional rights that the attorney failed to raise or preserve at trial or on direct appeal. The writ of habeas corpus[14] has long provided relief in these situations.[15] Recently,

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[9] *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); *see also* Gillers, *supra* note 4, at 31-37.

[10] *See* Strickland v. Washington, 104 S. Ct. 2052 (1984) (establishing low effective assistance of counsel standard in death penalty case).

[11] Burger, *The Special Skills of Advocacy*, 42 FORDHAM L. REV. 227, 234 (1973); *see also* Stetler, *Turning Our Backs on Death Row*, 8 DISTRICT L., Mar.-Apr. 1984, at 11, 12 ("There is a threat, then, that in the near future, prisoners with meritorious claims will be executed because they did not have attorneys to pursue their appeals.").

[12] *See* Comment, Washington v. Strickland: *Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544, 1569 (1983) [hereafter Comment, *Defining Effective Assistance*].

[13] For a discussion of the inadequacy of the traditional malpractice remedy for lawyer incompetence in cases in which constitutional rights are involved, see Catz & Firak, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 HARV. C.R.-C.L. L. REV. 397, 441-43 (1984).

[14] The writ of habeas corpus as it now exists is derived from British common law. The exact origin of the great writ is uncertain. Apparently it was referred to in 1220 as *habeat corpora* in a court order directing a constable to produce litigants before the court of common pleas in an action for trespass. Note, *Developments in the Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1042 (1970) [hereafter Note, *Developments*]. The writ of habeas corpus is expressly provided for in the United States Constitution, art. I, § 9, cl. 2. Congress first codified the writ as a judicial remedy in the Judiciary Act of 1789, which gave federal courts the power to issue relief to prisoners "in custody, under or by colour of the authority of the United States." Ch. 20, § 14, 1 Stat. 73, 82. The statutory precursor to the present day writ is found in the Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385. The writ is now codified at 28 U.S.C. §§ 2241-2256 (1982).

however, the ability of prisoners to secure federal habeas corpus review has been severely eroded.[16] Two recent Supreme Court decisions, *Wainwright v. Sykes*[17] and *Engle v. Isaac*,[18] limit a federal court's power to review a prisoner's claim of constitutional error that was not timely asserted at the state trial or appellate level. Under *Sykes*, if defense counsel neglects at trial or on direct appeal to allege constitutional error, the defendant is precluded from obtaining federal habeas review of the merits unless she can show both cause for the failure to raise the matter and prejudice resulting from such inadvertence.[19] Both cause

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This Article deals primarily with prisoners in state custody who seek relief in the federal courts. Controlling in such cases is § 2254, which provides, subsection (a):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Prior to seeking a writ, a state prisoner must first exhaust available state remedies. *Id.* § 2254(b). The Code provides similar relief for prisoners in federal custody. *Id.* § 2255. Though the relief is comparable for state and federal petitioners, distinct differences exist between the two sections. Section 2255 has its basis in the writ of coram nobis (an ancillary proceeding of the criminal case), and is brought as a corrective process of the original criminal case, while § 2254 is a collateral civil action. The distinctions and similarities, while important to an understanding of the writ and the developments of the issues discussed here, are not themselves the subject of this Article.

For a discussion of the writ and its expansion, see L. YACKLE, POSTCONVICTION REMEDIES (1981); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960); Rosenn, *The Great Writ — A Reflection of Societal Change*, 44 OHIO ST. L.J. 337 (1983). *See also* Note, *Developments*, *supra*.

The writ's scope is subject to judicial interpretation. Two cases that greatly expanded the writ's scope are Brown v. Allen, 344 U.S. 443 (1953), and Fay v. Noia, 372 U.S. 391 (1963). In subsequent cases the Supreme Court has developed prudent rules that limit the availability of habeas corpus relief for state prisoners. This Article addresses the recent developments.

[15] For articles reviewing the history and purposes of the writ, see Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Oaks, *Habeas Corpus in the States — 1776-1865*, 32 U. CHI. L. REV. 243 (1965); Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605; Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961).

[16] For a detailed analysis of this development, see Guttenberg, *Federal Habeas Corpus, Constitutional Rights and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617 (1984).

[17] 433 U.S. 72 (1977).

[18] 456 U.S. 107 (1982).

[19] 433 U.S. at 87.

and prejudice have been narrowly interpreted, severely limiting the possibility of obtaining federal habeas review.[20] Although a more recent ruling, *Reed v. Ross*,[21] has mitigated somewhat the effect of *Sykes* and *Isaac*, the Court's limiting preclusion doctrine remains intact.

Sykes and *Isaac* have staggering implications for death penalty cases. Defense counsel's omission or neglect during the heat of trial may result in a constitutionally tainted, and thereby unjust, death sentence. If the habeas petitioner in this case fails to demonstrate both cause for counsel's failure to raise the claim and actual prejudice resulting from that failure, the court will not consider the claim, the death sentence will remain in effect, and the petitioner will be executed. Since the Supreme Court has failed to define both cause and actual prejudice,[22] demonstrating the requisite presence of either often may be an insurmountable task to the habeas petitioner. Courts repeatedly have applied *Sykes* and *Isaac* to curtail the availability of a federal forum to habeas petitioners, including those sentenced to death.[23] This Article argues that the limiting preclusion rules for assessing whether federal relief should be withheld are inappropriate in death penalty cases. Procedural obstacles have no place in death penalty cases. Rather, habeas corpus review should be used to ensure that prisoners are not executed in the face of constitutional error.

I. Procedural Forfeitures and Habeas Corpus Review

Prior to *Wainwright v. Sykes*, the law governing the rights of the federal habeas petitioner who had failed to assert federal constitutional rights in state court was unclear. In *Fay v. Noia*,[24] the Court held that habeas relief was available unless the individual had deliberately chosen not to assert her rights for tactical reasons or had deliberately bypassed the state court system. Later, in *Francis v. Henderson*,[25] the Court reversed the presumption in favor of review, holding that a habeas applicant was not entitled to relief unless she demonstrated that actual prejudice resulted from the constitutional infirmities. The inherent conflict between these two standards for review set the stage for the

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[20] 456 U.S. at 129.

[21] 104 S. Ct. 201 (1984).

[22] 433 U.S. at 91.

[23] *See infra* notes 26-80 and accompanying text; *see also* Batey, *Federal Habeas Corpus and the Death Penalty: "Finality with a Capital F"*, 36 U. Fla. L. Rev. 252 (1984).

[24] 372 U.S. 391, 438-40 (1963).

[25] 425 U.S. 536, 542 (1976).

Sykes decision.[26]

The *Fay* deliberate bypass test was designed to foreclose relief to petitioners who willingly failed to raise their federal constitutional claims in state court before seeking habeas relief in federal court. Under this test, however, defendants who had not litigated their constitutional claims in state court through mere inadvertence, or because of ignorance that the claims were available, were still entitled to habeas relief from the federal courts. The majority opinion in *Fay* reflects a concern that a deprivation of constitutional rights is no less serious because the defendant, through her counsel's inadvertence, failed to raise the issue at the appropriate time and manner.[27] The Court noted that the state's interest in seeking compliance with its procedural rules is sufficiently satisfied by the defendant's inability to secure relief in the state court system. Furthermore, the Court indicated that the significant federal interest in vindicating federal constitutional rights outweighs the state interest that would be served by barring a defendant from receiving federal habeas relief.[28]

In 1976, the Court in *Francis* again resolved the claims of a defendant who had failed to raise timely objections to constitutional violations, this time in a grand jury setting. The Court held that a finding that the defendant inadvertently failed to assert constitutional rights was insufficient to qualify the petitioner for habeas corpus relief. The *Francis* Court required the petitioner to show also that the failure to adjudicate rights had led to actual prejudice.[29] After *Francis*, the habeas petitioner faced a bewildering predicament. If the reviewing court followed *Fay*, the petition would be heard unless the defendant had deliberately failed to litigate the constitutional issues in the state court. If the reviewing court followed *Francis*, however, the petitioner also would need to show actual prejudice resulting from the failure.

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[26] For a detailed review of the cause and prejudice test in procedural forfeiture cases, see Guttenberg, *supra* note 16. Guttenberg summarized Justice Stewart's majority opinion in *Francis* as "somewhat like watching a magician pull a rabbit out of an apparently empty hat; as we watch we know the rabbit is there, but we are still amazed at how swiftly and adeptly he makes it appear, and in the end, we are left wondering how he did it." *Id.* at 626.

[27] 372 U.S. at 428.

[28] *Id.* at 433.

[29] 425 U.S. at 542.

A. *Supreme Court Limitations on Habeas Corpus Review:* Sykes *and* Isaac

The *Francis* Court made no attempt to explain the precise meaning of the actual prejudice test, or its effect on the deliberate bypass doctrine. The Supreme Court addressed this apparent confusion for the first time in *Wainwright v. Sykes*.[30] The holding completely rejected the *Fay* Court's liberal standards for habeas relief and furthered the actual prejudice test of *Francis*.[31]

Petitioner Sykes in his habeas petition claimed that his statements to the police, a key part of the state's case, should have been excluded.[32] Sykes failed to object to the introduction of those statements at trial, as required by the applicable state rules of criminal procedure.[33] The court of appeals affirmed the granting of an evidentiary hearing on the issue. The court held that, because the trial judge had failed to consider the voluntariness of Sykes' statements, the procedural rules did not automatically bar Sykes' habeas position.[34] The court also concluded that no other basis supported a finding that Sykes had waived his constitutional rights. According to the Fifth Circuit, Sykes satisfied both the actual prejudice test and the deliberate bypass test. The use of a coerced confession was inherently prejudicial, and there was a "total absence of any indication that [Sykes'] failure to object [was] attributable to trial tactics."[35]

In reversing, the Supreme Court significantly limited *Fay*'s application and upheld the state's contemporaneous objection rule. The Court "require[d] that [a habeas corpus petitioner's] confession be challenged at trial or not at all," and that "failure to timely object to [a confession's] admission amounted to an independent and adequate state procedural ground which . . . prevented direct review."[36] As a result, the application of *Fay*'s deliberate bypass standard was severely limited. However, recognizing the need to protect the defendant in a state trial from a miscarriage of justice, the Court provided an exception to the *Sykes* forfeiture policy. Upon a showing by the petitioner of (1) cause for failing to make the objection, and (2) prejudice resulting from the

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[30] 433 U.S. 72 (1977).

[31] *Id.* at 87.

[32] Sykes claimed that he had been intoxicated at the time of his arrest and, therefore, was incapable of waiving his *Miranda* rights.

[33] FLA. STAT. ANN. R. CRIM. P. 3.190(i) (West 1975).

[34] Wainwright v. Sykes, 528 F.2d 522, 527 (5th Cir.), *rev'd*, 433 U.S. 72 (1976).

[35] *Id.* at 528.

[36] 433 U.S. at 86-87.

alleged violation, a state procedural default will not bar consideration of the petitioner's claim.[37] Thus, the *Sykes* Court extended the *Francis* actual prejudice test from cases involving grand jury rights to all cases involving state contemporaneous objection rules.[38]

In reaching its decision, the Court in *Sykes* stressed the value of a contemporaneous objection rule: it "enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, . . . enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question," and "may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation."[39] Concern for "sandbagging," a practice by which defense attorneys allegedly forego objections to constitutional violations at trial to fortify subsequent post-conviction challenges, also contributed to the Court's decision.[40]

After *Sykes*, lower federal courts exercised discretion in determining whether petitioners had fulfilled the cause and prejudice test. Typically, the courts balanced the defendant's interest in securing relief, the state's interest in finality and efficiency, and the needs of the adversarial process.[41] Consequently, if the alleged constitutional violation affected the truthfinding function of the trial, such as the misallocation of the burden of proof or the right to counsel, courts generally granted habeas corpus relief.[42]

In *Engle v. Isaac*,[43] however, the Supreme Court, while reaffirming the *Sykes* cause and prejudice test, rejected this balancing approach. The Court denied habeas relief to a petitioner who alleged an unconstitutional procedure distorted the truthfinding function of the trial. In *Isaac* the defendant, on trial for felonious assault, claimed that he had acted in self-defense. Pursuant to an Ohio state statute,[44] the trial court instructed the jury that Isaac carried the burden of proving his affirmative defense by a preponderance of the evidence. Isaac's attorney, relying on the statutory and case law prevailing at the time, did not object

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[37] *Id.* at 90-91.

[38] *See id.* at 87.

[39] *Id.* at 88.

[40] *Id.* at 89.

[41] *See generally* Goodman & Sallett, Wainwright v. Sykes: *The Lower Federal Courts Respond*, 30 HASTINGS L.J. 1683 (1979).

[42] Note, Engle v. Isaac: *The End of Innocence on Collateral Review*, 32 AM. U.L. REV. 1183, 1195 (1983) [hereafter Note, *End of Innocence*].

[43] 456 U.S. 107 (1982).

[44] OHIO REV. CODE ANN. § 2901.05(A) (1982).

to this jury instruction. The jury acquitted the defendant of felonious assault, but convicted him of the lesser included offense of aggravated assault.

Prior to the defendant's appeal, the Ohio Supreme Court in *State v. Robinson*[45] held that the state statute allocating the burden of proof for affirmative defenses did not require the defendant to prove the affirmative defense by a preponderance of the evidence, but rather only required the defendant to go forward with evidence sufficient to raise the defense. Relying on this decision, Isaac appealed in state court, challenging the trial court's jury instructions. The court of appeals dismissed Isaac's appeal, however, since he failed to comply with the Ohio Rules of Criminal Procedure, which require a contemporaneous objection to jury instructions at trial.[46] The court construed the defendant's procedural default as a waiver of his claim.

Isaac appealed to the Ohio Supreme Court, which dismissed his claim.[47] On the same day the court held in *State v. Humphries*[48] that in every criminal trial held on or after January 1, 1974, the date of the Ohio affirmative defense statute, courts must follow its provisions as interpreted by *Robinson*. Although Isaac's trial took place in 1975, the court refused to extend its ruling retroactively to defendants who had failed to comply with the contemporaneous objection rule.

Isaac then sought habeas relief in the federal district court, claiming that the state court system had violated his right to due process by failing to apply the Ohio Supreme Court's decision in *Humphries* to his case. The district court, relying on *Sykes*, denied the petition on the grounds that Isaac had shown neither cause for his failure to object to the jury instructions at trial, nor actual prejudice resulting from the alleged constitutional error. The district court concluded, therefore, that Isaac had waived his constitutional claim.[49]

The Sixth Circuit reversed,[50] holding that the Ohio Supreme Court had deprived Isaac of due process by withholding the retroactive application of *Robinson*. On rehearing en banc,[51] the court affirmed its holding, basing its decision, however, on the ground that the state procedural rule requiring a contemporaneous objection did not preclude

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[45] 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976).

[46] For the text of Ohio Rule of Criminal Procedure 30, see 456 U.S. at 115, n.15.

[47] State v. Isaac, No. 77-412 (Ohio, July 20, 1977).

[48] 51 Ohio St. 2d 95, 102-03, 364 N.E.2d 1354, 1359 (1977).

[49] Isaac v. Engle, C-2-78-278 (S.D. Ohio June 26, 1978).

[50] 646 F.2d 1122 (6th Cir. 1980).

[51] 646 F.2d 1129 (6th Cir. 1980) (en banc), *rev'd*, 456 U.S. 107 (1982).

Isaac from obtaining a writ of habeas corpus because he had satisfied the *Sykes* cause and prejudice test. The futility of Isaac's raising the claim, in light of prior case law interpreting the statute, established cause, and the improper allocation of the burden of proof, which might have affected the outcome of the trial, established prejudice.[52] In addition, the court held that by placing the burden of proof on the defendant, the trial court had denied Isaac due process of law.[53]

The Supreme Court reversed, holding that Isaac had not established the requisite showing of cause to obtain habeas relief.[54] The Court agreed that Ohio denied Isaac his right to due process by requiring him to prove the self-defense claim by a preponderance of the evidence. However, the Court did not excuse his failure to assert the claim properly. Because Isaac had neglected to present his claim at trial, as required by the Ohio Rules of Criminal Procedure, state law barred appellate consideration. The Supreme Court concluded that in the interests of comity, federalism, and finality — regardless of the type of claim — any prisoner seeking federal habeas review who had committed a procedural default at trial must show cause and prejudice before a court can adjudicate her constitutional claim.[55] Finding that Isaac had not shown cause for his failure to comply with the state procedural rule, the Court denied him habeas relief without reviewing the merits of his claim.[56]

Isaac advanced two reasons for his failure to object to the jury instructions at trial. He contended that an objection would have been futile because Ohio courts historically had required that defendants prove self-defense by a preponderance of the evidence. Additionally, he could not have objected to or waived his due process claim at trial because he could not have known that the jury instructions raised a constitutional question: at the time the court delivered the instructions they were consistent with judicial interpretations of the statute.[57]

Isaac presented the Court with its first opportunity to define "cause." However, in rejecting both justifications for Isaac's failure to object, the Court succeeded only in clarifying what cause is not:[58] the perceived futility of raising a claim is insufficient cause.[59] A state court

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[52] *Id.* at 1133-34.
[53] *Id.* at 1136.
[54] Engle v. Isaac, 456 U.S. 107 (1982).
[55] *Id.* at 129.
[56] *Id.* at 135.
[57] *Id.* at 130-31.
[58] *See* Note, *End of Innocence*, *supra* note 42, at 1203.
[59] Justice O'Connor summarily rejected the proposition that the futility of objection

should have the first opportunity to hear objections about alleged shortcomings or injustices in its judicial and legislative process. The Court reasoned that a defendant cannot deprive a court of this opportunity merely because she believes that the state's determination will be unfavorable.[60] Moreover, the refusal to raise a tenable constitutional claim in state court would be the functional equivalent of a deliberate bypass, which the Court had condemned explicitly in *Fay*.[61]

Cause also was not established by Isaac's ignorance of the possibility that the relevant jury instructions were unconstitutional. The Court held that the due process claim was "far from unknown" at the time of his trial.[62] The Supreme Court in *In re Winship*[63] had already determined that due process requires the prosecution to bear the burden of proving beyond a reasonable doubt every element of the charged crime. Moreover, at the time of Isaac's trial, some federal courts had held that due process also requires the prosecution to disprove certain affirmative defenses.[64] As a result, the Court concluded that it could not say that Isaac "lacked the tools to construct [his] constitutional claim."[65] The Court further reasoned that although the Constitution promises a defendant a fair trial and competent counsel, it does not guarantee that the attorney will ascertain and advance every conceivable constitutional claim.[66] Finally, the Court rejected Isaac's suggestion that the plain error rule, the standard federal courts generally apply in deciding whether to grant direct review of federal convictions, should either replace or supplement the cause and prejudice standard.[67]

In considering the meaning of cause, the Court rejected futility as well as attorney error through negligence, inadvertence, mistake, or calculated choice.[68] Since the reasons for limiting the writ's availability do not depend on the type of claim a prisoner asserts, the Court extended the *Sykes* principles to those cases in which the procedural default may

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may constitute cause. Yet futility is an established exception to the exhaustion of state remedies requirement of 28 U.S.C. § 2254(b) (1982). Furthermore, principles of comity and federalism behind the exhaustion requirement and its futility exception may be even more compelling in the case of procedural forfeiture. Guttenberg, *supra* note 16, at 651-57.

[60] 456 U.S. at 130.

[61] *See id.* at 130 n.36.

[62] *Id.* at 131.

[63] 397 U.S. 358 (1970).

[64] 456 U.S. at 132 n.40.

[65] *Id.* at 133.

[66] *Id.* at 134.

[67] *Id.*

[68] *Id.* at 133-34.

have jeopardized the trial's truthfinding function. The interests of comity, federalism, and finality require a state prisoner who has committed a procedural default at trial to show cause and prejudice to obtain habeas relief. This standard, the Court reasoned, can easily be met by a legitimate victim of a "fundamental miscarriage of justice."[69]

The rationale of *Sykes* and *Isaac* has been severely criticized.[70] Perhaps the strongest repudiation came from other members of the Court. Justice Brennan, joined by Justice Marshall, dissenting in *Sykes*, observed that punishing a defendant for a lawyer's unintentional errors by closing the federal courthouse door to her client is both a senseless and misdirected method of deterring the avoidance of state rules.

> It is senseless because unplanned and unintentional action of any kind generally is not subject to deterrence; and, to the extent that it is hoped that a threatened sanction addressed to the defense will induce greater care and caution on the part of the trial lawyers, thereby forestalling negligent conduct or error, the potential loss of all valuable state remedies would be sufficient to this end. And it is a misdirected sanction because even if the penalization of incompetence or carelessness will encourage more thorough legal training and trial preparation, the habeas applicant, as opposed to

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[69] *Id.* at 135.

[70] *See, e.g.*, Bamonte, *Habeas Corpus — Limiting the Availability of Habeas Corpus After a Procedural Default*, 73 J. CRIM. L. & CRIMINOLOGY 1612 (1983); Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. CHI. L. REV. 741 (1982); Guttenberg, *supra* note 16; Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 463-70 (1980) (arguing that *Wainwright* flies in the face of the Burger Court's preoccupation with the guilt-innocence determination, since the effect of *Wainwright* may be to promote federalism and comity by punishing the defendant — who may have been foreclosed from showing factual innocence — rather than the real violator, the attorney); Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do*, 31 STAN. L. REV. 1, 38-67 (1978) (demonstrating that *Sykes* majority, in its concern with "sandbagging," attaches too much importance to attorney-client relationship, and that cause/prejudice test may have undesired effect of causing flood of ineffective assistance of counsel claims brought by defendants seeking to circumvent test). For an exhaustive criticism of the Burger Court's restrictive view of habeas corpus, see Peller, *In Defense of Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 577, 602-63 (1982). Peller traces the statutory and judicial evolution of habeas corpus jurisdiction. He concludes that the "neutral" goals of finality and integrity of the states' criminal justice process that underlie the restrictive view are without valid empirical, historical, or theoretical support. Peller's position is in direct contrast to those expressed in the seminal works advocating the Court's present restrictive course in habeas issues. *See* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

his lawyer, hardly is the proper recipient of such a penalty.[71]

Justice Brennan observed that this rationale "is especially true when so many indigent defendants are without any realistic choice in selecting who ultimately represents them at trial."[72]

Given these circumstances, and the state's legitimate interest in securing compliance with its procedural rules, Justice Brennan viewed the *Fay* deliberate bypass standard as the more sensible approach. Justice Brennan found the idea that a deliberate bypass standard would encourage "sandbagging" of claims by defense lawyers to be "offen[sive to] common sense."[73] This practice would only increase the likelihood of a conviction, since the prosecution would be able to present arguably constitutionally deficient evidence that may be highly prejudicial to the defense. The attorney would thereby have forfeited all state review and remedies with respect to these claims, subject only to whatever plain error rule is available. Moreover, to carry out this unlikely scheme the attorney would be compelled to deceive the federal habeas court and to convince the judge that she did not deliberately bypass the state procedures. If the attorney loses this gambit, all federal review would be barred, and her "sandbagging" would have resulted in nothing less than the forfeiture of all judicial review of her client's claims.[74]

Justice Brennan chastised the majority's extension of the *Sykes* rule to the facts and types of claims involved in these cases. In *Isaac*, he noted that since the petitioner's claim "*did not exist*" during Isaac's trial or direct appeal, there was no procedural default in failing to raise the claim at trial or on direct appeal.[75] Thus, Brennan correctly noted that the essential factual predicate for an application of *Sykes* was completely absent in Isaac's case. Moreover, the policy behind the contemporaneous objection rule, that of encouraging error-free proceedings, is plainly irrelevant to a case involving inchoate constitutional claims.[76] Justice Brennan also criticized the Court's extension of the *Sykes* standard to cases in which the constitutional error affects the truthfinding function of the trial.[77] Finally, Justice Brennan questioned the majority's assertion that collateral review extends the ordeal of trial for both

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[71] *Sykes*, 433 U.S. at 113 (Brennan, J., dissenting).

[72] *Id.* at 114.

[73] *Id.* at 104 n.5.

[74] *Id.*

[75] *Isaac*, 456 U.S. at 141 (Brennan, J., dissenting) (emphasis in original).

[76] "Such claims are *ex hypothesis* so embryonic that only the extraordinarily foresighted criminal defendant will raise them. It is completely implausible to expect that the raising of such claims will predictably — or even occasionally — make trials more 'free of error.' " *Id.* at 146.

the defendant and society:

> [W]e are not told why the accused would consider it an "ordeal" to go to federal court in order to attempt to vindicate his constitutional rights. Nor are we told why society should be eager to ensure the finality of conviction arguably tainted by unreviewed constitutional error directly affecting the truthfinding function of the trial. I simply fail to understand how allowance of a habeas hearing "entails significant costs" to *anyone* under the circumstances of the cases before us.[78]

Sykes and *Isaac* resolved any doubts concerning the standard to be applied to habeas petitioners. A federal court may review a habeas petition only if the prisoner complied with the state's procedural rules or can show cause and prejudice for failing to raise or preserve the objection at trial. This standard severely restricts state prisoners' ability to obtain federal habeas review, regardless of the underlying claim.[79] In addition, the Court's failure to define cause and prejudice may all but foreclose habeas relief since "it will prove easier for a camel to go through the eye of a needle than for a state prisoner to show 'cause.' "[80]

B. Questioning the Legitimacy of the Sykes-Isaac *Limitations*

The Court in *Sykes* and *Isaac* relied on several interests — comity, federalism, and finality — in deciding to limit habeas review. Though important, these interests are insufficient to justify drastically curtailing federal protection of constitutional rights. In addition, the Court's failure to define cause has left lower courts in a quandary.

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[77] A defendant's Fourth Amendment rights, . . . or his *Miranda* rights, . . . may arguably be characterized as 'crucially different from many other constitutional rights,' . . . in that evidence procured in violation of these rights has not ordinarily been rendered untrustworthy by means of its procurement. But a defendant's right to a trial at which the burden of proof has been constitutionally allocated can *never* be violated, without rendering the *entire* trial result untrustworthy.

Id. at 149 (emphasis in original).

[78] *Id.* at 147 (emphasis in original).

[79] As a result of *Isaac*, courts could even extend the cause and prejudice standard to include a failure to raise a claim of ineffectiveness of counsel in the manner deemed timely under state procedural rules. Courts might require a defendant who failed to raise an ineffectiveness claim on direct appeal to show cause and prejudice for the failure, thereby foreclosing the possibility of federal habeas review. This "catch-22" effect, which offers little recourse for the habeas petitioner, has occurred in at least one instance. The Second Circuit has viewed the failure to raise a claim of ineffective assistance of counsel as a procedural default and therefore has barred habeas relief under *Sykes* absent a showing of cause and prejudice. Gulliver v. Dalsheim, 687 F.2d 655, 659 (2d Cir. 1982).

[80] *Isaac*, 456 U.S. at 144.

The *Isaac* Court justified applying the cause and prejudice standard to constitutional claims that affect the truthfinding function at trial as necessary to prevent unwarranted federal court interference with the states' criminal justice system and to promote finality of criminal judgments. Both justifications are unsupported by the practical effects of federal habeas relief. Few federal habeas petitions are actually granted to state prisoners,[81] and the number that are had already been decreasing at the time *Sykes* was decided. "In 1976 state and federal prisoners filed 9,254 habeas petitions in federal district courts. This number represents a decrease from 1970, when 10,613 habeas petitions were filed."[82]

In addition, the Court's concept of comity assumes a parity between the state and federal courts that the Court expressly has rejected in other cases. For example, in *Rose v. Mitchell*,[83] the Court recognized that preserving independent federal habeas review is necessary to ensure that constitutional defects in the state judiciary's grand jury selection procedure are not overlooked by state judges: "There is strong reason to believe that federal review would indeed reveal flaws not appreciated by the state judges perhaps too close to the day-to-day operation of their system to be able properly to evaluate claims that the system is defective."[84] In *Kaufman v. United States*,[85] the Court enumerated the justifications for affording federal habeas review to state prisoners:

> [E].g., the necessity that federal courts have the "last say" with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state judges may be unsympathetic to federally created rights, the institutional constraints on the exercise of this Court's certiorari jurisdiction to review state convictions. . . .[86]

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[81] Comment, Lundy, Isaac *and* Frady: *A Trilogy of Habeas Corpus Restraint*, 32 CATH. U.L. REV. 169, 217 (1982). The comment demonstrates that while the number of all civil filings (including mandamus and civil rights) has doubled from 1971 to 1982, the number of habeas petitions has remained relatively constant. Yet during that time, the prison population has more than tripled. Habeas petitions were filed by 2.3% of all state prisoners in 1982, compared to a 7.2% filing rate in 1971. *See also* Bamonte, *supra* note 70, at 1631 (showing that during the period studied, the burden of habeas petitions on the courts was not overwhelming).

[82] Comment, *The Burger Court and Federal Review for State Habeas Petitions After* Engle v. Isaac, 31 U. KAN. L. REV. 605, 618 (1983) [hereafter Comment, *After* Engle v. Isaac]; *see also supra* note 81.

[83] 443 U.S. 545 (1979).

[84] *Id.* at 563.

[85] 394 U.S. 217 (1969).

[86] *Id.* at 225-26; *see also* Mincey v. Arizona, 437 U.S. 385, 402-05 (1978) (Mar-

The notion that parity exists between the state and federal courts is questionable for several additional reasons.[87] State courts tend to respond more to local pressures, local prejudices, and local politics than do federal judges who possess lifetime tenure, and therefore may be less concerned with federal constitutional claims.[88] It is uncertain whether state judges feel compelled to determine federal constitutional issues.[89] State courts also tend to focus more upon the defendant's guilt or innocence in a criminal trial than upon constitutional claims.[90] In addition, *Isaac*'s underlying premise — that state judges will operate more effectively without federal review — is contrary to the view of most commentators.[91] Perhaps most important in dispelling the parity myth is the need to recognize that, regardless of the nature of the state court system itself, any definition of cause premised on the potential disadvantages of friction in federalism ignores the advantages and the need for that inherent friction.[92]

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shall, J., concurring).

[87] *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121-27 (1977). Neuborne lists three reasons why parity should not be assumed: (1) federal judges, because of their selection process, lighter caseloads, and greater pay and support services, have a higher technical competence; (2) federal courts are more sympathetic to constitutional issues, due in part to the structure of the federal system, which creates a community of interests with the Supreme Court; and (3) federal judges, because of their lifelong tenure, may be more removed from local political pressures. *See also* Bamonte, *supra* note 70, at 1638; Flagg, Stone v. Powell *and the New Federalism: A Challenge to Congress*, 14 HARV. J. ON LEGIS. 152 (1976); Peller, *supra* note 70, at 666-69; Note, *Developments*, *supra* note 14, at 1057. *But see* Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381, 383-99 (1984).

[88] *See* Neuborne, *supra* note 87, at 1127.

[89] *See* Comment, *After* Engle v. Isaac, *supra* note 82, at 619. *But cf.* Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U.L. REV. 1, 12 (1978).

[90] *See* Stone v. Powell, 428 U.S. 465, 493 n.35 (1976); Peller, *supra* note 70, at 668 n.424; Note, *Developments*, *supra* note 14, at 1068.

[91] *See* Comment, *After* Engle v. Isaac, *supra* note 82, at 619; *see also* Cover & Alienkoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1067 (1977) ("The trustworthiness of state courts is irrelevant. Even if state courts are entirely trustworthy in applying Supreme Court doctrine, they would not evolve the underlying principles in the same way *without* the habeas dialogue.") (emphasis in original). Justice O'Connor appears to suggest as much in O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 812-15 (1981).

[92] *See* Cover & Alienkoff, *supra* note 91. The premise of their position is that the dialogue between state and federal courts is itself critically important to the federal system, and that the Burger Court's concern with guilt and innocence and "waiver" may destroy that dialogue by foreclosing the needed input of the federal courts. *Cf.*

The Court's failure to define cause in *Isaac* has left lower courts to decide what level of attorney incompetence will constitute cause.[93] Several lower court holdings since *Sykes*, coupled with the decision in *Isaac*, indicate that nothing less than a sixth amendment claim of ineffective assistance of counsel would constitute cause.[94] Neither *Sykes* nor *Isaac* gives any indication of a lesser standard. A sixth amendment ineffectiveness standard, however, may prove both too stringent and too problematic. Under this standard a state petitioner must establish two constitutional violations to obtain relief.[95] Further, a finding that the attorney's conduct constituted constitutionally ineffective assistance of counsel seems highly improbable in light of the Supreme Court's recent decision of *Strickland v. Washington*.[96] The Court in *Strickland* held that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[97] The proper standard for attorney performance at trial and capital sentencing proceedings is merely "that of reasonably effective assistance."[98]

Friendly, *supra* note 70. Friendly argues that habeas review should be foreclosed absent a "colorable showing of innocence." *Id.* at 142.

[93] *See* Comment, *The Federal Courts: Habeas Corpus and Recent Meanings of Cause and Prejudice*, 10 AM. J. CRIM. L. 215 (1982); Comment, *Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims*, 130 U. PA. L. REV. 981 (1982); Note, *Attorney Error as "Cause" Under* Wainwright v. Sykes: *The Case for a Reasonableness Standard After* Washington v. Downes, 67 VA. L. REV. 415, 421-26 (1981) [hereafter Note, *Attorney Error*];

[94] *See* Guttenberg, *supra* note 16, at 645 n.149; Comment, *After* Engle v. Isaac, *supra* note 82, at 622. A Tenth Circuit decision, however, suggests that "in *some* 'instances ineffective counsel, short of that necessary to make out a Sixth Amendment claim will satisfy the "cause" prong.' " Runnels v. Hess, 653 F.2d 1359, 1364 (10th Cir. 1981) (citation omitted) (emphasis in original). The *Runnels* court did not indicate what that standard would be.

[95] *See* Tague, *supra* note 70, at 57; Note, *Attorney Error*, *supra* note 93, at 419 (in *Downes*, the district court, faced with a petition alleging attorney error as "cause," dismissed the claim and ordered the petitioner to exhaust his ineffective assistance claim in state court).

[96] 104 S. Ct. 2052 (1984); *see also* Evitts v. Lucey, 105 S. Ct. 830 (1985); United States v. Cronic, 104 S. Ct. 2039 (1984).

[97] 104 S. Ct. at 2064.

[98] *Id.* In addition to the degree of ineffectiveness of counsel at trial needed to show cause, another open issue after *Sykes* and *Isaac* is the appellate attorney's failure or refusal to include the constitutional issue in the appellate brief. *See* Kinnamon, *Defenses to the Preclusive Rule of* Wainwright v. Sykes, 28 DRAKE L. REV. 571, 588 (1979). The leading Supreme Court decision on this issue, Jones v. Barnes, 103 S. Ct. 3308 (1983), reserved the procedural forfeiture issue for later development. *Id.* at 3314

Though most of the questions about the meaning of cause remain unanswered, the Supreme Court recently took a first step towards defining the term. In *Reed v. Ross*,[99] with issues closely resembling those in *Isaac*,[100] the Court held that the novelty of a legal issue constituted adequate cause to allow federal habeas review.[101] Ross was convicted of first degree murder in 1969 and sentenced to life imprisonment. At trial, his defenses included lack of malice and self-defense. The trial judge instructed the jury in the case that the defendant had the burden of proving these affirmative defenses.[102] Six years later, the Supreme Court in *Mullaney v. Wilbur*[103] struck down this type of burden-shifting requirement on the malice element of the offense as violating due process. In 1977, the Supreme Court gave *Mullaney* retroactive application.[104] The question before the Supreme Court in *Ross* was whether defense counsel's failure to object to the jury instructions, the procedural forfeiture envisioned in *Sykes* and *Isaac*, was excused because of the novelty of the issue involved.[105]

Justice Brennan, writing for the Court,[106] held that at the time of the trial, the issue was so novel that Ross' attorney could not have reasona-

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n.7; *see also* Evitts v. Lucey, 105 S. Ct. 830 (1985) (establishing effective assistance standard for appellate counsel). One commentator has suggested that the procedural forfeiture rule of *Sykes* and *Isaac* should not apply in these situations unless the habeas petitioner has failed to make a good faith effort to urge appellate counsel to raise the issue. Note, *Federal Habeas Corpus Review of State Forfeitures Resulting From Assigned Counsel's Refusal to Raise Issues on Appeal*, 52 FORDHAM L. REV. 850, 882 (1984). This situation occurs, however, only in the context of the indigent defendant who actually requests the issue's assertion on appeal. From *Jones* it must be assumed that the habeas petitioner who is totally ignorant of the constitutional issue's existence will be bound by the attorney's procedural default. This scenario is perhaps typical of the capital case. Capital cases involve a myriad of issues and need thorough appellate review. Applying the *Jones* standard in a capital case may work a great injustice on the defendant in the habeas corpus proceeding.

[99] 104 S. Ct. 2901 (1984).

[100] *Id.* at 2912.

[101] *Id.* at 2910.

[102] *Id.* at 2903.

[103] 421 U.S. 684 (1975).

[104] Hankerson v. North Carolina, 432 U.S. 233 (1977).

[105] 104 S. Ct. at 2907. Prejudice was not at issue in the Court's consideration, the state having conceded its existence. *Id.* at 2906.

[106] Justices White, Marshall, Powell, and Stevens joined in the majority, with Justice Powell filing a concurring opinion. Justice Rehnquist wrote the dissenting opinion. For the importance of Justice Powell's concurring opinion, see *infra* notes 116-18 and accompanying text.

bly anticipated it, and therefore the requisite cause was established.[107] The Court, while again declining to define cause, did note that the cause requirement embodies "the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel, and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct."[108] Justice Brennan continued by stating that cause is satisfied in situations "when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests."[109]

Justice Brennan then revived the importance of recognizing futility that he had argued for in his dissents in *Sykes* and *Isaac*.[110]

> Despite the fact that a constitutional concept may ultimately enjoy general acceptance, as the *Mullaney* issue certainly does, when the concept is in its embryonic stage, it will, by hypothesis, be rejected by most courts. Consequently, a rule requiring a defendant to raise a truly novel issue is not likely to serve any functional purpose . . . . Raising such a claim in state court, therefore, would not promote either the fairness or efficiency of the state criminal justice system. It is true that finality will be disserved if the federal courts reopen a state prisoner's case, even to review claims that were so novel when the cases were in state court that no one would have recognized them. *This Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254.*[111]

The last sentence of the above passage is perhaps seen as mere dicta by one who has won the battle but lost the war, but it also points to the critical need for a meaningful dialogue between state and federal courts when the last say must be preserved for the federal courts.[112]

The Court then expounded upon the relative "newness" of the constitutional issue, here the *Mullaney* issue, under the typology estab-

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[107] *See* Ross v. Reed, 704 F.2d 705, 708-09 (4th Cir. 1983), *aff'd*, 104 S. Ct. 2901 (1984). The Fourth Circuit also held that the jury instruction had violated *Mullaney*. *Id.* at 709.

[108] 104 S. Ct. at 2909 (citations omitted).

[109] *Id.* at 2909. The Court cited several commentators for the proposition that novelty should be an exception to the cause requirement. *Id.* at 2909 n.10. Among the commentators cited were Professor Paul Bator and Judge Henry Friendly, perhaps the two most ardent and influential supporters of restrictive federal habeas corpus jurisdiction. See *supra* notes 70 and 92 for a brief description of their positions and arguments against their positions.

[110] *See supra* notes 71-80 and accompanying text.

[111] 104 S. Ct. at 2910 (emphasis added).

[112] *See* Peller, *supra* note 70.

lished in *United States v. Johnson*.[113] The practice involved in *Ross* was arguably sanctioned by the Supreme Court since 1952[114] and was well established under North Carolina law. The Court concluded that the *Mullaney* claim was novel at the time of Ross' trial and distinguished the situation from that presented in *Isaac*.[115]

The *Ross* decision may set some limit on the restrictiveness of the cause and prejudice standard, but its effect likely will be minimal. The narrow application of the decision can best be seen by Justice Powell's concurring opinion.[116] For Justice Powell, the decision to excuse procedural default in this case was qualified by his view of the retroactivity of constitutional rules. He would apply rules retroactively on collateral review only in exceptional cases, and in this case, the analysis of whether such an exception exists was foreclosed by the state's failure to challenge the retroactivity of *Mullaney* for collateral review purposes.[117] As a result, the narrow majority in *Ross* probably cannot be expected to provide much solace for future habeas petitioners.[118]

II. Procedural Forfeiture and Death Penalty Cases

Criticisms of *Sykes* and *Isaac* assume enhanced importance in criminal cases that involve the death penalty. The Supreme Court has long recognized the qualitative uniqueness of the death sentence from all other forms of punishment.[119] Since the decision of *Furman v. Geor-*

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[113] 457 U.S. 537 (1982). *Johnson* described three circumstances under which a decision of the Supreme Court may represent "a clear break from the past": (1) the decision explicitly overrules a standing Supreme Court precedent; (2) the decision is on an issue that the Court has not addressed, but overrules a near-unanimous lower court position; and (3) the decision overrules a line of practice that the Supreme Court has arguably sanctioned. *Id.* at 551.

[114] At the time of Ross' trial, the controlling Supreme Court case on the issue of placing the burden of proving affirmative defenses on the defendant was Leland v. Oregon, 347 U.S. 790 (1952). *Leland* placed the burden of proving all elements of an offense beyond a reasonable doubt on the prosecution.

[115] 104 S. Ct. at 2912. ***But see id.*** at 2914 (Rehnquist, J., dissenting).

[116] *Id.* at 2912-13 (Powell, J., concurring).

[117] *Id.*

[118] However, in the context of the death penalty writ, Justice Powell's position may well give rise to an argument that the exceptional nature of the capital case mandates retroactive application, even on an issue for which Justice Powell might not otherwise deem this appropriate.

[119] As Justice Stewart noted in *Furman*:

> 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

gia,[120] in which the Court established that the Constitution imposes special constraints on the administration of capital punishment, the Court has repeatedly held that procedures acceptable in a noncapital context may be unacceptable when a "life is at stake."

In general, the Court has held that capital punishment must be imposed on a principled, consistent basis, and with a greater degree of reliability than is required in noncapital sentencing. The term "reliability" as used by the Court has referred both to the quality and quantity of information considered by the sentencing court. Accordingly, the provisions of individual death penalty statutes, and the circumstances under which individual death sentences are imposed, have been, and continue to be, subject to careful scrutiny.[121] In *Lockett v. Ohio*,[122] the Court struck down a death sentence imposed under a statute that restricted the range of mitigating factors that could be considered at the sentencing phase of trial. In *Green v. Georgia*,[123] the Court invalidated a death sentence in a case in which certain mitigating evidence had been excluded as hearsay. In *Eddings v. Oklahoma*,[124] the Court struck down a death sentence imposed by a trial court that had refused to consider all mitigating evidence presented at the capital sentencing hearing.

In each case, the Court held that the circumstances created a risk that a death sentence had been imposed "in spite of factors which may call for a less severe penalty."[125] That risk is constitutionally intolerable. As a result, a capital defendant has a constitutional right to present, and have the sentencer consider, any aspect of his character, background, or crime as the basis for imposing a penalty less than death.[126]

Because this right is so essential, the opportunity for collateral review of constitutional issues not raised in a timely manner should not be conditioned on a showing of prejudice. Requiring a defendant to

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> criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in the concept of humanity.

408 U.S. at 306.

[120] 408 U.S. 238 (1972).

[121] *See* Comment, *Defining Effective Assistance*, *supra* note 12, at 1548.

[122] 438 U.S. 586 (1978).

[123] 442 U.S. 95 (1979).

[124] 455 U.S. 104 (1982).

[125] Lockett v. Ohio, 438 U.S. 586, 605 (1978).

[126] *See* Comment, *Defining Effective Assistance*, *supra* note 12, at 1549. In *Lockett*, for example, the Court called for an examination of the uniqueness of the defendant and the unique circumstances of the crime. The Court argued that such an examination leads to a "greater degree of reliability when the death sentence is imposed." 438 U.S. at 604 (plurality opinion).

establish prejudice is inconsistent with the Supreme Court's placing the risk of sentencing error in capital cases on the state. The adoption of a prejudice requirement for cases of procedural default at a capital trial or sentencing hearing reallocates that risk of error to the defendant.[127]

The Court's concern has been with the potential harm that procedural errors pose for prejudice to a defendant's interest. Indeed, many of the capital sentencing procedures have been found unconstitutional precisely because of their potential for leading to an unwarranted death sentence.[128] For example, the procedure held unconstitutional in *Eddings* created an unacceptable risk that a death sentence would be unreliably imposed.[129] In vacating the sentence the Court declined to determine whether the failure to consider all mitigating evidence had in fact contributed to the imposition of a death sentence. The potential for prejudice was sufficient to warrant reversal.

These arguments, however, have not persuaded federal courts to relax the *Sykes-Isaac* cause and prejudice standard in death penalty cases. The courts, in particular the Eleventh Circuit, have declined on grounds of procedural default to consider habeas petitions of numerous death row inmates subsequently executed, as well as many others awaiting execution.[130] The rulings that preceded the execution of Anthony Antone are illustrative. Antone had been sentenced to death in Florida after being convicted for arranging the contract murder of a former police officer. The evidence revealed that Antone had provided the specially equipped murder gun and disposed of it after the murder. Antone also paid $1500 "front money" before the murder and between $7000 and $8000 afterwards.[131]

In his habeas corpus petition, Antone contended in part that during the trial's penalty phase the judge erroneously instructed the jury concerning mitigating factors in contravention of *Lockett v. Ohio*. The trial judge's instruction, Antone argued, effectively precluded the jury from considering any nonstatutory mitigating factors. However, Antone's trial attorney had failed to object to these instructions at trial and on direct appeal.

Antone argued in his habeas petition that the *Sykes* cause and

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[127] Comment, *Defining Effective Assistance*, *supra* note 12, at 1573.

[128] This is particularly true of any restrictions limiting the consideration of mitigating circumstances. *See Eddings*, 455 U.S. 104 (1982).

[129] *Id.* at 112 (*Lockett* rule "recognizes that a consistency produced by ignoring individual differences is a false consistency").

[130] *See infra* note 175.

[131] Antone v. Strickland, 706 F.2d 1534, 1536 (11th Cir. 1983).

prejudice standard should not be applied to procedural default occurring in death penalty cases when the price of a procedural default — precluding review — may be a human life. He asserted that this is especially true when the default involves an unforeseen development in the law. Specifically, the law at that time indicated that only statutory mitigating circumstances should be considered, and *Lockett*, decided in 1978, was then two years away. To support his argument Antone relied on the Supreme Court's language in *Isaac*: "The terms 'cause' and 'actual prejudice' are not rigid concepts; they take their meaning from the principles of comity . . . and finality . . . . In appropriate cases those principles must yield to the imperative of a fundamentally unjust incarceration."[132]

The Eleventh Circuit was unreceptive. Under *Isaac*, it noted, the futility of presenting an objection in the state courts cannot alone constitute cause for failure to object at trial. Further, "Antone's argument that counsel could not reasonably anticipate the problems of *Lockett* is undermined by trial counsel's motion to dismiss the indictment which addressed the mitigating factors argument."[133] Accordingly, Antone lacked cause for failing to object to the jury instructions.

The court further concluded that Antone had failed under *Sykes* to show prejudice resulting from his trial attorney's procedural error. Antone had not established that the jury perceived that in deciding whether to recommend death it was prohibited from considering any nonstatutory mitigating factors.

> On this appeal, Antone advances two nonstatutory mitigating factors which could have been considered by the jury: disparity of sentences between the codefendants and the effects of brain surgery upon the defendant. Petitioner's counsel did argue to the jury the "justice" of one codefendant plea bargaining for a 35 year sentence and another defendant, petitioner, being sentenced to death. There was nothing in the jury instructions that precluded the jury from considering this fact. As to the brain surgery, *Lockett* concerns any factor that "the defendant proffers as a basis for a sentence less than death." Brain surgery was not proffered at trial, but even if it had been, the jury would not have been precluded from considering it by the court's instructions.[134]

In addition, "two of the seven mitigating factors specifically refer to mental qualities."[135]

The Supreme Court subsequently denied Antone's petitions for cer-

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[132] *Id.* at 1541 n.1 (quoting *Isaac*, 456 U.S. at 135).

[133] *Id.* at 1537.

[134] *Id.* at 1537-38 (citation and footnotes omitted).

[135] *Id.* at 1538 n.7.

tiorari.[136] One day before his execution the Court denied Antone's second petition for writ of certiorari and application for a stay of execution.[137] On January 26, 1984, the State of Florida executed Antone.

The Eleventh Circuit employed a similar cause and prejudice analysis to permit the execution of Robert Sullivan, whose ten years on Florida's Death Row exceeded that of any previous inmate. In 1973 a jury convicted Sullivan of first degree murder and recommended the death penalty. The evidence presented at trial showed that the defendant and a partner robbed a Howard Johnson's restaurant, abducted the restaurant's manager, taped his wrists behind his back, and drove him to a swampy area. Sullivan then struck the victim twice on the back of the head with a tire iron and shot him twice in the head with a double-barreled shotgun. When Sullivan was arrested, the police found the assistant manager's credit cards and watch, as well as two guns, white adhesive tape, and a tire iron, in Sullivan's car. Sullivan subsequently confessed to the murder and implicated his partner, who received a life sentence in exchange for his testimony at Sullivan's trial.[138]

After the trial judge imposed the death sentence, Sullivan made several unsuccessful state court motions for post-conviction relief and for a stay of execution. The federal district court denied his subsequent petition for writ of habeas corpus and stay of execution. On appeal to the Eleventh Circuit Sullivan contended that he was denied his sixth amendment right to effective counsel at the penalty phase and on direct appeal to the Florida Supreme Court. He also asserted that four prospective jurors who voiced reservations about imposing the death penalty were excused by the trial judge in violation of *Witherspoon v. Illinois*.[139] In *Witherspoon*, the Court recognized that the removal for cause of jurors based merely on their general beliefs against capital punishment denied a defendant of the due process right to an impartial jury at capital sentencing.

Sullivan further alleged that during the penalty phase the state prosecutor's remarks and the trial court's jury instructions allowed the jury to consider nonstatutory aggravating factors, contrary to Florida case law, and limited the jury's consideration of nonstatutory mitigating factors in violation of *Lockett v. Ohio*. In addition, the trial court's findings impermissibly relied upon a nonstatutory aggravating factor.

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[136] 104 S. Ct. 511 (1983), *reh'g denied*, 104 S. Ct. 750 (1984).

[137] 104 S. Ct. 962 (1984).

[138] Sullivan v. Wainwright, 695 F.2d 1306, 1311 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 290 (1983).

[139] 391 U.S. 510 (1968).

Sullivan's trial attorney had raised none of these allegations, and the state contended that such neglect barred their consideration on appeal.

The court of appeals decided that Sullivan had failed to show cause for the procedural default on the *Witherspoon* issue, since the 1968 decision was already five years old at the time of the trial and it would not have been futile to present such a claim to the state courts.[140] The procedural default regarding the state trial court's jury instructions and sentencing findings required a "more complicated" analysis.[141] The court noted that *Isaac* did not resolve whether the novelty of a constitutional claim ever establishes cause for a failure to object.[142]

The Eleventh Circuit asserted that "although the burden is on Sullivan to show that there is sufficient cause under *Sykes* to excuse the procedural default, we cannot be positive that the relative novelty of Sullivan's claims in 1973 would not excuse the default."[143] The court therefore felt compelled to consider whether Sullivan had satisfied the prejudice prong of *Sykes*. It concluded that Sullivan had failed to show "that the ailing instruction so infected the entire trial that. . . the sentence violate[d] due process," and therefore, that Sullivan suffered no prejudice.[144] For these reasons the court elected not to consider further the merits of Sullivan's claims.

After the Eleventh Circuit denied a petition for a rehearing,[145] and the Supreme Court denied certiorari,[146] Sullivan unsuccessfully sought a stay of execution. He contended that the Florida Supreme Court had not conducted a constitutionally adequate proportionality review of the sentence and that the Florida death penalty was racially discriminatory as applied. The United States Supreme Court rejected the grounds as inadequate for purposes of a stay,[147] and Sullivan was executed on No-

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[140] 695 F.2d at 1311.

[141] *Id.*

[142] We might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might make a latent constitutional claim. On the other hand, later discovery of a constitutional defect at the time of trial does not invariably render the trial fundamentally unfair.

Id. (quoting *Isaac*, 456 U.S. at 131). The Supreme Court probably would not have considered the *Witherspoon* issue sufficiently novel, given *Reed*'s limited scope.

[143] *Id.*

[144] *Id.*

[145] Sullivan v. Wainwright, 706 F.2d 318 (11th Cir. 1983).

[146] 104 S. Ct. 290 (1983).

[147] 104 S. Ct. 450 (1983). The Chief Justice, concurring in the denial of the motion for stay of execution, took the opportunity to admonish lawyers for vigorously representing death penalty inmates until the very end.

vember 30, 1983.

Fifteen days later the State of Georgia executed John Eldon Smith, whose trial attorney proved as lethally uninformed of applicable law as Sullivan's counsel. Smith had been convicted of murder and sentenced to death. His direct appeal and state federal habeas actions were unavailing. Smith argued in his second federal habeas corpus petition that the underrepresentation of women on the jury that convicted him was unconstitutional.[148] However, Smith's attorney made no jury challenges on these grounds before or at the trial. Georgia criminal procedure requires that a defendant's challenge to jury composition be made at or before the time the jury is "put on him."[149] Smith also failed to raise the jury composition issue on direct appeal to the Georgia Supreme Court,[150] in his initial state habeas corpus action,[151] or in his initial federal habeas corpus petition.[152]

Smith contended that he had established cause for noncompliance with the state procedural rule because his lawyers were ignorant of recently decided cases. On January 21, 1975, six days before Smith's trial began, the Supreme Court decided *Taylor v. Louisiana*.[153] The Court in *Taylor* struck down a Louisiana statute that automatically excluded women from jury service unless they filed a written request to be subject to such duty.[154] The resulting underrepresentation of women on juries unconstitutionally denied the defendant of the right to be tried by a jury selected from a representative cross-section of the commu-

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> In joining the *per curiam* opinion of the Court, I emphasize that this case has been in the courts for ten years and is here for the fourth time. This alone demonstrates the sp[e]ciousness of the suggestion that there has been a "rush to judgment." The argument so often advanced by the dissenters that capital punishment is cruel and unusual is dwarfed by the cruelty of ten years on death row inflicted upon this guilty defendant by lawyers seeking to turn the administration of justice into the sporting contest that Roscoe Pound denounced three-quarters of a century ago.

Id. at 452.

[148] Smith v. Kemp, 715 F.2d 1459, 1461 (11th Cir.), *cert. denied*, 104 S. Ct. 510 (1983).

[149] GA. CODE ANN. § 59-803 (Harrison 1981).

[150] Smith v. State, 236 Ga. 12, 222 S.E.2d 308 (1976), *cert. denied*, 428 U.S. 910 (1976).

[151] Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977), *cert. denied*, 436 U.S. 950 (1978).

[152] Smith v. Balkcom, 671 F.2d 858 (5th Cir. 1982), *cert. denied*, 459 U.S. 882 (1982).

[153] 419 U.S. 522 (1975).

[154] *Id.* at 525.

nity.[155] In *Duren v. Missouri*,[156] decided January 9, 1979, forty-three days before Smith filed his first federal habeas corpus petition, the Court held unconstitutional an "opt-out" statute that granted automatic exemption from jury service to any woman who so requested. On January 25, 1982 the Eleventh Circuit in *Machetti v. Linahan*[157] held unconstitutional Georgia's "opt-out" statute under which Smith's jury had been selected. Not until after *Machetti* was decided did Smith attempt to litigate the jury composition issue in his second state habeas corpus petition. The state habeas court applied the state procedural waiver rule and refused to consider the merits of the illegal jury composition issue.[158] The Georgia Supreme Court found that Smith had not shown grounds for raising this issue in his second habeas petition.[159] The federal district court subsequently held that it was precluded from considering this claim because the state court applied the state procedural rule, and the court of appeals affirmed.[160]

To show cause for his failure to object to the jury composition before the second habeas corpus petition, Smith asserted that his trial lawyers were unaware of the *Taylor* decision at the time of trial. Further, he argued that *Duren* and *Machetti* were intervening changes in the law that justified his failure to raise the issue until his second state habeas petition.

The Eleventh Circuit held that counsel's lack of awareness of the *Taylor* decision did not establish cause. The court quoted from *Isaac*: " 'Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling unawareness of the objection as cause for procedural default.' "[161] Moreover, the court held that Smith failed to establish cause because of any intervening change in the law resulting from *Duren* or *Machetti*. The "principles of *Duren* were evident from *Taylor*," and "we cannot hold that *Duren* made such a fundamental change in the law that it establishes 'cause' for a failure to

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[155] The Court noted that of 1800 persons drawn for jury duty in Louisiana, only 12 were female. *Id.* at 524.

[156] 439 U.S. 357 (1979).

[157] 679 F.2d 236 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983). It is important to realize that Machetti was Smith's wife and codefendant. They were tried under the same law in the same jurisdiction. Machetti's lawyer did preserve the error.

[158] Smith v. Kemp, 715 F.2d 1459, 1471 (11th Cir.), *cert. denied*, 104 S. Ct. 510 (1983).

[159] Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983).

[160] 715 F.2d at 1461.

[161] *Id.* at 1471 (quoting *Isaac*, 456 U.S. at 134).

raise the issue at Smith's 1975 trial."[162] Furthermore, the court said that Smith could not contend that his first opportunity to raise the *Taylor* issue was in his second state habeas corpus petition, since he cited *Taylor* in 1977 during the Georgia Supreme Court's review of his first state petition for habeas corpus.[163]

Smith could not show cause for his procedural default such that a hearing on the merits was necessary to prevent a "miscarriage of justice," nor could he show that actual prejudice from the alleged constitutional defect in jury selection affected his conviction.[164] Smith's petition for a rehearing en banc was denied,[165] as was his petition for a writ of certiorari.[166] Finally, on December 14, 1983, the Supreme Court denied Smith's petition for rehearing and application for a stay of execution.[167] He was promptly executed the following day.

The Supreme Court in *Sykes* and *Isaac* stressed that a habeas petitioner must show ***both*** cause ***and*** prejudice for a court to consider the merits of a case involving procedurally defaulted issues; conversely, if ***either*** cause ***or*** prejudice is not demonstrated, the federal habeas court may not review the constitutional claims asserted in the petition. Thus, federal courts have withheld habeas corpus relief based solely on the resolution of one prong.[168]

The injustice of this approach is evidenced by the decisions preceding the execution of Carl Shriner. Shriner asserted in his habeas petition that the trial judge had not expressly informed the jury at the sentencing phase that it could consider nonstatutory, as well as statutory, mitigating circumstances.[169] This error thus left the jury with the contrary and unconstitutional impression. The Supreme Court decision of

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[162] *Id.* Under *Reed*, the "novelty" approach might have fared better than in Antone's case. *See supra* note 133. However, Smith's claim would still have been defeated, in all likelihood, under the prejudice prong of *Sykes* and *Isaac*.

[163] Smith had referred to the *Taylor* case in claiming that his jury did not represent a true cross-section of the community because jurors who would automatically vote against the death penalty were excused. Thus, according to the Court, the *Taylor* issue was considered by the Georgia Supreme Court and was litigated in Smith's appeal to the Eleventh Circuit from the denial of his first petition for habeas corpus relief.

[164] 715 F.2d at 1472.

[165] 717 F.2d 1401 (11th Cir. 1983).

[166] 104 S. Ct. 510 (1983).

[167] 104 S. Ct. 565 (1983).

[168] See Guttenberg, *supra* note 16, at 703-06, for a criticism of the harsh effect of the conjunctive relationship of cause and prejudice.

[169] Shriner v. Wainwright, 715 F.2d 1452, 1457 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1328 (1984).

Eddings v. Oklahoma[170] requires the factfinder to consider nonstatutory mitigating factors at the sentencing phase. Needless to say, Shriner's attorney neither objected to the instructions at trial nor raised the issue on direct appeal.[171] This procedural default, the Eleventh Circuit held, precluded federal habeas review of the matter, since Shriner had failed to establish actual prejudice. Because of Shriner's failure to prove prejudice, the court declined to consider whether cause was shown.[172]

The Eleventh Circuit thereafter denied Shriner's petition for a rehearing,[173] and the Supreme Court denied a petition for writ of certiorari.[174] On June 20, 1984, Shriner was executed.[175]

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[170] 455 U.S. at 113-15.

[171] The court noted that Shriner had initially asked the jury to show no mercy and to sentence him to death. Therefore, his lawyer did not argue to the jury any mitigating circumstances specific to Shriner. 715 F.2d at 1457.

[172] *Id.*

[173] 720 F.2d 688 (11th Cir. 1982).

[174] 104 S. Ct. 1328 (1984).

[175] A substantial number of federal courts have, under the rationale of *Sykes* and *Isaac*, refused to consider the merits of subsequently executed death row inmates who failed to demonstrate cause for and prejudice from their trial attorneys' failure to timely raise appropriate constitutional issues. *See, e.g.*, O'Bryan v. Estelle, 714 F.2d 365, 383 (5th Cir. 1983) (failure to allege at trial that Texas capital sentencing procedure was unconstitutional foreclosed matter from later being raised; petitioner executed Mar. 31, 1984), *cert. denied*, 104 S. Ct. 1015 (1984); Adams v. Wainwright, 709 F.2d 1443, 1448 (11th Cir. 1983) (failure to object to jury instructions that implied that nonstatutory mitigating factors could not be considered precluded defendant from raising the matter in habeas petition; petitioner executed May 10, 1984), *cert. denied*, 104 S. Ct. 745 (1984); Gray v. Lucas, 677 F.2d 1086, 1109 (5th Cir. 1982) (counsel's failure to request jury instruction on lesser-included offense precluded him from later raising point; petitioner executed Sept. 2, 1983), *cert. denied*, 461 U.S. 910 (1983); Spenkelink v. Wainwright, 578 F.2d 582, 609 (5th Cir. 1978) (contention that prosecution failed to list in indictment aggravating circumstances on which he would rely in seeking the death penalty and contention that the admission into evidence of petitioner's custodial statements violated his constitutional rights held not reviewable; petitioner executed May 25, 1979), *cert. denied*, 440 U.S. 976 (1979); *see also* Lewis, Mannle, Allen & Vetter, *A Post-*Furman *Profile of Florida's Condemned — A Question of Discrimination in Terms of the Race of the Victim and a Comment on* Spenkelink v. Wainwright, 9 STETSON L. REV. 1 (1979).

The habeas petitions of numerous death row inmates awaiting execution have been denied consideration on the merits for similar reasons: Songer v. Wainwright, 733 F.2d 788, 792 (11th Cir. 1984); Palmes v. Wainwright, 725 F.2d 1511, 1525 (11th Cir.), *cert. denied*, 105 S. Ct. 227 (1984); Dobbert v. Strickland, 718 F.2d 1518, 1524 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 3591 (1984); Douglas v. Wainwright, 714 F.2d 1532, 1546 (11th Cir. 1983), *vacated*, 104 S. Ct. 3575 (1984); Bass v. Estelle, 696 F.2d 1154, 1157 (5th Cir.), *cert. denied*, 104 S. Ct. 200 (1983); Ford v. Strickland, 676 F.2d

A number of exceptions may exist to the preclusion of constitutional error on grounds of procedural default in federal habeas proceedings. Courts have held that a demonstration of ineffective assistance of counsel would furnish cause.[176] Several death penalty rulings recognize that a finding of ineffective assistance of counsel amounts to a showing of both cause and prejudice. In *Pickens v. Lockart*,[177] for example, the court premised a finding of cause and prejudice on a finding of ineffectiveness. The petitioner in *Pickens*, who had been convicted of first degree murder and sentenced to death, contended that jury instructions in violation of *Lockett v. Ohio* fundamentally affected the fairness of both phases of his trial. In vacating the district court judgment against the petitioner, the Eighth Circuit found that the defense counsel's neglect to raise this constitutional claim amounted to a failure to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.[178] Actual prejudice resulted from this neglect: "In the course of its deliberation about penalty, the jury came back in to ask for an explanation of [the improper jury instructions to which the defense attorney failed to object]. The trial judge told them to 'figure it out for yoursel[ves]' and gave no further instructions."[179] Many courts have also held that procedural default at trial

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434, 438 (11th Cir. 1982), *cert. denied*, 104 S. Ct. 201 (1983), *vacated*, 696 F.2d 804 (11th Cir. 1983); Briley v. Bass, 584 F. Supp. 807, 815 (E.D. Va. 1984), *aff'd*, 742 F.2d 155 (4th Cir. 1984); Morgan v. Zant, 582 F. Supp. 1026, 1031 (S.D. Ga. 1984), *aff'd in part & rev'd in part*, 743 F.2d 775 (11th Cir. 1984); Wallace v. Kemp, 581 F. Supp. 1471, 1479 (M.D. Ga. 1984); Prejean v. Blackburn, 570 F. Supp. 985, 992 (W.D. La. 1983), *aff'd*, 743 F.2d 1091 (5th Cir. 1984); Woodard v. Sargent, 567 F. Supp. 1548, 1572 (E.D. Ark. 1983); Hulsey v. Sargent, 550 F. Supp. 179, 187 (E.D. Ark. 1981); Collins v. Lockhart, 545 F. Supp. 83, 89-90 (E.D. Ark. 1982), *rev'd on other grounds*, 707 F.2d 341 (8th Cir. 1983); Mitchell v. Hopper, 538 F. Supp. 77, 96 (S.D. Ga. 1982); Stamper v. Baskerville, 531 F. Supp. 1122, 1129 (E.D. Va. 1982); Martin v. Blackburn, 521 F. Supp. 685, 706 (E.D. La. 1981), *aff'd*, 711 F.2d 1273 (5th Cir. 1983), *cert. denied*, 105 S. Ct. 447 (1984); Breest v. Perrin, 495 F. Supp. 287, 293 (D.N.H. 1980), *aff'd*, 655 F.2d 1 (1st Cir. 1981), *cert. denied*, 454 U.S. 1059 (1981).

[176] *See, e.g.*, Hall v. Wainwright, 733 F.2d 766, 778 (11th Cir. 1984); Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983).

[177] 714 F.2d 1455 (8th Cir. 1983).

[178] *Id.* at 1469.

[179] *Id.* at 1468 (second set of brackets in original). Courts have applied similar rationales in the following cases: Hall v. Wainwright, 733 F.2d 766, 778 (11th Cir. 1984); Jurek v. Estelle, 593 F.2d 672, 682 (5th Cir. 1979), *reh'g*, 623 F.2d 929 (5th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); Voyles v. Watkins, 489 F. Supp. 901, 912 (N.D. Miss. 1980). Indeed, in *Hall*, the Eleventh Circuit suggested that a finding of ineffective attorney assistance would make the need to show cause and prejudice aca-

will not foreclose federal habeas review when a state appellate court addresses the issue or otherwise declines to bar consideration of the claim.[180]

A federal court may also choose to address a procedurally defaulted claim if the prosecution does not preserve the default issue on appeal. In *Darden v. Wainwright*,[181] the Eleventh Circuit ordered the state court to grant the petitioner, who had been sentenced to death, a new sentencing hearing based on a *Witherspoon* violation at trial. That the petitioner's trial counsel failed to object contemporaneously to the violation was irrelevant; the majority did not discuss either *Sykes* or *Isaac*.[182]

Courts also have disregarded a procedural default when strict adherence to a contemporaneous objection rule would produce a miscarriage of justice. In *Smith v. Estelle*,[183] the court set aside the petitioner's death sentence because his attorneys were never notified by the prosecution that a psychiatrist who had examined the petitioner would testify against him at the sentencing phase. The defense attorneys, as a result, were completely unprepared when they cross-examined the psy-

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demic. 733 F.2d at 778.

[180] Francis v. Spraggins, 720 F.2d 1190, 1191 (11th Cir. 1983); White v. Estelle, 720 F.2d 415, 418 (5th Cir. 1983); Burger v. Zant, 718 F.2d 979, 983 n.3 (11th Cir. 1983), *vacated*, 104 S. Ct. 2652 (1984); Ross v. Hopper, 716 F.2d 1528, 1537 (11th Cir. 1983), *reh'g granted*, 729 F.2d 1293 (11th Cir. 1984); Corn v. Zant, 708 F.2d 549, 555 n.2 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 2670 (1984); Westbrook v. Zant, 704 F.2d 1487, 1491 n.6 (11th Cir. 1983); Booker v. Wainwright, 703 F.2d 1251, 1255 (11th Cir.), *cert. denied*, 104 S. Ct. 290 (1983); Bell v. Watkins, 692 F.2d 999, 1004, 1006 (5th Cir. 1982), *cert. denied* 104 S. Ct. 142 (1983); Henry v. Wainwright, 686 F.2d 311, 313 (5th Cir. 1982), *judgment vacated*, 103 S. Ct. 3566 (1983); Alderman v. Austin, 663 F.2d 558, 561 n.4 (5th Cir. 1981); Washington v. Watkins, 655 F.2d 1346, 1368 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982); Burns v. Estelle, 592 F.2d 1297, 1301-02 (5th Cir. 1979); Jones v. Thigpen, 555 F. Supp. 870, 873 (S.D. Miss. 1983); Barfield v. Harris, 540 F. Supp. 451, 455 (E.D.N.C. 1982), *aff'd*, 719 F.2d 58 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2401 (1984); Raulerson v. Wainwright, 508 F. Supp. 381, 387 (M.D. Fla. 1980). *But see* O'Bryan v. Estelle, 714 F.2d 365, 383 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1015 (1984).

[181] 725 F.2d 1526 (11th Cir. 1984), *cert. denied*, 104 S. Ct. 2688 (1984).

[182] In addition, procedural default has been excused when state grounds for a finding of default were inadequate, Spencer v. Zant, 715 F.2d 1562, 1575 (11th Cir. 1983), when state law recognized that a trial attorney's failure to object to an issue of constitutional magnitude does not amount to a waiver, Green v. Estelle, 706 F.2d 148 (5th Cir. 1983), when state law did not require a criminal defendant to object contemporaneously to a perceived error in jury instructions in order to preserve the claim on appeal, Westbrook v. Zant, 704 F.2d 1487, 1491 n.6 (11th Cir. 1983), and when the absence of a state contemporaneous objection rule precluded application of *Sykes*. Granviel v. Estelle, 655 F.2d 673, 678 (5th Cir. 1981), *cert. denied*, 455 U.S. 1003 (1982).

[183] 602 F.2d 694 (5th Cir. 1979), *aff'd*, 451 U.S. 454 (1981).

chiatrist. The Fifth Circuit noted that the state apparently had suggested that the failure by Smith's attorneys to move at the time for a continuance constituted procedural default. The court held that

> the gross disparity between the actual cross-examination conducted by Smith's attorneys . . . and the cross-examination they might have conducted if they had requested and received time to prepare . . . suggests that we should be prepared to excuse the defense attorneys' procedural default in order to avoid a "miscarriage of justice."[184]

The court reasoned that *Sykes* and *Isaac* did not altogether bar lower federal courts from applying the *Fay* deliberate bypass test. Rather, the Supreme Court had merely declined to extend the test to situations involving procedural default.[185]

The Eleventh Circuit has recognized in a death penalty case that attorney inadvertence that does not constitute procedural default may require the application of the deliberate bypass test, rather than a cause and prejudice analysis. In *Thomas v. Zant*,[186] the court held that the *Fay* deliberate bypass test remains intact and workable for situations contemplated by *Townsend v. Sain*.[187] The Supreme Court in *Townsend* delineated the criteria for determining when an evidentiary hearing would be mandated in federal habeas court and when it would be a matter for the district court's discretion. The Court held that "a federal evidentiary hearing is required unless the state court trier of fact has after a full hearing reliably found the relevant facts."[188] In *Townsend*, the Court explained that if "for any reason not attributable to the inexcusable neglect of petitioner, evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal [habeas] hearing is compelled."[189] The *Townsend* Court thus defined the inexcusable neglect standard in terms of the *Fay* deliberate bypass test.

The petitioner in *Thomas* had been sentenced to death for armed robbery, kidnapping, and murder. He unsuccessfully attempted to seek state habeas relief, arguing that his trial counsel was constitutionally ineffective for failing to investigate or prepare for the trial's penalty phase. Thomas filed a second state habeas petition, alleging that the attorney representing him at the earlier state habeas hearing had also

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[184] *Id.* at 701 n.8.
[185] *Id.*
[186] 697 F.2d 977 (11th Cir. 1983).
[187] 372 U.S. 293, 312 (1963).
[188] *Id.* at 312-13.
[189] *Id.* at 317 (citations omitted).

been ineffective. Following the state court's denial, without an evidentiary hearing, on the second petition, Thomas sought federal habeas review. The district court refused to order an evidentiary hearing and denied the petition.

On appeal to the Eleventh Circuit Thomas argued that a federal evidentiary hearing on the issue of ineffective assistance of counsel was required, since the prior state proceeding lacked, under *Townsend*, "crucial evidence 'indispensable to the fair, rounded development of the material facts.' "[190] That evidence included an affidavit of Thomas' trial counsel in which she admitted that she had not investigated or prepared for the penalty phase of the trial. Thomas further argued that the failure of his state habeas counsel to obtain and present the affidavit could not be attributed to Thomas' "inexcusable neglect."[191]

The Eleventh Circuit held that *Townsend* mandated that Thomas receive a federal evidentiary hearing on the threshold issue of deliberate bypass/inexcusable neglect on the part of the trial attorney.[192] Thus, the trial attorney's failure to prepare adequately for the sentencing phase and the state habeas attorney's subsequent neglect in securing the trial attorney's affidavit at the state proceeding did not come within the gambit of procedural default and was not subject to a cause and prejudice analysis.[193] Rather, these omissions were analyzed by the less stringent deliberate bypass standard.

Perhaps one of the most disturbing aspects of the Supreme Court's present willingness to afford greater reliability in death penalty trials can be seen in the case of *Barefoot v. Estelle*.[194] In that case the federal district court denied Barefoot's habeas writ, which challenged as violative of due process the psychiatric testimony predicting "future dangerousness," regularly used in Texas capital sentencing proceedings. In the case, the Supreme Court approved the Fifth Circuit's expedited appellate review process of capital cases.[195] The case serves as a reminder that the present Court is adhering to its view of federalism by refusing to adequately balance the state's interests in finality with the concern for full review and vindication of constitutional rights by the federal courts.

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[190] 697 F.2d at 979 (quoting *Townsend*, 372 U.S. at 321-22).

[191] *Id.*

[192] *Id.* at 988.

[193] The Court did not address whether the omissions of Thomas' state habeas counsel also constituted inexcusable neglect. *Id.* at 988 n.14.

[194] 103 S. Ct. 3383 (1983).

[195] *Id.* at 3392.

Justice Marshall, in his dissenting opinion, reminded the Court of the inadequate concern for rights with which it handles death penalty cases, but also pointed out that habeas review is necessary in capital cases and has, even during the period in which *Sykes* and *Isaac* have been controlling, been the primary means by which unjust death penalties have been reviewed and overturned.[196] To limit adequate and thoughtful habeas review would close the door on review of issues that had not been of issue on direct appeal. "A state has no legitimate interest in executing a prisoner before he has obtained full review of his sentence."[197]

Joining in dissent was Justice Blackmun, who in addition to disapproving of the lack of adequate appellate review of habeas petitions in capital cases, also found that the use of unreliable psychiatric testimony violates due process.[198] In the context of procedural forfeiture standards, what is most significant about Justice Blackmun's dissent is that the issue of unreliable expert opinions in capital sentencing is relatively new, and it is extremely unlikely that the issue had been preserved by all or even most capital defense attorneys at the time of the *Barefoot* decision. As the evidence of this testimony's inherent unreliability and prejudicial effects grows, Justice Blackmun's position may eventually be adopted by a majority of the Court. However, under *Sykes*, *Isaac*, and *Ross*, capital defendants who raise the issue for the first time in habeas petitions will be unable to show cause and prejudice, even though the testimony may result in the "miscarriage of justice" that Justice O'Connor promised in *Isaac* would still be averted under the cause and prejudice standard.[199]

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[196] "Of the 34 capital cases decided on the merits by courts of appeals since 1976 in which a prisoner appealed from the denial of habeas relief, the prisoner has prevailed in no fewer than 23 cases, or approximately 70% of the time." 103 S. Ct. at 3405 (Marshall, J., dissenting) (footnote omitted).

[197] *Id.* at 3403.

[198] 103 S. Ct. at 3406-17 (Blackmun, J., dissenting). The majority had held that even though it was uncontroverted that expert psychiatric opinion is incorrect in two out of three cases, the prejudicial effect of such authoritative pronouncements is not sufficient to create a constitutional violation. The majority had also noted that Barefoot's attorney had failed to challenge the testimony, even by impeachment, which suggests that their waiver/procedural forfeiture standards lent support to their summary rejection of Barefoot's habeas claim. *See* 103 S. Ct. at 3397 nn.5, 7, 10, & 11. In the aftermath of *Barefoot*, the two death penalty Circuits (the Fifth and the Eleventh) have adopted special rules providing for expedited and summary appeal procedures in death penalty cases. *See, e.g.*, 5TH CIR. R. 8.

[199] "[W]e are confident that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard . . ." Engle v. Isaac, 456 U.S. at 135 (citation

III. An Alternative to Cause and Prejudice in Habeas Review of Capital Cases: A Return to *Fay v. Noia*

The recent application of habeas preclusion rules in death penalty cases reveals the conflict lower courts have had in balancing the need for federal judicial scrutiny of capital sentences with the Supreme Court's restrictive approach in habeas review. As seen in *Antone*, *Sullivan*, and *Smith*, the federal courts have begun to vigorously apply the procedural forfeiture standard to avoid full consideration of important constitutional issues in capital cases. Clearly, however, the standard has proved unworkable in capital cases, and some lower federal courts have worked to find ways around its harsh results in some cases.[200] Given the unique character of the penalty, the cause and prejudice standard should be relaxed or eliminated in death penalty cases. As Justice Frankfurter reminded us long ago, "[t]he death penalty inevitably distorts judicial procedures."[201] Adherence to a standard of review that ignores the uniqueness and finality of a death sentence says something about the society.

Moreover, the policy concerns of *Sykes* and *Isaac* are inapplicable to capital cases. Underlying these policy concerns is the notion that federalism and comity dictate that the state criminal trial, not the federal habeas proceeding, should be the appropriate forum for the "main event" in the criminal justice system.[202] States impose procedural forfeiture rules to ensure that any deficiencies are brought to the attention of the trial court when such issues are fresh and can be reviewed promptly in the trial context. However salutary this concern may be, though, it is unreasonable to demand that every possible constitutional issue be raised at trial itself, both because such a requirement would prove unduly burdensome on the state court system and because it fails to take realistically into consideration the dynamics of the criminal trial. Requiring counsel to raise all conceivable but undeveloped issues "might actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition."[203] To impose upon the state courts

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omitted).

[200] *See supra* notes 176-93 and accompanying text.

[201] F. Frankfurter, Of Law and Men (1956).

[202] *Sykes*, 433 U.S. at 90. "Liberal allowance of the writ, moreover, degrades the prominence of the trial itself. A criminal trial concentrates society's resources at one 'time and place in order to decide, within limits of human fallibility, the question of guilt or innocence.' " *Isaac*, 456 U.S. at 127 (quoting *Sykes*, 433 U.S. at 90).

[203] *Reed v. Ross*, 104 S. Ct. at 2910 (footnote omitted).

this task of addressing a laundry list of constitutional claims would detract from the trial court's primary role of focusing on guilt or innocence.

In death penalty cases, to even expect the defense counsel to raise all conceivable issues at trial is unrealistic. The range of issues that even a minimally competent counsel is expected to know increases dramatically from those involved in other criminal trials. The opportunity for the attorney to overlook a possible ground of objection during the heat of trial is greatly increased in a capital case. In addition to focusing on the determination of guilt or innocence, the attorney in these cases also must be concerned with developing evidence of mitigating circumstances, the heightened public attention given to the trial, jury qualification under *Witherspoon*, and a whole range of pressures unique to death penalty cases. To contend that the trial is the "main event"[204] for purposes of raising constitutional issues, in addition to its undeniable importance as the time and place of guilt determination, is to ignore the complexity of the issues involved and the character of the death penalty case.

A second major policy concern underlying the cause and prejudice standard is the need for finality in the criminal process. In *Isaac*, Justice O'Connor advanced the notion of finality by pointing to the need of the convicted to face her situation and get on with the process of rehabilitation:[205]

> As Justice Harlan once observed, "[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community."[206]

Obviously, when a defendant faces a death sentence, the only finality of

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[204] *See Sykes*, 433 U.S. at 116 (Brennan, J., dissenting).

[205] 456 U.S. at 126-27.

> Justice Powell, elucidating a position that ultimately commanded a majority of the Court, similarly suggested: ". . . At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 262 (1973) (concurring opinion) (footnote omitted).

Id. at 126-27 n.31.

[206] *Id.* at 127 (quoting from Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting)).

interest to the defendant or society is the finality of death. In fact, according to Justice O'Connor, the question of "whether the prisoner can be restored to a useful place in the community" is itself answered only by the careful and comprehensive review of society's decision to kill one of its members.[207] Foreclosing habeas review prematurely, even in part, by reliance on procedural forfeitures is antithetical to the concept of rehabilitation.

Intertwined with the goal of finality is the desire to return to the states their "sovereign power to punish offenders" without unreasonable interference from the federal courts.[208] In the death penalty case, however, the decision to execute is one of national debate, and the scope of the state's power to carry out the punishment is itself of constitutional importance. Since *Furman*, the Supreme Court has scrutinized the states' power to invoke the punishment of death more carefully perhaps than any other issue in criminal law, and the Court's constitutional standards continue to evolve.[209] To foreclose this review under the standards of *Sykes* and *Isaac* would negate the history and importance of the constitutional debate on the death penalty. In his dissent in *Isaac*, Justice Brennan addressed the "chilling effect" that procedural forfeiture rules would have on proper review in stating that it is "inimical to the principle of federal constitutional supremacy to defer to state courts' 'frustration' at the requirements of federal constitutional law as it is interpreted in an evolving society."[210] In no area of the law is this more true than in death penalty cases.

Finally, the policy concern that underlies not only *Sykes* and *Isaac*, but most of the Supreme Court's opinions in habeas corpus cases in the past several years, is the desire to focus on guilt and innocence, rather than on constitutional errors not affecting this determination. However, this concern is cast to the wind under the conjunctive cause and prejudice test because even an error so prejudicial to the defendant that it may affect the outcome of the verdict may not be raised due to a lack of cause.[211] Attorney error that might be excusable in other felony trials should entitle the habeas petitioner in the capital case to federal court review, given the higher degree of reliability constitutionally required

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[207] *Id.*

[208] 456 U.S. at 128.

[209] *See, e.g.*, Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984) (proportionality challenges in death penalty cases).

[210] 456 U.S. at 148.

[211] *See* Guttenberg, *supra* note 16, at 622.

in these cases. By the same token, the actual prejudice requirement under *Sykes* and *Isaac* is at odds with the history of death penalty review, in which even the possibility of an incorrect sentence has led to reversal.[212]

In the absence of full federal review in capital cases, state courts may not adequately protect important rights. After studying state appellate review of capital cases, one commentator concluded that the state system may lack the rigorous review needed to provide any rational basis for imposing the death sentence and that state appellate review fails to produce adequate guidelines for trial courts in administering their capital cases.[213] Furthermore, by its very nature, the procedural forfeiture standard is not concerned with guilt or innocence, but with the setting of a systemwide standard that protects the sovereignty of the state courts. "In an individual case, the significance of [the state court's frustration with new federal court demands from a section 2254 proceeding] may pale beside the need to remedy a constitutional violation. Over the long term, however, federal intrusions may seriously undermine the morale of our state judges."[214]

Thus, the Supreme Court, in prescribing the standards for federal habeas review, has determined on balance that comity and federalism are more important than the vindication of rights in individual cases. This balancing is inappropriate in death penalty cases, for as the Supreme Court has repeatedly held, courts must look at the uniqueness of the offense, the offender, and the circumstances of the case to ensure the requisite reliability and certainty when imposing the penalty.[215]

To apply a procedural bar, more stringent than a deliberate bypass standard, in a death penalty case almost always will assure the unwarranted imposition of death. The cause and prejudice standard is designed to deal with the processes of a federal system. However salutary such a process is as a corrective for potential abuse of the system, to allow the imposition of a potentially unjust death sentence that might not have been imposed but for the procedural bar is irreconcilable with the notion of a humane society. As discussed earlier,[216] the case of John Eldon Smith best illustrates the use of the cause and prejudice standard to bar relief for a defendant who would have prevailed but for that standard. The dissent is perhaps one of the clearest indications of the

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[212] *See supra* text accompanying notes 119-29.

[213] Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979).

[214] *Isaac*, 456 U.S. at 128 n.33; *see also* Brilmayer, *supra* note 70, at 770.

[215] *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280 (1976).

[216] *See* notes 148-67 and accompanying text.

need for a different standard when the penalty of death is to be invoked:

> Machetti, the mastermind in this murder, has had her conviction overturned, has had a new trial, and has received a life sentence. This court overturned her first conviction because in the county where her trial was held, women were unconstitutionally underrepresented in the jury pool. Her lawyers timely raised this constitutional objection. They won; she lives.
>
> John Eldon Smith was tried in the same county, by a jury drawn from the same unconstitutionally composed jury pool, but because his lawyers did not timely raise the unconstitutionality of the jury pool he faces death by electrocution. His lawyers waived the jury issue. Judicial economy, as required by recent decisions of the United States Supreme Court, dictate that we not reach the underrepresentation of women issue, even under principles of "manifest injustice." The fairness promised in *Furman v. Georgia* has long been forgotten.[217]

What, then, should be the appropriate standard for habeas review of procedurally defaulted claims in capital cases. At a minimum, any standard should continue to maintain the interplay between the state courts and federal courts that is intended under section 2254. This is clearly the case in death penalty reviews in which evolving standards of society and prudent federal supervision and scrutiny of procedures has long been not only the norm, but constitutionally required.

An appropriate standard for habeas review of procedurally defaulted claims in capital cases must balance society's interest against the interest of the person being executed. The standard must provide for sufficient interplay between the state and the federal courts to ensure not only a just result with respect to guilt or innocence, but also a strict adherence to our constitutional and common law traditions of fairness, so that society can say that justice has prevailed over passion, haste, or revenge. The principles of *Fay v. Noia* meet such a need. *Fay* would permit complete federal and state review for procedurally defaulted claims unless the forfeiture or waiver was the result of a well thought out decision by the defendant and counsel.

In the capital case, even if an attorney's tactical decisions are to be imputed to the defendant, there must be some conscious choice involved before an accused foregoes a protected right that may result in the im-

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[217] 715 F.2d at 1476 (citations omitted). Judge Hatchett's dissent incorrectly stated that Machetti's lawyers timely raised the issue. In fact, in her case, the only reason the federal courts reached the claim is that the state supreme court had addressed the issue in a state post-conviction proceeding. *See* 679 F.2d at 238. Thus, it was not the orderly federal system that saved Machetti's life, but a fortunate (for her) exception to the deadly implications of the cause and prejudice test.

position of death. Any lesser standard in capital cases will heighten the possibility, as in *Machetti* and *Smith*, that the sentence of death will be imposed without constitutional scrutiny.

Application of the deliberate bypass standard in capital cases would address some of the Court's recent concerns and still assure society that justice was performed. At the onset, *Fay* does not permit sandbagging or the deliberate flaunting of the states' legitimate procedural rules. These tactics represent a deliberate bypass of the kind that would preclude federal habeas review. A sandbag of the type anticipated by Justice Rehnquist in *Sykes* would be suicidal in capital cases. In a society that neither condones nor tolerates homicide or suicide, a sandbag of any legitimate constitutional issue would be the height of professional malfeasance. Sandbagging would be gambling with the defendant's life on odds that are significantly less than pursuing favorable redress at trial. Finally, significant ethical considerations are raised when an attorney is willing to sandbag a legitimate constitutional claim of which her client has no knowledge and who does not participate in the decision. Any standard more stringent than the deliberate bypass rule places the defendant at the mercy, competence, and risk of the defense attorney without judicial scrutiny or control. The state and federal courts cannot abdicate their responsibilities to those accused of capital crimes.

Under the *Fay* standard, a capital trial will always remain the main event. Nothing will ever surpass the significance of the trial as the most important event, short of the governor ordering commutation, and as the defendant's greatest opportunity to avoid execution.

In addition, appellate review of issues not raised at trial is subject to the harmless error standard, which would not preclude the carrying out of the sentence when the forfeited constitutional issue is of little significance to the trial's outcome. The procedural bypass rule also accords significant finality to the capital conviction. Once the state and federal courts have reviewed all legitimate constitutional issues relevant to the imposition of the death penalty, society can be assured that the imposition of sentence will be final and that justice has been carried out. Finality assumes that society has an interest in putting the trial behind and moving on to the business of carrying out the sentence. In noncapital cases this means the imposition of a prison sentence and all that accompanies it. In a capital case, however, the imposition of sentence terminates the life of a member of our society, the ultimate and final act of any criminal prosecution. Society's interest in carrying out an execution only exists when society is sure that the tenets by which we have all agreed to live, by both those who commit crimes and those who

do not, are adhered to scrupulously. For whatever reasons may exist to overlook constitutional commands when they have not been properly raised in noncapital cases, no legitimate reasons justify terminating someone's life without first strictly scrutinizing the proceeding to determine that the procedures are consistent with the Constitution.

Using the deliberate bypass standard may extend the litigation of the capital cases, but in the interests of comity and federalism, it will also encourage the states to review forfeited claims to ensure that justice is done. The deliberate bypass rule will encourage the state courts to make a factual record and specific factual findings consistent with their role in our federal-state system. The amount of time spent on federal review, once the state court has made a factual record, is minimal compared to the stakes for all involved. In addition, federal intervention is limited to a review of federal constitutional claims based on the factual record made in state courts. This minimal federal intervention is consistent with the ambit of federal habeas jurisdiction as created by Congress. Only when the federal courts encourage the mutual cooperation and review envisioned in the habeas statutes can society be assured that the imposition of the death penalty has occurred in accordance with the Constitution.

The death penalty is imposed because an individual or group of individuals unlawfully took a life. The use of the deliberate bypass standard to review forfeited or waived constitutional issues promotes society's belief that a life will not be terminated without strict adherence to the law. Out of respect for those whose lives have been taken in violation of the law, the federal and state courts must assure that the death penalty is carried out only after complete review and complete certainty that the laws and Constitution were followed. The deliberate bypass rule does not place procedure over substance, and when coupled with the harmless error rule, it permits interference in state capital cases only when there is a real chance that the constitutional defect may have affected the outcome of the trial. In a just and secure society procedure must not prevail over substance, and capital cases must be strictly scrutinized so that we can remain confident that the constitutional rule of law has been applied.

In the capital case, not only should the cause requirement be relaxed or waived, but similarly, the actual prejudice requirement should be replaced by a showing of reasonable possibility of harm. To continue to invoke the actual prejudice standard in habeas review of death penalty cases will ultimately result in an execution when the reliability of the sentence is less than that which is constitutionally required.

CONCLUSION

It is ironic that Chief Justice Burger, who has suggested that the level of attorney preparedness is so woefully inadequate, should criticize those same attorneys' efforts at keeping Robert Sullivan and his hopes alive for so long. In his concurrence of a denial of a stay on the eve of Sullivan's execution, the Chief Justice wrote, "[t]he argument so often advanced . . . that capital punishment is cruel and unusual is dwarfed by the cruelty of ten years on death row inflicted upon this guilty defendant by lawyers seeking to turn the administration of justice into [a] sporting contest."[218] It can fairly be said that Sullivan might not have experienced "the cruelty of ten years on death row" if his trial attorney had been competent enough to raise constitutional claims when they should have been raised, and if his habeas attorneys had not been barred procedurally from presenting his claims. Confronted with the stringent standard of cause and prejudice, Sullivan and others like him have little chance of receiving full consideration, let alone redress, of their constitutional claims. Yet the Supreme Court, even in the *Sullivan* case, has traditionally recognized that the penalty of death is qualitatively unique from all other forms of punishment. It follows that the imposition of a death sentence should never be conditioned on an attorney's effectiveness. Courts must guard against that by relaxing the cause and prejudice standard and restoring the *Fay v. Noia* deliberate bypass test to habeas review of death penalty cases.

Concededly there is resistance, even among "neutral" judges, to the idea that someone who appears "guilty anyway" should receive a new trial or possibly go free because of some "technical" mistake by her attorney. Resistance to claims of denial of constitutional rights is likely to run particularly high in capital cases. Those who "are sentenced to death have been convicted of murdering others — often in brutal ways. Vacating a death sentence so that the defendant may be resentenced may be thought a futile exercise on behalf of someone who 'should have' been sentenced to death."[219]

Such an outlook, however, ignores the impact of the Supreme Court's decisions on the procedural requirements of capital punishment over the past decade. These decisions have interpreted the Constitution to require that capital sentencing decisions be made not as an emotional response to a particular crime, but as a result of careful and, so far as

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[218] *Sullivan*, 104 S. Ct. 450, 452 (1983) (Burger, C.J., concurring in denial of stay).

[219] Comment, *Defining Effective Assistance*, *supra* note 12, at 1579 (footnotes omitted).

possible, dispassionate weighing of all relevant factors in a particular case.