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Federal Habeas Corpus Review of State Forgeitures Resulting from Assigned Counsel's Refusal to Raise Issues on Appeal

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FEDERAL HABEAS CORPUS REVIEW OF STATE FORFEITURES RESULTING FROM ASSIGNED COUNSEL'S REFUSAL TO RAISE ISSUES ON APPEAL

INTRODUCTION

The writ of habeas corpus[1] permits a court to order a custodian detaining a person to produce that individual in order to determine the legality of the detention.[2] The exercise of habeas jurisdiction by a federal court to assess the validity of a state court criminal conviction

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1. As used in this Note, the writ of habeas corpus refers to the common-law writ of *habeas corpus ad subjiciendum*, commonly known as the "Great Writ." *See* Engle v. Isaac, 456 U.S. 107, 126 (1982); Stone v. Powell, 428 U.S. 465, 474 n.6 (1976); Fay v. Noia, 372 U.S. 391, 399 (1963); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807); 3 W. Blackstone, Commentaries *131; C. Wright, The Law of Federal Courts § 53, at 331 n.8 (4th ed. 1983); Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 Ohio St. L.J. 337, 337 (1983). Many have commented on the Great Writ's "extraordinary prestige." *Noia*, 372 U.S. at 399; *see Isaac*, 456 U.S. at 126 ("writ is a bulwark against convictions that violate 'fundamental fairness' ") (quoting Wainwright v. Sykes, 433 U.S. 72, 97 (1977) (Stevens, J., concurring)); *Noia*, 372 U.S. at 441 ("Habeas corpus is one of the precious heritages of Anglo-American civilization."); Bowen v. Johnston, 306 U.S. 19, 26 (1939) ("there is no higher duty than to maintain [the writ] unimpaired"); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1868) (writ is "the best and only sufficent defence of personal freedom"); Secretary of State for Home Affairs v. O'Brien, 1923 A.C. 603, 609 ("the most important writ known to the constitutional law of England . . ."); 3 W. Blackstone, Commentaries *129, ("the most celebrated writ in the English law").

2. C. Wright, *supra* note 1, § 53, at 330-31; L. Yackle, Postconviction Remedies § 3, at 4-5 (1981); *see* Fay v. Noia, 372 U.S. 391, 402 (1963) ("Vindication of due process is precisely [the writ's] historic office."); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 80 (1807) (writ relieves prisoner "from illegal imprisonment"). The fundamental principle underlying the writ is that government should be accountable for a person's imprisonment. Thus, if the incarceration violates an individual's fundamental rights, he is entitled to immediate release. *Noia*, 372 U.S. at 402; *see Ex parte* Bollman, 8 U.S. (4 Cranch) at 95 (purpose was to provide "efficient means" for relief); Secretary of State for Home Affairs v. O'Brien, 1923 A.C. 603, 609 (writ affords "a swift and imperative remedy in all cases of illegal restraint or confinement"); 3 W. Blackstone, Commentaries *135 (court shall within 3 days determine legality of detention). *But see* L. Yackle, *supra*, § 3, at 6 (in modern practice, immediate release does not always occur).

The writ of habeas corpus traces its origins in United States jurisprudence to the United States Constitution, art. I, § 9, cl. 2, and to the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (1789). The Act did not extend federal habeas relief to persons in state custody. *Ex parte* Dorr, 44 U.S. (3 How.) 103, 105 (1845). This was done by the Judiciary Act of 1867, ch. 27, 14 Stat. 385 (1867). Today, the power of the federal courts to issue the writ is found in 28 U.S.C. §§ 2241-2254 (1976 & Supp. V 1981). Section 2254(a) provides that an application for a writ of habeas corpus shall be entertained whenever the prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." *Id.* § 2254(a).

The writ's scope has been a matter of judicial interpretation. The Supreme Court has noted its "historic willingness to overturn or modify its earlier views of the scope

creates a tension between two important principles: federal protection of individual constitutional rights and maintenance of a proper separation of authority between the state and federal judicial systems.[3] Although society has an interest in providing redress to an unjustly incarcerated individual, liberal allowance of the writ interferes with

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of the writ, even where the statutory language . . . has remained unchanged." Wainwright v. Sykes, 433 U.S. 72, 81 (1977); *see* Hensley v. Municipal Court, 411 U.S. 345, 349-50 (1973); Braden v. Thirtieth Judicial Circuit Court, 410 U.S. 484, 501 (1973) (Blackmun, J., concurring). Originally, the writ would issue only if the court that ordered the detention of the prisoner lacked jurisdiction to do so. *See, e.g., In re* Wood, 140 U.S. 278, 287 (1891); *Ex parte* Bigelow, 113 U.S. 328, 330-31 (1885); *Ex parte* Siebold, 100 U.S. 371, 375 (1879); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830). *But see Noia*, 372 U.S. at 413-14 (common-law habeas review was not limited to cases in which the sentencing court lacked jurisdiction).

In 1942, the Court abandoned this jurisdictional requirement and extended the use of the writ to cases in which the conviction was obtained "in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." Waley v. Johnston, 316 U.S. 101, 105 (1942). Today, virtually all federal constitutional claims raised by state prisoners are cognizable in federal habeas corpus petitions. Brown v. Allen, 344 U.S. 443, 485-87 (1953); *see Sykes*, 433 U.S. at 87 ("This rule of *Brown v. Allen* is in no way changed by our holding today."); Mackey v. United States, 401 U.S. 667, 685 (1971) (Harlan, J., concurring) ("habeas lies to inquire into every constitutional defect"); *Noia*, 372 U.S. at 401-02 (function of writ is to provide "a prompt and efficacious remedy for whatever society deems to be intolerable restraints"). *But see* Stone v. Powell, 428 U.S. 465, 481-82 (1976) (fourth amendment challenges no longer cognizable in federal habeas proceeding if there has been a full and fair opportunity to raise them in state court).

In theory, the writ is not a collateral attack in which the prisoner seeks review of a state court judgment. Rather, it is an independent civil suit brought by the defendant against the official detaining him. *E.g., Noia*, 372 U.S. at 429-31; Townsend v. Sain, 372 U.S. 293, 311-12 (1963); Frank v. Mangum, 237 U.S. 309, 346-47 (1915) (Holmes, J., dissenting); L. Yackle, *supra*, § 3, at 5. Accordingly, a federal court has the power on a habeas petition to rehear evidence and retry the facts. *Townsend*, 372 U.S. at 312; *see Brown*, 344 U.S. at 460-61, 463-64.

For a historical analysis of the "Great Writ," see Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 463-99 (1963); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L. Rev. 423, 426-40 (1961); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315, 1324-32 (1961). *See generally Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038 (1970) (exhaustive treatment of federal habeas corpus).

3. Forman v. Smith, 633 F.2d 634, 634 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); L. Yackle, *supra* note 2, § 70, at 298; *see* Sumner v. Mata, 449 U.S. 539, 550 (1981); Wainwright v. Sykes, 433 U.S. 72, 115-16 (1977) (Brennan, J., dissenting); Huffman v. Pursue, Ltd., 420 U.S. 592, 606-07 (1975); Schneckloth v. Bustamonte, 412 U.S. 218, 263-65 (1973) (Powell, J., concurring); Fay v. Noia, 372 U.S. 391, 431-32 (1963); Norris v. United States, 687 F.2d 899, 901 (7th Cir. 1982); 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, 801 (1981).

the state's orderly administration of criminal procedure[4] and increases the workload of the already over-burdened federal courts.[5] To protect the autonomy of state judicial systems, state court decisions resting on adequate foundations of state substantive law are often barred from review in the federal courts.[6] The area of greatest federal-state ten-

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4. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 127 (1982); Wainwright v. Sykes, 433 U.S. 72, 88-89 (1977); Schneckloth v. Bustamonte, 412 U.S. 218, 263-65 (1973) (Powell, J., concurring); Fay v. Noia, 372 U.S. 391, 445-46 (1963) (Clark, J., dissenting); *id.* at 466-67 (Harlan, J., dissenting); United States *ex rel.* Spurlark v. Wolff, 699 F.2d 354, 361 (7th Cir. 1983) (en banc); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 146-48 (1970); *see also* Bator, *supra* note 2 (although broad collateral review is necessary it must be balanced by limits supporting the interest in finality).

5. Fay v. Noia, 372 U.S. 391, 445-46 (1963) (Clark, J., dissenting); *see, e.g.*, Brown v. Allen, 344 U.S. 443, 536 (1953) (Jackson, J., concurring) ("[F]loods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own."); Norris v. United States, 687 F.2d 899, 900 (7th Cir. 1982) (danger of courts "being flooded by unworthy postconviction motions every one of which must be . . . painstakingly considered on the merits"); Bator, *supra* note 2, at 506 (availability of habeas review "must be assessed in light of the strains put on the federal judicial system"). In 1982, 8,059 federal habeas petitions were filed by state prisoners in United States district courts. This constituted an increase in filings of approximately 700% since 1961. Bureau of Statistics, United States Dep't of Justice, Habeas Corpus—Federal Review of State Prisoner Petitions 2 (1984) [hereinafter cited as DOJ Report].

6. Wainwright v. Sykes, 433 U.S. 72, 81 (1977); Henry v. Mississippi, 379 U.S. 443, 446 (1965); *see, e.g.*, Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Fox Film Corp. v. Muller, 296 U.S. 207, 210-11 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 630 (1875). The rationale for this doctrine is that a favorable decision on a prisoner's federal claim would not alter a state judgment resting upon an independent basis of state law. Any federal court resolution of the claim on direct review, therefore, would be advisory and thus beyond the federal power. *See* Fay v. Noia, 372 U.S. 391, 429-30 (1963). The Court has reserved comment on whether the adequate state ground doctrine as applied to state substantive or procedural law on direct review is mandated by the Constitution or results from concepts of federalism. *See id.* at 430 n.40. *But cf. id.* at 466 (Harlan, J., dissenting) (adequate state ground doctrine is constitutionally mandated).

The adequate state ground doctrine clearly does not limit a federal habeas court's power to review state decisions based on substantive or procedural law. See *infra* note 34. For reasons of comity, however, a court sitting on habeas or direct review will not review state court decisions resting on adequate foundations of state substantive law. *Noia*, 372 U.S. at 431-32; *see Sykes*, 433 U.S. at 81. Clearly, in cases in which state substantive law is "patently evasive of or discriminatory against federal rights," however, federal courts on habeas or direct review will hear the constitutional claims. *Noia*, 372 U.S. at 432; *see* Solem v. Helm, 103 S. Ct. 3001, 3016 (1983) (Court examining whether state sentence of imprisonment constitutes cruel and unusual punishment in violation of the eighth amendment); Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam) (Court examining whether state death penalty constitutes cruel and unusual punishment in violation of the eighth amendment).

sion, however, involves federal habeas review of constitutional claims that the state courts declined to entertain on the merits because such claims were not presented in the manner prescribed by state procedural rules.[7]

In 1983, the Supreme Court held, in *Jones v. Barnes*,[8] that indigent defendants do not have a constitutional right to compel their court-appointed counsel to raise every nonfrivolous issue they wish litigated on appeal.[9] Six Justices, however, expressly reserved decision on whether an attorney's refusal to pursue such issues in the state appellate courts, despite the defendant's demand, will result in a forfeiture of those issues as a basis for habeas corpus relief.[10] Justice Blackmun stated in his concurrence that although counsel's refusal to raise nonfrivolous issues in the state appellate courts did not violate the defendant's right to effective assistance of counsel,[11] it nevertheless should not result in a forfeiture of the claims in a habeas corpus proceeding.[12] Justices Brennan and Marshall argued in dissent that counsel's refusal to raise the colorable claims on appeal violated the defendant's right

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7. Wainwright v. Sykes, 433 U.S. 72, 81-82 (1977); *see* Fay v. Noia, 372 U.S. 391, 432 (1963); Forman v. Smith, 633 F.2d 634, 634 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); L. Yackle, *supra* note 2, § 71, at 299-300. This controversy only exists as to federal habeas review of state procedural defaults. Clearly, the adequate state grounds doctrine will bar federal relief for any defaults on direct review in the state court, if that court has invoked a procedural default as the basis for refusing to address the merits of defendant's constitutional claims. *See id.* §§ 71, 74, at 299, 305. See *infra* note 34.

Rejection of a constitutional claim on the merits by a state court, however, will not prevent the federal court from giving relief. Accordingly, state court decisions dealing on the merits with pure questions of federal constitutional law are not res judicata. *See, e.g., Noia*, 372 U.S. at 421-22; Brown v. Allen, 344 U.S. 443, 458 (1953); Salinger v. Loisel, 265 U.S. 224, 230 (1924); Frank v. Mangum, 237 U.S. 309, 334 (1915).

8. 103 S. Ct. 3308 (1983).

9. *Id.* at 3314.

10. *See id.* at 3314 n.7; *cf.* Frazier v. Czarnetsky, 439 F. Supp. 735, 738 n.5 (S.D.N.Y. 1977) (court-appointed counsel's failure to raise claim in state court resulted in forfeiture of the claim but "result might be different if petitioner had vigorously opposed his counsel's decision of which issues to raise on appeal.").

11. *Barnes*, 103 S. Ct. at 3314 (Blackmun, J., concurring); *see* U.S. Const. amend. VI. The sixth amendment provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." This right has been incorporated by the due process clause of the fourteenth amendment to apply to the states. *E.g.*, Argersinger v. Hamlin, 407 U.S. 25, 27 (1972); Duncan v. Louisiana, 391 U.S. 145, 148 (1968); Klopfer v. North Carolina, 386 U.S. 213, 222 (1967); Gideon v. Wainwright, 372 U.S. 335, 337-38, 345 (1963). The right to assistance of counsel is interpreted to mean the right to effective assistance of counsel. *See* Powell v. Alabama, 287 U.S. 45, 53, 58, 71 (1932).

12. *Barnes*, 103 S. Ct. at 3314 (Blackmun, J., concurring).

to assistance of counsel[13] as well as his right of equal access to the appellate courts.[14]

This Note analyzes whether a court-appointed attorney's refusal to pursue nonfrivolous issues in a state court[15] appeal despite the indigent prisoner's demand should result in a forfeiture of those claims in a subsequent habeas corpus proceeding. This issue typically arises when an indigent defendant is convicted in a state trial court, and thereafter appeals the conviction with an assigned public defender or an appointed defense attorney. The defendant requests that the attorney allege certain trial errors[16] on appeal.[17] The attorney refuses to raise the constitutional claims or put them in his brief,[18] and the state appellate court affirms the conviction. Because of state procedural rules that deem any issues that could have been raised but were not briefed or argued on appeal to be waived,[19] no higher state court will

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13. *Id.* at 3314-15 (Brennan, J., dissenting).

14. *Id.* at 3315. The fourteenth amendment requires that if an appeal is available to those who can pay for it, the state must afford an indigent adequate access to the appellate process. *Id.* at 3312; *see, e.g.*, Anders v. California, 386 U.S. 738, 744-45 (1967) (state must appoint new counsel when old counsel withdraws from a nonfrivolous appeal); Douglas v. California, 372 U.S. 353, 357-58 (1963) (indigent has right to appointed counsel on appeal); Griffin v. Illinois, 351 U.S. 12, 19-20 (1956) (indigent entitled to free trial transcript or similar trial report).

15. This Note does not discuss 28 U.S.C. § 2255 (1976 & Supp. V 1981), which affords federal postconviction review for federal prisoners.

16. Habeas petitioners typically claim that an improper instruction was given to the jury or that unconstitutionally-seized evidence was admitted, improper testimony was adduced or that there was prosecutorial misconduct. Wainwright v. Sykes, 433 U.S. 72, 92 (1977) (Burger, C.J., concurring).

17. *See, e.g.*, Jones v. Barnes, 103 S. Ct. 3308, 3310-11 (1983); Cunningham v. Henderson, 725 F.2d 32, 34-35 (2d Cir. 1984); Moreno v. Estelle, 717 F.2d 171, 177 (5th Cir. 1983); Cerbo v. Fauver, 616 F.2d 714, 717 (3d Cir.), *cert. denied*, 449 U.S. 858 (1980); Ennis v. LeFevre, 560 F.2d 1072, 1075 (2d Cir. 1977), *cert. denied*, 435 U.S. 976 (1978); Paine v. McCarthy, 527 F.2d 173, 175 (9th Cir. 1975) (per curiam), *cert. denied*, 424 U.S. 957 (1976); High v. Rhay, 519 F.2d 109, 112 (9th Cir. 1975); United States *ex rel.* Winters v. DeRobertis, 568 F. Supp. 1484, 1489 (N.D. Ill. 1983).

18. *See, e.g.*, Jones v. Barnes, 103 S. Ct. 3308, 3310-11 (1983); Cunningham v. Henderson, 725 F.2d 32, 34-35 (2d Cir. 1984); Moreno v. Estelle, 717 F.2d 171, 177 (5th Cir. 1983); Cerbo v. Fauver, 616 F.2d 714, 717 (3d Cir.), *cert. denied*, 449 U.S. 858 (1980); Ennis v. LeFevre, 560 F.2d 1072, 1075 (2d Cir. 1977), *cert. denied*, 435 U.S. 976 (1978); Paine v. McCarthy, 527 F.2d 173, 175 (9th Cir. 1975) (per curiam), *cert. denied*, 424 U.S. 957 (1976); High v. Rhay, 519 F.2d 109, 112 (9th Cir. 1975); United States *ex rel.* Winters v. DeRobertis, 568 F. Supp. 1484, 1489 (N.D. Ill. 1983).

19. *See, e.g*, Carrier v. Hutto, 724 F.2d 396, 399 n.1 (4th Cir. 1983) (Virginia law); Gray v. Greer, 707 F.2d 965, 967 & n.3 (7th Cir. 1983) (Illinois law); Holcomb v. Murphy, 701 F.2d 1307, 1309 (10th Cir.) (Oklahoma law), *cert. denied*, 103 S. Ct. 3546 (1983); Matias v. Oshiro, 683 F.2d 318, 321 & n.3 (9th Cir. 1982) (Hawaii law); Hubbard v. Jeffes, 653 F.2d 99, 102 (3d Cir. 1981) (Pennsylvania law); Forman v.

hear the issues.[20] If the conviction is affirmed on direct review in the state's highest court, or leave to appeal to that court is denied, the defendant petitions a federal court[21] for a writ of habeas corpus.[22]

The Supreme Court has developed two standards for determining when a state procedural default[23] barring state court review also results in a forfeiture of federal claims as a basis for habeas relief. Under the first, a prisoner will not obtain habeas review of the claims if the state proves that the defendant "deliberately by-passed" the procedural rule.[24] The second, and stricter, standard allows habeas

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Smith, 633 F.2d 634, 636 (2d Cir. 1980) (New York law), *cert. denied*, 450 U.S. 1001 (1981); Hargrave v. State, 396 So. 2d 1127, 1127-28 (Fla. 1981) (Florida law); State v. LaGarde, 311 So. 2d 890, 891 (La. 1975) (Louisiana law); State v. Gilles, 279 Minn. 363, 365, 157 N.W.2d 64, 66 (1968) (Minnesota law); Petition of Meyers, 91 Wash. 2d 120, 122, 587 P.2d 532, 537 (1978) (Washington law), *cert. denied*, 422 U.S. 912 (1979); *cf.* Levine v. United States, 436 F.2d 641, 642-43 (7th Cir. 1970) (barring federal prisoner's claim in a § 2255 proceeding for claims that could have been raised on appeal).

20. *See, e.g.*, Ennis v. LeFevre, 560 F.2d 1072, 1074 (2d Cir. 1977), *cert. denied*, 435 U.S. 976 (1978); Paine v. McCarthy, 527 F.2d 173, 175 (9th Cir. 1975) (per curiam), *cert. denied*, 424 U.S. 957 (1976); United States *ex rel.* Winters v. DeRobertis, 568 F. Supp. 1484, 1487 (N.D. Ill. 1983).

21. 28 U.S.C. § 2241(a) (1976 & Supp. V 1981) permits the granting of the writ by a district court, a judge of any circuit acting within his jurisdiction, and by the Supreme Court or any Justice thereof. In practice, the application is usually made to the district court. C. Wright, *supra* note 1, § 53, at 333. A higher court receiving an application may transfer it to a lower court having jurisdiction. 28 U.S.C. § 2241(b) (1976 & Supp. V 1981); *see Ex parte* Abernathy, 320 U.S. 219, 220 (1943).

22. Before an individual petitions the federal court, however, he must exhaust his state remedies. *Ex parte* Royall, 117 U.S. 241, 252-53 (1886); Stranghoener v. Black, 720 F.2d 1005, 1007 (8th Cir. 1983) (per curiam); 28 U.S.C. § 2254(b)-(c) (1976 & Supp. V 1981). The exhaustion requirement evolved as a doctrine of comity between the federal and state courts and does not limit the jurisdiction or power of the federal court to intercede. Fay v. Noia, 372 U.S. 391, 415-20 (1963); *see* Bowen v. Johnston, 306 U.S. 19, 23-27 (1939). The rationale for this doctrine is that "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity [for] the state courts to correct a constitutional violation." Darr v. Burford, 339 U.S. 200, 204 (1950), *overruled in part, Noia*, 372 U.S. at 435. The exhaustion requirement refers only to a failure to exhaust state remedies still open at the time the prisoner files an application for habeas corpus in the federal court. Humphrey v. Cady, 405 U.S. 504, 516 (1972); *Noia*, 372 U.S. at 434-35; *see* Picard v. Connor, 404 U.S. 270, 272 n.3 (1971). The Court recently held that when a habeas petition contains both exhausted and unexhausted claims, it must be dismissed until the unexhausted claims are either adjudicated by a court or voluntarily waived by the defendant. Rose v. Lundy, 455 U.S. 509, 521-22 (1982). For a thorough analysis of *Rose v. Lundy* and the exhaustion doctrine, see Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 Ohio St. L.J. 393, 401-440 (1983).

23. A "procedural default" as used in this Note refers to a failure by the defendant to comply with a state rule or statute governing criminal procedure.

24. Fay v. Noia, 372 U.S. 391, 438 (1963).

review only when the prisoner shows good cause[25] for, and prejudice[26] resulting from, the procedural default. The Court has not determined which standard will apply to procedural defaults, that barred state court review of constitutional issues not raised on direct appeal.[27]

This Note analyzes the two standards and concludes that the stricter standard should apply to situations involving forfeitures of constitutional claims in state court resulting from assigned defense counsel's failure to raise these claims on direct appeal. Further, the Note examines the circumstances under which a defendant whose attorney refuses to raise demanded issues on appeal may satisfy this standard, thereby allowing federal review of constitutional claims not considered at the state level.[28]

I. Standards for Determining the Availability of Federal Habeas Review After State Forfeitures

A. *The* Fay v. Noia *Approach: "Deliberate By-pass"*

In *Fay v. Noia*,[29] the Supreme Court addressed the question of when a state procedural default, that barred state court review of constitutional issues will similarly result in the forfeiture of those claims in a federal habeas corpus proceeding.[30] A state prisoner who failed to take a timely appeal of his conviction in state court[31] was barred by the state courts from later appealing the conviction.[32] He later sought habeas review of the state conviction in federal court on the ground that his state court conviction had resulted from the introduction of a coerced confession.[33] The Court ruled that the doc-

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25. Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

26. *Id.*

27. *See id.* at 88 n.12; Forman v. Smith, 633 F.2d 634, 638 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); Cole v. Stevenson, 620 F.2d 1055, 1059 (4th Cir.), *cert. denied*, 449 U.S. 1004 (1980). See *infra* note 113. Professor Yackle commented that the standard that federal habeas courts should apply when deciding whether to review constitutional claims after forfeitures of those claims in state court "evades a definitive answer which can guide the lower courts in what must be considered a critical part of their postconviction work." L. Yackle, *supra* note 2, § 71, at 300.

28. This Note does not suggest that either standard is completely satisfactory but rather examines the policy considerations underlying the standards and applies these considerations to procedural defaults that barred state court review of constitutional claims because of defense counsel's failure to raise issues on appeal. For criticisms of these standards, see *infra* notes 48, 53, 58, 62, 67, 69.

29. 372 U.S. 391 (1963).

30. *See id.* at 394.

31. Noia did not appeal because he feared that he might receive a death sentence should he succeed on appeal and face a second trial. *Id.* at 440.

32. *Id.* at 394.

33. *Id.* at 395. Noia appealed in state court fifteen years later, after his co-defendants were released because their confessions were coerced in violation of the

trine under which state procedural defaults constitute an adequate and independent state ground barring federal review does not limit the power granted to the federal courts under the federal habeas corpus statute.[34]

The Court advocated liberal availability of the writ to provide remedies for persons illegally detained.[35] To facilitate liberal use, the Court reasoned, state procedural rules should not lightly foreclose a full opportunity for judicial review when federal constitutional rights of personal liberty are in question.[36] As a matter of comity, however, the Court acknowledged a "limited discretion in the federal judge to deny relief . . . to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies."[37]

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fourteenth amendment. *Id.* at 396 n.3. The parties stipulated that Noia's confession was coerced. *Id.* at 395-96 & n.2.

34. *Id.* at 399, 434. *Noia* partially overruled Brown v. Allen, 344 U.S. 443 (1953). In *Brown*, a consolidation of three lower court appeals, a federal habeas court refused to review one of the state capital convictions after state courts refused to consider an appeal because the appellate papers had been filed one day late. The Court reasoned that it was without power to review the judgment because the state decision rested on an adequate and independent state ground. *Brown*, 344 U.S. at 484-87. See *supra* notes 6-7. Justice Brennan, writing for the Court in *Noia*, reasoned that the adequate and independent state grounds doctrine relates only to the federal court's direct appellate jurisdiction and not to the original jurisdiction of a federal habeas court. *Noia*, 372 U.S. at 429-30. Unlike an appellate court, a federal habeas court does not review state court judgments per se, but rather, inquires independently into the constitutional validity of the petitioner's detention. *Id.* at 430. If the federal claim has merit, the appropriate relief is release. See *supra* note 2. In theory, the state court judgment is unaffected, therefore, application of the adequate state grounds doctrine is inappropriate. *See Noia*, 372 U.S. at 430. See *supra* note 2. Justice Brennan stated that measured against the individual's interest in federal consideration of federal claims, the state's interest in "an airtight system of forfeitures" must give way. *Noia*, 372 U.S. at 432.

Justices Harlan and Clark in dissent wrote that the decision struck a "heavy blow at the foundations of our federal system," *id.* at 449, reasoning that the federal courts are constitutionally without power to release a prisoner whose conviction rests upon adequate and independent state grounds. *Id.* at 448, 466. The dissenters argued that the Court's decision would disrupt the effective administration of justice in state courts by depriving state judgments of finality, *id.* at 446 (Clark, J., dissenting), and by assuming full power to review matters of state procedure, *id.* at 466-67 (Harlan, J., dissenting). Justice Clark feared that the federal habeas petition would become a functional equivalent of a state court appeal. *See id.* at 446 (Clark, J., dissenting).

35. *Id.* at 405-06 ("[T]he constitution invites, if it does not compel . . . a generous construction . . ."). The Court found that Congress, by providing a federal forum for state prisoners in 1867, intended the writ to be issued liberally to redress unjust incarceration. *Id.* at 426.

36. *Id.* at 424, 426-27, 433-34. See *infra* note 67.

37. *Id.* at 438. The Court reasoned that discretion is implicit in the language of 28 U.S.C. § 2243 (1976 & Supp. V 1981), which commands the judge to "dispose of

The majority made clear that to support a finding that the prisoner deliberately by-passed the state court procedures, the waiver must be "an intentional relinquishment or abandonment of a known right or privilege."[38] Knowledge of the right and intent to abandon it are examined from the defendant's viewpoint.[39] A choice made by counsel without the defendant's knowledge will not necessarily bar relief.[40]

B. *The* Wainwright v. Sykes *Approach: "Cause" and "Actual Prejudice"*

Fourteen years after *Noia*, the Court in *Wainwright v. Sykes*[41] set forth a more stringent standard for determining when habeas corpus review should be granted following certain state procedural defaults. The Court held that failure of a defense counsel to comply with a state contemporaneous-objection rule[42] would result in the forfeiture of those objections in a federal habeas corpus proceeding unless the accused could show good cause[43] for the procedural default and resultant prejudice.[44]

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the matter as law and justice require," *id.*, and also because habeas has been guided by equitable principles, one being that a "suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Noia*, 372 U.S. at 438.

38. *Noia*, 372 U.S. at 439 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

39. *Id.*

40. *Id.*; *see* Humphrey v. Cady, 405 U.S. 504, 517 (1972) (Court emphasizing need to find personal participation of prisoner). Although the Court acknowledged that Noia fully understood his right to appeal, it expressed sympathy with his "grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence." *Noia*, 372 U.S. at 440. It has been argued that the "deliberate by-pass" standard was never applied in this case, because Noia's action was in fact deliberate. *See* Wainwright v. Sykes, 433 U.S. 72, 95 n.3 (1977) (Stevens, J., concurring).

41. 433 U.S. 72 (1977).

42. State contemporaneous-objection rules provide that all objections not raised at the time evidence is introduced are deemed waived. *See, e.g.*, Fla. R. Crim. P. 3.190(i)(2) (West 1973); La. Code Crim. Proc. Ann. art. 920 (West Supp. 1984); Ohio R. Crim. P. 30(A) (Page Supp. 1982). *Sykes* involved Florida's criminal procedure law, which required a pretrial motion to suppress an illegally-obtained confession or admission. *See* Fla. R. Crim. P. 3.190(i)(2) (West 1973). Sykes contended that his conviction was tainted by the admission into evidence of a confession he had made without understanding his *Miranda* rights. *Sykes*, 433 U.S. at 74-75. Because he failed to assert this claim at his trial or on direct appeal, the state habeas court refused to hear the claim. *See id.* at 75.

43. *Sykes*, 433 U.S. at 87.

44. *Id. Sykes* was not the first case in which the Court found that a claim could be waived despite the absence of a considered choice by the defendant as required by *Noia*. In Henry v. Mississippi, 379 U.S. 443 (1965), defense counsel failed to object at the proper time to the introduction of allegedly illegally-seized evidence. *Id.* at 445-46. After the state court refused to hear the claim, the case came to the Supreme Court on a writ of certiorari. *Id.* The Court remanded the case to the state court, stating that if counsel did not object for strategic purposes it "would amount to a

waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here." *Id.* at 451. One commentator opined that *Henry* precipitated the dilution of *Noia's* requirement of personal participation by the prisoner for waiver. Rosenberg, *Jettisoning* Fay v. Noia: *Procedural Defaults by Reasonably Incompetent Counsel*, 62 Minn. L. Rev. 341, 352 n.50 (1978).

The "cause and prejudice" test derives from Davis v. United States, 411 U.S. 233 (1973) and Francis v. Henderson, 425 U.S. 536 (1976). In *Davis*, a federal prisoner attempted to raise a grand jury discrimination claim for the first time in a federal collateral proceeding. 411 U.S. at 234-36. He had not raised the claim before trial as required by Fed. R. Crim. P. 12(b)(2), which at that time provided that failure to object to the makeup of the grand jury before trial constitutes a waiver of the objection, but that "the court for cause shown [could] grant relief from the waiver." *Id.* at 236. The Court applied this rule without examining the defendant's participation as required by *Noia*. *Id.* at 255-57 (Marshall, J., dissenting).

In *Francis*, the defendant failed to comply with a state statute that was similar to Rule 12(b)(2). 425 U.S. at 537-38 & n.1. There was no "cause" or "prejudice" provision. *Id.* at 537 n.1. Nevertheless, the Court extended *Davis* to state prisoners and held that the defendant could have his claim litigated only upon a showing of both "cause" for the failure to comply with the procedural rule, and "actual prejudice." *Id.* at 542. Thus, *Sykes* extended *Davis* and *Francis* beyond issues pertaining to the initiation of criminal proceedings.

Finally, in Estelle v. Williams, 425 U.S. 501 (1976), a prisoner was denied permission by the jailer to wear street clothes at his state trial. *Id.* at 502. At trial, Williams' attorney did not object when Williams appeared in prison clothes. *Id.* at 509-10. On habeas review, Justice Burger acknowledged that a criminal defendant may not be forced to stand trial in clothing that may be prejudicial. *Id.* at 504-05. Williams was denied relief, however, because the state judge might have allowed him to stand trial in civilian clothing if the issue had been raised and, therefore, there was no showing of compulsion. *Id.* at 511-12. Curiously, as in *Henry*, *Davis*, and *Francis*, the Court failed to distiguish *Noia*.

For a more complete look at the dilution of the "deliberate by-pass" standard prior to *Sykes*, see Hill, *The Inadequate State Ground*, 65 Colum. L. Rev. 943, 980-87 (1965); Rosenberg, *supra*, at 350-393; Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do*, 31 Stan. L. Rev. 1, 57-61 (1978).

Sykes is not applicable when failure to object does not violate a procedural rule. *E.g.*, Washington v. Harris, 650 F.2d 447, 451-52 (2d Cir. 1981), *cert. denied*, 455 U.S. 951 (1982); Cook v. Bordenkircher, 602 F.2d 117, 119 (6th Cir. 1979), *cert. denied*, 450 U.S. 933 (1981); Freeman v. Georgia, 599 F.2d 65, 68-69 (5th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); Jurek v. Estelle, 593 F.2d 672, 681 (5th Cir. 1979), *vacated on other grounds*, 623 F.2d 929 (5th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 1001 (1981); *see* Ulster County v. Allen, 442 U.S. 140, 154 (1979) ("[I]f neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim."). Furthermore, if the state decides the federal constitutional question on the merits despite the failure to comply with the contemporaneous-objection rule, habeas review of those questions is still available. *See, e.g.*, Dobbert v. Strickland, 718 F.2d 1518, 1524 (11th Cir. 1983); Phillips v. Smith, 717 F.2d 44, 47 (2d Cir. 1983); Rogers v. McMullen, 673 F.2d 1185, 1188 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 740 (1983).

In addition, *Sykes* will not bar habeas relief unless the state procedural rule constitutes an adequate state ground. *See* L. Yackle, *supra* note 2, § 79, at 318-19.

The Court noted that a contemporaneous-objection rule preserves trial integrity by forcing counsel to raise all issues at trial.[45] The majority asserted that the "deliberate by-pass" standard did not accord adequate deference to the states' procedural rules because it would encourage "sandbagging"[46] by defense lawyers.[47] These lawyers, it was argued, might choose not to raise constitutional claims in a state trial, intending to preserve major claims for a federal habeas corpus proceeding in the event their gamble on an acquittal in the state proceeding does not succeed.[48]

To meet this requirement the rule must serve a legitimate state interest. *See* Henry v. Mississippi, 379 U.S. 443, 448 (1965).

The *Sykes* test was extended to federal prisoner's failures to comply with a district court's contemporaneous-objection rule. *See* United States v. Frady, 456 U.S. 152, 167-68 (1982).

45. *Sykes*, 433 U.S. at 90; *see* Engle v. Isaac, 456 U.S. 107, 127-29 (1982); Forman v. Smith, 633 F.2d 634, 639 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). The Court reasoned that not deferring to the contemporaneous-objection rule would "detract from the perception of the trial . . . as a decisive and portentous event." *Sykes*, 433 U.S. at 90. The Court wanted a standard that would make the parties perceive the state trial as the " 'main event' . . . rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Id.*

46. *Sykes*, 433 U.S. at 89.

47. *Id.*; *see* Engle v. Isaac, 456 U.S. 107, 129 n.34 (1982); Hockenbury v. Sowders, 620 F.2d 111, 113 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981).

48. Wainwright v. Sykes, 433 U.S. 72, 89 (1977); *see* Engle v. Isaac, 456 U.S. 107, 129 n.34 (1982). Because a defense attorney may make strategic decisions without his client's knowledge, it is possible to be barred from federal review because of "sandbagging" without having "deliberately by-passed" the state procedural rules. Justice Brennan persuasively argued that an attorney does not have an incentive to "sandbag":

> [T]he defense lawyer would face two options: (1) He could elect to present his constitutional claims to the state courts in a proper fashion. If the state trial court is persuaded that a constitutional breach has occurred, the remedies dictated by the Constitution would be imposed, the defense would be bolstered, and the prosecution accordingly weakened, perhaps precluded altogether. If the state court rejects the properly tendered claims, the defense has lost nothing: Appellate review before the state courts and federal habeas consideration are preserved. (2) He could elect to "sandbag." This presumably means, first, that he would hold back the presentation of his constitutional claim to the trial court, thereby increasing the likelihood of a conviction since the prosecution would be able to present evidence that, while arguably constitutionally deficient, may be highly prejudicial to the defense. Second, he would thereby have forfeited all state review and remedies with respect to these claims . . . . Third, to carry out his scheme, he would now be compelled to deceive the federal habeas court and to convince the judge that he did not "deliberately bypass" the state procedures. If he loses on this gamble, all federal review would be barred, and his "sandbagging" would have resulted in nothing but the forfeiture of all judicial review of his client's claims. The Court, without substantiation, apparently believes that a meaningful number of lawyers are induced into option 2 by *Fay*. I do not. That belief simply offends common sense.

The Court enunciated four reasons for a strict standard mandating forfeiture of constitutional issues not raised at trial. First, such a standard would encourage litigation of constitutional issues at trial and thereby promote accuracy by enabling the trial court to develop the factual record underlying the constitutional claim at a time when witnesses are available and their memories are fresh.[49] Because the passage of time leads to erosion of memory and dispersion of witnesses, a retrial or an evidentiary hearing pursuant to a federal habeas corpus proceeding years later may be less reliable or even impossible.[50] A liberal standard for availability of the writ, therefore, would often lead to the outright release of the prisoner, thereby "cost[ing] society the right to punish admitted offenders."[51] The stricter *Sykes* standard further promotes accuracy because it allows the judge who observed the demeanor of the witnesses to make the factual determinations necessary for deciding constitutional issues.[52]

Second, the Court reasoned that as a matter of comity federal courts should respect state rules of procedure.[53] Allowing these claims to be heard in a habeas corpus proceeding would degrade the state court system by depriving state trial judges of the opportunity to play

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Sykes, 433 U.S. at 103 n.5 (Brennan, J., dissenting); *accord* Galtieri v. Wainwright, 582 F.2d 348, 367 (5th Cir. 1978) (Goldberg, J., dissenting) ("Mesmerized by a specter of its own creation, a litigious prisoner so diabolically clever that he may be counted on to outwit state's attorneys and federal district judges, the court today condemns real men of flesh and blood, untutored and unlettered in law, to years of unconstitutional confinement."); *see Isaac*, 456 U.S. at 146 n.13 (Brennan, J., dissenting).

One commentator has noted that an attorney might "sandbag" if the constitutional claim turns on disputed facts, the trial judge is thought to be hostile to the claim, and counsel believes it would be more advantageous to make the first record on that issue in front of a more symphathetic federal judge. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. Pa. L. Rev. 473, 507 n.180 (1978).

49. *Sykes*, 433 U.S. at 88; *see* Engle v. Isaac, 456 U.S. 107, 127-28 (1982); Forman v. Smith, 633 F.2d. 634, 639 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); Hockenbury v. Sowders, 620 F.2d 111, 112-13 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981); Friendly, *supra* note 4, at 147-48.

50. Engle v. Isaac, 456 U.S. 107, 127-28 (1982); Friendly, *supra* note 4, at 147. Judge Friendly notes that it is unreasonable to expect police officers to remember what warnings they gave a prisoner ten years prior, although the prisoner will claim to remember well. *Id.* The average interval between state conviction and federal habeas filing is 2.9 years. Almost one-third of these prisoners filed more than ten years after conviction. DOJ Report, *supra* note 5, at 7.

51. Engle v. Isaac, 456 U.S. 107, 127 (1982); *see* Friendly, *supra* note 4, at 147.

52. *Sykes*, 433 U.S. at 88.

53. *Id.*; Forman v. Smith, 633 F.2d 634, 639 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *see* Engle v. Isaac, 456 U.S. 107, 128, 134 (1982).

Justice Brennan countered that sufficient deference is shown to the state by allowing it to foreclose access to its courts on forfeited issues and that the state's interests do not demand that federal courts close off further review. *Sykes*, 433 U.S. at 111-12 (Brennan, J., dissenting).

an active role in the adjudication of constitutional issues.[54] As a result, state appellate courts would be less stringent in enforcing their procedural rules[55] because they would perceive that constitutional issues raised for the first time on appeal might be decided in any event by a federal habeas court.[56] This would leave state judges with the choice of addressing the issue despite the petitioner's failure to raise the claims at trial, or not addressing the issue and risking a federal habeas decision on the question without state court guidance.[57] Similarly, frequent federal intrusions undermine the morale of state judges, who possess primary authority for enforcing the law, and thereby "diminish [their] fervor . . . to root out constitutional errors."[58] The Court has noted that: "[T]here is 'nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.' "[59]

Third, the Court reasoned that the stricter standard would promote judicial efficiency.[60] A trial concentrates society's resources by assembling jurors, witnesses, prosecutors, defendants and judges.[61] By enacting a standard that would force issues to be raised at trial, the trial court could correct the claimed errors and thereby avoid further expenditures of society's resources on costly retrials.[62]

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54. *Sykes*, 433 U.S. at 89-90; *see* United States *ex rel.* Spurlark v. Wolff, 699 F.2d 354, 361 (7th Cir. 1983) (en banc) ("For a federal district court to examine this claim now undermines the relationship between state and federal courts and only serves to relegate the state courts to the status of second class citizens in the task of protecting constitutional rights.").

55. *Sykes*, 433 U.S. at 89-90; *see* Engle v. Isaac, 456 U.S. 107, 129 (1982).

56. *Sykes*, 433 U.S. at 89.

57. *Id.* at 89-90.

58. Engle v. Isaac, 456 U.S. 107, 128 n.33 (1982). Supreme Court Justice Sandra D. O'Connor, while a judge of the Arizona Court of Appeals, noted that the Justices of the Supreme Court of Arizona were so frustrated by the extent of the exercise of federal jurisdiction over prisoner complaints that they refused to hear any. O'Connor, *supra* note 3, at 801. Justice Brennan argues, however, that the states' power is still limited by the Constitution, and therefore, "[i]t is inimical to the principle of federal constitutional supremacy to defer to state courts' 'frustration' at the requirements of federal constitutional law." *Isaac*, 456 U.S. at 148 (Brennan, J., dissenting).

59. *Isaac*, 456 U.S. at 128 n.33 (quoting Bator, *supra* note 2, at 451); *see* Friendly, *supra* note 4, at 148-49.

60. *Sykes*, 433 U.S. at 90; *see* Engle v. Isaac, 456 U.S. 107, 127 (1982).

61. *Sykes*, 433 U.S. at 90; *see* Engle v. Isaac, 456 U.S. 107, 127 (1982).

62. *See Sykes*, 433 U.S. at 90; Friendly, *supra* note 4, at 148-49. Justice Brennan, however, argues that society's interest in judicial efficency does not outweigh its interest in preventing innocent persons from being unfairly convicted. *See* Engle v. Isaac, 456 U.S. 107, 146-48 (1982) (Brennan, J., dissenting).

Fourth, the Court noted that a stricter standard of forfeiture would contribute to the finality of criminal judgments.[63] The state has an interest in prompt enforcement of its judicial decrees.[64] The Court reasoned in a later case that, at some point, a prisoner must become reconciled to conviction and focus on rehabilitation rather than on endless appeals.[65] The contemporaneous-objection rule contributes to finality because it may lead to the exclusion of the allegedly unconstitutionally-obtained evidence at trial.[66] Without this evidence, the jury may either acquit the defendant and end the case, or convict him, and leave him with one less claim to assert in a habeas petition.[67]

An unmentioned fifth reason for a more stringent test is the need to reduce the burden on the federal courts created by liberal issuance of the writ.[68] This burden may be reduced by enforcing "gatekeeping procedures."[69]

On the basis of these five policy considerations, the *Sykes* Court enunciated the "cause and prejudice" standard, but declined to define

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63. *Sykes*, 433 U.S. at 88-89; *see* Engle v. Isaac, 456 U.S. 107, 127, 134 (1982); Forman v. Smith, 633 F.2d 634, 639 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

64. Fay v. Noia, 372 U.S. 391, 446 (1963) (Clark, J., dissenting).

65. Engle v. Issac, 456 U.S. 107, 127 & n.32 (1982) (quoting Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting)); Bator, *supra* note 2, at 452; *see* United States v. Frady, 456 U.S. 152, 164 (1982).

66. *Sykes*, 433 U.S. at 88.

67. *Id.* at 88-89. Justice Brennan has stated that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." Fay v. Noia, 372 U.S. 391, 424 (1963).

68. The fear is that liberal allowance of the writ will flood the court with frivolous applications, thereby prejudicing the occasional meritorious ones. Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring) ("He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."); *see* Norris v. United States, 687 F.2d 899, 900 (7th Cir. 1982); Bator, *supra* note 2, at 506. In a representative sample of federal habeas petitions, the Department of Justice determined that only 1.8% of the petitions filed resulted in release of the prisoner. DOJ Report, *supra* note 5, at 5.

69. Norris v. United States, 687 F.2d 899, 900 (7th Cir. 1982). The Department of Justice reports that the 700% increase in filings from 1961 to 1970 "may reflect the impact of court rulings that . . . permitted Federal habeas corpus review of claims foreclosed from state review by procedural limitations." DOJ Report, *supra* note 5, at 2.

It has been argued that *Sykes'* concern with finality, judicial efficiency and reducing the federal courts' caseload is not furthered by the "cause and prejudice" test. The result of this test is that petitioners simply assert ineffective assistance of counsel as their "cause," thereby forcing the courts to review the merits of the habeas claim because the underlying claim is relevant in determining whether counsel's failure to raise it made him ineffective. *See* Tague, *supra* note 44, at 57-61; Comment, *Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims*, 130 U. Pa. L. Rev. 981, 992 (1982). Recently, Justice O'Connor asserted: "Ineffective assistance of counsel claims are becoming as much a part of state and federal habeas

either "cause" or "prejudice."[70] Rather, the lower courts were left to decide what constituted "cause" and "prejudice,"[71] while keeping in mind the petitioner's interest in redressing unjust incarceration,[72] the state's interest in the orderly administration of justice,[73] society's interest in federalism,[74] and the federal courts' interest in maintaining a manageable caseload.[75] The Court noted only that, although the "cause and prejudice" standard is narrower than the "deliberate by-pass" standard,[76] a prisoner will satisfy *Sykes* whenever a forfeiture would result in a "miscarriage of justice."[77]

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corpus proceedings as the bailiffs' call to order in those courts." McKaskle v. Vela, 104 S. Ct. 736, 738 (1984) (O'Connor, J., dissenting from denial of certiorari). In addition, the "prejudice" prong of the test forces the courts to examine the merits of the case and, therefore, detracts from the goals of judicial efficiency and finality.

70. *See Sykes*, 433 U.S. at 87.

71. *See id.*

72. See *supra* text accompanying notes 34-40.

73. See *supra* text accompanying notes 45-67.

74. See *supra* text accompanying notes 53-59.

75. See *supra* text accompanying notes 68-69.

76. *Sykes*, 433 U.S. at 87. It is possible for a defendant not to deliberately by-pass the state procedures yet still not satisfy the "cause" prong of *Sykes*. *E.g.*, Ford v. Strickland, 696 F.2d 804, 816 (11th Cir. 1983) (per curiam) (stating that application of the *Noia* standard would leave the prisoner's claim open in habeas, while reliance upon the *Sykes* formula would foreclose it from habeas review), *cert. denied*, 104 S. Ct. 201 (1983); Forman v. Smith, 633 F.2d 634, 638 (2d Cir. 1980) (same), *cert. denied*, 450 U.S. 1001 (1981). This is because *Noia* looks to the petitioner's knowledge and intention concerning assertion of his claim whereas *Sykes* focuses on whether his attorney has a justifiable reason for not asserting the claim. *Forman*, 633 F.2d at 638. "In the absence of such a reason, the claim is deemed to be forfeited, regardless of whether the petitioner . . . consciously intended to waive a claim known to exist." *Id.*

In addition, the burden is on the defendant to prove "cause" and "prejudice," *see, e.g.*, Carrier v. Hutto, 724 F.2d 396, 401 (4th Cir. 1983); Runnels v. Hess, 713 F.2d 596, 598 (10th Cir. 1983); Graham v. Mabry, 645 F.2d 603, 605 (8th Cir. 1981); Mendiola v. Estelle, 635 F.2d 487, 490 (5th Cir. 1981) (per curiam), whereas the state bears the burden of proving a "deliberate by-pass," *see, e.g.*, Fay v. Noia, 372 U.S. 391, 439-40 (1963); Rinehart v. Brewer, 561 F.2d 126, 129 (8th Cir. 1977); United States *ex rel.* Cruz v. LaVallee, 448 F.2d 671, 676 (2d Cir. 1971), *cert. denied*, 406 U.S. 958 (1972). In *Sykes*, the Court found no "cause" because the defendant offered "no explanation whatever for his failure to object at trial." *Sykes*, 433 U.S. at 91 (citation omitted).

Under the *Noia* standard, habeas examination of the merits was the rule. Refusal to grant habeas review was justified only when the state could prove the applicant's deliberate attempt to deprive the state of an opportunity to hear the claim. Under the *Sykes* standard, federal courts will routinely decline to address the merits of federal claims unless the petitioner can show good reason why the procedural default should not foreclose federal review. *Sykes* can thus be understood as a mirror image of *Noia*. L. Yackle, *supra* note 2, § 84, at 128 (Supp. 1984).

77. *Sykes*, 433 U.S. at 91. The Court's narrowing of the scope of habeas review in *Sykes* has been the subject of much commentary and criticism. *See, e.g.*, Goodman & Sallett, Wainwright v. Sykes: *The Lower Federal Courts Respond*, 30 Hastings L.J.

1. Good Cause For Default

In light of *Sykes*' "sandbagging" fears, the lower federal courts' interpretations of "cause" have focused on defense counsel's reasons for failing to properly raise and present a constitutional question. Most circuits have reasoned that an attorney's failure to assert a claim due to neglect, ignorance or mistake constitutes "cause."[78] Attorney errors of this sort cannot be deterred by enforcement of procedural rules.[79] Some of these courts have not required the error to amount to a violation of the sixth amendment right to effective assistance of counsel to warrant relief.[80] On the other hand, the majority of circuits has reasoned that counsel's strategic decisions not to raise claims will not constitute "cause"[81] unless the prisoner can show that the attorney's error amounted to ineffective assistance of counsel.[82]

1683, 1689-1725 (1979), Rosenberg, *supra* note 44, at 397-448; Soloff, *Litigation and Relitigation: The Uncertain Status of Federal Habeas Corpus for State Prisoners*, 6 Hofstra L. Rev. 297, 318-32 (1978); Spritzer, *supra* note 48, at 497-514; Tague, *supra* note 44, at 38-67.

78. *See, e.g.*, Carrier v. Hutto, 724 F.2d 396, 401, 403 (4th Cir. 1983); Gibson v. Spalding, 665 F.2d 863, 866 (9th Cir. 1981), *vacated on other grounds sub nom.* Washington v. Gibson, 456 U.S. 968 (1982); Hines v. Enomoto, 658 F.2d 667, 673-74 (9th Cir. 1981); Garrison v. McCarthy, 653 F.2d 374, 378 (9th Cir. 1981); Huffman v. Wainwright, 651 F.2d 347, 351 (5th Cir. 1981) (per curiam); Goldman v. Anderson, 625 F.2d 135, 138 (6th Cir. 1980) (dictum); Harris v. Spears, 606 F.2d 639, 644 (5th Cir. 1979); Jurek v. Estelle, 593 F.2d 672, 683 (5th Cir. 1979), *vacated on other grounds*, 623 F.2d 929 (5th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 1001 (1981); Rachel v. Bordenkircher, 590 F.2d 200, 204 (6th Cir. 1978); Collins v. Auger, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978) (dictum), *cert. denied*, 439 U.S. 1133 (1979); Jiminez v. Estelle, 557 F.2d 506, 511 (5th Cir. 1977). *But cf.* Tyler v. Phelps, 643 F.2d 1095, 1101 (5th Cir. 1981) (acknowledging that failure of attorney to object was not a trial tactic but holding that "cause" prong not satisfied because counsel voiced no explanation regarding his failure to object), *cert. denied*, 102 S. Ct. 1992 (1982).

79. *See* Garrison v. McCarthy, 653 F.2d 374, 378 (9th Cir. 1981).

80. *See, e.g.*, Carrier v. Hutto, 724 F.2d 396, 398, 401 (4th Cir. 1983); Gibson v. Spalding, 665 F.2d 863, 866 (9th Cir. 1981), *vacated on other grounds sub nom.* Washington v. Gibson, 456 U.S. 968 (1982); Runnels v. Hess, 653 F.2d 1359, 1364 (10th Cir. 1981); Garrison v. McCarthy, 653 F.2d 374, 378 (9th Cir. 1981); Jurek v. Estelle, 593 F.2d 672, 683 n.19 (5th Cir. 1979), *vacated on other grounds*, 623 F.2d 929 (5th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 1001 (5th Cir. 1981); Collins v. Auger, 577 F.2d 1107, 1110 & n.2 (8th Cir. 1978) (dictum), *cert. denied*, 439 U.S. 1133 (1979). *But see Hutto*, 724 F.2d at 405 (Hall, J., dissenting) (allowing attorney error that falls short of a sixth amendment violation to constitute "cause" would emasculate the contemporaneous-objection rule and the purposes of *Sykes*).

81. *E.g.*, Carrier v. Hutto, 724 F.2d 396, 400-01, 403 (4th Cir. 1983); Long v. McKeen, 722 F.2d 286, 289 (6th Cir. 1983); Fowler v. Parratt, 682 F.2d 746, 751 (8th Cir. 1982); Comer v. Parratt, 674 F.2d 734, 737 (8th Cir.), *cert. denied*, 103 S. Ct. 125 (1982); Hines v. Enomoto, 658 F.2d 667, 673-74 (9th Cir. 1981); Runnels v. Hess, 653 F.2d 1359, 1364 (10th Cir. 1981); Goldman v. Anderson, 625 F.2d 135, 138 (6th Cir. 1980); Satterfield v. Zahradnick, 572 F.2d 443, 446 (4th Cir.), *cert. denied*, 436 U.S. 920 (1978); *see* Huffman v. Wainwright, 651 F.2d 347, 351 (5th Cir. 1981) (per curiam); Rachel v. Bordenkircher, 590 F.2d 200, 204 (6th Cir. 1978);

By reserving decision on the "cause" issue[83] after holding that counsel's failure to raise requested claims did not violate the sixth amendment,[84] the Supreme Court in *Jones v. Barnes* left open two questions: first, whether attorney conduct that does not amount to ineffective assistance of counsel can constitute "cause"; second, whether a strategic decision by counsel can constitute "cause."

A rule that attorney conduct must amount to ineffective counsel to constitute "cause" is inconsistent with the policies underlying *Sykes*. If such a rule existed, the flexible "cause and prejudice" standard would serve no purpose because ineffective counsel would be an independent reason to award relief and would make it irrelevant whether other constitutional claims were forfeited.[85] In addition, such a rule would force defendants to prove two constitutional violations in order to receive a remedy for one.[86] *Sykes* simply stated that "cause" would be found when a forfeiture would result in a "miscarriage of justice."[87] There may be instances when an attorney's single act or omission might unfairly prejudice his client's case without rendering the entire defense ineffective.[88]

Singleton v. Lefkowitz, 583 F.2d 618, 626 (2d Cir. 1978) (dictum), *cert. denied*, 440 U.S. 929 (1979); Collins v. Auger, 577 F.2d 1107, 1110 & n.2 (8th Cir. 1978) (dictum), *cert. denied*, 439 U.S. 1133 (1979); Jiminez v. Estelle, 557 F.2d 506, 511 (5th Cir. 1977); Rodriguez v. Estelle, 536 F.2d 1096, 1097-98 (5th Cir. 1976).

82. *See, e.g.*, Carrier v. Hutto, 724 F.2d 396, 401, 403 (4th Cir. 1983); Hines v. Enomoto, 658 F.2d 667, 673-74 (9th Cir. 1981); Garrison v. McCarthy, 653 F.2d 374, 378 (9th Cir. 1981). Ineffective counsel is often asserted as the defendant's "cause." See *supra* note 69. If a prisoner proves that his counsel was ineffective, he will most likely satisfy the "cause" prong. *See* Sincox v. United States, 571 F.2d 876, 879-80 (5th Cir. 1978); Rinehart v. Brewer, 561 F.2d 126, 130 & n.6 (8th Cir. 1977).

83. Jones v. Barnes, 103 S. Ct. 3308, 3314 n.7 (1983).

84. *Id.* at 3314.

85. Carrier v. Hutto, 724 F.2d 396, 401 (4th Cir. 1983) (quoting Jurek v. Estelle, 593 F.2d 672, 683 n.19 (5th Cir. 1979)), *vacated on other grounds*, 623 F.2d 929 (5th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 1001 (1981); *see* L. Yackle, *supra* note 2, § 86, at 347-48.

86. Note, *Attorney Error as "Cause" Under* Wainwright v. Sykes: *The Case for a Reasonableness Standard After* Washington v. Downes, 67 Va. L. Rev. 415, 425 (1981) [hereinafter cited as *Attorney Error*]; *see* L. Yackle, *supra* note 2, § 86, at 347-48. Such a standard would require the defendant to prove a constitutional violation that tainted his trial as well as ineffective counsel.

87. *See Sykes*, 433 U.S. at 90-91.

88. *See, e.g.*, Carrier v. Hutto, 724 F.2d 396, 398, 401 (4th Cir. 1983); Hines v. Enomoto, 658 F.2d 667, 673-74 (9th Cir. 1981); Runnels v. Hess, 653 F.2d 1359, 1364 (10th Cir. 1981); Jurek v. Estelle, 593 F.2d 672, 683 n.19 (5th Cir. 1979), *vacated on other grounds*, 623 F.2d 929 (5th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 1001 (1981); L. Yackle, *supra* note 2, § 86, at 348; *Attorney Error*, *supra* note 86, at 425.

The circuit courts hold that counsel's performance meets the sixth amendment requirements if he performs with reasonable professional competence. *See, e.g.*, Trapnell v. United States, 725 F.2d 149, 155 (2d Cir. 1983) (per curiam); Dyer v.

Similarly, a rule that strategic decisions cannot amount to "cause" under *Sykes* is unjustified. In most instances, when counsel does not raise a claim for tactical purposes, he does so not because he wants to preserve the claim for a possible habeas petition but because he believes raising the claim will hurt his client's case.[89] Nevertheless, once the courts have determined that counsel was aware of a claim but decided not to raise it, they inquire no further.[90] Rather, some courts simply reason that the attorney's reason for not raising the claim "might" have been to save the claim for a habeas proceeding[91] and

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Crisp, 613 F.2d 275, 278 (10th Cir.) (en banc), *cert. denied*, 445 U.S. 945 (1980); Cooper v. Fitzharris, 586 F.2d 1325, 1328-30 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979); United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975); United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973). Counsel's performance must be extremely incompetent to fail under this standard. *See Sykes*, 433 U.S. at 105 n.6 (1977) (Brennan, J., dissenting) ("[I]n light of the prevailing standards . . . for judging the competency of trial counsel, . . . it is perfectly consistent for even a lawyer who commits a grievous error—whether due to negligence or ignorance—to be deemed to have provided competent representation.") (citation omitted). If the defendant asserts an unreasonable strategic decision as the basis for an ineffectiveness claim, it is virtually impossible for him to prevail. *See, e.g.*, Moreno v. Estelle, 717 F.2d 171, 177 (5th Cir. 1983); Fowler v. Parratt, 682 F.2d 746, 751 (8th Cir. 1982); Hubbard v. Jeffes, 653 F.2d 99, 104 (3d Cir. 1981); Drake v. Wyrick, 640 F.2d 912, 915 (8th Cir. 1981); United States v. Rhoads, 617 F.2d 1313, 1320-21 (8th Cir. 1980); Reynolds v. Mabry, 574 F.2d 978, 979-80 (8th Cir. 1978); United States v. DeCoster, 487 F.2d 1197, 1201 (D.C. Cir. 1973); L. Yackle, *supra* note 2, § 86, at 347.

89. *See, e.g.*, Miller v. California, 392 U.S. 616, 622-23 (1968) (Marshall, J., dissenting) (attorney did not object to testimony by informant because even a successful objection might cause jury to speculate on damaging character of the evidence sought to be excluded); Henry v. Mississippi, 379 U.S. 443, 451 (1965) (defense counsel may have wanted to let officer testify in order to impeach him); Comer v. Parratt, 674 F.2d 734, 736-37 (8th Cir.) (trial counsel did not challenge admissibility of evidence because he erroneously believed that record contained other evidence that independently corroborated victim's testimony), *cert. denied*, 103 S. Ct. 125 (1982); Garrison v. McCarthy, 653 F.2d 374, 378 (9th Cir. 1981) (counsel preferred to raise argument of unnecessarily suggestive identification procedures in closing argument rather than risk having objection overruled in front of jury); Hubbard v. Jeffes, 653 F.2d 99, 104 (3d Cir. 1981) (trial counsel did not object to prosecutor's improper closing statements because he thought prosecutor "would become shrill and alienate the jury"); Goldman v. Anderson, 625 F.2d 135, 138 (6th Cir. 1980) (attorney did not object because he did not want to draw jury's attention to issue); Satterfield v. Zahradnick, 572 F.2d 443, 446 (4th Cir.) (counsel did not object to prosecution's closing argument for fear of prejudicing defendant), *cert. denied*, 436 U.S. 920 (1978).

90. *See* Carrier v. Hutto, 724 F.2d 396, 401 (4th Cir. 1983); Fowler v. Parratt, 682 F.2d 746, 751 (8th Cir. 1982); Comer v. Parratt, 674 F. 2d 734, 737 (8th Cir.), *cert. denied*, 103 S. Ct. 125 (1982); Garrison v. McCarthy, 653 F.2d 374, 378 (9th Cir. 1981); Goldman v. Anderson, 625 F.2d 135, 138 (6th Cir. 1980).

91. *See* Estelle v. Williams, 425 U.S. 501, 514 (1976) (Powell, J., concurring) ("counsel's failure to object is in itself susceptible of interpretation as a tactical choice"); Harris v. Spears, 606 F.2d 639, 644 (5th Cir. 1979) (asking whether there is

therefore such failure does not constitute "cause." The *Sykes* Court, however, arguably did not intend to bar habeas review of all strategic decisions in situations when it is clear that no "sandbagging" problem exists.[92] If in a given situation the courts are satisfied that "sandbagging" was not intended, habeas review should not be foreclosed merely because counsel's decision was strategic.

A recent Court decision indicates that it will be difficult for a prisoner to satisfy the "cause" prong of the *Sykes* test. *Engle v. Isaac*[93] is the only post-*Sykes* Supreme Court case discussing this requirement. In *Isaac*, defense counsel failed to object to a jury instruction[94] because he felt the objection would be futile in light of long-standing state case law.[95] After Isaac's conviction, a state appellate decision cast doubt on the constitutionality of the instruction.[96] Thereafter, Isaac filed a habeas petition in federal court.[97] The Court held that the mere

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any discernible advantage to failing to specify grounds for a new trial and whether it can be presumed that no strategical advantage can be gained from failure to comply with the procedural rule); Rosenberg, *supra* note 44, at 342 (courts ask "whether any conceivable strategic or tactical advantage might accrue to defendants in general by virtue of the particular type of procedural error that was committed in the state court").

92. L. Yackle, *supra* note 2, § 86, at 349-50. *See* Wainwright v. Sykes, 433 U.S. 72, 91 (1977) (standard will prevent "miscarriage of justice").

93. 456 U.S. 107 (1982).

94. The trial court instructed the jury that Isaac, who was charged with assault, bore the burden of proving self-defense by a preponderance of the evidence. *Id.* at 112. Ohio had a contemporaneous-objection rule. *Id.* at 115 & n.15.

95. *Id.* at 130. For over a century, the Ohio courts had required criminal defendants to carry the burden of proving self-defense by a preponderance of the evidence. *See id.* at 110. In 1974, a new criminal code was enacted stating: "Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense . . . is upon the accused." 1971-72 Ohio Laws 1866, 1893 (codified as amended at Ohio Rev. Code Ann. § 2901.05(A) (Page 1982)). For more than two years after the statute was enacted, most Ohio courts assumed that this section did not change Ohio's traditional burden-of-proof rules. *See Isaac*, 456 U.S. at 111.

96. After Isaac's trial, the Ohio Supreme Court construed the statute to place only the burden of production, not the burden of persuasion, on the defendant. State v. Robinson, 47 Ohio St. 2d 103, 110-13, 351 N.E.2d 88, 93-95 (1976). Once the defendant produced some evidence of self-defense, the prosecution was forced to disprove self-defense beyond a reasonable doubt. *Id.*; Engle v. Isaac, 456 U.S. 107, 111 (1982). Later, in State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977), the state court allowed *Robinson* to be applied retroactively if the instruction had been properly objected to. *Id.* at 101-03, 364 N.E.2d. at 1358-59. Isaac's failure to object to the instruction barred him from later asserting the claim in state court. *Isaac*, 456 U.S. at 124-25 (1982).

97. Isaac asserted that because the due process clause of the fourteenth amendment requires the prosecution to prove each element of a crime beyond a reasonable doubt, and intent was an element of his crime, the prosecution had to prove lack of self-defense beyond a reasonable doubt. *See Isaac*, 456 U.S. at 121-22. Isaac alleged

futility of presenting an objection at trial cannot constitute "cause" for a failure to object at trial.[98] The majority held further that the novelty of a constitutional claim does not constitute "cause" when a basis for the claim exists and other defense counsel perceived and litigated the same issue.[99] The Court expounded on the "significant costs"[100] that liberal use of the writ entails.[101] In his dissent, Justice Brennan commented: "The Court still refuses to say what 'cause' *is*: And I predict that on the Court's present view it will prove easier for a camel to go through the eye of a needle than for a state prisoner to show 'cause.' "[102]

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that it was impossible for him to know at the time of his trial that the due process clause addressed his burden of proving an affirmative defense. *Id.* at 130. Additionally, he contended that any objection to the self-defense instruction would have been futile in light of Ohio case law. *Id.*

98. *Isaac*, 456 U.S. at 130. The Court stated:

> If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes*.

Id.

99. *Id.* at 131-34. "Cause" is not present where "the tools to construct" the constitutional claim exist. *Id.* at 133. The Court found that the "tools" existed because *In Re* Winship, 397 U.S. 358 (1970) which held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *id.* at 364, was decided almost five years before Isaac's first trial. *Isaac*, 456 U.S. at 131. The majority commented that it "might hesitate to adopt a rule that would require trial counsel . . . to exercise extraordinary vision," *id.*, but noted that many counsel had relied on *Winship* in asserting these objections, *id.* at 131-32.

The Court later emphasized the conjunctive nature of the *Sykes* test and after finding no "cause" held it unnecessary to decide the "prejudice" issue. *Id.* at 134 n.43; *see* United States v. Frady, 456 U.S. 152, 168 (1982); Hockenburry v. Sowders III, 718 F.2d 155, 160 (6th Cir. 1983); Runnels v. Hess, 713 F.2d 596, 599 (10th Cir. 1983). *Isaac* extended *Sykes* to cases in which the alleged constitutional error affects the truth-finding function of the trial. *Isaac*, 456 U.S. at 129.

100. *Isaac*, 456 U.S. at 126.

101. *Id.* at 126-29.

102. *Id.* at 144 (Brennan, J., dissenting); *see* Runnels v. Hess, 713 F.2d 596, 598 (10th Cir. 1983) (heavy burden on prisoner to unequivocally show good cause for default after *Isaac*). *Isaac* has evoked much commentary and criticism. *See, e.g.*, Note, *Habeas Corpus: A Rule of Timing Evolves into a Doctrine of Forfeiture—The* Wainwright *Cause and Actual Prejudice Test Remains Undefined*—Engle v. Isaac, 26 How. L.J. 1269, 1284-87 (1983); Comment, *"Fundamental Miscarriage of Justice": The Supreme Court's Version of the "Truly Needy" in Section 2254 Habeas Corpus Proceedings*, 20 San Diego L. Rev. 371, 393-97 (1983); Note, *Habeas Corpus—The Supreme Court Defines the* Wainwright v. Sykes *"Cause" and "Prejudice" Standard*, 19 Wake Forest L. Rev. 441, 460-69 (1983). For a thorough analysis of *Isaac*, see L. Yackle, *supra* note 2, § 86, at 169-78 (Supp. 1984).

2. Actual Prejudice Resulting From Default

The "prejudice" prong of the *Sykes* test focuses on the significance of the evidence admitted as a result of the constitutional error.[103] The defendant bears the burden of demonstrating the absence of "strong uncontradicted evidence" of guilt,[104] and thus showing that errors at his trial "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[105] To meet this requirement, therefore, the petitioner must establish a colorable claim of innocence.[106]

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103. Forman v. Smith, 633 F.2d 634, 642 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *see* United States v. Frady, 456 U.S. 152, 172 (1982) (no prejudice found in trial for second-degree murder because of "strong uncontradicted evidence of malice in the record"); *Sykes*, 433 U.S. at 91 (no actual prejudice found because other evidence of guilt presented at trial was substantial); Harris v. Spears, 606 F.2d 639, 644 (5th Cir. 1979) ("prejudice" prong satisfied because entire case turned on hearsay evidence that was not objected to); Collins v. Auger, 577 F.2d 1107, 1110-11 (8th Cir. 1978) (prejudice found because in context of entire record the only evidence of guilt was admission of incriminating statements made by defendant to psychiatrist), *cert. denied*, 439 U.S. 1133 (1979); Jiminez v. Estelle, 557 F.2d 506, 510 (5th Cir. 1977) (prejudice found because introduction of two prior uncounseled convictions was only evidence introduced). The "actual prejudice" prong also examines the nature of the constitutional error and its relation to the reliablity of the evidence. *Forman*, 633 F.2d at 642.

104. United States v. Frady, 456 U.S. 152, 172 (1982). The Court appears to have incorporated the harmless-error doctrine into its test for actual prejudice. *See Sykes*, 433 U.S. at 117 (Brennan, J., dissenting). Under the traditional harmless-error doctrine, the beneficiary of the error (the state) must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24 (1967). Under *Sykes*, however, the burden is on the prisoner to show the absence of "uncontradicted evidence" of guilt. *See Frady*, 456 U.S. at 172; *Sykes*, 433 U.S. at 90-91; Washington v. Strickland, 693 F.2d 1243, 1258 & n.25 (5th Cir. 1982) (per curiam) (en banc), *cert. granted*, 103 S. Ct. 2451 (1983); Forman v. Smith, 633 F.2d 634, 642 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); Collins v. Auger, 577 F.2d 1107, 1110-11 (8th Cir. 1978), *cert. denied*, 439 U.S. 1133 (1979). The Court has imposed this stricter "prejudice" requirement for petitioners on habeas review than is imposed on direct appeal because of the increased finality problems inherent in collateral attacks on convictions. *See Frady*, 456 U.S. at 164.

105. United States v. Frady, 456 U.S. 152, 170 (1982); *accord* Foster v. Strickland, 707 F.2d 1339, 1342 (11th Cir. 1983); Washington v. Strickland, 693 F.2d 1243, 1258 (5th Cir. 1982) (en banc), *cert. granted*, 103 S. Ct. 2451 (1983).

Prejudice will not be presumed even if the alleged error infringes upon the truth-finding function of the trial. *See Frady*, 456 U.S. at 171 (Court rejecting contention that erroneous jury instruction on meaning of malice in first-degree murder conviction is per se prejudicial and finding that defendant did not show "actual prejudice" because other evidence of guilt was "overwhelming"). The Court has restricted this definition of prejudice to alleged improper jury instructions while stating that "the import of the term in other situations . . . remains an open question." *Id.* at 168.

106. United States v. Frady, 456 U.S. 152, 171 (1982). In *Frady*, the Court held that the petitioner was not prejudiced by an improper jury instruction, but implied that the result would have been different if he had brought forward "affirmative

II. Applicable Standard for Review of Forfeitures Resulting from Failure to Assert Claims on Direct Appeal

Sykes did not overrule *Noia*.[107] The cases may be distinguished on two grounds. First, Noia's decision whether to appeal was a fundamental decision reserved for the defendant, not his attorney.[108] The *Noia* standard, examining the defendant's personal knowledge and intention concerning the assertion of the claim, is therefore appropriate. The decision whether to assert specific constitutional objections, however, generally does not involve a personal decision by the defendant but is entrusted to his attorney.[109] It would therefore be unsound to require a defendant's knowing and intelligent approval of these decisions.[110]

Second, *Noia* is inapplicable to errors alleged to have been committed during trial when the defendant's attorney is required to make on-

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evidence indicating that he had been convicted wrongly of a crime of which he was innocent." *Id.* The Court emphasized that Frady "never presented colorable evidence" that would reduce his crime from murder to manslaughter. *Id.* For a thorough discussion of judicial interpretations of the "actual prejudice" prong prior to *Frady*, see Goodman & Sallett, *supra* note 77, at 1701-07; Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 Colum. L. Rev. 1050, 1088-96 (1978).

107. Justice Rehnquist, speaking for the *Sykes* Court, stated: "It is the sweeping language of *Fay v. Noia*, going far beyond the facts of the case eliciting it, which we today reject." *Sykes*, 433 U.S. at 87-88. The Court further stated: "We have no occasion today to consider the *Fay* rule as applied to the facts there confronting the Court." *Id.* at 88 n.12.

The circuit courts have continued to apply *Noia* when the defendant failed to appeal his conviction. *See, e.g.*, Knott v. Mabry, 671 F.2d 1208, 1210 (8th Cir.), *cert. denied*, 103 S. Ct. 115 (1982); Crick v. Smith, 650 F.2d 860, 867-68 (6th Cir. 1981), *cert. denied*, 455 U.S. 922 (1982); Boyer v. Patton, 579 F.2d 284, 286 (3d Cir. 1978); Ferguson v. Boyd, 566 F.2d 873, 879 (4th Cir. 1977) (per curiam); Rinehart v. Brewer, 561 F.2d 126, 130 n.6 (8th Cir. 1977) (per curiam). *But see* Sincox v. United States, 571 F.2d 876, 879 (5th Cir. 1978) (court used "cause and prejudice" test for failure to appeal).

108. *Sykes*, 433 U.S. at 92 (Burger, C.J., concurring); *see* Jones v. Barnes, 103 S. Ct. 3308, 3312 (1983); 1 ABA Standards for Criminal Justice, Standard 4-5.2 commentary at 4.66-.67 (2d ed. 1980) [hereinafter cited as ABA Standards].

109. Jones v. Barnes, 103 S. Ct. 3308, 3312 (1983); *Sykes*, 433 U.S. at 93 (Burger, C.J., concurring); *see* Estelle v. Williams, 425 U.S. 501, 512 (1976); Henry v. Mississippi, 379 U.S. 443, 451 (1965); Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)); Jones v. Estelle, 722 F.2d 159, 165 (5th Cir. 1983); Moreno v. Estelle, 717 F.2d 171, 177 (5th Cir. 1983); Ennis v. LeFevre, 560 F.2d 1072, 1075 (2d Cir. 1977), *cert. denied*, 435 U.S. 976 (1978).

110. *See* United States *ex rel.* Allum v. Twomey, 484 F.2d 740, 745 (7th Cir. 1973) ("A rule which would require the client's participation in every decision to object, or not to object, to proferred evidence would make a shambles of orderly procedure.").

the-spot decisions.[111] The trial process does not allow for the "frequent and protracted interruptions [that might result if the defendant was required] to give knowing and intelligent approval to each of the myriad tactical decisions [that are made] as a trial proceeds."[112]

The *Sykes* Court left open the question of which test to apply when a defendant's failure to raise issues at the appellate level results in a procedural default barring state court review.[113] Lower courts' treatment of the question has not been uniform.[114] Because the decision as

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111. Wainwright v. Sykes, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring). *But cf.* Rosenberg, *supra* note 44, at 408 (decision whether to object to evidence should not be a split-second decision because it should properly be made before trial).

112. *Sykes*, 433 U.S. at 93 (Burger, C.J., concurring).

113. The Court stated:

> Whether the *Francis* rule should preclude federal habeas review of claims not made in accordance with state procedure where the criminal defendant has surrendered, other than for reasons of tactical advantage, the right to have all of his claims of trial error considered by a state appellate court, we leave for another day.
>
> The Court in *Fay* stated its knowing-and-deliberate-waiver rule in language which applied not only to the waiver of the right to appeal, but to failures to raise individual substantive objections in the state trial. Then, with a single sentence in a footnote, the Court swept aside all decisions of this Court "to the extent that [they] may be read to suggest a standard of discretion in federal habeas corpus proceedings different from what we lay down today . . . ." We do not choose to paint with a similarly broad brush here.

Id. at 88 n.12 (citation omitted) (quoting Fay v. Noia, 372 U.S. 391, 439 n.44 (1963)); *see, e.g.*, Cole v. Stevenson, 620 F.2d 1055, 1059 (4th Cir.) ("The Supreme Court has not decided where the final line between *Wainwright* and *Fay* will be drawn. . . ."), *cert. denied*, 449 U.S. 1004 (1980); United States *ex rel.* Carbone v. Manson, 447 F. Supp. 611, 619 (D. Conn. 1978) ("[I]t remains undecided which procedural waivers will be evaluated under *Fay's* 'deliberate bypass' standard and which under the narrower 'cause' and 'prejudice' test of *Sykes*."); Frazier v. Czarnetsky, 439 F. Supp. 735, 737 (S.D.N.Y. 1977) ("In the wake of *Wainwright*, it remains unclear which waivers are to be evaluated under the *Fay* 'deliberate bypass' standard and which under the *Francis* test. . . ."). The Supreme Court recently applied the "cause and prejudice" test in cases involving two procedural defaults: a failure to object at trial, and a failure to raise the claim on direct appeal. Engle v. Isaac, 456 U.S. 107, 112-13, 123 (1982); United States v. Frady, 456 U.S. 152, 162, 167-68 (1982).

114. Norris v. United States, 687 F.2d 899, 904 (7th Cir. 1982) (Cudahy, J., concurring) ("[T]he lower federal courts have been unable to agree about the effect of *Wainwright v. Sykes*" on *Noia*). A majority of the courts addressing the issue has applied the "cause and prejudice" standard. *See* Carrier v. Hutto, 724 F.2d 396, 399 & n.2 (4th Cir. 1983); United States *ex rel.* Spurlark v. Wolff, 699 F.2d 354, 360-61 (7th Cir. 1983) (en banc); Ford v. Strickland, 696 F.2d 804, 816-17 (11th Cir.) (per curiam), *cert. denied*, 104 S. Ct. 201 (1983); Matias v. Oshiro, 683 F.2d 318, 321 & n.3 (9th Cir. 1982); Gibson v. Spalding, 665 F.2d 863, 866 (9th Cir. 1981), *vacated on other grounds sub nom.* Washington v. Gibson, 456 U.S. 968 (1982); Hubbard v. Jeffes, 653 F.2d 99, 101 n.2 (3d Cir. 1981) (dictum); Huffman v. Wainwright, 651

to which issues to raise on appeal is typically entrusted to the attorney, the *Sykes* standard arguably is correct.[115] Conversely, because the attorney is not required to make a split-second trial decision, the *Noia* standard requiring the defendant's approval of such a decision is feasible.[116] Resolution of this issue will help the courts decide cases in which an attorney refuses his client's request to raise certain claims on appeal. In this situation, the accused has not "deliberately by-passed" the state procedures and therefore, under *Noia*, his claims may be raised in a habeas petition.[117] Application of the stricter "cause and prejudice" test,[118] however, will better further the policies identified in *Sykes*.

F.2d 347, 350 (5th Cir. 1981) (per curiam); Forman v. Smith, 633 F.2d 634, 635, 640 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); Evans v. Maggio, 557 F.2d 430, 433-34 (5th Cir. 1977); Ramsey v. United States, 448 F. Supp. 1264, 1273 n.18 (N.D. Ill. 1978); United States *ex rel.* Carbone v. Manson, 447 F. Supp. 611, 619 (D. Conn. 1978); Frazier v. Czarnetsky, 439 F. Supp. 735, 737-38 (S.D.N.Y. 1977); *cf. Spurlark*, 699 F.2d at 363 (Cudahy, J., concurring in part and dissenting in part) (applying *Noia* standard to reach same result as majority that applied *Sykes* standard).

Although most of the circuits apply the "cause and prejudice" test, they do so without any significant discussion of why *Sykes* is preferred over *Noia*. Holcomb v. Murphy, 701 F.2d 1307, 1310 (10th Cir.), *cert. denied*, 103 S. Ct. 3546 (1983); *see, e.g., Matias*, 683 F.2d at 349-50 n.3; *Hubbard*, 653 F.2d at 101 n.2; *Huffman*, 651 F.2d at 350; *Evans*, 557 F.2d at 433-34.

A number of courts, however, has applied the "deliberate by-pass" standard. *See Holcomb*, 701 F.2d at 1312; Rinehart v. Brewer, 561 F.2d 126, 129-30 (8th Cir. 1977); Maddux v. Rose, 483 F. Supp. 661, 665 (E.D. Tenn.), *aff'd*, 627 F.2d 1091 (6th Cir. 1980). *But see Holcomb*, 701 F.2d at 1312 (Seth, C.J., concurring) (concurring in result but applying *Sykes* test.)

One circuit has reserved comment on which test it will apply. *See* United States v. Barnes, 610 F.2d 888, 894-95 (D.C. Cir. 1979).

115. *E.g.*, Graham v. Mabry, 645 F.2d 603, 606-07 (8th Cir. 1981); Harris v. Spears, 606 F.2d 639, 642 (5th Cir. 1979); Rinehart v. Brewer, 561 F.2d 126, 130 n.6 (8th Cir. 1977); Frazier v. Czarnetsky, 439 F. Supp. 735, 737-38 (S.D.N.Y. 1977).

116. Norris v. United States, 687 F.2d 899, 910 (7th Cir. 1982) (Cudahy, J., concurring); L. Yackle, *supra* note 2, § 84, at 339; *see* Jones v. Barnes, 103 S. Ct. 3308, 3317 (1983) (Brennan, J., dissenting) (stating that unlike a trial decision, "[d]ecisions regarding which issues to press on appeal . . . can and should be made more deliberately . . . ."); Harris v. Spears, 606 F.2d 639, 642-44 (5th Cir. 1979) (accepting distinction between trial and appellate defaults but finds default excused under *Noia* and *Sykes*); Ennis v. LeFevre, 560 F.2d 1072, 1075 (2d Cir. 1977) (embracing distinction but binding defendant to attorney's decision to omit issue on appeal), *cert. denied*, 435 U.S. 976 (1978); *cf.* Tollett v. Henderson, 411 U.S. 258, 271 n.2 (1973) (Marshall, J., dissenting) (opining that counsel's ability to bind client "should be limited narrowly to situations in which practical realities bar consultation, as often may happen during the course of the trial").

117. Paine v. McCarthy, 527 F.2d 173, 175-76 (9th Cir. 1975) (per curiam), *cert. denied*, 424 U.S. 957 (1976).

118. See *supra* note 76.

First, a concern for accurate fact-finding[119] necessitates a stringent requirement that discourages defense attorneys from saving issues for federal habeas corpus consideration.[120] Because an individual must exhaust state remedies before habeas review can be obtained,[121] state appellate review will occur more quickly after trial than will federal habeas review. The accuracy of fact-finding at trial is not the primary concern; transcripts from the original trial can partially substitute for witnesses absent at retrial.[122] The accuracy concern, however, is extremely relevant to fact-finding on issues that were not developed at the trial and that underlie the constitutional claim.[123] Because a state appellate court's factual determinations made shortly after trial may be presumed correct,[124] a state prisoner may not want to present a claim to the appellate court, but "wait until memories have faded"[125] and present his claim years later in a federal habeas corpus petition.[126]

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119. See *supra* text accompanying notes 49-52.

120. Ford v. Strickland, 696 F.2d 804, 816 (11th Cir.) (per curiam), *cert. denied*, 104 S. Ct. 201 (1983); Forman v. Smith, 633 F.2d 634, 640 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *see* United States *ex rel.* Spurlark v. Wolff, 699 F.2d 354, 361 (7th Cir. 1983) (en banc) (adopting *Forman* analysis).

121. See *supra* note 22.

122. Forman v. Smith, 633 F.2d 634, 640 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

123. *Id.; see* United States *ex rel.* Spurlark v. Wolff, 699 F.2d 354, 361 (7th Cir. 1983) (en banc) (adopting *Forman* analysis). One judge noted, however, that the accuracy consideration is not as relevant to appellate defaults because, unlike trial defaults, the failure to object to the admitted evidence does not contribute to the introduction of additional error. Norris v. United States, 687 F.2d 899, 910 (7th Cir. 1982) (Cudahy, J., concurring). Similarly, Professor Yackle has suggested that if the underlying federal claim "is purely legal. . . an appellate court is in just as good a position to determine it, whether it was raised below or not." L. Yackle, *supra* note 2, § 83, at 121 (Supp. 1984). Thus, if the underlying claim is legal, application of the *Noia* standard on federal habeas review would not prejudice the state. *See id.*; Cole v. Stevenson, 620 F.2d 1055, 1070 (4th Cir.) (Murnaghan, J., dissenting), *cert. denied*, 449 U.S. 1004 (1980).

124. *See* Marshal v. Lonberger, 103 S. Ct. 843, 850 (1983); Sumner v. Mata II, 455 U.S. 591, 591-93 (1982) (per curiam). The circumstances in which state courts findings of facts are entitled to a presumption of correctness are listed in 28 U.S.C. § 2254(d) (1976 & Supp. V 1981).

125. United States *ex rel.* Spurlark v. Wolff, 699 F.2d 354, 361 (7th Cir. 1983) (en banc).

126. *Id.; see* Ford v. Strickland, 696 F.2d 804, 816 (11th Cir.) (per curiam) (standard prevents defense attorneys from omitting arguments in preparing appeals with the intent of saving issues for federal habeas consideration), *cert. denied*, 104 S. Ct. 201 (1983); Gibson v. Spalding, 665 F.2d 863, 866 (9th Cir. 1981) (same), *vacated on other grounds sub nom.* Washington v. Gibson, 456 U.S. 968 (1982). *But see* Norris v. United States, 687 F.2d 899, 910 (7th Cir. 1982) (laches doctrine which applies in habeas proceedings ensures that habeas relief will be denied when prisoner's delay in bringing his claim prejudices the state or government); L. Yackle, *supra* note 2, § 83, at 122 (Supp. 1984) (same).

In addition, forty-two percent of habeas petitioners assert ineffective assistance of counsel as their federal habeas claim.[127] Such claims cannot be easily adjudicated by resort to the cold trial record without further fact-finding. It is important, therefore, to compel the defendant to assert issues in a timely fashion so that witnesses can be located and a record made. Asserting the claim on direct review allows the state appellate court to remand the case for a prompt evidentiary hearing or an adjudication on the merits.[128]

Second, considerations of comity[129] apply as forcefully to the observance of state appellate procedures as they do to those of state trials.[130] States have a strong interest in protecting both their appellate and trial procedures from circumvention by federal courts.[131] Application of the "cause and prejudice" standard will decrease the possibility that a federal court will decide constitutional issues without benefit of the state courts' views, and will thereby encourage state appellate courts to enforce strictly their procedural rules.[132]

The third concern, promoting judicial efficiency,[133] is not applicable to appellate defaults. The opportunity to resolve issues conclusively and efficiently by submitting them to a jury has already passed. Therefore, it makes no difference whether the trial outcome is reversed and a state appellate court or a federal habeas court orders a retrial.[134]

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127. DOJ Report, *supra* note 5, at 6; *see* United States *ex rel.* Spurlark v. Wolff, 699 F.2d 354, 361 (7th Cir. 1983) (en banc). See *supra* note 69.

128. Forman v. Smith, 633 F.2d 634, 640 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

129. See *supra* text accompanying notes 53-59.

130. Ford v. Strickland, 696 F.2d 804, 816 (11th Cir.) (per curiam), *cert. denied*, 104 S. Ct. 201 (1983); Forman v. Smith, 633 F.2d 634, 639-40 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *see* United States *ex rel.* Spurlark v. Wolff, 699 F.2d 354, 361 (7th Cir. 1983) (en banc); *cf.* Sumner v. Mata, 449 U.S. 539, 547 (1981) (concerns of comity entitle factual decisions of appellate and trial courts to "presumption of correctness").

131. Forman v. Smith, 633 F.2d 634, 639-40 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *see* United States *ex rel.* Spurlark v. Wolff, 699 F.2d 354, 361 (7th Cir. 1983) (en banc).

The Court has stated:

> [I]t is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions . . . . [W]e do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts.

Huffman v. Pursue, Ltd., 420 U.S. 592, 609 (1975).

132. Ford v. Strickland, 696 F.2d 804, 816 (11th Cir.) (per curiam), *cert. denied*, 104 S. Ct. 201 (1983); Gibson v. Spalding, 665 F.2d 863, 866 (9th Cir. 1981), *vacated on other grounds sub nom.* Washington v. Gibson, 456 U.S. 968 (1982).

133. See *supra* text accompanying notes 60-62.

134. Forman v. Smith, 633 F.2d 634, 640 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *see* L. Yackle, *supra* note 2, § 83, at 339.

Fourth, finality in litigation[135] is promoted by a strict forfeiture rule in appellate proceedings.[136] This rule is consistent with the Court's wish that a prisoner who has had full opportunity to raise issues at trial and on appeal be reconciled to his conviction.[137] Regarding the finality and comity concerns the Court has commented that: "Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks."[138]

Finally, the need for docket control[139] in the federal court system calls for a strict standard to deter "piecemeal litigation."[140] Less than two percent of all habeas petitions result in release of the petitioner;[141] yet, unless a stricter screening standard is imposed, most applications will be "painstakingly considered on the merits"[142] at a time when federal courts are already "drowning in litigation."[143]

In addition to the policy considerations advanced in *Sykes* that support the "cause and prejudice" standard, there is a practical reason for applying the *Sykes* test to defaults resulting from attorney failures to raise claims on appeal. The *Noia* standard arguably is appropriate because the consultation required for these decisions would not interrupt trials, and therefore, a claim should be forfeited only if the client approved his attorney's failure to assert the claim.[144] Because the ultimate responsibility for strategic decisions rests with the attorney,[145] however, application of the "deliberate by-pass" test to defaults resulting from failures to raise issues on appeal would make state procedural rules easy to subvert. In most instances, the defendant has little knowledge of what particular claims should be urged, and usually leaves these decisions to his attorney.[146] If the *Noia* test

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135. See *supra* text accompanying notes 63-67.

136. United States *ex rel.* Spurlark v. Wolff, 699 F.2d 354, 361 (7th Cir. 1983) (en banc).

137. See *supra* text accompanying note 65.

138. United States v. Frady, 456 U.S. 152, 164-65 (1982).

139. See *supra* text accompanying notes 68-69.

140. Norris v. United States, 687 F.2d 899, 903 (7th Cir. 1982).

141. See *supra* notes 5, 68.

142. Norris v. United States, 687 F.2d 899, 900 (7th Cir. 1982).

143. *Id.* at 903. Applying the "cause and prejudice" standard to appellate defaults would be a significant extension of *Sykes* because the Supreme Court has applied this standard only in cases involving a trial procedural rule. *See* United States v. Frady, 456 U.S. 152, 153-54, 167 (1982); Engle v. Isaac, 456 U.S. 107, 110, 115 & n.15, 129 (1982); Wainwright v. Sykes, 433 U.S. 72, 76-77, 87 (1977); Francis v. Henderson, 425 U.S 536, 537 (1976); Davis v. United States, 411 U.S. 233, 236-38, 245 (1973).

144. See *supra* note 116 and accompanying text.

145. See *supra* note 109 and accompanying text.

146. *See* Powell v. Alabama, 287 U.S. 45, 68-69 (1932) ("[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law"); *cf.* Douglas

applied, however, the defendant could litigate in federal court whenever an attorney failed to inform him of all the legal issues in the case and then secure approval of counsel's decision not to press these issues.[147]

Furthermore, the Court has distinguished the failure to raise an issue on appeal from the failure to appeal.[148] A criminal defendant has a constitutional right to force an attorney to pursue a nonfrivolous appeal.[149] There is no corresponding right, however, to compel an attorney to raise nonfrivolous issues on appeal.[150] Application of the *Noia* standard in this circumstance would therefore entail a metaphysical inquiry into whether a defendant "deliberately by-passed" a right he did not possess.[151] Accordingly, application of different standards in these differing situations is justified. Furthermore, in light of the Court's recent decisions restricting the use of the writ,[152] it is doubtful that it would revert to the liberal *Noia* standard.[153]

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v. California, 372 U.S. 353, 358 (1963) (emphasizing attorney's importance in "marshalling" of arguments).

147. *Cf.* Wainwright v. Sykes, 433 U.S. 72, 95 n.2 (1977) (Stevens, J., concurring) ("The very reasons why counsel's participation is of such critical importance in assuring a fair trial for the defendant . . . make it inappropriate to require that his tactical decisions always be personally approved, or even thoroughly understood, by his client.") (citations omitted) (quoting United States *ex rel.* Allum v. Twomey, 484 F.2d 740, 744-45 (7th Cir. 1973)).

148. *Compare* Jones v. Barnes, 103 S. Ct. 3308, 3314 (1983) (attorney not required to raise all nonfrivolous issues on appeal) *with* Anders v. California, 386 U.S. 738, 744 (1967) (attorney may not withdraw from a nonfrivolous appeal).

149. *See* Anders v. California, 386 U.S. 738, 744 (1967).

150. *See* Jones v. Barnes, 103 S. Ct. 3308, 3314 (1983).

151. *Cf.* Wainwright v. Torna, 455 U.S 586, 587-88 (1982) (per curiam) (respondent could not be deprived of effective assistance of counsel because he had no constitutional right to counsel); Ross v. Moffitt, 417 U.S. 600, 618-19 (1974) (respondent was not deprived of federal constitutional rights when state refused to provide counsel for second appellate review, because such appellate review was discretionary under state law).

152. *See* United States v. Frady, 456 U.S. 152 (1982); Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977).

153. One judge, however, has argued that *Noia* should apply because there is Supreme Court precedent for its use. United States *ex rel.* Spurlark v. Wolff, 699 F.2d 354, 363 (7th Cir. 1983) (en banc) (Cudahy, J., concurring in part and dissenting in part); Norris v. United States, 687 F.2d 899, 908 (1982) (Cudahy, J. concurring). In Kaufman v. United States, 394 U.S. 217 (1969), the Supreme Court applied the "deliberate by-pass" test when failure by a federal prisoner to press an issue in federal district court barred him from later raising the claim on direct appeal. *Id.* at 227 n.8. It is argued that because *Sykes* never overruled *Noia*, and *Kaufman* adopted the *Noia* test for federal prisoners, *Kaufman* is still good law. *Norris*, 687 F.2d at 908-09 (Cudahy, J., concurring). *Kaufman*, however, was written eight years before *Sykes*, which explicitly left the issue open. *Sykes*, 433 U.S. at 88 n.12. Furthermore, Jones v. Barnes, 103 S. Ct. 3308 (1983), casts grave doubt on *Kaufman's* vitality. See *infra* notes 154-69 and accompanying text. In addition, dictum in *Barnes* may indicate that the Court has concluded that *Sykes*, rather than *Noia*, applies. *See*

III. Application of the *Sykes* Standard to Forfeitures Resulting from Assigned Counsel's Refusal to Raise Issues on State Court Appeal

In *Jones v. Barnes*,[154] David Barnes argued that assigned counsel's refusal to raise all requested nonfrivolous claims deprived Barnes of his sixth amendment right to assistance of counsel[155] and his fourteenth amendment right of equal access to the appellate courts.[156] Respondent relied heavily on *Anders v. California*,[157] in which the Court held that an indigent defendant was deprived of his right to assistance of counsel when his court-appointed attorney withdrew from a nonfrivolous appeal.[158] The Court rejected these contentions

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Barnes, 103 S. Ct. at 3314 n.7 ("We have no occasion to decide whether counsel's refusal to raise requested claims would constitute *'cause'* for a petitioner's default *within the meaning of Wainwright v. Sykes.*") (emphasis added).

154. 103 S. Ct. 3308 (1983).

155. Brief for Respondent at 12, Jones v. Barnes, 103 S. Ct. 3308 (1983), *reprinted in* 14 Petitions and Briefs, Criminal Law Series (BNA), no. 19, at 101, 122 [hereinafter cited as Criminal Law Series].

156. Brief for Respondent at 12, Jones v. Barnes, 103 S. Ct. 3308 (1983), *reprinted in* Criminal Law Series, *supra* note 155, at 101, 122. The Court of Appeals for the Second Circuit held that:

> [A]ppointed counsel's unwillingness to present particular arguments at appellant's request functions not only to abridge defendant's right to counsel on appeal, but also to limit the defendant's constitutional right of equal access to the appellate process in order to redress asserted errors at trial—the very right that an appointment of appellate counsel was designed to preserve.

Barnes v. Jones, 665 F.2d 427, 433-34 (2d Cir. 1981), *rev'd*, 103 S. Ct. 3308 (1983).

157. 386 U.S. 738 (1967); *see* Brief for Respondent at 14-17, Jones v. Barnes, 103 S. Ct. 3308 (1983), *reprinted in* Criminal Law Series, *supra* note 155, at 124-27.

158. 386 U.S. at 743. In *Anders*, a court-appointed counsel concluded there was "no merit" to an appeal and withdrew from the case. *Id.* at 739. The defendant was denied his request for another attorney. *Id.* at 740. After the appellate court affirmed the conviction, defendant sought to reopen the case on the ground that he was deprived of the assistance of counsel on his appeal. *Id.* A higher state court denied his claim because the record showed the appeal to be "without merit." *Id.* at 740-41. The Supreme Court held that the failure of the state to provide an indigent appellant with services of counsel that would otherwise have been available to an appellant with financial means violated the defendant's right to fair procedure and equal protection guaranteed by the fourteenth amendment. *See id.* at 741, 744.

The Court stated that counsel's role as advocate requires him to "support his client's appeal to the best of his ability." *Id.* at 744. The Court noted, however, that if the claims were wholly frivolous, counsel may with the court's permission withdraw from the suit. *Id.* If after full review the court finds any legal points arguable, however, it must appoint counsel to argue the appeal. *Id.*

Barnes did not assert ineffectiveness of counsel as his claim but rather that he was totally deprived of counsel on the particular issues he urged counsel to raise. *See* Brief for Respondent at 12, Jones v. Barnes, 103 S. Ct. 3308 (1983) ("Counsel's duty is not measured against a standard of lawyer competence, but rather is founded on his client's fundamental right to access to the courts."), *reprinted in* Criminal Law

and reversed the Second Circuit,[159] holding that such a rule would undermine counsel's ability to present his client's case in accord with his professional evaluation[160] and would thereby "disserve the very goal of vigorous and effective advocacy that underlies *Anders*."[161]

The majority reasoned that good appellate advocacy requires selectivity among arguments,[162] noting that "[l]egal contentions, like the currency, depreciate through over-issue."[163] The Court concluded that Barnes was not deprived of counsel or access to the courts[164] because counsel is most effective when he eliminates valid but weaker arguments.[165] The Court recognized, however, that the accused retains final authority to make certain basic decisions such as whether to plead guilty,[166] waive a jury,[167] take an appeal,[168] or testify in his own behalf.[169]

The dissent argued that because the defendant must bear the consequences of a conviction, the right to assistance of counsel is a personal right of the defendant.[170] Accordingly, the defendant must be permit-

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Series, *supra* note 155, at 122. It would be virtually impossible to prove that counsel's overall performance was ineffective because of his strategic decision not to raise certain issues. *See* Cerbo v. Fauver, 616 F.2d 714, 718-19 (3d Cir.), *cert. denied*, 449 U.S. 858 (1980). See *supra* note 88.

159. See *supra* note 156.

160. *Barnes*, 103 S. Ct. at 3312.

161. *Id.* at 3314.

162. *Id.* at 3312-13.

163. *Id.* at 3313 (quoting Jackson, *Advocacy Before the United States Supreme Court*, 25 Temple L.Q. 115, 119 (1951)).

164. *See Barnes*, 103 S. Ct. at 3313-14.

165. *Id.* at 3312-14.

166. *Id.* at 3312; *see* Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring); Boykin v. Alabama, 395 U.S. 238, 242-44 (1969); Brookhart v. Janis, 384 U.S. 1, 7-8 (1966).

167. *Barnes*, 103 S. Ct. at 3312; *see* Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (Burger, C.J., concurring).

168. *Barnes*, 103 S. Ct. at 3312; Doyle v. United States, 721 F.2d 1195, 1198 (9th Cir. 1983); *see* Anders v. California, 386 U.S. 738, 744-45 (1967); Douglas v. California, 372 U.S. 353, 357-58 (1963).

169. *Barnes*, 103 S. Ct. at 3312; *see* Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (Burger, C.J., concurring). It is unclear why the decision whether to waive the right to a jury trial and the decision whether to testify are ultimately decisions of the accused. Both decisions are as integral to an attorney's formulation of trial strategy as the decisions regarding which issues to raise on appeal. It is equally unclear why these decisions are considered different from determining whether to seek a suppression of a confession. *See* Rosenberg, *supra* note 44, at 409.

170. *Barnes*, 103 S. Ct. at 3316 (Brennan, J., dissenting); *see* Faretta v. California, 422 U.S. 806, 819-20 (1975) (sixth amendment is a personal right of the accused that protects more than states' interest in reliability of guilt determination resulting from defendant presenting case in best manner possible).

ted to disregard his attorney's advice regardless of its merit.[171] A defendant's right to proceed pro se,[172] it was argued, should not force him either to forego the assistance of counsel or to relinquish control over the entire case.[173] The dissent further argued that because defendants are capable of making informed judgments about which issues to appeal,[174] and because these judgments need not be made quickly, as in a trial, there is no need to confer decisive authority on the attorney.[175] Justice Brennan commented that "to force a lawyer's *decisions* on a defendant 'can only lead him to believe that the law conspires against him.' "[176]

Application of the circuit courts' interpretations of "cause"[177] to a *Barnes* fact pattern creates a dilemma. On one hand, an attorney's

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171. *Barnes*, 103 S. Ct. at 3316 (Brennan, J., dissenting).

172. *See* Faretta v. California, 422 U.S. 806, 836 (1975). *Faretta* established that the sixth amendment guarantees that a defendant in a state criminal trial has the right to defend pro se when he knowingly, voluntarily and intelligently elects to do so. *Id.* at 835-36. After *Faretta*, it was argued that, because one has a constitutional right to defend pro se and an independent constitutional right to assistance of counsel, it is illogical to make a defendant relinquish one constitutional right to preserve another. A defendant, therefore, should be entitled to conduct his own defense and at the same time have the assistance of counsel. *See* Note, *Assistance of Counsel: A Right To Hybrid Representation*, 57 B.U.L. Rev. 570, 579, 581-82, 583 (1977).

173. *Barnes*, 103 S. Ct. 3317-18 (Brennan, J., dissenting). The ABA Standards state:

> [W]hen, in the estimate of counsel, the decision of the client to take an appeal, *or the client's decision to press a particular contention on appeal*, is incorrect, [c]ounsel has the professional duty to give to the client fully and forcefully an opinion concerning the case and its probable outcome. *Counsel's role, however, is to advise. The decision is made by the client.*

ABA Standards, *supra* note 103, Standard 21-3.2 commentary at 21-42 (emphasis added); *see* Model Code of Professional Responsibility Ethical Consideration 7-7 (1980) ("the authority to make decisions is exclusively that of the client" except for decisions "not affecting the merits of the cause or substantially prejudicing the rights of a client"); *id.* at Ethical Consideration 7-8 ("the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client"). *But cf.* Model Rules of Professional Conduct, Rule 1.2(a) (1983) ("In a criminal case, the lawyer shall abide by the client's decision, . . . *as to a plea to be entered, whether to waive jury trial and whether the client will testify.*") (emphasis added).

174. *Barnes*, 103 S. Ct. at 3319 (Brennan, J., dissenting).

175. *Id.* at 3317.

176. *Id.* at 3318. (quoting Faretta v. California, 422 U.S. 806, 834 (1975)) (emphasis in original). Indigent defendants often view their counsel as acting in concert with the prosecution and the court. In a recent study nearly one-half of the indigent defendants represented by public defenders stated that they thought their attorney was on the other side. J. Casper, Criminal Courts: The Defendant's Perspective iv (1978) (abstract), *reprinted in* Y. Kamisar, W. LaFave, J. Israel, Basic Criminal Procedure 90 (5th ed. 1980). Justice Brennan argued that the *Barnes* decision will result in greater mistrust between the indigent and his attorney. *Barnes*, 103 S. Ct. at 3318 (Brennan, J., dissenting).

177. See *supra* notes 78-82 and acompanying text.

refusal to raise a requested claim is clearly a strategic decision that, in a majority of circuits, does not constitute "cause."[178] Binding an indigent defendant to his attorney's refusal to raise issues on appeal, however, presents certain problems. Unlike paying clients, the indigent defendant neither employs nor selects the court-appointed attorney,[179] and hence the power of such a defendant to control his attorney's litigation strategy is limited. The typical indigent defendant is not consulted on strategic decisions, not informed of which issues will be raised on appeal, and not advised on how the attorney is conducting the defense.[180] Accordingly, to bind an indigent defendant to a court-appointed attorney's refusal to raise requested issues on appeal and thereby deem any review of the federal claim to be waived is arguably the sort of "miscarriage of justice" that the *Sykes* Court sought to prevent.[181] Unless the accused has acquiesced in his attorney's decision,[182] the "cause" prong should therefore be satisfied.

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178. See *supra* notes 81-82, 89-92 and accompanying text.

179. The prisoner may not choose his attorney. The court has relatively unbridled discretion in determining which attorney will be assigned to the indigent. Drumgo v. Superior Court, 8 Cal. 3d 930, 933-34, 506 P.2d 1007, 1009, 106 Cal. Rptr. 631, 633, *cert. denied*, 414 U.S. 979 (1973); Note, *Client-Counsel Conflict Between an Indigent Defendant and the Court-Appointed Attorney: A Procedural Analysis*, 13 U.S.F.L. Rev. 177, 179 (1978); *see* Morris v. Slappy, 103 S. Ct. 1610, 1616-17 (1983) (rejecting argument that sixth amendment guarantees a harmonious attorney-client relationship); United States v. Gray, 565 F.2d 881, 887 (5th Cir.) (right to counsel of one's choice is not a sixth amendment right), *cert. denied*, 435 U.S. 955 (1978); United States v. Tortora, 464 F.2d 1202, 1210 (2d Cir.) ("No defendant has an absolute right to any particular counsel."), *cert. denied*, 409 U.S. 1063 (1972).

180. *See* Bazelon, *The Realities of* Gideon *And* Argersinger, 64 Geo. L.J. 811, 815 (1976). Because of limited funding, public defenders' offices are often understaffed, resulting in a high volume of cases. *Id.* Consequently the public defender may spend relatively little time on each case. Over 60% of the defendants in a recent study reported that their attorney had spent less than one-half hour with them; almost 30% reported that the attorney spent less than ten minutes. *See* J. Casper, Criminal Courts: The Defendant's Perspective iv (1978) (abstract), *reprinted in* Y. Kamisar, W. LaFave, & J. Israel, *supra* note 176 at 90.

181. *See Barnes*, 103 S. Ct. at 3315 n.2 (Brennan, J., dissenting) ("[W]ith regard to issues involving the allocation of authority between lawyer and client, courts may well take account of paying clients' ability to specify . . . what degree of control they wish to exercise, and to avoid attorneys unwilling to accept client direction."); *cf.* Douglas v. California, 372 U.S. 353, 357-58 (1963) ("There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit[s] of [counsel]. . . while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself."); Griffin v. Illinois, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.").

182. See *infra* text accompanying notes 183-86.

A. *Satisfying the "Cause" Requirement: Safeguards to Prevent Circumvention of* Sykes

An accused who initially requests his attorney to raise issues on appeal but later acquiesces in his counsel's decision not to argue or brief the issues should be estopped from later asserting that the attorney's refusal to raise such claims constitutes good cause for the default.[183] An objective measure is needed to determine when a defendant has acquiesced in his counsel's decision in order to prevent circumvention of *Sykes* every time a defendant is convicted and later seeks habeas relief insisting that he demanded that his attorney raise these issues.

Whenever a disagreement occurs in the *Barnes* context, the indigent defendant's "acquiescence" vel non in the attorney's advice should depend upon the indigent defendant's awareness of his right to seek a change of counsel, and given this awareness, his conduct in asserting this right. In all cases involving such disagreements, the attorney should be required to advise the defendant of his right to seek a change of attorney. If the attorney fails to inform the defendant of this right, and the defendant is unaware of this option, the "cause" prong should be deemed met.[184] The prisoner should bear the burden of proving not only the existence of a good faith dispute, but also his ignorance of the right to replace his attorney. This would be consistent with the *Sykes* requirement that the burden of proof is on the defendant to prove good cause for any default.[185] If a defendant attempts to substitute counsel, but is denied this request, the "cause" prong likewise should be satisfied.[186] In cases in which the defendant is led to believe that counsel will raise the claims or brief the issues and later discovers that

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183. Even under the *Noia* test, a strategic choice made by counsel with the defendant's participation would be a "deliberate by-pass" of the state procedures and, therefore, would bar the defendant from habeas review. See *supra* text accompanying notes 39-40.

184. *Cf.* Swenson v. Bosler, 386 U.S. 258, 260 (1967) (per curiam) (indigent's failure to request appointment of counsel is not necessarily a waiver of right to counsel); Carnley v. Cochran, 369 U.S. 506, 513 (1962) (same).

185. See *supra* note 76.

186. In this situation, the defendant has done everything he could to have the claim presented at trial. This accords with the goals of *Sykes*. See *supra* text accompanying notes 46-48.

It has generally been difficult for a defendant to change attorneys simply because of disagreements over which issues to raise. *See, e.g.*, United States v. Zylstra, 713 F.2d 1332, 1338 (7th Cir.), *cert. denied*, 104 S. Ct. 403 (1983); Ennis v. LeFevre, 560 F.2d 1072, 1073 (2d Cir. 1977), *cert. denied*, 435 U.S. 976 (1978); High v. Rhay, 519 F.2d 109, 112 (1975). Some courts require the defendant to prove counsel's ineffectiveness before they will grant a request for a new attorney. *See* People v. Marsden, 2 Cal. 3d 118, 123, 465 P.2d 44, 47, 84 Cal. Rptr. 156, 159 (1970); People v. Molina, 74 Cal. App. 3d 544, 548-49, 141 Cal. Rptr. 533, 536 (1977).

the claims are not raised,[187] the defendant cannot be faulted for not seeking to change attorneys earlier, and thus the "cause" requirement should be met.

Failure of an indigent defendant to submit a pro se brief or properly assert claims in his brief should not automatically bar him from having his claims heard on habeas review. Issues must be clearly presented in a brief in order to be considered by the court and thereby preserved for a future appeal.[188] Although an indigent defendant may have the ability to spot nonfrivolous issues, it is unduly harsh to require him to have the writing skills necessary to promote consideration of his claims by an appellate court.[189]

Furthermore, the policy considerations in *Sykes*[190] do not support a forfeiture in this situation. Although the attorney's decision not to raise the claims is a strategic one, any "sandbagging" problem is mitigated because the defendant, by demanding that his attorney raise the issues, and requesting a change of attorney, will have done everything possible to avoid a procedural default.

Likewise, comity concerns militate against imposition of a forfeiture in this situation. It is inequitable to base foreclosure of habeas review on comity grounds in cases in which the state refuses to assign another attorney despite the existence of a good faith dispute.

Furthermore, applying a forfeiture here will not contribute to the finality of litigation because it will simply encourage attorneys to advise their clients to include every conceivable claim in their briefs.[191] Moreover, allowing these claims to be heard in the few situations in which a defendant seeks to participate in his case, along

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187. *See* Moreno v. Estelle, 717 F.2d 171, 176 n.7 (5th Cir. 1983) (defendant claiming he could not have made his request to dismiss counsel prior to trial date because he had been incarcerated and had not learned of his attorney's trial strategy until the day of his trial).

188. *See* Picard v. Connor, 404 U.S. 270, 275-76 (1971); Mattes v. Gagnon, 700 F.2d 1096, 1098 n.1 (7th Cir. 1983); United States *ex rel.* Spurlark v. Wolff, 699 F.2d 354, 356-57 (7th Cir. 1983) (en banc); Toney v. Franzen, 687 F.2d 1016, 1022 (7th Cir. 1982); Klein v. Harris, 667 F.2d 274, 282 (2d Cir. 1981); Johnson v. Metz, 609 F.2d 1052, 1054 (2d Cir. 1979).

189. *See* United States *ex rel.* Winters v. DeRobertis, 568 F. Supp. 1484, 1487 (N.D. Ill. 1983) ("[A]s with many pro se briefs, Winters' was not precise in delineating the discrete issues it sought to argue."); *cf.* Powell v. Alabama, 287 U.S. 45, 69 (1932) (emphasizing need for counsel's aid "at every step"). In addition, the state appellate court may refuse to accept a supplementary brief. Unless the prisoner fires the attorney and defends pro se, it is in the court's discretion whether to accept his brief. *See* Brief for Respondent at 29 n.27, Jones v. Barnes, 103 S. Ct. 3308 (1983), *reprinted in* Criminal Law Series, *supra* note 155, at 139.

190. See *supra* notes 45-69 and accompanying text.

191. *Cf.* Ross v. Reed, 704 F.2d 705, 708 (4th Cir. 1983) (stating that too stringent a "cause" requirement would discourge lawyers from limiting the number of arguments), *cert. granted*, 104 S. Ct. 523 (1984).

with requiring him to prove resultant actual prejudice,[192] will not greatly increase the burden on federal courts.

Defendants are bound by their attorneys' tactical decisions except when the circumstances surrounding the decision are "exceptional."[193] The situation in which an indigent defendant urges his court-appointed attorney to raise claims on appeal and later is denied his request to change attorneys despite a good faith conflict is an "exceptional" circumstance that should constitute good cause for any resulting procedural default. If the "prejudice" requirement of *Sykes* is also satisfied, the claim should be heard on the merits.

B. *"Actual Prejudice": Substantial Errors That Taint the Trial*

When an attorney refuses to raise issues on appeal despite defendant's request, the "prejudice" requirement of *Sykes* should be satisfied if the claims sought to be introduced are substantial[194] and as a result the failure to raise the claims taints the defendant's "entire trial with error of constitutional dimensions."[195] A claim would not be considered substantial enough to entitle the defendant to review if there is strong independent evidence against the accused.[196] If a major part of the prosecution's case relies upon the invalidity of the asserted claims, however, they should be considered substantial, and therefore, entitle the defendant to review on the merits.[197]

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192. See *infra* text accompanying notes 194-97.

193. Henry v. Mississippi, 379 U.S. 443, 451 (1965); *see* Brookhart v. Janis, 384 U.S. 1, 7-8 (1965) (court refused to bind defendant to counsel's virtual surrender in court); Whitus v. Balkcom, 333 F.2d 496, 502-03 (5th Cir.) (court declined to find a "deliberate by-pass" when counsel failed to object to jury selection for fear that such challenge would have adverse impact on counsel and would provoke social pressures upon defendant and counsel), *cert. denied*, 379 U.S. 931 (1964).

194. One court recently hinted that, despite *Barnes*, if the requested claims are substantial rather than " 'weaker arguments' winnowed out by appellate counsel in the exercise of professional judgment," counsel's performance may amount to ineffective counsel. United States *ex rel.* Winters v. DeRobertis, 568 F. Supp. 1484, 1489 (N.D. Ill. 1983), *citing* Jones v. Barnes, 103 S. Ct. 3308, 3311-13 (1983); *see* Ennis v. LeFevre, 560 F.2d 1072, 1077 (2d Cir. 1977) (Gurfein, J., concurring) (if issue is serious it may not be left entirely to lawyer's discretion whether to raise claim), *cert. denied*, 435 U.S. 976 (1978). Most courts, however, do not inquire into the substantiality of the claim but simply state that the sixth amendment does not protect against strategic decisions of counsel. *See* Cunningham v. Henderson, 725 F.2d 32, 36 (2d Cir. 1984); United States v. Zylstra, 713 F.2d 1332, 1339 (7th Cir.), *cert. denied*, 104 S. Ct. 403 (1983); Cerbo v. Fauver, 616 F.2d 714, 718-19 (3d Cir.), *cert. denied*, 449 U.S. 858 (1980); Ennis v. LeFevre, 560 F.2d 1072, 1075 (2d Cir. 1977), *cert. denied*, 435 U.S. 976 (1978). In light of the virtual impossibility of counsel's strategic decisions amounting to ineffective counsel, see *supra* note 88, it is possible for an attorney to refuse to raise a substantial claim and still not be considered "ineffective."

195. United States v. Frady, 456 U.S. 152, 170 (1982).

196. See *supra* notes 103-04 and accompanying text.

197. See *supra* notes 103-04 and accompanying text.

Although the defendant should be required to show that his claims are substantial, he should not be required to prove his innocence in the habeas petition. Recent Supreme Court interpretations of the "prejudice" requirement imply that a federal judge should examine a habeas petition for "affirmative evidence indicating that [the defendant] had been convicted wrongly of a crime of which [the defendant] was innocent."[198] This standard would force the judge at the threshold stage to make essentially the same inquiry as is made when reviewing the petition on its merits.[199] Nevertheless, determinations of "prejudice" should remain a threshold inquiry rather than a ruling on the merits. A habeas petition is not a substitute for a retrial. Once the defendant shows the requisite "cause" and substantiality of his claims, the courts should remand the case for a retrial, rather than determine guilt.

In *Isaac*, Justice O'Connor speaking for the Court stated: " '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."[200] If habeas corpus is to remain "one of the precious heritages of Anglo-American civilization,"[201] then the refusal by an assigned counsel to raise a substantial claim in his client's appeal must be an "appropriate case" for a federal habeas court to hear the claims and thereby prevent a "miscarriage of justice."[202]

CONCLUSION

Application of the "cause and prejudice" standard is appropriate for determining the availability of federal habeas corpus review of constitutional claims that state appellate courts refused to consider due to counsel's failure to raise these claims on direct appeal. This standard preserves the integrity of the state appellate courts by promoting accuracy of fact-finding and enhancing the state's interest in the finality of its convictions. In addition, it maintains the autonomy of the state judicial systems and the principles of federalism while still providing the accused with the opportunity to redress unjust incarceration.

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198. United States v. Frady, 456 U.S. 152, 171 (1983); *see* Wainwright v. Sykes, 433 U.S. 72, 91 (1977).

199. *See* Runnels v. Hess, 713 F.2d 596, 600 (10th Cir. 1983) (Logan, J., dissenting) (interpreting majority's reading of *Frady* as requiring prisoner to prove his innocence on habeas petition to satisfy "prejudice" prong of *Sykes*).

200. Engle v. Isaac, 456 U.S. 107, 135 (1982).

201. Fay v. Noia, 372 U.S. 391, 441 (1963).

202. *See* Wainwright v. Sykes, 433 U.S. 72, 91 (1977).

If a defendant insists that his court-appointed attorney raise claims or brief issues on appeal and the attorney refuses, the "cause" prong of the test should be satisfied unless the indigent defendant has acquiesced in his attorney's advice that the claims not be raised. If the claims raise a substantial constitutional issue that taints the defendant's trial, the "prejudice" requirement should likewise be met thereby allowing the prisoner to raise such claims in a federal habeas corpus proceeding.

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