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FEDERAL HABEAS CORPUS AFTER STATE COURT DEFAULT: A DEFINITION OF CAUSE AND PREJUDICE

MARIA L. MARCUS *

*The social interest in the general security and the social interest in the individual life continually come into conflict and in criminal law, as everywhere else in law, the problem is one of . . . balancing conflicting interests and of securing as many as may be and as completely as may be with the least sacrifice . . . .***

INTRODUCTION

DURING the course of a state prosecution, the defendant poses a constitutional objection to the admission of damaging evidence. His challenge is rejected by the trial court, and resort to state appellate and collateral remedies after conviction is unavailing. As a final measure, the defendant petitions for a federal writ of habeas corpus.

The statute embodying the writ[1] makes two historic commitments. The first is to provide a process for examining the constitutionality of a prisoner's detention.[2] This process inevitably draws into question the validity of the state judgment of conviction, empowering federal district court judges to correct errors of constitutional dimension by their counterparts on the state court bench. Hence, the second commitment in the congressional habeas scheme: The application for a writ may not be entertained unless the applicant has already exhausted state court remedies,[3] thereby giving the state the first opportunity to determine the validity of challenges to convictions.

Consider how these statutory strictures change if the state prisoner in our hypothetical had posed no objection at his trial to the admission of allegedly tainted proof, but nevertheless now requests that the federal court order his release because of this defect. If the state has a contemporaneous objection rule which bars later presentation and review of the claim, there would be no further state remedies to pursue. Exhaustion is dispensed with when such remedies are no longer available at the time the habeas petition is filed, even if they could have been invoked at the time of trial.[4] This "even if" provides the framework for the central

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** Pound, *The Future of the Criminal Law*, 21 Colum. L. Rev. 1, 11 (1901).

1. 28 U.S.C. § 2254 (1982).
2. See *infra* notes 50, 86 and accompanying text.
3. 28 U.S.C. § 2254(b) (1982).
4. See *infra* notes 203-04 and accompanying text.

question in this Article: the appropriate restrictions on federal judicial consideration of a defaulted but unexhaustable issue.

The same Supreme Court ruling that prohibited district courts from dismissing petitions for failure to utilize no-longer-available state procedures also recognized that some limitation on the granting of relief under such circumstances would be warranted. The approach taken in *Fay v. Noia*[5] was that the habeas applicant's motive for defaulting could "disentitle" him to the writ: "We . . . hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies."[6]

That approach was revised in *Wainwright v. Sykes*,[7] which opted instead for a requirement that petitioner show "cause and prejudice": cause for the forfeiture and actual prejudice flowing from the claimed violation beyond the fact of conviction.[8] This effected a shift from recognizing a limited discretion in a federal district court to *deny* relief if defendant's waiver was knowing and actual, to permitting a limited discretion to *grant* relief if defendant's explanation of his default and its consequences is satisfactory. The shift was accompanied by an assurance that precise definition of the operative terminology would be supplied in later cases.[9]

Two recent Supreme Court decisions have provided important insights into the tensions this assurance has created. *Strickland v. Washington*,[10] in the analogous area of incompetent counsel claims,[11] has introduced a prejudice definition that is also pertinent to analysis of the *Sykes* prejudice prong. *Reed v. Ross*[12] is novel in two critical respects: It presents a united judicial front on the demise of the *Noia* "deliberate bypass" formulation,[13] but aligns a majority of the Justices behind the position that the "cause and prejudice" standard should not be further defined.[14]

Part I of this Article commences with an overview of the core issues and then examines the process by which the cause and prejudice requirement, with its doctrinal and policy underpinnings, evolved as to forfeitures by counsel at trial.[15] After comparing *Sykes* defaults to *Strickland*

5. 372 U.S. 391 (1963).
6. *Id.* at 438.
7. 433 U.S. 72 (1977).
8. *Id.* at 84-85, 87.
9. *Id.* at 87, 91.
10. 104 S. Ct. 2052 (1984).
11. See *infra* text accompanying notes 253-68.
12. 104 S. Ct. 2901 (1984).
13. *See id.* at 2909, 2913 n.1.
14. *See id.* at 2909.
15. The appropriate standard for habeas consideration of a constitutional claim which was not proffered on appeal is beyond the scope of this Article. See generally Note, *Federal Habeas Corpus Review of State Forfeitures Resulting from Assigned Counsel's Refusal to Raise Issues On Appeal*, 52 Fordham L. Rev. 850, 871-77 (1984) [hereinafter cited as *Appellate Forfeitures*], for discussion of such a standard.

incompetent counsel cases, Part I concludes that a more precise definition of cause and prejudice is essential to promote uniformity of federal rights.

Part II of the Article offers a definition which could yield consistent results. It explores the meaning of prejudice and its relation to guilt and innocence and harmless error, the meaning of cause and its relation to inadvertent forfeitures, and the connection of both prongs of the test to miscarriage of justice.

I. EVOLUTION OF THE CAUSE AND PREJUDICE REQUIREMENT

The *Wainwright v. Sykes*[16] test has now been accepted in principle by all nine Supreme Court Justices. Indeed, Justice Brennan, who fashioned the deliberate by-pass standard of *Fay v. Noia*,[17] also wrote the majority opinion in *Reed v. Ross*,[18] thus finally adopting cause and prejudice as the appropriate formulation for determining the availability of federal habeas corpus after state court default. This accord is fragile and has been achieved in part because the question of whether inadvertence constitutes cause for forfeiture of a constitutional claim remains unresolved.

A. *Overview: Supreme Court Revision of* Fay v. Noia

Sykes presented the cause and prejudice requirement as a response to the "broad brush" approach used in *Fay v. Noia* to determine which defaulted claims may be heard by a federal district court.[19] Comparison of *Noia*'s basic assumptions to the recent pronouncements on the same points in *Reed v. Ross*, a *Sykes* descendant, provides an overview of the similarities as well as the dramatic doctrinal shifts which have developed.

Noia's state court conviction for felony murder rested upon a confession which the state later conceded to be coerced.[20] He allowed the time for a direct appeal to elapse, but then requested federal habeas corpus review.[21] The Supreme Court granted the writ,[22] concluding that Noia's forfeiture of state remedies did not validate the unconstitutional conduct by which the conviction was obtained.[23] Because no relief was available

16. 433 U.S. 72 (1977).
17. 372 U.S. 391, 438 (1963).
18. 104 S. Ct. 2901 (1984).
19. *Sykes*, 433 U.S. at 88 n.12.
20. *Noia*, 372 U.S. at 394-96. Noia and two co-defendants were convicted of felony murder in the shooting death of a robbery victim. The sole evidence against all three men consisted of signed confessions later shown to be coerced. Both co-defendants sought habeas corpus relief and the Court of Appeals for the Second Circuit set aside their confessions on the grounds that their statements had been unconstitutionally obtained. Retrial was impossible because no inculpatory evidence against them existed other than the coerced confessions. New evidence could not be obtained; there was a fourteen year lapse between petitioners' original convictions and the granting of the writ. *See id.* at 395 & n.1.
21. *Id.* at 394.
22. *See id.* at 398-99.
23. *See id.* at 428.

within the state judicial system, "the federal courts have the power and the duty to provide it."[24]

Note that the majority empowered the federal courts to issue the writ regardless of what has occurred in prior state court proceedings.[25] The dissenting opinion of Justice Harlan urged that if a habeas petitioner has violated a reasonable state rule and is therefore barred from state judicial review, the federal courts have neither statutory nor constitutional authority to release him from detention.[26] The dissent reasoned that such a defendant's conviction would rest on an adequate and independent state ground that the federal courts must respect.[27] Subsequent Supreme Court decisions could have wholly foreclosed federal relief after a state court default simply by utilizing Justice Harlan's rationale.

His view, however, was never adopted, and the authority of the federal judiciary to grant the writ despite a prior trial or appellate default has been repeatedly reaffirmed.[28] In part, this reaffirmation reflects a policy determination that the habeas court must retain the capacity to act in the event of a "miscarriage of justice."[29] If petitioner has a colorable claim of innocence, the court should be free to grant relief.

On this point, *Fay v. Noia* remains intact. In other respects the assumptions underlying the *Noia* decision have been substantially revised. The weight of the state's interest in the finality of a habeas applicant's conviction has been recalculated, and the federal court's discretion to grant a writ on a defaulted claim has been correspondingly diminished.

While *Noia* had discounted "conventional notions of finality" as a ba-

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24. *Id.* at 441.

25. *See id.* at 426-27.

26. *See id.* at 448, 466, 469 (Harlan, J., dissenting). No specific provision was cited to buttress the conclusion that constitutional authority does not exist. Justice Harlan merely referred to the language of Baltimore & O.R.R. v. Baugh, 149 U.S. 368, 401 (1893):

> [T]he Constitution . . . recognizes and preserves the autonomy . . . of the States . . . . Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters . . . specially authorized [by the Constitution].

Noia, 372 U.S. at 466 (Harlan, J., dissenting). This of course begs the question of whether habeas relief may be said to fit into the exception described. The writ originates in the Constitution, but limits on its availability have been approved despite that origin. See *infra* note 49 and accompanying text.

27. *See Noia*, 372 U.S. at 448 (Harlan, J., dissenting). The relation of adequate and independent state grounds to a defaulted claim is discussed in detail *infra* notes 70-109 and accompanying text.

28. *See* Reed v. Ross, 104 S. Ct. 2901, 2907 (1984); Wainwright v. Sykes, 433 U.S. 72, 91 (1977). The *Reed* majority held: "Our decisions have uniformly acknowledged that federal courts are empowered . . . to look beyond a state procedural forfeiture and entertain a state prisoner's contention that his constitutional rights have been violated. . . . The more difficult question . . . is: What standards should govern the exercise of the habeas court's equitable discretion in the use of this power?" 104 S. Ct. at 2907 (citations omitted).

29. Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977).

sis for denying plenary federal review,[30] Justice Brennan's *Reed* opinion came to a strikingly different conclusion. He cited the federal interest in providing a forum for constitutional challenges by prisoners, but described finality as a significant competing concern that would be "undermined" if federal courts could ignore prior procedural defaults:[31]

> To the extent that federal courts exercise their § 2254 power to review . . . claims that were not properly raised before the state court, . . . legitimate state interests may be frustrated: evidence may no longer be available to evaluate the . . . claim . . . ; and it may be too late to retry the defendant effectively if he prevails in his collateral challenge.[32]

With respect to the state's ability to handle constitutional questions, he pressed further: "Each State's complement of procedural rules facilitates [determination of constitutional challenges at a stage when] they can be resolved most fairly and efficiently."[33]

A more equivocal aspect of the revision concerned the treatment of inadvertent forfeitures. Under a standard that prohibits only purposeful evasion of state rules, habeas consideration would be granted if a failure to present a claim was the result of carelessness. *Noia* held that a violation of state procedure flowing from "inadvertence or neglect" does not bar habeas relief because the state interest implicated must yield to the federal policy underlying the writ.[34]

Reed retreated from that position, holding that cause may be demonstrated "under certain circumstances" when a default does not stem from an intentional decision by counsel on behalf of his client.[35] This, of course, resembles the old *Noia* rule, but the Court's statement appears to contain a converse implication that some inadvertent failures do *not* constitute cause.[36] Dissenting Justices Rehnquist, Blackmun and O'Connor objected to the ambivalence of this holding, but added that the thrust of the majority's opinion makes clear that there will be no return to the

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30. *Noia*, 372 U.S. at 424.

31. *Reed*, 104 S. Ct. at 2907.

32. *Id.* The Court would diminish the significance of the finality interest where the habeas claims were "so novel when the cases were in state court that no one would have recognized them." *See id.* at 2910. See *infra* notes 359-67, 370-74 and accompanying text.

33. *Reed*, 104 S. Ct. at 2907. How often is appellate challenge to a conviction successful? In 1983, the number of convicted defendants who filed applications for leave to appeal in New York State's highest tribunal, the Court of Appeals, totaled 1,954. One hundred of these applications were granted. Court of Appeals of the State of New York, Ann. Rep. 13 app. (1983). Of those granted, 62.5% were affirmed, 31.2% were reversed, 4.2% were modified and 2.1% dismissed. *Id.* at 6C app. Thirty-three cases came up to the Court of Appeals pursuant to leave granted by New York's intermediate court, the Appellate Division. Within this group, 72.7% of the convictions were affirmed, 15.2% were reversed, 6.1% were modified and 6.1% were dismissed. *Id.*

34. 372 U.S. at 433.

35. 104 S. Ct. at 2909.

36. See *infra* Pts. I.B.3.c., 4.a. for a detailed discussion of the Court's analysis of inadvertent default in *Sykes* and its successor Engle v. Isaac, 456 U.S. 107 (1982).

deliberate bypass approach of *Noia*.[37]

Thus, the full impact of the cause and prejudice test can be assessed only by exploring in depth the process by which the *Noia* standard was revised, the purposes of the revision, and the court's explication of its substitute requirement. Also essential is an inquiry into whether the lower courts have received sufficient guidance to interpret this requirement, and the extent to which more content must be infused into the terminology that has been chosen.

B. Wainwright v. Sykes: *Antecedents, Rationales, Purposes and Progeny*

1. *Sykes* and Its Predecessors

The majority opinion in *Wainwright v. Sykes* characterized its mission as one of clarifying and limiting rather than overruling *Fay v. Noia*.[38] Indeed, the Court declared that it was only expanding the scope of a restriction which had already been established in a prior case.[39] Analysis of the cause and prejudice test therefore requires an examination not only of *Sykes* but also of its ancestors.

The habeas corpus petition presented by John Sykes recited facts that were considerably less sympathethic than those of *Noia*.[40] Although his claim was based on *Miranda v. Arizona*,[41] Sykes conceded that police officers had advised him of his rights. These rights were read to him at the police station after his arrest; he declined counsel and made a statement which was then reduced to written form. He refused to sign this statement, but it was admitted into evidence through the testimony of the two officers who had heard it.[42] After a Florida jury trial, he was convicted of third degree murder.[43]

Sykes had been drinking on the day the killing occurred, and on the previous day.[44] However, he did not at any time during the trial or in

37. *Reed*, 104 S. Ct. at 2913 n.1 (Rehnquist, J., dissenting).

38. "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.

39. "To the extent that the dicta of *Fay v. Noia* may be thought to have laid down an all-inclusive rule . . . its effect was limited by [Francis v. Henderson, 425 U.S. 536 (1976)]. . . ." *Sykes*, 433 U.S. at 85.

40. *See Sykes*, 433 U.S. at 74-75. Sykes' trial testimony was that on the night of the killing, he asked his wife to call the police because he had shot Willie Gilbert. Other proof indicated that when the police came to respondent Sykes' trailer home, they found the deceased's body lying near the front porch. Respondent approached them and voluntarily stated that he had shot Gilbert; his wife confirmed this fact. *Id.* at 74.

41. 384 U.S. 436 (1966).

42. *Sykes*, 433 U.S. at 74. Justice Stevens' concurrence points out that the main difference between this statement and other unchallenged evidence was that Sykes described Gilbert as walking away from him at the time of the shooting rather than turning toward him with a knife in a threatening manner. *Id.* at 96 n.5 (Stevens, J., concurring).

43. *Id.* at 74.

44. *Id.* at 74-75.

subsequent state appeals contend that his statements were inadmissible because he had been too intoxicated to understand the *Miranda* warnings.[45] This claim, later embodied in a habeas corpus petition based on 28 U.S.C. § 2254,[46] was favorably received by the lower federal courts. Holding that only strategy decisions at trial can bar federal habeas review of constitutional error, the district court ordered a hearing on whether Sykes had knowingly waived his *Miranda* rights.[47] The order was affirmed by the Fifth Circuit.[48]

The Supreme Court reversed, ruling that the "simple legal question" at issue was the construction of the habeas statute, which provides that the writ shall be entertained on behalf of a state prisoner " 'only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States.' "[49] Justice Rehnquist's opinion for the majority noted that although the language of the statute has remained relatively unchanged, the Court has historically been willing to "overturn or mod-

45. This claim was made for the first time in a motion filed in the trial court after appellate review, and was repeated again in state habeas corpus proceedings. *Id.* at 75. The state courts refused to entertain the claim. *Id.* at 74.

46. 28 U.S.C. § 2254 (1982); *see Sykes*, 433 U.S. at 75. Any contention that counsel was ineffective was relinquished. *See id.* at 75 n.4. See *infra* notes 263, 413-15 and accompanying text for a discussion of the circumstances under which failure to make a timely trial objection becomes a failure to render constitutionally adequate assistance.

47. *See Sykes*, 433 U.S. at 76.

48. Wainwright v. Sykes, 528 F.2d 522, 528 (5th Cir. 1976), *rev'd*, 433 U.S. 72 (1977). The Fifth Circuit reasoned that under Florida law, it was the state's burden to obtain a "prima facie determination of voluntariness." *Id.* at 525. The court also concluded on the basis of *Fay v. Noia* that unless trial counsel had deliberately bypassed state procedures as a trial tactic, habeas corpus relief could be granted despite Florida's contemporaneous objection rule requiring prompt filing of motions to suppress illegally obtained statements. *Id.* at 527. Davis v. United States, 411 U.S. 233 (1973), was found to be inapposite. *Sykes*, 528 F.2d at 526-27. *Davis* had held that a federal prisoner's failure to make a timely pre-trial motion to challenge the make-up of the grand jury that indicted him would bar habeas review of his constitutional claim unless he could show cause for the failure and prejudice flowing from such failure. *Id.* at 526 (citing *Davis*, 411 U.S. at 233). The court of appeals in *Sykes* noted that while no prejudice had been demonstrated in *Davis*, prejudice is "inherent" in all cases where the admissibility of an incriminating statement is at issue. *Id.* at 526-27.

49. *Sykes*, 433 U.S. at 77 (quoting 28 U.S.C. § 2254(a)). To what extent does the Constitution permit a discretionary refusal to entertain the writ when the applicant proffers a constitutional challenge to his detention? Art. I, § 9, cl. 2 states that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless . . . the public Safety may require it." Nevertheless, the Supreme Court has had occasion to sustain statutory limitations on the granting of the writ. *See, e.g.*, Swain v. Pressley, 430 U.S. 372, 384 (1977). The Chief Justice concluded in *Swain* that the suspension clause was not pertinent:

> The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted . . . . The writ in 1789 was not considered "a means by which one court . . . exercises post-conviction review over the judgment of another . . . ."

Id. at 384-85 (Burger, C.J., concurring) (quoting Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 451 (1966)).

ify its earlier views of the scope of the writ."[50]

The majority proceeded with a sparse but fair summary of the *Noia* holding.[51] It then characterized that holding as having been circumscribed by later decisions in *Davis v. United States*,[52] and *Francis v. Henderson*.[53]

An examination of *Davis* and *Francis* will indicate that their ancestral

50. *Sykes*, 433 U.S. at 81. Justice Brennan's dissent in Engle v. Isaac, 456 U.S. 107 (1982), a *Sykes* descendant, accuses the majority of embarking on "a conspicuous exercise in judicial activism . . . . [i]n its eagerness to expatiate upon the 'significant costs' of the Great Writ . . . and to apply 'the principles articulated in *Wainwright v. Sykes*.' " *Id.* at 137 (Brennan, J., dissenting) (quoting *Isaac*, 456 U.S. at 123, 126-28). To what extent was *Fay v. Noia* itself an example of this willingness to reinterpret the prior parameters of habeas discretion? Justice Harlan's dissenting opinion in *Noia* urged that custody resting on an adequate and independent state ground could not violate federal law, and that the federal courts therefore lacked not only the discretion but the power to issue the writ under such circumstances. 372 U.S. at 448 (Harlan, J., dissenting). In a lengthy historical analysis Justice Harlan concluded that prior to 1915, federal habeas review examined only the jurisdiction of the sentencing tribunal, *id.* at 450 (citing *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 203 (1830)), convictions under an allegedly unconstitutional statute, *id.* at 451 (citing *Ex parte* Siebold, 100 U.S. 371 (1880)), and detention based on a claimed illegality in the sentence imposed rather than in the judgment of conviction, *id.* (citing *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873)). The extension of the writ to state prisoners in 1867 added a new class of persons to the ambit of the writ but did not alter its substantive reach. The doctrine of exhaustion of state remedies, introduced in 1886 and applicable to state prisoners, authorized a discretionary postponement of review as to cases which the federal courts had the power to decide. *Id.* at 453-54 (Harlan, J., dissenting) (citing *Ex parte* Royall, 117 U.S. 241 (1886)). From 1915 to 1953, beginning with the "mob domination" decision of *Frank v. Mangum*, the Supreme Court established that the federal judiciary could consider whether habeas petitioners had been given an adequate opportunity to raise their constitutional claims in the state courts. *Id.* at 456-57 (Harlan, J., dissenting) (citing Frank v. Mangum, 237 U.S. 309 (1915)). *Brown v. Allen* thereafter expanded the scope of inquiry to include instances where petitioner could show that his detention stemmed from a state court's allegedly erroneous determination of a constitutional claim. However, there was no authority to review detention resting on a reasonable application of the state's own procedural requirements. *Id.* at 460-62 (Harlan, J., dissenting) (citing Brown v. Allen, 344 U.S. 443 (1953)).

The *Noia* majority's review of historical precedent stressed that although the writ is procedural in form, it is inextricably related to the growth of personal rights of liberty. *See id.* at 401. When the suspension clause, U.S. Const. art. I, § 9, cl. 2, became part of the Constitution and the first Judiciary Act was passed, giving federal judges habeas corpus jurisdiction, there was "respectable common-law authority for the proposition that habeas was available" in any case in which governmental detention violated fundamental law. *Noia*, 372 U.S. at 405. Justice Brennan acknowledged, however, that the Supreme Court's development of a law of habeas corpus has not been "unwavering." *Id.* at 411-12. Justice Harlan's chronology of the phases of that development was not directly countered.

51. *See Sykes*, 433 U.S. at 82-83 (citing *Noia*, 372 U.S. at 399). The Court's description of *Noia* emphasized the holding that petitioner was entitled to raise a habeas claim even though he had failed to appeal his original conviction. *See id.* There was no deliberate bypass of state court procedures because of the "grisly choice" between acceptance of a life sentence and pursuit of an appeal which might culminate in a sentence of death. *Id.* at 83. *Noia* had also found that on the basis of comity, a federal judge could deny the writ to an applicant whose waiver of state remedies was "knowing and actual." *Id.*

52. 411 U.S. 233 (1973).

53. 425 U.S. 536 (1976).

relationship to *Sykes* is somewhat speculative. *Davis* was a stepping stone rather than a precedent, because it did not involve a state prisoner and was based primarily on interpretation of congressional intent. Invoking federal jurisdiction under section 2255,[54] petitioner claimed constitutional error because of the racial composition of the federal grand jury that indicted him.[55] He had failed to comply with Rule 12 of the Federal Rules of Criminal Procedure, which then provided[56] that objections based on defects in the indictment must be raised in a pre-trial motion and that "waiver" under the rule could be cured only "for cause shown."[57] The *Davis* Court rejected the petitioner's contention that collateral review could not be denied unless deliberate bypass and "knowing waiver" standards were met.[58] It held that Congress had not intended that the cause requirement in Rule 12 be vulnerable to negation via habeas corpus, and that some showing of actual prejudice resulting from the alleged constitutional defect must be made.[59]

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54. 28 U.S.C. § 2255 (1982) provides that a federal prisoner is entitled to review when he is held in violation of the Constitution or laws of the United States or when the court that sentenced him lacked jurisdiction. If the judgment is found to be faulty, the court will set aside the sentence and either discharge the action, resentence the prisoner or grant a new trial. The writ will not be "entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." *Id.*

55. Davis v. United States, 411 U.S. 233, 238 (1973) (citing Fed. R. Crim. P. 12(b)(2)).

56. Francis v. Henderson, 425 U.S. 536, 539 n.4 (1976), notes that this provision now appears at paragraphs (b)(2) and (f) of Fed. R. Crim. P. 12.

57. Davis v. United States, 411 U.S. 233, 236 (1973). The term "waiver" implies the knowing and voluntary relinquishment of a right, as described in Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Invocation of this word is inappropriate when a defendant was not advised of counsel's forfeiture of a claim, or when a default stemmed from "grisly alternatives" or from inadvertence. See *infra* Pts. II.B.2., 3. This Article therefore uses the more inclusive terms "forfeiture" and "default," which apply to any failure to present a claim in a timely manner. For an extensive discussion of the differences between forfeiture and waiver, see generally Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214 (1977).

58. *Davis*, 411 U.S. at 236. See *supra* note 57. Also rejected was the argument that *Davis* should be governed by prior collateral review cases such as *Kaufman v. United States*, which had utilized the *Noia* standard. *Davis*, 411 U.S. at 240 (citing Kaufman v. United States, 394 U.S. 217 (1969)). *Kaufman* involved a failure to raise a claim on appeal, and no federal rule expressly barred claims forfeited at the appellate level. *Id.* Defaults at the trial level are distinguishable because defects can be cured before the participants have undergone the expense and burden of a prosecution. *Id.* at 241. Justice Rehnquist's *Davis* opinion held that the relevant precedent was *Shotwell Mfg. Co. v. United States*, a direct review case establishing that Rule 12 of the Federal Rules of Criminal Procedure governed late challenges to a grand jury array. *Davis*, 411 U.S. at 238 (citing Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963)). In light of the Rule's purpose, the standard on collateral review should not be more lenient than the one applicable in the criminal proceeding itself. *Id.* at 240-41.

59. *Davis*, 411 U.S. at 242. The Court noted that the facts relevant to the jury selection process were available at the time of the indictment; that the petitioner, who was black, was indicted together with two white accomplices; and that the government's case was certainly strong enough to be sent to the grand jury. These factors were cited to

The legislative intent foundation of *Davis* was replaced by a judicially developed "comity" concept in *Francis v. Henderson*.[60] The *Francis* Court dispatched a Louisiana prisoner's challenge to a grand jury array to which he had not objected on time.[61] State law provided that unless such objections were made in advance of trial, they were regarded as waived.[62] In a six page decision for the majority, Justice Stewart found that the "important purposes"[63] served by the *Davis* rule were equally legitimate with respect to state criminal proceedings.[64] Delay in determining grand jury discrimination questions means that witnesses or grand jurors may be unavailable or dead, and that recollection of how a particular grand jury was chosen may fade.[65]

Without further ado, Justice Stewart held that petitioner must meet the *Davis* cause and actual prejudice requirements, because "considerations of comity and federalism"[66] were as significant as considerations affecting federal prosecutions: "[T]he National Government, anxious though it may be to vindicate and protect federal rights . . . [should] do so in ways that will not unduly interfere with the legitimate activities of the States."[67] This conclusion not only applied a federal Rule 12 forfei-

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demonstrate lack of actual prejudice as well as lack of cause. *See id.* at 243-44. *But see* Francis v. Henderson, 425 U.S. 536, 552 n.3 (1976) (Brennan, J., dissenting) (Justice Brennan's later interpretation that the majority used prejudice merely as a "means of demonstrating 'cause' for relief").

60. 425 U.S. 536 (1976).

61. *See id.* at 537. The petitioner was a 17-year old black youth indicted for felony murder. The death occurred during the robbery of a white couple by several black males, during which one of the alleged robbers was killed. The death penalty was sought against the three youths for the death of their accomplice. Appointed counsel, who had been out of criminal law practice for several years, made no challenge to the composition of the grand jury, although it was later alleged on collateral review that daily wage earners were intentionally excluded and that therefore a disproportionate number of blacks were prevented from serving. *Id.* at 554-55 (Brennan, J., dissenting).

62. *Id.* at 537.

63. *Id.* at 540.

64. *See id.* at 540-41.

65. *Id.* at 541 (citing Michel v. Louisiana, 350 U.S. 91, 98 n.5 (1955)).

66. *Id.*

67. *Id.* at 541-42. The *Francis* majority was quoting from Younger v. Harris, 401 U.S. 37, 44 (1971), which rejected appellee's claim that the federal courts should enjoin state authorities from prosecuting him under an allegedly invalid statute. Injunctive relief against pending state criminal proceedings should not issue in the absence of extraordinary circumstances such as bad faith harassment of defendant or enforcement of a state statute which patently infringes the Constitution in every clause and sentence. *See Younger*, 401 U.S. at 53-54, which held:

> [The] underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by [the] vital consideration . . . of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id. at 44.

ture to habeas for state prisoners, but also incorporated into the operable test the language derived from the federal rules and their interpretation.

Justice Brennan, the lone dissenter in *Francis*, suspected that the Court's purpose might be to dispense with *Fay v. Noia*'s deliberate bypass formulation, and challenged the majority to justify its new position:

> If the Court believes that *Fay* is no longer good law, and if the Court has the "institutional duty" to develop and explicate the law in a reasoned and consistent manner, then it has the duty to face squarely our prior cases . . . and honestly state the reasons, if any, for its altered perceptions of federal habeas jurisdiction.[68]

2. Flaws in the Doctrinal Framework

To what extent was the challenge posed in Justice Brennan's *Francis* dissent met by the *Sykes* opinion? The *Sykes* majority did not expressly rely on comity and federalism, which Justice Brennan had dismissed as "vague" concepts relevant to the postponement rather than the abdication of federal jurisdiction.[69] Rather, the majority attempted to give sharper contours to its concern for federalism by invocation of the familiar "adequate state grounds" doctrine.

This doctrine, which *Sykes* attenuated almost beyond recognition, traditionally comes into play when a decision of a state court rests on a nonfederal basis which provides independent and adequate support for the judgment. Under these circumstances, the Supreme Court may not review the state determination regardless of whether federal issues have been raised.[70]

A substantive state foundation was the focus in early cases such as *Murdock v. Memphis*.[71] *Murdock* established that a decision resting on

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68. Francis v. Henderson, 425 U.S. 536, 547 (1976) (Brennan, J., dissenting).

69. *Id.* at 551 (citing Younger v. Harris, 401 U.S. 37 (1971)). See *supra* note 67. Yet the Supreme Court has expressed persistent concern for the preservation of federalism. Consider the federal-state comity issues implicit in the Court's reluctance to exercise equitable powers when interference with threatened state criminal proceedings would result. Douglas v. City of Jeannette, 319 U.S. 157 (1943), held that no person is immune from a good faith prosecution for alleged criminal acts unless irreparable injury, clear and immediate, is shown. *Id.* at 162-64. The state courts are the final arbiters of the meaning and application of state criminal statutes, "subject only to review by this Court on federal grounds appropriately asserted." *Id.* at 163; *accord* Fenner v. Boykin, 271 U.S. 240, 243-44 (1926).

70. *See* R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 89, at 163 (1951).

71. 87 U.S. (20 Wall.) 590 (1875). Murdock's ancestors had conveyed land to the city of Memphis with a provision for reversion if the property was not appropriated for use as a naval depot. The city conveyed the land without reservation to the United States, which constructed the depot but then returned the property to the city. In claiming the land, Murdock raised general trust law and a federal cession statute, but the state court ruled against him on both grounds. *Id.* at 596-97. Murdock argued in the United States Supreme Court that because Congress had repealed § 25 of the Judiciary Act of 1789, which had previously limited Supreme Court review of state court decisions to errors directly concerning the question giving jurisdiction to review, every point passed on by

adequate and independent nonfederal grounds could not be reversed even if it contained errors concerning federal law, because a Supreme Court opinion correcting these errors would have no effect on the judgment. It would merely constitute impermissible advice to the state judiciary.[72] *Limited* review of the sufficiency of any nonfederal issues would of course be appropriate, indeed essential, because a spurious or untenable foundation might otherwise defeat the federal claim.[73]

How does this rationale apply to procedural state grounds? The premise of *Murdock* was both acknowledged and shunted aside in *Fay v. Noia*. While Justice Brennan's opinion for the majority recognized that the Supreme Court on direct review cannot revise decisions based on adequate state foundations regardless of whether federal issues are also present, he concluded that *Murdock* was inapposite to collateral review.[74]

In the first place, *Noia* found, the jurisdictional prerequisite of habeas is not the state court's judgment but the detention of the prisoner.[75] *Murdock's* concern with jurisdictional limits on revising state court decisions therefore becomes irrelevant; the federal district court is not changing such decisions, "it [is] act[ing] only on the body of the petitioner."[76]

Second, the Court noted that "the problem is crucially different from that posed in *Murdock*."[77] While in *Murdock* substantive state policies were at stake, "[i]n Noia's case the only relevant substantive law is fed-

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the state tribunal could now be reconsidered. *Id.* at 616. The Court did not reach the issue of whether this complete inquiry would be constitutional; it ruled only that the statute as it then read did not authorize the inquiry. *See id.* at 635.

Under 28 U.S.C. § 1257 (1982), the provision now governing such Supreme Court review, jurisdiction is limited to "judgments or decrees rendered by the highest court of a State in which a decision could be had." The *Noia* majority found that this statutory language supported continued adherence to *Murdock* because correction of state opinions on state law questions would be merely advisory and therefore impermissible. *See Noia*, 372 U.S. at 430 n.40. See *infra* note 72 and accompanying text.

72. *See* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); *cf.* Minnesota v. National Tea Co., 309 U.S. 551, 555 (1940) (constitutional questions not reached unless necessary to decision); *Ex parte* Spencer, 228 U.S. 652, 664 (1913) (state questions are province of state courts).

Would the *Murdock* ban against advisory opinions operate to preclude habeas corpus consideration of a state prisoner's defaulted claim? If the procedural rule violated by the default is viewed as the reason for the prisoner's detention because he failed to avail himself of the opportunity to be heard, Brown v. Allen, 344 U.S. 443, 484-85 (1953), the habeas court should do no more than review the rule's sufficiency. See *infra* note 78. Any consideration of the underlying constitutional claim would be advisory and enmesh the reviewing court in deciding state law. However, if the constitutional violation is regarded as the reason for the detention, the issue is one of constitutional interpretation appropriate for federal review. The answer to the initial question therefore depends entirely on how the cause of the incarceration is described.

73. *See* Hill, *The Inadequate State Ground*, 65 Colum. L. Rev. 943, 967 (1965) [hereinafter cited as Hill I]; Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Sup. Ct. Rev. 187, 221, 227.

74. *See Noia*, 372 U.S. at 428-29.

75. *See id.* at 426.

76. *Id.* at 431.

77. *Id.*

eral—the Fourteenth Amendment."[78] *Noia*'s premise was that the constitutional claim must be balanced against whatever procedural ground is invoked by the state and that the former would almost invariably outweigh the latter. Thus the habeas court must pit the applicant's rights against state interests such as the maintenance of orderly criminal processes.[79]

The subsequent decision in *Wainright v. Sykes* resurrected the applicability of the adequate state procedural ground doctrine to habeas corpus, implicitly rejecting *Noia*'s suggestion that granting the writ affects only the prisoner's detention, not the state judiciary's judgment of conviction.[80] However, rather than holding that the sufficiency of the state foundation ended the quest, the Court retained *Noia*'s use of a weighing process to decide whether the writ should be granted.[81]

The weighing process was expressed in *Noia* as a comparison between the underlying constitutional claim and the importance of the state's interest in the procedural rule violated.[82] In *Sykes*, the state's interest was weighed against the significance of the habeas applicant's reasons for defaulting as well as the consequences of that default.[83] Both formulations distort the original meaning of the adequate state grounds doctrine.[84] This doctrine only authorizes an inquiry into the sufficiency of the

78. *Id.* The majority did not acknowledge that the fourteenth amendment's due process clause was satisfied to the extent that the state had preserved defendant's right to be heard. Noia failed to avail himself of this aspect of his fourteenth amendment rights; therefore he obtained no state ruling on the admission of the coerced confession. The competence of his counsel was not challenged. Indeed, Noia had personally approved the default. The Court's statement that "due process denied in the proceedings leading to conviction is not restored just because the state court declines to adjudicate the claimed denial," *id.* at 427, omits the reasons for the declination.

79. Justice Brennan in *Noia* defined these interests as including an "airtight system of forfeitures," punishment of a defaulter and deterrence of others who might otherwise commit defaults. *See id.* at 431-33. The overall question of state autonomy was considered relevant to *Murdock*, but discounted as to habeas corpus cases such as *Noia*. *See id.* at 431. See *infra* notes 112-27 and accompanying text for a discussion of the state interests implicated when a defendant seeks to assert a defaulted claim.

80. *See Sykes*, 433 U.S. at 89-90. Because the petitioner is in custody pursuant to a state judgment, an order directing his release invariably nullifies that judgment. In addition, such an order would undermine the state procedural requirement which petitioner had violated. Granting the writ would not stigmatize the reasonableness of the state rule. See Abraham D. Sofaer's analysis in Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U. L. Rev. 78, 94 (1964) [hereinafter cited as *The Isolation Principle*]. However, the effect of according habeas relief would be to nullify this rule in all cases presenting constitutional claims unless a discretionary limitation on the district court's jurisdiction is invoked.

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

82. *See Noia*, 372 U.S. at 431-32.

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

84. See *supra* text accompanying note 72. Nor can it be argued that decisions other than *Noia* resorted to a balancing test for procedural cases that the Court was unwilling to use in a substantive law context. See *infra* text accompanying note 106 for a discussion of Henry v. Mississippi, 379 U.S. 443 (1965), an oft-cited procedural precedent where no such weighing process was utilized.

grounds—whether they are reasonable, supported by the record, and in accord with previous state authority.[85] It does not contemplate a balancing operation that would require not only deciding whether these foundations are adequate but also whether they occupy as favored a position as the concerns proffered by the defendant.

Furthermore, this distortion is not justified by the procedural context in which it was presented. After reviewing the common law and statutory history of the writ,[86] *Sykes* described the adequacy of state procedural foundations to bar federal habeas review as a crucial area.[87] The Court's analysis, however, was limited to naming "the pertinent decisions marking the . . . somewhat tortuous efforts to deal with this problem,"[88] and a brief description of *Brown v. Allen.*[89]

The *Brown* decision both supports and undercuts the conclusions in *Sykes*. There, petitioner's counsel had not mailed appeal papers on the last day set by state law for filing. Although the papers were hand-delivered the following day, the state supreme court refused to accept them because the time for appeal had expired.[90] The United States Supreme Court held that this ruling precluded federal habeas consideration of the contentions which were never entertained by state appellate tribunals: "[W]here the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the depriva-

85. *See* Sandalow, *supra* note 73, at 226, 227. The grounds asserted must also be independent of the federal issue, *see* Delaware v. Prouse, 440 U.S. 648, 652-53 (1979), and broad enough to maintain the judgment, Eustis v. Bolles, 150 U.S. 361, 369-70 (1893).

86. *Sykes*, 433 U.S. at 77-85. Justice Rehnquist pointed out that the writ's earliest predecessor, which existed under the Judiciary Act of 1789, was available only for a petitioner held in federal custody. *See Sykes*, 433 U.S. at 77-78. Congress in 1867 extended the writ to those held in state custody. *Id.* at 78. Although the federal habeas statute was originally construed as authorizing only an inquiry into the jurisdiction of the sentencing court, *id.* at 78 (citing *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830)), this approach was gradually changed, *id.* at 79 (citing *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873), and *Ex parte* Wells, 59 U.S. (18 How.) 307 (1855)), and then explicitly rejected, *id.* at 79 (citing Waley v. Johnston, 316 U.S. 101 (1942)). *Waley* acknowledged that habeas review is appropriate as to claims involving " 'disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.' " *Id.* at 79 (quoting *Waley*, 316 U.S. at 105). The circumstances under which the federal court should hold a fact-finding hearing to review the state court's prior rulings were examined in *Townsend v. Sain* and codified in 28 U.S.C. § 2254(d) (1982). *See Sykes*, 433 U.S. at 80 (citing Townsend v. Sain, 372 U.S. 293 (1963)).

Consideration of a habeas claim may be barred by the adequacy of the independent procedural grounds asserted by the state in support of the detention, although such procedural grounds have been treated differently from those that are substantive. *Id.* at 82. *Brown v. Allen* established that habeas is not available to review a constitutional claim resting on an adequate and independent procedural basis where direct review of this claim would have been barred in the Supreme Court. *Id.* (citing Brown v. Allen, 344 U.S. 443, 486-87 (1953)). See also *supra* note 50 for a discussion of the history of the writ.

87. *See Sykes*, 433 U.S. at 81-82.

88. *Id.* at 82.

89. 344 U.S. 443 (1953).

90. *Id.* at 484-85.

tion of federal constitutional rights ever existed."[91] Thus, procedural grounds were relevant not only to direct but also to collateral review.[92]

In addition, the *Brown* Court took the view that once the state procedural foundation has been found to be sufficient, the door to the federal courthouse is closed.[93] Thus, no discretion would remain to pick and choose among proffered petitions, whether pursuant to a deliberate bypass formulation or a cause and prejudice standard. Yet *Sykes*, like *Noia*, adopted the opposite position that the habeas court could decide not only whether the state ground was adequate, but whether the writ should nonetheless be granted on the basis of a generally described discretion.[94]

Further development of a distinction between substantive and procedural bases was provided in the post-*Brown* ruling in *Henry v. Mississippi*.[95] *Henry* involved violation of a contemporaneous objection rule as to admission of illegally seized evidence, but not a complete default on this fourth amendment claim.[96] Defendant had moved for a directed verdict at the close of the state's case, citing the introduction of the tainted proof.[97] The state courts found that as a matter of state law, violation of the contemporaneous objection requirement precluded consideration of the constititutional challenge.[98]

When the case reached the Supreme Court on direct review, the major-

91. *Id.* at 458.

92. *See id.* at 486-87. See *supra* notes 54-59, *infra* notes 238, 242, 244 and accompanying text with respect to federal procedural rules as a bar to the granting of collateral relief to federal prisoners.

93. *See* 344 U.S. at 485. Since the opinion also explored other grounds for its holding, its precedential value is somewhat diminished. The *Brown* majority refers both to waiver and exhaustion. "Failure to appeal . . . . bars subsequent objection to conviction on those grounds." *Id.* at 486. "A failure to use a state's available remedy, in the absence of some interference or incapacity . . . bars federal habeas corpus." *Id.* at 487; *see also The Isolation Principle*, *supra* note 80, at 82 n.24 (interrelation of devices that limit habeas corpus review).

94. *See Sykes*, 433 U.S. at 91; *Noia*, 372 U.S. at 438. See *supra* text accompanying notes 25-29 for a discussion of the undiluted federal power to grant the writ.

95. 379 U.S. 443 (1965).

96. *Id.* at 445-46. Defendant was a black resident of Clarksdale, Mississippi, and an official of the NAACP. He was charged with disturbing the peace by molesting a hitchhiker to whom he had allegedly given a ride in his car. The principal evidence against defendant was the testimony of the alleged hitchhiker. The state sought to corroborate this evidence by introducing a police officer's testimony about certain aspects of defendant's car interior. The officer reported on details which had also been mentioned by the complaining witness. The officer's search of the car was unlawful, but no objection to his testimony was offered until the close of the state's case. *Id.* at 444-45.

97. *Id.* at 445.

98. *See id.* at 446. The Supreme Court of Mississippi had at first reversed the conviction because the search was unlawful. The state's requirement of a contemporaneous objection to the tainted evidence was not applied because fundamental rights were involved and because Henry had been represented by nonresident counsel who were unaware of state procedure. The court withdrew its first opinion when the state argued in a "Suggestion of Error" that defendant had local counsel as well. This left the conviction in place. *See* Henry v. State, 253 Miss. 263, 281-82, 154 So. 2d 289, 296 (1963), *vacated*, 379 U.S. 443 (1965).

ity opinion held that when solely procedural grounds support a state court decision, the state's rule must serve a "legitimate" interest.[99] The existence of such an interest was acknowledged: Prompt objection gives the trial court an opportunity to exclude the fruits of the illegal search and avoid reversal and a new trial.[100]

Yet the Court suggested that Henry had been prompt enough. The *application* of the rule under these circumstances was not legitimate, because the motion for a directed verdict served the same alerting function as a contemporaneous objection, permitting the trial judge to avoid error and waste of judicial resources.[101] Moreover, even if the state foundation were deemed to preclude Supreme Court review, a federal district court could consider the constitutional claim in a habeas proceeding unless the forfeiture of state remedies constituted a *Noia* deliberate bypass.[102]

Henry's distinction between the relative adequacy of substantive and procedural grounds is ultimately unpersuasive. The assertion of a substantive ground may follow a state disposition of the federal claim, while the assertion of a procedural ground may follow the defendant's failure to submit the federal claim to the state courts for disposition. Nevertheless, both foundations could block the implementation of a federal right.[103] Both may arguably frustrate federal policy. However, a legitimate procedural ground may pose less conflict with the supremacy clause,[104] since it does not create a policy competing with federal law, but only regulates the way in which federal claims are to be proffered in state courts.[105] And it cannot be assumed that the state considers most of its substantive policies to be more important than the accuracy and efficiency of its criminal law administration.

Even accepting the substance/procedure dichotomy as valid, *Henry* does not fundamentally alter the adequate state ground rationale. The methodology used in *Henry* departed from the traditional scrutiny of the

99. *See Henry*, 379 U.S. at 449.

100. *Id.* at 448.

101. *Id.*

102. *Id.* at 452. Commentators both before and after *Henry* have found this distinction dubious, arguing that the considerations for application of the adequate state ground doctrine are the same on habeas as on direct review. *See* Hart, *The Supreme Court: 1958 Term—Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 118-19 (1959); Sandalow, *supra* note 73, at 231-34. Professor Sandalow concludes:

> If the state's interest in requiring adherence to its procedures is insufficient to bar habeas corpus, it is difficult to see why it is sufficient to bar direct review . . . . [T]he practical effect of ignoring the state procedural determination would be the same in both situations: to put extreme pressure on the state courts to ignore their procedural rules in deference to the federal claim.

Id. at 232-33. *But see* Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315, 1347 (1961) ("a federal habeas corpus proceeding differs from direct review both in the quality and the extent of interference with the state's domain").

103. *See* Sandalow, *supra* note 73, at 198.

104. U.S. Const. art. VI, § 1, cl. 2.

105. *See* Sandalow, *supra* note 73, at 228-29.

sufficiency of state foundations to the extent that it looked to the particular application of a valid procedure to see whether the defendant's default had in fact adversely affected the state's interest. Yet once a legitimate interest has been infringed, a state judgment based upon it may not be disturbed by the reviewing court.[106]

By contrast, the version of adequate state ground adopted in *Sykes* effects a fundamental doctrinal change. The legitimacy of the state's interest is only the first tier of the scrutiny; the second, as we have seen,[107] weighs that interest against defendant's cause and prejudice showing.

The majority's purpose in adopting this approach can be readily discerned. In the context of a default by counsel, the Court did not wish to approve a standard that confines the habeas inquiry to determining whether the state foundation is reasonable, independent of the federal issues, broad enough to maintain the judgment, fairly supported by the record, and consonant with prior state precedents.[108] Such a standard would have precluded the granting of the writ in all cases where the opportunity to comply with legitimate state procedures had been made available. A closed-door system would have none of the flexibility suggested by the definition proposed in Part II of this Article.

Nonetheless, it must be recognized that the adequate state ground doctrine has lost its original identity in its *Sykes* incarnation. As it is formulated, it is indistinguishable from the comity concerns described in *Francis v. Henderson*.[109] It merely expresses a general policy of deference to state interests, without supplying any criteria for assessing the degree of deference or the circumstances under which cause and prejudice should be found.

3. *Sykes* and Its Purposes

Despite the *Sykes* majority's characterization of its goal as one of pruning rather than discarding *Fay v. Noia*,[110] dissatisfaction with *Noia*'s premises emerged. In revising these premises, the Court had three purposes: enhancing state interests, reinterpreting counsel's power to effectuate a binding default without the client's assent, and diminishing the distinction between deliberate and inadvertent attorney conduct. After

106. See supra notes 99-101 and accompanying text.

107. See *supra* notes 83-85 and accompanying text.

108. See *supra* note 85 and accompanying text.

109. 425 U.S. 536 (1976). See *supra* note 67 and accompanying text.

110. See *supra* notes 38-39 and accompanying text. *Cf.* Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 Colum. L. Rev. 436, 465 (1980) ("[It is not] entirely clear that, as a practical matter, the new cause and prejudice standard really marks a sharp departure from the deliberate bypass test. Of course, the *Wainwright* Court tells us that the two standards are different. But the Court's extraordinary reluctance to give any content to the new test leaves in doubt the real significance of the difference.") (footnote omitted). *But see* Rosenberg, *Jettisoning* Fay v. Noia*: Procedural Defaults by Reasonably Incompetent Counsel*, 62 Minn. L. Rev. 341, 447 (1978) (concluding that *Noia* has been entirely replaced).

elimination of several plausible but ultimately unsatisfactory interpretations of *Sykes*, it becomes evident that the third purpose is the most significant, even though the majority avoided any express ruling on inadvertence.[111]

a. *Enhancing State Interests*

Much of Justice Rehnquist's opinion for the *Sykes* majority was addressed to identifying the state's procedural interests and upgrading the advantages of enforcing them. The overarching theme was the respect which should be accorded to state functions. Because the term "comity" was never explicitly invoked, there was no need to explain its precise application in this context.[112] Rather, the Court introduced its theme with a specific linkage to congressional intent as expressed in the habeas corpus statute: "[T]he 1966 amendment to § 2254 requires deference to be given to . . . determinations made by state courts[;] the determinations themselves are less apt to be made in the first instance if there is no contemporaneous objection to the admission of the evidence on federal constitutional grounds."[113]

Although commentators have suggested that the intrusion into state judicial processes may be greater when a federal court reviews a claim which several tiers of state judges have rejected,[114] the Court has solid

111. Justice Rehnquist's hesitance is understandable, as two of the concurring Justices indicate that inadvertence should always constitute cause. *See Sykes*, 433 U.S. at 96-97 (Stevens, J., concurring); *id.* at 98-99 (White, J., concurring). See *infra* notes 183-84 and accompanying text.

112. Comity is relevant in the general sense: The Supreme Court has emphasized that the federal judiciary must avoid unnecessary intrusion into legitimate state activities. However, past precedent has centered on refusal to enjoin pending or threatened state prosecutions, rather than on refusal to issue a writ which would in effect invalidate a state conviction. See *supra* notes 67, 69 and accompanying text. The *Sykes* Court did not avail itself of the opportunity to create a precedent as to the role of comity in the habeas context.

113. *Sykes*, 433 U.S. at 88. The state trial judge could of course raise the constitutional problem sua sponte. Justice Rehnquist pointed out that "as the proceeding unfolded," the judge presiding over John Sykes' trial could not be criticized for failing to do so. *See id.* at 91. This may imply that under some circumstances, habeas review might be granted if such judicial prompting did not occur. Commentators have suggested that states could decrease the number of procedural defaults by advising judges of new constitutional rulings and asking them to remind counsel of potential constitutional claims. Note, *Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims*, 130 U. Pa. L. Rev. 981, 1001 (1982) [hereinafter cited as *Defaulted Constitutional Claims*]; *see* Rosenberg, *supra* note 110, at 413; Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. Pa. L. Rev. 473, 514 (1978); Tague, *The Attempt to Improve Criminal Defense Representation*, 15 Am. Crim. L. Rev. 109, 142 & nn.175-78, 161-62 & n.282 (1977) [hereinafter cited as Tague I]. Professor Tague suggests methods for judicial supervision of counsel and also discusses the problems such supervision entails. *See id.* at 161-65.

114. *See* 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, 395 (1983) [hereinafter cited as *Section 2254 Habeas Corpus Proceedings*]; *see also* Hart, *supra* note 102, at 118 (deference to state court procedural determinations not

grounds for reaching the opposite conclusion that the intervention is often more significant when a defaulted claim is decided. The congressional requirement that state prisoners exhaust state remedies prior to receiving federal habeas consideration was developed in deference to the states' capacity and willingness to resolve constitutional challenges.[115] If such a resolution has occurred and the state record shows that the habeas applicant received a full and fair trial, a plenary federal hearing is generally deemed unnecessary.[116] Thus, the intrusion is made semi-palatable. By contrast, federal disposition of a constitutional claim which the state courts had no opportunity to adjudicate imposes a de novo determination and is therefore more intrusive.

The *Sykes* majority elaborated on several reasons for its deference to the states: improved fact-finding, finality, reduction of wasted court time, and prevention of manipulation by criminal defendants or their counsel.[117] On the question of better fact-finding, the Court came to the unexceptionable conclusion that prompt objection at trial allows correction at a time when witnesses still remember the events and their demeanor is under observation by the judge who decides the constitutional claim.[118] It is interesting to note that little emphasis was placed on the one point which the dissent acknowledged as critical: Default followed by issuance of the writ years later may mean that effective fact-finding is

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inconsistent with reexamination of federal claims); Reitz, *supra* note 102, at 1349 (although state court judgment rests on adequate and independent state ground, Congress may "provide a federal forum for the vindication of federal rights").

115. *See Sykes*, 433 U.S. at 88; *see also* 28 U.S.C. § 2254(b) (1982) (exhaustion requirement). *See generally* 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4264 (exhaustion of state remedies). The rationale for the judicially created exhaustion rule that preceded the congressional enactment is explored in *Ex parte* Royall, 117 U.S. 241 (1886).

116. *See, e.g.*, Sumner v. Mata, 449 U.S 539, 546 (1981); Townsend v. Sain, 372 U.S. 293, 312-13 (1963); *see also* Note, *State Criminal Procedure and Federal Habeas Corpus*, 80 Harv. L. Rev. 422, 425 (1966) (federal court must also examine adequacy of state procedures) [hereinafter cited as *State Criminal Procedure*]. Indeed, where a fourth amendment claim is at issue, such a full and fair hearing precludes federal review altogether. See Stone v. Powell, 428 U.S. 465, 494 (1976), discussed *infra* notes 313-21 and accompanying text.

117. *Sykes*, 433 U.S. at 88-89. The Court did not directly invoke the argument that the broad *Noia* standard created too great a workload for federal district courts. One commentator has argued, however, that although the *Sykes* majority did not mention the floodgates problem, this problem was an underlying reason for the decision. *See Appellate Forfeitures*, *supra* note 15, at 863. 8059 federal habeas petitions were filed in 1982; this amounted to a filing increase of approximately 700% since 1961. *Id.* at 852 n.5 (citing Bureau of Statistics, United States Dep't of Justice, Habeas Corpus—Federal Review of State Prisoner Petitions 2 (1984)). See also *Section 2254 Habeas Corpus Proceedings*, *supra* note 114, at 394, suggesting that if attorneys pose more constitutional objections in state courts, there will be more issues preserved in state appeals and more candidates for federal habeas corpus. This suggestion overlooks the fact that such a workload would consist of properly presented and exhausted claims. These claims are entitled to review, and would be considered with the aid of a prior opinion by the state judiciary.

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

precluded.[119] The witnesses may be forgetful, unavailable or dead, and documents may be lost, preventing altogether the reprosecution of the defendant.[120]

Judicial economy, particularly with respect to finality of judgments, occupied a central place in Justice Rehnquist's panoply. Objection could lead to exclusion of the offending evidence, which in turn might induce the jury to acquit, or at least to convict on untainted proof.[121] Alternatively, the constitutional objection might be rejected but would still culminate in a full and fair hearing which could provide information and guidance to the subsequent habeas court.[122] All these possibilities preserve the original criminal trial as the "main event," where the relevant proof and the available resources are combined to decide the central issue: guilty or not guilty.[123]

These invocations of state interests do not tell us how many pounds should be allotted to them when they are placed on the scale against a petitioner's twin claims of constitutional error and innocence.[124] A weighing process is necessitated by the *Sykes* majority's interpretation of the adequate state grounds doctrine,[125] but after each relevent component is identified, this weighing process breaks down. In an effort to enhance the state's side of the scale, the majority launched its controversial "sandbagging" theory,[126] which refocuses blame on the habeas applicant by stressing the guilt of the calculating forfeiter. The opinion set out this theory in one sentence:

> We think that the rule of *Fay* v. *Noia*, broadly stated, may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off.[127]

Two assumptions are latent in this statement. One is that the practice described is not a rarity. The other is that a change of judicial direction was needed to deter such attorneys because *Noia*'s deliberate bypass standard does not provide an adequate warning signal.

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119. *Id.* at 112 n.11 (Brennan, J., dissenting).

120. Justice O'Connor stressed this point in her opinion for the Court in Engle v. Isaac, 456 U.S. 107, 127-28 (1982): "Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible."

121. *Sykes*, 433 U.S. at 88-89.

122. *Id.* The majority also observed that objection could even induce the prosecutor to withdraw the disputed proof and restructure the case rather than risk appellate or collateral reversal. *Id.* at 89.

123. *Id.* at 90.

124. In a few cases, defendant disputes only the degree of the crime for which he was convicted. See United States v. Frady, 456 U.S. 152, 156-58 (1982), where a petitioner convicted of murder argued that although the evidence against him was "overwhelming," erroneous jury instructions on malice prevented a manslaughter verdict.

125. See *supra* Pt. I.B.2.

126. *See Sykes*, 433 U.S. at 89.

127. *Id.*

Yet close analysis indicates that sandbagging and deliberate bypass are curiously similar. *Noia* had held that "the exigencies of federalism warrant . . . [denial of federal relief] to one who has deliberately sought to subvert or evade the orderly adjudication of his federal defenses in the state courts"[128] because of "strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures."[129]

Justice Brennan, the author of *Noia*, made interchangeable use of the sandbagging and bypass concepts in his lengthy *Sykes* dissent.[130] Ironically, however, his dissent argued that sandbagging is unlikely to occur.[131] He noted that a lawyer could present a constitutional claim in the state courts and hope to win there or on collateral review. As an alternative,

> [counsel] could elect to "sandbag." . . . [T]o carry out his scheme, he would now be compelled . . . 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.[132]

The dissent concluded that no "rational" lawyer would engage in such conduct.[133] Nevertheless, *Noia* had acknowledged that some attorneys purposely default in state court and that it is necessary to devise a blockade against this tactic.[134]

The anomaly affects the *Sykes* majority and dissenting views, as both appear to assume that deliberate bypass under a new rubric will have a different consequence. Can the inconsistency be resolved by interpreting sandbagging as a more inclusive concept than bypassing? The argument would run that he who sandbags is "irrational" not in foregoing his state court remedies, but in making such a choice for reasons which could bring no benefit to his client.[135] *Noia*, in punishing only reasonable de-

128. 372 U.S. at 433.

129. *Id.* at 439. The issue of whether a deliberate bypass requires in all cases that the client assent to the circumvention is discussed *infra* at Pt. I.B.3.b.

130. *Sykes*, 433 U.S. at 102 (Brennan, J., dissenting).

131. *Id.*

132. *Id.* at 103 n.5 (Brennan, J., dissenting).

133. *See id.* at 104 (Brennan, J., dissenting).

134. *Noia*, 372 U.S. at 433. See *infra* note 384 and accompanying text.

135. For an example of such an "irrational" default, see Gruttola v. Hammock, 639 F.2d 922 (2d Cir. 1981), where the defense attorney failed to raise the claim that pretrial publicity prejudiced the eyewitness identification of his client. *See id.* at 928. The defendant was accused of robbery, and of shooting a police officer and a patron in a local bar. *Id.* at 924. The New York City newspapers and television stations ran extensive stories on the incident, including pictures of the defendant. *Id.* Had counsel objected to this prejudicial publicity, the testimony of the eyewitnesses could have been suppressed and the "jury's verdict may well have been different." *Id.* at 930 & n.5. The court of appeals found that the defense attorney must have been aware of the potential claim, because he cross-examined the witnesses on the publicity issue. *See id.* at 930.

fault strategy, did not go far enough and a new label was necessary to cover ill-conceived tactics as well.

The language of the *Sykes* opinions does not support this interpretation of the sandbagging phenomenon. Justice Rehnquist's decision for the Court made no distinction between types of strategy; the concurring Justices differed from each other not only as to the kind of deliberate choice which was interdicted in *Noia*, but also as to the kind which should be penalized by the new approach.[136] Ultimately, this explanation of the majority's sandbagging emphasis accounts neither for the Court's dissatisfaction with the *Noia* formulation nor for the necessity of establishing the cause and prejudice standard.

b. *Reinterpreting Unilateral Attorney Default*

Another possible interpretation of the Court's tacit conclusion that deliberate bypass and sandbagging diverge is that the former is addressed to defaults in which the client also participated, while the latter involves defaults allegedly occuring without the client's knowledge.[137] The *Noia* majority had held that federal review could be forfeited only by a knowing waiver, "the considered choice of the petitioner" acting "after consultation with competent counsel or otherwise."[138] The assertion that defendant was unaware of the decision to withhold a constitutional claim

136. Justice Stevens' concurrence concluded that the cause and prejudice requirement is not a "significant departure" from *Fay v. Noia*, because "the holding is consistent with the way other federal courts have actually been applying *Fay*." *Sykes*, 433 U.S. at 94 (Stevens, J., concurring). The opinion went on to explain that courts have "generally found a 'deliberate bypass' where counsel could *reasonably* have decided not to object." *Id.* at 95 n.1 (emphasis added). Since Justice Stevens read both *Noia* and *Sykes* as covering only well-conceived strategy, no change would have been effectuated by prohibiting sandbagging.

Justice White's concurring opinion embraced the old deliberate bypass approach rather than the new cause formulation. *See id.* at 98 (White, J., concurring). However, unlike Justice Stevens, he did not appear to limit *Noia*'s application solely to reasonable default decisions. Any default that "flows from [counsel's] exercise of professional judgment" constitutes a deliberate bypass. *Id.* at 99. Under this view of *Noia*, reasons which could benefit the client would apparently have the same effect as those which could not, because "[i]t will not later suffice to allege in federal habeas corpus that counsel was mistaken, unless . . . the error is sufficiently egregious to demonstrate . . . [incompetence contravening the sixth amendment]." *Id.* Under Justice White's interpretation, no new requirement would be needed to cover unreasonable but deliberate decisions, which were already penalized under the old approach. Justice Burger's concurrence addresses only the issue of unilateral action by counsel. See *infra* Pt. I.B.3.b.

137. This distinction has been suggested by Professor Larry Yackle, a thoughtful and knowledgeable commentator on habeas corpus. *See* L. Yackle, Postconviction Remedies § 86, at 167 (1981).

138. *Noia*, 372 U.S. at 439. The "knowing waiver" formulation was developed in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). However, not every deliberate choice would fit the *Zerbst* rationale. Noia did make a personal decision not to appeal, but since he faced the choice of accepting life imprisonment or pursuing an appeal which might have resulted in retrial and a death sentence, his decision was not merely a tactical circumvention of state rules. *Noia*, 372 U.S. at 440. Without such a deliberate evasion, the federal court would lack discretion to deny relief. *See id.* at 433.

could therefore place such a decision outside *Noia*'s prohibition. The sandbagging attorney would be encouraged[139] to make such an assertion because of the availability of a federal writ if that prohibition were found to be inapplicable.[140]

The majority and concurring opinions in *Sykes* authorized a penalty for unilateral forfeiture. They took the view that counsel's failure to proffer a constitutional claim at trial may preclude subsequent federal habeas consideration even if the client did not know of this failure,[141] unless cause and prejudice are demonstrated. Justice Rehnquist's opinion for the majority made a footnote reference to the binding effect of a trial attorney's decisions on defendant.[142] A practical note was sounded in Justice Stevens' concurring opinion: "The notion that a client must always consent to a tactical decision not to assert a constitutional objection to a proffer of evidence has always seemed unrealistic to me."[143] The concurrence also suggested, however, that a default by counsel should not be binding where the right involved is " 'deeply embedded' in the Constitution."[144]

This raises the issue of whether the consequences of counsel's default should turn on which federal right is at stake.[145] Chief Justice Burger's

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139. The *Sykes* majority had stressed that the *Noia* approach could encourage sandbagging, but offered no explanation for its conclusion. *See* 433 U.S. at 89.

140. *State Criminal Procedure*, *supra* note 116, at 434.

141. See *infra* notes 142-55 and accompanying text. This rule should not encompass situations where a defendant instructs trial counsel to assert the claim but the instruction was disregarded. See *Appellate Forfeitures*, *supra* note 15, at 878-85 (where an indigent defendant asks his lawyer to raise an issue on appeal and attorney refuses, preclusion of claim on habeas would, under certain circumstances, constitute miscarriage of justice). Thus the *Sykes* cause requirement would be met. Although the discussion addressed appellate defaults such as those in Jones v. Barnes, *see id.* at 878-81 (citing Jones v. Barnes, 463 U.S. 745 (1983)), the reasoning would also apply at the trial level. If defendant can demonstrate that he objected to a decision, he should not be bound by it.

142. *Sykes*, 433 U.S. at 91 n.14. The concurrence of Justice White, while expressing a preference for the *Noia* approach, succinctly concluded that deliberate bypass should not be interpreted to require defendant's personal concurrence in his attorney's action or inaction. *See id.* at 98 (White, J., concurring).

143. *Id.* at 94-95 (Stevens, J., concurring). Justice Stevens noted that " '[a] rule which would require the client's participation in every decision to object, or not to object, to proffers of evidence would make a shambles of orderly procedure.' " *Id.* at 95 n.2 (quoting United States *ex rel.* Allum v. Twomey, 484 F.2d 740, 745 (7th Cir. 1973)). The concurrence also accepted the converse proposition that some constitutional waivers are excusable even when made by the client. *See id.* at 95. The "grisly" choice faced by Noia himself was cited as an example. *See id.* at 95-96 n.3.

144. *See id.* at 95 n.1 (Stevens, J., concurring) (quoting Frazier v. Roberts, 441 F.2d 1224, 1230 (8th Cir. 1971)). In *Frazier*, the search warrant issued was in violation of the fourth amendment because it lacked both supporting information and a sworn affidavit. *See* 441 F.2d at 1228. Justice Stevens would look to factors such as the competence of counsel and the overall fairness of the proceeding in deciding whether to grant habeas after a default. *See Sykes*, 433 U.S. at 96 (Stevens, J., concurring).

145. *See* Spritzer, *supra* note 113, at 508 (suggesting that some rights such as the right to trial must be waived by the defendant personally). *But see* Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 Iowa L. Rev. 609, 647 n.175 (1983) (arguing that the "vital flaw [in this approach] is that it calls for a principled basis for distinguish-

concurrence devised a "bright line" approach linking the nature of the right to the stage of the proceeding at which the default occurred. In the Chief Justice's view, the deliberate bypass standard developed in *Fay v. Noia* "was never designed for, and is inapplicable to, errors—even of constitutional dimension—alleged to have been committed during trial."[146] Noia was called upon to decide whether to appeal or not; this he did personally, though his lawyer may have been an adviser.[147] Similarly, in *Johnson v. Zerbst*,[148] which supplied *Fay v. Noia*'s component of knowing and intelligent waiver,[149] defendant had to make his own decision as to whether to represent himself or to have an attorney at his criminal trial.[150] Thus, there are fundamental rights which can only be waived by the habeas petitioner personally, but these are pre-trial and post-trial rights that he is capable of understanding.[151]

By contrast, trial decisions cannot be freighted with the requirement that defendant be consulted and consent, Chief Justice Burger's concurrence concluded. First of all, "[t]he trial process simply does not permit the type of frequent and protracted interruptions which would be necessary" to secure such client approval.[152] Second, the type of claim arising during the course of trial is generally too technical even for the intelligent and educated layman to comprehend.[153] Therefore, the new cause and prejudice standard established in *Sykes* would govern defaults occurring during the trial.[154]

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ing decisions that are not, or cannot be, delegated to defense counsel . . . . [I]t is most unlikely that we can develop a satisfactory body of law on the point") (citations omitted); *see also* Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do*, 31 Stan. L. Rev. 1, 9 (1978) (only counsel can recognize the tactical consequences of failure to object) [hereinafter cited as Tague II].

146. *Sykes*, 433 U.S. at 92 (Burger, C.J., concurring).

147. *Id.* at 92 (Burger, C.J., concurring) (citing *Noia*, 372 U.S. at 391).

148. 304 U.S. 458 (1938).

149. *See Noia*, 372 U.S. at 439.

150. 304 U.S. at 464.

151. *See Sykes*, 433 U.S. at 92-93 (Burger, C.J., concurring).

152. *Id.* at 93.

153. *Id.*; *see* Tague I, *supra* note 113, at 132-33. Professor Tague discusses instances when an attorney may refrain from mentioning a tactical decision to his client because of a legitimate concern that defendant may insist on pursuing a strategy which would backfire. But see Sincox v. United States, 571 F.2d 876 (5th Cir. 1978), where a client showed more legal acumen than an attorney later found to be ineffective under sixth amendment standards. The defendant attempted to alert his lawyer to the basic constitutional defect in a nonunanimous jury verdict. *Id.* at 879-80.

154. See Chief Justice Burger's opinion in Estelle v. Williams, 425 U.S. 501 (1976), which involved a defendant who was tried in prison attire although he requested civilian clothes from a jail officer prior to the trial. The officer did not grant the request; trial counsel failed to raise the issue in court. Respondent then sought a writ of habeas corpus, which was denied because the trial attorney had not made an appropriate objection on the prison clothes issue. *Id.* at 512-13. In a footnote the Court suggested that no "fundamental right" was involved, and that no conscious surrender of a "known right" was required in order to give a binding effect to strategy decisions by counsel. *See id.* at 508 n.3. It was unclear whether the trial/post-trial distinction was critical here. However, Justice Burger's concurring opinion in Henderson v. Kibbe, 431 U.S. 145 (1977), set out

The aggregate of these *Sykes* opinions indicates that counsel may effect a unilateral and binding trial default, and may not evade a prohibition against deliberate bypass by contending that his client was not consulted. However, if this is the only distinction between deliberate bypass and sandbagging, the core question of why the Court abandoned the bypass approach and established an entirely new requirement governing trial forfeitures remains unanswered.

Arguably, a loophole in *Noia* has been sealed. Yet that aim could have been accomplished in one sentence, as Justice White's concurrence demonstrated: "The bypass rule . . . as applied to events occurring during trial, cannot always demand that the defendant himself concur in counsel's judgment."[155] This simple modification would probably have met with little resistance from any member of the Court. Indeed, Justice Brennan's dissent in *Sykes* acknowledged that a trial forfeiture may bar habeas corpus relief unless counsel intentionally relinquished the claim with his client's participation "where possible."[156] Even if the majority had determined that Justice White's use of the qualifying phrase "cannot always" might permit subterfuge, the word "always" could simply have been eliminated. *Noia* would then have been secured against manipulation without the necessity of developing the cause and prejudice requirement.[157]

Thus, the majority's emphasis on the sandbagging phenomenon provides a clue, but not an explanation of *Sykes*' purposes.[158] On the one hand, there has been a significant change of emphasis. The habeas court now has discretion to grant review if petitioner shows cause and prejudice, whereas before the court had discretion to deny review if the state showed deliberate evasion of its processes.[159] More skepticism will be shown in evaluating petitioner's explanation of the forfeiture.[160]

On the other hand, no automatic bar against intentional defaults has been inaugurated. The majority took no position on whether the granting of habeas relief would be appropriate in cases where an applicant, like Charles Noia, knowingly forfeited his claim for reasons other than tacti-

this "bright line" distinction with only post-trial defaults governed by *Noia*. *See Francis*, 431 U.S. at 157-58 (Burger, C.J., concurring). See also Justice Powell's concurrence in *Estelle*, 425 U.S. at 515 n.4 (Powell, J., concurring) ("The right involved here is a trial-type right. As a consequence, an attorney's conduct may bind the client.").

155. *Sykes*, 433 U.S. 72, 98 (1977) (White, J., concurring).

156. *Id.* at 116 (Brennan, J., dissenting).

157. A shift in the burden of proof from the state striving to show deliberate evasion to the habeas applicant striving to negate such evasion, *see Sykes*, 433 U.S. at 98 (White, J., concurring), could also have been accomplished in one sentence.

158. In Engle v. Isaac, 456 U.S. 107 (1982), a *Sykes* successor, the discussion of sandbagging is confined to a footnote: "[A] defendant's counsel may deliberately choose to withhold a claim in order to 'sandbag'—to gamble on acquittal while saving a dispositive claim in case the gamble does not pay off." *Id.* at 129 n.34.

159. See *infra* Pt. I.B.4.b. for further discussion of the current requirement that petitioner demonstrate prejudice.

160. *See* L. Yackle, *supra* note 137, § 83, at 338.

cal advantage.[161] Moreover, the Court underscored the flexibility of the cause and prejudice requirement by pointing out that this rule would not prevent a federal habeas court from considering the constitutional claim of a defendant who has been the victim of a miscarriage of justice.[162]

Despite the Court's express intention to circumscribe *Noia* and to discourage sandbagging, intentional forfeitures remain—as they were before[163]—unlikely but not ineligible candidates for the writ. We therefore proceed to consider the implications of the *Sykes* agenda for inadvertent defaults.

c. *Diminishing the Distinction Between Intentional and Inadvertent Forfeitures*

A threshold problem with viewing *Sykes* as concerned only with intentional forfeitures is that in some cases counsel's conduct cannot be confidently labeled as either purposeful or inadvertent.[164] Indeed, the Justices could not agree on a category for John Sykes' counsel. The majority merely noted that no explanation was given for the failure to object to the admission of testimony about defendant's statement to the police.[165] Justice Stevens' concurrence, however, carefully examined counsel's decision and concluded that there was probably a strategic reason for the failure.

John Sykes' statement, the concurrence pointed out, was to a great extent in harmony with his trial testimony and in fact somewhat enhanced his defense because it demonstrated that he was a victim of provocation.[166] This might have persuaded the jury to convict him of a lower degree of murder. Police officers gave Sykes the appropriate warnings, and any claim that he was too intoxicated to understand them would have been inconsistent with his ability to recall the circumstances of the shooting. Even if a trial objection had been made and sustained, the

161. *Noia* involved the appellate stage of a criminal proceeding, which may distinguish the case from one involving a trial default. *See Sykes*, 433 U.S. at 88 n.12. *But see Appellate Forfeitures*, *supra* note 15, at 871-77 (acknowledging this distinction but concluding that *Sykes* nevertheless applies to defaults at the appellate stage). Yet the reference to the *Noia* facts may also reflect a recognition that it would be inappropriate to penalize an applicant facing a choice between two intolerable alternatives. *Noia*, 372 U.S. at 440. See *supra* note 138.

162. *See Sykes*, 433 U.S. at 90-91. In a similar vein, Justice Stevens' concurrence quotes with approval a lower court holding that even a deliberate choice by trial counsel should not preclude relief when "the result would be unjust." *Id.* at 94-95 n.1 (Stevens, J., concurring).

163. See *supra* note 51.

164. *See* Hill I, *supra* note 73, at 984; Tague I, *supra* note 113, at 155-56. See also Yackle, *supra* note 145, at 660 n.240, explaining the conflict felt by trial counsel testifying in subsequent collateral evidentiary hearings. Such counsel may face the choice of admitting embarrassing lapses or of impeding their former clients' habeas petitions by proffering strategic reasons for trial defaults.

165. *See Sykes*, 433 U.S. at 75.

166. *See id.* at 96 (Stevens, J., concurring).

statement would have been admissible for impeachment purposes.[167]

While Justice Brennan's dissenting opinion stated that habeas courts will be able to distinguish between intentional and inadvertent defaults,[168] he rejected Justice Stevens' analysis of counsel's motivation. Finding a possible tactical reason for the forfeiture "most implausible," he concluded that the *Sykes* case was a "typical" example of inadvertence.[169]

The majority may have been reluctant to leave the deliberate bypass standard in place because it would encourage the habeas applicant and his counsel to proffer self-serving characterizations of the trial forfeiture as inadvertent in order to receive an exemption from the *Noia* penalty.[170] Even if we assume, however, that most defaults are in fact the result of error,[171] the remaining question is whether the Court's establishment of the cause and prejudice requirement signals an end to the automatic granting of review to such defaults.

Some erosion in the intention/error dichotomy occurred even before the *Sykes* decision was rendered. The antecedent opinions in *Davis v. United States*[172] and *Francis v. Henderson*[173] did not appear to define cause as synonymous with inadvertence. In *Davis*, the district court held that lack of due diligence explained but did not excuse the default, and this conclusion was affirmed by the court of appeals and subsequently by the Supreme Court.[174] In *Francis*, the court of appeals did find that since petitioner had been represented by "a civil lawyer, unskilled in the intricacies of criminal practice,"[175] cause had been demonstrated, although prejudice had not.[176] This finding was left undisturbed by the Supreme

167. *See id.* at 96-97 (Stevens, J., concurring) (citing Harris v. New York, 401 U.S. 222 (1971), which held that a statement that would be inadmissible against defendant because of a violation of Miranda v. Arizona, 384 U.S. 436 (1966), could nevertheless be used to impeach him if he took the stand).

168. *See Sykes*, 433 U.S. at 101 n.3 (Brennan, J., dissenting).

169. *Id.* at 104 (Brennan, J., dissenting). The dissent further indicated its high threshold for a finding of strategic forfeiture by using as examples several cases where the trial judge had expressly pointed out the potential constitutional claim to the defense, or where counsel had raised such a claim and abandoned it. *See id.* at 104-05 (citing Murch v. Mottram, 409 U.S. 41, 43 (1972); Henry v. Mississippi, 379 U.S. 443, 448 n.3 (1965); Sanders v. United States, 373 U.S. 1, 18 (1963)).

170. See Justice O'Connor's reference in Engle v. Isaac, 456 U.S. 107, 134 (1982), to trial counsel's "alleged" unawareness of the constitutional claim, discussed *infra* notes 222-26 and accompanying text.

171. *See Sykes*, 433 U.S. at 104 (Brennan, J., dissenting); L. Yackle, *supra* note 137, § 83, at 338. See also *infra* note 394.

172. 411 U.S. 233 (1973).

173. 425 U.S. 536 (1976).

174. *Davis*, 411 U.S. at 238, 243. It should be noted, however, that Justice Rehnquist's majority opinion in *Davis* also expressed special concern about deliberate manipulation of court rules. *See id.* at 241.

175. Newman v. Henderson, 496 F.2d 896, 897-98 (5th Cir. 1974), *aff'd sub nom.* Francis v. Henderson, 425 U.S. 536 (1976).

176. *Id.* at 898. The court of appeals vacated and remanded the case to allow a determination of whether the facts showed "prejudice." *Id.* at 899.

Court, but the majority did not indicate that inadvertence would always satisfy the cause requirement. Indeed, Justice Brennan's *Francis* dissent expressed dismay about the Court's approval of a waiver which "would apparently take effect . . . whether or not mere inadvertence . . . accounted for the untimely challenge."[177]

Yet a head count of the Justices who have directly addressed the issue indicates that the ultimate application of the cause test to unintentional defaults may be a close question. Chief Justice Burger's view was indicated in a companion case to *Davis, Estelle v. Williams.*[178] The petitioner in *Estelle* had been in prison clothing during his state court prosecution; while a jailer had rejected his request to wear street clothing, no such request and no such objection was made at trial.[179] The Chief Justice's opinion for the Court held that petitioner had not been compelled to wear jail clothing, and therefore no habeas corpus relief was warranted.[180] He added in a footnote that there would be no significant difference between a failure resulting from strategy and one resulting from negligence: "It is not necessary, if indeed it were possible, for us to decide whether this was a defense tactic or simply indifference."[181]

By contrast, Justice White's concurring opinion in *Sykes* opted to equate cause with deliberate bypass,[182] and stated that defaults which are not a result of conscious determination, "such as ignorance of the applicable rules, would be sufficient to excuse the failure."[183] Justice Stevens' concurrence would limit binding forfeitures to reasonable decisions not to object.[184]

The split among the Justices with respect to treatment of inadvertent defaults becomes most evident in the *Sykes* dissenting opinion. Justices Brennan and Marshall identified the application of the new standard to

177. *Francis*, 425 U.S. at 550 (Brennan, J., dissenting).

178. 425 U.S. 501 (1976).

179. *Id.* at 509-10. There was evidence that the judge generally permitted "any accused who so desired to change into civilian clothes." *Id.* at 510.

180. *See id.* at 512-13. Had the trial court denied a request to wear street clothing, there would have been a constitutional violation because prison garb might prejudice the jury. *Id.* at 504, 512-13.

181. *Id.* at 512 n.9. Justice Powell's concurring opinion noted: "We generally disfavor inferred waivers of constitutional rights . . . . That policy, however, need not be carried to the length of allowing counsel for a defendant deliberately to forego objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection." *Id.* at 515 (Powell, J., concurring). This statement could of course be read as limited to the facts in *Estelle*, which arguably involved a trial strategy of seeking to evoke jury sympathy. Or, Justice Powell's reluctance to countenance inferred waivers could presage a reluctance to penalize an inadvertent error.

182. *Sykes*, 433 U.S. at 98 (White, J., concurring). A rider is attached, clarifying application of the test to decisions as to which defendant was not consulted: "The bypass rule . . . cannot always demand that the defendant himself concur in counsel's judgment." *Id.*

183. *Id.* at 99 (White, J., concurring).

184. *See id.* at 95-96 (Stevens, J., concurring). Justice O'Connor's views are discussed *infra* at notes 222-26 and accompanying text in the context of her opinion for the Court in Engle v. Isaac, 456 U.S. 107 (1982), a *Sykes* descendant.

such defaults as a "key issue" in the interpretation of cause and prejudice.[185] Concluding that "no standard stricter than *Fay*'s deliberate-bypass test" should be imposed,[186] they went on to anticipate counter-arguments to this view. Examination of the dissent's analysis will illustrate the Justices' divergent positions.

While acknowledging the value of encouraging the proffer of objections at the time when a trial error can still be cured, the dissent contended that denying subsequent habeas review is pointless. Loss of all state remedies would be sufficient to "induce greater care and caution."[187] In any event, "unintentional action of any kind generally is not subject to deterrence."[188]

One commentator has suggested that unintentional forfeitures can be deterred to some extent and offered an analysis of why such forfeitures occur.[189] Overburdened and underpaid attorneys may spend too little time on each case, and make too little effort to supplement their knowledge of new legal developments. Eliminating habeas review is "not likely to decrease materially" the number of defaults, however, because counsel may be unwilling to pay the personal or professional costs which would be required to reduce his caseload and continue his legal education.[190] A salutary recommendation is made: States could use both the carrot and the stick to induce counsel to be more careful.[191] Increased funding for court-appointed attorneys[192]—a critical corollary to a stricter forfeiture rule—should be combined with disciplinary action against inveterate de-

185. *Sykes*, 433 U.S. at 100 (Brennan, J., dissenting).

186. *Id.* at 112 (Brennan, J., dissenting).

187. *Id.* at 113 (Brennan, J., dissenting). But see *infra* note 384 and accompanying text for examples of strategic bypass.

188. *Id.* at 113 (Brennan, J., dissenting). This assumption is not shared by legislatures that devise criminal penalties for reckless or negligent acts. *See, e.g.*, New York Penal Law §§ 125.10, 125.15, 15.05(3), 15.05(4) (McKinney 1975) (criminally negligent homicide, manslaughter and definitional provisions).

In the context of trial defaults, attorneys may strive to avoid being personally embarrassed by being named in a decision critical of their trial errors. *See, e.g.*, Johns v. Perini, 462 F.2d 1308, 1310, 1314-15 (6th Cir.), *cert. denied*, 409 U.S. 1049 (1972).

189. *See Defaulted Constitutional Claims, supra* note 113, at 1006.

190. *Id.* The Note suggests that these costs may be loss of time for other professional or personal activities and enrollment fees for courses in continuing legal education. *See id.* The author concludes that habeas review should always be available for claims inadvertently defaulted. *See id.* at 1004; *see also* Seidman, *supra* note 110, at 467 (arguing that "[t]he financial realities of criminal defense work may make it more profitable for an attorney to 'lose' quickly than to pursue every conceivable remedy for his client").

191. *See Defaulted Constitutional Claims, supra* note 113, at 1000-02.

192. *Id.* at 1000. Thus, individual public defender caseloads would be decreased because a larger staff would be available. More talented and experienced lawyers would be attracted to public defender offices and accept court appointment of cases involving indigent defendants. *See id.* at 1000-01. Justice O'Connor has concluded that because the need for representation of the indigent cannot be met only by legal services offices or low cost clinics, attorneys must recognize their social responsibilities by volunteering their services where necessary. O'Connor, *Legal Education and Social Responsibility*, 53 Fordham L. Rev. 659, 661 (1985).

faulters.[193] Such state action would directly affect attorneys who represent criminal defendants.

By contrast, denial of a federal writ has a direct impact on the client rather than his lawyer.[194] Justice Brennan's dissent in *Sykes* therefore concluded that such a sanction is "misdirected" as to inadvertent defaults but not, paradoxically, as to intentional ones.[195] While a defense attorney must be given authority to conduct the trial without consultation on each point, no federal habeas consequence should attach unless the attorney "knowingly applied his professional judgment in his client's behalf."[196]

The power of counsel to bind his client, Justice Brennan pointed out, is more appropriate in a civil than a criminal case.[197] A lawyer in civil litigation may be considered an agent acting on behalf of a principal, consensually vested with authority to bind that principal. Conversely, counsel for an indigent criminal defendant is often imposed on him rather than selected by him.[198] The dissent's thesis was that the habeas applicant should not be penalized for his lawyer's errors because he has not authorized them and cannot control them. The difficulty with this thesis is that it proves too much. The indigent whose counsel negligently defaults on a constitutional claim has not retained such counsel, but

193. *Defaulted Constitutional Claims, supra* note 113, at 1002.

194. Indeed, state trial counsel may not be representing the defendant in his federal habeas proceeding. *See* Committee on Civil Rights, *Pending Legislation to Amend the Federal Habeas Corpus Statutes*, 35 Rec. A.B. City N.Y. 124, 135 (1980). Nevertheless, trial counsel may be motivated to secure his client's release either at trial, or in the event of conviction at a later time when reprosecution would be difficult. He may also wish to avoid personal criticism for trial errors. See *supra* note 188.

195. *See Sykes*, 433 U.S. at 101-02, 113-14 (Brennan, J., dissenting).

196. *Id.* at 114 n.13 (Brennan, J., dissenting). Perhaps the dissent's reference to the appropriateness of denying federal relief if counsel exercised judgment "in his client's behalf" implies a distinction between omissions which could benefit the client and those which could not. The latter might escape penalty. This would parallel the tenuous differentiation discussed *supra* in Pt. I.B.3.a. between "rational" and "irrational" decisions, a differentiation not embraced by the *Sykes* majority and concurring Justices. In any event, the convicted defendant has derived no "benefit" from counsel's default regardless of the reasons for it.

197. *See Sykes*, 433 U.S. at 114 n.13 (Brennan, J., dissenting).

198. *Id.* at 114 (Brennan, J., dissenting). See also discussion of the possible disadvantages of being represented by assigned counsel in Spritzer, *supra* note 113, at 509; Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 Ariz. L. Rev. 443, 455-56 (1977); Note, *Habeas Corpus—Limiting the Availability of Habeas Corpus After A Procedural Default*, 73 J. of Crim. Law and Criminology 1612, 1636 n.168 (1982); Note, *Habeas Corpus—The Supreme Court Defines the* Wainwright v. Sykes *"Cause" and "Prejudice" Standard*, 19 Wake Forest L. Rev. 441, 462 (1983). The *Sykes* dissent also argues that penalizing inadvertent errors would mean that the state, which drafts rules of procedure and decides which attorneys shall be admitted to practice, would in essence "determine whether a habeas applicant will be permitted the access to the federal forum that is guaranteed him by Congress." *Sykes*, 433 U.S. at 107 (Brennan, J., dissenting). This conclusion overlooks the sixth amendment limitations on the effect of an unlucky assignment of counsel. See *infra* notes 253-59 and accompanying text. Moreover, the cause and prejudice requirement does not apply unless the state procedural rule violated by the habeas applicant is valid. See *infra* note 297.

neither has the indigent fortuitously represented by a deliberate manipulator of state procedures. In both cases, defendant may lack the technical knowledge to instruct his attorney on the handling of trial issues;[199] in both, denial of habeas review primarily affects the client rather than the lawyer.[200]

Protection of the client against such a consequence could of course be accomplished by a no-forfeitures rule which would provide for automatic granting of federal habeas review and disposition of the petition on the merits.[201] This approach would not only directly contravene the state interests cited by the majority,[202] but would have significant implications for the congressionally mandated policy that state remedies must be exhausted before the writ issues.

Under 28 U.S.C. § 2254(b), the habeas petitioner must resort to effective remedies "available in the courts of the State."[203] This provision refers to corrective procedures which are still available at the time petitioner applies to the habeas court for relief.[204] The exhaustion requirement permits states the first opportunity to determine the validity of

199. See *supra* note 153 and accompanying text for a discussion of Chief Justice Burger's *Sykes* concurrence on this point.

200. One possible impact on counsel if habeas review is denied on the basis of an inexcusable default would be a malpractice suit. *Cf.* Tague I, *supra* note 113, at 155 (noting possible result of ineffective representation).

201. Another approach would be to require defendant's advance consent to all binding forfeitures, but this was precisely what the *Sykes* concurring Justices rejected because consultation on the numerous legal points which arise during the trial proceeding would be impracticable. *See Sykes*, 433 U.S. at 93 (Burger, C.J., concurring); *id.* at 94-95 (Stevens, J., concurring). See *supra* notes 143, 152 and accompanying text. The dissenting Justices also seemed to acknowledge the validity of this conclusion. *See Sykes*, 433 U.S. at 116 (Brennan, J., dissenting). See *supra* note 156 and accompanying text. In addition, such client authorization may in some cases be only a nominal consent. Chief Justice Burger's concurrence suggested that even an educated layman may not be in a position to understand and to participate meaningfully in decisions about technical trial issues. *See Sykes*, 433 U.S. at 93 (Burger, C.J., concurring) (quoting Gideon v. Wainwright, 372 U.S. 335, 345 (1963)). See *supra* note 153 and accompanying text.

202. See *supra* Pt. I.B.3.a.

203. 28 U.S.C. § 2254(b) (1982). Similarly, subsection (c) provides that an applicant shall not be deemed to have exhausted state remedies "if he has the right . . . to raise, by any available procedure, the question presented." *Id.* § 2254(c).

Section 2254 codified the Supreme Court's holding in *Ex parte* Royall, 117 U.S. 241 (1886), where a state defendant sought pre-trial habeas on the grounds that he had been indicted under an unconstitutional statute. *Id.* at 242-45. The Court acknowledged the federal judicial power to entertain the petition, but held that as a matter of comity the writ had been properly dismissed pending consideration of the issue at the state trial. *See id.* at 252-54. *But see* Irvin v. Dowd, 359 U.S. 394, 403-06 (1959) (section 2254 requires exhaustion); Darr v. Burford, 339 U.S. 200, 210-14 (1950) (same); *Ex parte* Hawk, 321 U.S. 114, 116-17 (1944) (per curiam) (same).

204. *Noia*, 372 U.S. at 434-35, so interpreted § 2254(b) and *Sykes* did not disturb this finding. Nor did either decision dispose of the petition merely by holding that because petitioner had failed to comply with state rules at the time of trial, he could not be heard to complain that exhaustion was no longer possible.

challenges to state convictions,[205] and the Supreme Court has described it as "rooted in considerations of federal-state comity" and based on " 'a proper respect for state functions.' "[206] A judicial ruling that a petitioner who fails to follow state procedures available at the time of trial will therefore never have to exhaust them would not literally violate the federal provision. However, such a pronouncement would hardly demonstrate respect for state functions, or for the congressional intent evidenced in the habeas corpus statute.

The *Sykes* dissenters seemed to prefer a system which would immunize any client from penalty arising out of counsel's default, but the division they proposed between intentional and nonintentional forfeitures[207] would not achieve that aim. The majority, recognizing that automatic immunity would be inappropriate, developed a different approach which centered on the reasons for the trial attorney's default and the harm arising from that default,[208] rather than on a distinction between bypass and inadvertence.

The Court stressed its concern that cause and prejudice be interpreted so as to prevent a miscarriage of justice.[209] The majority appears to have concluded that this concern may well require looking beyond labels. Thus, some deliberate defaults should still lead to the granting of review;[210] some inadvertent defaults should not if the degree of prejudice is slight.[211]

Yet without a more precise definition of cause and prejudice, neither the *Sykes* purpose of "narrowing" the prior *Noia* standard nor its purpose of avoiding miscarriages of justice can be implemented. As will be seen below,[212] an undefined threshold test may lead to judicial "bypass," with circuit courts reaching the merits of habeas petitions rather than risking misapplication of the standard.[213] Moreover, those courts which do attempt to apply the new rule will remain in conflict with each other, and will therefore be unable to provide uniformly fair results to federal litigants.

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205. *See* 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, 814-15 (1981).

206. Preiser v. Rodriguez, 411 U.S. 475, 491 (1973) (quoting Younger v. Harris, 401 U.S. 37, 44 (1971)). See *supra* notes 67, 69.

207. *Sykes*, 433 U.S. at 101-02 (Brennan, J., dissenting).

208. *Id.* at 91.

209. *Id.* at 90-91.

210. The Court refrained from concluding that as to the facts in *Noia*, and the choice presented there between accepting a life term or risking a death sentence, habeas should be barred merely because the choice was deliberate. *See id.* at 88 n.12.

211. See the standard suggested *infra* at Pt. II. which would link habeas review of negligently defaulted claims to the degree of prejudice demonstrated by petitioner.

212. See *infra* Pt. I.D.

213. *See* Tague II, *supra* note 145, at 21-22.

4. The Progeny of *Sykes*

Additional ramifications of the *Sykes* test emerged in *Engle v. Isaac*[214] and *United States v. Frady*.[215] *Isaac* provides further grist for determining whether and when inadvertence constitutes cause, while *Frady* interprets the prejudice prong of the test. Both supply valuable insight into the link between the *Sykes* requirement and the habeas petitioner's innocence.

a. Isaac *and Cause*

In *Engle v. Isaac*, three habeas applicants who were respondents in the Supreme Court had been convicted in unrelated cases, but each had failed to comply with an Ohio rule mandating contemporaneous objections to erroneous jury instructions concerning self-defense.[216] Justice O'Connor's opinion for the majority stressed the importance of the state's interest in prompt assertions of alleged constitutional error at a criminal trial, and balanced the "honored position" of habeas corpus against the writ's "significant costs."[217] These costs include not only finality concerns, but also frustration of the state's primary responsibility to define crimes and punish them.[218] Habeas intervention may overturn a conviction at a time when reprosecution may be difficult or impossible.

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214. 456 U.S. 107 (1982).

215. 456 U.S. 152 (1982).

216. Engle v. Isaac, 456 U.S. 107, 110 (1982). Isaac was indicted on a charge of felonious assault for the severe beating of his ex-wife's male friend. Respondent claimed self-defense, arguing that the victim had initiated the fight. Isaac was ultimately convicted of the lesser offense of aggravated assault. *Id.* at 114. Respondent Bell was indicted for aggravated murder. He was one of a group of bartenders who had agreed to aid one another. Bell responded to such a call, and was told that the men causing the disturbance had left. He followed them, shooting one of the men. Bell's defense was that a bartender had warned him that a member of the party had a gun. *Id.* at 113. Respondent Hughes was also charged with aggravated murder. He had shot and killed a male friend of his former girlfriend. Hughes contended that the victim, who was larger than he, had touched his pocket while coming towards Hughes. *Id.* at 112. All three respondents challenged their convictions on the grounds that Ohio had changed the burden of proving self-defense, shifting it to the prosecution once defendant has introduced some initial evidence on this issue. *Id.* at 110-11. At trial, however, jury instructions placed the burden of proof as to self-defense on the respondents rather than on the state. *Id.* at 112-14.

217. *See id.* at 126-28.

218. *Id.* at 127-28. In addition, Justice O'Connor noted, the morale of state judges suffers when their work is redone by their federal counterparts. *Id.* at 128 n.33; *see also* O'Connor, *supra* note 205, at 814-15 (federal courts should "defer to the state courts and give finality to their judgments on federal constitutional questions where a *full* and *fair* adjudication has been given in the state court") (emphasis in original). The *Isaac* majority also adopted the suggestion of Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit and Professor Paul J. Bator that absence of finality frustrates deterrence and rehabilitation because the former depends on swift and certain punishment and the latter on the convicted defendant's knowledge that he is in need of rehabilitation. *See Isaac*, 456 U.S. at 127-28 n.32 (citing Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 146 (1970)).

Yet a defendant's prior procedural default has prevented both trial and appellate courts from correcting constitutional defects.[219]

Respondents attempted to meet the cause requirement by arguing that although it was later held that Ohio could not constitutionally shift the burden of proving self-defense to them, they were unable to anticipate this due process defect at the time of their trials.[220] Furthermore, they urged that objection would have been futile because Ohio traditionally required defendants to prove this affirmative defense.[221] Much of the majority's opinion explored the circumstances under which the failure to raise a novel claim becomes a binding forfeiture. In the course of this exploration, several references were made to the effect of an inadvertent default. Justice O'Connor noted:

> Counsel might have overlooked or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause . . . .[222]

This passage can be interpreted as establishing the fungibility of "overlooking" and "choosing."[223] Or, the thrust of it may be that where a claim is in the public domain, an *allegation* of unawareness would be difficult to credit and therefore insufficient to meet the cause requirement.[224]

Under the first interpretation, the majority was expressing a basic doctrinal conclusion that the costs of the writ may outweigh the costs of

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219. *See Isaac*, 456 U.S. at 127-28.

220. *Id.* at 130. See *infra* notes 356-58, 369 and accompanying text for a discussion of the Court's treatment of the novelty issue.

221. *Isaac*, 456 U.S. at 130. In a footnote, the Court found that the decision to withhold a claim on grounds of futility resembles a deliberate bypass. Because the cause and prejudice standard is "more demanding" than the *Noia* test, futility cannot constitute cause per se. *Id.* at 130 n.36.

222. *Id.* at 133-34. The majority also held: "We do not suggest that every astute counsel would have relied upon *Winship* to assert the unconstitutionality of a rule saddling criminal defendants with the burden of proving an affirmative defense. Every trial presents a myriad of possible claims." *Id.* at 133. Because the Court follows this passage by noting that counsel might have overlooked or discounted this line of defense, *id.* at 133-34, it can be read as a comment on the difference between incompetent counsel and counsel who negligently fails to raise a claim. Even an "astute" attorney could forget one of a panoply of possible defenses. *See* L. Yackle, *supra* note 137, § 86, at 177 (Supp. 1984).

223. The Government's amicus curiae brief argued that the cause requirement cannot be satisfied merely by contending that the failure to object was an oversight. *See* Brief for the United States as Amicus Curiae at 12-16, Engle v. Isaac, 456 U.S. 107 (1982); *Isaac*, 456 U.S. at 133-34; L. Yackle, *supra* note 137, § 86, at 170 (Supp. 1984).

224. *See* L. Yackle, *supra* note 137, § 86, at 178 (Supp. 1984).

penalizing counsel's error; thus, district courts should not automatically equate cause with inadvertence. Under the second interpretation, the Court was merely expressing skepticism about the assertion of ignorance proferred by Isaac's trial counsel, yet this narrower finding would also have significant implications for future inadvertence cases.

Such cases would now require a more searching look at whether counsel had in fact forgotten the constitutional objection; his statement of ignorance would not suffice. Moreover, if assertions of unawareness are regarded as questionable with respect to a newly emerging constitutional claim,[225] as in *Isaac*, these assertions would be even more difficult to credit when the claim is a familiar one.[226]

Isaac also addressed the central question of how the *Sykes* standard relates to the defendant's guilt or innocence. Respondents had urged that this standard should apply only to cases in which the defect would not affect the truth-finding process.[227] On the one hand, Justice O'Connor rejected this contention, noting that "[t]he costs outlined above do not depend upon the type of claim raised by the prisoner. While the nature of the claim may affect the calculation of cause and actual prejudice, it does not alter the need to make that threshold showing."[228] On the other hand, the language of the rejection sustained the propriety of according leniency when the new requirement is applied to violations which affect the petitioner's innocence. This reading of the majority's view is strengthened by a statement later in the decision: "[W]e are confident that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard."[229]

Thus, three levels of scrutiny may be envisioned in making the "calcu-

225. See *infra* Pt. II.B.1. for a further discussion of the Court's treatment of novelty claims.

226. In a terse footnote, the *Isaac* majority made one further reference to inadvertence: "Counsel's default may stem from simple ignorance or the pressures of trial. We noted in *Sykes*, however, that a defendant's counsel may deliberately choose to withhold a claim in order to 'sandbag'—to gamble on acquittal while saving a dispositive claim in case the gamble does not pay off." *Isaac*, 456 U.S. at 129 n.34. On its face, this reference does no more than describe two possible reasons for a failure to make an objection. The second reason received more emphasis and implicitly more censure. However, in the context of the holding that counsel's claim of ignorance does not constitute cause, the footnote may be a further indication that Justice O'Connor did not consider the distinction between inadvertence and deliberate bypass to be critical.

Chief Justice Burger and Justices White, Powell, and Rehnquist joined Justice O'Connor's opinion. *See id.* at 109. *But see Sykes*, 433 U.S. at 98-99 (White, J., concurring) (endorsing the distinction between deliberate and inadvertent failure). See also *supra* Pt. I.A. for a discussion of the Court's equivocal handling of inadvertence in Reed v. Ross, 104 S. Ct. 2901 (1984), in which Justices White and Powell joined in the majority.

227. *See Isaac*, 456 U.S. at 129. The respondents emphasized that, unlike the *Miranda* violations claimed in *Sykes* which did not affect the determination of guilt, the allegedly erroneous jury instructions on self-defense related directly to the guilt or innocence of the prisoners. *See id.*

228. *Id.*

229. *Id.* at 135. Note that both prongs of this standard are described as more easily satisfied by an arguably innocent defendant. Nevertheless, *Isaac* held that both prongs

lation" to which the majority referred: (1) lenient, where defendant makes a colorable showing of innocence;[230] (2) median, where the impact of the alleged constitutional violation on the truth-finding processes at trial is speculative;[231] (3) strict, where the constitutional violation invoked has no relation to defendant's innocence.[232]

b. Frady *and Prejudice*

The unadorned reference to "actual prejudice" approved in *Sykes* was given additional embellishment by Justice O'Connor's opinion for the majority in *United States v. Frady*,[233] which involved an admittedly guilty habeas applicant. Defendant was convicted of first degree murder after an exceptionally brutal "hit man" killing,[234] and his claim reached the Supreme Court nineteen years after the crime occurred. Frady, the respondent, conceded that the evidence against him was "overwhelming"[235] but argued that jury instructions given without objection at his trial in a District of Columbia court constituted "plain error" under Rule 52(b) of the Federal Rules of Criminal Procedure because they improperly precluded the possibility of a manslaughter verdict.[236]

On direct appeal of a federal conviction, the "plain error" doctrine[237] may override the requirement that a defendant make a contemporaneous objection to erroneous jury instructions.[238] A default would therefore not be binding. Justice O'Connor noted that the "plain error" to which Rule 52(b) refers must affect substantial rights, and becomes operative " 'if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.' "[239] Respondent urged that the same standard should govern a federal prisoner's

must be separately met. *See id.* at 134 n.43. See the discussion of miscarriage of justice in the definitional portion of this Article, *infra* Pt. II.

230. See *infra* Pt. II.A.1.

231. See *infra* Pt. II.A.1.

232. See *infra* Pt. II.A.

233. 456 U.S. 152 (1982).

234. Frady and his accomplice were covered with the dead man's blood when they were captured by the police while fleeing from the victim's residence. The deceased's neck and chest had wounds from the metal heel plates on Frady's boots, and one of his eyes had been knocked out. *Id.* at 154-55.

235. Respondent had filed a pro se brief in the circuit court containing this admission. *Id.* at 156 & n.1. However, he had denied his guilt at trial, stating that the real murderer had escaped while the police were apprehending the respondent. *Id.*

236. *Id.* at 157-58. The death sentence was imposed on Frady, but it was set aside in the United States Court of Appeals for the District of Columbia, and he was resentenced to life imprisonment. *Id.* at 156-57. Frady sought to vacate this sentence, claiming that if the jury had been properly instructed on the meaning of malice, he might have been convicted only of manslaughter. *Id.* at 157-58.

237. Fed. R. Crim. P. 52(b) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

238. Fed. R. Crim. P. 30 provides in part that objections to jury instructions must be presented "before the jury retires to consider its verdict."

239. *Frady*, 456 U.S. at 163 n.13 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

collateral challenge.[240]

The majority rejected this argument, holding that once a defendant has completed the appellate process and has had an adequate opportunity to present his claims, a presumption that his conviction is proper arises.[241] The Court reaffirmed that the burden of establishing plain error on collateral review is " *'even greater'* " than would be required on direct appeal.[242] Thus, an erroneous jury instruction would not aid respondent unless he could meet the *Sykes* test.[243]

The plain error doctrine and the concept of miscarriage of justice were linked several times in the course of the majority's decision.[244] Plain error, however, stems from the nature of the challenged violation, while miscarriage of justice appears to relate directly to the question of the habeas applicant's innocence. Justice O'Connor stated: "We perceive no risk of a fundamental miscarriage of justice in this case."[245] She emphasized that such a conclusion would not have been reached if Frady had presented affirmative evidence indicating that he was innocent of the

240. *Id.* at 162-64. 28 U.S.C. § 2255 (1982) provides for collateral attack on a federal conviction. If the applicant alleges that sentence was imposed in violation of the Constitution, he may move in the sentencing court for relief. The court may "vacate, set aside, or correct the sentence." *Id.*

241. *Frady*, 456 U.S. at 164. Justice Blackmun's concurrence concluded that comity does not apply to federal prisoners and that finality is also irrelevant because the plain error doctrine constitutes an exception to Fed. R. Crim. P. 30's mandate that timely objections to instructions be made. *Id.* at 176-77 (Blackmun, J., concurring).

242. *Id.* at 166 (quoting Henderson v. Kibbe, 431 U.S. 145, 154 (1977)) (emphasis in original). The majority acknowledged that *Kibbe* involved a state rather than a federal court conviction, and that therefore comity and federalism were implicated. Nevertheless, the Court held that finality was of equal concern to both federal and state forums. *See id.* at 166. In any event, Frady had had the opportunity to present his claims in federal trial and appellate courts. *Id.*

The technical support for the majority's holding was extensively criticized by the dissent. Justice Brennan charged that the majority's opinion had failed to consider "the explicit congressional distinction between § 2254, a *civil* collateral review procedure for *state* prisoners, and § 2255, a *criminal* collateral review procedure for *federal* prisoners." *Id.* at 181 (Brennan, J., dissenting) (footnotes omitted) (emphasis in original). Thus, the federal collateral attack should not be governed by a different rule than appeal of a federal conviction, because both would be part of the original criminal proceeding. *Id.* at 184.

243. *See id.* at 167-69.

244. The Court stated that Rule 52(b), which governs plain error, "was intended to afford a means for the prompt redress of miscarriages of justice," *id.* at 163 (footnote omitted), and quoted lower courts' holdings that the rule should be utilized "sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result," *id.* at 163 n.14. This seems to equate the two concepts; indeed, Jutice Blackmun's concurrence suggested that recognition of the plain error doctrine on collateral review would not conflict with the *Sykes* requirement. *See id.* at 175 (Blackmun, J., concurring).

On the other hand, the majority also referred with approval to reversal of errors which are obvious. *See id.* at 163. Thus, plain error would apply even where no miscarriage of justice has occurred. This interpretation would be consonant with the Court's conclusion that the burden of overcoming a prior failure to make a trial objection is greater on collateral than on direct review. *See id.* at 166.

245. *Id.* at 172.

homicide for which he was convicted.[246]

The majority also concluded that respondent had been unable to show that "he suffered such . . . prejudice that reversal of his conviction 19 years later could be justified."[247] Prejudice was defined as a test of actuality, not possibility. The habeas petitioner must show that errors of constitutional dimension substantially disadvantaged him[248] and "so infected the entire trial that the resulting conviction violates due process."[249] The fact that a jury instruction is invalid is insufficient; the judge's entire charge to the jury and the "total context of the events at trial" must be assessed.[250]

It is significant that the Court used the term "innocent" in two senses, both of which can form the basis for a finding of prejudice.[251] Defendant may be altogether innocent of the crime with which he is charged. Or, he may be innocent of the *degree* of the crime for which he was convicted, but guilty of a lower degree which would carry a shorter sentence. Frady failed even the second test, as he "never presented colorable evidence . . . [of] such justification, mitigation, or excuse that would reduce his crime from murder to manslaughter."[252]

Innocence and prejudice are therefore more inclusive concepts than miscarriage of justice. Prejudice may result from a constitutional error substantially affecting the degree of the challenged conviction and the

246. *See id.* at 171.

247. *Id.* at 172. Note that the *Frady* Court did not reach the question of cause because it disposed of respondent's claims on the grounds of prejudice, *see id.* at 175, while the *Isaac* majority did not reach the question of prejudice because it disposed of respondents' claims on the grounds of cause, *see Isaac*, 456 U.S. at 135. This reaffirms not only the doctrinal matter of the severability of the two requirements, but also the practical corollary that the district court may dispose of petitioner's case by dealing only with the weakest prong.

248. *Frady*, 456 U.S. at 170.

249. *Id.* at 169 (quoting with approval from Justice Stevens' opinion in Henderson v. Kibbe, 431 U.S. 145, 154 (1977)). *But see* Yackle, *supra* note 145, at 646 n.170 (pointing out that the *Kibbe* discussion concerned the requirements for finding a constitutional violation rather than for hearing a constitutional claim).

250. *Frady*, 456 U.S. at 169.

251. Factual and legal guilt were not expressly distinguished. See *infra* notes 306-11 and accompanying text.

252. *Frady*, 456 U.S. at 171. Frady did not argue at trial that he lacked malice at the time of the murder. Rather, respondent claimed that he did not commit the crime. However, on appeal Frady dropped this theory in light of the overwhelming evidence against him. The record indicated further that there was premeditation and " 'malice aplenty.' " *Id.* Prior to the murder, respondents were overheard discussing the fact that they were hired to kill the deceased. Gloves were brought to the scene of the crime and there were no finger prints on the weapon. *Id.* at 171-72. "Finally, there was the unspeakable brutality of the killing itself." *Id.* at 172. See *supra* note 234. Justice Stevens in his concurrence similarly noted that Frady failed to demonstrate prejudice. *See id.* at 175 (Stevens, J., concurring). Justice Brennan's dissent acknowledged this lack of prejudice, stating that "if the Court had concluded that there was not 'plain' error, it might be difficult to support a dissent from that conclusion, given the particular facts of this case." *Id.* at 187 (Brennan, J., dissenting).

proportionality of defendant's sentence. This would be a subset of innocence unlikely to rise to a "fundamental miscarriage of justice" level.

C. *Incompetent Counsel and the Prejudice Definition*

While the Supreme Court has not yet provided specific content for the critical *Sykes* terminology, it has recently issued significant guidelines as to claims of ineffective assistance of counsel. *Strickland v. Washington*[253] interpreted the sixth amendment right to an attorney in all criminal prosecutions, which in turn enhances the fundamental right to a fair trial.[254] The Court provided an illuminating analysis of the degree of prejudice that a defendant must show in order to invalidate a conviction because of errors by counsel.

Justice O'Connor's opinion for the majority noted that where counsel has arguably been ineffective, a critical element required for a fair trial may be missing.[255] Thus, the government's interest in finality would be weaker than in cases in which all the essential components of a "presumptively accurate and fair proceeding were present."[256] The habeas applicant must prove not only that his attorney's performance was deficient but also that he was prejudiced by this deficiency.[257] However, the test for prejudice is less stringent where the finality concern is more questionable. Rejecting a test which would require demonstrating by a preponderance of the evidence that counsel's errors "determined the outcome" of the trial,[258] the Court held: "[D]efendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result . . . would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[259]

The second sentence of this explanation is essential to dispel a misconception which might otherwise be created by the first. The words "reasonable probability" might be read to be outcome-determinative—

253. 104 S. Ct. 2052 (1984).

254. *Id.* at 2063. See *Strickland*'s companion case, United States v. Cronic, 104 S. Ct. 2039, 2043 (1984).

255. *Strickland*, 104 S. Ct. at 2064.

256. *Id.* at 2068. Since the fundamental fairness of the proceeding is challenged, and the finality interest diminished, ineffectiveness claims will be governed by the same standards on both direct and collateral review. *Id.* at 2070. The majority distinguished *Frady* and *Isaac*, noting that "the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment." *Id.*

257. *Id.* at 2068.

258. *Id.* Also rejected was a proposed test at the other end of the leniency spectrum, which would merely have required a showing that the error affected the outcome, because "[v]irtually every act or omission of counsel would meet that test." *Id.* at 2067.

259. *Id.* at 2068. In United States v. Cronic, 104 S. Ct. 2039 (1984), Justice Stevens' opinion for the majority identified several circumstances which are so likely to produce prejudice that "the cost of litigating their effect in a particular case is unjustified." *Id.* at 2046-47. These include lack of counsel, lack of "meaningful adversarial testing," and counsel's conflict of interest. *Id.* at 2047-48 & n.28.

probably defendant would have been acquitted but for his lawyer's mistake.[260] Yet this is the very test that the majority found to be too stringent. By defining a "reasonable probability" as one which undermines confidence in the verdict, the Court was in effect requiring a reasonable possibility rather than a probability that the result would have been different.[261]

To what extent could the *Strickland* definition be serviceable for *Sykes* situations, or alternatively, to what extent could the unsuitability of the *Strickland* definition in such habeas situations aid in determining what prejudice under *Sykes* should mean?[262] Presume that Steel, a habeas petitioner, has based his contention that trial counsel was incompetent on a single egregious mistake.[263] Another petitioner, Nickel, presents a constitutional claim on which his attorney has defaulted at trial, but he argues that there was cause for the default.

Because the state's interest in finality would be much stronger in Nickel's case, his burden of showing prejudice should be heavier than Steel's. *Frady* stressed the respect due to a final judgment[264] and the

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260. The word "probable" may be defined as "reasonably, but not certainly, to be . . . expected." Webster's New International Dictionary (2d ed. 1959) (unabridged). However, it can also be understood to signify "[h]aving more evidence for than against." *Id.* The Court does not seem to be using the word in the latter sense.

261. *Strickland* cites United States v. Agurs, 427 U.S. 97 (1976), as a precursor of the "reasonable probability" test. *See* 104 S. Ct. at 2068. Justice Stevens in his opinion for the majority in *Agurs* stated:

> [If] omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed . . . . If there is no reasonable doubt about guilt . . . there is no justification for a new trial. On the other hand if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Agurs, 427 U.S. at 112-13.

262. Our inquiry into cause is not materially aided by rulings on incompetent counsel. Deprivation of an attorney's effective assistance would be cause per se. *See* Sincox v. United States, 571 F.2d 876, 880 (5th Cir. 1978); Rinehart v. Brewer, 561 F.2d 126, 132-33 (8th Cir. 1977); Jiminez v. Estelle, 557 F.2d 506, 511 (5th Cir. 1977). See also *infra* note 411. Conversely, counsel's failure—for example, a failure to ask for a jury instruction on manslaughter in a homicide case in order to compel the jury to choose between acquittal and conviction for murder—might constitute neither incompetence nor cause. See *infra* note 384 and accompanying text. Other defaults, such as one motivated by a fear that making an objection would lead to consequences so punitive that reasonable counsel would avoid it, see *infra* Pt. II.B.2., might meet the cause test but fall short of establishing incompetence.

263. Generally, it is the totality of counsel's mistakes which leads to a sixth amendment reversal of a conviction on direct appeal or the granting of the writ on collateral review. *See* L. Yackle, *supra* note 137, § 86, at 196-97 (Supp. 1984). In some instances, however, a single error may be sufficient. *See, e.g.*, United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977) (failure of appointed attorney to challenge search of defendant's home); Lufkins v. Solem, 554 F. Supp. 988, 993-96 (D.S.D.) (failure of defense counsel to seek hearing on issue of voluntariness of confession), *aff'd*, 716 F.2d 532 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 2667 (1984).

264. *See* United States v. Frady, 456 U.S. 152, 164-65 (1982). While the *Frady* Court referred particularly to federal convictions, a similar rationale as to state convictions was set forth in *Sykes*. *See* 433 U.S. at 80.

increased weight such a judgment gains on collateral attack.[265] The connection between finality and the stringency of the prejudice test was also made: The required showing of prejudice is less demanding on direct appeal than on habeas.[266] The *Strickland* Court took the converse position, relating the lowered interest in finality to a lighter prejudice burden which would be the same on direct and collateral review.[267]

Strickland gives us a floor and a ceiling as to Nickel's burden. While higher than the one mandated for ineffective counsel cases, it is lower than the outcome-determinative test required, for example, in cases of newly discovered evidence.[268] In the latter situation, the defendant does not attack the fairness of the completed trial, but instead urges that proof subsequently found may demonstrate his innocence. Nickel, by contrast, alleges that the defaulted claim was of constitutional dimension and infected his entire trial. The appropriate prejudice test here will be discussed in detail in Part II.

D. *The Need for an Operative Definition*

In the court's most recent bout with the application of "cause and actual prejudice," *Reed v. Ross*,[269] there was for the first time unanimous acceptance of this requirement as governing habeas claims barred in state court by a procedural default. Ironically, it was also the first occasion on which a majority of the Justices indicated that rather than furnish operative content for the critical terms, as was promised or at least predicted in *Sykes*,[270] the Court should continue to do without such precision. The rationale offered in Justice Brennan's majority opinion was that there is a "broad range of potential reasons for an attorney's failure to comply with a procedural rule, and [a] virtually limitless array of contexts in which a procedural default can occur."[271]

Yet the dissenters in *Sykes*, now forming part of the majority in *Ross*, unequivocally condemned the "undefined" nature of the burden that the cause requirement places on habeas applicants, particularly the open question of whether the burden could be discharged by "attorney ignorance or error beyond the client's control."[272] The amorphous prejudice prong of the requirement was also criticized; Justices Brennan and Mar-

265. *Frady*, 456 U.S. at 164-65.

266. *Id.* at 166.

267. *See Strickland*, 104 S. Ct. at 2070.

268. *Id.* at 2068.

269. 104 S. Ct. 2901 (1984). See discussion of *Reed v. Ross supra* Pt. I.A.

270. *See Sykes*, 433 U.S. at 87, 91.

271. Reed v. Ross, 104 S. Ct. 2901, 2909 (1984).

272. *Sykes*, 433 U.S. at 116-17 (Brennan, J., dissenting). Similarly, in *Isaac*, dissenting Justices Brennan and Marshall criticized the majority's failure to keep its "promise" to define cause and prejudice in later cases, and noted that the Court "still refuses to say what 'cause' is . . . [b]ut . . . is more than eager to say what 'cause' is not." Engle v. Isaac, 456 U.S. 107, 144 (1982) (Brennan, J., dissenting).

shall noted that if prejudice were to be equated with harmless error,[273] the habeas courts would have to review the petitioner's trial record and could therefore as easily dispose of the petition on the merits as on the *Sykes* criteria.[274]

The continuing definitional vagueness has not had a salutary effect on the lower federal courts. Some circuits have attempted to supply content for the standard, but have reached conflicting results. The Eleventh Circuit, for example, has concluded that "ignorance and inadvertence cannot form the basis for cause under *Sykes*,"[275] while the Fifth Circuit has ruled that nonstrategic attorney conduct constitutes cause.[276]

In addition to the split on the meaning of cause,[277] lower courts have

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273. If a petitioner demonstrates that a constitutional violation has occurred, the writ may still be dismissed if the state can demonstrate that this violation was harmless beyond a reasonable doubt. See *infra* notes 328-33 and accompanying text.

274. *Sykes*, 433 U.S. at 177 (Brennan, J., dissenting). See *infra* note 338 and accompanying text.

275. Spencer v. Zant, 715 F.2d 1562, 1575 (11th Cir. 1983). The circuit court approved the lower court's position on inadvertence but found for the defendant on other grounds. *Id.* at 1575, 1583; *see* Smith v. Kemp, 715 F.2d 1459, 1471 (11th Cir.) (attorney unawareness of decision presenting constitutional claim does not establish "cause"), *cert. denied*, 104 S. Ct. 510 (1983); Dietz v. Solem, 677 F.2d 672, 675 (8th Cir. 1982) (respondents' claims were far from unknown at time of their trials and thus cause prong was not met); Gates v. Henderson, 568 F.2d 830, 844 n.6 (2d Cir. 1977) (en banc) (Oakes, J., concurring) (in light of the *Sykes* decision, "inadvertence on the part of trial counsel [does not meet] the *Francis* 'cause' standard"), *cert. denied*, 434 U.S. 1038 (1978). Some federal district courts have reached the same conclusion. *See* Porter v. Leeke, 457 F. Supp. 253, 259 n.7 (D.S.C. 1978) ("[A]n extension of the 'cause-prejudice' standard to situations involving inaction by counsel *not* rising to the level of malpractice would seem to emasculate the contemporaneous objection rule entirely." If attorney ignorance constituted cause the exception would "swallow the rule.") (emphasis in original); Ramsey v. United States, 448 F. Supp. 1264, 1272 (N.D. Ill. 1978) (" 'inadvertence' and inefficiency . . . [do] not constitute cause under *Sykes*"); United States v. Underwood, 440 F. Supp. 499, 502 (D.R.I. 1977) ("sheer inadvertence [does not] excuse the default").

276. Harris v. Spears, 606 F.2d 639, 644 (5th Cir. 1979). Other circuit courts have reached similar conclusions. *See* Carrier v. Hutto, 724 F.2d 396, 398 (4th Cir. 1983) ("under certain circumstances attorney error which is insufficient to make out a violation of the sixth amendment may nevertheless constitute 'cause' "); Garrison v. McCarthy, 653 F.2d 374, 378 (9th Cir. 1981) ("[I]n cases involving attorney inadvertence or ignorance, a lesser showing of incompetency of counsel should be sufficient for 'cause.' "); Jurek v. Estelle, 593 F.2d 672, 683 (5th Cir. 1979) ("attorney misfeasance can constitute 'cause' "), *cert. denied*, 450 U.S. 1001 (1981); Rachel v. Bordenkircher, 590 F.2d 200, 204 (6th Cir. 1978) ("failure to make timely objections . . . resulted from either inexperience, inattention or lack of knowledge of the law"; cause prong therefore is met); Farrow v. United States, 580 F.2d 1339, 1356-57 (9th Cir. 1978) ("[T]he degree of attorney inadvertence that would be necessary to constitute cause . . . would have to be resolved by careful application of *Sykes*."); Collins v. Auger, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978) (dictum) (" 'lack of knowledge of the facts or law would be sufficient cause' ") (quoting Collins v. Auger, 451 F. Supp. 22, 27-28 (S.D. Iowa 1977)), *cert. denied*, 439 U.S. 1133 (1979).

277. *See* Goodman & Sallett, Wainwright v. Sykes: *The Lower Federal Courts Respond*, 30 Hastings L. J. 1683, 1721 (1979). This split is also reflected in circuit court decisions concerning federal prisoners challenging their convictions. *Compare* Indiviglio v. United States, 612 F.2d 624, 630-31 (2d Cir. 1979) (citing Davis v. United States, 411 U.S. 233 (1973), rather than *Sykes* as a basis for concluding that inadvertence is not cause

produced divergent interpretations of prejudice.[278] Equally troubling is the judicial "bypass" of the *Sykes* requirement, noted by several commentators.[279] Rather than interpreting the presently undefined terminology and thus risking reversal, lower courts have been summarily holding against petitioners on the merits,[280] relying on alternative grounds for disposition of petitions,[281] or deciding the merits even after concluding that there is no jurisdiction to do so.[282]

Casualties of the refusal to provide guidance are the litigants in these lower court cases, whose rights vary in accordance with jurisdiction rather than jurisprudence. The "importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution" has been acknowledged by the Supreme Court for more than a century.[283]

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under Fed. R. Crim. P. 12(b)(2)), *cert. denied*, 445 U.S. 933 (1980) *with* United States v. Hall, 565 F.2d 917, 920 (5th Cir. 1978) (holding that inadvertence is cause under Fed. R. Crim P. 12(f)'s "for cause shown" language).

278. Respondent in Forman v. Smith, 633 F.2d 634 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981), had been convicted of second-degree murder in a New York state court. Under police questioning, and in the absence of counsel, Forman had related two different explanations for the killing, while denying his own guilt. These statements were used during the trial to prove that he had in fact shot the victim. Respondent sought habeas relief on sixth amendment grounds, claiming that his right to counsel during police questioning had not been waived. *Id.* at 641. In applying the *Sykes* prejudice test to respondent's claim, the Second Circuit stressed "the significance of the evidence admitted as a result of the constitutional error in relation to all the other evidence in the case." *Id.* at 642. Under this definition, the prejudice prong was not met because of other "overwhelming evidence of guilt." *Id.* Compare *Forman* with Myers v. Washington, 646 F.2d 355 (9th Cir. 1981), *vacated*, 456 U.S. 921 (1982), *aff'd on rehearing*, 702 F.2d 766 (9th Cir. 1983), in which respondent was also convicted of second degree murder. The evidence against him consisted of both a confession made to police and a similar statement made to a television reporter. *Id.* at 356-57. Respondent challenged his conviction on a number of grounds, including faulty jury instructions. The court granted the writ, finding the prejudice prong to be met because of "the crucial role the challenged jury instructions could have played in securing appellant's conviction." *Id.* at 360. The prejudice standard applied in *Myers* was much less stringent than that used in *Forman*. Another court chose a "colorable showing of innocence" interpretation. Robertson v. Collins, 466 F. Supp. 262, 270 (D. Md. 1979) ("The prejudice standard [serves] to . . . prevent the miscarriage of justice which results from convicting an innocent person.") (footnote omitted), *aff'd*, 624 F.2d 1095 (4th Cir.), *cert. denied*, 449 U.S. 961 (1980); *see* L. Yackle, *supra* note 137, § 87, at 351-54; *id.* § 87, at 199-202 (Supp. 1984); Goodman & Sallet, *supra* note 277, at 1700-07.

Goodman & Sallett point out that the colorable showing of innocence standard examines the question of factual guilt. Thus, the court would focus on both the tainted and untainted evidence equally, ultimately determining if the petitioner's factual guilt is in dispute. This standard may lead to different results than the legal guilt model utilized in harmless error cases. See *infra* notes 306-11 and accompanying text. For example, in the case of a *Miranda* claim, the tainted evidence may support the determination of guilt and the writ would probably be denied. Goodman & Sallett, *supra* note 277, at 1700.

279. See *infra* notes 280-82 and accompanying text.

280. L. Yackle, *supra* note 137, § 86, at 165 (Supp. 1984); *Defaulted Constitutional Claims, supra* note 113, at 987 & n.53.

281. L. Yackle, *supra* note 137, § 84, at 340 & n.14.

282. Tague II, *supra* note 145, at 22.

283. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 345 (1816) (emphasis added).

A coherent standard could promote uniformity in the development of federal rights while still retaining sufficient flexibility to avoid miscarriages of justice. In the related area of ineffective assistance claims, the Supreme Court was able to provide a precise core definition of the prejudice requirement which must be met by habeas petitioners.[284] However, the majority expressly declined to adopt a more complete standard which had been suggested by the lower court for assessing incompetence, listing several specific policy objections to such amplification.[285] Examination of these objections demonstrates that they do not present obstacles to elaboration of a cause test.[286]

First, the Court noted that although the sixth amendment does not list the components of effective assistance, the organized bar has issued standards that provide adequate guidance to lawyers. More detailed rules would interfere with counsel's independence and distract him from vigorous advocacy on behalf of his client.[287]

This rationale would be weaker in the context of defining cause for a default. Such a definition, focusing on omissions, need not cover the whole range of what constitutes trial competence. Advising the bar as to when an omission is binding on a client in a later habeas proceeding would not make counsel more dependent, merely better informed. If this information induces him to make a trial objection rather than to remain silent, it may contribute to *more* vigorous advocacy.[288]

The Court's next objection to the formulation of comprehensive competence standards was that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, . . . [but] simply to ensure that criminal defendants receive a fair trial."[289] Thus, deterrence of manipulative or reckless behavior was not relevent in *Strickland*.

This objection is inapplicable to the purpose of *Sykes*, in which Justice Rehnquist's opinion for the majority expressed concern about the effect

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Martin, which rejected a challenge to Supreme Court jurisdiction over state court judgments, did so on uniformity grounds equally applicable to federal judgments. *See also Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 103 (1868) (habeas proceedings attain uniformity only through appellate decisions); *cf.* Malloy v. Hogan, 378 U.S. 1, 11 (1964) (same standard in federal and state court for determining accused's fifth amendment privilege).

284. See *supra* Pt. I.C. discussing Strickland v. Washington, 104 S. Ct. 2052 (1984).

285. *See* Strickland v. Washington, 104 S. Ct. 2052, 2065-66 (1984). Justice Marshall vigorously dissented, arguing that such malleable standards compel the judiciary to resort to intuition. He concluded that merely advising attorneys to behave reasonably gives them no guidance. *Id.* at 2075 (Marshall, J., dissenting).

286. As indicated *supra* at notes 255-59 and accompanying text, the Court recognized the need for a precise definition of prejudice, and developed one in the context of the sixth amendment.

287. Strickland v. Washington, 104 S. Ct. 2052, 2065 (1984).

288. See *supra* note 192 and accompanying text, discussing suggestions for enhancing the level of criminal defense representation and deterring carelessness. Increased funding for appointed attorneys has been identified as crucial to both aims.

289. *Strickland*, 104 S. Ct. at 2065.

of the *Noia* standard on the conduct of defense lawyers.[290] The cause and prejudice test was intended in part as a disincentive to counsel who might withhold a constitutional claim at the trial level but introduce it on collateral review at a time when reprosecution might be difficult.[291]

Finally, the *Strickland* majority opposed more detailed guidelines because they would "encourage the proliferation of ineffectiveness challenges."[292] If defendant were convicted, "second trial[s]" concerning the quality of counsel's defense would increase.[293]

By contrast, elaboration of a cause definition would not create another trial about counsel's conduct. In *Strickland*, the constitutional claim was the attorney's defective performance; proof of the defect would have led to the granting of the writ. In *Sykes*, the underlying constitutional claim was not counsel's default but police conduct allegedly violative of the fifth amendment. Defendant's decision to press for habeas review would depend on the strength of this *Miranda* claim. Clarification of the cause requirement would not enhance the underlying constitutional argument and would therefore create no additional litigation.[294]

Thus, any negative side effects of formulating a more precise *Sykes* standard do not outweigh the benefits of enhancing consistency in the adjudication of federal rights. Such a standard could, of course, emanate

290. *See Sykes*, 433 U.S. at 89.

291. *Id.* at 88-89. Justice Rehnquist's opinion in *Sykes* implicitly recognizes this reprosecution problem by pointing out that "contemporaneous objection enables the record to be made . . . when the recollections of witnesses are freshest, not years later in a federal habeas proceeding. It enables the judge who observed the demeanor of those witnesses to make the factual determinations." *Id.* at 88. Similarly, Justice O'Connor, in her opinion for the Court in Engle v. Isaac, 456 U.S. 107, 127-28 (1982), states: "We must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time . . . may render retrial difficult, even impossible." See *supra* Pt. I.B.3.a.

292. 104 S. Ct. at 2066.

293. *Id.*

294. One commentator, writing before *Strickland* was decided, concluded:

> [T]he urgency of providing guidelines for determinations of ineffective assistance will be enhanced as more and more habeas petitions are denied because of the procedural defaults of marginally effective attorneys, consequently requiring prisoners who are thereby precluded from asserting other constitutional claims to allege incompetency of counsel, either as a means of satisfying the cause and prejudice requirements in *Sykes* or as a separate sixth amendment claim.

Rosenberg, *supra* note 110, at 430 (footnotes omitted). Professor Rosenberg is arguing that a narrow interpretation of cause and prejudice could induce habeas petitioners who are barred from presenting other constitutional claims to move these claims into the neighboring yard of ineffective assistance. This would create no new or additional litigation, but it might create strained judicial analyses of attorney incompetence if courts had to resort to this formulation to aid defendants deprived of a fundamentally fair trial. This is an argument *for*, not against, clarification of the standards governing cause, prejudice, miscarriage of justice and incompetent counsel. *See also* Canary v. Bland, 583 F.2d 887, 890 (6th Cir. 1978) (unclear whether defense counsel's failure to challenge introduction of a prior conviction constituted "cause" under *Sykes*; however, such failure constituted sufficient "prejudice" to establish a sixth amendment violation); Strazzella, *supra* note 198, at 475 (use of ineffectiveness claims to neutralize possible forfeitures is likely to increase).

from Congress[295] as an amendment to the habeas provisions set out in 28 U.S.C. § 2254. At present, however, the vacuum in the habeas statute as to defaulted claims[296] has been filled by the judiciary. If the Court retains its primary role in this area, it should establish a standard which is neither ossified nor so protean that lower courts will founder in attempting to follow it. The elements of such a standard are explored below.

II. DEFINING PREJUDICE, CAUSE, AND MISCARRIAGE OF JUSTICE

The Supreme Court has supplied the vocabulary for the cause and prejudice standard, and has indicated the diverse purposes that this standard is designed to serve.[297] Within that judicial framework, proposed definitions of the key terms are set forth below, followed by an analysis of the inclusions and exclusions.

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295. Congress created the lower federal courts and has traditionally drawn the parameters of their jurisdiction. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513 (1868); Sheldon v. Sill, 49 U.S. (8 How.) 440, 448 (1850); *see* Yakus v. United States, 321 U.S. 414, 429 (1944). The legislature also has considerable authority to determine which forum, federal or state, is most appropriate for the adjudication of federal issues. City of Greenwood v. Peacock, 384 U.S. 808, 833 (1966).

296. As previously noted, see *supra* Pt. I.B.3.c., 28 U.S.C. § 2254(c) (1982) provides states with an opportunity to adjudicate constitutional challenges to state convictions. Federal habeas applicants must exhaust whatever remedies are still available in the state courts. Such exhaustion cannot take place in a *Sykes* situation, however, because defendant has failed to follow state requirements; nevertheless he argues on habeas that he is entitled to immediate federal resolution of his claims.

The Reagan Administration has proposed a number of changes in the present statutory scheme. See generally, Yackle, *supra* note 145 for a discussion and critique of these bills. The proposals would deny the writ in cases where there was a full and complete adjudication in state proceedings. *Id.* at 620-21. Similarly, factual determinations by the state court would be presumed correct, with the applicant bearing the burden of rebuttal by "clear and convincing evidence." *Id.* at 629.

The Administration also proposes its own cause and prejudice standard. If there has been a failure to raise a claim in the state proceedings, actual prejudice must be coupled with cause resulting from (1) state action in violation of the Constitution or United States laws, (2) a novel federal right, or (3) facts not reasonably discoverable prior to the default. *Id.* at 634-35.

297. See *supra* Pt. I.B.3.a. The *Sykes* requirements would be inappropriate where the state procedural rule violated by the habeas applicant was irrational or invented to defeat federal rights. See discussion of adequate state ground cases, *supra* note 73 and accompanying text. In addition, lower courts have held that *Sykes* does not apply if the state court itself reaches the merits of petitioner's claim. *See* Braxton v. Estelle, 641 F.2d 392, 394 (5th Cir. 1981); Gruttola v. Hammock, 639 F.2d 922, 926 (2d Cir. 1981); Clark v. Blackburn, 632 F.2d 531, 533 n.1 (5th Cir. 1980); Smith v. Estelle, 445 F. Supp. 647, 659 (N.D. Tex. 1977), *aff'd*, 602 F.2d 694 (5th Cir. 1979), *aff'd*, 451 U.S. 454 (1981); *cf.* Irvin v. Dowd, 359 U.S. 394, 406 (1959) (federal habeas review available if petitioners obtained decision on constitutional claim from highest state court even if decision could have been based on other grounds). *Sykes* may also be inapplicable if the state itself forgives the default. *See* Hicks v. Wainwright, 633 F.2d 1146, 1148 (5th Cir. 1981); Quigg v. Crist, 616 F.2d 1107, 1111 n.4 (9th Cir.), *cert. denied*, 449 U.S. 922 (1980); Zapata v. Estelle, 588 F.2d 1017, 1021 (5th Cir. 1979). See *infra* note 307.

A. *Definition of Actual Prejudice:*

> IF A HABEAS CORPUS APPLICANT SEEKS RELIEF ON THE BASIS OF A COGNIZABLE CONSTITUTIONAL CLAIM[298] THAT HE OR HIS COUNSEL FAILED TO PRESENT AT TRIAL,[299] HE HAS THE BURDEN OF DEMONSTRATING A SUBSTANTIAL POSSIBILITY THAT BUT FOR THE CONSTITUTIONAL VIOLATION, THE RESULT WOULD HAVE BEEN DIFFERENT. A SUBSTANTIAL POSSIBILITY IS ONE WHICH CLEARLY COULD HAVE CHANGED THE OUTCOME BUT DID NOT NECESSARILY HAVE THIS EFFECT.

This definition is consonant with *United States v. Frady*'s requirement that the petitioner show "substantial disadvantage" because of an "error of constitutional dimensions."[300] Moreover, it recognizes the relationship established in *Strickland v. Washington* between the degree of finality accorded to the judgment being challenged and the degree of prejudice that the applicant must demonstrate.

As shown above,[301] the Supreme Court has characterized the finality of defendant's conviction as greater in *Sykes* than in *Strickland* challenges. Thus, the burden of proving prejudice in cases of procedural default is heavier than the one imposed when defendant claims that he has been deprived of competent counsel, an indispensable component of a fair trial.[302] Under the proposed definition it must be clear that the error could have changed the verdict.

On the other hand, the *Sykes* burden is lighter than in cases where the fairness of the procedures used at the completed trial is not challenged.[303] An outcome-determinative test has therefore been avoided: The applicant need not show by a preponderance of the evidence that the verdict was probably different because of the constitutional error. He must show only that there is a substantial possibility of this result.[304]

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298. If the underlying claim is not cognizable, there would be no reason to consider whether the applicant's prior default should be binding. *See* L. Yackle, *supra* note 137, § 87, at 199 (Supp. 1984).

299. In accordance with the *Sykes* parameters, this Article examines only the appropriate standard to be applied when a default has occurred at trial. See *supra* note 15 and accompanying text.

300. 456 U.S. 152, 170 (1982).

301. See *supra* Part I.C.

302. See *supra* notes 255-56, 264-68 and accompanying text for an analysis of the relationship between finality and prejudice requirements. The Eleventh Circuit's equation of *Sykes* prejudice with prejudice in sixth amendment cases, *see* Baker, *Constitutional Criminal Procedure*, 34 Mercer L. Rev. 1241, 1269 (1983), has been superseded by United States v. Cronic, 104 S. Ct. 2039, 2048 (1984), and Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984).

303. Challenges based on newly discovered evidence are an example. See *supra* note 268 and accompanying text.

304. Thus, the defendant must persuade the district court judge that there is a serious doubt that the outcome of the trial would have been the same absent the violation. Assume, for example, that defendant has been convicted of first degree murder for the

1. The Relevance of Guilt and Innocence

How does the guilt/innocence calculus enter into this test? The prejudice requirement must be met in every case in which a prior procedural default has occurred, but the habeas court's analysis may take the question of innocence into account when deciding whether to grant the writ.[305]

Here a critical distinction between two basic kinds of innocence must be made. Assume that our hypothetical defendant Nickel claims that he was not given *Miranda* warnings before he confessed to murder, including details concerning the crime which had never been publicly reported. If a standard of legal guilt is used, the habeas court would consider the confession only for the purpose of determining its effect on a verdict which should have been based on untainted proof.[306] If a standard of factual guilt is used, however, the habeas court could consider all the pertinent evidence. This would include not only the confession and the other proof adduced or wrongfully excluded at trial, but any probative evidence discovered after trial.[307]

Collateral review would be available under a legal guilt model if the state's case were dependent upon the tainted proof.[308] Such review could be denied under a factual guilt model, because the court could recognize the probative value of the confession containing facts unknown to anyone except the killer.

The distinction between these two models has not been explored in the

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shooting of his brother. The defense argued at trial that the deceased had taken defendant's gun out of a drawer and threatened to kill him. A struggle ensued, and the gun accidentally discharged. The deceased's wife testified that the day before the shooting, defendant had stated that he would kill his brother. Jury instructions given at the trial improperly placed the burden of proving self-defense on defendant. See *supra* note 216, *infra* note 359. If the habeas judge would seriously consider the possibility that correct jury instructions might have led to an acquittal, the applicant has satisfied the prejudice requirement. This would be so even if the court ultimately concludes that defendant would have been convicted regardless of the error.

305. See *supra* notes 227-32 and accompanying text.

306. Goodman & Sallett, *supra* note 277, at 1700.

307. Under Judge Henry J. Friendly's formulation, the applicant for the writ must show a "fair probability that, in light of all the evidence . . . the trier of the facts would have entertained a reasonable doubt of his guilt." Friendly, *supra* note 218, at 160. Judge Friendly eloquently argues that there are four areas where collateral attack may be "readily justified irrespective of any question of innocence." *Id.* at 152. The first area is where the criminal process is no longer operating, with the result that defendant is denied a constitutionally guaranteed fair trial. *Id.* at 151. A second "is where a denial of constitutional rights is claimed on the basis of facts which 'are *dehors* the record and their effect on the judgment was not open to consideration and review on appeal.' " *Id.* at 152 (quoting Waley v. Johnston, 316 U.S. 101, 104-05 (1942)). Another area is "where the state has failed to provide proper procedure for making a defense at trial and on appeal." *Id.* Finally "[n]ew constitutional developments relating to criminal procedure are another special case." *Id.* at 153.

308. When a habeas court reviews the merits of a petition, the state must demonstrate that constitutional error was harmless beyond a reasonable doubt. See *infra* notes 328, 335 and accompanying text for a discussion of the state's burden.

Supreme Court's development of the cause and prejudice requirement. The *Sykes* majority implicitly accepted a legal guilt approach in its holding that no prejudice had resulted from admitting defendant's inculpatory statement in view of the substantiality of the other proof against him.[309] By contrast, *Frady* referred to the lack of "affirmative evidence" of innocence,[310] apparently utilizing a factual guilt standard. In *Strickland*, the Court searched for "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt," rejecting a factual guilt test without explicit reference to the point.[311]

The definition of prejudice proposed in this Article is based on legal guilt. This determination is consonant with the present congressional direction in 28 U.S.C. § 2254, which states that the federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court . . . in violation of the Constitution."[312] The statute does not restrict the writ to those who make a colorable showing of innocence. Rather, Congress focused on the requirement of a constitutionally valid trial.

However, a particular concern for excluding the factually guilty from habeas consideration emerged in the Supreme Court's historic *Stone v. Powell* [313] ruling. Noting that no exceptions for particular categories of constitutional claims had been made during the period of substantive expansion of the writ,[314] the Court proceeded to create one such exception. It held that if a state "has provided an opportunity for full and fair litigation of a Fourth Amendment claim, [the Constitution does not require that] a state prisoner . . . be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[315]

309. *Sykes*, 433 U.S. at 91. In *Sykes*, both Justices Brennan and Marshall interpreted this reliance on the other evidence of guilt as a species of harmless error which excludes the tainted proof in assessing the question of innocence. *See id.* at 117 (Brennan, J., dissenting).

310. 456 U.S. at 171.

311. Strickland v. Washington, 104 S. Ct. 2052, 2069 (1984).

312. 28 U.S.C. § 2254 (1982). But see Judge Friendly's argument, *supra* note 218, at 154, that although § 2254 also provides for the writ in cases in which the defendant is held in violation of a federal statute, collateral attack on statutory grounds has been disfavored. Judge Friendly points out that collateral review is similarly disfavored "when a constitutional claim has been rejected, allegedly in error, after thoroughly constitutional proceedings." Friendly, *supra* note 218, at 154; *see* Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31, 58 (1965) (analyzing the history of the 1867 statute and concluding that it was not intended as a comprehensive device for review of state court convictions).

313. 428 U.S. 465 (1976).

314. *See id.* at 475-76 nn.7-8. The court pointed out that before 1889, appellate review in federal criminal cases was rare. The writ was gradually expanded to encompass cases involving fundamental rights essentially related to "unconstitutional statutes" and "illegal sentence[s]." *Id.* at 476 n.8. See *supra* notes 50, 86.

315. *Stone*, 428 U.S. at 494. *Stone*'s allusion to an opportunity for a full and fair hearing was explained only by a footnote reference to Townsend v. Sain. *See id.* at 494 n.36.

Justice Powell's opinion for the majority listed several guilt/innocence issues among the costs of applying the exclusionary rule: Probative evidence is not admitted, truth-finding is frustrated, the guilty may be freed.[316] The rule is retained at trial and on direct appeal despite these costs because of the "hope" that future unlawful seizures will be deterred.[317] The rejection of the rule on collateral review stemmed from the Court's conclusion that such deterrence would be increased only marginally, if at all, by the possibility that a writ might issue years after the defendant's conviction.[318] A footnote tendered an assurance that the decision was "*not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally."[319]

Stone illustrates the Court's continuing ambivalence about the relation

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Townsend required that the federal courts hold an evidentiary hearing if it appears that a habeas petitioner did not receive a full and fair litigation "on the merits" in a state court. 372 U.S. 293, 314 (1963). Thus, *Stone* may be read to preclude habeas consideration of fourth amendment claims only if such claims were actually addressed in state tribunals. *See* O'Berry v. Wainwright, 546 F.2d 1204, 1221 (5th Cir.) (Goldberg, J., dissenting), *cert. denied*, 433 U.S. 911 (1977). Under this reading, a petitioner who never presented his fourth amendment challenge to the state courts at all may be eligible for federal review, because the Court's holding applies only to cases in which a prior state court litigation on the merits of the claim has occurred. *But see* Gates v. Henderson, 568 F.2d 830, 837-38 (2d Cir. 1977) (concluding that the footnoted reference to *Townsend* would not require habeas consideration of an unlawful search and seizure challenge if "the state prisoner, having an opportunity to do so, never tendered the question to the state court"), *cert. denied*, 434 U.S. 1038 (1978). See also the other post-*Sykes* decisions in Morrison v. Kimmelman, 752 F.2d 918, 920 (3d Cir. 1985) (state provided "opportunity for full and fair litigation of a Fourth Amendment claim") (quoting Stone v. Powell, 428 U.S. 465, 494 (1975)); Maxey v. Morris, 591 F.2d 386, 388-91 (7th Cir.) (defendant who failed to litigate his constitutional claim in state courts will not be entitled to habeas corpus review), *cert. denied*, 442 U.S. 912 (1979); Johnson v. Meacham, 570 F.2d 918, 920 (10th Cir. 1978) (failure to make timely objection in state court amounts to "independent adequate state procedural ground" precluding habeas consideration). See *supra* note 321. These cases should not be interpreted too broadly, however. *Sykes*, which was issued one year after *Stone*, reaffirms the power of the federal district courts to grant relief as to a defaulted claim if cause and prejudice are shown; preservation of this power is essential to prevent miscarriage of justice. See *supra* note 29, *infra* notes 404-25 and accompanying text.

Thus, even under the more restrictive approach suggested by the circuit courts, *Stone*'s preclusion of habeas applicants who have forfeited an opportunity for a full and fair hearing applies only to those whose default is unexcused. *See Johnson*, 570 F.2d at 920; *cf. Maxey*, 591 F.2d at 391 (habeas review available if default was "result of 'cause and prejudice' "). Defendants who meet the *Sykes* test could therefore receive consideration of fourth amendment claims on the merits.

316. *Stone*, 428 U.S. at 490. In an earlier decision, Kaufman v. United States, 394 U.S. 217 (1969), the Court had held that "a claim of unconstitutional search and seizure is cognizable in a [28 U.S.C.] § 2255 proceeding." *Id.* at 231. Justice Black dissented, stating that the "element of probable or possible innocence . . . should be given weight in determining whether a judgment after conviction and appeal and affirmance should be open to collateral attack, for the great historic role of the writ of habeas corpus has been to insure reliability of the guilt-determining process." *Id.* at 234 (Black, J., dissenting) (footnote omitted).

317. *Stone*, 428 U.S. at 492.

318. *Id.* at 493.

319. *Id.* at 495 n.37 (emphasis in original).

between the congressional scheme governing the writ and the question of factual innocence.[320] Nevertheless, the apprehension of the *Stone* dissenters that all claims which are not "guilt-related" would be withdrawn from habeas corpus jurisdiction has not yet proved prophetic.[321] Similarly, our proposed definition of prejudice effects no such preclusion.

"Actual prejudice" could apply if a petitioner alleging factual innocence makes the requisite showing as to the effect of a constitutional error, such as admission of a coerced confession constructed by state officers.[322] The standard could also be met in cases where an element in

320. *See* Seidman, *supra* note 110, at 449-59. See also Tague II, *supra* note 145, at 29-34, arguing that limitation of habeas relief to the factually innocent would be consistent with the Court's treatment of guilty plea cases, its emphasis on due process, and its standards for prospective application of new procedural rules. Professor Tague predicts that adoption of a factual innocence approach for defining "actual prejudice" would eliminate from habeas review not only *Miranda* cases, but also claims subsumed under Rochin v. California, 342 U.S. 165, 172 (1952), where the Court held that use of a stomach pump as an involuntary device to obtain evidence violated due process because such behavior "shocks the conscience." Tague II, *supra* note 145, at 32 & n.156; *see* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1077-1100 (1977). *Stone*'s rationale was presaged by Justice Powell's concurrence in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), concluding that those proffering a colorable claim of innocence are the appropriate candidates for a writ of habeas corpus, *see Schneckloth*, 412 U.S. at 265-66 (Powell, J., concurring) (citing Friendly, *supra* note 218).

321. The dissenters expressed concern that *Miranda* violations, double jeopardy, entrapment and other issues would be precluded. *Stone*, 428 U.S. at 517-18 (Brennan, J., dissenting). This concern was relieved, at least as to fourteenth amendment challenges, by Rose v. Mitchell, 443 U.S. 545, 560-61 (1979). In *Mitchell*, the habeas petition alleged racial discrimination in the selection of members of a state grand jury. *Id.* at 549. The Court pointed out that this fourteenth amendment claim differed fundamentally from the fourth amendment questions raised in *Stone*. *Id.* at 560-61. The claims in *Mitchell* concerned "allegations that the trial court itself violated the Fourteenth Amendment," in contrast to fourth amendment cases involving police seizure of evidence. *Id.* at 561. Justice Blackmun stated that in the context of these violations "[f]ederal habeas review is necessary to ensure that constitutional defects . . . are not overlooked by the very state judges who operate that system." *Id.* at 563.

The impact of *Stone* on sixth amendment claims was explored in Morrison v. Kimmelman, 752 F.2d 918, 921-22 (3d Cir. 1985). State trial counsel had conducted no discovery and was therefore unaware that damaging evidence against defendant had been unlawfully seized. *Id.* at 919. Counsel failed to make a timely motion to suppress the evidence before trial, as required by state law. *Id.* Defendant's subsequent petition for habeas corpus alleged that his attorney's negligence rose to the level of a sixth amendment infringement. *See id.* Although the state had accorded petitioner a full and fair opportunity to litigate his fourth amendment challenge, the Third Circuit remanded for a determination of whether counsel's incompetence had prevented him from utilizing this opportunity. *See id.* at 923. *Stone* would bar consideration of the fourth amendment violation but not of the claim of ineffective assistance. *Id.* at 920-22. While *Stone* reflects doubts about the efficacy of the exclusionary rule, the Supreme Court has not doubted the necessity of competent counsel. *Id.* at 921-22 (citing *Strickland*, 104 S. Ct. at 2063); *accord* Sallie v. North Carolina, 587 F.2d 636, 640-41 (4th Cir. 1978), *cert. denied*, 441 U.S. 911 (1979). *But see* LiPuma v. Commissioner, 560 F.2d 84, 89 (2d Cir.) (claim of incompetence with regard to assertion of fourth amendment violation is barred under *Stone*), *cert. denied*, 434 U.S. 861 (1977).

322. In Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), a habeas applicant challenging a first degree murder conviction and death sentence alleged that he had confessed because he was threatened by police officers, and that details of the confessions had been

the truth-finding process was defective at trial. Thus, if the jury that convicted the defendant was selected by an official who might possibly have been sympathetic to the prosecution, prejudice could be established even without a colorable showing of innocence.[323] The constitutional error here would not involve the admission of tainted proof. Rather, the error would stem from the use of a suspect method of arriving at a just verdict. This claim would have a more attenuated relation to guilt or innocence than the coerced confession challenge, but that relation would still be discernible.

In addition, the prejudice test would be satisfied in a case where the habeas applicant demonstrates a substantial possibility that a constitutional error changed the verdict, even if that error was not guilt-related. Would defendant Nickel's confession, containing some indicia of reliability but given in the absence of a police recital of his constitutional rights, meet this standard?

If an assumption that any confession is prejudicial per se is rejected,[324] this question must be answered by conducting an empirical examination of the prejudicial impact of Nickel's confession. The examination cannot proceed in a vacuum. A conclusion about that impact will depend in part upon the quality and quantity of the uncontaminated proof. It matters whether the rest of the prosecution's case consisted of several reliable and independent eyewitnesses who testified that defendant shot the deceased or, conversely, consisted merely of circumstantial evidence.[325] This empirical approach was used in *Sykes*, where the majority con-

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suggested to him by these officers. *Id.* at 34. The court held that because defense counsel had failed to object to the confession, petitioner had been deprived of effective representation under the sixth amendment. *See id.* at 39.

323. *See, e.g.*, Thompson v. White, 661 F.2d 103 (8th Cir. 1981), *vacated*, 456 U.S. 941, *aff'd on rehearing per curiam*, 680 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983). In *Thompson*, a petitioner convicted of murder and sentenced to death for the shooting of a law enforcement officer showed that a local sheriff had personally selected all the potential jurors. The court held that although the sheriff was not the one who had investigated the killing, the sympathy he might feel for a fellow officer made it possible that the jurors that he selected could be biased in favor of the prosecution. *Id.* at 107. Actual prejudice under *Sykes* was found by the circuit court even though no identifiable group was excluded from the jury panel. *See id.* at 105; *see also* Francis v. Henderson, 425 U.S. 536, 542 (1976) (showing of actual prejudice resulting from failure to object to grand jury array required to overturn state court conviction).

324. United States v. Frady, 456 U.S. 152 (1982), held that actual prejudice, not merely the possibility of prejudice, must be shown by a petitioner with a defaulted claim. *See id.* at 170; *see also Sykes*, 433 U.S. at 91 (finding no "actual prejudice"); Francis v. Henderson, 425 U.S. 536, 542 (1976) (Supreme Court affirmed remand to explore question of whether defendant was actually prejudiced by grand jury selection process); Shotwell Mfg. Co. v. United States, 371 U.S. 341, 363 (1963) (when "objection to the jury selection has not been timely raised under rule 12(b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule"). See *supra* notes 248-49 and accompanying text. Thus, prejudice in *Sykes* cases will not be presumed; there may, however, be circumstances in which the demonstration will be facilitated. See *infra* notes 418-24 and accompanying text.

325. *But see* Goodman & Sallett, *supra* note 277, at 1702-04 (apparently concluding

cluded that "[t]he other evidence of guilt . . . was substantial to a degree that would negate any possibility of actual prejudice."[326] Note, however, that such an analysis of the record does not transform our proposed definition into a factual guilt standard; the confession is considered for its impermissible influence on the verdict rather than for indications that defendant committed the crime.

2. The Relevance of Harmless Error

Does the prejudice inquiry, which assesses the gravity of the constitutional error and the strength of the uncontaminated portions of the state's case, "bear a strong resemblance to harmless-error doctrine," as charged by the *Sykes* dissent?[327] If so, should the contours of this doctrine guide the lower courts in defining prejudice? Traditionally, harmless error comes into play in the federal habeas corpus context after a petition has been accepted for consideration on the merits. Even if the petitioner demonstrates that a constitutional violation has occurred, the writ may be dismissed if the state can prove that the violation was harmless beyond a reasonable doubt.[328]

An initial difficulty in answering the questions raised above is that harmless error is not one doctrine but many. Three distinct approaches have emerged: a stress on the constitutional error to see whether it might have contributed to the verdict; a determination of whether the improperly admitted evidence was merely cumulative; and consideration of whether overwhelming untainted proof supported the conviction.[329]

The first of these was an earlier formulation than the others, and was reiterated in cases riddled with internal contradictions.[330] Moreover, the

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that the weight of the untainted proof is not relevant in assessing the impact of a constitutional error).

326. 433 U.S. at 91.

327. *See id.* at 117 (Brennan, J., dissenting); *see also id.* at 97-98 (White, J., concurring) (coming to a similar conclusion); United States *ex rel.* Knights v. Wolff, 713 F.2d 240, 243 (7th Cir.) (the "error, if any . . . is harmless"), *cert. denied*, 104 S. Ct. 504 (1983); United States *ex rel.* Spurlark v. Wolff, 699 F.2d 354, 361 (7th Cir. 1983) ("the error, if any, was harmless beyond a reasonable doubt"); United States v. Underwood, 440 F. Supp. 499, 503-04 (D.R.I. 1977) ("[b]ecause the prejudice is harmless error beyond a reasonable doubt, the Court will not grant relief"); Goodman & Sallett, *supra* note 277, at 1703-04 (contrasting cases applying a harmless error analysis with those that do not); *Appellate Forfeitures*, *supra* note 15, at 870 n.104 (collecting sources).

328. L. Yackle, *supra* note 137, § 94, at 365. See, for example, Milton v. Wainwright, 407 U.S. 371 (1972), in which petitioner brought a federal district court challenge to his state conviction of first degree murder. The Supreme Court affirmed the denial of relief by the lower courts, holding that if there had been trial error in admitting a confession it was nonetheless harmless beyond a reasonable doubt. *See id.* at 377-78.

329. *See* State v. McKenzie, 186 Mont. 481, 533, 608 P.2d 428, 458 (1980); Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. Pa. L. Rev. 15, 16 (1976).

330. A focus on the nature of the violation was stressed in Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963). There the Court rejected a prior rule which appeared to mandate automatic reversal of convictions involving constitutional errors. *See id.* at 86. *See generally* Saltzburg, *The Harm of Harmless Error*, 59 Va. L. Rev. 988, 999-1002 (1973)

Supreme Court has recently underscored the defects of a test that would allow nullification of a conviction if an error "had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding."[331] The last of these harmless error approaches—the overwhelming evidence standard—focuses on the weight of the untainted proof.[332] The Court has continued to utilize this standard, which

(special treatment for constitutional violations). *Fahy* stated: "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87. While this standard refers to a possibility that a certain result occurred, note the *kind* of result that is described: "the evidence . . . contributed to the conviction." *Id.*

The stringent *Fahy* approach was reconsidered in Chapman v. California, 386 U.S. 18, 22-23 (1967), where the Court acknowledged that some constitutional errors might be too insignificant to warrant reversal of a conviction, although reversal would be called for where "highly important and persuasive evidence . . . finds its way into a trial in which the question of guilt or innocence is a close one." *Id.* at 22. However, this modification of *Fahy* appears to be neutralized when the *Chapman* majority again repeats that "error in admitting plainly relevant evidence which possibly influenced the jury . . . cannot, under *Fahy*, be conceived of as harmless." *Id.* at 23-24.

A more definitive modification of *Fahy* was adopted in Harrington v. California, 395 U.S. 250, 253-54 (1969), which involved the admission of confessions by co-defendants, only one of whom took the stand and was cross-examined. The Court asserted that no dilution of *Chapman* was intended, but went on to hold:

> [The confessions of co-defendants] . . . did place [Harrington] at the scene of the crime. But others, including Harrington himself, did the same. Their [confessions were] cumulative. But apart from them the case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt . . . .

Id. at 253-54.

To what extent can these standards be reconciled? The "cumulative evidence" test, which may be viewed as separate from the other renditions of harmless error, *see* State v. McKenzie, 186 Mont. 481, 533, 608 P.2d 428, 458 (1980); Field, *supra* note 329, at 16, has not been extensively developed by the Supreme Court. Some commentators have concluded that the "overwhelming evidence" and "contribution to the verdict" approaches would produce similar holdings, because the presence of untainted and overwhelming proof of guilt beyond a reasonable doubt would lead the reviewing court to determine that the error made no significant contribution to the conviction. *See* Goodman & Sallett, *supra* note 277, at 1699-1703; Saltzburg, *supra* note 330, at 1014 n.89. Nevertheless, a blending of the various harmless error holdings would be anomalous if *Chapman* remains viable and is read as mandating that a constitutional error "made *no* contribution to a criminal conviction." *Harrington*, 395 U.S. at 255 (Brennan, J., dissenting) (emphasis in original). *Chapman* is susceptible of several different readings, however. The majority concluded inter alia that "absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts," *Chapman*, 386 U.S. at 25-26, inferring that the error could have tipped the scales in favor of conviction.

331. *Strickland*, 104 S. Ct. 2052, 2067-68 (1984) (citations omitted). The context in *Strickland* was a discussion not of the harmless error doctrine but of the appropriate prejudice burden when a sixth amendment claim of incompetent counsel is made.

332. Harrington v. California, 395 U.S. 250, 253-54 (1969). As the dissenting *Harrington* Justices noted, the *Chapman* rule had focused instead upon the impact of the constitutional violation. *See id.* at 255 (Brennan and Marshall, JJ., and Burger, C.J.,

is met if the verdict would beyond a reasonable doubt have been the same even without the violation.[333]

We therefore address the overwhelming evidence formulation in answering the question of whether the *Sykes* prejudice requirement resembles the harmless error doctrine. A threshold distinction between the two is that under the prejudice requirement, it is the habeas applicant who has the burden of proof;[334] the state bears that burden when harmless error is alleged.[335] This is not merely a role reversal; the habeas petitioner need not prove that the constitutional error was harmful beyond a reasonable doubt.

Indeed, under the prejudice definition suggested in this Article, the applicant need not marshal a preponderance of the evidence in favor of the probability that the error tipped the scales against him. His task extends no further than demonstrating a substantial possibility of such a result.[336] This test is satisfied if a federal habeas judge entertains a serious doubt that there would have been a conviction absent the error, even if he ultimately determines that the verdict would have been the same. By contrast, a reverse version of harmless error would require a demonstration that an outcome-determinative impact had actually occurred.[337]

The principal similarity between harmless error analysis and our proposed prejudice approach is that both are premised on a legal rather than a factual guilt model.[338] Beyond this common point, such analysis is of

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dissenting). The two inquiries are obviously connected, however. Indeed, the dissenters urged that the lower courts concentrate on "the character . . . of the tainted evidence as it relates to the untainted evidence." *Id.* at 256.

333. *See, e.g.*, Milton v. Wainwright, 407 U.S. 371, 372-73 (1972). Yet the Court often incorporates harmless error language to reject constitutional challenges to state convictions, *see, e.g.*, Schneble v. Florida, 405 U.S. 427, 430-32 (1972), without expressly enthroning a particular formulation of the doctrine. Justice Marshall concluded in Briggs v. Connecticut, 447 U.S. 912 (1980) (Marshall, J., dissenting from denial of certiorari), that state courts have the power to "select" a standard, but criticized the choice of the overwhelming evidence formulation as unsuitable in a case in which unconstitutional jury instructions were given. *Id.* at 914-15.

334. *See* United States v. Frady, 456 U.S. 152, 170 (1982).

335. *See* Chapman v. California, 386 U.S. 18, 24 (1967).

336. See *supra* note 304 and accompanying text.

337. *Cf.* Strickland v. Washington, 104 S. Ct. at 2067-68 (analogous rejection of an outcome-determinative test as to claims of prejudice by a petitioner alleging ineffective assistance of counsel in violation of the sixth amendment).

338. See *supra* text accompanying notes 332-33, 312. The *Sykes* dissent had urged that if the prejudice analysis resembled the inquiry conducted in response to harmless error claims, federal courts might as well dispense with the *Sykes* pre-screening and proceed to dispose of habeas petitioners' challenges on the merits. 433 U.S. at 117 (Brennan, J., dissenting). While it is true that in both situations the courts would be examining the constitutional error in the light of the rest of the record, burden of proof differences could lead to different results. A defendant whose claim was not presented in state court would prevail in the pre-screening only if he showed not only an error of constitutional dimension, Kentucky v. Whorton, 441 U.S. 786, 789 (1979); Payne v. Smith, 667 F.2d 541, 544 n.2 (6th Cir. 1981), *cert. denied*, 456 U.S. 932 (1982), but also cause for the default and a substantial possibility that the error changed the verdict. Once a merits review stage is reached, however, the habeas applicant's principal task is to meet the requirement of

little assistance in defining prejudice. Harmless error explores the relation between the seriousness of the constitutional violation at issue and the strength of the state's uncontaminated proof largely on a case-by-case basis, and in the context of searching for errors of "reversible weight"[339]—those which would cause a juror who would have voted for the defense to vote instead for the prosecution. Thus, no transferable principles emerge to give guidance to the prejudice inquiry.

B. *Definition of Cause:*

> ALTHOUGH A DEFAULT SHOULD NOT BE EXCUSED SOLELY BECAUSE COUNSEL ACTED PURSUANT TO A POORLY CONCEIVED STRATEGY OR INADVERTENTLY NEGLECTED TO PRESENT A CLAIM, CAUSE MAY BE FOUND IF A COGNIZABLE CONSTITUTIONAL CLAIM PROFFERED IN A HABEAS PETITION
>
> (1) IS BASED ON AN INTERPRETATION OF THE CONSTITUTION WHICH WAS TOO NOVEL AT THE TIME OF TRIAL FOR A REASONABLE ATTORNEY TO HAVE ANTICIPATED IT, OR ON FACTS WHICH WOULD NOT HAVE BEEN DISCOVERED AT THE TIME OF TRIAL BY REASONABLE INVESTIGATION, OR
>
> (2) WAS NOT PRESENTED AT TRIAL BECAUSE THE CONSEQUENCES WOULD HAVE BEEN SO PUNITIVE THAT A REASONABLE ATTORNEY WOULD NOT HAVE PURSUED IT, OR
>
> (3) WAS NOT PRESENTED AT TRIAL BY INADVERTENCE, AND IN ADDITION THE APPLICANT MEETS THE PREJUDICE REQUIREMENT BY A SHOWING INDICATING FACTUAL INNOCENCE OR A DEFECT IN THE TRUTH-FINDING PROCESS.[340]

The substitution of the "cause and prejudice" formulation for *Noia*'s "deliberate bypass" approach has been analyzed extensively in Part I.[341] The underlying purposes of the change bear a critical relation to the cause definition proposed above, and therefore must be briefly reexamined.

The *Sykes* majority described the decision in *Noia* as encouraging sandbagging.[342] This criticism is puzzling if one assumes that a standard

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demonstrating constitutional error. He could prevail on the merits if the state failed to show that this error was harmless beyond a reasonable doubt. Moreover, in a close case the merits review might well be more intensive than the pre-merits inquiry because of the increased demands of an outcome-determinative standard.

339. Harrington v. California, 395 U.S. 250, 254 (1969).

340. See *supra* notes 228-32 and accompanying text. This definition presumes that the defaulted claims could have been presented at trial under available and valid procedures. See *supra* note 297, *infra* note 386.

341. See *supra* Pts. I.A., B.3.

342. *See* 433 U.S. at 89.

penalizing defendants for strategic decisions to circumvent a state rule[343] is a sufficient deterrent against any conscious choice to withhold a viable claim during a state prosecution. But, for two reasons, this was not the Supreme Court's assumption.

First, *Noia* had incorporated a client-consultation requirement that suspended the deliberate bypass penalty for actions taken by counsel alone.[344] Because such consultations are often impracticable in the course of trial, the bypass restriction failed to screen out purposeful attorney behavior.[345] Second, identification of such behavior became a guessing game even for the Justices themselves, as their disagreement over the motives of John Sykes' counsel illustrates.[346]

Cause should therefore be defined so as to enhance particular results rather than adopt particular labels. Some deliberate choices should be acknowledged as proper "cause" candidates. Some inadvertent errors should not.[347] *Sykes* and its progeny indicate which results are to be effectuated.

In its treatment of the cause requirement, the Court lingered over the enhanced trial efficiency resulting from better lawyering, deterrence of attorney misfeasance, and respect for the finality of state convictions.[348] Nevertheless, competing values also emerged and received repeated emphasis: concern with protecting a defendant who is unjustly incarcerated and preventing a miscarriage of justice.[349] The cause definition proposed in this Article takes into account these competing considerations.

1. Novelty

a. *The Legal Basis for the Claim*

An attorney at a criminal trial fails to raise objections to jury instructions on self-defense. After conviction and exhaustion of the direct appeal process, the Supreme Court renders a decision in an unrelated case declaring such jury instructions to be defective on constitutional

343. Also evaded in this end run is the congressional mandate that state remedies be exhausted prior to applying for habeas corpus relief. See *supra* Pt. I.B.3.c.

344. *See* 372 U.S. at 439. See *supra* notes 138-40 and accompanying text.

345. See *supra* Pt. I.B.3.b.

346. See *supra* notes 164-69 and accompanying text. An attorney who wishes to protect his professional reputation and foreclose potential malpractice suits may label his own inaction as strategic. *See* Goodman & Sallett, *supra* note 277, at 1720. See *supra* note 164, *infra* note 416. Conversely, an attorney who wishes to help his client may purposely mislabel a strategic decision as inadvertent. De novo fact-finding in the federal district court may thus be necessary in *Sykes* cases. *See* Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980). If there is no testimony, the written record will be the only basis for the court's assessment of the attorney's motivation. Goodman & Sallett, *supra* note 277, at 1720-21.

347. See *infra* Pt. II.B.3.

348. *See Sykes*, 433 U.S. at 88-90. See *supra* Pts. I.B.3.a., B.4.

349. *See Frady*, 456 U.S. at 163, 172; *Isaac*, 456 U.S. at 135; *Sykes*, 433 U.S. at 91. See *supra* notes 251-52 and accompanying text for a discussion of the relationship between innocence and prejudice. See also *infra* Pt. II.C. for a discussion of miscarriage of justice.

grounds. Under what circumstances should the novelty of the legal claim constitute cause for the failure to object at trial?

As Justice O'Connor's opinion for the majority in *Engle v. Isaac* stated, it has long been held that "later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair."[350] The word "unknown" might be read as referring merely to the trial attorney's unfamiliarity with a developing line of lower court cases concerning the constitutional violation at issue. However, a footnote reference indicates that this term was intended also to include instances when there was no judicial basis for claiming the right during the course of the prosecution.[351]

Thus, not every new constitutional right is declared retroactive and relevant to habeas corpus petitions involving prosecutions that have already taken place.[352] Should one which *has* been held retroactive be available on habeas even though the applicant failed to invoke it at trial?

In answering this question, the *Isaac* majority had several options. It could have found the *Sykes* requirements inapplicable and permitted a merits review as to any retroactive right proffered in a habeas petition. Conversely, it could have held that unless the defendant was prescient enough to raise the constitutional objection, the default would be binding.[353] The Court did neither, adopting instead an approach requiring an individualized analysis as to the novelty of the right at stake.[354]

In avoiding the first option, the majority decreased the number of petitions which would otherwise have been eligible for federal district court review. In avoiding the second, the majority decreased the number of insubstantial arguments which might otherwise have been proffered in state trial and appellate courts.[355] In adopting the third approach, the

350. 456 U.S. at 131.

351. *Id.* at 131 n.38. The footnote attached to the quoted statement, see *supra* text accompanying note 350, refers to Justice Harlan's concurring opinion in Mackey v. United States, 401 U.S. 667, 675-702 (1971), which examined at length the justification for refusing to make certain categories of new constitutional rights apply retroactively on collateral review. While acknowledging that uniform retroactivity would promote a "rough form of justice" and similarity of treatment among prisoners, Justice Harlan concluded that this consideration was outweighed by the state's interest in finality with respect to convictions that were free from error at the time they occurred. *See id.* at 689-91. Indeed, a second prosecution on "stale facts" might produce a result which is no more reliable than the first trial. *Id.* at 691 (Harlan, J., concurring).

352. Engle v. Isaac, 456 U.S. 107, 134 & n.43 (1982).

353. While the Court did not foreclose the possibility of such a holding in a future case, it expressed hesitation as to adopting a rule which would require clairvoyance or objection to every aspect of a proceeding in the hope of touching upon an inchoate claim. *See id.* at 131. The subsequent decision in Reed v. Ross, 104 S. Ct. 2901 (1984), definitively held that novelty could constitute cause under the proper circumstances. *Id.* at 2910. See *infra* notes 359-67, 370-74 and accompanying text.

354. *See Isaac*, 456 U.S. at 133-34.

355. Justice Brennan stated that if novelty never constituted cause "we might actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition." Reed v. Ross, 104 S. Ct. 2901, 2910 (1984).

Court increased the complexity of the inquiry that the habeas court must make when a defaulted claim was inchoate at the time of trial.

The *Isaac* respondents invoked rights which had been declared retroactive in *Hankerson v. North Carolina*.[356] However, *Hankerson* itself had indicated in a footnote that the states may have the power to insulate past convictions by enforcing valid waiver rules.[357] Rather than taking the *Hankerson* footnote as preclusive, the *Isaac* majority looked to whether respondents had "lacked the tools to construct their constitutional claim" while the prosecution was occurring.[358]

A number of questions arise from this test. Must counsel have personal knowledge of the decisions which would constitute "tools," or is constructive knowledge to be imputed to him under some circumstances? How many such decisions would suffice, and from which judicial level must they emanate?

The next foray into the meaning of cause, *Reed v. Ross*,[359] suggested answers to these questions. Justice Brennan's opinion for the majority reviewed three ways in which a new constitutional requirement can be established by the Supreme Court: a prior precedent might be explicitly overruled, a widespread practice expressly approved by virtually all lower courts could be overturned, or a practice which has arguably been permitted in prior Supreme Court cases may be disapproved.[360]

A retroactive decision falling into one of the first two categories would by definition provide no foundation for a prior state court objection and

356. 432 U.S. 233, 243 (1977). Mullaney v. Wilbur, 421 U.S. 684 (1975), held that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Id.* at 704. *Hankerson* in turn gave *Mullaney* "complete retroactive effect." *Hankerson*, 432 U.S. at 240-41 (quoting Ivan V. v. City of New York, 407 U.S. 203, 204-05 (1972)).

357. 432 U.S. at 244 n.8 ("The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.").

358. 456 U.S. at 133.

359. 104 S. Ct. 2901 (1984). Respondent Daniel Ross was convicted in North Carolina of first degree murder for the shooting death of his wife. The victim's brother testified that Ross fired a number of shots, went outside and reloaded his gun, and then returned and fired what was possibly the fatal shot. The prosecutor's witness further testified that the victim did not have a weapon and that Daniel Ross did not appear to be injured. Respondent testified that his wife stabbed him in the back of the neck with a knife and that he responded by shooting her. His sister corroborated this statement, testifying that her brother was bleeding from a neck wound. State v. Ross, 275 N.C. 550, 551-52, 169 S.E.2d 875, 876-77 (1969), *cert. denied*, 397 U.S. 1050 (1970). At trial, jury instructions placed the burden of proving lack of malice and self-defense on the defendant. *Ross*, 104 S. Ct. at 2905. Ross' challenge to his conviction in the federal courts cited the subsequent decision in Mullaney v. Wilbur, 421 U.S. 684 (1975), which held that requiring defendant to bear the burden of proving lack of malice was a violation of due process. *Ross*, 104 S. Ct. at 2906-07. See *supra* note 356. The Court in *Ross* held that the "claim was sufficiently novel in 1969 to excuse his attorney's failure to raise the *Mullaney* issue." *Ross*, 104 S. Ct. at 2912.

360. *See Ross*, 104 S. Ct. at 2911.

therefore cause could be found for such a default. Cases falling into the last category, however, would have to be more closely examined.[361] Criteria for such an examination were supplied:

> Whether an attorney had a reasonable basis for pressing a claim challenging a practice that this Court has arguably sanctioned depends on how direct this Court's sanction of the prevailing practice had been, how well entrenched the practice was in the relevant jurisdiction at the time of defense counsel's failure to challenge it, and how strong the available support is from sources opposing the prevailing practice.[362]

Note the majority's use of the phrase "reasonable basis," which parallels an earlier reference to failure to raise a "reasonably unknown" constitutional issue.[363] The standard of reasonableness is objective, looking to what counsel should have recognized rather than what he did recognize. Thus, constructive knowledge rather than proof of personal knowledge becomes the relevant touchstone.[364]

Is the state of the art in counsel's jurisdiction the appropriate context? Should he be judged only against what other lawyers in his locality knew? One lower court has answered these questions affirmatively: Cause has been found where a constitutionally objectionable practice was customary and was presumed valid by the prosecutor, court, and defendant's attorney.[365]

The *Ross* criteria focus to some extent on counsel's own locality. Attention is directed to the "jurisdiction" in which the violation occurred, and how entrenched the offending practice was at the time when counsel failed to challenge it. On the other hand, the majority's reference to assessment of the "available support" for objecting to the unconstitutional practice could be interpreted as referring to relevant precedents in any locality. Indeed, decisions from a federal and a state court outside of the jurisdiction where Ross was prosecuted were considered as possible authority for a contemporaneous objection.[366] These cases were ultimately found insufficient because they were not directly on point rather than

361. *Id.*

362. *Id.*

363. *Id.* at 2909.

364. *But see* Ford v. Strickland, 696 F.2d 804, 829 (11th Cir.) (pre-*Reed* decision holding that personal knowledge must be shown in order to bar a finding of cause), *cert. denied*, 104 S. Ct. 201 (1983).

365. *See* Bromwell v. Williams, 445 F. Supp. 106, 114 (D. Md. 1977). Because of lack of courtroom space, it had been customary to argue consolidation motions within the hearing of the petit jury panel. Defendant was charged with assault and battery and a handgun violation. While the voir dire panel was in the courtroom before the jury was selected, the prosecution moved to consolidate the case with another charging the defendant with breaking and entering and larceny. The motion was denied. No objection was made to the holding of the discussion in front of the jury that was to determine guilt on the assault and handgun violations. Defendant was convicted and subsequently argued on federal habeas corpus that his right to a fair and impartial jury had been infringed. The *Sykes* cause requirement was found satisfied because none of the trial participants "conceived that any error was being committed." *Id.*

366. *See Ross*, 104 S. Ct. at 2912.

because they were extraterritorial.[367]

The question of whether a reasonable attorney would have challenged the objectionable practice cannot be resolved simply by pointing to a dearth of such challenges in his home state at the time of prosecution. Reasonable preparation should include not only knowledge of Supreme Court precedents, but also of federal circuit court holdings and decisions by the highest court of a state,[368] assuming sufficient time has elapsed for their publication in advance sheets.

How many cases must be aggregated in order to constitute an effective tool? Both *Isaac* and *Ross* concerned allegations that jury instructions on burden of proof were unconstitutional. Justice O'Connor's *Isaac* opinion concluded that the Court's prior decision in *In re Winship* constituted an available foundation for a burden of proof challenge, particularly since other defendants had so utilized it.[369] The *Ross* majority, in discussing and distinguishing *Isaac*, agreed that "numerous courts" had provided further authority which Isaac's counsel could have cited at trial.[370]

In *Ross*, however, defendant's trial took place before *Winship*, and the majority found that there was only "indirect" support available for the claim at issue.[371] The dissent disputed this conclusion, arguing that *Winship*'s treatment of burden of proof requirements as to adults[372] was "settled by a long line of earlier decisions,"[373] and that "the legal basis on which *Winship* rested was perceived earlier by other courts" whose decisions provided more than indirect guides for Ross and his attorney.[374]

Thus, neither the majority nor the dissent would accept two or three isolated cases as an "available tool." Both factions stressed the need for several clear precedents, although they disagreed on whether such precedents existed in *Ross*. The number of decisions that would trigger the reasonable attorney's contemporaneous objection should also depend on the tribunal from which such cases emanate. If a Supreme Court decision such as *Winship* is available for interpretation and application, fewer auxiliary cases should be required.

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367. *See id.* at 2912.

368. Many such cases are reported in the Criminal Law Reporter published by the Bureau of National Affairs. *See generally* Crim. L. Rep. (BNA). Federal district court cases and intermediate level state court decisions outside counsel's jurisdiction have not been included in our interpretation of the appropriate standard; such detailed knowledge would be laudable but difficult to maintain without access to computer aids.

369. *See* 456 U.S. at 131-32 (citing *In re* Winship, 397 U.S. 358, 364 (1970)).

370. *See Ross*, 104 S. Ct. at 2912 (quoting *Isaac*, 456 U.S. at 132).

371. *Id.*

372. Justice Rehnquist's dissenting opinion concluded that *Winship*'s "novel" holding was that prior burden of proof requirements would also apply to juveniles. *See id.* at 2914 (Rehnquist, J., dissenting).

373. *Id.* (Rehnquist, J., dissenting). The dissent noted that these decisions ranged from Miles v. United States, 103 U.S. 304 (1881), to Holland v. United States, 348 U.S. 121 (1954).

374. *Ross*, 104 S. Ct. at 2915 (Rehnquist, J., dissenting).

b. *The Factual Basis for the Claim*

What if the cause showing made by a habeas applicant is based on facts which trial counsel did not know, rather than on legal theories which counsel failed to apply? The definition proposed in this Article calls for reasonable inquiry—the touchstone is whether a prudent attorney would have discovered the critical facts and made a timely proffer in the state court.

If one purpose of *Sykes* is to deter counsel's carelessness, it is particularly appropriate to require a high threshold for cause relating to the failure to uncover relevant facts. There may be valid reasons for hesitating to encourage trial proffers of novel but tenuous legal theories;[375] by contrast, encouragement of thorough factual investigation prior to trial is of undoubted value. As noted by the American Bar Association, it is the duty of counsel

> to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits . . . and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.[376]

These standards have been cited by the Supreme Court as suitable "guides to determining what is reasonable."[377] Justice O'Connor's *Strickland* opinion, which concerns sixth amendment incompetence claims,[378] succinctly described the kind of preparation that is expected of an attorney: "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[379]

In assessing such decisions, however, hindsight should not be permitted to provide too much illumination. The number, complexity and strategic implications of the potential defenses must be evaluated from the perspective in which they appeared to counsel at the time of trial. The

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375. See *supra* note 355 and accompanying text.

376. *See* 1 American Bar Ass'n, Standards for Criminal Justice 4-4.1, 4.53 (2d ed. 1980) ("The Defense Function").

377. Strickland v. Washington, 104 S. Ct. 2052, 2065 (1984).

378. *See id.* at 2063-64. For discussion of such claims, see *supra* Pt. I.C.

379. *Strickland*, 104 S. Ct. at 2066; see Thompson v. White, 661 F.2d 103, 105-06 (8th Cir. 1981), *vacated*, 456 U.S. 941 (1982), *aff'd on rehearing per curiam*, 680 F.2d 1173 (8th Cir.), *cert. denied*, 459 U.S. 1177 (1983), discussed *infra* note 380. Violations of this duty are illustrated by Johns v. Perini, 462 F.2d 1308, 1313-14 (6th Cir.), *cert. denied*, 409 U.S. 1049 (1972), and Brubaker v. Dickson, 310 F.2d 30, 38 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963), both involving ineffective assistance claims. In *Johns*, counsel made virtually no effort to investigate the alibi that was his client's chief defense or to secure available exculpatory records. *See* 462 F.2d at 1310-11. In *Brubaker*, counsel in a capital case was told that his client's confession was coerced, but he did not obtain a copy of the initial recorded interrogation nor did he contact obvious witnesses. *See* 310 F.2d at 35, 38. But see *supra* notes 189-92 and accompanying text for a discussion of the importance of adequate funding for public defender offices and court-appointed lawyers as a means of reducing caseloads and permitting more preparation time.

cause requirement is satisfied if an inquiry seemed to be unnecessary then, even if later events prove that such an inquiry would have unearthed a significant fact.[380] The cause requirement is also met if governmental misconduct has obscured counsel's opportunity to discover favorable proof. In *Freeman v. Georgia*,[381] for example, a city homicide detective concealed the location of a woman who might have given evidence helpful to the defense, and later married her.[382] The circuit court noted: "When a police statement misleads the defense into believing that evidence will not be favorable, the state cannot thereafter argue that it was a waiver not to request it."[383]

Thus, an attorney who failed to proffer a constitutional claim at trial because he was unaware of its factual basis must demonstrate either that the information was unavailable at the time, or that reasonable inquiry would not have uncovered it, or that in the light of all the potential defenses and all the information received from the state, a reasonable decision not to investigate was made.

2. Default Arising Out of "Grisly" Alternatives

Generally, a tactical decision to withhold a constitutional claim in a state court should not lead to a merits review in a federal court. Thus, where an attorney withdrew a request for instructions on a lesser included offense so that the jury would have to choose between convicting the defendant of murder or acquitting him, the client was bound by the default even though the gamble failed.[384] Nor should a belief that an objection would be futile constitute cause, regardless of whether that per-

380. See Thompson v. White, 661 F.2d 103, 105-06 (8th Cir. 1981), *vacated*, 456 U.S. 941 (1982), *aff'd on rehearing per curiam*, 680 F.2d 1173 (8th Cir.), *cert. denied*, 459 U.S. 1177 (1983), where defense counsel failed to investigate the means by which jurors were selected in defendant's trial for the murder of a police officer. On appeal it was shown that investigation into the selection process would have revealed that the sheriff selected the entire jury. The court held that the cause prong of the *Sykes* requirement was satisfied. *Id.* at 105-06.

381. 599 F.2d 65 (5th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

382. *Id.* at 68.

383. *Id.* at 72; *accord* Forman v. Smith, 633 F.2d 634, 641 (2d Cir.), *cert. denied*, 450 U.S. 1001 (1980).

384. *See* Ringstaff v. Mintzes, 539 F. Supp. 1124, 1129-30 (E.D. Mich. 1982) ("It is apparent that the petitioners gambled that by having the jury consider only the alternatives of a conviction for first degree murder or acquittal, the latter would be chosen. Petitioners complain of error now that their calculated gamble has failed."). See also United States *ex rel.* Edwards v. Warden, 676 F.2d 254 (7th Cir. 1982), where counsel failed to object to the prosecution's opening statements which alluded to defendant's post-arrest acts on behalf of the government. *Id.* at 257. Defendant filed a habeas claim, arguing that these statements violated his rights against self-incrimination and to due process under the fifth amendment. The writ was denied because the court found that trial counsel was pursuing a deliberate strategy of portraying defendant's "unsuccessful efforts to cooperate with the government as a conscientious effort to assist in the apprehension of a suspected narcotics trafficker." *Id.* The Seventh Circuit found that the failure to object had a reasonable tactical basis. *See id.* Similarly, in Graham v. Mabry, 645 F.2d 603 (8th Cir. 1981), the court found that defense counsel's failure to object to a

ception is correct.[385] In these situations, time may be lost but the claim should nonetheless be proffered at trial or forfeited.[386]

Yet there may be extraordinary occasions when the making of a legitimate objection would generate such hostility that the trier of the facts might turn against the defendant. For example, in *Whitus v. Balkcom*[387] there was a historical foundation for counsel's concern that challenging the racial composition of an all-white petit jury would irretrievably damage defendant's chances for acquittal. The circuit court added: "When a defendant's attorney prefers a particular jury, there is 'a voluntary choice between two meaningful alternatives.' Absent this preference, there is no voluntary choice to relinquish the right to a fairly constituted jury when the right *must* be relinquished in order not to imperil the defense."[388]

Another instance of such "grisly" alternatives, in a post-trial context, was *Noia* itself. Defendant was faced with giving up his appeal on a viable constitutional claim after being sentenced to life imprisonment or risking a death sentence if he were convicted on retrial.[389]

In *Moreno v. Beto*,[390] counsel refrained from challenging admission of an allegedly coerced confession because to do so would have required

juror's possible bias amounted to a trial tactic. Counsel merely had stronger reasons to exclude other jurors. *Id.* at 607.

385. See *Engle v. Isaac*'s refusal to countenance futility arguments, discussed *supra* at note 221 and accompanying text. See also Estelle v. Williams, 425 U.S. 501 (1976), where the Court pointed out that if the underlying perception was that the judge would overrule any objections to defendant wearing prison clothes at trial, such a perception was erroneous. The state judge had a policy of allowing defendants to wear civilian clothes on request. *Id.* at 510-11.

386. A closer case may be made where fear of irritating the trial judge appears to have been counsel's motive. *See* Williams v. Beto, 354 F.2d 698, 703 (5th Cir. 1965) ("[H]e who often objects, only to have his objections over-ruled, risks alienating the jury even if he does not test the patience of the presiding judge."). While avoidance of such conflict may be a tactical consideration for defense counsel, R. Givens, Advocacy, The Art of Pleading a Cause 113-16 (Supp. 1984); *see* Tague I, *supra* note 113, at 131, it should not ordinarily constitute cause. If a challenged violation was so significant that it would merit the issuance of collateral relief, concern about being scolded by the judge must become secondary. However, entirely arbitrary foreclosure of objections by such a trial judge might be the basis for an argument in the federal district court that an opportunity to articulate the constitutional challenge was not actually available. While exhaustion of state remedies requires that a habeas petitioner "fairly presen[t]" the substance of his claim to the state courts, Anderson v. Harless, 459 U.S. 4, 6 (1982) (quoting Picard v. Connor, 404 U.S. 270, 275 (1971)), a conscientious effort to do so should be sufficient to preclude a finding of a *Sykes* forfeiture. See also *infra* notes 387, 388 and accompanying text (concluding that under rare circumstances objecting could be so prejudicial to defendant that deliberate silence should not be penalized under the cause requirement).

387. 333 F.2d 496 (5th Cir.), *cert. denied*, 379 U.S. 931 (1964).

388. *Id.* at 502 (quoting Comment, *Negro Defendants and Southern Lawyers: Review in Federal Habeas Corpus of Systematic Exclusion of Negroes From Juries*, 72 Yale L.J. 554, 567 (1963)) (footnote omitted) (emphasis in original).

389. Fay v. Noia, 372 U.S. 391, 440 (1963). A similar concern motivated defendant in Thompson v. White, 661 F.2d 103, 106 (8th Cir. 1981), *vacated*, 456 U.S. 941 (1982), *aff'd on rehearing per curiam*, 680 F.2d 1173 (8th Cir.), *cert. denied*, 459 U.S. 1177 (1983).

390. 415 F.2d 154 (5th Cir. 1969).

putting defendant on the stand and exposing him to cross-examination on all aspects of the case in front of the jury,[391] a requirement not known at the time to be unconstitutional.[392]

The common thread in these intentional failures to pursue constitutional objections is that counsel found himself between the hazard of forfeiting the defense and the danger of forfeiting subsequent habeas consideration. The cause definition proposed in this Article is satisfied if assertion of a right would result in consequences that are so punitive that a reasonable attorney would feel compelled to avoid them.

3. Inadvertence as Cause If Petitioner Meets the Prejudice Requirement With a Showing of Factual Innocence or a Defect in the Truth-Finding Process

If inadvertence automatically constituted cause, the *Sykes* standard would differ from that of *Noia* only on the rather tenuous grounds explored in Part I.[393] Aside from this anomaly, the practical effect of such an interpretation would be to reduce cause to a nominal requirement[394] and to interfere with the congressional intent evidenced by the mandate that state remedies be exhausted before habeas relief is granted.[395] Moreover, distinguishing between defaults which are tactical and those which are not may involve a difficult balance of inferences.[396]

The strongest point in favor of such a reading of "cause"—avoiding a client penalty for a lawyer's mistake—could also be invoked on behalf of a client whose counsel made strategic errors.[397] In both situations, the defendant has been convicted and now proffers a constitutional claim that could have been presented at the state trial pursuant to an appropriate procedural mechanism. Yet, as Justice Brennan's opinion in *Reed v. Ross* acknowledges, application of this argument to any default occurring without client consultation "would not only offend generally accepted principles of comity, but would also undermine the accuracy and efficiency of the state judicial systems to the detriment of all concerned."[398]

391. *Id.* at 155.
392. *Id.* at 157.
393. See *supra* Pt. I.B.3.
394. It has been persuasively argued that the majority of trial defaults may be the result of neglect. *See* Tague II, *supra* note 145, at 46.
395. See *supra* Pt. I.B.3.c.
396. In Murch v. Mottram, 409 U.S. 41 (1972), for example, counsel's misinterpretation of the law led to his failure to present defendant's claim in a timely manner. The Supreme Court concluded that this was deliberate bypass rather than a species of inadvertence and held the default to be binding. *See id.* at 46-47. See also *supra* Pt. I.B.3.c. The discussion in this Article presumes that as in most cases involving counsel's trial conduct, the default occurred without consultation with the client. In the converse situation—when defendant actually instructed counsel to present the claim and the instruction was ignored—defendant should not be bound. *See Appellate Forfeitures*, *supra* note 14, at 881.
397. See *supra* Pt. I.B.3.c.
398. 104 S. Ct. at 2909.

The cause definition suggested in this Article, while avoiding an automatic exemption for inadvertence, recognizes the argument that unconscious omissions offer no benefit to a client to offset the harm flowing from the default.[399] However, this argument loses its force as the degree of harm demonstrated becomes less substantial and thus less in need of an offset. The definition therefore specifies that inadvertence will constitute cause only when the applicant's incarceration is unjust.

Such an approach does not conflict with *Sykes* and its successors. The Supreme Court has treated cause as an inquiry into the factors motivating counsel and prejudice as an inquiry into the harm stemming from the constitutional violation, requiring that both prongs be met.[400] The definition of cause proposed above remains within these parameters, but conditions the granting of relief for inadvertence on the nature of the prejudice demonstration.[401] Such a condition would not attach if either of the alternate branches of the cause definition were invoked.

Our prior prejudice illustration involved a defendant whose confession bore the earmarks of truth but was elicited without warnings about his right to remain silent.[402] If the prosecution's case were otherwise circumstantial, the prejudice requirement would be met. However, the cause showing would probably fail. *Miranda*[403] is hardly novel. Presumably, reasonable inquiry would have elicited the fact that the mandated warnings were not given. No punitive consequences attach to making an objection to admission of the confession. A deliberate decision to withhold objection would not constitute cause, and an inadvertent one would not qualify because the underlying claim neither indicates innocence nor involves a defect in the truth-finding procedure. Thus, the justice of defendant's incarceration is not implicated.

C. *The Relation of the Cause and Prejudice Standard to Preventing Miscarriage of Justice*

Concern with prevention of a miscarriage of justice has been cited in several of the Supreme Court's cause and prejudice decisions.[404] This concern could be seen as embodied in the *Sykes* standard or as requiring a separate structure of its own. That is, it could be regarded as satisfied

399. See *supra* Pt. I.B.3.c.

400. *See* Reed v. Ross, 104 S. Ct. 2901, 2908 (1984); United States v. Frady, 456 U.S. 152, 167-69 (1982); Engle v. Isaac, 456 U.S. 107, 126-29 (1982).

401. *Sykes* evolved from the "cause" requirement established by Congress in Fed. R. Crim. P. 12. *See* Davis v. United States, 411 U.S. 233, 242 (1973). The Rule 12 cases, however, appear to merge the cause and prejudice inquiry, examining the relationship of the default, the merits and the consequences of the omitted objection. *See, e.g.*, Wells v. Wainwright, 488 F.2d 522, 523 (5th Cir. 1973). The cause definition proposed in this Article would require two separate inquiries, *see Sykes*, 433 U.S. at 87; *Frady*, 456 U.S. at 167-68, but would match the two at the point where a determination is made.

402. See *supra* notes 306, 308 and accompanying text.

403. Miranda v. Arizona, 384 U.S. 436 (1966).

404. *See Frady*, 456 U.S. at 163, 172; *Isaac*, 456 U.S. at 135; *Sykes*, 433 U.S. at 91.

by the cause and prejudice exception to a general rule that counsel's trial defaults are binding on a habeas applicant,[405] or as an exception to the *Sykes* rule itself. Commentators favoring the latter approach[406] have viewed avoidance of a miscarriage of justice as a loophole or escape hatch; this would imply a conflict with the cause and prejudice requirement.

A close reading of the Supreme Court's procedural default decisions finds little support for this "loophole" interpretation. *Frady*'s reference to the subject may be equivocal;[407] the discussions in *Sykes* and *Isaac*, however, are not. The majority's decision in *Sykes* states:

> The 'cause'-and-'prejudice' exception . . . will afford an adequate guarantee, we think, that the [*Francis*] rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice.[408]

In *Isaac*, Justice O'Connor expressed confidence that such defendants "will meet the cause and prejudice standard."[409]

Accordingly, the definition suggested in this Article must be examined further to see how it would operate in cases where it would be generally conceded that a miscarriage of justice has occurred.[410] Two hypothetical examples will be considered: first, a prosecution involving a factually innocent defendant, and second, an instance in which the state engaged in the egregious misconduct of physically coercing a confession.

Presume that defendant Granite is in fact innocent of a homicide for which he was convicted, but that improperly adduced identification evidence was introduced against him. Failure to attack such evidence deprives him of a significant defense. Prejudice under our definition could be demonstrated, as there would be a substantial possibility that the constitutional violation changed the verdict.

The cause requirement may be met in several ways. If counsel knew of

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405. Kinnamon, *Defenses to the Preclusive Rule of* Wainwright v. Sykes, 28 Drake L. Rev. 571, 571 (1979).

406. *See* W. Easton, II Annual Survey of American Criminal Procedure 117, 125 (1983); Goodman & Sallett, *supra* note 277, at 1711; *Defaulted Constitutional Claims*, *supra* note 113, at 992.

407. The *Frady* majority noted that the evidence in the record "disposes of [defendant's] contention that he suffered such actual prejudice that reversal of his conviction 19 years later could be justified. [The Court] perceive[s] no risk of a fundamental miscarriage of justice in *this* case." 456 U.S. at 172 (emphasis added). The Court's holding can be read either as a reference to a category separate from the prejudice requirement or as an interpretation of that requirement.

408. *Sykes*, 433 U.S. at 90-91.

409. *Isaac*, 456 U.S. at 135. The reference in *Isaac* is to a "*fundamental* miscarriage of justice." *Id.* (emphasis added). This may resemble Justice Stevens' reference to fundamental fairness in his concurring *Sykes* opinion. *See* 433 U.S. at 94-97. However, neither term is given explicit content outside of the cause and prejudice requirement itself.

410. *See* Friendly, *supra* note 218, at 150. See also *infra* note 419, 424 and accompanying text.

this violation but deliberately failed to object even though the faulty identification was the prime evidence against an innocent defendant, a violation of the sixth amendment right to effective assistance of an attorney has occurred and the cause standard is satisfied.[411] Such a deliberate forfeiture could only be justified in the rare instance in which an objection would itself turn the trier of fact against the defendant.[412] Under these extraordinary circumstances, cause could also be found under our definition because counsel would be faced with two "grisly" alternatives.

It may be more likely, however, that counsel's failure to object resulted from a faulty pre-trial investigation. Such inadvertence will constitute cause if the prejudice to the defendant involves the basic justice of his incarceration—precisely the situation here.

How does the test apply if Marble, a homicide defendant, has been physically coerced into making a confession? The cause analysis under these facts would be the same as in Granite's case if the trial attorney intentionally failed to raise Marble's claim. Unless an unusual demonstration of intolerable alternatives could be made, deliberate forfeiture of an opportunity to object to the admission of the confession would generally be tantamount to denial of effective assistance of counsel. A prima facie showing of such a denial was found where trial counsel was told that defendant had been refused access to an attorney and that he had been threatened by the police in order to induce his confession.[413] No effort was made to pursue these claims, nor to obtain a copy of the initial recorded interrogation of the defendant which contained material valuable to the defense but was later destroyed.[414]

A competent lawyer would not "forget" that his client had been compelled to confess, nor fail to ask about the circumstances under which the confession was elicited.[415] Accordingly, an inadvertent forfeiture would not arise unless defendant Marble was afraid to reveal the facts, and bruises were not evident. Cause for a forfeiture could therefore be satis-

411. *See, e.g.*, Beasley v. United States, 491 F.2d 687, 691 (6th Cir. 1974) (ineffectiveness found where counsel never called to stand a favorable rebuttal witness whose testimony would have refuted palm print identification that was sole evidence against the defendant); Saltys v. Adams, 465 F.2d 1023, 1028 (2d Cir. 1972) (counsel was incompetent because the only evidence against defendant was questionable identification testimony and counsel failed to take the rudimentary step of seeking a suppression hearing for exploration of this evidence). Incompetence would constitute cause under *Sykes*. *See* L. Yackle, *supra* note 137, § 86, at 347; Tague II, *supra* note 145, at 25; *cf.* Strazzella, *supra* note 198, at 478-79 (ineffective assistance of counsel will qualify as cause under *Sykes* only when a federal court determines that the claim need not have been made in state court and is thus properly before the federal court). See *supra* note 262.

Note, however, that if the state shows that counsel's incompetence was harmless error, the writ would not issue. *See* Tague I, *supra* note 113, at 143 & n.186.

412. *See* Whitus v. Balkcom, 333 F.2d 496, 505-07 (5th Cir.), *cert. denied*, 379 U.S. 931 (1964).

413. *See* Brubaker v. Dickson, 310 F.2d 30, 38 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963).

414. *Id.* at 38-39.

415. *Id.* at 34-35.

fied either by a showing that Marble had ineffective assistance of counsel[416] or by a showing that facts concerning the coercion were reasonably unavailable.[417]

A confession is a powerful jury persuader; the required prejudice demonstration[418] of a substantial possibility that failure to object tipped the scales may be more easily met in this context than with respect to any other type of claim. Indeed, if a defendant's confession has been physically coerced by the state, the Supreme Court has uniformly held that regardless of the strength of the untainted remainder of the record, the conviction must be nullified as incompatible with the fourteenth amendment's due process clause.[419]

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416. Professor Tague notes that the *Sykes* cause and prejudice test may result in more attacks on attorney competence. Among the negative consequences of such attacks may be that some lawyers will refuse court appointment in criminal cases or feel compelled to proffer even frivolous objections at trial to avoid defaults and accusations of ineffectiveness. Still others may view the client as a potential adversary. Tague II, *supra* note 145, at 66. Professor Strazzella also argues that the *Sykes* standard may result in an increase in unfounded incompetence claims. Strazzella, *supra* note 198, at 483-84. Goodman and Sallett conclude that lawyers attempting to protect their professional reputations may testify that their decisions were tactical when in fact they were nonstrategic. *See* Goodman & Sallett, *supra* note 277, at 1725.

However, a finding of ineffectiveness may not necessarily stigmatize counsel. The Sixth Circuit in Schaber v. Maxwell, 348 F.2d 664 (6th Cir. 1965), emphasized that its incompetence finding was not meant to be a reflection on the professional reputation of the two court-appointed attorneys, "both of whom are shown by the record to be reputable and experienced lawyers. We recognize that good lawyers can and do make mistakes." *Id.* at 673. Conversely, the possibility of public embarrassment may prod attorneys into raising their level of performance. *See* Tague II, *supra* note 145, at 66. Professor Strazzella notes further that in cases of blatant incompetence, it is fitting that "the system's failure be laid directly to the real cause where it can be confronted more clearly." Strazzella, *supra* note 198, at 484. Some defaults may stem from the fact that court-appointed attorneys are often overburdened and underpaid. *See Defaulted Constitutional Claims*, *supra* note 113, at 996. If defendants are receiving inferior representation at the trial level, ineffectiveness claims could place added pressure on the states to remedy this deficiency. Strazzella, *supra* note 198, at 483-84.

Professor Tague suggests that a court-provided checklist consonant with American Bar Association guidelines might provide a partial remedy to the problem of incompetence. The list would include general questions as to whether potential lines of investigation or objections had been pursued. Counsel's answers could be reviewed by the habeas court if there were an assertion of ineffectiveness. Tague I, *supra* note 113, at 164. This procedure would also serve to protect attorneys from unscrupulous clients seeking to attack their convictions by making charges of incompetence. Furthermore, it should be noted that although disgruntled clients may be quick to allege a sixth amendment violation, judges are equally quick to strike down nonmeritorious claims. *See* United States v. Joyce, 542 F.2d 158, 160 (2d Cir. 1976) (" 'A convicted defendant is a dissatisfied client, and the very fact of his conviction will seem to him proof positive of his counsel's incompetence.' ") (quoting United States v. Garguilo, 324 F.2d 795, 797 (2d Cir. 1963)), *cert. denied*, 429 U.S. 1100 (1977).

417. See *supra* notes 375-83 and accompanying text.

418. Where defendant has a viable sixth amendment ineffectiveness claim, his prejudice burden would be lighter than in *Sykes* cases. Compare the test in Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984), discussed *supra* at Pt. I.C., with the prejudice definition suggested in this Article *supra* at Pt. II.A.

419. *See* Jackson v. Denno, 378 U.S. 368, 376 (1964); Blackburn v. Alabama, 361 U.S.

The Court has reasoned that such coercion violates rights "so basic to a fair trial that their infraction can never be treated as harmless error."[420] A further concern is that the "confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence."[421] Consequently, once the violation is proven on a merits review, the habeas applicant's request for relief is granted.[422]

This prejudice rule as to coerced confessions has developed in the context of statements admitted at trial over objection.[423] Nevertheless, the conclusion that violations of this magnitude undermine the basic fairness of a criminal prosecution[424] and the reliability of the conviction also supports an expeditious determination of prejudice in the *Sykes* context.

Thus, the definition of cause and prejudice proposed in this Article would meet the Court's concern with preventing a miscarriage of justice, without addition of a third prong to the original two. To the extent that the Court's reference to miscarriage of justice encompasses "essential rights of the people or of the defendant,"[425] the definition takes into account both considerations.

CONCLUSION

The Supreme Court's current position is that the writ of habeas corpus

199, 206 (1960); Spano v. New York, 360 U.S. 315, 320-21 (1959); Payne v. Arkansas, 356 U.S. 560, 568 (1958). This position stems in part from "outrage" and a concomitant desire to deter future "third degree" tactics and prevent the state from profiting by such a confession. For example, Judge Friendly refers to the outrage which arises in response to "the confession extorted by the rack." Friendly, *supra* note 218, at 157. *But see* White, *Federal Habeas Corpus: The Impact of the Failure to Assert a Constitutional Claim at Trial*, 58 Va. L. Rev. 67, 84-85, 89 (1972) (arguing that habeas corpus should not issue if the failure to object at trial to a coerced confession was the result of strategy which would benefit the defendant); *see also* Hill, *The Forfeiture of Constitutional Rights In Criminal Cases*, 78 Colum. L. Rev. 1050, 1061 (1978) (may be good strategy to refrain from objecting to admission of a coerced confession that has some damaging features but supports "a significant theory of the defense") [hereinafter cited as Hill II].

420. Chapman v. California, 386 U.S. 18, 23 (1967).

421. Stein v. New York, 346 U.S. 156, 192 (1953).

422. See *supra* text accompanying notes 419-20.

423. *See* Payne v. Arkansas, 356 U.S. 560, 568 (1958).

424. *See Enforcement of the Sixth Amendment Right to a Speedy Trial: Hearing on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 92d Cong., 1st Sess. 93-121 (1971) (Justice Rehnquist as an Assistant Attorney General testifying that habeas relief is appropriate in cases of gross unfairness such as those involving coerced confessions); *see also* Hill II, *supra* note 419, at 1075 (every Supreme Court Justice would have misgivings about incarcerating an undoubtedly guilty person whose conviction was based upon a confession "induced by physical torture of the prisoner or of immediate members of the prisoner's family"); Tague II, *supra* note 145, at 31 n.147 (reference to Justice Rehnquist's testimony, suggesting habeas corpus relief as to convictions resulting from grossly unfair trials).

425. People v. Weatherford, 27 Cal. 2d 401, 420, 164 P.2d 753, 763 (1945); *see* People v. Musumeci, 133 Cal. App. 2d 354, 365, 284 P.2d 168, 175 (1955); People v. Robarge, 111 Cal. App. 2d 87, 95, 244 P.2d 407, 412 (1952); People v. Geibel, 93 Cal. App. 2d 147, 180, 208 P.2d 743, 762-63 (1949).

will not be generally available to state prisoners proffering a defaulted constitutional claim. A showing that petitioner's trial counsel unilaterally failed to press the claim and had no "deliberate bypass" motivation is an insufficient basis for granting federal district court review on the merits.

This Article accepts these parameters and suggests a definition that could guide habeas courts in determining whether an applicant for relief has shown cause for his default and prejudice resulting from the constitutional violation alleged. The "actual prejudice" prong, which is based on a legal rather than on a factual guilt model, requires the applicant to demonstrate a substantial possibility that but for the violation, his trial would have culminated in an acquittal. A substantial possibility is one which clearly could have changed the outcome, but did not necessarily have this effect. The prejudice showing would be adequate if the federal district court judge would seriously consider the likelihood of such an outcome-determinative effect, even if he ultimately concludes that defendant would have been convicted regardless of the error.

Cause would not automatically be found if the petitioner's counsel inadvertently forfeited the claim, nor automatically be denied if the forfeiture was deliberate. Inadvertence suffices only where the petitioner's prejudice showing indicates factual innocence or a defect in the truth-finding process. Intentional waiver suffices only where assertion of a right would result in consequences that are so punitive that a prudent attorney would feel compelled to avoid them.

Novelty constitutes cause if a retroactive interpretation of the Constitution was too inchoate at the time of trial for a reasonable lawyer to have anticipated it. The cause requirement is also met if trial counsel was unaware of the factual basis for a constitutional challenge because the pertinent information could not have been uncovered by reasonable inquiry or because a reasonable decision not to investigate was made.

This definition would be appropriate even if the Supreme Court were to issue rulings further restricting the substantive scope of the writ by extending the *Stone v. Powell* rationale.[426] Under *Stone*, the writ may not be granted to a petitioner who had the opportunity for a full and fair hearing in the state courts on his fourth amendment claim of an unlawful search and seizure.[427] Extension of the decision to other non-guilt-related challenges, such as the failure to give *Miranda* warnings, would have no impact on the proposed definition. Generally, the two run on separate tracks. The substantive restriction would apply when a state court hearing on the claim has taken place, while the *Sykes* requirement applies only when there was no such hearing. However, if the petitioner forfeited an opportunity to present his claim to the state courts, no federal relief could be accorded on the *Miranda* violation unless the cause

426. 428 U.S. 465 (1976). See *supra* note 315 and accompanying text.
427. 428 U.S. at 485-86.

and prejudice standard is satisfied. The rule would be the same regardless of whether *Miranda* is altered by application of the *Stone* rationale.

The approach suggested in this Article recognizes not only the value of maintaining an efficient and accurate state criminal court system, but also the obligation to prevent unjust incarceration of defendants. Petitions presenting a colorable claim of innocence, or a showing that the state may have physically coerced petitioner's confession, would constitute the best candidates for satisfying the cause and prejudice definition. Such petitions will therefore pass through the pre-screening net and navigate habeas review on the merits under the criteria applicable to cases in which no default has occurred.