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APPLYING *WAINWRIGHT V. SYKES* TO STATE ALTERNATIVE HOLDINGS AND SUMMARY AFFIRMANCES

INTRODUCTION

In 1963, the Supreme Court in *Fay v. Noia*[1] rejected the proposition that the doctrine of adequate and independent state procedural grounds[2]

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1. 372 U.S. 391 (1963).

2. This doctrine limits federal jurisdiction. The Supreme Court on direct review of a state court decision will not review the state judgment if it rests on adequate and independent state grounds. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983); Henry v. Mississippi, 379 U.S. 443, 446 (1965); Herb v. Pitcairn, 324 U.S. 117, 125 (1945); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 636 (1875). Justice Jackson speaking for the Court explained the reasoning:

> [The reason] is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

It has been argued that the real rationale for the doctrine is that the federal question is mooted by the existence of a state ground which will support the judgment. J. Nowak, R. Rotunda & J. Young, Constitutional Law 95 (2d ed. 1983); *see* Fay v. Noia, 372 U.S. 391, 429-30 (1963). Whether this jurisdictional limit is statutory or constitutionally mandated is not settled. *See* Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Sup. Ct. Rev. 187, 188-89 & n.6. *Compare Noia*, 372 U.S. at 430 n.40 (expressing no opinion) *with id.* at 466-67 (Harlan, J., dissenting) (arguing that it is constitutionally mandated).

A distinction has been made between procedural and substantive state grounds. "While [this Court] has deferred to state substantive grounds so long as they are not patently evasive of or discriminatory against federal rights, it has sometimes refused to defer to state procedural grounds only because they made burdensome the vindication of federal rights." *Noia*, 372 U.S. at 432; *see* Henry v. Mississippi, 379 U.S. 443, 446-48 (1965). *But see* Hill, *The Inadequate State Ground*, 65 Colum. L. Rev. 943, 989 (1965) [hereinafter cited as Hill I]; Sandalow, *supra*, at 197-99; Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 Wash. & Lee L. Rev. 1043, 1054 (1977).

A state ground is adequate if it is sufficient in itself to maintain the judgment. *See* Eustis v. Bolles, 150 U.S. 361, 369-70 (1893). However, not all state procedural grounds are adequate to block consideration of the federal issue. *See, e.g.*, Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982) (default rule inconsistently applied cannot be invoked to bar federal claim); NAACP v. Alabama, 377 U.S. 288, 301 (1964) (new rule of procedure cannot be created to bar federal claim); Davis v. Wechsler, 263 U.S. 22, 24 (1923) ("Whatever springes [sic] the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."); *see also* Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680-82 (1930) (state procedural ground that is unconstitutional is not adequate); Ward v. Board of County Comm'rs, 253 U.S. 17, 22-23 (1920) (same). Whether the state procedural ground is adequate to block consideration of the federal issue is a question of federal law which federal courts must decide. Henry v. Mississippi, 379 U.S. 443, 447 (1965); *see* Michigan v. Long, 463 U.S. 1032, 1038 (1983); Chapman v. California, 386 U.S. 18, 21 (1967); Ancient Egyptian Arabic Order of Nobles

constituted a jurisdictional bar to federal habeas corpus review of state criminal convictions.[3] The Court held that although an adequate and independent state procedural ground blocked direct review by the Supreme Court, federal habeas relief remained available.[4] The *Noia* Court further stated that lower federal courts may exercise their jurisdiction to hear the petition of a prisoner who had lost the right to raise a federal constitutional issue because of a procedural default, unless the prisoner had "deliberately bypassed" the procedural rule.[5]

Subsequent to *Noia*, the Court limited the discretion of federal courts to exercise habeas corpus jurisdiction.[6] Indeed, in a series of cases culmi-

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of the Mystic Shrine v. Michaux, 279 U.S. 737, 744-45 (1929); Ward v. Board of County Comm'rs, 253 U.S. 17, 22-23 (1920).

Professor Wright has summarized the cases of inadequate state grounds as follows:

> If there is no fair and substantial support in the facts for the state court's ruling on the state ground, the Supreme Court can disregard it. A new state rule cannot be invented for the occasion in order to defeat the federal claim. It has been said that if the state court's refusal to consider the merits of a case is based on a rule "more properly deemed discretionary than jurisdictional" this does not bar review in the Supreme Court. Even a state procedural rule of general applicability may be thought not an adequate state ground if it is so strict that it interferes unduly with the presentation of federal questions.

C. Wright, Law of Federal Courts § 107, at 748-49 (4th ed. 1983) (footnotes omitted) (quoting Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 234 (1969)).

To be independent the state court's decision must derive solely from state law. *See* Michigan v. Long, 463 U.S. 1032, 1044 (1983). If the state court holds that the federal constitution compelled the result, that state ground is not independent. *See id.* at 1040-41, 1043-44; Minnesota v. National Tea Co., 309 U.S. 551, 554-55 (1940). *See generally* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure §§ 4023-4025 (1977 and Supp. 1984). For a complete discussion of the doctrine of adequate and independent state grounds, see generally *id.* at §§ 4019-4028.

3. *See* Fay v. Noia, 372 U.S. 391, 399 (1963). The grant of federal habeas jurisdiction over persons in state custody is found at 28 U.S.C. § 2254 (1982). If the federal court issues the habeas writ the state is required to retry the case or release the petitioner. *See* C. Wright, *supra* note 2, § 53, at 332.

For discussions of the background, history and concerns involved in federal habeas review of state court convictions, see generally C. Wright, *supra* note 2, § 53; L. Yackle, Postconviction Remedies §§ 15-21 (1981 and Cum. Supp. 1985); Note, *Federal Habeas Corpus Review of State Forfeitures Resulting From Assigned Counsel's Refusal to Raise Issues on Appeal*, 52 Fordham L. Rev. 850, 850-52 & nn.1-3 (1984) [hereinafter cited as *Federal Habeas Corpus Review*].

4. *See* Fay v. Noia, 372 U.S. 391, 398-99, 426-34 (1963).

5. *See id.* at 438. A deliberate bypass is " 'an intentional relinquishment or abandonment of a known right or privilege.' " *Id.* at 439 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Errors of counsel committed after conviction without the defendant's knowledge will not be visited upon the defendant. *Id.*; *see* Humphrey v. Cady, 405 U.S. 504, 517 (1972). Only when a defendant knowingly and intentionally abandons the right has he deliberately bypassed the state procedure for vindicating that right. *See Noia*, 372 U.S. at 439. *But see* Wainwright v. Sykes, 433 U.S. 72, 94 n.1 (1977) (Stevens, J., concurring) (courts have found deliberate bypass without intent of defendant). It has been argued that the deliberate bypass standard was never intended to be applied to errors committed during trial; rather, it was limited to post-conviction decisions in which the defendant participated. *Id.* at 91-92 (Burger, C.J., concurring).

6. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Francis v. Henderson, 425 U.S.

nating in *Wainwright v. Sykes*[7] the Court substantially limited the reach of *Noia*.[8] In *Sykes*, the habeas petitioner had forfeited his right to raise a federal constitutional claim in state court because he failed to object contemporaneously.[9] The Supreme Court held that a federal habeas court could review a petition involving a procedural default only when a defendant could show cause for and prejudice arising from the default.[10]

536, 538-39, 541-42 (1976); Davis v. United States, 411 U.S. 233, 242 (1973); L. Yackle, *supra* note 3, § 21, at 102-03.

7. 433 U.S. 72 (1977). See *supra* note 6.

8. *See id.* at 87-88 & n.12. See *infra* note 70 and accompanying text.

9. *See id.* at 75, 86-87. Florida law required the defense to object at or prior to trial to the erroneous admission of a confession or be deemed to have waived the objection. *See id.* at 76 n.5, 86. The *Sykes* Court rejected the petitioner's contention that Florida did not have a contemporaneous objection rule, stating that "Florida procedure did, consistently with the United States Constitution, require that respondent's confession be challenged at trial or not at all." *Id.* at 86.

10. *See id.* at 87. The *Sykes* rule provides that when a procedural default constitutes an adequate and independent state ground sufficient to block direct Supreme Court review, the petitioner must demonstrate cause for and prejudice arising from the default before the reviewing court may disregard the default and entertain the claim on the merits. *Id.* at 86-87; *see* Reed v. Ross, 104 S. Ct. 2901, 2908 (1984); Engle v. Isaac, 456 U.S. 107, 128-29 (1982); L. Yackle, *supra* note 3, § 82 (1981); Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 Colum. L. Rev. 1050, 1059 (1978) [hereinafter cited as Hill II]. This limitation does not arise from the limited scope of the federal courts' jurisdiction. Rather, it is a discretionary limit on the exercise of that jurisdiction. *See* Reed v. Ross, 104 S. Ct. 2901, 2907 (1984); Francis v. Henderson, 425 U.S. 536, 538-39 (1976); Fay v. Noia, 372 U.S. 391, 438 (1963). The Supreme Court justifies this limit because habeas corpus review is equitable in nature. *See Noia*, 372 U.S. at 438. The *Sykes* rule places the burden of proving cause and prejudice on the habeas petitioner. *See* Engle v. Isaac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, 433 U.S. 72, 91 (1977).

However, the definition of cause and prejudice is not clear. The *Sykes* Court left the definition to later cases. *See Sykes*, 433 U.S. at 87; *see also* Engle v. Isaac, 456 U.S. 107, 144 (1982) (Brennan, J., dissenting). The Court in *Reed v. Ross*, 104 S. Ct. 2901 (1984), described some of the boundaries of the cause requirement, stating:

> a defendant is bound by the tactical decisions of competent counsel . . . and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct . . . .
>
> On the other hand, the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests.

Id. at 2909 (citations omitted).

Prejudice may be demonstrated by showing that no evidence, other than the challenged evidence, supports the prisoner's conviction, *see* United States v. Frady, 456 U.S. 152, 172 (1982), and that the errors at trial "worked to his *actual* and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions." *Id.* at 170 (emphasis in original). This prong may be a variation of the harmless error doctrine. *Compare* Chapman v. California, 386 U.S. 18, 24 (1967) (on direct appellate review, state has burden of proving the error was harmless) *with* Wainwright v. Sykes, 433 U.S. 72, 91 (1977) (habeas applicant has not shown cause and prejudice) *and id.* at 117 (Brennan, J., dissenting) (noting similarity to harmless error).

Whatever the exact definition of cause and prejudice may be, it has been viewed as a significant barrier to obtaining federal habeas review. *See* Engle v. Isaac, 456 U.S. 107, 144 (1982) (Brennan, J., dissenting). The barrier, however, may have been lowered somewhat by the Court's decision in Reed v. Ross, 104 S. Ct. 2901 (1984), which held that a novel claim may satisfy the cause test. *See id.* at 2910.

However, when a state court "forgives" the default and decides the case solely on the constitutional issue, a federal court may freely entertain the habeas petition.[11]

In *Sykes* the state courts—trial and appellate—did not discuss the merits of the petitioner's constitutional claim, because the claim was never presented on direct review.[12] The Supreme Court acknowledged that, under the circumstances, the claim would have been barred by the state procedural ground.[13] Since *Sykes*, lower federal courts have disagreed over whether the cause and prejudice standard applies in the case of alternative holdings,[14] in which the state court dismisses the petitioner's federal claim due to a procedural default but also reaches and dismisses the federal claim on the merits. Some courts have held that despite the state court's procedural dismissal, *Sykes* does not apply if the state court has also decided the merits of the federal constitutional claim.[15] Others have held that *Sykes* applies if a procedural ground was a substantial basis for the state court's decision.[16] A third group has held that *Sykes* applies whenever the state court finds a procedural default, regardless of whether the merits of the claim were also reached.[17]

When a state court bases its decision on two independent holdings—

11. *See* County Court v. Allen, 442 U.S. 140, 150-51 & nn.8-10, 154 (1979); Castaneda v. Partida, 430 U.S. 482, 485 n.4 (1977); Martinez v. Harris, 675 F.2d 51, 54 (2d Cir.), *cert. denied*, 459 U.S. 849 (1982). The state court in Partida v. State, 506 S.W.2d 209 (Tex. Crim. App. 1974) did not mention the possible procedural problem, but rather discussed only the merits of the constitutional claim. *See id.* at 210-11.

12. *See* Wainwright v. Sykes, 433 U.S. 72, 75 & n.3 (1977).

13. *See id.* at 85-87. The Court further held that if the state court had relied on that procedural ground, that reliance would have barred direct federal review. *See id.* at 86-87.

14. See *infra* note 18 for a definition of alternative holdings.

15. *See, e.g.*, Darden v. Wainwright, 699 F.2d 1031, 1034 & n.4 (11th Cir.), *aff'd by an evenly divided court*, 708 F.2d 646 (11th Cir.) (en banc), *vacated on other grounds*, 715 F.2d 502 (11th Cir. 1983) (en banc), *aff'd in part, rev'd in part on other grounds*, 725 F.2d 1526 (11th Cir.) (en banc), *cert. denied*, 104 S. Ct. 2688 (1984), *vacated on other grounds*, 105 S. Ct. 1158 (1985); Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981); Bradford v. Stone, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979); Bagwell, *Procedural Aspects of Prisoner § 1983 and § 2254 Cases in the Fifth and Eleventh Circuits*, 95 F.R.D. 435, 457 (1982).

The Eleventh Circuit presents a unique approach to this problem. In Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 3591 (1984), the court stated that an alternative holding is sufficient to trigger the *Sykes* rule. *See id.* at 1524. Nevertheless, in a subsequent case the Eleventh Circuit held that *Sykes* did not bar review, even though it recognized that the state court had made an alternative holding. *See* Darden v. Wainwright, 699 F.2d 1031 (11th Cir.), *aff'd by an evenly divided court*, 708 F.2d 646 (11th Cir.) (en banc), *vacated on other grounds*, 715 F.2d 502 (11th Cir. 1983) (en banc), *aff'd in part, rev'd in part on other grounds*, 725 F.2d 1526 (11th Cir.) (en banc), *cert. denied*, 104 S. Ct. 2688 (1984), *vacated on other grounds*, 105 S. Ct. 1158 (1985). The *Darden* court relied on the fact that the merits of the petitioner's claim was a basis for the state court's decision. *See id.*

16. *See* Dietz v. Solem, 640 F.2d 126, 131-32 & n.1 (8th Cir. 1981); Hockenbury v. Sowders, 620 F.2d 111, 115 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981).

17. *See, e.g.*, Phillips v. Smith, 717 F.2d 44, 48 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); United States *ex rel.* Veal v. DeRobertis, 693 F.2d 642, 650 (7th Cir. 1982); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982).

one procedural and one substantive, for example—the court's holding is said to be in the alternative.[18] Because both holdings can independently support the court's decision,[19] they each constitute binding precedent.[20] However, if a court fails to state explicitly that its decision is based on two independent holdings, a reviewing court might interpret the opinion as resting on only one.[21]

Assume that the two possible grounds are A—the independent state ground—and B—the federal constitutional ground. The reviewing court can interpret the decision in three different ways. The first interpretation is that A is the sole basis of the state court's decision and that B is dictum.[22] Under this interpretation, the state court's decision is not characterized as an alternative holding because it rests only on A.[23] In this situation, it is generally agreed that *Sykes* applies.[24] A second interpretation is that A and B each independently supports the state court's deci-

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18. *See* Phillips v. Smith, 717 F.2d 44, 46-47, 49 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984). "Where the judgment is based upon two alternative grounds, one on the merits and the other not on the merits, there is a decision on both grounds although either alone would have been sufficient to support the judgment . . . ." Restatement of Judgments § 49 comment c (1942).

> If the judgment of the court of first instance was based upon two alternative grounds, either of which would be sufficient to support the judgment, and the appellate court holds that both of these grounds are sufficient, and accordingly affirms the judgment, the judgment is conclusive as to both grounds in a subsequent action on a different cause of action.
>
> If the appellate court determines that one of these grounds is sufficient but that the other is not, and accordingly affirms the judgment, the judgment is conclusive only as to the first ground.
>
> If the appellate court determines that one of these grounds is sufficient and refuses to consider whether or not the other ground is sufficient, and accordingly affirms the judgment, the judgment is conclusive only as to the first ground.

Id. at § 69 comment b (citation omitted).

An alternative holding should be distinguished from an alternative judgment. The alternative holding results in a judgment. That judgment can also be in the alternative—meaning that the party against whom the judgment was entered may satisfy that judgment in one of several ways. *See* Kaybill Corp. v. Cherne, 24 Ill. App. 3d 309, 313-14, 315-16, 320 N.E.2d 598, 602-03, 604 (1974); Donaldson v. Greenwood, 40 Wash. 2d 238, 251-52, 242 P.2d 1038, 1044, 1046 (1952); State v. Wilson, 216 N.C. 130, 133, 4 S.E.2d 440, 442 (1939).

The alternative holding disposes of one issue, but gives two reasons for that disposition. *See* United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 439-40 (3rd Cir. 1982). For example, a claim of constitutional immunity against the use of testimony could be dismissed exclusively on the merits or on a procedural basis, or on both grounds.

19. *See* Phillips v. Smith, 717 F.2d 44, 49 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); R. Cross, Precedent in English Law 86-87 (3d ed. 1977). See *supra* note 18.

20. *See* United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982); R. Cross, *supra* note 19, at 41.

21. *See* R. Cross, *supra* note 19, at 87, 89.

22. *See* Irvin v. Dowd, 359 U.S. 394, 404 (1959). For a complete discussion of this case, see Hart, *The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 108-22 (1959).

23. See *supra* notes 18-20 and accompanying text.

24. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 117, 135 (1982); Phillips v. Smith, 717 F.2d 44, 48 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); United States *ex rel.* Veal v.

DeRobertis, 693 F.2d 642, 650 (7th Cir. 1982); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982).

Circuits that hold that a state court opinion must rest exclusively on the procedural ground will apply the *Sykes* test when the state court merely discussed the federal constitutional claim in dictum. *See* Hall v. Wainwright, 733 F.2d 766, 777 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2344 (1985); Ratcliff v. Estelle, 597 F.2d 474, 475-76, 478 (5th Cir.), *cert. denied*, 444 U.S. 868 (1979). The Fifth Circuit has stated that the applicable rule is that "if 'the state courts entertained the federal claims on the merits, a federal habeas corpus court must also determine the merits of the applicant's claim.' " Ratcliff v. Estelle, 597 F.2d 474, 478 (5th Cir.), *cert. denied*, 444 U.S. 868 (1979) (quoting Lefkowitz v. Newsome, 420 U.S. 283, 292 n.9 (1975)). Discussing the federal claim in dictum is not equivalent to entertaining the federal claim on the merits. See *infra* note 36 and accompanying text. Indeed, the cases cited and discussed by the court in *Ratcliff* do not support the proposition that dictum on a federal issue triggers federal habeas review, regardless of cause and prejudice. *See id.* at 477-78. For instance, in Lefkowitz v. Newsome, 420 U.S. 283 (1975), there was no procedural default. *See id.* at 289-90. The *Newsome* Court stated its holding was "that when state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding." *Id.* at 293. The footnote in the *Newsome* opinion referred to by the *Ratcliff* Court distinguished Fay v. Noia, 372 U.S. 391 (1963), by pointing out that there was no bypass, deliberate or otherwise, in the *Newsome* case. *See Newsome*, 420 U.S. at 291-92 & n.9. The other case cited was Newman v. Henderson, 425 U.S. 967 (1976), in which the Supreme Court vacated the lower court's judgment, citing *Newsome*, 420 U.S. at 292 n.9, and Francis v. Henderson, 425 U.S. 536, 542 n.5 (1976). *Newsome* has already been discussed. The footnote in *Francis* referred to by the Supreme Court says in its entirety: "In a case where the state courts have declined to impose a waiver but have considered the merits of the prisoner's claim, different considerations would, of course, be applicable. See *Lefkowitz v. Newsome*, 420 U.S. 283." Francis v. Henderson, 425 U.S. 536, 542 n.5 (1976). Since the lower federal courts applied a procedural bar when the state courts had not, the Supreme Court's holding did not allow a federal court to disregard a state court's holding that no default existed when that holding forgave a procedural default and went on to the merits of petitioner's federal claims. Other cases pointed to by *Ratcliff* involved holdings on the merits and dictum as to procedural grounds. *See Ratcliff*, 597 F.2d at 477-78. Finally, the state court in *Ratcliff* discussed the federal issue in dictum, and squarely held that that claim was barred by a procedural default. *See id.* at 478. Thus, the Fifth Circuit will apply the *Sykes* rule when the state court discusses the federal ground in dictum, but nonetheless holds the claim barred by a procedural default.

The Eleventh Circuit similarly imposes the *Sykes* rule when the state court merely comments in dictum on the federal claim, but holds on the procedural ground. *See, e.g.*, Hall v. Wainwright, 733 F.2d 766, 777-78 (11th Cir. 1984) (*Sykes* applied despite the state court's discussion of the merits); Dobbert v. Strickland, 718 F.2d 1518, 1524 (11th Cir. 1983) ("where a state court clearly and correctly applies a procedural default rule, *Sykes* requires the federal court to abide by the state court's decision even though the state court discusses the merits as an alternate ground for rejecting a claim"), *cert. denied*, 104 S. Ct. 3591 (1984).

The Tenth Circuit similarly applies the *Sykes* rule despite the state court's comments in dictum on the federal constitutional issue. *See* Runnels v. Hess, 653 F.2d 1359, 1363 (10th Cir. 1981). In *Runnels*, the state appellate court noted that the prosecutor improperly directed the attention of the jury to the defendant's failure to testify, but held that the claim was barred by a procedural default. *See* Runnels v. State, 562 P.2d 932, 937 (Okla. Crim. App. 1977), *cert. denied*, 434 U.S. 893 (1977).

Circuits holding that *Sykes* applies if the state court's decision was substantially based on a procedural ground also apply *Sykes* when the federal constitutional discussion is dictum. *See* Dietz v. Solem, 640 F.2d 126, 131-32 & n.1 (8th Cir. 1981) (state court held on procedural ground and its discussion of federal issue was dictum); Hockenbury v.

sion,[25] and, therefore, A and B are both binding precedent. Here, the state court's decision is properly characterized an alternative holding,[26] and the courts are divided as to whether *Sykes* applies.[27] A third interpretation is that the procedural ground A is dictum and that the federal ground B is the sole basis of the opinion.[28] Again, this is not an alternative holding because the state court's decision is interpreted as resting only on B.[29] In this case, it is generally agreed that *Sykes* does not apply.[30]

These three possiblities assume that the federal reviewing court can reasonably interpret the state court's opinion. Some opinions, however, are not easily susceptible to interpretation. A classic example is the summary affirmance, in which the state court fails to give any reasons for its decision.[31] In this situation, the federal courts are again split as to whether *Sykes* applies.[32]

Part I of this Note discusses the application of the *Sykes* cause and prejudice test when the state court bases its decision on only one ground—substantive or procedural—and discusses the other in dictum. Part II examines whether the *Sykes* test should also apply when the state court's holding is based on independent and adequate state procedural grounds as well as on federal constitutional grounds—the alternative holding. Part III discusses the inappropriateness of applying the *Sykes* standard when the basis of the state court's holding is unclear.

This Note concludes that if a state court decides a claim against the defendant on adequate and independent procedural grounds, the *Sykes* cause and prejudice test should apply regardless of any further comments by that court on the federal constitutional ground. Thus, *Sykes* should apply to alternative holdings. However, when the state court forgives the default, decides the case solely on a federal constitutional issue or fails to clearly identify the basis of its holding, the federal habeas court should review the state court's holding without regard to the *Sykes* cause and prejudice standard.

Sowders, 620 F.2d 111, 115-16 (6th Cir. 1980) (state court held substantially on procedural ground, but also discussed merits), *cert. denied*, 450 U.S. 933 (1981).

25. *See* United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 437, 440 (3d Cir. 1982).

26. See *supra* notes 18-20 and accompanying text.

27. See *supra* notes 15-17 and accompanying text.

28. *See* Irvin v. Dowd, 359 U.S. 394, 406 (1959).

29. See *supra* notes 18-20 and accompanying text.

30. See *infra* note 57 and accompanying text.

31. *See, e.g.*, Memoranda, February 1980, 74 A.D.2d 738, 738-41 (162 judgments affirmed without opinion, dated from February 4, 1980 to February 28, 1980). A summary affirmance, for the purposes of this Note, is an affirmance without opinion.

32. See *infra* note 118 and accompanying text.

I. THE APPLICATION OF THE *SYKES* STANDARD WHEN THE STATE COURT'S DECISION IS BASED ON ONLY ONE GROUND

Although two grounds for deciding an issue may exist, the state court may choose to rely on only one. It may decide the case on an available procedural ground, and comment in dictum on the federal issue. In contrast, it can choose to decide the case on the merits of the federal claim, and comment in dictum that the claim could have been precluded by a procedural default.

A. *The Procedural Ground Is the Basis of the State Court's Decision and Its Discussion of the Federal Issue Is Dictum*

In *Wainwright v. Sykes*,[33] the Supreme Court held that when a state court has not resolved or ruled on a federal constitutional claim based on a procedural default in state court, a federal court may not grant habeas relief absent a showing of cause and prejudice.[34] In light of *Sykes*' strict language, the suggestion that any state court's comment on a federal issue, even dictum, suffices to open federal habeas review is untenable for several reasons.[35] First, when a federal habeas court decides that the state court's comments concerning the merits of petitioner's constitutional claim are dictum, the state court has not resolved or adjudicated the federal issue.[36] Thus, *Sykes* properly applies.[37] Moreover, the Supreme Court has repeatedly held that state procedural defaults alone can preclude federal review of the merits of a criminal conviction despite the petitioner's later assertions of constitutional violations.[38] Indeed, a state court need not even discuss a constitutional claim if that claim is "waived" or "defaulted" because of the violation of a valid procedural rule.[39] Thus, when a state court considers the constitutional issue in dictum but dismisses the claim on a state procedural ground that would bar direct Supreme Court review, the *Sykes* rule should apply in full force.

Concern that state courts will "hide behind" procedural grounds to defeat federal rights is unfounded. Not all procedural grounds constitute adequate and independent state grounds.[40] The resolution of this issue is

33. 433 U.S. 72 (1977).

34. *See id.* at 86-87. See *supra* note 10 for a discussion of cause and prejudice.

35. In the absence of that comment, habeas review would be unavailable without a showing of cause and prejudice. See *supra* note 10 and accompanying text.

36. *See* Garvey v. Trew, 64 Ariz. 342, 350, 170 P.2d 845, 850, *cert. denied*, 329 U.S. 784 (1946); People v. Case, 220 Mich. 379, 382-83, 190 N.W. 289, 290 (1922); Winn v. Warner, 193 S.W.2d 867, 881 (Tex. Civ. App.), *rev'd on other grounds*, 145 Tex. 302, 197 S.W.2d 338 (1946).

37. See *supra* note 24 and accompanying text.

38. *See* Reed v. Ross, 104 S. Ct. 2901, 2908 (1984); Engle v. Isaac, 456 U.S. 107, 110, 124-25 (1982); Wainwright v. Sykes, 433 U.S. 72, 75, 86-87 (1977); Francis v. Henderson, 425 U.S. 536, 538, 542 (1976); Henry v. Mississippi, 379 U.S. 443, 446-52 (1965); Fay v. Noia, 372 U.S. 391, 428-29 (1963).

39. *See* Edelman v. California, 344 U.S. 357, 358-59 (1953); Herndon v. Georgia, 295 U.S. 441, 442-43 (1935); Parker v. Illinois, 333 U.S. 571, 573-74 (1948).

40. *See* Hill I, *supra* note 2, at 944-53. Examples of procedural rules that will not bar

a federal question which a federal habeas court is competent to decide.[41] If a state court denies the federal constitutional claim on an inadequate state ground it risks having the conviction vacated on federal habeas review.[42] Considering the potentially overwhelming problems of retrial,[43] a prosecutor should be loath to rely on inadequate state procedural grounds.[44] Further, the *Sykes* rule will not bar federal review should the petitioner show cause and prejudice.[45] This exception was designed in part to prevent miscarriages of justice.[46] Therefore, if the state unreasonably invokes a procedural rule to prevent the defendant from asserting a constitutional claim, the federal court might properly find a miscarriage of justice amounting to cause and prejudice.[47]

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federal review of federal constitutional claims include a default rule that is inconsistently applied, rules that are unconstitutional, rules that are newly created to bar the federal claim and overly technical rules of local practice. See *supra* note 2.

41. *See* Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977); Walker v. Engle, 703 F.2d 959, 966 & n.10 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 396 (1984); Alderman v. Austin, 663 F.2d 558, 561 n.4 (5th Cir. 1982); Breest v. Perrin, 655 F.2d 1, 2-3 & n.1 (1st Cir.), *cert. denied*, 454 U.S. 1059 (1981); *In re* Kravitz, 488 F. Supp. 38, 45 (M.D. Pa. 1979); L. Yackle, *supra* note 3, § 84, at 144 (Cum. Supp. 1985); *cf.* Parker v. Illinois, 333 U.S. 571, 574-75 (1948) (rule same on direct review); Ward v. Board of County Comm'rs, 253 U.S. 17, 22-23 (1920) (same).

42. *See* Walker v. Engle, 703 F.2d 959, 966-67 & nn.10-11 (6th Cir. 1983) (asserted procedural bar by state court that has no basis in fact or law will not bar federal review), *cert. denied*, 104 S. Ct. 396 (1984); Kozerski v. Smith, 555 F. Supp. 212, 216-18 (D.N.H. 1983) (indigent's failure to notarize motion claiming indigency due to inability to pay notary fee is not adequate to bar federal habeas review).

43. See *infra* notes 106-08 and accompanying text for a discussion of these problems. *See* Reed v. Ross, 104 S. Ct. 2901, 2907 (1984); Engle v. Isaac, 456 U.S. 107, 127-28 (1982); Forman v. Smith, 633 F.2d 634, 640 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 147 (1970).

44. *Cf.* Wainwright v. Sykes, 433 U.S. 72, 89 (1977) (prosecutor may avoid using testimony that may result in reversal on direct appeal or in federal habeas relief).

45. *See id.* at 87. *Sykes* does not preclude all review of a claim merely because there has been a procedural default. Rather, the claim may still be considered on the merits if the petitioner can demonstrate cause and prejudice. *See* Reed v. Ross, 104 S. Ct. 2901, 2906-07 (1984). See *supra* note 10.

46. *See id.* at 90-91.

47. *See* Engle v. Isaac, 456 U.S. 107, 135 (1982) ("we are confident that victims of a fundamental miscarriage of justice will meet the cause—and—prejudice standard"); Phillips v. Smith, 717 F.2d 44, 49 (2d Cir. 1983) (states will not sacrifice federal constitutional rights "because the cause and prejudice test allows for federal habeas review, despite a procedural default, to prevent a fundamental miscarriage of justice"), *cert. denied*, 104 S. Ct. 1287 (1984); Huffman v. Wainwright, 651 F.2d 347, 351 (5th Cir. 1981) (explaining that Fifth Circuit defines cause to protect "defendants who have not strategically withheld constitutional objections in state court proceedings from the possibility of injustice"); Hill II, *supra* note 10, at 1076-78 (listing factors which might guide a finding of a miscarriage of justice). *But see* Engle v. Isaac, 456 U.S. 107, 129 (1982) (*Sykes* test is not limited to constitutional errors which impair truthfinding—implying that cause and prejudice might block habeas review despite petitioner's possible innocence).

Moreover if the state court asserts a procedural default which is "an obvious subterfuge to evade consideration of a federal issue," this will not constitute an adequate state ground. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945); *see* Mullaney v. Wilbur, 421 U.S. 684, 691 & n.11 (1975); Williams v. Georgia, 349 U.S. 375, 382-83, 389

Finally, post-*Sykes* cases compel the conclusion that *Sykes* applies if the state court dismissed the claim on adequate and independent procedural grounds, although it also discussed the federal constitutional claim in dictum. For example, in *County Court v. Allen*,[48] although the state court had addressed the merits of the constitutional claim,[49] the Supreme Court on habeas review nevertheless searched the record to determine whether the state court had relied on a procedural default.[50] The Court indicated that such a ground would have triggered the *Sykes* cause and prejudice test.[51] Therefore, a state court may comment in dictum on the merits of the constitutional claim without subjecting the conviction to federal habeas review if its actual holding is based solely on an adequate and independent state procedural ground.

B. *The Constitutional Ground Is the Basis of the State Court's Decision and Its Discussion of the Procedural Ground Is Dictum*

When a federal habeas court interprets a state court's holding as resting on the constitutional basis, with the consideration of the procedural ground either reduced to dictum or the default forgiven, habeas review is available for two reasons. First, when the state court's holding is based solely on the merits of the federal ground, the rule of *Brown v. Allen*[52] entitles the petitioner to federal habeas review of his federal contention because that claim is not barred by a procedural default.[53]

Second, as discussed earlier, the scope of direct review with respect to adequate and independent state procedural grounds parallels the *Sykes* habeas corpus rule.[54] The *Sykes* standard applies only when an adequate and independent state procedural ground would block direct review.[55] When a state procedural ground is not relied on or is forgiven, direct federal review is not barred,[56] and *Sykes* does not apply.[57]

(1955). Finally, if the asserted state ground is not adequate, the *Sykes* bar does not apply. See *supra* notes 17-19 and accompanying text.

48. 442 U.S. 140 (1979).

49. *See id.* at 145-46.

50. *See id.* at 149-54.

51. *See id.* at 148-49.

52. 344 U.S. 443 (1953). See *infra* notes 73-78 and accompanying text.

53. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

54. See *supra* note 10.

55. See *supra* notes 10, 41-42.

56. *See* United Air Lines, Inc. v. Mahin, 410 U.S. 623, 630-31 (1973); Beecher v. Alabama, 389 U.S. 35, 37 n.3 (1967) (per curiam); Irvin v. Dowd, 359 U.S. 394, 406 (1959); International Steel & Iron Co. v. National Sur. Co., 297 U.S. 657, 665-66 (1936); Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120 (1924); Maxwell v. Sumner, 673 F.2d 1031, 1034 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982). On direct review, if the Supreme Court reverses the state court's federal determination, the case will be remanded to the state court for determination of the state issue. *See* Orr v. Orr, 440 U.S. 268, 283-84 (1979); Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 98, 109 (1938).

57. *See* County Court v. Allen, 442 U.S. 140, 154 (1979); Corn v. Zant, 708 F.2d 549, 555 n.2 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 2670 (1984); Walker v. Engle, 703 F.2d

II. THE APPLICATION OF *SYKES* TO ALTERNATIVE HOLDINGS BASED ON STATE PROCEDURAL AND FEDERAL CONSTITUTIONAL GROUNDS

When a federal habeas court interprets a state court's decision as an alternative holding based on state procedural grounds and on federal constitutional grounds, the *Sykes* cause and prejudice standard should apply[58] as long as the state procedural ground is adequate and independent.[59] As a matter of procedure, most courts hold that to reverse a conviction based on alternative grounds, both grounds must be negated.[60] If only one of the grounds is erroneous, the conviction may stand on the other ground.[61] Similarly, because a state judgment may stand on a procedural ground, the federal court must in some way overrule or disregard that ground before it can issue a writ of habeas corpus.[62] Otherwise fed-

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959, 966 & n.10 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 396 (1984); Booker v. Wainwright, 703 F.2d 1251, 1255 (11th Cir.), *cert. denied*, 104 S. Ct. 290 (1983); Bell v. Watkins, 692 F.2d 999, 1004 (5th Cir.), *cert. denied*, 104 S. Ct. 142 (1983); United States *ex rel.* Ross v. Franzen, 688 F.2d 1181, 1183 (7th Cir. 1982) (en banc); Washington v. Harris, 650 F.2d 447, 452 (2d Cir. 1981), *cert. denied*, 455 U.S. 951 (1982); Dietz v. Solem, 640 F.2d 126, 131-32 (8th Cir. 1981); Hockenbury v. Sowders, 620 F.2d 111, 115 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981); Brinlee v. Crisp, 608 F.2d 839, 857 & n.13 (10th Cir. 1979), *cert. denied*, 444 U.S. 1047 (1980); Bradford v. Stone, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979).

The Supreme Court has stated that when a state court does not rely on an available state ground, the federal habeas court should not bar review on the basis of that state ground. *See* Lefkowitz v. Newsome, 420 U.S. 283, 292 n.9 (1975); Irvin v. Dowd, 359 U.S. 394, 406 (1959).

58. *See* Phillips v. Smith, 717 F.2d 44, 48-49 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); United States *ex rel.* Veal v. DeRobertis, 693 F.2d 642, 650 (7th Cir. 1982); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440-41 (3d Cir. 1982).

59. See *supra* notes 40-42 and accompanying text.

60. *See* Michigan v. Long, 463 U.S. 1032, 1042 (1983) (if a state court decision rests on two grounds, one of which could be reversed by the Supreme Court, the same judgment will be rendered if the other ground remains as an adequate and independent state ground); Wright v. Georgia, 373 U.S. 284, 287-89 (1963) (state decision seemed to rest on both merits and on procedural default, Supreme Court held procedural ground inadequate and reversed state court's holding on merits, reversing the conviction); *cf.* Restatement of Judgments § 49 comment c, § 69 comment b (1942) (a civil judgment based on alternative grounds will stand if one ground is overruled, but the other ground is left standing).

61. *See* Michigan v. Long, 463 U.S. 1032, 1041-42 (1983) (state criminal conviction will stand regardless of Supreme Court's disposition of the federal issue if the conviction rests alternatively on adequate state grounds); *cf.* Benton v. Maryland, 395 U.S. 784, 787-89 (1969) (when appellant is sentenced to concurrent sentences, prisoner will serve one sentence even if other is reversed); Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 196-97 (1965) (civil judgment will stand on alternative ground); Halpern v. Schwartz, 426 F.2d 102, 105-06 (2d Cir. 1970) (same); Markoff v. New York Life Ins. Co., 369 F. Supp. 308, 313 (D. Nev. 1973) (same), *aff'd*, 530 F.2d 841 (9th Cir. 1976); Restatement of Judgments § 49 comment c, § 69 comment b (1942) (same); Restatement (Second) of Judgments § 27 comment i (1982) (same); 46 Am. Jur. 2d, *Judgments* § 463 (1969) (same); Annot., 157 A.L.R. 1038, 1045 (1945) (same).

62. *See* Fay v. Noia, 372 U.S. 391, 466-67 (1963) (Harlan, J., dissenting); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982). See *infra* note 63 and accompanying text.

eral habeas "relief" will constitute nothing but an advisory opinion,[63] and the alternative state procedural ground will not be negated. At best, all that a federal decision would accomplish under these circumstances would be the correction of an erroneous state view of federal law, a view that was not essential to the state holding.

It is well settled that a federal court may not overrule a state procedural holding on state law grounds.[64] The federal court must therefore negate the state ground as a matter of federal law.[65] If it rules that the state ground is not adequate and independent, it would have the discretion to entertain the habeas petition.[66] An alternative holding based on federal law and inadequate state procedural grounds would then be reviewable without a showing of cause and prejudice. This Note assumes, however, that the state procedural ground is adequate and independent.

The federal court could acknowledge the existence of the state procedural ground but choose to "overlook" it, so that it will not block the issuance of the federal writ.[67] This was the case in *Fay v. Noia*,[68] when the Court held that a federal habeas court could overlook the procedural

63. *See* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); *see also* Fay v. Noia, 372 U.S. 391, 429 (1963) (federal question would be moot or opinion would be advisory); J. Nowak, R. Rotunda & J. Young, *supra* note 2, at 95 (arguing that the proper rationale for refusing to decide the case is mootness). For discussions of advisory opinions, see generally *id.* at 61-64; L. Tribe, American Constitutional Law § 3-10, at 56-57 (1978); C. Wright, *supra* note 2, § 12, at 57-58.

64. *See* Mullaney v. Wilbur, 421 U.S. 684, 690-91 (1975); Scripto, Inc. v. Carson, 362 U.S. 207, 210 (1960); Edelman v. California, 344 U.S. 357, 358-59 (1953); Fox Film Corp. v. Muller, 296 U.S. 207, 209-10 (1935); Ward v. Board of County Comm'rs, 253 U.S. 17, 22-23 (1920); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1874); Breest v. Perrin, 495 F. Supp. 287, 290 & n.6 (D.N.H. 1980), *aff'd*, 655 F.2d 1 (1st Cir.), *cert. denied*, 454 U.S. 1059 (1981); C. Wright, *supra* note 2, § 107, at 747; Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 504 (1954).

However, the Supreme Court will review the state court disposition of the state ground if that decision appears to be an "obvious subterfuge to evade consideration of a federal issue." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945); *see* Mullaney v. Wilbur, 421 U.S. 684, 691 & n.11 (1975); Williams v. Georgia, 349 U.S. 375, 382-83, 389 (1955); Lawrence v. State Tax Comm'n, 286 U.S. 276, 282 (1932); Davis v. Wechsler, 263 U.S. 22, 24 (1923).

This exception is parallelled in habeas corpus by the provisions of 28 U.S.C. § 2254(d)(8) (1982), which provide for new findings of fact if the state court's factual determination is not fairly supported by the evidence. *See id.*; *see also* Sumner v. Mata, 449 U.S. 539, 549-50 (1981) (discussing application of § 2254(d)).

65. See *supra* note 3 and accompanying text.

66. *See, e.g.*, Walker v. Engle, 703 F.2d 959, 966-67 & nn.10-11 (6th Cir. 1983) (asserted procedural bar by state that has no support in fact or law is inadequate), *cert. denied*, 104 S. Ct. 396 (1984); Breest v. Perrin, 655 F.2d 1, 2 & n.1 (1st Cir.) (contemporaneous objection rule is adequate), *cert. denied*, 454 U.S. 1059 (1981); *In re* Kravitz, 488 F. Supp. 38, 45 (M.D. Pa. 1979) (ordering hearing as to adequacy of state ground).

67. *See* Fay v. Noia, 372 U.S. 391, 467-68 (1963) (Harlan, J., dissenting); Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981); Hockenbury v. Sowders, 620 F.2d 111, 115-16 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981); Bradford v. Stone, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979).

68. 372 U.S. 391 (1963).

default unless it was intentional.[69] To the extent that *Noia* was willing to ignore the state procedural ground without a separate showing of cause and prejudice by the defendant, however, it has since been limited by *Sykes*.[70] A federal court may no longer overlook the procedural aspect of an alternative holding unless it can demonstrate that *Sykes* was not meant to apply to alternative holdings. In short, the federal court must determine whether, in the case of an alternative holding, it can overlook the procedural default without requiring the petitioner to show cause and prejudice.

The *Sykes* rule can be read in two ways. A narrow interpretation is that cause and prejudice must be shown if and only if the state court, because of the procedural default, makes no comment on the federal constitutional issue.[71] Thus, *Sykes* would not apply whenever the state court rules on the merits of the constitutional claim, regardless of its disposition of the procedural ground. A broader interpretation of the *Sykes* rule, however, is that the cause and prejudice standard applies whenever a state court relies on an adequate and independent state ground.[72] This interpretation would allow the state court to rule on both the federal and state issues without exposing the conviction or the federal issue to federal habeas review.

At first blush, the language of *Sykes* appears to support the narrow interpretation. Closer analysis, however, suggests that the Court had the broader interpretation in mind. For example, when referring to *Sykes'* effect on the rule of *Brown v. Allen*,[73] the *Sykes* Court stated that "we deal only with contentions of federal law which were *not* resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure."[74] Arguably, this language indicates that *Sykes* should not apply to alternative holdings. However, immediately prior to this statement the Court identified the rule of *Brown v. Allen*[75] as guaranteeing a state prisoner independent federal habeas review of his federal constitutional claim irrespective of the state court interpretation of that issue.[76] The rule of *Brown v. Allen* thus guarantees

69. *See id.* at 433-34. See *supra* note 3.

70. *See* Wainwright v. Sykes, 433 U.S. 72, 86-88 & n.12 (1977).

71. *See* Lowery v. Estelle, 696 F.2d 333, 342 n.28 (5th Cir. 1983); Rogers v. McMullen, 673 F.2d 1185, 1188 (11th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983); Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981); Bradford v. Stone, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979).

72. *See* Phillips v. Smith, 717 F.2d 44, 48 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); United States *ex rel.* Veal v. DeRobertis, 693 F.2d 642, 650 (7th Cir. 1982); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982); *see also* Jones v. Jago, 701 F.2d 45, 47 n.2 (6th Cir. 1983) (when alternative holding exists, the procedural ground can be a substantial basis of the decision sufficient to meet the Sixth Circuit's "substantial basis" test), *cert. denied*, 104 S. Ct. 274 (1984).

73. 344 U.S. 443 (1953).

74. Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (emphasis in original).

75. 344 U.S. 443 (1953).

76. *See Sykes*, 433 U.S. at 87. The opinion states:

independent federal habeas review when an adequate, independent state procedural ground does not exist to bar such review.[77] It was not intended to guarantee federal review simply because the state court discussed the federal issue. Indeed, *Brown* held explicitly that an adequate and independent state procedural ground would bar federal habeas relief.[78] Thus, *Sykes*' discussion of *Brown* is properly read as reaffirming the existence of independent federal habeas review of federal constitutional claims when there exists no adequate state procedural ground barring such review. It does not limit the use of the adequate and independent state ground doctrine in habeas corpus proceedings.

The *Sykes* Court also did not read *Brown v. Allen*[79] as having been modified by *Fay v. Noia*.[80] *Sykes* stated that *Brown v. Allen* guaranteed independent federal habeas review of *dispositive* federal issues,[81] which in the context of *Brown* did not include alternative holdings when one ground was an adequate and independent state procedural ground.[82] Under *Noia*,[83] any federal issue, dispositive or not, guaranteed federal habeas review absent a deliberate bypass.[84] Moreover, *Sykes* explicitly rejected the *Noia* rule, which allowed the federal habeas court to ignore the state procedural ground, unless a deliberate bypass was shown.[85] It therefore read *Brown* independently of *Noia*.

A second example of ambiguous language in *Sykes* is the Court's statement that "the [cause and prejudice] rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant."[86] One might argue this language implies that the rule is inapplicable to review of a conviction when the state court has adjudicated the claim, albeit in the alternative. The sentence continues, however, adding, "who in the absence of such an adjudication will

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> [S]ince *Brown v. Allen* . . . it has been the rule that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings. This rule of *Brown v. Allen* is in no way changed by our holding today. Rather, we deal only with contentions of federal law which were *not* resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure.

Id. (citation omitted) (emphasis in original).

77. *See Sykes*, 433 U.S. at 82; *Brown*, 344 U.S. at 485-86.

78. *Brown*, 344 U.S. at 485-87; *see Sykes*, 433 U.S. at 82. In a companion case to *Brown*, the petitioner was denied federal habeas review due to a procedural default. *Brown*, 344 U.S. at 485-87.

79. 372 U.S. 391 (1963).

80. 344 U.S. 443 (1953).

81. *See* Wainwright v. Sykes, 433 U.S. 72, 79 (1977).

82. See *supra* notes 73-78 and accompanying text.

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

84. *See id.* at 398-99, 438.

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

86. *Id.* at 91.

be the victim of a miscarriage of justice."[87] An accurate rewording of this statement is that a state prisoner who is the victim of a miscarriage of justice will not be barred from federal habeas review despite his default. Thus, in the case of alternative holdings, the state court's holding on procedural grounds should block federal habeas review unless the petitioner can demonstrate cause and prejudice or that the state's reliance on the procedural ground results in a miscarriage of justice. The statement does not indicate that the Court intended to immunize alternative holdings from its decision; rather, it merely reaffirms that the cause and prejudice standard is flexible enough to deal with those isolated cases in which a miscarriage of justice might have occurred. Therefore, rather than showing that *Sykes* applies only when the state court has not adjudicated the federal claim, this statement is one example of the use of the cause and prejudice standard.

Moreover, the Court has held that when a state conviction is based on adequate and independent state grounds sufficient to bar direct federal review, federal habeas review will be available only after a showing of cause and prejudice.[88] An alternative holding is immune from direct federal review if it is based on adequate and independent state grounds.[89] If such a holding is sufficient to bar completely direct review, it would a fortiori be sufficient to bar habeas review unless the *Sykes* test is met.

Finally, the policies emphasized by the Court in *Sykes* compel its application to alternative state holdings. In *Sykes* and subsequent habeas decisions, the Burger Court has emphasized the need to protect systemic interests over and above individual liberties.[90] Applying the cause and prejudice test to alternative holdings protects these systemic interests. Allowing free habeas review would injure them.

A major interest furthered by *Sykes* is respect for coordinate units of

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87. *Id.* The full text reads:

> The "cause"-and-"prejudice" exception of the *Francis* rule will afford an adequate guarantee, we think, that the 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.

Id. at 90-91.

88. *See id.* at 86-87. See *supra* note 10.

89. *See* Michigan v. Long, 463 U.S. 1032, 1041-42 (1983); Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487, 489 (1965); Cramp v. Board of Pub. Instruction, 368 U.S. 278, 281 (1961); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1871). See *supra* note 2.

90. *See, e.g.*, Reed v. Ross, 104 S. Ct. 2901, 2915 n.3 (1984) (Rehnquist, J., dissenting); *see also id.* at 2907-08 (accuracy, efficiency and finality dictate that "in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo [sic] the exercise of its habeas corpus power.") (quoting Francis v. Henderson, 425 U.S. 536, 539 (1976)); Engle v. Isaac, 456 U.S. 107, 126-28 (1982) (protection of finality, the role of trial, ability to punish offenders, federalism); Wainwright v. Sykes, 433 U.S. 72, 88-90 (1977) (protection of finality, comity, role of trial).

the federal and state judicial systems.[91] This policy is based on comity and is seriously undermined if *Sykes* is not applied to alternative holdings. For instance, a federal court shows disrespect for a state rule if it is allowed to disregard an adequate and independent state procedural rule that is part of an alternative holding.[92] In *Sykes*, the Supreme Court stressed that such rules should be respected by the federal courts.[93] By applying cause and prejudice to alternative grounds, full respect and effect are given to state procedural rules, thus promoting comity.

A second systemic policy furthered by *Sykes* is the promotion of finality of litigation.[94] *Sykes* forces the defense to raise all issues at trial or risk a procedural default.[95] This furthers accuracy of results at trial and general judicial efficiency.[96] Accuracy is maximized because all issues are placed before the trier of fact, enabling it to make an informed decision.[97] Applying *Sykes* to alternative holdings would encourage defense counsel to contest all issues at trial, or risk losing them both on direct appeal and habeas review.[98]

In addition, if *Sykes* is not applied to alternative holdings, state courts may stop writing opinions with alternative holdings. If an adequate and independent state procedural ground exists, a state court may decide to limit its decision solely on that ground in order to avoid federal habeas review.[99] Placing the state courts in this dilemma violates comity because it unnecessarily discourages them from exercising their full juris-

91. *See* Reed v. Ross, 104 S. Ct. 2901, 2907-08 (1984); Engle v. Isaac, 456 U.S. 107, 128 (1982); Wainwright v. Sykes, 433 U.S. 72, 88 (1977); Schneckloth v. Bustamonte, 412 U.S. 218, 263-65 (1973) (Powell, J., concurring); Phillips v. Smith, 717 F.2d 44, 48 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); Forman v. Smith, 633 F.2d 634, 639-40 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

92. *See* Fay v. Noia, 372 U.S. 391, 467-68 (1963) (Harlan, J., dissenting); Phillips v. Smith, 717 F.2d 44, 49 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984).

93. *See Sykes*, 433 U.S. at 88.

94. *See Sykes*, 433 U.S. at 88-90. This policy has been recognized by subsequent courts. *See* Reed v. Ross, 104 S. Ct. 2901, 2907 (1984); Engle v. Isaac, 456 U.S. 107, 126-27 & n.31 (1982); Phillips v. Smith, 717 F.2d 44, 48-49 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 441 (3d Cir. 1982); *cf.* Schneckloth v. Bustamonte, 412 U.S. 218, 261-63 (1973) (Powell, J., concurring) (finality is furthered by cutting off all review of fourth amendment claims).

95. *See Sykes*, 433 U.S. at 89-91. Subsequent courts have also recognized this effect. *See* Engle v. Isaac, 456 U.S. 107, 127 (1982); Phillips v. Smith, 717 F.2d 44, 48 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984).

96. *See* Reed v. Ross, 104 S. Ct. 2901, 2907 (1984); Engle v. Isaac, 456 U.S. 107, 127 (1982); *Sykes*, 433 U.S. at 90.

97. *See Sykes*, 433 U.S. at 90; Phillips v. Smith, 717 F.2d 44, 48 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 442 (3d Cir. 1982).

98. *See* Phillips v. Smith, 717 F.2d 44, 48 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984).

99. *See id.* at 51; United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982).

diction[100] and unjustifiably restricts their freedom in writing decisions.[101] Furthermore, because alternative holdings promote efficiency and finality of litigation, they should be encouraged rather than discouraged.[102] An alternative holding allows a lower court to resolve a case on all possible grounds, thus providing the appellate court with findings on all possible dispositions of the issues before it. If it turns out that one of the grounds is erroneous, the appellate court can affirm the judgment on the alternative ground,[103] thus promoting efficiency and finality. On the other hand, if the alternative holding is not made, the appellate court must remand the case to the lower court for determination of the other ground[104]—a time-consuming procedure. Finally, alternative holdings should be encouraged because they contribute to the development of the jurisdiction's precedents and law, thus providing maximum guidance to the lower courts.[105]

A final systemic policy asserted by the Burger Court for limiting the exercise of federal habeas corpus jurisdiction is that it deprives society of the right to punish the guilty.[106] While it is true that the state can retry the successful habeas petitioner, often habeas relief comes years after the original trial. As time passes, memories fade and witnesses become difficult to locate. In such cases retrial is effectively impossible and the state is forced to simply let the petitioner go.[107] The limits placed by the Burger Court on habeas review have reduced this undesirable result.[108] The necessity of freeing guilty prisoners would be reduced even further if *Sykes* is applied to alternative holdings.

In *Fay v. Noia*,[109] the Warren Court noted several policies that support unlimited federal habeas review of alternative holdings. These policies did not survive the Burger Court's decision in *Sykes*, however, and therefore do not allow a federal habeas court to disregard a state procedural

100. *See* United States *ex rel.* Caruso v. Zelinsky, 689 F.2d at 440.

101. *See* Hall v. Wainwright, 565 F. Supp. 1222, 1233 (M.D. Fla. 1983), *aff'd in part, rev'd in part on other grounds*, 733 F.2d 766 (11th Cir. 1984).

102. *See* Phillips v. Smith, 717 F.2d 44, 49 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984).

103. See *supra* notes 18-20 and accompanying text.

104. *See* Orr v. Orr, 440 U.S. 268, 274, 283 (1979); Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 109 (1938).

105. *Cf.* Ramirez v. Jones, 683 F.2d 712, 718 (2d Cir. 1982) (Leval, J., concurring) (state court may reach the merits despite procedural default to provide guidance to lower courts), *cert. denied*, 460 U.S. 1016 (1983); R. Cross, *supra* note 19, at 41 (dictum provides guidance).

106. *See* Engle v. Isaac, 456 U.S. 107, 127-28 (1982); Stone v. Powell, 428 U.S. 465, 490 (1976).

107. *See* Reed v. Ross, 104 S. Ct. 2901, 2907 (1984); Engle v. Isaac, 456 U.S. 107, 127-28 (1982); Rules Governing § 2254 Cases in the United States District Courts, Rule 9 advisory committee note (1982) (appearing after 28 U.S.C. § 2254 (1982)); Friendly, *supra* note 43, at 146-47.

108. *See* Engle v. Isaac, 456 U.S. 107, 127-28 (1982); *see also* Stone v. Powell, 428 U.S. 465, 490 (1976) (possibility of freeing the guilty is a reason to bar fourth amendment claims from federal habeas review).

109. 372 U.S. 391 (1963).

holding. One of the policies advanced in *Noia* was that imprisonment in violation of a petitioner's constitutional rights, whether or not properly presented, was intolerable.[110] A second policy was that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[111] A related concern of the Warren Court was that federal courts are better able to protect and are more receptive to the assertion of federal rights.[112]

These policies, however, retain little vitality in the wake of *Sykes* and subsequent habeas corpus cases. The Burger Court has consistently held that procedural defaults of federal rights should be respected absent a showing of cause and prejudice.[113] Therefore, *Sykes* and its progeny imply that it is entirely tolerable for a petitioner to be imprisoned despite the fact that his federal claim might have produced an acquittal or a reversal if it had been properly raised.[114] Similarly, by requiring a showing of cause and prejudice, the Burger Court has indicated that the policy of affording federal review of federal claims must be balanced against the countervailing policy of respecting valid state procedural rules.[115] Moreover, the Burger Court has explicitly rejected the idea that state courts are less able or willing to enforce federal rights.[116] Therefore, although applying the cause and prejudice test to alternative holdings offends the policies of *Noia*, those policies have been largely replaced, if not eviscerated, by *Sykes*.

The policies expressed by the Burger Court suggest the application of *Sykes* to alternative holdings. Under *Sykes*, the federal habeas court may no longer blithely overlook or overrule independent state procedural grounds. Accordingly, it should deny habeas review unless cause and prejudice is shown.

III. THE PROBLEM OF THE UNCLEAR HOLDING: SHOULD *SYKES* APPLY?

Unfortunately, state courts often fail to identify clearly the bases for

110. *See id.* at 401-02; Friendly, *supra* note 43, at 149-50; *see also* Sanders v. United States, 373 U.S. 1, 8 (1963) (approving policy advanced in *Noia*).

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

112. *See* Kaufman v. United States, 394 U.S. 217, 225-26 (1969); Friendly, *supra* note 43, at 154-55. *But see* Stone v. Powell, 428 U.S. 465, 493 n.35 (1976) (Burger Court rejecting argument that federal courts are better able to and more willing to protect federal rights).

113. *See, e.g.*, Reed v. Ross, 104 S. Ct. 2901, 2908 (1984); Engle v. Isaac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977); Francis v. Henderson, 425 U.S. 536, 542 (1976).

114. *See* Wainwright v. Sykes, 433 U.S. 72, 87, 88-89 (1977).

115. *See* Reed v. Ross, 104 S. Ct. 2901, 2907-08 (1984); Wainwright v. Sykes, 433 U.S. 72, 88 (1977).

116. *See* Stone v. Powell, 428 U.S. 465, 493 n.35 (1976).

their decisions.[117] In such a situation, should *Sykes* apply? Federal courts have not answered this question uniformly.[118] For instance, the Second Circuit in *Martinez v. Harris*[119] stated that a federal habeas court should assume that a state court's summary affirmance of a conviction rests on the procedural ground, if the prosecutor argued procedural default to the state court, even if the constitutional claim was argued on the merits.[120] This assumption mandates application of *Sykes*, which is unsatisfactory for several reasons.[121] First, the Court in *Sykes* explicitly stated that the *Brown v. Allen* right to federal review of dispositive federal constitutional issues remained undisturbed.[122] Under *Martinez*, this personal right may be sacrificed on the altar of systemic interests even when no such interests exist or are unclear in a particular case.[123] The *Martinez* approach discounts the possibility that the state court's affirmance may be on the merits of the federal grounds alone, which would entitle the petitioner to federal habeas review under the rule of *Brown v. Allen*.[124] The court's reasoning in *Martinez* allows a state court to block federal habeas review by merely affirming without opinion in any case in which the prosecution raises the issue of procedural default.[125] This is impermissible.[126] The *Sykes* Court's reaffirmance of the rule of *Brown v. Allen* indicates that the Court did not intend to limit habeas review so radically.[127]

Second, the *Martinez* rule assumes that an adequate and independent state procedural ground exists whenever the prosecutor argues a procedural issue to the state court.[128] This approach is intolerable because, in

117. See *supra* notes 31-32 and accompanying text. *Compare* Jerome Hat Corp. v. Lou Temco Uniforms, Inc., 74 A.D.2d 745, 745, 425 N.Y.S.2d 255, 255 (1980) (mem.) (affirming on the basis of the opinion below) *with* People v. Salerno, 74 A.D.2d 745, 745 (1980) (mem.) (affirming without opinion).

118. *Compare* County Court v. Allen, 442 U.S. 140, 147-54 (1979) (searching record and state law for procedural default) *with* Campbell v. Wainwright, 738 F.2d 1573, 1578 (11th Cir. 1984) (assuming procedural default when prosecutor argues merits and procedure alternatively) *and* Martinez v. Harris, 675 F.2d 51, 54-55 (2d Cir.) (same), *cert. denied*, 459 U.S. 849 (1982) *with* White v. Estelle, 720 F.2d 415, 418 (5th Cir. 1983) (when state court record is unclear, federal courts will assume state court held on merits) *and* Williams v. Zahradnick, 632 F.2d 353, 357, 359-60 (4th Cir. 1980) (same).

119. 675 F.2d 51 (2d Cir.), *cert. denied*, 459 U.S. 849 (1982).

120. *See id.* at 54.

121. *See* Martinez v. Harris, 675 F.2d 51, 55 (2d Cir.), *cert. denied*, 459 U.S. 849 (1982).

122. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

123. *See* Hawkins v. LeFevre, 758 F.2d 866, 872 (2d Cir. 1985); Edwards v. Jones, 720 F.2d 751, 757 (2d Cir. 1983) (Newman, J., concurring); L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

124. See *supra* note 123.

125. *See* Henry v. Wainwright, 686 F.2d 311, 314 & n.4 (5th Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983).

126. *Cf.* Michigan v. Long, 463 U.S. 1032, 1041 (1983) (similar reasoning in direct review) (quoting Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940)).

127. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

128. *See* Martinez v. Harris, 675 F.2d 51, 54 (2d Cir.), *cert. denied*, 459 U.S. 849 (1982). As a result of *Martinez*, any New York prosecutor may now assert a procedural

the event of a summary affirmance, it allows the prosecutor to defeat the petitioner's right to federal habeas review without proving that the state court relied on a procedural ground, and that the ground was both adequate and independent.

In the recent decision of *Hawkins v. LeFevre*,[129] the Second Circuit expressed its dissatisfaction with the *Martinez* rule and its unjust results.[130] In *Hawkins*, the prosecutor only argued the merits and the state appellate court affirmed the conviction without opinion.[131] On habeas review, the federal district court, citing *Martinez*, held that Hawkins was barred from habeas review due to a procedural default.[132] In reversing the district court, the *Hawkins* court stated that "[t]he scope of . . . *Martinez* . . . does not extend to all factual situations and, in particular, does not control the instant action."[133]

Curiously, the panel could have reached the same result by merely citing *Washington v. Harris*,[134] which provides that a federal habeas court should assume that a state court's summary affirmance of a conviction rests on constitutional grounds when the prosecutor argued solely on the merits.[135] The *Hawkins* Court's criticism of the district court's application of *Martinez* indicates that the Second Circuit may no longer be willing to apply automatically *Martinez* whenever the prosecutor argues a procedural default to the state appellate court. Indeed the court stated "[w]e choose not to extend *Martinez* and presume reliance by a state court on a procedural default, where it appears unlikely that the court rested its affirmance on that ground."[136] This statement may be a warning to state appellate courts to clearly identify the bases of their holdings, or risk federal habeas review.[137] Indeed, the court cited with approval Judge Newman's concern about the *Martinez* rule:

> What concerns me about the majority's inference from state court silent affirmance is the prospect that in some future case where a procedural default is arguable, but not clear, the [state appellate court] will silently affirm after deciding that there was neither procedural default

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ground for affirmance in the State's brief to the Appellate Division in order to block federal habeas review. However, the prosecutor's procedural argument may not be accurate. *See, e.g.*, County Court v. Allen, 442 U.S. 140, 148 & n.6 (1979); Henry v. Wainwright, 686 F.2d 311, 314 (5th Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983).

129. 758 F.2d 866 (2d Cir. 1985).

130. *See id.* at 872-73.

131. *See id.* at 870 & n.6. "The Queens County District Attorney seemingly conceded that the trial judge's actions amounted to a constitutional violation, but argued that such error was harmless." *Id.* at 870.

132. *See id.* at 870.

133. *See id.* at 871.

134. 650 F.2d 447 (2d Cir. 1981), *cert. denied*, 455 U.S. 951 (1982).

135. *See id.* at 451-52.

136. Hawkins v. LeFevre, 758 F.2d 866, 874 (2d Cir. 1985).

137. *See id.* at 872 & n.8 ("[w]e continue to urge the state courts to remove the ambiguity in their summary affirmances by indicating, with citation to [the state rules of criminal procedure] . . . . , their reliance on procedural default") (citation omitted).

> nor a valid claim on the merits, and we will then affirm the denial of habeas corpus relief because we mistakenly presume state court reliance on procedural default even though we think a constitutional error affecting substantial rights has occurred.[138]

In the past, the Supreme Court has attempted to solve the problem presented by unclear state opinions by searching the state court records—appellate and trial—to determine whether the state courts relied on a state procedural ground.[139] The major problem with this approach is that it is time-consuming[140] and therefore inefficient. This is a significant problem because one of the primary purposes of limiting habeas—relieving the burden on the lower federal courts[141]—is undermined by requiring federal habeas courts to search the trial and appellate records every time a state court fails to state clearly the basis of its holding.

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138. *Id.* at 872 (quoting Edwards v. Jones, 750 F.2d 751, 757 (2d Cir. 1983) (Newman, J., concurring)).

139. *See, e.g.*, County Court v. Allen, 442 U.S. 140, 147 n.5, 152 (1979); Wainwright v. Sykes, 433 U.S. 72, 74-75, 85-86 (1977); Irvin v. Dowd, 359 U.S. 394, 402-04 (1959). Some circuits have also applied this method. *See, e.g.*, Preston v. Maggio, 705 F.2d 113, 116 (5th Cir. 1983); Hockenbury v. Sowders, 620 F.2d 111, 113 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981).

140. *See* Batchelor v. Cupp, 693 F.2d 859, 864 (9th Cir. 1982), *cert. denied*, 463 U.S. 1212 (1983).

141. *See* Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring.); Friendly, *supra* note 43, at 143-51; *Federal Habeas Corpus Review*, *supra* note 3, at 863 & nn.68-69. It is correctly pointed out that *Sykes* may not effectively relieve the burden of the lower federal courts. *See id.* at 863 n.69. The *Sykes* rule may be an attempt by the Court to retain the supervisory role of the federal courts, while responding to the concerns expressed by Justice Jackson in *Brown*, 344 U.S. at 537-41 (Jackson, J., concurring). In that case he wrote:

> [T]his Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions innundate the docket of the lower courts and swell our own. Judged by our own disposition of habeas corpus matters, they have, as a class, become peculiarly undeserving. It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search. . . .
>
> It cannot be denied that the trend of our decisions is to abandon rules of pleading or procedure which would protect the writ against abuse. . . .
>
> . . . .
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> . . . It really has become necessary to plead nothing more than that the prisoner is in jail, wants to get out, and thinks it is illegal to hold him. If he fails, he may make the same plea over and over again.
>
> Since the Constitution and laws made pursuant to it are the supreme law and since the supremacy and uniformity of federal law are attainable only by a centralized source of authority, denial by a state of a claimed federal right must give some access to the federal judicial system. But federal interference with state administration of its criminal law should not be premature and should not occur where it is not needed.

Id. at 536-41 (footnotes omitted). However, when the petitioner's claim falls short of a miscarriage of justice and he cannot show good cause for his default, then his pleas, meritorious or frivolous, will not be heard. *See* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977); Brown v. Allen, 344 U.S. 443, 541 (1953) (Jackson, J., concurring).

A second problem is that ad hoc federal determinations of the basis of state court decisions injure the policy of comity, a doctrine which requires predictable interaction[142] between state and federal courts. State courts should know how federal habeas courts will react to their decisions.[143] This is impossible if a case-by-case rule of interpretation is adopted.[144]

Finally, this approach is of limited use because it can lead to inaccurate results.[145] For example, if a state appellate court issues an affirmance without opinion,[146] it is impossible to determine which of several grounds asserted by the prosecution forms the basis of the appellate court's decision. Moreover, a search of the trial court record—always a time-consuming process—will be unavailing in many cases because trial courts often fail to address the issue either as a matter of procedure or on the merits.[147] Thus, the first state court to face the issue may be an appellate court or a state habeas court.[148] All of these reasons point to the inaccuracy inherent in this approach. Inaccurate results are intolerable when an individual's liberty is at stake.[149] In addition, such inaccuracies thwart the policy of comity[150] which the Burger Court has so zealously guarded.[151]

A third approach to the problem of unclear state holdings—one which avoids unduly burdening the federal courts—is for the federal habeas court to assume that the state appellate court relied on federal law whenever the basis of the state court's opinion is unclear.[152] This would pro-

142. *See* Michigan v. Long, 463 U.S. 1032, 1039 (1983).

143. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

144. *See id.*

145. *See* Michigan v. Long, 463 U.S. 1032, 1039-40 (1983); *see also* Irvin v. Dowd, 359 U.S. 394, 403 (1959) (lower federal courts erred in construing the state court opinion as resting on state grounds).

146. See *supra* note 117.

147. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 263 & n.19 (1973) (Powell, J., concurring); *see, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 74-75 (1977); Phillips v. Smith, 717 F.2d 44, 46 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984); Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981).

148. *See* Sumner v. Mata, 449 U.S. 539, 541-42 (1981) (state appellate court); Wainwright v. Sykes, 433 U.S. 72, 75 (1977) (state habeas appeal); Martinez v. Harris, 675 F.2d 51, 53-54 (2d Cir.) (state appellate court), *cert. denied*, 459 U.S. 849 (1982); Washington v. Harris, 650 F.2d 447, 450-51 (2d Cir. 1981) (state appellate court), *cert. denied*, 455 U.S. 951 (1982); Hockenbury v. Sowders, 620 F.2d 111, 115 (6th Cir. 1980) (state appellate court), *cert. denied*, 450 U.S. 933 (1981); Preston v. Maggio, 705 F.2d 113, 114-15 (5th Cir. 1983) (appeal to state appellate court from denial of state habeas petition).

149. *See* Townsend v. Sain, 372 U.S. 293, 312-13 (1963); *see also* 28 U.S.C. § 2254(d)(2), (3), (6), (8) (1982). One of the policies of *Sykes* is to promote accuracy of results at trial. See *supra* notes 96-97 and accompanying text. It would be ironic if the accuracy promoted by the *Sykes* limit on habeas review was then subverted by the application of *Sykes* by the federal habeas courts to murky state court determinations.

150. *See* Michigan v. Long, 463 U.S. 1032, 1039-41 (1983).

151. See *supra* notes 91-93 and accompanying text.

152. *See* White v. Estelle, 720 F.2d 415, 418 (5th Cir. 1983) (assuming state court held on the merits); Williams v. Zahradnick, 632 F.2d 353, 359 & n.6, 360 (4th Cir. 1980)

tect the petitioner's right under *Brown v. Allen*[153] to federal review, while avoiding undue burden on the lower federal courts.[154] This approach would also produce consistent results by avoiding ad hoc interpretations of state court opinions.[155] Finally, this method is supported by the Supreme Court's decision in *Michigan v. Long*.[156]

In *Long*, the Court on direct review confronted the problem of determining the basis of a state court's holding.[157] One basis for the state court's holding could have been an adequate and independent state ground, but the other could have been federal.[158] The Supreme Court held that review is not barred unless the state court includes "a 'plain statement' that a decision rests upon adequate and independent state grounds."[159] This rule assumes that there are no adequate and independent state grounds "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law."[160] *Long* held that when it is not clear that adequate and independent state grounds support the judgment, the Supreme Court on direct appeal will assume that none exist.[161] Federal habeas courts should assume the same.

Arguably, applying the plain statement rule to state court opinions in the context of habeas review would allow the prisoner to obtain habeas review any time he merely asserted a federal claim. This argument is unpersuasive because it ignores the fact that if a valid state procedural ground exists and the state court's opinion clearly rests on that ground, the petitioner cannot secure habeas review by asserting a federal issue.[162] Requiring state courts to make a plain statement is a slight burden considering the prisoner's interest in securing federal habeas review.[163] A plain statement may be cursory; it does not require an in-depth written analysis.[164] Thus, the compromise of the state interest is slight in com-

(same); L. Yackle, *supra* note 3, § 84, at 142-43 (Cum. Supp. 1985) (federal habeas court should assume state court held on merits).

153. 344 U.S. 443 (1953).

154. See *supra* notes 140-41, *infra* notes 163-65 and accompanying text.

155. L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985). See *supra* note 121 and accompanying text.

156. 463 U.S. 1032 (1983).

157. *See id.* at 1037.

158. *See id.* The state court could have held on either state constitutional grounds or federal constitutional grounds on the issue of whether a search of defendant's car was illegal. *Id.* at 1043-44.

159. *Id.* at 1042.

160. *Id.* (footnote omitted).

161. *See id.*

162. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985). See *supra* notes 33-51, 58-116 and accompanying text.

163. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985); *cf.* Smith v. Digmon, 434 U.S. 332, 333-34 (1978) (exhaustion requirement is satisfied if petitioner raises the claim in state court, regardless of whether the state court passes on it).

164. *See* Hawkins v. LeFevre, 758 F.2d 866, 872 (2d Cir. 1985); Edwards v. Jones, 720

parison to the total compromise of the prisoner's rights if another rule were adopted.[165]

Moreover, the state court is the controlling actor in this scenario. It has complete control over the content of its opinion,[166] and the content determines whether the *Sykes* cause and prejudice standard applies.[167] Therefore, the state court, by drafting an opinion with a plain statement, can determine whether federal habeas review will be freely given; the prisoner does not have that control. If the state court does not clearly indicate the basis for its holding, the doubt should be resolved against the state—the controlling actor—and *Sykes* should not apply.[168]

Finally, applying *Long*'s plain statement rule to habeas review does not unduly offend the systemic policies of *Sykes*. Under the plain statement rule the policies of finality and efficiency would be harmed only when the basis of the state court's opinion is ambiguous.[169] When a state court clearly indicates that its decision is based on adequate and independent state grounds, federal review would be unavailable absent a demonstra-

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F.2d 751, 757 (2d Cir. 1983) (Newman, J., concurring); Henry v. Wainwright, 686 F.2d 311, 314 n.4 (5th Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983); L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985); *cf.* County Court v. Allen, 442 U.S. 140, 153-54 (1979) (state court passed on merits of federal constitutional claim, despite brevity of its discussion of that issue); Martinez v. Harris, 675 F.2d 51, 54 (2d Cir.) (assuming procedural ground when no reasoning given), *cert. denied*, 459 U.S. 849 (1982).

165. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

166. *See id.*

167. If the rationale is solely federal, then *Sykes* does not apply. See *supra* notes 52-57 and accompanying text. If the decision is based alternatively on federal and state grounds, *Sykes* should apply, though some circuits do not apply *Sykes* in this case. See *supra* notes 15-17, 58-116 and accompanying text. If the state ground is the sole basis, then *Sykes* applies. See *supra* notes 33-51 and accompanying text.

168. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985); *cf.* Michigan v. Long, 463 U.S. 1032, 1042 (1983) (direct review of state court conviction). The Supreme Court in the context of direct review has stated:

> It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. . . . For no other course assures that important federal issues . . . will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states.

Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940). In *National Tea* the Supreme Court vacated a state court judgment and remanded for a clarification of the basis of that court's decision. *See id.* at 556-57. A federal habeas court should not, however, employ that procedure. Vacating every state conviction in which the state court's reasoning was not clear would be contrary to the policy of comity. *See* Fay v. Noia, 372 U.S. 391, 467-68 (1963) (Harlan, J., dissenting). The problem is more easily solved by requiring a plain statement.

169. *See* Michigan v. Long, 463 U.S. 1032, 1041-42 (1983).

tion of cause and prejudice.[170] Further, to avoid federal habeas review, a state court need only briefly state in its opinion the adequate and independent state grounds.[171] Although it can be argued that placing requirements on the drafting of state courts' opinions offends comity, in these circumstances the offense is minimal. In the case of an unclear holding, the state court is asked to say more. It is not constrained from discussing federal law. Thus, applying *Long* to unclear holdings would not offend comity to the same extent that not applying *Sykes* to alternative holdings would.[172]

In *Long*, the Supreme Court discussed the effect of the plain statement rule on comity. First, the Court emphasized the problems presented when a reviewing court determines ad hoc whether a decision was based on adequate and independent state grounds.[173] The Court viewed that method as "antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved."[174] The Court then stated that the plain statement approach "provide[s] state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law. . . . '[It is important] that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by [the Supreme Court] of the validity under the federal constitution of state action.' "[175] Thus the Court indicated that the plain statement rule might actually promote rather than offend comity.

Because the alternatives to applying the plain statement rule to habeas corpus review are to accept ad hoc determinations by reviewing courts[176] or to assume that the claim is procedurally barred,[177] any injury to comity arising from applying *Long* to unclear state holdings is tolerable.[178] Although more friction may arise from applying *Long* in the habeas context than on direct review, this merely reflects the fact that habeas review by its very nature creates friction between federal and state courts.[179] Further, applying *Long* to unclear holdings furthers *Brown v. Allen*'s protection of state prisoners against violations of their federal rights by the states.[180] Finally, although applying *Long* to habeas review may com-

170. See *supra* note 24 and accompanying text; *cf. Long*, 463 U.S. at 1043-44 (rule applied in context of direct review).

171. See *supra* note 164 and accompanying text.

172. See *supra* notes 142-44 and accompanying text.

173. *See* Michigan v. Long, 463 U.S. 1032, 1039 (1983).

174. *Id.*

175. *Id.* at 1041 (quoting Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940)).

176. See *supra* notes 139-51 and accompanying text.

177. See *supra* notes 120-28 and accompanying text.

178. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

179. *See* Engle v. Isaac, 456 U.S. 107, 128 & n.33 (1982); Sumner v. Mata, 449 U.S. 539, 550 (1981); Norris v. United States, 687 F.2d 899, 901 (7th Cir. 1982); 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4261, at 600 (1978).

180. See *supra* notes 122-27 and accompanying text.

promise comity slightly, it also furthers comity since it is a consistent and predictable approach.

CONCLUSION

The *Sykes* cause and prejudice standard should be applied whenever a state court, solely or alternatively, relies on a procedural ground that constitutes an adequate and independent state ground. If the state court does not rely on a state ground, free habeas review as guaranteed by *Brown v. Allen* should be granted. When the basis of the state conviction is unclear, the federal court should apply the plain statement rule established by the Court in *Michigan v. Long*. When it is not clear that adequate and independent state grounds support the conviction, the federal habeas court should assume none exist and therefore grant habeas review.

These rules further the systemic policies enunciated by the Court in *Sykes*. Although applying *Long* to habeas review might slightly increase federal-state friction, this is tolerable. If *Long* is not applied to unclear holdings, the alternatives are to accept ad hoc determinations by reviewing courts, which can lead to even greater friction between the two court systems, or risk sacrificing the state prisoner's right to federal adjudication of his federal claim even though that claim is not barred by an adequate and independent state procedural ground.

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