Constricting Federal Habeas Corpus: From Great Writ To Exceptional Remedy

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Almost a decade ago, two decisions of the United States Supreme Court signaled a significant transformation of the landscape of federal habeas corpus. *Stone v. Powell*[1] and *Wainwright v. Sykes*[2] changed the questions asked by courts appraising the nature and purpose of federal habeas corpus. The prior emphases had been on the review of claims and remedy of violations of prisoners' fundamental rights.[3] Then in *Stone v. Powell*, the Court barred Fourth Amendment challenges under 28 U.S.C. section 2254 by prisoners who had been afforded an opportunity for full and fair litigation of their search and seizure claims in state court;[4] and in *Wainwright v. Sykes*, the Court established stringent federal habeas corpus forfeiture rules against defendants whose attorneys had committed even inadvertent procedural defaults in assertion of constitutional claims at their state court trials.[5]

Together these two rulings set the stage for a jurisprudential shift that could turn habeas into an extraordinary writ available only in a narrow range of cases and situations, rather than a general and unfettered remedy for vindication of all constitutional rights.[6] Looking at the

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1. 428 U.S. 465 (1976).

2. 433 U.S. 72 (1977).

3. For discussions of the federal habeas jurisdiction prior to 1976, see generally Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 441 (1963); Hart, *The Supreme Court, 1958 Term-Foreword: The Time Chart of the Justices,* 73 HARV. L. REV. 84, 101-25 (1959); Oaks, *Legal History in the High Court—Habeas Corpus,* 64 MICH. L. REV. 451 (1966); Peller, *In Defense of Federal Habeas Corpus Relitigation,* 16 HARV. C.R.-C.L. L. REV. 579 (1982); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding,* 74 HARV. L. REV. 1315 (1961); Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility,* 75 YALE L.J. 895 (1966).

4. 428 U.S. at 494.

5. 433 U.S. at 87.

6. Justice Brennan's dissents in *Powell* and *Sykes* were particularly pessimistic. *See* 428 U.S. at 502; 433 U.S. at 99. The two decisions spawned numerous law review articles commenting on their implications. *See, e.g.,* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court,* 86 YALE L.J. 1035 (1977); Hill, *The Forfeiture of Constitutional Rights in Criminal Cases,* 78 COLUM. L. REV. 1050 (1978); Soloff, *Litigation and Relitigation: The Uncertain Status of Federal Habeas Corpus for State Prisoners,* 6 HOFSTRA L. REV. 297 (1978);

Court's habeas decisions since *Powell* and *Sykes,* however, it is possible to conclude that the doomsayers were, as usual, wrong, that the revolution has not occurred and is not even close, and that what we are now seeing in the Court's habeas decisions is the traditional backing and filling of the common law. Thus, while the conceptual bases of the two decisions have not been fully extended to their logical limits—the effect of which would be to permit maximal erosion of the habeas jurisdiction—undoubtedly habeas jurisdiction has been somewhat restricted and the efficacy of the habeas remedy has been diminished.

Part I of this Article will consider the impact of the *Stone v. Powell* preclusionary doctrine. Although *Stone v. Powell* has not been extended beyond its Fourth Amendment exclusionary rule origins, the Court's rationale still stands as an invitation for curtailment of the writ of habeas corpus, at least with respect to nonguilt-related claims. Part II analyzes the cases treating the *Wainwright v. Sykes* procedural default rules. In contrast to the stalled momentum of *Stone v. Powell, Sykes* has been broadly interpreted so as almost routinely to permit forfeiture of the constitutional claims of habeas petitioners. Further, the cases elaborating on the *Sykes* opinion appear to be at odds with both the Court's ineffective assistance of counsel decisions and its retroactivity rulings. Part III will study a series of cases that threaten to turn the requirement of exhaustion of state remedies into a preclusionary device rather than a deferral mechanism. Finally, in Part IV, the Article will explore how the Court applies considerably more lenient forfeiture standards to state prosecutors and judicial officials than it does to defendants and their attorneys. On the basis of these analyses, I conclude that in its habeas rulings, the Court has gone far beyond the traditional common law interpretive process and is engaging in a result-oriented jurisprudence designed to make habeas hearings on the merits almost as rare as sightings of Halley's comet.

I. *Stone v. Powell:* The Sleeping Giant

The 1976 decision in *Stone v. Powell* provided a new and theretofore unknown mechanism for carving out whole subject matter areas from the

Spritzer, *Criminal Waiver, Procedural Default and the Burger Court,* 126 U. PA. L. REV. 473 (1978). Perhaps the gloomiest article was Rosenberg, *Jettisoning Fay v. Noia: Procedural Defaults by Reasonably Incompetent Counsel,* 62 MINN. L. REV. 341 (1978).

There are, however, a number of commentators who, while not uncritical, appear to view the decisions in *Stone v. Powell* and *Wainwright v. Sykes* at least as steps in the right direction, *see, e.g.,* Saltzburg, *Habeas Corpus: The Supreme Court and the Congress,* 44 OHIO ST. L.J. 367 (1983), or as part of the ebb and flow of social change, *see* Rosenn, *The Great Writ—A Reflection of Societal Change,* 44 OHIO ST. L.J. 337 (1983).

jurisdiction of the federal habeas court.[7] The approach authorized in that case has the greatest potential for curtailing federal habeas as a remedy for vindication of constitutional rights, for theoretically it permits a massive evisceration of habeas jurisdiction. Defendants had each been convicted of a crime in their respective state courts in trials in which each had unsuccessfully argued that evidence presented was the product of an unconstitutional search and seizure.[8] Each filed a petition for a writ of federal habeas corpus under 28 U.S.C. section 2254.[9] The Court stated the issue in these terms:

> The question is whether state prisoners—who have been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state courts at trial and on direct review—may invoke their claim again on federal habeas corpus review. The answer is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims.[10]

After an extended cost-benefit analysis, the Court responded in the negative.[11]

This method of carving out whole subject matter areas from the jurisdiction of the federal habeas court is conceptually limitless, easily ac-

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7. *See* Stone v. Powell, 428 U.S. 465, 521-22 (1976) (Brennan, J., dissenting):

> At least since Brown v. Allen, [344 U.S. 443 (1953)], detention emanating from judicial proceedings in which constitutional rights were denied has been deemed 'contrary to fundamental law,' and all constitutional claims have thus been cognizable on federal habeas corpus. There is no foundation in the language or history of the habeas statutes for discriminating between types of constitutional transgressions . . . .

Although the *Powell* majority denied that it was limiting habeas as a means of litigating constitutional claims generally, *id.* at 494 n.37, Justice Brennan in dissent viewed the Court's decision as permitting "a drastic withdrawal of federal habeas jurisdiction, if not for all grounds of alleged unconstitutional detention, then at least for claims—for example, of double jeopardy, entrapment, self-incrimination, Miranda violations, and use of invalid identification procedures—that this Court later decides are not 'guilt-related.'" *Id.* at 517-18 (footnote omitted). At the least, language in the majority opinion justified these apprehensions. *See, e.g., id.* at 491 n.31.

Three years earlier, in his concurring opinion in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973), Justice Powell, the author of *Stone v. Powell*, raised the possibility of limiting federal habeas in this manner. To the same effect, see Lefkowitz v. Newsome, 420 U.S. 283, 302-03 (1975) (Powell, J., dissenting).

8. Powell v. Stone, 507 F.2d 93, 94 (9th Cir. 1974); Rice v. Wolff, 573 F.2d 1280, 1283 (8th Cir. 1975).

9. *Id.*

10. 428 U.S. at 489.

11. Not surprisingly, the Chicago School of Economics gives the Burger Court good marks. *See, e.g.*, Easterbrook, *The Supreme Court, 1983 Term-Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

complished, and almost absolute in its preclusionary result.[12] Moreover, its very simplicity may engender a snowball effect: today the Fourth Amendment, tomorrow the Fifth and Sixth.[13]

Although the Court's methodology in *Powell* appears simple and straightforward, the opinion itself is not. The majority's focus on the nature of the exclusionary rule and its limited deterrent value in federal habeas proceedings suggests that the Court's rationale might be relatively narrow and limited to exclusionary remedies created by the Court, such as the suppression of confessions taken in violation of *Miranda*.[14] On the other hand, the Court's reasoning may be more broadly interpreted to include other constitutional claims unrelated to guilt or innocence, such as those involving grand jury discrimination and double jeopardy.[15]

12. The opportunity for full and fair litigation in state court is the sole prerequisite for precluding a federal forum in Fourth Amendment cases. With rare exceptions, the lower courts interpreting that criterion have found it satisfied, even in highly questionable circumstances. *See, e.g.,* Holmberg v. Parratt, 548 F.2d 745 (8th Cir. 1977) (state court application of erroneous Fourth Amendment rules did not deprive petitioner of opportunity for full and fair litigation); O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977), *cert. denied,* 433 U.S. 911 (1977) (state court's resolution of Fourth Amendment claim on adequate and independent state grounds that do not impinge on federal rights satisfies *Stone v. Powell*); *but see* Gamble v. Oklahoma, 583 F.2d 1161 (10th Cir. 1978) (holding petitioner did not receive sufficient opportunity when state court did not consider his arguments based on a controlling United States Supreme Court decision). The lower courts have, however, adopted differing formulations of what constitutes an opportunity for full and fair litigation. *See, e.g.,* Shoemaker v. Riley, 459 U.S. 948 (1982) (White, J., dissenting from denial of certiorari).

13. Justice Powell, concurring in Brewer v. Williams, 430 U.S. 387, 413-14 (1977), argued in response to the dissent of the Chief Justice, that the *Stone v. Powell* issue was not before the Court and that the question whether to extend *Powell* to Fifth and Sixth Amendment claims should be decided only after briefing and argument. During the same Term, the Court declined to decide whether a mere allegation of a *Miranda* violation, unaccompanied by a claim of involuntariness or unreliability, should be made subject to the *Powell* rule. *See* Wainwright v. Sykes, 433 U.S. 72, 87 n.11 (1977), discussed *infra* Part II.

14. *See* 428 U.S. at 486: "Post-*Mapp* decisions have established that the [exclusionary] rule is not a personal constitutional right. . . . Instead, . . . '[it] is a judicially created remedy designed to safeguard Fourth amendment rights generally through its deterrent effect.' " (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

Compare Michigan v. Tucker, 417 U.S. 433, 444 (1974), in which the Court viewed *Miranda* warnings not as rights protected by the Constitution, but merely as "prophylactic standards" judicially created to provide practical reinforcement of the privilege against self-incrimination.

15. *See supra* note 7. Because Justice Brennan viewed the exclusionary rule as a constitutional ingredient of the Fourth Amendment, conceded by the majority to be applicable at trial and on appeal, he asserted that the real attack was on the habeas statute and the habeas jurisdiction. 428 U.S. at 506-15 (Brennan, J., dissenting). In his dissent, Justice White also discerned no basis for distinguishing between Fourth Amendment and other constitutional issues. He declined to join the majority because of the fortuitous circumstance that a certiorari petitioner whose writ was granted and whose exclusionary rule claim was upheld would go free, whereas an accomplice to the same crime who was tried later, whose certiorari petition was subsequently denied, and who sought the same relief via federal habeas was out of luck. *Id.* at

Moreover, the Court's emphasis on finality, comity, federalism, and preservation of judicial resources[16] indicates the even broader potential scope of *Powell*. Arguably, *Powell* lacks any form of built-in limitation beyond the assurance of an adequate state process for determining the merits of federal constitutional claims.[17]

In spite of the open-ended reasoning of the *Powell* Court, perhaps the most arresting point to be made is that in the nearly ten years since the *Powell* opinion, the snowball has gathered no moss. The Court has decided only three cases directly involving *Stone v. Powell* issues,[18] and its resolution of those questions indicates that there are limits on the *Powell* construct. Nevertheless, the results in these cases with respect to the underlying constitutional rights leave unclear the value of federal habeas as a vindicator of the particular claims involved.

The Court's most recent interpretation of *Powell* is *Cardwell v. Taylor*,[19] a brief, 1983 per curiam decision. In *Cardwell*, the Court summarily reversed the Ninth Circuit's remand of a habeas case directing the district court to consider petitioner's claim that his confession should be excluded because it was the product of an illegal arrest. The Court concluded that its decision in *Dunaway v. New York*,[20] which authorized suppression of a similar confession, was based on Fourth rather than Fifth Amendment concerns, and therefore *Stone v. Powell* precluded reliance on *Dunaway* in a habeas action. Thus, petitioner could prevail only by showing involuntariness under the Fifth Amendment.

In one sense, *Cardwell* is a minor extension of *Powell*, because it merely brings confessions secured through Fourth Amendment violations within the latter's ambit. Compared to the decision in *Powell*, which precluded an attack on a vague vagrancy ordinance under which

536-37 (White, J., dissenting). However, Justice White added that he would be willing to join four other Justices in substantially limiting the reach of the exclusionary rule. *Id.* at 537-42. He has since done so. *See, e.g.,* United States v. Leon, 104 S. Ct. 3405 (1984) (opinion of White, J.) (creating good faith exception to the exclusionary rule).

16. 428 U.S. at 491-92 n.31.

17. *See id.* at 522-23 (Brennan, J., dissenting). The majority's emphasis on an opportunity for full and fair litigation may be seen as an acceptance of Professor Bator's view that federal habeas should be available only where the state's corrective process is inadequate or unfair. *See* Bator, *supra* note 3, at 462, 523-28. *See also* Cover & Aleinikoff, *supra* note 6, at 1094 (suggesting that *Stone v. Powell* will be applied where the claim has been litigated in a fair and adequate forum, and the constitutional right at issue does not create uncertainty that the defendant is guilty, or the claim is one that does not involve the right to be free from conviction despite guilt, or the right is not granted special protection because of its fundamental nature).

18. Cardwell v. Taylor, 461 U.S. 571 (1983) (per curiam); Rose v. Mitchell, 443 U.S. 545 (1979); Jackson v. Virginia, 443 U.S. 307 (1979).

19. 461 U.S. 571 (1983) (per curiam).

20. 442 U.S. 200 (1979).

the petitioner had been arrested and searched,[21] the *Cardwell* ruling seems quite modest: *Cardwell* at least allows the habeas court to reach the voluntariness issue with respect to the confession; *Powell* effectively insulates the results of the arrest and search from the scrutiny of the federal habeas court.[22]

On the other hand, the extension of *Powell* to confessions gained as a result of an illegal arrest presents somewhat different concerns from those usually involved in Fourth Amendment cases involving the suppression of physical evidence. The rationale for the *Dunaway* ruling is that, without suppression of illegally obtained results, the police would be able to arrest individuals without probable cause, take them to the police station, give them *Miranda* warnings, and then secure a valid confession.[23] Permitting such conduct could drastically alter our accusato-

21. 428 U.S. at 469-71. *Stone v. Powell* involved companion cases: one case raised the issue of the vagueness of a vagrancy ordinance; the other concerned the adequacy of a search warrant. The Nevada vagrancy ordinance provided:

> Every person is a vagrant who
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> [1] Loiters or wanders upon the streets or from place to place without apparent reason or business and
>
> [2] who refuses to identify himself and to account for his presence when asked by a police officer to do so
>
> [3] if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

Id. at 469 n.1.

While this ordinance is somewhat more specific than the one invalidated in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), there are strong similarities between the two. *See also* Kolender v. Lawson, 461 U.S. 352 (1983) (invalidating on vagueness grounds a statute construed so as to make it a crime for a person lawfully stopped to fail to provide "credible and reliable" identification and to account for his presence). *But see* Michigan v. DeFillippo, 443 U.S. 31 (1979), in which the Court upheld a conviction based on evidence seized from a defendant stopped pursuant to a local ordinance requiring a person lawfully stopped to produce evidence of identity. The majority reasoned that a prudent police officer should not be required to anticipate that a court would later hold the ordinance unconstitutional. *Id.* at 37-38. The Court, however, created a "possible exception" with respect to "a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Id.* at 38. It is unclear whether the ordinance in *Stone v. Powell* comes within the *DeFillippo* rule or its "possible exception."

22. *Cf.* Michigan v. DeFillippo, 443 U.S. at 43 (Brennan, J., dissenting) [citations omitted]:

> The ultimate issue is whether the State gathered evidence against respondent through unconstitutional means. Since the State is responsible for the actions of its legislative bodies as well as for the actions of its police, the State can hardly defend against this charge of unconstitutional conduct by arguing that the constitutional defect was the product of legislative action and that the police were merely executing the laws in good faith.

23. Dunaway v. New York, 442 U.S. 200, 216-19 (1979). *See also* Brown v. Illinois, 422 U.S. 590, 602 (1975) [citation omitted]:

> If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, . . . the effect of the exclusionary rule would be substantially diluted. . . . Arrests made without warrant or without probable cause, . . . would

rial system and create even greater potential for abuse than exists in searches for physical evidence. That the *Cardwell* Court was willing to take this step, and without so much as briefing and oral argument, suggests that *Powell*'s preclusionary potential should not be underestimated.[24]

This potential notwithstanding, the Court refused to extend *Powell* in *Jackson v. Virginia*[25] to claims based on the reasonable doubt standard of proof, and in *Rose v. Mitchell*,[26] to racial discrimination in grand jury selection. Interestingly, however, in both cases the majority concluded that, although habeas remained available for such claims, petitioners had failed to prove their constitutional assertions and were not entitled to relief. Indeed, the manner in which the majority articulated the contours of the implicated constitutional rights makes it problematic whether the habeas remedy will be particularly efficacious in vindicating these rights. Nevertheless, in the face of strong opposition,[27] the Court was willing to reach and reject the *Stone v. Powell* argument in cases in which the claims were ultimately found not to be proved,[28] indicating that a majority of the Justices may be reluctant to engage in piecemeal dismantling of the habeas jurisdiction via this route.

In *Rose v. Mitchell*,[29] the State of Tennessee urged not only that habeas relief be denied with respect to allegations of grand jury discrimi-

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be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings.

24. Justices Brennan and Marshall, the only dissenters in *Cardwell*, would have granted certiorari and heard oral argument. 461 U.S. at 573.

25. 443 U.S. 307 (1979).

26. 443 U.S. 545 (1979).

27. In *Rose v. Mitchell*, the grand jury discrimination case, Justices Stewart and Powell separately concurred in the judgment, but opposed the view that grand jury discrimination should afford a basis for overturning a conviction. Justice Powell's opinion focused particularly on federal habeas. He thought the Court's ruling was "unprincipled" and "wholly at odds with the history and purpose of the writ," and he concluded that "habeas corpus should not be available for the vindication of claims, such as respondents' grand jury discrimination claim, that have nothing to do with the fairness of the claimant's conviction." *Id.* at 588. Justice Rehnquist joined the opinions of both Justices Powell and Stewart. *Id.* at 574, 579. The Chief Justice joined with the majority on the merits of the grand jury claim, but apparently took no position on the *Stone v. Powell* issue. *Id.* at 547 n.1.

In *Jackson v. Virginia*, the evidentiary sufficiency case, Justice Stevens, joined by the Chief Justice and Justice Rehnquist, concurred in the judgment based on rejection of petitioner's claim on the merits, but believed that the Court's ruling on the availability of habeas would be "seriously harmful both to the state and federal judiciaries." 443 U.S. at 335. Justice Powell did not participate in the decision.

28. *See infra* notes 35-39 & 54-56 and accompanying text.

29. 433 U.S. 545 (1979). Justice Powell's 1977 dissent in Castaneda v. Partida, 430 U.S. 482 (1977), made it clear that the Court would soon be called upon to determine whether claims of grand jury discrimination were cognizable in federal habeas. *Id.* at 508 n.1.

nation, but that these claims be considered harmless error, whether on direct or collateral review.[30] The majority rejected the harmless error argument, citing to an almost century-old line of cases holding that the Equal Protection Clause prohibits criminal conviction if an indictment issues from a grand jury selected in a racially discriminatory manner.[31] The Court emphasized that such discrimination "strikes at the fundamental values of our judicial system and our society as a whole."[32]

Turning to the *Stone v. Powell* contention, the Court addressed the state's assertion that habeas relief should be available only when the error affects the determination of guilt. Writing for the majority, Justice Blackmun noted that the *Powell* Court "carefully limited the reach of its opinion . . . [and] made it clear that it was confining its ruling to cases involving the judicially created exclusionary rule, which had minimal utility when applied in a habeas corpus proceeding."[33] He distinguished the claim of racial discrimination from *Powell's* exclusionary rule issue and concluded that the reasoning in *Powell* was inapplicable in the grand jury context for several reasons. First, exclusionary rule claims involve charges of police misconduct, which state courts are competent to review, whereas grand jury discrimination attacks are lodged against the state trial courts themselves. When state courts rule on these challenges, the opportunity for "full and fair" litigation, as required by *Powell*, is diminished, thus necessitating independent federal review. Second, while the exclusionary rule is a judicially created remedy, grand jury discrimination claims—which call into question the very fairness and integrity of the criminal justice system—are protected "directly" by the Equal Protection Clause of the Fourteenth Amendment. In the latter context, reviewing the merits in habeas does not unnecessarily exacerbate federalism tensions. Third, the *Powell* decision "rested to a large extent" on the view that the exclusionary rule was a minimal deterrent when applied in habeas corpus, whereas habeas review of grand jury discrimination claims has a much more substantial educative and deterrent effect. Finally, the penalty resulting from a finding of grand jury discrimination—reindictment—is not as severe as the penalty for violation of the

30. 433 U.S. at 550-59.

31. 443 U.S. at 556 (citing, *e.g.*, Reece v. Georgia, 350 U.S. 85, 87 (1955); Neal v. Delaware, 103 U.S. 370, 394 (1881). *See also* Alexander v. Louisiana, 405 U.S. 625 (1972); Cassell v. Texas, 339 U.S. 282 (1950); Hill v. Texas, 316 U.S. 400 (1942); Strauder v. West Virginia, 100 U.S. 303 (1880)).

32. 443 U.S. at 556.

33. *Id.* at 560. *But see id.* at 587 n.10 (Powell, J., concurring in the judgment), arguing that the majority had overstated the differences between *Stone v. Powell* and *Rose v. Mitchell*, and that the former presaged a limitation on federal habeas with respect to all nonguilt-related claims.

exclusionary rule. For these reasons, the Court determined that *Powell* was clearly distinguishable.[34]

What remains unclear from the Court's analysis is whether the exclusionary rule is the sole exception to which the *Stone v. Powell* preclusionary doctrine applies, or whether instead the Equal Protection Clause is the sole exception (at least in nonguilt-related claims) to which *Stone v Powell* does *not* apply. The majority's extended discussion of the limited reach of *Powell* suggests that the Court may lean toward the former position. Arguably, however, because *Rose v. Mitchell* clearly involves a constitutional violation as opposed to a "judge-made rule," Justice Blackmun's balancing methodology may reflect an acceptance of the view that *Stone v. Powell*'s basic premise is that the habeas jurisdiction need not be available with respect to all *constitutional* violations. In other words, by accepting this mode of analysis, the Court may have revealed that *Stone v. Powell* was in fact a limitation on the habeas jurisdiction rather than on the exclusionary rule (and other so-called judicially created remedies), and therefore the limitations on habeas may be extended beyond the latter's confines.

If this view is correct, *Rose v. Mitchell* does not explain how the Court will decide which rights will not be cognizable in federal habeas. Given the majority's focus on racial discrimination, the Court may have been implying that only certain very "special" rights will not be sent the way of *Stone v. Powell*. If so, Justice Blackmun provided no guidelines for establishing such a hierarchy, although obviously the guilt-innocence factor would not be critical. It may be that whether a right will be deemed special or fundamental for this purpose will be defined by whether the right by its very nature permits an adequate state corrective

34. *Id.* at 560-64. For a cogent critique of the Court's analysis in *Rose v. Mitchell,* see Peller, *supra* note 3 at 596-602.

The Court's refusal to apply *Stone v. Powell* to grand jury racial discrimination cases because of its view of the importance of the implicated right has not prevented it from denying relief in cases raising such claims, based on less expansive forfeiture grounds. *See, e.g.,* Parker v. North Carolina, 397 U.S. 790 (1970) (state court's refusal to consider defendant's grand jury claim on basis of waiver constituted an adequate and independent state ground precluding Supreme Court review on direct appeal); Tollett v. Henderson, 411 U.S. 258 (1973) (valid guilty plea waives antecedent constitutional claim based on discrimination in grand jury selection process, even though habeas petitioner was unaware of existence of facts underlying claim at the time plea was entered); Francis v. Henderson, 425 U.S. 536 (1976) (defendant's failure to challenge grand jury selection method as racially discriminatory at trial precludes habeas relief, unless cause and prejudice are established). The decision in *Francis v. Henderson* prompted Justice Brennan to assert, in dissent, that either *Fay v. Noia's* deliberate bypass test (*see infra* text accompanying note 65) was dead, or that the right to challenge racially discriminatory grand jury selection methods was a lesser constitutional right. *Id.* at 546, 551-53 & n.4. It was the former that proved to be true. *See infra* notes 63-66 and accompanying text.

process, and the Court's emphasis on the need for independent federal review in the grand jury context suggests this as a possible limitation. But inasmuch as very few rights go to the integrity of the state judicial process as do grand jury racial discrimination claims, this reading turns *Stone v. Powell* into a sleeping giant.

Despite the Court's refusal in *Rose v. Mitchell* to extend *Stone v. Powell* to grand jury racial discrimination issues, its resolution of the constitutional claim there lessened the value of habeas as a remedy in that context: while upholding the availability of habeas, the majority also constricted the implicated constitutional right. Part of the difficulty in *Mitchell* was that the discrimination charged involved only the selection of the grand jury foreman, and not the entire jury.[35] Under state law, the foreman was chosen by the judge for a two-year period, and his or her special powers made that person a pivotal figure in the indictment process.[36] The petitioner's evidence indicated that although blacks constituted 30% of the county's population, no black foreman had been chosen during the period 1951-1973, a statistical disparity that at least arguably required the state to rebut an inference of intentional racial discrimination.[37] Indeed, in his dissenting opinion, Justice White did not "see how respondents could be expected to make a stronger statistical showing."[38] The majority, however, found the petitioner's evidence meager and insufficient to make out a prima facie case, notwithstanding the state's concession to the contrary on oral argument.[39]

The Court's decision that same Term in *Jackson v. Virginia*[40] is in the same analytical mode as *Rose v. Mitchell*—allowing habeas review but rejecting the constitutional claim on the merits. At issue in *Jackson* was the standard a federal habeas court is required to use in determining whether a state court has violated the requirement established in *In re Winship*[41] of proof beyond a reasonable doubt. Prior to *Winship*, the Court used the "no evidence" criterion of *Thompson v. Louisville.*[42]

35. The majority assumed, without deciding, that discrimination only with respect to selection of the foreman would require that the conviction be set aside. 443 U.S. at 551 n.4.

In his dissenting opinion, Justice White stated that the fact that discrimination was charged only with respect to selection of the foreman had implications with respect to how discrimination could be proved: the sample size would be so small as to prevent the sort of overwhelming statistical evidence found in other grand jury cases. *Id.* at 590-91.

36. *See id.* at 548 n.2. Although in this particular case the foreman did not vote, that did not preclude the possibility of prejudice because of the special powers he exercised. *Id.* at 569.

37. *Id.* at 565-69.

38. *Id.* at 592 (footnote omitted).

39. *Id.* at 573.

40. 443 U.S. 307 (1979).

41. 397 U.S. 358 (1970).

42. 362 U.S. 199 (1960).

Thompson was, however, designed to secure the due process right to "freedom from a wholly arbitrary deprivation of liberty."[43] The ruling in *Winship* implicated a due process right with respect to sufficiency of the evidence and thus raised the question whether the standard of review should be elevated.[44] In *Jackson* the Court concluded that the nature of the *Winship* right required the reviewing court to determine whether "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[45]

In urging the *Jackson* Court not to depart from the "no evidence" test, the state was essentially arguing that *Stone v. Powell* precluded federal habeas review of such sufficiency-of-the-evidence claims. Responding to the assertion that application of the reasonable doubt standard would unduly burden federal habeas courts, the majority said that this standard would not create a new class of cases, but would merely expand the implicated constitutional right, and that determination of such issues could be made on the record without an additional evidentiary hearing. The federal habeas court's burden would be further diminished by prior state court review of these claims.[46]

Justice Stewart tersely rejected the state's arguments, which were based on comity and the importance of finality in the criminal justice system. He noted that issues of comity and finality arise whenever a state prisoner asks a federal court to vindicate any federal constitutional right. Finally, the *Jackson* Court specifically distinguished *Powell* on the ground that the standard of proof issue is "central to the basic question of guilt or innocence."[47]

The Court's discussion in *Jackson* of the differences between the policy concerns presented in *Stone v. Powell* and in evidentiary sufficiency cases supports the view that *Powell* will be construed less expansively than its analytical approach would theoretically permit. The arguments relating to burden on the federal habeas court, finality and comity are common to both cases, and indeed these concerns are arguably more

43. 443 U.S. at 314.

44. *Id.* at 315-16.

45. *Id.* at 318-19. After *Winship*, the lower courts had assumed that as long as a reasonable doubt instruction had been given at trial, the "no evidence" standard remained sufficient. The Court rejected this view on the theory that even a properly instructed jury could convict although no rational trier of fact could find guilt beyond a reasonable doubt. *Id.* at 319; *but see id.* at 330-33 (Stevens, J., concurring in the judgment).

46. *Id.* at 320-22.

47. *Id.* at 323. In its emphasis on the guilt-related nature of the claim, the Court accepts at least part of Judge Henry Friendly's proposals. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142 (1970).

compelling in the *Jackson* context. It is simply more difficult for federal judges to evaluate the sufficiency of evidence relating to the material elements of crimes defined by state law than it is for them to evaluate familiar federal constitutional claims, such as search and seizure allegations. Since sufficiency claims to some extent replicate the state criminal trial, incursions on the finality of judgments are arguably greater in this context. In terms of federalism and comity, federal court directives relating to guilt and innocence certainly can be seen as more intrusive than setting aside state court convictions because of a violation of other federal constitutional rights.[48] Moreover, with respect to the latter, defendants usually can be retried without the tainted evidence, whereas a finding of evidentiary insufficiency precludes reprosecution of the defendant.[49]

The critical factor, therefore, is the nature of the implicated constitutional right. As the *Jackson* majority put it, "[t]he constitutional issue presented in this case is far different from the kind of issue that was the subject of the Court's decision in *Stone v. Powell* . . . ."[50] Unlike the majority opinion in *Rose v. Mitchell*, which focused on the minimal deterrent value of the judge-made exclusionary rule to distinguish it from the equal protection right implicated by discriminatory grand jury selection, the Court in *Jackson* discussed only the central importance of the *Winship* right without contrasting it in detail to search and seizure claims. Thus, although the nature of the implicated constitutional right should be pivotal, the *Jackson* opinion does not clarify whether the focus of the Court's analysis will be on the nature of the constitutional claim at issue or on the nature of the exclusionary rule.

To some extent, the Court's analysis in the grand jury case, focusing on the nature of the exclusionary rule, tends to support the view that *Powell* is an extremely limited case, since very few constitutional claims would meet the *Powell* Court's criteria for finding federal habeas unavailable.[51] The approach in *Jackson*, however, leaves open the possibility of a more expansive interpretation of *Stone v. Powell*, because *Jackson's* focus on guilt-related claims implies that constitutional rights unrelated to guilt or innocence may still fall within the ambit of *Stone v. Powell*.[52]

48. *See id.* at 335-39 (Stevens, J., concurring in the judgment).

49. Greene v. Massey, 437 U.S. 19 (1978).

50. 443 U.S. at 323.

51. Under this narrow interpretation, *Stone v. Powell* might be extended only to procedural safeguards stemming from *Miranda*. *See supra* note 14. *Rose v. Mitchell* can, however, be interpreted much more broadly. *See supra* text following note 34.

52. In his concurrence in *Jackson*, Justice Stevens cited *Powell* and stated that habeas was "designed to guard against extreme malfunctions in the state criminal justice systems." 443 U.S. at 332 n.5.

While it is true that *Rose v. Mitchell* establishes that at least one nonguilt-related claim will remain cognizable,[53] the basis for such inclusion remains uncertain.

As in *Rose v. Mitchell*, the *Jackson* majority, after determining that insufficiency claims were reviewable, proceeded to take away what it had given, concluding that a rational trier of fact could "readily" have found the habeas petitioner guilty beyond a reasonable doubt.[54] The concurring Justices, who opposed the majority with respect to availability of habeas for sufficiency claims, were probably correct in their assertion that defendant's first degree murder conviction could be upheld under either the no evidence rule or the new reasonable doubt sufficiency standard,[55] thus raising the question why the majority felt it necessary to decide the *Stone v. Powell* issue at all. The Court's arguably gratuitous resolution of this matter supports the view that a majority is disinclined to extend *Powell* to guilt-related constitutional claims. On the other hand, concurring Justice Stevens may also have been correct that the majority did not choose the most expansive review standard for insufficiency of evidence challenges.[56] To the extent that the Court has selected a narrower scope of review—one that may be practically indistinguishable from the no evidence test—it may be indicating that although the habeas forum remains available, its efficacy for sufficiency-of-the-evidence claims will be limited.

The Court has thus rebuffed efforts to extend *Stone v. Powell* to its analytical outer limits, and so far, the case remains anchored to its Fourth Amendment exclusionary rule moorings. But whether *Powell* will linger in splendid isolation remains uncertain. The refusals to extend *Powell* involved two "special" rights: grand jury racial discrimination, which implicates equal protection and the integrity of the state judicial process, and the reasonable doubt standard, the ultimate guilt-related due process guarantee. Moreover, although the Court rejected the extension of *Stone v. Powell* to these two rights, it accepted *Powell's* balancing approach, thus indicating reaffirmation of its preclusionary doctrine. Therefore, it seems highly unlikely that *Stone v. Powell* will become the

53. *See supra* notes 29-34 and accompanying text.

54. 443 U.S. at 324.

55. *Id.* at 328 (Stevens, J., concurring in the judgment). "[I]n practice there may be little or no difference between a record that does not contain at least some evidence tending to prove every element of an offense and a record containing so little evidence that no rational factfinder could be persuaded of guilt beyond a reasonable doubt." *Id.* at 335.

56. *See id.* at 334-35. As examples, Justice Stevens stated that the reasonable doubt standard could be applied by the reviewing court itself or that the reviewing court might not confine itself solely to the evidence most favorable to the prosecution. *Id.*

Usery[57] of its genre, and the decision's conceptual reach may yet be expanded at least to additional nonguilt-related constitutional claims.[58] In any event, the apparent dormancy of the *Powell* reasoning does not characterize that of the related habeas corpus decision, *Wainwright v. Sykes.*[59]

II. Of Procedural Defaults, Ineffective Assistance of Counsel, and Retroactivity

In *Wainwright v. Sykes,*[60] the prisoner's attorney failed to object at trial to the admission of statements the defendant had made at the police station.[61] Sykes subsequently sought federal habeas relief on the ground that he was intoxicated and therefore had no capacity to understand the *Miranda* warnings he received or to waive his rights.[62] The United States Supreme Court held that, because the petitioner had not complied with state contemporaneous objection rules, federal habeas relief was unavailable.

The *Sykes* decision explicitly discarded,[63] at least with respect to such objections at trial,[64] the deliberate bypass rule of *Fay v. Noia*,[65]

57. National League of Cities v. Usery, 426 U.S. 833 (1976) (holding that the Tenth Amendment acts as a limitation on Congress' commerce power), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005 (1985). In the interim between *Usery* and *Garcia*, the Court upheld every federal law challenged under the *Usery* rationale. *See, e.g.*, Hodel v. Virginia Surface Min. & Recl. Ass'n, 452 U.S. 264 (1981); United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982); FERC v. Mississippi, 456 U.S. 742 (1982); EEOC v. Wyoming, 460 U.S. 226 (1983). This led some commentators to ask whether *Usery* was still viable. *See, e.g.*, G. GUNTHER & F. SCHAUER, CONSTITUTIONAL LAW CASES AND MATERIALS 45 (Supp. 1984). *Garcia* supplied the answer.

58. *Cf.* Lehman v. Lycoming County Children's Serv. Agency, 458 U.S. 502 (1982), in which the Court held that 28 U.S.C. § 2254 could not be used to challenge the constitutionality of a state law under which a state obtained custody of children and terminated the rights of natural parents. Although the majority found jurisdiction to be lacking under the statute because of failure to meet its "custody" requirement, the decision resembles *Stone v. Powell* in its approach. The dissent argued that the majority could have reached the same result by finding that, as a discretionary matter, the petitioning natural mother had not made a sufficient showing that she acted in the interests of her child, therefore making her an inappropriate petitioner. The majority's jurisdictional approach, in Rose v. Mitchell, 443 U.S. 545 (1979) and Jackson v. Virginia, 443 U.S. 307 (1979), allows the Court to decide the case on considerably broader grounds.

59. 433 U.S. 72 (1977).

60. *Id.*

61. *Id.* at 75.

62. Wainwright v. Sykes, 528 F.2d 522, 523 (5th Cir. 1976), *rev'd,* 433 U.S. 72 (1977). This claim was alluded to briefly in the Supreme Court's opinion. *See* 433 U.S. at 74-75.

63. The result in *Sykes* had been foreshadowed in a series of cases decided in the 1970's. *See* Davis v. United States, 411 U.S. 233 (1973); Francis v. Henderson, 425 U.S. 536 (1976); Estelle v. Williams, 425 U.S. 501 (1976).

64. Wainwright v. Sykes, 433 U.S. at 88 n.12 (declining to decide whether the cause and prejudice requirements should apply to appellate defaults, such as the one in Fay v. Noia, 372

which had imposed a habeas forfeiture for procedural defaults only if the defendant personally participated with counsel in a strategic, intentional relinquishment of the procedure afforded by state law for vindication of the constitutional claim. The *Sykes* Court substituted the dual requirements that a petitioner in a section 2254 proceeding establish "cause" to excuse noncompliance with state procedural rules and "prejudice" resulting from the alleged constitutional violation.[66] The majority dealt with these requirements in cursory fashion, merely finding that the defendant had not offered any explanation for his failure to object to the challenged confession and that other evidence of guilt precluded any possibility of actual prejudice.[67] Justice Rehnquist's majority opinion did not elaborate on the meaning of either "cause" or "prejudice," stating that those terms would be given more "precise content" in later cases.[68]

Compared to *Stone v. Powell,* the ruling a year later in *Wainwright v. Sykes* may be viewed as a lesser included curtailment because it applies only to parties committing defaults rather than to entire categories of constitutional issues. *Sykes* nonetheless affects many habeas petitioners and has an especially unfair double-or-nothing effect—those who have litigated their non-Fourth Amendment constitutional claims in state court receive another opportunity to do so in a federal forum, whereas those whose attorneys committed defaults in state court will also be precluded from litigating such claims in federal court unless they can meet *Sykes'* difficult requirements of "cause" and "prejudice."[69]

A. The Prejudice Requirement—*United States v. Frady*

In the eight years since the *Sykes* decision, the court has taken three opportunities to provide the promised elaboration of "cause" and "prejudice."[70] In one of the cases, *United States v. Frady,*[71] the Court held the "plain error" standard of Rule 52(b) of the Federal Rules of Criminal

U.S. 391 (1963)). *Cf.* Evitts v. Lucey, 105 S. Ct. 830 (1985), in which the Court held that criminal defendants were entitled as of right to effective assistance of counsel on appeals. Defendant's attorney had failed to comply with an appellate rule, and as a result his appeal was dismissed. The Court held that it violated due process for the state to punish the defendant for his attorney's default by dismissing the appeal. *Id.* at 838-41. *See also infra* note 128.

65. 372 U.S. 391 (1963).

66. 433 U.S. at 90-91.

67. *Id.* The Court's discussion of the application of the new standards to *Sykes* was contained in a single paragraph.

68. *Id.* at 91.

69. *See supra* note 66.

70. Two cases deal with the meaning of cause: Reed v. Ross, 104 S. Ct. 2901 (1984), and Engle v. Isaac, 456 U.S. 107 (1982). In *Ross* the cause requirement was satisfied; in *Engle* it was not. The third case interprets prejudice: United States v. Frady, 456 U.S. 152 (1982).

71. 456 U.S. 152 (1982).

Procedure, applicable on direct appeal in federal cases, did not apply in the counterpart section 2255 proceeding used by federal prisoners,[72] when the defendant fails to object contemporaneously to a jury instruction that impermissibly permits a presumption of malice.[73] Instead, the Court ruled that the appropriate standard for a collateral attack in this context, as with state prisoners, consists of the cause and prejudice requirements.[74] Prejudice was defined so stringently that a court may, in effect, require a defendant to prove wrongful conviction of the crime. The *Frady* majority found it unnecessary to determine whether cause had been established,[75] because the petitioner "suffered no actual prejudice of a degree sufficient to justify collateral relief nineteen years after his crime."[76]

In the *Frady* majority opinion, Justice O'Connor reaffirmed the prejudice formulation for jury instructions articulated in *Henderson v. Kibbe*[77] that the "degree of prejudice resulting from instruction error be evaluated in the total context of the events at trial."[78] Frady's claim of prejudice was that the instruction relieved the government of its burden of proving malice, thus denying the jury an adequate opportunity to return a verdict of manslaughter. In response, the majority stated that Frady must show not merely that this error created a possibility of prejudice, but that it "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[79] Because defendant failed to substantiate his claim that he had nothing to do with the homicide, because the evidence of guilt was overwhelming, because Frady failed to present evidence that he acted without malice, and because the jury necessarily found premeditation and deliberation in reaching its verdict of murder in the first degree, the Court saw "no risk

72. *See* Sanders v. United States, 373 U.S. 1, 15 (1963); *but see infra* note 74.

73. The government did not contest Frady's assertion that the jury instruction was erroneous, as determined by later court rulings. 456 U.S. at 157-58 n.6.

74. *Id.* at 167-68. Justice Brennan in dissent argued that there were distinctions between the § 2254 civil actions and the § 2255 criminal proceedings that militated in favor of retaining the plain error doctrine in a case involving a federal prisoner. In particular, he noted that the plain error rule gives federal courts the discretion that most state courts have to waive procedural defaults when necessary, and that comity and federalism tensions were not present in the § 2255 context. *See id.* at 178-87 (Brennan, J., dissenting).

75. It is doubtful that Frady could have established cause under the Court's holding the same day in *Engle v. Isaac,* discussed *infra* at notes 92-105 and accompanying text. *See* 456 U.S. at 168 n.16.

76. *Id.* at 168.

77. 431 U.S. 145 (1977).

78. 456 U.S. at 169.

79. *Id.* at 170.

of a fundamental miscarriage of justice."[80]

The *Frady* Court's delineation of the prejudice requirement is discussed only with regard to jury instruction claims. However, the plain error doctrine of Rule 52(b) of the Federal Rules of Criminal Procedure, which the Court said was inapplicable in collateral proceedings,[81] encompasses all "plain errors or defects affecting substantial rights," not merely jury instruction errors.[82] Thus, although the majority's articulation of this prejudice test is framed in terms of failure to object to jury instructions, the test may have applicability beyond that limited context.[83] Errors not properly objected to may therefore have to be viewed in the total context of the trial, and a defendant—in order to satisfy the prejudice requirement—may have to meet a strict test of actual and substantial disadvantage infecting the entire trial with constitutional error and amounting to a fundamental miscarriage of justice.

It is perhaps because the *Frady* defendant's claim went to the question of guilt or innocence[84] that the majority stressed his failure to come forward with evidence that he was not guilty of the crime of which he was convicted. In cases involving constitutional errors not related to guilt or innocence, arguably such a requirement should be inappropriate.[85] Perhaps a variant of the harmless error doctrine would suffice in

80. *Id.* at 171-74.

81. *Id.* at 167-68. *See supra* note 74.

82. *See* FED. R. CRIM. P. 52(b), which states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

83. Justice Brennan noted that the cause and prejudice requirements originated with Davis v. United States, 411 U.S. 233 (1973), in which the Court construed Rule 12(b)(2) of the FED. R. CRIM. P. to require a defaulting § 2255 applicant claiming discrimination in grand jury selection to show prejudice as well as cause. *Davis* was held applicable to the same sort of defaulted claim in a state court proceeding in Francis v. Henderson, 425 U.S. 536 (1976). Those two cases were in turn relied on in Wainwright v. Sykes, 433 U.S. 72 (1977), requiring showings of cause and prejudice with respect to *all* state court trial defaults. Justice Brennan viewed the *Frady* decision as coming full circle to supplant the plain error rule specified in Rule 52(b). 456 U.S. at 185-86.

84. The defendant essentially claimed that the government had not met its burden of proving him guilty of murder in the first degree. 456 U.S. at 170. As Mullaney v. Wilbur, 421 U.S. 684 (1975), makes clear, *In re Winship*'s requirement of proof beyond a reasonable doubt (*see infra* notes 105-107 and accompanying text) is not limited to situations in which the defendant would be wholly exonerated or, as the Court put it in Jackson v. Virginia, 443 U.S. 307, 323-24 (1979), "under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar."

85. This is not to suggest that *Frady*'s stringent "actual prejudice" test, requiring evidence of innocence or of a miscarriage of justice, is appropriate as to guilt-related claims either. While there is a logical nexus in the guilt-innocence context, the *Frady* test nonetheless erects virtually insuperable barriers and improperly shifts the burden to the defendant.

these circumstances,[86] but requiring a colorable claim of innocence appears to be inapposite.[87] In the *Sykes* decision, however, in which the defaulted claim involved a *Miranda* violation, the Court's allusion to the substantial evidence of defendant's guilt and its use of the phrase "miscarriage of justice" seem to amount to a rejection of the harmless error test with respect to nonguilt-related claims.[88]

The facts of the *Frady* case clearly suggest that the majority could have used the plain error criterion to obtain the same result—upholding the conviction.[89] This approach would have made it unnecessary to decide whether the cause and prejudice requirements applied to section 2255 proceedings, which in turn would have obviated the need to interpret the prejudice standard.[90] In a sense, the Court was reaching out to extend the *Sykes* procedural default rulings and to protect the finality of criminal convictions. *Frady* can thus be contrasted with the approach taken by the Court in interpreting *Stone v. Powell.* In *Jackson v. Virginia* and *Rose v. Mitchell,* the Justices reached out to decide that *Powell* was not going to be extended, even though in those very cases the majority determined that petitioners had not in any event established their consti-

86. *See* Goodman & Sallett, *Wainwright v. Sykes, The Lower Federal Courts Respond,* 30 HASTINGS L.J. 1683, 1700-01 (1979) (discussing various formulations of the harmless error standard and other tests used to define actual prejudice).

In Chapman v. California, 386 U.S. 18 (1967), the Court ruled that the harmless error test requires the state to prove beyond a reasonable doubt that the alleged constitutional violation did not contribute to the defendant's conviction. Therefore, when unconstitutional evidence is merely cumulative and there is untainted and overwhelming proof of guilt, the constitutional error is deemed harmless. Because the *Chapman* Court rejected California's argument that a more stringent "miscarriage of justice" standard should govern, 386 U.S. at 23, and because the *Sykes* majority accepted such a miscarriage of justice test in its discussion of cause and prejudice, 433 U.S. at 90-91, it appears that the *Sykes*' requirements are harsher than the harmless error test. *See infra* note 88 and accompanying text.

87. *But see* Friendly, *supra* note 47, at 150-53.

88. *See* 433 U.S. at 91. *See also* Spritzer, *Criminal Waiver, Procedural Default and the Burger Court,* 126 U. PA. L. REV. 473, 508-09 (1978), arguing that, since the harmless error doctrine had long been the law at the time *Sykes* was decided, *Sykes'* actual prejudice requirement must have been intimating a more stringent standard. *But see* Wainwright v. Sykes, 433 U.S. at 97-98 (White, J., concurring in the judgment) and *id.* at 117 (Brennan, J., dissenting) (suggesting that the actual prejudice test was similar to the harmless error doctrine).

89. In addition to other extremely damaging evidence, there was evidence that Frady and an accomplice, covered with the blood of the deceased, were apprehended while running from the victim's house. Frady contended that the real killer escaped while the police were arresting him. 456 U.S. at 154-56.

90. In *Frady,* the United States urged in its brief that the defendant had not shown plain error, and Justice Blackmun concurred in the judgment on the basis of the government's argument. *Id.* at 187. Justice Brennan stated that had the Court decided the case on a plain error basis, it would have been difficult for him to dissent. *Id.* at 187; *see also supra* note 89 and accompanying text.

tutional claims.[91] Those cases support the view that the Court is not eager to extend *Powell* to at least certain types of constitutional issues, whereas the *Frady* Court's broad sweep suggests a willingness to reinforce the stringency of *Sykes'* requirements and indicates that the cause and prejudice standards are being made more difficult for petitioners to meet.

B. The Cause Requirement

1. Engle v. Isaac and Ineffective Assistance of Counsel

Although the Court's two decisions interpreting cause reached opposite results, both opinions are in line with *Frady*'s insistence on finality in the criminal justice process and its consequent tightening of the requirements for excusing procedural defaults. In *Engle v. Isaac*,[92] decided the same day as *Frady*, petitioners alleged on appeal that the jury instructions at their state criminal trials impermissibly shifted the burden of proof for self-defense, thus violating the requirements set forth in *In re Winship*[93] and *Mullaney v. Wilbur*.[94] Petitioners had not objected to these instructions at trial, although required to do so by the Ohio Rules of Criminal Procedure.[95] Their trials were conducted after the decision in *Winship*, but prior to or immediately after the ruling in *Mullaney*.[96] *Winship* merely held that the state must prove every material element of a crime beyond a reasonable doubt.[97] *Mullaney* ruled that *Winship* pro-

91. *See supra* notes 35-39, 54-56 and accompanying text.

92. 456 U.S. 107 (1982).

93. 397 U.S. 358 (1970).

94. 421 U.S. 684 (1975). Although the Court's decision only prohibited the state from shifting the burden of proof with respect to malice (if malice is an element of the crime, Patterson v. New York, 432 U.S. 197 (1977)), some courts have applied the *Mullaney* ruling to self-defense on the theory that this defense will negate purposeful conduct, the *mens rea* requirement for the crime. *See, e.g.*, cases noted in Engle v. Isaac, 456 U.S. at 122 nn.22-24. Although there are significant differences between the defense of insanity and that of self-defense, several of the Court's decisions indicate that the *Isaac* petitioners' claims might have been rejected on the merits. *See, e.g.*, Rivera v. Delaware, 429 U.S. 877 (1976) (mem.) (summarily affirming a conviction pursuant to a statute requiring defendant to prove insanity by a preponderance of the evidence); Leland v. Oregon, 343 U.S. 790 (1952) (upholding a statute requiring defendant to prove insanity beyond a reasonable doubt); Patterson v. New York, 432 U.S. 197 (1977) (reaffirming the vitality of these decisions notwithstanding the rulings in *Winship* and *Mullaney*).

95. 456 U.S. at 124-25.

96. Two of the petitioners had been tried prior to the decision in *Mullaney*, while the trial of the third, Isaac, occurred three months thereafter. 456 U.S. at 133 n.42.

97. *In re* Winship, 397 U.S. 358 (1970), was a juvenile delinquency case in which the Court invalidated a New York statute permitting the state to adjudicate a child delinquent by a mere preponderance of the evidence. The Court ruled that the reasonable doubt standard was constitutionally required both in juvenile cases and in adult criminal prosecutions, although the latter issue was not before the Court. For an explanation why the Court characterized its

hibited the state from shifting to the defendant the burden of proving absence of malice in a murder prosecution.[98] The *Engle* defendants claimed that they could not have known at the time of trial that *Winship* could be applied to prohibit the shifting of burdens with respect to affirmative defenses,[99] and that in any event, an objection to the jury instructions would have been futile in view of the long standing rule in Ohio requiring defendants to bear the burden of proving self-defense.[100]

The futility argument was rejected out of hand as a deliberate bypass of state courts and thus was held insufficient by itself to constitute cause for failure to object.[101] The Court found it unnecessary to determine whether the novelty of a constitutional claim could ever establish cause, because these claims were not unknown at the times of the petitioners' trials. *Winship,* decided four and one half years before any of these trials, afforded a foundation for fashioning their arguments about the burden of proof of affirmative defenses. Indeed, the Court noted that during the interim period many defendants had relied on *Winship* to challenge the allocation of the burden of proof for various affirmative defenses and several state courts had accepted their theories.[102] Under these circumstances, the majority concluded that defendants could have asserted their claims at trial. Thus, although the Court previously had held both *Mullaney* and *Winship* to be completely retroactive,[103] the ruling in *Engle* effectively denies retroactive application to those tried after *Winship* who did not raise the issue at trial.[104]

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reasonable doubt standard for adults as a "holding," see Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past,* 27 UCLA L. REV. 656, 674-75 (1980).

98. In *Mullaney,* the challenged statute required the defendant to prove heat of passion in order to reduce the murder charge to manslaughter. Under those circumstances, heat of passion negated malice, which was a specific element of the crime of murder. On the other hand, in its subsequent decision in Patterson v. New York, 432 U.S. 197 (1977), the majority found *Mullaney* inapplicable to a more modern statute patterned after the Model Penal Code that similarly required defendant to prove "extreme emotional disturbance" (the contemporary successor to common law heat of passion) to reduce murder to manslaughter, since malice was not explicitly designated as an element of the crime. *Id.* at 199. The dissent viewed the result as a triumph of form over substance, because it allowed the legislature to violate *Winship* by manipulating the elements of the crime. *Id.* at 221-25 (Powell, J., dissenting).

99. 456 U.S. at 130. *See also supra* notes 94, 97 & 98.

100. 456 U.S. at 130.

101. *Id.*

102. *Id.* at 131-33 & n.40.

103. *Mullaney* was held retroactive in Hankerson v. North Carolina, 432 U.S. 233 (1977), as was *Winship* in Ivan V. v. City of New York, 407 U.S. 203 (1972) (per curiam). *But cf. infra* note 139.

104. In *Hankerson,* 432 U.S. at 244 n.8, the majority suggested that its retroactivity ruling might be mitigated by enforcing waivers with respect to defendants who had failed to make appropriate objections.

The only additional guidance given by the *Engle* Court with respect to the meaning of the cause and prejudice requirements is in connection with its rejection of petitioners' argument that these requirements be either supplanted or supplemented with a plain error rule. The majority stated that the plain error test is unnecessary to correct "miscarriages of justice," since victims of such miscarriages would be able to meet the cause and prejudice criteria. The Court noted that the latter were not "rigid concepts," but rather were rooted in principles of comity and finality that would yield in the case of a "fundamentally unjust incarceration."[105]

Notwithstanding the *Engle* Court's discussion of numerous pre-*Mullaney* burden of proof claims percolating in the lower courts after the decision in *Winship*,[106] *Mullaney* represents a sophisticated extension of the concepts articulated in *Winship*. Indeed, the *Engle* majority acknowledged this when it stated that it was not suggesting that even every "astute" attorney would have asserted these arguments in the interim between *Winship* and *Mullaney*.[107] Justice O'Connor recognized, at least tacitly, the underlying tension between the cause and prejudice requirements and the constitutional right to effective assistance of counsel; she pointed out that the Bill of Rights entitles the accused only to "a fair trial and a competent attorney"[108] and not to an especially "astute" lawyer. She further stated that "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default."[109] In other words, with respect to individuals represented by merely competent criminal defense attorneys who are not sufficiently prescient or skilled to be on the cutting edge of constitutional litigation, the "de-

105. 456 U.S. at 135.

106. In fact, the *Engle* majority pointed out that even before *Winship* was decided, a few courts had ruled or stated that state laws shifting the burden of proof violated due process. *Id.* at 131 n.39. Those few cases, however, were ruled insufficient to preclude establishment of cause by defaulting defendants tried before *Winship*. *See* Reed v. Ross, 104 S. Ct. 2901 (1984), discussed *infra* notes 138-156 and accompanying text.

107. 456 U.S. at 133. Three years before *Engle*, in Jackson v. Virginia, 443 U.S. 307 (1979), the Court held that *Winship* required the reasonable doubt standard to be applied in federal habeas proceedings to test the sufficiency of the evidence. Justice Stevens (joined by the Chief Justice and Justice Rehnquist) disagreed, arguing that "nothing in the *Winship* opinion suggests that it also bore on appellate or habeas corpus procedures." 456 U.S. at 330-31 (Stevens, J., concurring). He noted that in *Winship* it was the trial judge who had acknowledged that he was not convinced beyond a reasonable doubt of the juvenile's guilt. *Id.* at 330. Thus, the Justices themselves have not always agreed on *Winship*'s implications.

108. 456 U.S. at 134.

109. *Id.*

mands of comity and finality" require that defendants forfeit the opportunity to vindicate their constitutional rights through federal court habeas corpus actions. Thus, defendant faces a formidable "Catch-22": counsel for the defendant may be sufficiently competent to preclude an ineffective assistance claim, yet insufficiently astute to enable the accused to avoid a procedural default or to meet the apparently more difficult cause and prejudice requirements.[110]

The 1984 decision in *Strickland v. Washington*,[111] delineating the requirements for proving ineffective assistance violations, reinforces this view of the defendant's dilemma. The *Strickland* test for establishing such claims has two prongs. First, the defendant must show that the attorney's performance was deficient by identifying acts or omissions of counsel that are not the result of reasonable professional judgment, and the reviewing court must determine whether under all the circumstances these acts or omissions were outside the "wide range" of professionally competent assistance.[112] Second, the defendant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the trial would have been different—that absent the errors, the fact-finder would have had a reasonable doubt respecting guilt.[113] The focus of the Court's opinion is thus on the unreliability of the fact-finding procedure that results from a breakdown in the adversarial process.[114]

Although the *Strickland* Court said that no "special standards"[115]

110. Some lower courts interpreting Wainwright v. Sykes, 433 U.S. 72 (1977), have, however, found cause established where the attorneys' defaults were so serious that they might well amount to ineffective assistance. *See, e.g.,* Ross v. Heyne, 638 F.2d 979 (7th Cir. 1980) (counsel failed to correct false trial testimony because of conflict of interest); Rachel v. Bordenkircher, 590 F.2d 200 (6th Cir. 1978) (trial counsel submitted affidavits swearing that their failure to object to the prosecutor's comments was due to their lack of knowledge of the law); Sincox v. United States, 571 F.2d 876 (5th Cir. 1978) (defendant's lawyer did not object to non-unanimous verdict and failed to perfect appeal notwithstanding defendant's request that he do so). On the other hand, garden variety defaults have not been found to establish cause. *See, e.g.,* Spillers v. Housewright, 692 F.2d 524 (8th Cir. 1982); Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981), *cert. denied,* 465 U.S. 935 (1982); Grace v. Butterworth, 635 F.2d 1 (1st Cir. 1980), *cert. denied,* 452 U.S. 917 (1981); Cole v. Stevenson, 620 F.2d 1055 (4th Cir. 1980), *cert. denied,* 449 U.S. 1004 (1981).

111. 104 S. Ct. 2052 (1984).

112. *Id.* at 2066.

113. *Id.* at 2067-69. *See also* United States v. Cronic, 104 S. Ct. 2039 (1984), holding that, absent surrounding circumstances that make it unlikely that the accused could have received effective assistance of counsel, a criminal defendant can make out a claim of ineffective assistance only by showing specific errors committed by defense counsel.

114. 466 U.S. at 2069.

115. *Id.* at 2070. The majority noted that cause and prejudice must be proved in other default contexts because of the strong presumption of finality in collateral attacks; it distinguished ineffectiveness claims as attacks "on the fundamental fairness of the proceeding whose

should apply to ineffective assistance claims in habeas cases, it noted that determinations with respect to ineffective assistance are mixed questions of law and fact and thus not binding on federal courts in the manner that state court findings of basic fact are.[116] The majority also suggested that its new test might not be too different from the low level "farce and mockery" standard previously adopted by some of the lower courts[117] and that judicial assessment of an attorney's performance must be "highly deferential."[118] Nonetheless, the Court's formulation of the standard for prejudice in ineffective assistance claims appears to be somewhat less stringent than the prejudice standard for procedural defaults. Whereas the *Frady* test for prejudice requires, at least with respect to jury instructions, an infection of the entire trial sufficient to violate due process,[119] *Strickland*'s prejudice test mandates a reasonable probability that, but for counsel's errors, the outcome would have been different.[120] On the other hand, it is not likely that the Court would have created a substantial disparity in the standards of prejudice, since that would invite litigants to mask procedural defaults as ineffective assistance claims.[121] Perhaps it is because of this possibility that the Court in *Engle,* two years earlier, made it clear that while counsel might be required to be highly astute in order to preserve a federal remedy by anticipating legal developments, failure to do so would not necessarily constitute a Sixth Amendment violation.[122] While this obviates one form of tension between ineffective assistance claims and procedural defaults, it leaves the troubling possibility that a defendant may forfeit the right to assert constitutional claims of a sophisticated nature in federal habeas actions if he or

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result is challenged," and concluded that "[s]ince fundamental fairness is the central concern of the writ of habeas corpus, . . . no special standards ought to apply to ineffectiveness claims made in habeas proceedings." *Id.*

116. *Id.*

117. *Id.* at 2069. *See, e.g.,* United States v. Stern, 519 F.2d 521, 524 (9th Cir.), *cert. denied,* 423 U.S. 1033 (1975) (requiring defense counsel's ineffectiveness to be so substantial as to render the trial a farce and a mockery).

118. 104 S. Ct. at 2065.

119. *See supra* notes 77-83 and accompanying text.

120. *See* 104 S. Ct. at 2068-69.

121. *Compare* LiPuma v. Commissioner, 560 F.2d 84 (2d Cir.), *cert. denied,* 434 U.S. 861 (1977) (holding that *Stone v. Powell* applies to petitioner's Sixth Amendment claim of ineffective assistance based on counsel's failure to move for a suppression hearing) *with* Sallie v. North Carolina, 587 F.2d 636, 640-41 (4th Cir. 1978), *cert. denied,* 441 U.S. 911 (1979) (reaching contrary result). The Supreme Court recently agreed to review a Third Circuit decision holding that a Sixth Amendment claim based solely on failure to assert a Fourth Amendment objection was not barred by *Stone v. Powell.* The case before the Court also raises the issue whether such an ineffective assistance claim is barred by *Wainright v. Sykes. See* Morrison v. Kimmelman, 752 F.2d 918 (3d Cir.), *cert. granted,* 54 U.S.L.W. 3189 (U.S. Oct. 7, 1985).

122. *See supra* notes 107-110 and accompanying text.

she is represented by a "merely" competent criminal lawyer.[123]

The Court's recent grant of certiorari in *Sielaff v. Carrier*[124] increases the likelihood that *Engle* will be interpreted to bar even ordinary claims not raised due to counsel's negligence or inadvertence falling short of ineffective assistance.[125] In *Carrier*, although the defendant's attorney had properly raised the issue at trial,[126] on appeal he failed to press the contention that the trial judge's refusal to order production of certain material by the district attorney violated the due process rights of the accused.[127] In a subsequent federal habeas action, a divided panel of the Fourth Circuit found *Sykes'* cause and prejudice standards applicable to appellate defaults[128] and ruled that an attorney's default not amounting

123. A similar tension exists in cases in which the Court has held that defendant's guilty plea bars assertion of antecedent constitutional violations. *See, e.g.*, Tollett v. Henderson, 411 U.S. 258 (1973); Brady v. United States, 397 U.S. 742 (1970). The test for attacking the validity of the plea in that context is whether counsel's advice was within the range of competence demanded by attorneys in criminal cases. The Court emphasized that counsel need not be omniscient in foreseeing the outcome of a particular constitutional claim. *See* McMann v. Richardson, 397 U.S. 759, 772-73 (1970), in which the Court upheld defendant's guilty plea notwithstanding his coerced confession claim and despite the fact that New York's procedure for testing the voluntariness of confessions was subsequently held unconstitutional in Jackson v. Denno, 378 U.S. 368 (1964), a decision that was retroactively applied. *Id.* at 773. Thus, defendants whose lawyers were prescient enough to advise them to challenge the subsequently invalidated New York procedure were entitled to the retroactive benefits of *Jackson*, while those whose attorneys were competent but less astute could claim neither ineffective assistance of counsel nor the benefits of the *Jackson* ruling.

124. 53 U.S.L.W. 3903 (U.S. July 1, 1985).

125. The questions presented were: (1) Is attorney error based on ignorance or inadvertence, which does not constitute ineffective assistance of counsel in violation of Sixth Amendment, sufficient to establish "cause" required to excuse procedural default under *Wainwright v. Sykes?* (2) May exhaustion requirement of 28 U.S.C. § 2254 be circumvented merely because claim of attorney error is asserted to establish *Wainwright* "cause" rather than as independent ground for habeas corpus relief? 53 U.S.L.W. 3903 (U.S. July 1, 1985).

The state's exhaustion argument is that Virginia recognizes attorney errors of sufficient magnitude as a basis for excusing procedural defaults, and that therefore Carrier's contention in this regard must first be presented to the state court. Brief of Petitioner at 23-30, Sielaff v. Carrier, 105 S. Ct. 3523 (1985). The Fourth Circuit panel rejected this contention on the ground that section 2254's exhaustion requirement "pertains to independent claims for habeas relief, not to the proffer of *Wainwright* cause and prejudice." Carrier v. Hutto, 724 F.2d 396, 402 (4th Cir. 1983).

126. According to the dissenting judge on the Fourth Circuit panel, however, trial counsel had not raised the claim properly, because he had merely sought statements pursuant to Jencks v. United States, 353 U.S. 657 (1957), for purposes of cross examination, rather than for discovery pursuant to Brady v. Maryland, 373 U.S. 83 (1963). *See* Carrier v. Hutto, 724 F.2d at 403-04 (Hall, J., dissenting).

127. Carrier v. Hutto, 724 F.2d at 398.

128. The *Sykes* Court left open whether its cause and prejudice requirements would supplant the deliberate bypass test of Fay v. Noia, 372 U.S. 391 (1963), with respect to appellate defaults. *See* Wainwright v. Sykes, 433 U.S. 72, 88 n.12 (1977). In *Carrier*, 724 F.2d at 399 n.2, the Fourth Circuit, relying on its decision in Cole v. Stevenson, 620 F.2d 1055 (4th Cir.)

to ineffective assistance may constitute cause, provided it stems from ignorance or inadvertence rather than being a deliberate tactical decision.[129] The majority suggested that it would be irrational to mandate a showing of ineffective assistance to satisfy the cause requirement, since that would constitute an independent basis for relief, rendering the forfeiture of other due process claims irrelevant.[130] The dissenter contended that this interpretation of the cause standard would ultimately undermine all contemporaneous objection rules, since every default by counsel, which would presumptively preclude habeas relief under *Sykes*, would, by virtue of a claim of attorney ignorance, constitute cause under that very case.[131] In a 5-to-4 per curiam opinion, the Fourth Circuit *en banc* agreed with the panel majority.[132] Given *Engle's* apparent expectation

(en banc), *cert. denied,* 449 U.S. 1004 (1980), applied the *Sykes* standards to appellate defaults. In view of the *Sykes* Court's concern about interfering with contemporaneous objection rules that require instantaneous decisions by counsel at trial, 433 U.S. at 88-89, it is at least arguable that a different rule should govern with respect to decisions of appellate counsel, since these decisions can and should be made after deliberation and consultation with the client.

Evitts v. Lucey, 105 S. Ct. 830 (1985), held that the state could not deprive defendant of his right to appeal because of his attorney's failure to comply with the state's rules of appellate procedure and that a defendant is entitled to effective assistance of counsel on his first appeal as of right. However, in Jones v. Barnes, 463 U.S. 745 (1983), the Court held that counsel exercising professional judgment is not required to raise every nonfrivolous contention proffered by the client. That decision, however, left undecided whether an attorney's refusal to raise such claims would constitute cause under *Sykes. Id.* at 753 n.7.

In its *amicus* brief in the *Carrier* case, the United States contends that the Court, in Reed v. Ross, 104 S. Ct. 2901 (1984), "*held* that the 'cause and prejudice' standard applies to appellate defaults as well as trial defaults." Brief of United States, at 22 (emphasis added). While that case involved a post-trial default that was considered within the cause and prejudice framework, the majority did not specifically address the issue of whether *Fay v. Noia* should be overruled in the appellate context. Such a concession seems unlikely, since Justice Brennan, who wrote the *Noia* majority opinion and who has been a persistent critic of the Court's restrictive habeas rulings, *see, e.g.,* United States v. Frady, 456 U.S. 152, 178 (1982) (Brennan, J., dissenting); Francis v. Henderson, 425 U.S. 536, 542 (1976) (Brennan, J., dissenting), also wrote the majority opinion in *Reed v. Ross.* Because Justice Brennan's majority in *Reed v. Ross* was a fragile one, *see infra* note 156 and accompanying text, he may not have deemed it advisable to address this issue specifically. This form of treatment allows *Reed v. Ross* to be viewed in the same manner as Fourth Amendment habeas cases decided prior to Stone v. Powell, 428 U.S. 456 (1976). In *Stone v. Powell,* the majority stated that it was not bound by earlier federal habeas decisions entertaining Fourth Amendment claims, because these decisions had not "fully" considered whether federal habeas was available with respect to such claims. *Id.* at 480-81.

129. The panel majority concluded that counsel's deliberate strategic defaults could form a basis for relief only under the Sixth Amendment, because tactics are entrusted to the lawyer's judgment. 724 F.2d at 401. The dissenting judge thought that there was a great likelihood that the default in question was tactical, because defense counsel had originally included the issue in his notice of appeal but then did not brief it. *Id.* at 405 (Hall, J., dissenting).

130. *See Id.*

131. *Id.* at 405 (Hall, J., dissenting).

132. Carrier v. Hutto, 754 F.2d 520 (4th Cir. 1985) (en banc).

that criminal defense attorneys anticipate sophisticated extensions of embryonic case law,[133] it would not be surprising if a Supreme Court majority in *Carrier* adopted the position that attorney error may never constitute cause to excuse any procedural default and may only be raised in the context of a Sixth Amendment claim.[134]

In addition to putting defendants who cannot retain prescient attorneys at a considerable disadvantage, *Engle* also appears to be at odds with the *Stone v. Powell* line of cases. The absence of competent counsel implicates many of the concerns that appear to underlie *Stone v. Powell* and its progeny. Effective assistance of counsel is a special or fundamental right intimately related to guilt or innocence, the denial of which indicates an inadequate state corrective process. Yet to impose a forfeiture on a defendant because of counsel's omissions—while making it difficult to establish that these attorney errors constitute ineffective assistance—increases the likelihood that defendants with inferior attorneys will be left without a remedy. Thus, the very factors that appear to militate in favor of the continued availability of habeas in the *Stone v. Powell* line of cases do not accomplish that result in the *Wainwright v. Sykes* line of cases.

Such an "airtight system of forfeitures"[135] might be justified with respect to nonguilt-related constitutional claims, but makes very little sense when applied to constitutional violations that affect the accuracy of the fact-finding procedure. In *Engle,* the Court was asked to limit *Sykes'* stringent cause and prejudice requirements to nonguilt-related claims. The majority rejected that argument because of the great costs imposed by federal habeas, to wit, preclusion of finality, downgrading the prominence of the trial, inability to punish offenders and impingement on federalism.[136] Thus, notwithstanding the majority's insistence that the writ remain available to set aside fundamentally unfair incarceration or to correct miscarriages of justice, the cause requirement, as articulated in *Engle,* makes it more likely that innocent persons will be denied relief.

133. *See supra* notes 106-110 and accompanying text.

134. This is the position adopted by the United States in its *amicus* brief to the court in *Carrier*. The government contended that under *Sykes*, whether there was a procedural default turned on objectively verifiable events (e.g., failure to object). Cause excusing such default similarly should be based:

> on an objectively verifiable and external impediment to the defense's developing or presenting the claim—such as the refusal by the trial or appellate court to entertain the claim or the impracticability of raising it, interference by officials with the assertion of the right, or the unavailability at the time of trial or appeal of the factual or legal basis of the claim.

Amicus Brief of United States, at 8.

135. *Sykes,* 433 U.S. at 105 (Brennan, J., dissenting).

136. 456 U.S. at 126-29.

This again is inconsistent with the Court's refusal in the *Stone v. Powell* line of cases to extend that preclusionary doctrine beyond the judge-made exclusionary rule.[137] The Court thus appears more interested in preserving habeas with respect to claims affecting guilt or innocence in the *Powell* context than it is with respect to procedural defaults. Presumably, the majority does not wish to cut off all access to a federal forum with respect to whole categories of guilt-related claims, but it is willing to do so on a piecemeal basis using the procedural default mechanism.

2. *Reed v. Ross and Retroactivity*

There are, however, limits to the stringent cause requirement for excusing procedural defaults. In *Reed v. Ross,*[138] the Court resolved an issue left open in *Engle*. In a 5-4 decision,[139] the Court concluded "that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel," a defendant will be deemed to have established cause for failure to comply with state procedural rules governing assertion of such a claim.[140] According to the majority, defaults by attorneys in these contexts do not implicate the concerns normally present in default situations.[141] At issue in *Ross* was the effect to be given a failure to object to jury instructions that impermissibly shifted the burden of proof with respect to malice at a trial conducted before *Winship* was decided. The majority confined its ruling on whether an attorney had a reasonable basis to object to the situation in which the Court articulated a previously unrecognized constitutional principle but held it to be retroactive. If retroactive application were given to a decision of the Court that explicitly overruled its own precedent or overturned a longstanding and widespread practice sanctioned by the lower courts, there would be no reasonable basis for an attorney to object, and defaults in these cir-

137. *See supra* notes 29-58 and accompanying text; *see also Engle*, 456 U.S. at 149-50 (Brennan, J., dissenting).

138. 104 S. Ct. 2901 (1984).

139. The majority opinion, written by Justice Brennan, was joined by Justices Marshall, White, Powell, and Stevens. Justice Powell, however, wrote a concurring opinion stating that although he had joined the majority opinion, he continued to adhere to the view that cases should not be applied retroactively on collateral review other than in exceptional circumstances. Only because North Carolina had not raised that issue did Ross prevail. *See infra* note 156 and accompanying text.

140. 104 S. Ct. at 2910.

141. The majority asserted that it is reasonable to assume that if counsel cannot perceive the possibility of raising a claim, it is unlikely that a court would consider it seriously. Were the rule otherwise, attorneys would raise every conceivable claim, thus disrupting state court proceedings. *Id.* at 2910.

cumstances would thus be excused.[142]

The defendant in *Ross* did not fall into either of these categories, but into a third category presenting greater difficulty, namely, one in which the Court arguably had sanctioned a particular rule that was subsequently overturned. At the time that Ross appealed his conviction in the state courts, the Supreme Court decision most directly on point suggested that there was no constitutional barrier to the state shifting burdens of proof in criminal cases,[143] and the North Carolina courts, in which Ross was tried, had consistently approved such practices.[144] The meager case law in other jurisdictions to the opposite effect was viewed as sufficiently distinguishable that it could not have provided a reasonable basis for Ross' attorney to raise the objection.[145]

The effect of *Ross* is to narrow the gap between the Court's rulings with respect to retroactivity and procedural defaults. The governing factors in determining retroactivity are: (1) the purpose to be served by the new rule; (2) the extent of reliance on the old rule by state officials; and (3) the effect on the administration of justice.[146] Thus, when the new constitutional rule affects the accuracy of the verdict, could have been anticipated by the state, and will not disrupt the administration of justice, it is more likely to be made completely retroactive. Conversely, prophy-

142. *See id.* at 2911. In such cases the new constitutional rule is generally not made retroactive because of the reliance of state officials on the former rule and the impact on the administration of criminal justice. *See also* United States v. Johnson, 457 U.S. 537 (1982); Solem v. Stumes, 104 S. Ct. 1338 (1984). However, when the implicated constitutional right strongly impacts on the accuracy or reliability of the verdict or the court's power to try the defendant at all (e.g., double jeopardy claims), the Court may nonetheless apply the particular right retroactively. It might be argued that in the latter situation, law enforcement authorities are penalized for their failure to anticipate the new rule, while the defaults of defense attorneys, under Reed v. Ross, are excused. This is not inconsistent, however, since the reason the new rule is made retroactive in the law enforcement context is unrelated to the police reliance factor, but is instead based on an independent factor relating to the fairness of the verdict.

143. Leland v. Oregon, 343 U.S. 790 (1952) (holding that the state may require defendant to bear the burden of proving insanity beyond a reasonable doubt).

144. *Reed,* 104 S. Ct. at 2911.

145. *Id.* at 2911-12. The dissenters argued that there was no distinction between *Reed* and *Engle v. Isaac.* In *Engle,* the majority had cited cases in which attorneys had raised a *Mullaney*-type argument before *Winship* was decided. *Id.* at 2915 (Rehnquist, J., dissenting). The dissent viewed the majority's reasoning as "bizarre," since *Winship* reaffirmed the longstanding view that the reasonable doubt rule was constitutionally required, and *Mullaney* was an *a fortiori* extension of *Winship. But see supra* notes 92-99 & 106-107 and accompanying text.

146. Solem v. Stumes, 104 S. Ct. 1338, 1341 (1984). With respect to non-Fourth Amendment cases arising on collateral review, the *Solem* Court reaffirmed the applicability of the three criteria stated in the text and in Stovall v. Denno, 388 U.S. 293 (1967). The Court uses a somewhat different analysis with respect to Fourth Amendment issues arising on direct appeal, *see* United States v. Johnson, 457 U.S. 537 (1982), as well as Fifth Amendment questions on direct review, *see* Shea v. Louisiana, 105 S. Ct. 1065 (1985).

lactic rules that are a "clear break" with precedent and that have an adverse impact on the criminal justice process are more likely to be made only prospective. For example, in *Solem v. Stumes,*[147] the Court considered whether *Edwards v. Arizona*[148] should be given retroactive application on habeas. *Edwards* held that once a suspect in custody has asserted the right to counsel, the police cannot initiate further communication with the accused. In finding *Edwards* nonretroactive, the majority analyzed the reliance factor in a manner at odds with the reasoning in *Engle.* The Court acknowledged that *Edwards* was not a "clear break" case,[149] but insisted that it nonetheless articulated a new rule since it was not "a necessary consequence of *Miranda,*" and that the police could not be blamed for failing to anticipate its per se approach.[150] The majority noted that before the *Edwards* decision, the issue whether the police could resume questioning after a defendant had asked for an attorney was "unsettled."[151] The opinion stressed that the disagreement in the lower courts on this issue precluded a finding that "*Edwards* had been 'clearly' or 'distinctly' foreshadowed."[152] The Court considered the reliance interest compelling "even though *Edwards* did not overrule a specific decision."[153] Thus, under *Solem,* state officials are not required to anticipate "new" legal principles, and the existence of conflicting lower court case law in effect insulates law enforcement officials from retroactivity rulings because the Supreme Court's ultimate determination of the issue cannot be "clearly" anticipated.

On the other hand, in *Engle* the majority's standard for meeting the cause requirement for excusing procedural defaults is whether astute at-

147. 104 S. Ct. 1338 (1984).

148. 451 U.S. 477 (1981).

149. As the *Solem* Court noted, "[u]njustified 'reliance' is no bar to retroactivity. This inquiry is often phrased in terms of whether the new decision was foreshadowed by earlier cases or was a 'clear break with the past.' " 104 S. Ct. at 1343 (footnote omitted). In Shea v. Louisiana, 105 S. Ct. 1065 (1985), *Edwards v. Arizona* was made retroactive to cases pending on direct appeal at the time *Edwards* was decided.

150. 104 S. Ct. at 1344. Justice Stevens argued that the case did not present any real retroactivity question, since it was well settled before *Edwards* that the police could not interrogate in these circumstances. *Id.* at 1348, 1354 (Stevens, J., dissenting).

151. Justice Stevens, in dissent, asserted that the majority's analysis was unprecedented, and that the effect of the majority's reasoning was to eliminate the incentive for authorities to comply with the plain meaning of the Court's decisions. *Id.* at 1354 & n.11.

152. *Id.* at 1345.

153. *Id. Cf.* Hankerson v. North Carolina, 432 U.S. 233 (1977), in which the Court reiterated that when the *major* purpose of a new constitutional rule is to prevent *substantial* impairment of the fact-finding function, thus raising *serious* questions about the accuracy of guilty verdicts, the new rule will be given retroactive effect notwithstanding reliance of state officials and the impact on the administration of justice. *Id.* at 243 (citing Ivan V. v. City of New York, 407 U.S. 203, 204 (1972) (per curiam)).

torneys are making such challenges at the time of defendant's trial. That there may be a split in the lower courts, or indeed that most courts are rejecting such challenges, is irrelevant in this context. Thus, the police's lack of foresight in effect creates a basis for denying retroactivity, whereas a more excusable lack of foresight of criminal defense counsel is penalized by denial of the availability of federal habeas, even with respect to a right that the Court has found to be completely retroactive. While *Mullaney* is a sophisticated extension of *Winship, Edwards* is little more than an explanation of the obvious in *Miranda*. Thus, *Engle* and the Court's retroactivity rulings work at irrational cross purposes.

Ross somewhat diminishes the disparate treatment of mistakes by police and those of defense counsel. Just as police are not required to be seers for purposes of retroactivity, defense counsel's failure to object based on a completely novel theory of law will not preclude the availability of a federal habeas forum to assert a right that has been made completely retroactive by the Court. This congruity, however, is far from perfect. Whereas unsettled case law militates in favor of nonretroactivity, which is a way of excusing state errors, under *Engle* the same unsettled state of the law mandates a finding that counsel could have anticipated the new rule and that the prisoner will be foreclosed from federal habeas relief.[154]

The *Ross* decision also somewhat reduced the tension between the standards for forfeiture rulings with respect to procedural defaults and those with respect to ineffective assistance of counsel. The Court, by refusing to require prescience on the part of defense counsel in anticipating legal developments, put the criterion for excusing procedural defaults more in line with the test for determining what constitutes ineffective assistance of counsel, although the *Engle-Strickland* whipsaw still remains basically intact.[155]

While *Ross* was clearly a victory for proponents of broader availability of federal habeas, it is of limited value. The cause requirement was found to have been met, but in an extremely circumscribed context. *Ross* only excuses defaults based on failure to anticipate a new rule of constitutional law (*e.g., Winship*) that is once removed from the new rule that is really applicable (*e.g., Mullaney*). Under *Engle,* any case that reasonably could be analyzed as creating a foundation for extrapolating new legal principles becomes a two-edged sword. It can be used both to expand legal frontiers (*e.g., Winship* as the forerunner of *Mullaney*) and to trap

154. Under *Engle* it is unnecessary that the law be unsettled: all that appears to be required is that some lawyers have made such challenges. *See* 456 U.S. at 134.

155. *See supra* notes 111-123 and accompanying text.

unwary defense counsel and their clients. Moreover, the *Ross* majority was a fragile one. Although Justice Powell joined the majority opinion, his concurrence made it clear that had the state argued that *Mullaney* should not be retroactive on collateral review, he probably would have reached the opposite result in the case.[156] Thus, but for the state's default, the *Ross* decision might well have gone the other way. This message surely will not be lost on prosecutors.

Based on the few Supreme Court decisions interpreting the cause and prejudice requirements, it seems clear that the majority's tests for these standards are so stringent that the writ is of limited value to prisoners whose attorneys have committed even inadvertent procedural defaults. For these prisoners, the requirements of a fundamental miscarriage of justice in the prejudice context and virtually omniscient counsel in the cause sphere reduce habeas to a remedy available only in rare circumstances. As a result, the merits of many constitutional claims of defaulting petitioners will never be reached, thus permitting prisoners to be incarcerated even though their convictions may be based on unconstitutional practices. These cause and prejudice criteria, working in tandem with the Court's requirement of exhaustion of state remedies, put habeas virtually out of the reach of state prisoners.

III. Exhaustion of State Remedies—An Emerging Preclusionary Technique

Enacted in 1948 as a codification of prior case law,[157] 28 U.S.C. section 2254(b) precludes availability of federal habeas "unless it appears that the applicant has exhausted the remedies available in the courts of the State."[158] Designed to assure that state courts have the first opportunity to evaluate federal constitutional claims, the exhaustion requirement purportedly furthers the concepts of comity and federalism while reducing the federal court workload.[159] Supreme Court rulings have indicated that the exhaustion requirement would be given a common-sense, prag-

156. 104 S. Ct. at 2912-13 (Powell, J., concurring). Justice Powell only concurred in the judgment in Hankerson v. North Carolina, 432 U.S. 233 (1977), because the case was on direct review.

157. *Ex parte* Hawk, 321 U.S. 114 (1944); *Ex parte* Royall, 117 U.S. 241 (1886). For a discussion of the legislative history of section 2254(b), see Brown v. Allen, 344 U.S. 443, 447-50 (1950). For the history of the exhaustion doctrine, see Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles,* 44 OHIO ST. L.J. 393, 401-13 (1983).

158. 28 U.S.C. § 2254(b) (1977).

159. *See, e.g.,* Rose v. Lundy, 455 U.S. 509, 518-19 (1982).

> The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial procedings. . . .

matic application: *Fay v. Noia*[160] held that exhaustion is required only with respect to currently available state remedies; and *Brown v. Allen*[161] held that exhaustion is satisfied by appeal to the state's highest court without the prisoner also seeking state collateral relief.

Rose v. Lundy,[162] the Burger Court's major foray into the exhaustion area, however, effects a significant shift in emphasis.[163] The majority held that mixed petitions, that is, petitions containing both exhausted and unexhausted claims, whether unrelated or interrelated,[164] are required to be dismissed by the federal habeas court. The decision gives petitioners the option either of going back to state court to exhaust the claims not previously presented to that forum before returning to federal

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> [F]ederal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review.

Id.

160. 372 U.S. 391 (1963). In Fay v. Noia, the Court also specified that it was not necessary to petition for certiorari in order to fulfill the exhaustion requirement. *Id.* at 435-36 (dictum).

Although there is a tendency to compartmentalize concepts and to denominate defaults separately, the unitary nature and interrelationship of such concepts are demonstrated by *Noia*. The state argued that the defendant's failure to appeal his judgment of conviction, thereby failing to challenge his confession as coerced, was either a violation of the exhaustion requirement (even though state remedies were no longer available), a waiver of his rights, or an adequate and independent state ground barring federal review of his claim. *Id.* at 395-99. *See generally* Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle,* 39 N.Y.U. L. REV. 78 (1964) (written by former United States District Judge Abraham Sofaer when he was a student).

161. 344 U.S. 443, 447 (1953).

162. 455 U.S. 509 (1982). For an excellent critique of *Rose v. Lundy, see* Yackle, *supra* note 157, at 424-45.

163. In earlier exhaustion decisions, the Burger Court had held that prisoners challenging the length of their confinement due to losses of good conduct time credits could not proceed under 42 U.S.C. § 1983, which has no exhaustion requirement, Patsy v. Board of Regents, 457 U.S. 496 (1982), and must instead proceed under the habeas statute, which requires exhaustion, Preiser v. Rodriguez, 411 U.S. 475 (1973). In addition, exhaustion of remedies after trial is not required if the purpose of the petitioner's claim is to force the state to abide by its speedy trial obligations, and the petitioner already has litigated that particular issue in the state courts. *See* Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973). *See also* Pickard v. Connor, 404 U.S. 270 (1971) (reaffirming that exhaustion is satisfied only where petitioner is presenting the same claim in federal court that has already been urged in the state forum).

164. Although the *Lundy* majority found that the petitioner's claims were related and that the United States district judge had impermissibly considered both the exhausted and the unexhausted claims, the ruling applies as well to mixed petitions in which the exhausted and unexhausted claims are independent. As the majority noted, "[r]equiring dismissal of petitions containing both exhausted and unexhausted claims will relieve the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims." 455 U.S. at 519. In his dissent, Justice Stevens argued that the majority had gone even further and had determined that the federal district judge erred not only in reaching the merits of the exhausted claims, but also in considering the portions of the trial record in which the unexhausted claims were described to evaluate the exhausted claims. *Id.* at 542. *See also infra* note 176.

court, or of resubmitting a new petition to the federal court containing only exhausted claims.[165] A plurality suggested, however, that if a prisoner elects to remain in federal court by amending the petition—thereby deleting the unexhausted claims—he or she runs the risk that subsequent federal habeas action based on the omitted claims will constitute an abuse of the writ.[166]

The abuse of process issue aside, the Court's ruling on its surface, appears to establish a reasonably coherent framework for processing habeas suits. The reality may prove otherwise. The *Lundy* decision precludes any exercise of discretion by federal district judges in this context. Even though consideration of a meritorious exhausted claim may be the most efficient and just manner in which to proceed, if the petition contains even one unexhausted claim, however marginal, the federal judge must dismiss the action. Faced with dismissal, *pro se* federal habeas petitioners may feel obliged to go back to state court in order to present what may be even trivial claims, rather than proceeding with more substantial issues in the federal courts. This wastes the petitioner's time and continues his or her incarceration even though a valid constitutional challenge may be involved. It also wastes the state courts' time because they may be required to consider weak claims. In addition, federal courts' time is wasted because they must assess whether any unexhausted claims are presented in the petition, and, if so, they may be required to process the case a second time before reaching the merits.[167]

165. 455 U.S. at 520. Justice Blackmun, concurring in the judgment, took issue with the majority's ruling, noting that, on the one hand, state prisoners often are permitted simply to strike unexhausted claims from the petition and proceed as if those claims had not been presented. He asserted that if that was all the majority had been doing, its approach was the same as that of the majority of the courts of appeal that had dealt with the issue. His concern, however, was that the opportunity merely to amend and proceed in this manner would depend on the petitioner's awareness of the availability of this right, and this would in turn depend upon petitioner either being a sophisticated litigator or appearing before a sympathetic judge. On the other hand, if the Court's ruling required the petitioner to refile after striking unexhausted claims, even those who wished to forego exhaustion of state claims and to proceed with exhausted claims in the federal forum would have to begin again, with attendant delays in again reaching the top of the federal court's docket. *Id.* at 529-31. *See* Slayton v. Smith, 404 U.S. 53 (1971) (per curiam) (if prisoner is required to exhaust claims in state court, federal court should dismiss habeas petition rather than hold it on the docket).

166. *See* 455 U.S. at 520-21; *but see id.* at 533-38 (Brennan, J., concurring in part and dissenting in part), arguing that dismissal for abuse of the writ, under 28 U.S.C. § 2254 Rule 9(b) (1976), is appropriate only when a prisoner is free to include all claims in his or her first petition, but knowingly and deliberately does not do so. The abuse-of-process issue had not been presented, argued, or briefed by the parties. For a discussion of abuse of the writ in death penalty cases, see Witt v. Wainwright, 105 S. Ct. 1415 (1985) (Marshall, J., dissenting from denial of certiorari and application for stay).

167. *See* 455 U.S. at 523-31 (Blackmun, J., concurring in the judgment).

While such exhaustion determinations by the federal courts may not seem difficult,[168] the Court itself has discovered, for example, that state court consideration of federal claims is not always visible. In *Smith v. Digmon,*[169] the district court dismissed a habeas petition for failure to exhaust one of the claims, stating that it was inconceivable that the state court would not have mentioned the contention in its opinion denying relief had the claim been raised there. After the court of appeals denied leave to appeal, the Supreme Court summarily reversed, finding that the prisoner's state court brief had in fact set forth the claim in question. The Court stressed that a state appellate court cannot effectively preclude exhaustion by ignoring in its opinion a federal claim directly presented to it by petitioner in his brief, and that a federal district court cannot assume that petitioner failed to exhaust simply because the state court opinion contains no reference to the claim.[170]

On the one hand, the *Lundy* Court rejected the argument that a dismissal requirement for mixed petitions would burden the lower federal courts, which would be required to determine that all claims had been exhausted before reaching the merits of any claim.[171] On the other hand, in *Duckworth v. Serrano*[172] the Court refused to create an exception to the exhaustion requirement for "clear violations," which would have expedited plainly meritorious petitions, claiming that the determination of which cases met that criterion would require expenditure of significantly more time and resources by the federal courts.[173] Thus, it appears that

168. Notwithstanding the ostensible simplicity of exhaustion determinations, the federal courts often are faced with difficult issues in this context. *See, e.g.,* Finetti v. Harris, 609 F.2d 594, 597-99 (2d Cir. 1979); Piercy v. Parratt, 579 F.2d 470 (8th Cir. 1978); Carter v. Estelle, 499 F. Supp. 777, 779-83 (S.D. Tex. 1980), *aff'd,* 677 F.2d 427 (5th Cir. 1982), *cert. denied,* 460 U.S. 1056 (1983).

169. 434 U.S. 332 (1978) (per curiam).

170. The Court found it "inexplicable" that the attorney general's reply to the petition for certiorari failed to mention that the prisoner had in fact raised his claim in the Alabama courts. *Id.* at 333 n.2. Even so, Justice Rehnquist wrote a separate concurring opinion, in which the Chief Justice and Justice Blackmun joined, expressing doubt that the petitioner had properly presented the district court's error to the court of appeals. *Id.* at 334. *See also* Sumner v. Mata, 449 U.S. 539 (1981) discussed *infra* at notes 215-216 and accompanying text.

171. 455 U.S. at 520; *id.* at 526 (Blackmun, J., concurring in the judgment). *But see supra* note 168.

172. 454 U.S. 1 (1981) (per curiam).

173. *Compare Duckworth with* Public Utilities Comm'n v. United Fuel Gas Co., 317 U.S. 456 (1943), which excused failure to exhaust administrative remedies when the state commission's orders were plainly invalid on their face. The policy concerns in this state administrative law area are not dissimilar from those in the habeas context; they may include federalism, comity, avoiding disruption of the state proceeding, and judicial economy. *See also* Roberts v. LaVallee, 389 U.S. 40 (1967) (per curiam) (holding that an intervening change in state law that occurred after the prisoner's exhaustion of state remedies and that might have changed the result in the state court, nonetheless did not require petitioner to return to the latter forum).

the Court would rather have a district judge spend considerable time deciding, for example, whether a petitioner's coerced confession claim had been exhausted, rather than deciding the more pertinent issue whether the confession was coerced, even when it is quite clear that the confession was in fact coerced.

In light of the possibility that petitioners who elect to proceed in federal court after dismissal on exhaustion grounds may be faced with charges of abuse of the writ, the Court's approach in *Lundy,* as suggested by Justice Blackmun in his concurring opinion, may "serve to trap the unwary *pro se* prisoner who is not knowledgeable about the intricacies of the exhaustion doctrine."[174] Ironically, Justice O'Connor's pronouncement that prisoners without attorneys would have no difficulty in mastering the Court's newly created, but, in her view, "straightforward exhaustion requirement,"[175] came in a case that reversed a federal district court and court of appeals, and that spawned five separate opinions by the Justices.[176]

Essentially, the Court has established exhaustion guidelines that require habeas petitioners, most of whom are *pro se,*[177] to make sophisticated legal judgments concerning the strength of their claims and to make difficult strategic choices about the appropriate forum in which to proceed. For those with meritorious claims, the wrong choice could

174. 455 U.S. at 530.

175. *Id.* at 520.

176. Justice O'Connor wrote the majority opinion requiring total exhaustion, which included within it the plurality opinion regarding abuse of the writ. Justice Blackmun wrote an opinion concurring in the judgment, in which he disagreed with both parts of Justice O'Connor's opinion. He would have remanded the case, ordering dismissal of respondent's unexhausted claims and examination of the exhausted claims to determine if they were interrelated with the unexhausted grounds, and, if they were not, to determine if they warranted collateral relief. *Id.* at 532 (Blackmun, J., concurring in the judgment). Justice Brennan, joined by Justice Marshall, concurred in the majority's total exhaustion requirement, but dissented from the plurality position regarding dismissal for abuse of process. *Id.* at 532-33 (Brennan, J., concurring and dissenting). Justice White, concurring in part and dissenting in part, agreed with most of Justice Brennan's opinion, but, like Justice Blackmun, would not have required that a mixed petition be totally dismissed. He would have allowed the trial judge to rule on the exhausted issues unless they were intertwined with unexhausted claims. *Id.* at 538 (White, J., concurring and dissenting). Finally, Justice Stevens, dissenting, described different levels of constitutional error and concluded that district judges should have the discretion to determine whether the presence of an unexhausted claim in a habeas petition makes it inappropriate to consider the merits of an exhausted claim. *Id.* at 543-46 (Stevens, J., dissenting).

177. Allen, Schactman, & Wilson, *Federal Habeas Corpus and Its Reform: An Empirical Analysis,* 13 RUTGERS L.J. 675, 679 n.6, 733-34 (1982), in which a study of approximately 1,900 federal habeas petitions filed in six districts and one court of appeals over a two-year period revealed that 79% were *pro se.* Not surprisingly, petitioners represented by counsel prevailed in whole or in part in 12.6% of their cases, whereas *pro se* petitioners did so in only .8% of their cases. *Id.* at 746.

mean either unnecessary continued incarceration or possible dismissal for abuse of the writ.

The prisoner's difficulties are exacerbated by the Court's requirement that petitioners must have "fairly presented" the substance of their federal habeas claims to the state courts. In *Anderson v. Harless,*[178] the Court in a summary decision required a prisoner to return to the Michigan courts to exhaust his claim that the trial court's instruction on malice impermissibly shifted the burden of proof. Petitioner had in fact made such a contention on direct appeal, claiming that the malice instruction was "reversible error" and quoting from a Michigan case holding that under state law malice could not be inferred from the use of a weapon. Although the court in the cited case had decided that the challenged instruction violated state law, it had also considered broader attacks on the instruction based on the due process right to a fair trial.[179] Indeed, the lower federal courts in *Harless* had concluded that the state courts had had a fair opportunity to consider the federal claim.[180] Nonetheless, the Court found petitioner's brief insufficient to apprise the state court of the basis of his federal claim.[181]

The contrast between the solicitude shown for state court judges in *Harless* and the legal acumen required of habeas petitioners or their attorneys in *Lundy* is striking. Similarly, in *Engle v. Isaac*[182] defense attorneys were expected to anticipate the Supreme Court decision in *Mullaney v. Wilbur,*[183] based on the ruling five years earlier in *In re Winship,*[184] and failure to do so resulted in forfeiture of their clients' rights to federal habeas corpus. In *Harless,* however, petitioner was deemed not to have exhausted state remedies on the theory that the state courts could not be

178. 459 U.S. 4 (1982) (per curiam).

179. *See id.* at 10-11 n.4 (Stevens, J., dissenting).

180. *Id.* at 11 n.4.

181. The decision in Picard v. Connor, 404 U.S. 270 (1971), requiring that defendant fairly present the "substance" of his federal claim, is not dispositive of the *Harless* issue. As Justice Stevens noted in his *Harless* dissent, in *Picard* the petitioner had made a due process argument in the state courts and an equal protection argument in the federal courts, although both were based on the same facts. In *Harless,* however, the substance of the petitioner's challenge was the same in both forums, since his claim was that the instructions created a mandatory presumption of malice and thereby deprived him of a fair jury trial. 459 U.S. at 11-12 n.5.

The requirement that the prisoner's claim be fairly presented to the state court is stringently interpreted. *See, e.g.,* Moore v. Duckworth, 581 F.2d 639 (7th Cir. 1978), *aff'd,* 443 U.S. 713 (1979) (per curiam); Paullet v. Howard, 634 F.2d 117 (3d Cir. 1980) (per curiam); Thomas v. Wyrick, 622 F.2d 411 (8th Cir. 1980), *cert. denied,* 459 U.S. 1175 (1983); Klein v. Harris, 667 F.2d 274 (2d Cir. 1981); *but cf.* McShall v. Henderson, 526 F. Supp. 158, 160 n.1 (S.D.N.Y. 1981) (brief not required to contain "talismanic" words).

182. 456 U.S. 107 (1982). *See supra* notes 92-123 and accompanying text.

183. 421 U.S. 684 (1975).

184. 397 U.S. 358 (1970).

expected to divine from his appeal, which challenged the jury instructions as reversible error, that defendant was making a federal due process constitutional claim, even though petitioner's appeal was taken two years *after* the *Mullaney* decision.[185]

Inasmuch as the Court's tougher exhaustion requirements delay rather than preclude habeas review, they are not as draconian in their effect as *Stone v. Powell* and *Wainwright v. Sykes.* However, the *Lundy* plurality's strictures concerning abuse of the writ go beyond deferral of relief. Even aside from the possibility of dismissal on that basis, "mere" delay may effectively preclude vindication of constitutional rights. A *pro se* prisoner who is shuttled from federal to state court and back again may be released in the interim and decide to drop the petition, or may watch the evidentiary basis of a bona fide claim dissipate.[186] Thus, the distinction between deferral and denial may be more theoretical than actual.

Taken together, these three lines of cases have a synergistic effect in constricting the availability of federal habeas corpus. Moreover, the remaining federal avenues still left open are being closed by the Court's use of one set of standards to govern the defaults or errors of state officials and another with respect to defendants and their attorneys.

IV. Stacking the Deck To Favor the State

One of the primary aims of the Burger Court has been to reinvigorate federalism.[187] To this end, the Court has repeatedly deferred to the state courts,[188] sometimes appearing to give the states not only deference

185. Defendant's appeal in state court was taken in 1977. Although the district court in *Harless* had relied primarily on Sandstrom v. Montana, 442 U.S. 510 (1979), which invalidated a particular jury instruction shifting the burden of proof concerning malice, that decision, although also implicating another line of cases dealing with presumptions, was an obvious spin-off from Mullaney v. Wilbur, 421 U.S. 684 (1975). *See* 442 U.S. at 520-27.

186. *See* Rose v. Lundy, 455 U.S. 509, 528 (1982) (Blackmun, J., concurring in the judgment).

In addition, assuming that the prisoner does make it back to federal court, the promise of an independent review of his or her federal constitutional claim may be only technically fulfilled by virtue of the Court's increasingly stringent interpretations of 28 U.S.C. § 2254(d), which presumes that the state court's findings of fact are correct. The effect may be no more than superficial federal review. *See infra* notes 194-197 and accompanying text.

187. Although the zenith of the Court's federalism drive, National League of Cities v. Usery, 426 U.S. 833 (1976), has been overruled, Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985), its spirit can be seen in other decisions of the Court. *See infra* note 188. Moreover, *Garcia* was a 5-4 decision, and, at least according to dissenting Justice Rehnquist, *Usery*, which he authored, will rise again. *Garcia,* 105 S. Ct. at 1033.

188. *See, e.g.,* Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900 (1984) (prohibiting the federal courts from enforcing a pendent state law claim against state officials); Trainor v. Hernandez, 431 U.S. 434 (1977) (prohibiting federal court injunctive relief against

but preference.[189] This policy has been most explicit in the habeas corpus area because of the inherent federal-state tensions built into the federal habeas review process.[190] In fact, however, the Court's respect for state tribunals and state legal officials is, in many instances, outcome-oriented.

As already indicated, the Court, in its preclusionary, procedural default and exhaustion decisions, has erected stringent, hypertechnical barriers for habeas petitioners to overcome, with severe sanctions for failure to do so. At the same time, in cases such as *Harless,*[191] it has cosseted the state court systems.[192] A reading of other decisions by the Court, both within and outside the habeas area, indicates that this dichotomy is not aberrant. For example, the most egregious violations of due process by state court judges may be immune from suit for money damages under the federal civil rights laws, even where there is no possibility of correctability on appeal.[193]

The Court's willingness to defer to state tribunals is also illustrated by its decision in *Marshall v. Lonberger,*[194] in which the state trial court had neglected to make findings on the habeas petitioner's credibility.

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state attachment law where state officials had sued plaintiffs in state court to recover allegedly fraudulently obtained welfare payments and had begun attachment proceedings); Ingraham v. Wright, 430 U.S. 651 (1977) (holding that severe corporal punishment of public school students invades a liberty interest, but that procedural due process does not require a pre-disciplinary hearing because of the availability of state court tort and criminal remedies).

189. *See* Rosenberg, *The Horowitz Affair,* 58 B.U.L. REV. 733, 763-64 (1978):

> [T]he Court all too often appears to be selecting for review cases involving gross constitutional violations . . . . In adjudicating these more rudimentary claims, the Court has adopted two related approaches. When it upholds government power, . . . the Court tends to do so on broad grounds. Yet, when it sustains the individual's claim, it often does so on considerably narrower grounds. The effect is to send out signals to government officials either that almost anything goes in the particular area in which their power has been upheld or, where their authority has been denied, that a slightly less obvious intrusion on individual rights may well withstand constitutional challenge.

190. *See, e.g.,* Stone v. Powell, 428 U.S. 465 (1976); Engle v. Isaac, 456 U.S. 107 (1982); Rose v. Lundy, 455 U.S. 509 (1982). Even in capital cases, the Court has voiced concern that habeas not be used to thwart the state's legitimate interests. In Barefoot v. Estelle, 463 U.S. 880, 882 (1983), the majority stressed that "[f]ederal courts are not forums in which to relitigate state trials." The Court held that although the courts of appeal must decide the merits of a nonfrivolous appeal before denying a stay, they may invoke summary procedures to do so. *Id.* at 889.

191. 459 U.S. 4 (1982) (per curiam).

192. *See supra* notes 178-185 and accompanying text.

193. *E.g.,* Stump v. Sparkman, 435 U.S. 349 (1978) (holding that any judicial act within the state court's subject matter jurisdiction confers absolute immunity in suits for money damages under 42 U.S.C. § 1983; the defendant judge had issued an *ex parte* order for sterilization of a 15-year-old girl). *Cf.* Pulliam v. Allen, 466 U.S. 522 (holding that the judicial immunity doctrine does not bar prospective relief or the award of attorneys' fees).

194. 459 U.S. 422 (1983).

Under 28 U.S.C. section 2254(d), state court factual determinations are presumed correct, whereas questions of law and mixed questions of fact and law are not entitled to similar deference.[195] In *Lonberger,* the Court in effect supplied the missing finding of fact by assuming that the state tribunal had applied the correct standard of federal law,[196] and thus would have granted the prisoner relief had it believed him. It consequently determined that the state court's ruling against him was "tantamount to a refusal to believe the testimony of respondent."[197]

Yet the Court is not uniformly solicitous of state court abilities to understand legal issues. In *Michigan v. Long,*[198] the Court, reversing longstanding practice,[199] held that if an ambiguous state court opinion did not contain a plain statement that the case was decided on "adequate and independent" state law grounds, the Court would presume it was decided on federal grounds.[200] Absent such a plain statement in other-

195. *See* Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980); Townsend v. Sain, 372 U.S. 293, 309 & n.6 (1963). The Court has become more likely to find particular issues factual rather than mixed questions, and to deny relief both on that basis and on the basis that the state court's findings were "fairly supported by the record" within the meaning of section 2254(d). *See, e.g.,* Wainwright v. Witt, 105 S. Ct. 844 (1985); Rushen v. Spain, 464 U.S. 114 (1983) (per curiam); Maggio v. Fulford, 462 U.S. 111 (1983) (per curiam); Sumner v. Mata, 449 U.S. 539 (1981), 455 U.S. 591 (1982) (per curiam).

On the other hand, the Court has interpreted the custody requirement of section 2254(a) more generously for petitioners. *See, e.g.,* Justices of Boston Mun. Ct. v. Lydon, 466 U.S. 294, 300 (1984); Hensley v. Municipal Court, 411 U.S. 345 (1973).

196. As the Court in *Lonberger* noted, this assumption stems from Townsend v. Sain, 372 U.S. at 314-15, in which the Court indicated that "in the ordinary case" in which the state court has not articulated the standard of federal law, it may be assumed that the trier of fact applied the correct standard. 459 U.S. at 433. As an example of the "ordinary case," the *Townsend* Court stated that if a petitioner alleged that his confession was obtained by "third-degree methods," the federal court could assume that if the state trier ruled against petitioner, it did so on the facts because the law was so clear in this regard. 372 U.S. at 315. The complicated fact pattern and interrelated legal issues in *Lonberger* make that case far removed from the *Townsend* example.

197. 459 U.S. at 434 (footnote omitted).

198. 463 U.S. 1032 (1983).

199. *See id.* at 1066 (Stevens, J., dissenting).

200. *Id.* at 1041-44 n.7 & 8. The ambiguity could result from primary reliance on federal law, from an interweaving of federal and state law, or from uncertainty on the face of the opinion as to the adequacy and independence of the state law ground. *See id.* at 1040-41; *see also* Delaware v. Prouse, 440 U.S. 648 (1979).

The adequate and independent state ground rule is a jurisdictional barrier designed to prevent the Court from rendering advisory opinions. *See* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). State courts are of course free to give greater protection pursuant to their own constitutions or statutes, but may not do so as a matter of federal law. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). Rulings based on state law may not be reviewed by the Supreme Court. Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875). Starting in the 1930's and 1940's, ambiguous state court decisions were either dismissed or remanded for clarification. *See Long,* 463 U.S. at 1066-67. In the early 1980's, however, the Court began to

wise ambiguous cases, the Court has created a presumption that cases are being decided on federal law grounds, whereas in *Harless,* the presumption is that the case was decided exclusively on the basis of state law.[201] The result of the rule announced in *Long* is to permit the Supreme Court to review state court decisions in favor of the accused, which, in the Burger Court era, inevitably means reversal and a decision against the individual rights of citizens.[202]

Nonetheless, when a state court opinion is unambiguous and clearly rests on adequate and independent state grounds, thus precluding Supreme Court review,[203] the Chief Justice has expressed exasperation with expansive interpretations of state constitutional provisions by his colleagues in the state judicial systems. In *Florida v. Casal,*[204] for example, the Chief Justice, concurring in dismissal of a writ of certiorari as improvidently granted, expressed doubt that the Florida counterpart of the Fourth Amendment actually required suppression of the evidence and applauded the citizens of Florida for amending their state constitution to prevent such results in the future. He concluded that "[w]hen state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement."[205] Thus, although the adequate and independent state ground rule has furthered federalism and facilitated diversity by permitting federal constitutional limitations to act as a floor rather than a ceiling,[206] the Chief Justice

undertake examinations of state laws to determine if decisions were based on adequate and independent state grounds. *See id.* In *Long,* the Court discarded the foregoing methods of dealing with ambiguous state court decisions and concluded that the best approach was to assume jurisdiction absent a plain statement of a state law basis. The *Long* approach, according to the majority, furthers uniformity of federal law, avoids advisory opinions, and enhances state court independence. *But see id.* at 1072 (Stevens, J., dissenting) ("I am thoroughly baffled by the Court's suggestion that it must stretch its jurisdiction and reverse the judgment of the Michigan Supreme Court in order to show '[r]espect for the independence of state courts.' ").

201. 459 U.S. at 7.

202. 463 U.S. at 1070 (Stevens, J., dissenting), referring to a Supreme Court "docket swollen with requests by states to reverse judgments that their courts have rendered in favor of their citizens."

203. *See supra* note 200.

204. 462 U.S. 637 (1983) (per curiam).

205. *Id.* at 639. The Chief Justice also has expressed vigorous opposition to broad availability of federal habeas corpus. *See, e.g.,* Spalding v. Aiken, 460 U.S. 1093 (1983) (statement concerning denial of certiorari) (the Chief Justice urged summary dismissal of belated habeas petitions when the state can show that lapse of time has made reprosecution impossible, unless petitioner can establish a "significant miscarriage of justice"). *Id.* at 1097-98.

206. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977).

would turn the doctrine on its head, converting the Constitution into a ceiling—and a very low ceiling at that.[207]

In some circumstances—when convenient—the Justices appear willing to view their state counterparts as quite competent. In *Stone v. Powell,*[208] for example, the majority explicitly rejected the argument that state court judges were either unwilling or unable to enforce the Fourth Amendment. Moreover, it deplored the lack of trust that such an argument implied and favorably compared state court judges' abilities to interpret the Fourth Amendment with those of federal judges.[209] Similarly, in *Ross v. Moffitt*[210] the Court ruled that neither due process nor equal protection required the state to assign counsel for discretionary appeals to its highest court.[211] Justice Rehnquist's majority opinion presumed that by using the record below, supplemented by any materials that the *pro se* defendant supplied, the state tribunals would have an adequate basis to determine whether to review the case.[212] In *Harless,*[213] on the other hand, the state appellate courts had to be told with considerable specificity that the claim raised by the habeas petitioner was based on federal as well as state law.

State judges are not the only state officials given preferred treatment by the Court. Although the Court punishes petitioners who inadvertently mix exhausted and unexhausted claims or who commit inadvertent procedural defaults, it is considerably more solicitous of defaults by state attorneys general, even when they are deliberate.[214] For example, in *Sumner v. Mata,*[215] the Court applied to state appellate court findings the requirement of section 2254(d) that state court findings of fact be presumed correct. It reversed the Ninth Circuit, which had affirmed the grant of a writ, even though the state had abandoned on appeal any claim

207. *See, e.g.,* Brewer v. Williams, 430 U.S. 387, 415 (1977) (Burger, C.J., dissenting); Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring); Faretta v. California, 422 U.S. 806, 836 (1975) (Burger, C.J., dissenting).

208. 428 U.S. 465 (1976).

209. *Id.* at 493 n.35. *But see* Neuborne, *The Myth of Parity,* 90 HARV. L. REV. 1105 (1977); Peller, *supra* note 3, at 663-69.

210. 417 U.S. 600 (1974).

211. *Id.* at 610, 618-19. The Court also held that the Constitution does not require the state to provide counsel for defendants seeking review of their convictions in the United States Supreme Court. *Id.* at 616-18.

212. *Id.* at 615.

213. *See supra* notes 178-185 and accompanying text.

214. *But cf., e.g.,* Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) and Arlington Heights v. Metropolitan Hous. Per. Corp., 429 U.S. 252 (1977) (proof of deliberate intent to discriminate establishes a violation of the Equal Protection Clause).

215. 449 U.S. 539 (1981).

based on section 2254(d).[216]

Similarly, in the October 1983 Term, the Court granted certiorari in *New Jersey v. T.L.O.*[217] to answer the question whether the Fourth Amendment exclusionary rule was applicable to searches of students by public school officials. The state of New Jersey had argued in state court not only that the exclusionary rule was inapplicable to delinquency proceedings, but also that the search was constitutional.[218] Thus, the state had abandoned the latter claim before the Supreme Court. Nonetheless, at the end of the Term, five Justices agreed to set the case for reargument and directed the parties to brief the issue whether the search by school officials violated the Fourth Amendment.[219] In his opinion dissenting from the reargument order, Justice Stevens admonished the majority for its action, stating: "[O]f late, the Court has acquired a voracious appetite for judicial activism in its Fourth Amendment jurisprudence, at least when it comes to restricting the constitutional rights of the citizen."[220] Not surprisingly, the Court ultimately decided that although the Fourth Amendment applied to searches of public school students, the appropriate standard was a low level "reasonableness under all the circumstances" test that had not been violated in the instant case.[221]

In practical terms, the majority in *T.L.O.* came to the aid of the highest legal official of the state, who obviously had made a strategic decision not to raise a particular issue.[222] In habeas terms, the Attorney General had committed a deliberate bypass, and, even under *Fay v. Noia,*[223] such action by a petitioner would be punished by dismissal.

Moreover, in the procedural default context, if the state contests the merits of petitioner's constitutional claim notwithstanding the default, the federal courts will reach the merits.[224] Similarly, if a prisoner

216. *Id.* at 547 n.2; *id.* at 554 (Brennan, J., dissenting). The majority asserted that it was determining the issue in order to assure that the lower court had not exceeded its jurisdiction.

217. 105 S. Ct. 733 (1985).

218. *In re* T.L.O., 94 N.J. 331, 463 A.2d 934 (1983).

219. 104 S. Ct. 3583 (1984).

220. *Id.*

221. New Jersey v. T.L.O., 105 S. Ct. 733 (1985). The Court's ruling upheld a school official's search of a student's purse for evidence that would impeach her claim that she had not violated a school rule prohibiting smoking in the bathrooms. *Id.* at 745-47.

222. The state claimed that it had not earlier raised the Fourth Amendment contention before the Court because such a determination was basically factual and because a decision relying on the exclusionary rule would make it unnecessary for the Court to reach the issue of the constitutionality of the search. *See* Supplemental Brief for Petitioner on Reargument, at 6-7, New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

223. *See supra* notes 65-66 and accompanying text.

224. *See* Kibbe v. Henderson, 534 F.2d 493, 496 n.4 (2d Cir. 1976), *rev'd on other grounds,* 431 U.S. 145 (1977); Mullaney v. Wilbur, 421 U.S. 684, 704 n.* (1975) (Rehnquist, J., concur-

presents a petition with exhausted and unexhausted claims, the federal court must dismiss unless the state agrees to reach the merits of the unexhausted issues.[225]

Thus, prisoners whose attorneys default are denied federal court review, and those who even inadvertently mix exhausted and unexhausted claims are sent back to state court only to return again to federal court before relief may be available; the result may be increased periods of incarcertion and ultimately dismissal of their petitions. By comparison state officials can in effect require consideration of unexhausted and defaulted claims by the federal habeas courts, and their strategic decisions to withhold constitutional claims, if found to be ill-advised, may be overlooked by the nation's highest tribunal.

While the state's legal officers are thus apparently given every benefit of the doubt, the habeas petitioner fares less well. There is no right to counsel either in federal habeas actions[226] or in discretionary appeals.[227] Although entitled to reasonably competent counsel at trial[228] and on first appeal,[229] the accused has no right to an attorney sufficiently astute to foresee subsequent Supreme Court rulings and thereby avoid the catastrophe of a procedural default barring federal habeas.[230]

Under *Sykes,* a trial default committed solely by counsel without prior consultation with the client is nonetheless binding.[231] Notwithstanding counsel's broad power to preclude vindication of federal consti-

ring); *cf.* Lefkowitz v. Newsome, 420 U.S. 283, 292 n.9 (1975) and Warden v. Hayden, 387 U.S. 294, 297 n.3 (1967) (when state courts decided each petitioner's constitutional claim on the merits despite procedural default, federal habeas courts will not impose forfeiture). On the other hand, where the state has not argued in the lower courts that habeas is barred because of a procedural default, the Supreme Court will refuse to entertain such an argument. *See* Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980).

225. Strickland v. Washington, 104 S. Ct. 2052, 2060, 2063 (1984).

226. Ardister v. Hopper, 500 F.2d 229, 233 (5th Cir. 1974); Plaskett v. Page, 439 F.2d 770, 771 (10th Cir. 1971) (per curiam); United States *ex rel.* Marshall v. Wilkins, 338 F.2d 404, 406 (2d Cir. 1964). *But cf.* Bounds v. Smith, 430 U.S. 817 (1977) (requiring states to assure access to courts by providing adequate law libraries or alternative methods of assisting prisoners in the presentation of claims).

227. Ross v. Moffitt, 417 U.S. 600 (1974).

228. Strickland v. Washington, 104 S. Ct. 2052, 2069 (1984) (requiring reasonably competent counsel at trials and at capital sentencing proceedings); Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel in misdemeanors that result in jail time); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in felony cases).

229. Evitts v. Lucey, 105 S. Ct. 830 (1985) (requiring effective assistance of counsel on first appeal as of right); Douglas v. California, 372 U.S. 353 (1963). Because there is no right to counsel in discretionary state appeals, counsel's failure to file a timely writ in state supreme court does not deny defendant effective assistance of counsel. Wainwright v. Torna, 455 U.S. 586 (1982) (per curiam).

230. *See supra* notes 106-123 and accompanying text.

231. 433 U.S. at 72, 91 n.14 (1977); *id.* at 91-94 (Burger, C.J., concurring).

tutional claims, the Sixth Amendment gives the accused no right to a meaningful attorney-client relationship that will assure an indigent defendant continued representation by the same attorney.[232] Although an accused has the right to *pro se* representation,[233] if he or she accepts counsel, there is no constitutional right to compel the attorney to assert nonfrivolous issues that the client wishes to have presented if the attorney decides as a matter of professional judgment not to do so.[234] This ruling raises the obvious question of the effect on the availability of federal habeas of a refusal by counsel to argue an issue urged by the client. The Court's only response was a footnote statement that "we have no occasion to decide whether counsel's refusal to raise requested claims would constitute 'cause for a petitioner's default.' "[235]

It thus appears that the Court is establishing one set of ground rules for habeas petitioners and their attorneys and another for the state and its legal representatives. While it may be that "the Great Writ imposes special costs on our federal system,"[236] the proper way to manage those costs cannot lie in stacking the deck against the Bill of Rights and the remedies for its vindication.

Conclusion

While the Court, in its decisions since *Stone v. Powell* and *Wainwright v. Sykes,* has not completely eliminated federal habeas corpus as a viable remedy for unconstitutional detention by state authorities, it has circumscribed its availability, almost rendering it an extraordinary remedy confined to prevention of miscarriages of justice. Although the *Stone v. Powell* preclusionary doctrine has not been extended beyond its Fourth Amendment exclusionary rule origins, the potential for expansion still exists. At the same time, the procedural default rules have been refined and tightened, and the interpretation of the requirement of exhaustion of state remedies has created a maze that many habeas petitioners may be unable to master.

Moreover, the Court has applied forfeiture rules in an uneven fashion. While *pro se* defendants are subjected to harsh penalties, state judicial and legal officials are indulged with almost every benefit of the

232. Morris v. Slappy, 461 U.S. 1 (1983).

233. Faretta v. California, 422 U.S. 806 (1975); *but see* McKaskle v. Wiggins, 465 U.S. 168 (1984) (stand-by counsel's participation in trial of *pro se* defendant held not to violate *Faretta*).

234. Jones v. Barnes, 463 U.S. 745, 751 (1983).

235. *Id.* at 754 n.7.

236. Engle v. Isaac, 456 U.S. 107, 128 (1982).

doubt—unless to do so would provide an escape hatch for the accused in a criminal case.

The Court's forfeiture cases also rest uncomfortably alongside its retroactivity and ineffective assistance rulings. New decisions may not be applied retroactively if there was unsettled lower court case law because police should not be required to predict how the Supreme Court will ultimately rule on an issue. Defense counsel's failure to anticipate Supreme Court rulings will not constitute cause to excuse a default, however, even where the decisions are far less foreseeable. As long as some attorneys somewhere have made such objections, the habeas remedy may be effectively foreclosed. Yet counsel's failure generally will not be sufficient to amount to ineffective assistance. Heads the state wins, tails the state wins.

This ongoing evisceration of the habeas remedy roughly tracks the Court's constriction of substantive constitutional rights. While the Court is unwilling, for the most part, to overrule major Warren Court decisions governing the procedural guarantees given the accused in criminal proceedings, it has chipped away at them repeatedly, in some instances leaving only shards of the original rulings.[237] Habeas is in an even greater state of decline. Thus, to conform with the Burger Court's constricted visions of federalism and finality, both the Bill of Rights and the Great Writ are being scaled down. Such procedural and substantive diminution of protection indicates that, at least in this context, the Court views personal liberty as expendable.

237. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) and Miranda v. Arizona, 384 U.S. 436 (1966), whose holdings remain only in skeletal form. Among the primary decisions scaling down *Mapp* are United States v. Leon, 104 S. Ct. 3405 (1984); Nix v. Williams, 464 U.S. 810 (1984); and U.S. v. Calandra, 414 U.S. 338 (1974). Their counterparts with respect to *Miranda* include Harris v. New York, 401 U.S. 222 (1971); Michigan v. Tucker, 417 U.S. 433 (1974); North Carolina v. Butler, 441 U.S. 369 (1979); and New York v. Quarles, 467 U.S. 649 (1984). For a discussion of the cutbacks by the Burger Court of the constitutional protections afforded the criminal defendant by the Warren Court, see Goldberg, *Stanley Mosk: A Federalist for the 1980's,* 12 HASTINGS CONST. LAW Q. 395, 399-401, 413-418 (1985).