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Coleman v. Thompson - Sacrificing Fundamental Rights in Deference to the States: The Supreme Court's 1991 Interpretation of the Writ of Habeas Corpus

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COLEMAN v. THOMPSON—SACRIFICING FUNDAMENTAL RIGHTS IN DEFERENCE TO THE STATES: THE SUPREME COURT'S 1991 INTERPRETATION OF THE WRIT OF HABEAS CORPUS

I. INTRODUCTION

Virginia coal miner Roger Keith Coleman was convicted and sentenced to death by a Virginia trial court in 1982 for the rape and murder of his sister-in-law.[1] He petitioned the state court for a writ of habeas corpus, but the Buchanan County Circuit Court ruled against him on numerous federal constitutional issues and rejected his petition.[2] His attorney then filed a notice of appeal in response to the rejected petition, but missed the filing deadline by three days.[3] Under Virginia state law, missing the deadline for a notice of appeal constitutes a procedural default to further appeals.[4] The Virginia State Supreme Court ruled that Coleman's untimely

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1. Coleman v. Thompson, 111 S. Ct. 2546, 2552 (1991); Jill Smolowe, *Must This Man Die?*, TIME, May 18, 1992, at 40.

2. *Coleman*, 111 S. Ct. at 2552. Coleman raised seven constitutional claims in his state habeas petition based on the following allegations:

> (1) at least one member of the jury failed to disclose his preconceived opinion of Coleman's guilt; (2) Coleman was not afforded reasonably effective assistance of counsel; (3) jurors were improperly excluded because of their opposition to imposition of the death penalty; (4) the prosecution failed to disclose exculpatory evidence; (5) the prosecution's closing argument denied Coleman a fair trial; (6) the jury instructions were constitutionally inadequate; and (7) Virginia's capital murder statute and sentencing procedures were unconstitutional on their face and as applied, under the Eighth and Fourteenth Amendments to the Constitution of the United States.

Coleman v. Thompson, 895 F.2d 139, 142 (4th Cir. 1990).

3. *Coleman*, 111 S. Ct. at 2553.

4. Virginia Supreme Court Rule 5:9(a) provides:

> No appeal shall be allowed unless, within 30 days after the entry of final judgment or other appealable order or decree, counsel for the appellant files with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel.

11 VA. CODE. ANN. § 5:9 (Michie 1993).

appeal prevented him from entering any other appeals in the state courts.[5]

Coleman filed a petition for a writ of habeas corpus with the federal court.[6] The United States Supreme Court upheld the lower federal courts and deferred to the state court decision in the interests of comity and federalism, because the state decision was founded on adequate and independent state grounds.[7] The Court relied on the procedural default doctrine and held that Coleman had not exhausted his state court remedies before he defaulted on his appeal;[8] consequently, federal review was not available. In short, when Coleman's attorney filed the untimely notice of appeal in state court, he forfeited Coleman's right to further state and federal review of the case.

Coleman was executed on May 21, 1992.[9] Controversy surrounded the review process: Newly-discovered evidence suggested that Coleman was not the murderer—or at least had not acted alone[10]—and allegations of incompetent assist-

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5. *Coleman*, 111 S. Ct. at 2553.

6. Coleman v. Thompson, 111 S. Ct. 2546, 2553 (1991). The federal district court held that Coleman had procedurally defaulted pursuant to Virginia Supreme Court Rule 5:9(a). *Id.* Nonetheless, the district court reviewed all eleven claims (four federal constitutional claims raised in state habeas corpus proceedings and seven raised in federal court) on the merits. *Id.* The court rejected all challenges without evidentiary hearings and denied the petition. Coleman, 895 F.2d at 139. *See supra* note 2 for a comprehensive list of the claims.

7. *Coleman*, 111 S. Ct. at 2553-54. *See also infra* text accompanying notes 79-93.

8. *Coleman*, 111 S. Ct. at 2553.

9. Robert L. Jackson & David G. Savage, *Final Appeals Rejected. Killer is Executed; Crime: Roger Coleman Dies by Electrocution in Virginia. He Had Failed a Polygraph Test Earlier in the Day. High Court Turned Down His Bid for a Stay*, L.A. TIMES, May 21, 1992, at 16.

10. Virginia state law states that only the actual perpetrator of a crime may be convicted of a capital murder unless the crime is murder for hire. VA. CODE. ANN. § 18.2-18 (Michie 1993). The Virginia General Assembly added this amendment, commonly called the "triggerman" statute, in 1977. *Id.* Prior to this amendment, every principal in the second degree who was convicted of a felony could be indicted, tried, convicted, and punished as if the individual were a principal in the first degree. Now only the immediate perpetrator must be found to be the principal in the first degree and thus liable for the capital murder. The court, in Johnson v. Commonwealth of Virginia, 255 S.E.2d 525, 527 (Va. 1979), *cert. denied*, 454 U.S. 920 (1981), quoted the state attorney general: "It is the position of the Commonwealth that the defendant cannot be convicted of capital murder by [evidence showing that the defendant merely planned] the robbery and that a death ensued during the commission of the robbery, regardless of who committed the killing." *Id.*

ance of counsel at trial and throughout the post-conviction hearings haunted the proceedings.[11] Many wondered whether Coleman was guilty of the crime for which he was executed.[12] But for the untimely notice of appeal and procedural default, Coleman, and petitioners in similar circumstances, would have had access to federal habeas corpus review with new evidence, and would have been able to utilize the federal review process, as do petitioners who are able to file their petitions on time.

A federal court may grant a writ of habeas corpus and allow federal review of a claim if the petitioner alleges a violation of the United States Constitution.[13] The court may conduct a new evidentiary hearing to determine whether the state has constitutionally detained the petitioner.[14] If the state detention violates the Constitution, the federal court may release the petitioner.[15] The Virginia state rule, how-

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11. *See* Smolowe, *supra* note 1, at 43-44.

12. *See id.* Roger L. Matney, a convicted felon, testified that while he was incarcerated in the same cell block in the county jail with Coleman, petitioner described the rape and killing of the victim Wanda McCoy. Coleman v. Virginia, 307 S.E.2d 864, 868 (Va. 1983). Matney testified that Coleman drew a diagram of the McCoy house, that he admitted to being there on the night of the killing, that a companion slashed the victim's throat with a knife, and that the two men took the victim to the bedroom and took turns raping her. *Id.* Matney remembered Coleman identifying his companion as "Danny Ray." *Id.* Coleman began discussing a piece of paper towel, but the conversation between the inmates ended before Coleman finished discussing the paper towel. *Id.* The State had evidence that a paper towel was found near the body. *Id.* at 868. A person by the name of Danny Ray Stiltner was scheduled to testify for Virginia at the Coleman trial, but was never called as a witness. Coleman v. Virginia, 307 S.E.2d 864, 868 (Va. 1983). The record reflects that Stiltner was also the brother-in-law of McCoy. *Id.* at n.2.

The defense never presented evidence that may have raised reasonable doubt regarding petitioner's guilt in the minds of the jurors. *Id.* A neighbor of the victim reportedly found in the back of his truck a plastic bag, containing blood-soaked lilac sheets, two Van Heusen cowboy shirts, and a pair of scissors. *Id.* The neighbor buried the bag in a landfill instead of notifying the police. *Id.* The court-appointed attorney who represented Coleman at the trial stated that he knew about the evidence prior to the trial, but "considered the information useless." Smolowe, *supra* note 1, at 43. Petitioner's pro bono attorney, who handled the case during the final habeas petition, vigorously attempted to establish that petitioner was actually innocent of the crime. *Id.* The attorney dug up the landfill where the neighbor allegedly buried the plastic bag and found a one-foot by two-foot swatch of the sheet. *Id.* at 44.

13. 28 U.S.C. § 2243 (1988).

14. *Id.* § 2244(b).

15. *Id.* § 2241(c)(3) (1988). Section 2243 in pertinent part reads: "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." *Id. See also* Brown v. Allen, 344 U.S. 443, 465 (1953).

ever, barred further federal or state review of the case; thus, the courts never reviewed the new evidence to determine whether it had an exculpatory effect upon Coleman's conviction. If this evidence were evaluated pursuant to a writ of habeas corpus and were found to exculpate Coleman to some degree, then the federal court could have provided a remedy.

This comment examines the history and purpose of the writ of habeas corpus to determine whether the writ should have been utilized in Coleman's particular circumstances.[16] The focus then turns to the procedural default doctrine; its application in *Coleman* quashed any further appeals once the filing deadline in the state appellate court passed.[17] The United States Supreme Court relied upon the doctrine of federalism throughout its discussions of both the writ and the procedural default doctrine to justify deferring to Virginia state court decisions and barring federal action.[18] The salient issue is whether the goals of federalism and the writ of habeas corpus were achieved by applying the doctrine in *Coleman*.

The United States Supreme Court closed the case of Roger Keith Coleman when it refused to grant the writ of habeas corpus.[19] Foreclosing further judicial review and possible relief to a death-penalty petitioner in a situation such as Coleman's subordinates the individual's fundamental rights and contradicts the fundamental principles of the writ of habeas corpus.[20]

This comment proposes that the Supreme Court dispose of the procedural default doctrine in the narrow category of cases in which new evidence sufficient to cast reasonable doubt upon the validity of a defendant's conviction has been discovered.

II. BACKGROUND

A. *The Writ of Habeas Corpus*

The writ of habeas corpus occupies a unique position in Anglo-American legal history. The Great Writ of Liberty, as

16. *See infra* text accompanying notes 21-125.

17. *See infra* text accompanying notes 13029-187.

18. *See infra* text accompanying notes 115-125, 128-196.

19. *See supra* text accompanying notes 4-8, and *infra* text accompanying notes 94-96.

20. *See infra* text accompanying notes 28-37.

it is often called, is heralded as man's last recourse against illegal confinement.[21] In England, habeas corpus was the most important writ in constitutional law because it was a "swift and imperative remedy in all cases of illegal restraint or confinement."[22] In 1962, the United States Supreme Court adopted this perspective in *Fay v. Noia*:[23]

> [I]ts function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office.[24]

The United States Congress and Supreme Court maintained this principle by safeguarding the existence and application of the federal writ. Congress provided in Article I, Section Nine of the Constitution that the writ would apply in a plethora of circumstances, as "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."[25] The Court, in *Bowen v. Johnston,*[26] declared there was no higher duty than maintaining the writ unimpaired and unsuspended, except under the few circumstances specified in the Constitution.[27]

Particular phrases consistently emerge from the Court's discussions of the writ that reflect the fundamental purpose of the doctrine. "Fundamental fairness" and the avoidance of "manifest injustice" outline the writ's operative effect.[28] The

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21. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 28.2, at 1178 (2d ed. 1992).

22. Fay v. Noia, 372 U.S. 391, 400 (1962), *overruled by* Coleman v. Thompson, 111 S. Ct. 2546 (1991).

23. *Id.* at 391.

24. *Id.* at 401-02.

25. U.S. CONST. art. I, § 9, cl. 2.

26. 306 U.S. 19 (1939).

27. *Id.* at 26-27.

28. *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 515 (1986) (Stevens, J., dissenting) (noting that the Court historically preserved writ as relief against injustice); Strickland v. Washington, 466 U.S. 668, 697 (1984) (reiterating that

Court described the writ as cutting through the maze of legal procedure to find the heart of justice in those situations when the law somehow fails and grave injustice results.[29] In order to accomplish this function, however, the writ must often be applied in circumstances that seemingly contradict the established legal precedent of criminal procedure. A dissenting Justice William Brennan wrote, in *Murray v. Carrier*,[30] that "the scope of the writ has been adjusted to meet changed conceptions of the kind of criminal proceedings so fundamentally defective as to make imprisonment under them unacceptable."[31]

The Supreme Court slowly redefined the profile of federal and state criminal procedure with increasingly expansive applications of the writ. In expanding beyond the original, limited construction in *Ex parte Bollman*,[32] the Court justified its actions by finding that many circumstances warranted the exceptional relief afforded by the writ. When furthering the principles of the writ, the Court acknowledged that it was not directly interfering with state procedure by revising the state court judgment, but rather utilizing the power granted to it by acting upon the body of the petitioner.[33]

Justices and commentators have often expounded upon the unstructured application of the writ, asserting that in order to accomplish its historic purpose, application should not

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the Court's central concern is fundamental fairness); Engle v. Isaac, 456 U.S. 107, 126 (1982) (characterizing writ as holding an indisputably honored position in American jurisprudence as a bulwark aginst fundamentally unjust convictions).

29. *See, e.g.*, Harris v. Nelson, 394 U.S. 286, 291 (1969) (expounding upon flexibility of writ to defeat procedural error and resulting injustice); Jones v. Cunningham, 371 U.S. 236, 243 (1963) (recognizing writ as protection against wrongful restraint); Frank v. Magnum, 237 U.S. 309, 346-47 (1915) (Holmes, J., dissenting) (noting writ's purpose as collateral attack on procedure).

30. 477 U.S. 478 (1968).

31. *Id. See also, e.g.*, Fay v. Noia, 372 U.S. 391 (1963), *overruled by* Coleman v. Thompson, 111 S. Ct. 2546 (1991) (permitting habeas review in absence of appellate review where appellate review could have resulted in retrial and imposition of death penalty); Waley v. Johnston, 316 U.S. 101 (1942) (recognizing appropriateness of writ for conviction based upon allegedly coerced confession by federal law enforcement officers); Johnson v. Zerbst, 304 U.S. 458 (1938) (applying writ to conviction achieved in violation of Sixth Amendment); Moore v. Dempsey, 261 U.S. 86 (1923) (issuing writ where trial proceedings, counsel, judge, and jury influenced by public insurrection).

32. 8 U.S. (4 Cranch) 75 (1807).

33. *Fay*, 372 U.S. at 431.

be restricted to the narrow interpretations of medieval procedure.[34] Instead, procedural instruments should achieve a rational legal end under contemporary circumstances, rather than become arcane rigidities that outlive their usefulness.[35] The Court has recognized that the writ is not a static, narrow, formalistic remedy,[36] but rather must be "administered with the initiative and flexibility" essential to finding and correcting miscarriages of justice.[37]

1. *English Origins*

The writ of habeas corpus[38] was developed in England several centuries ago,[39] and the British common law defines the scope of its application. In *Darnel's Case*,[40] petitioners attempted to utilize the writ to enforce the guarantees of the Magna Carta against imprisonment by the Crown without judicial authorization.[41] The English court, however, ruled that it must abide by the Crown's decisions and therefore denied the petition.[42] Dissatisfaction with this judgment prompted Parliament to enact the 1641 Act, which removed power from the Crown to make arrests without probable cause.[43] This Act granted any arrested person immediate action by writ of habeas corpus to a judicial determination of

34. *See* Rex A. Collings, Jr., *Habeas Corpus for Convicts–Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 361 (1952). *See also* Hensley v. Municipal Court, 411 U.S. 345-51 (1973) (per curiam) (noting Court's consistent rejection of formalistic constraints on applicability of writ); Jones v. Cunningham, 371 U.S. 236, 239-40 (1963) (per curiam) (preserving opportunity for further grounds for writ application); William J. Brennan Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 425 (1961).

35. *See* Collings, *supra* note 34, at 361.

36. *See, e.g., Hensley*, 411 U.S. at 349-50; Harris v. Nelson, 394 U.S. 286, 291 (1969) (expounding upon flexibility of writ to cut through procedure and form in order to release petitioners from intolerable restraint); *Jones*, 371 U.S. at 243.

37. *Harris*, 394 U.S. at 291.

38. The meaning of the writ is derived from the Latin term "habeus corpus," which translates as "have the body." LAFAVE & ISRAEL, *supra* note 21, at 1178. The common law definition is a judicial order directing a person to have the body brought before a tribunal at a certain time and place, in order to facilitate the proceedings. *Id.* In the mid-fourteenth century, it became an independent proceeding to challenge illegal detentions. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

the detention's legality.[44] Twenty-nine years later, the writ was issued in *Bushell's Case*[45] to release a juror held in contempt for refusing to return a guilty verdict as directed by the trial court.[46]

2. *The American Writ of Habeas Corpus*

a. *Incorporation into the United States Constitution*

The United States adopted the English concept of the writ of habeas corpus by incorporation into the United States Constitution.[47] The language in the Constitution appeared to grant nearly unlimited access to the writ. The Framers wrote that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[48]

The Judiciary Acts of 1789[49] and 1867,[50] however, restricted the availability of the writ of habeas corpus, because each Act expressly authorized issuance of the writ by a particular judicial body.[51] In the Act of 1789, the first Congress specifically authorized the issuance of the writ by the newly created federal courts.[52] This action suggests implicitly that Congress did not believe that the lower federal courts inherently had the power to issue the writ. The Act added the following language to the law governing the writ: "[The writ] shall in no case extend to prisoners in [jail], unless where

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44. *Id.*

45. *Id.* at 1178-79.

46. *Id.* Justice Brennan concluded, in Fay v. Noia, 373 U.S. 381 (1962), *overruled by* Coleman v. Thompson, 11 S. Ct. 2546 (1991), that *Bushell's Case* established that the writ was available at common law to challenge imprisonment based upon a conviction in violation of due process. *Id.* Justice Powell countered, in Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (Powell, J., concurring and dissenting in part), arguing that Justice Brennan had interpreted *Bushell's Case* too broadly. *Id.* Justice Powell asserted that the writ was developed only to allow the petitioner to challenge the jurisdiction of the convicting court. *Id.* at 233-36.

47. U.S. CONST. art. I, § 9, cl. 2.

48. *Id.*

49. Judiciary Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82.

50. Judiciary Act of Feb. 5, 1867, ch. 28, 14 Stat. 385-86 *reprinted in* Fay v. Noia, 372 U.S. 391, 441-42 (1962).

51. *See* Judiciary Act of 1789, *supra* note 49, and Judiciary Act of 1867, *supra* note 50.

52. *See* Murray v. Carrier, 477 U.S. 478, 500 (Stevens, J., concurring and dissenting in part).

they are in custody under or by colour of the authority of the United States or are committed for trial before some court of the same, or are necessary to be brought into court to testify."[53] This declaration is well recognized as granting to federal prisoners the power to utilize the writ.[54] The Act of 1789, however, did not address the issue of whether the writ could be granted to prisoners in custody under state convictions who were seeking relief from federal court regarding issues protected by federal law.

b. *Common Law Development*

While the importance of the writ is demonstrated by its presence in the Constitution, the practical impact on individual rights has been shaped by case law. In *Ex parte Bollman*,[55] Chief Justice John Marshall wrote that courts may rely upon common law to determine where the writ appropriately applies.[56] The Court also held that congressional refusal to authorize federal habeas corpus relief for federal prisoners was inconsistent with the Framers' intent,[57] although the denial of such relief to state prisoners was consistent with any "obligation" the Constitution's clause imposed upon Congress.[58] The *Bollman* Court, however, failed to define the circumstances under which the writ would be available to state as well as federal prisoners. Instead, it reasoned that the writ could not readily be extended to persons in custody of state courts.[59] Nonetheless, the Court managed to find a constitutionally protected right to the writ.[60] Thirty-eight years later, in 1845, the Court specifically found in *Ex parte Dorr*[61] that the Judiciary Act barred issuance of the federal writ to state prisoners.[62]

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53. LAFAVE & ISRAEL, *supra* note 21.

54. *See* Wainwright v. Sykes, 433 U.S. 74, 78 (1977).

55. 8 U.S. (4 Cranch) 75 (1807).

56. *Id.* at 93-94. Justice Marshall reasoned that the Court must be able to call people before it in order to accomplish its judicial tasks. *Id.* at 79. Therefore, the Court could define when the writ would be utilized; for example, compelling attendance by a witness or a potential juror, or holding a person in contempt of court. *Id.*

57. *Id.* at 95.

58. *Id.* at 97.

59. *Id.*

60. Ex parte Bollman, 8 U.S. (4. Cranch) 74, 75 (1807).

61. 44 U.S. (3 How.) 103 (1845).

62. *Id.*

While the Court grappled with the application of the writ, Congress intermittently provided legislative guidance and expanded the scope of the habeas corpus writ. The Judiciary Act of 1867 generally extended the writ to state prisoners.[63] The Act stated that the several courts of the United States shall have the power to grant habeas relief to any person restrained of his liberty in violation of the Constitution or of any treaty or law of the United States within the court's jurisdiction.[64]

c. *Determining the Writ's Scope of Applicability*

The only real guidance Congress has provided regarding the practical methods of application of the writ is designating which courts may issue the writ. The Supreme Court developed the application of the writ, and Congress subsequently codified many of the common law decisions in 1948.[65]

Today, the Supreme Court must evaluate no fewer than four issues to determine whether the federal courts have jurisdiction to hear a habeas claim:[66] (1) whether it is a claim the federal courts may properly adjudicate;[67] (2) whether adequate and independent state grounds bar consideration of otherwise cognizable federal issues; (3) the extent to which

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63. *See* Wainwright v. Sykes, 433 U.S. 72, 78 (1977).

64. Judiciary Act of 1867, *supra* note 50. The Act of 1867 included a major change that provided that petitioners could "deny any of the material facts set forth in the return" or allege any additional fact. *Id.* Consequently, the federal court has not limited its jurisdiction from the habeas writ to appellate review of the state court, but has additionally allowed factual inquiry. *See* Brown v. Allen, 344 U.S. 443, 464 (1953).

65. Sections §§ 2241-55 of 28 U.S.C. resemble their predecessors by virtue of the language regarding the issuance of the federal writ to prisoners held in contravention of the Constitution, the nation's laws, or the nation's treaties. 28 U.S.C. § 2254(b) (1988). It also includes restrictions regarding exhaustion of available state remedies as a prerequisite to gaining access to the federal writ. *Id.* § 2241(c)(3).

66. *See Wainwright*, 433 U.S. at 78-79. The Court commented that the case law on the first three issues demonstrated that historically the Court has been willing to overturn or modify its earlier rules regarding the scope of the writ, although the language authorizing the Court's jurisdiction has not changed. *Id.* at 81.

67. Section § 2241(a) of 28 U.S.C. states in pertinent part: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . . ."

Section § 2241(c)(3) states in pertinent part: "The writ of habeas corpus shall not extend to a prisoner unless . . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States . . . ." 28 U.S.C. § 2241(a),(c)(3) (1988).

the petitioner must exhaust the state remedies before resorting to federal relief;[68] and (4) whether the federal court must defer to the prior resolution of a claim in state proceedings.[69] The scope of these inquiries overlaps, and the Court has integrated each into the analysis necessary to determine whether a federal habeas claim will be heard.

1. *The Type of Habeas Corpus Claims the Federal Court May Hear*

The writ was first utilized by petitioners to challenge the constitutionality of the statutes under which they were convicted.[70] Under the modern codification, if the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States," the federal court may issue the writ of habeas corpus.[71] This broadly worded phrase provides the basis for determining what type of claims the federal court may hear.

Subsequent to its original construction, the use of the writ was expanded to include claims addressing the scope of a court's authority at trial.[72] In the early twentieth century, the Court began hearing claims resulting from jury and court trials tainted by "mob domination."[73] The Court, in *Johnson v. Zerbst,*[74] granted writs to review claims addressing the

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68. 28 U.S.C. § 2254(b) (1988). This section provides:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

Id.

Section § 2254(c) reads: "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c) (1988).

69. *See* Wainwright v. Sykes, 433 U.S. 72, 78-79 (1977).

70. *See Ex parte* Siebold, 100 U.S. 371 (1880).

71. 28 U.S.C. § 2541(c)(3). The writ is not authorized for state prisoners at the discretion of the federal courts; the availability is expressly restricted to state prisoners held in violation of the Constitution. Brown v. Allen, 344 U.S. 443, 486 (1953).

72. *See* Moore v. Dempsey, 261 U.S. 86 (1923).

73. *Id. See also* Frank v. Magnum, 237 U.S. 309 (1915) (refusing to issue writ pursuant to allegations that trial process was tainted by mob protests).

74. 304 U.S. 458 (1938) (regarding an indigent federal prisoner claiming that he was denied the right to counsel at trial).

"power and authority" of the trial court.[75] The Court later abandoned jurisdictional issues as the determinative criteria, focusing instead upon the accused's constitutional rights in situations where the writ was the only effective means of preserving these rights.[76] In 1953, the Court, in *Brown v. Allen,*[77] resolved an age-old question when it held that a federal habeas court could always review a state court's decision when a federal issue was dispositive to the case.[78]

3. *Adequate and Independent State Grounds Barring Federal Habeas Review*

The Supreme Court has long ruled that when a decision in a case is based upon state law grounds that are adequate and independent, the federal court will not review the case even if independent federal claims exist.[79] If the federal court addresses a federal issue that is not dispositive to the case, then it would merely be providing an advisory opinion.[80] As federal courts are barred from issuing advisory opinions, the federal court would not have grounds to review a case based on adequate and independent state grounds.[81] The Supreme Court has applied this principle to cases where the Supreme Court sits as an appellate court reviewing state court judgments, as well as to situations where a petitioner seeks relief from a federal habeas court for a state court conviction.[82]

In sum, a federal habeas court may obtain jurisdiction if the federal issue of constitutional error is dispositive in the

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75. *Id.*

76. See Brown v. Allen, 344 U.S. 443 (1953).

77. *Id.*

78. *Id.* A federal court hearing a claim pursuant to the issuance of a writ of habeas corpus is commonly referred to as a federal habeas court. *Id.*

79. The Court has applied this analysis to state laws that are procedural as well as substantive. *See* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) (denying writ because state grounds are adequate and independent and therefore justify the state court decision); Herndon v. Georgia, 295 U.S. 441 (1935) (denying writ because federal issues not raised on appeal when opportunity existed). The central issue of the analysis is jurisdictional; if there are sufficient grounds to support a state decision, the Supreme Court has no power to review such a decision. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

80. *See Herb*, 324 U.S. at 125-26.

81. *See* Coleman v. Thompson, 111 S. Ct. 2546, 2554 (1991).

82. *See, e.g.,* Wainwright v. Sykes, 433 U.S. 72, 81 (1977); Harris v. Reed, 489 U.S. 255, 263 (1989).

case.[83] A petitioner convicted under adequate and constitutional state law may be released upon a favorable federal ruling on a dispositive federal issue, regardless of the validity of his or her conviction on state grounds.[84]

This overlap between federal and state jurisdiction threatens the sovereignty of states to develop and execute their own laws in response to the crimes within their borders. Indeed, the Supreme Court in *Daniels v. Allen*[85] declared that allowing federal habeas corpus review in such circumstances would "subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime."[86]

Commenting on the issue of federalism, Professor Paul Bator noted that *Moore v. Dempsey*,[87] one of the two prominent habeas corpus cases involving "mob domination,"[88] could represent the following proposition:

> [A] conclusory and out-of-hand rejection by a state of a claim of violation of federal right, without any process of inquiry being afforded at all, cannot insulate the merits of the question from a habeas corpus court: if the state's findings are to 'count,' they must be reasoned findings rationally reached through fair procedures.[89]

Professor Bator also noted that it was logically possible to have a system whereby the state's failure to provide sufficient corrective process could itself constitute "error" subject to reversal on direct review by the Supreme Court.[90] The Due Process Clause could be interpreted as imposing an affirmative duty upon states "to provide a full system of remedies for the meaningful litigation of all federal questions relevant to the case."[91]

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83. *See* Brown v. Allen, 344 U.S. 443 (1953).

84. *See id.*

85. 345 U.S. 946 (1953), *decided sub nom.* Brown v. Allen, 344 U.S. 443 (1953).

86. *Id.* at 485.

87. 261 U.S. 86 (1923).

88. Frank v. Mangum, 237 U.S. 309 (1915), and Moore v. Dempsey, 261 U.S. 86 (1922), are two cases in which the petitioners filed requests for writs of habeas corpus alleging that the trial proceedings were dominated by mobs, which in turn destroyed the possibility of impartial adjudication.

89. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 489 (1963).

90. *Id.* at 491.

91. *Id.*

Bator suggests that using the habeas writ as a "backstop" for the inadequacies of state procedure is politically unwise.[92] The preferred method of handling the state's inadequacies is to declare the procedure "error" on direct review by the Supreme Court, thereby forcing the states to create adequate procedural systems.[93]

3. *Exhaustion of Available State Remedies Required*

The modern statute governing the habeas corpus petition requires a petitioner to attempt to obtain relief from the state court at all appellate levels, including the state supreme court and the state habeas court,[94] prior to petitioning the federal courts for habeas review.[95] Failure to use a state remedy bars federal habeas corpus review except where the circumstances giving rise to the complaint involve lack of counsel, incapacity, or interference by officials.[96]

One reason for this requirement is that state courts are given the opportunity to cure their own constitutional errors before allowing a federal court to adjudicate the issue.[97] The other reason is that requiring exhaustion of state remedies promotes orderly and proper utilization of the existing state procedure.[98] States have criminal procedures that regulate the lengthy appellate process and provide petitioners with

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92. *Id.* at 492.

93. *Id.* at 492-93.

94. 28 U.S.C. § 2254 (1988). The state courts may issue writs of habeas corpus pursuant to state law. *Id.* If a petitioner is held in state custody, comity dictates that the petitioner plead his claims to the state trial, appellate, and habeas courts before petitioning the federal courts for relief on the federal issues. *Id.*

95. *Id.* This section provides that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." *Id.*

96. *See* Brown v. Allen, 344 U.S. 433, 486-87 (1953).

97. Darr v. Burford, 339 U.S. 200 (1950), *overruled by* Fay v. Noia, 372 U.S. 435 (1963). The Court reiterated in *Coleman* that the exhaustion doctrine was based upon considerations of comity between the courts. Coleman v. Thompson, 111 S. Ct. 2546, 2554 (1991) (citing *Darr*, 339 U.S. at 204). The *Darr* Court noted that "a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Darr*, 339 U.S at 204. The *Darr* Court required the petitioner to seek certiorari in the Supreme Court as a precondition for habeas corpus review. *Id.*

98. Brennan, *supra* note 34, at 429. Justice Brennan reasoned that the Court traditionally declined to exercise its power to review cases until after the

avenues of relief.[99] Granting federal courts jurisdiction over federal constitutional claims arising from state court proceedings before full use of the state court system usurps state sovereignty over its own law and government[100] and defeats the goal of judicial economy.

The Court yielded to this principle in *Ex parte Royall*,[101] by delaying federal habeas jurisdiction over a Virginia petitioner's claims until he exhausted all available remedies in state court.[102] The Court held that even where a federal court has the power to release the state prisoner, it should not intervene until after state proceedings conclude.[103]

Eighty-two years later in *Brown v. Allen*,[104] the Court restricted the availability of the writ by defining "exhaust[ion of] available state remedies" as utilizing all available state remedies, unless prohibited by interference from officials, incapacity, or lack of counsel.[105] The Court held that demonstrating that the time for filing an appeal expired was insufficient justification for a federal court to issue the writ.[106] Failure to exhaust all remedies barred federal habeas corpus review.[107]

In *Fay v. Noia*,[108] the Court determined this re straint was based upon consideration of comity rather than

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state courts make final determinations in a demand for orderly procedure. *Id.* *See also* 28 U.S.C. § 2254 (1988).

99. *See* Reed v. Ross, 468 U.S. 1, 10 (1984). *See also* Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490-91 (1973) (quoting Note, *Development in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1094 (1970)).

100. The *Coleman* Court recognized the importance of comity between the state and federal government, and assumed that this concept would be achieved if the Court were allowed to review the state ruling on direct review, before allowing the petitioner to seek habeas relief. *Coleman*, 111 S. Ct. at 2559.

101. 117 U.S. 241 (1886).

102. *Id.*

103. *Id.* at 250-51.

104. 334 U.S. 443 (1968).

105. *Id.* at 487.

106. *Id.* The *Brown* Court noted that the term "exhaust[ion of] available state remedies" had been interpreted with varying results in the federal circuit courts. *Id.* at 487. *See also, e.g.*, Ekberg v. McGee, 191 F.2d 625 (9th Cir. 1951) (refusing to consider that the statute intended to deny a federal forum where state procedures were inexhaustible); Master v. Baldi, 198 F.2d 113, 116 (3rd Cir. 1952) (holding that it is sufficient to exhaust only one of several available alternative state remedies).

107. *Brown*, 344 U.S. at 448.

108. 372 U.S. 391, 418 (1963), *overruled by* Coleman v. Thompson, 111 S. Ct. 2546 (1991). The Court followed *Fay* in Tinsley v. Anderson, 171 U.S. 101 (1988), where it pronounced:

power.[109] The *Fay* Court held that the exhaustion requirement bars petitioners who have not yet availed themselves of possible state court remedies,[110] as well as to those who have deliberately refused to seek state adjudication of federal issues.[111] Furthermore in *Stone v. Powell,*[112] the Court denied federal habeas review where the petitioner had full and fair opportunity to raise the claim in a state proceeding.[113]

4. *Federal Deference to State Proceedings*

State legislatures and judiciaries create a body of substantive and procedural law designed to meet state individual needs, and maintain sovereign power over the laws' execution.[114] The Court in *Reed v. Ross*[115] acknowledged that "[e]ach State's complement of procedural rules facilitates this complex process, channeling, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and effi-

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> [T]he Courts . . . of the United States, while they have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty of any person in custody under the authority of a State in violation of the Constitution, . . . yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person in advance of a final determination of his case in the courts of the State . . . .

Id. at 104-05.

The Court later held that any decision by the state supreme court adverse to the state prisoner's federal claim does not preclude federal habeas court adjudication of the matter; the state court decision would not be considered res judicata. Daniels v. Allen, 345 U.S. 946 (1953), *decided sub nom.* Brown v. Allen, 344 U.S. 443, 458 (1953). *See also* Darr v. Burford, 339 U.S. 200, 214-15 (1950), *overruled by* Fay v. Noia, 372 U.S. 391 (1963) (holding res judicata does not apply to fedearal habeas proceedings, thereby allowing federal courts to consider federal issues on habeas petition).

109. Fay, 372 U.S. at 418.

110. *Id.* at 415-20.

111. *Id.* at 438-39.

112. 428 U.S. 465 (1976).

113. *Id.* at 494.

114. U.S. CONST. amend. X. *See also* Sinnot v. Davenport, 63 U.S. 227 (1859) (determining that state police power which is not surrendered to general government is reserved to the state government); Parker v. Brown, 317 U.S. 341 (1943) (finding state governments are sovereign within their territories, except as provided by specific constitutional prohibitions and conflicts with powers delegated to the national government).

115. 468 U.S. 1 (1984).

ciently."[116] The procedure provides an orderly structure for appellate and state collateral challenges, and affords the state the opportunity to resolve issues soon after trial, while evidence is still available for evaluation or, if necessary, to retry the case if the petitioner succeeds in his challenges.[117] The *Reed* Court asserted that the procedural rules promote "not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together" as soon after trial as the docket allows.[118]

Some fear that an attorney may deliberately "sandbag" his or her defenses if the federal habeas writ were available whether or not all federal claims were brought in state court.[119] If a federal habeas court has the power to overturn any state conviction on federal grounds, regardless of whether all state remedies are pursued, then many attorneys may present their clients' defense in this bifurcated manner to increase the opportunities for review and unnecessarily prolong litigation. Constitutional claims that may be adjudicated at trial could possibly bombard the federal docket. Without the mandatory state procedural exhaustion requirement, there would be no assurance that state disposition concludes judicial adjudication.[120] The state courts might stand merely as a preliminary judicial body as the federal claim would be finally adjudicated and laid to rest by the federal habeas court.

In *Darr v. Burford,*[121] the Supreme Court recognized that the federal courts have the power to re-examine constitutional issues arising in state court trials on a writ only after state appellate review and denial of certiorari by the United States Supreme Court.[122] In *Brown v. Allen,*[123] the Court ex-

116. *Id.* at 10. The Court highlighted the functional purposes of state procedure by pointing out that the court handled the guilt determinination as well as the constitutional challenges to the pre-trial and trial procedure. *Id.*

117. *Id.*

118. *Id.* at 10-11.

119. *See* Wainwright v. Sykes, 433 U.S. 72, 89 (1976). "Sandbagging" occurs when a defendant or the defendant's attorney takes his or her chances in the state trial to obtain an acquittal, but saves some defenses to present to the federal habeas court if the defendant is convicted. *See id.*

120. *See infra* text accompanying notes 138-40.

121. 339 U.S. 200 (1950), *overruled by* Fay v. Noia, 372 U.S. 391 (1963).

122. *Id.* at 214.

123. 344 U.S. 443, 458 (1953).

plained that the state court's determination of the federal issues will be accorded the "weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata*."[124] Congress later amended Section 2254 to hold that there were circumstances when the state court's factual findings are "presumed to be correct."[125] In *Keeney v. Tamayo-Reyes*,[126] the Court held that a federal court may grant a habeas request for failure to develop a material fact in a state court proceeding.[127]

B. *Procedural Bar Doctrine*

In *Coleman v. Thompson*,[128] Virginia Supreme Court Rule 5:9(a) barred further review because the attorney failed to follow correct procedure.[129] The Supreme Court recognized this rule as adequate and independent state grounds on which to determine Coleman's fate.[130] The principle that governs this procedure is called the "procedural default doctrine."[131] Under this rule, failure to follow a procedural requirement results in the "default" of one's right to further review.[132] In *Coleman,* this resulted in the conclusion of state review, thereby barring any federal habeas corpus.[133]

The procedural bar doctrine relies upon the exhaustion requirement and dictates that a habeas petitioner must satisfy state procedural requirements before he may have access to federal relief.[134] The rationale is that the procedural bar promotes comity by providing states the first opportunity to correct any constitutional violation in their own proceedings, prior to federal adjudication of the matter.[135] The procedural bar sanctions improper procedural conduct and motivates a

124. *Id.* at 457-58 (footnote omitted).
125. *See,* La Vallee v. Delle Rose, 410 U.S 690 (1973) and 28 U.S.C. § 2254(d) (1988).
126. 112 S. Ct. 1715 (1992).
127. *Id.* at 1719.
128. 111 S. Ct. 2546 (1991).
129. *See also supra* note 4.
130. *See* Engle v. Isaac, 456 U.S. 107 (1982).
131. *See* Coleman, 111 S. Ct. at 2553.
132. *Id.*
133. *See supra* text accompanying notes 4-8, 94-96.
134. *See* Darr v. Burford, 339 U.S. 200 (1950), *overruled by* Fay v. Noia, 372 U.S. 435 (1963).
135. *Id.*

petitioner to follow state procedural requirements.[136] The petitioner must follow state rules or else risk forfeiting the right to further review.

The procedural bar demonstrates that a petitioner may forfeit his constitutional rights in criminal and civil cases by failing to make a timely assertion of his rights in the proper court. Justice O'Connor reasoned in *Coleman* that there was no principle more familiar to the Supreme Court than this forfeiture of constitutional claims.[137] She explained that time limits for procedural filings were "jurisdictional,"[138] and effectively establish a definite point in time where the opportunity to litigate will end. The rule also indicates to potential appellees that if the filings are not made by the specific point in time, the appellees will be free from the appellant's claims.[139]

1. *Expansive Application*

In 1913, the Court first enunciated the procedural bar in *Ex parte Spencer*.[140] The Court denied a state prisoner federal habeas review after he exhausted his state remedies, because he deliberately withheld presenting his federal claims in state court in hopes of gaining federal review.[141] Forty years later, the Court expanded the application of the writ; once available only to federal petitioners, it was extended to petitioners challenging state convictions on federal claims.[142] In *Brown v. Allen*,[143] a state death row petitioner asserted that racial discrimination had influenced the jury that convicted him, and that a coerced confession had been admitted

136. *See infra* text accompanying notes 119-21, 138-40.

137. Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991) (citing Yakus v. United States, 321 U.S. 414, 444 (1944)).

138. *Id.* The Court relied upon Browder v. Illinois Dep't of Corrections, 434 U.S. 257 (1978) and found that a state prisoner was barred from federal habeas review because his untimely appeal was prohibited under Federal Rule of Appellate Procedure 4(a). The Court in *Coleman* has described the rule as "mandatory and jurisdictional." *Coleman*, 111 S. Ct. at 2565.

139. *Coleman*, 111 S. Ct. at 2565. (citing Matton Steamboat Co. v. Murphy, 319 U.S. 412, 415 (1943)). *See also* Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 264 (1978) (compelling respondent to release petitioner from custody because respondent failed to meet deadline for appeal).

140. 228 U.S. 652 (1913).

141. *Id.*

142. Brown v. Allen, 344 U.S. 443 (1953).

143. *Id.*

into evidence.[144] The state appellate court determined that the claims lacked merit, but the Supreme Court granted certiorari.[145] The Court held that the state court's determination of the matter was not res judicata, and therefore the federal courts were free to adjudicate the matter.[146] The Court ruled that a state prisoner's challenge to the trial court's resolution of dispositive federal issues is always reviewable by the federal habeas court.[147]

In *Daniels v. Allen*,[148] the companion case to *Brown*, the Court ruled that federal claims never considered on the merits in state court could not be reviewed on direct appeal to the federal court.[149] Daniels' claims were never heard in state court, because his attorney did not file his appeal in a timely manner.[150] Late filings constitute a default under North Carolina state law, unless the petitioner proves the filings were detained without opportunity for appeal.[151] The Court concluded that the procedural default foreclosed the possibility of federal habeas review.[152] The Court failed to proffer a definitive analysis for this ruling, suggesting instead that there were three possible bases for the decision: the exhaustion doctrine required foreclosure of a claim that cannot be exhausted in state court because of a procedural irregularity; the failure to perfect the appeal constituted a "waiver" of the claim; and the procedural requirement provided adequate and independent state grounds for the decision.[153]

2. *The Deliberate By-Pass Standard*

In *Fay v. Noia*,[154] the Court determined that application of the procedural bar doctrine depended upon whether the

144. *Id.* at 466.
145. *Id.*
146. *Id.* at 458 (footnote omitted).
147. Brown v. Allen, 344 U.S. 443, 458 (1953).
148. 345 U.S. 946 (1953), *decided sub nom.* Brown v. Allen, 344 U.S. 443 (1953).
149. Brown, 344 U.S. at 466-67.
150. *Id.* at 482-83.
151. *Id.* at 485.
152. *Id.* at 460.
153. *See* Daniels v. Allen, 345 U.S. 946 (1953), *decided sub nom.* Brown v. Allen, 344 U.S. 443, 460 (1953).
154. 372 U.S. 391 (1963), *overruled by* Coleman v. Thompson, 111 S. Ct. 2546 (1991). Respondent Noia sought habeas relief, alleging that his state court conviction was based upon a coerced confession in violation of the Fourteenth Amendment. *Id.* at 395-98. Noia's co-defendants had made timely appeals for

procedural default was a deliberate action or an inadvertent error.[155] The Court conferred federal court jurisdiction over any allegation of unconstitutional restraint, regardless of whether the restraint was otherwise based on adequate and independent state grounds.[156] It held that allowing state procedural rules to defeat federal constitutional concerns "wholly misconceives" the scope of due process.[157] The Court asserted that forfeiting remedies available in state court does not legitimize the unconstitutional conduct utilized in securing the conviction.[158] The Court identified the problematic analysis of *Murdock v. Memphis*[159] as a failure to recognize that decisions based upon adequate and independent state grounds limit appellate review rather than federal habeas review.[160] Justice William Brennan, writing for the majority, stated that this doctrine would not be extended to limit the federal court's power under the federal habeas statute.[161]

The *Fay* Court held that a federal habeas judge has limited discretion to deny relief to a petitioner who has "deliberately by-passed the orderly procedure of the state courts" and thereby forfeited the right to further appeals.[162] This stan-

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their convictions, which were subsequently reversed. *Id.* Noia, however, filed his untimely appeal after the reversals were granted. *Id.* The New York courts ruled that his coram nobis action was barred as a result of this procedural failure. *Id.* The *Fay* Court overruled *Brown v. Allen*, 344 U.S. 443 (1953) and granted Noia the right to make the untimely claim. *Fay*, 372 U.S. at 438.

155. Fay, 372 U.S. at 438.

156. *Id.*

157. *Id.*

158. *Id.* at 428.

159. 87 U.S. (20 Wall.) 590 (1874).

160. Fay v. Noia, 372 U.S. 391, 429 (1963), *overruled by* Coleman v. Thompson, 111 S. Ct. 2546 (1991). The *Fay* Court identified the court's flawed decision in *Murdock*, 87 U.S. at 590, which held that the Court's lack of jurisdiction on direct review to decide questions of state law also precludes federal review of federal questions. *Fay*, 372 U.S. at 429 (*citing Murdock*, 87 U.S. at 590). The *Fay* Court acknowledged that exhaustion of state remedies is a prerequisite for a petitioner to qualify for federal habeas petition as evidenced in this requirement's codification in 28 U.S. § 2255; a state court judgment, however, is not a prerequisite in order for the federal court to gain jurisdiction. *Fay*, 372 U.S. at 429. The Court held that when a state's decision unconstitutionally denies a defendant the right to liberty, the federal court cannot revise the state court decision on habeas review. It can, however, release the prisoner because of its jurisdiction over habeas corpus petitions. *Id.* at 430-31.

161. *Fay*, 372 U.S. at 430-31. "The doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute." *Id.* at 399.

162. *Id.* at 438.

dard endowed the federal judges with the responsibility of determining whether the petitioner failed to meet his procedural requirements inadvertently or as a litigation strategy. The deliberate by-pass standard assumes that "[a] man under conviction for a crime has an obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him than a state court proceeding."[163] Inadvertent failure by an attorney or petitioner to comply with procedural requirements under *Fay* would not deny the petitioner further possibilities for relief.[164] The *Fay* standard allows judges to bar further appeals if they find that the default was a deliberate attempt to circumvent state law. The Court reasoned that a deliberate bypass by the petitioner was probably an attempt to escape state adjudication because his chances for relief were greater when based solely on federal claims.[165] The Court refused to allow behavior that deliberately flouted state law and procedure.[166]

3. *Development of the Cause-and-Prejudice Standard*

The Court never revisited the standard established in *Fay*. All subsequent cases limited a petitioner's abilities to receive a habeas petition in federal court.[167] Eleven years after *Fay,* the Court in *Davis v. United States*[168] found that a habeas petitioner must show sufficient "cause" for his default

163. *Id.* at 433. *See also* Rogers v. Richmond, 365 U.S. 534, 547-48 (1961) (discussing disadvantages to allowing district judges, on habeas corpus jurisdiction, to substitute their judgment on issues that should rightfully be adjudicated in state court).

164. Fay v. Noia, 372 U.S. 391, 439 (1963), *overruled by* Coleman v. Thompson, 111 S. Ct. 2546 (1991). The Court referenced its earlier attempt to distinguish procedural defaults on the basis of whether the attorney had decided to default on state procedure or whether the petitioner himself had made the conscious decision to forego state relief. *Id.* If the petitioner were a willing participant in such a default, then the Court would uphold a bar to further relief. *Id.* The Court, however, later abandoned this distinction because it placed too great a burden upon the federal habeus court to determine whether the petitioner had chosen to default. *Id.* (*citing* Carnley v. Cochran, 369 U.S. 506, 513-17 (1962); Moore v. Michigan, 355 U.S. 155, 162-65 (1957)).

165. *Fay*, 372 U.S. at 439.

166. *Id.* at 438.

167. *See, e.g.*, Coleman v. Thompson, 111 S. Ct. 2546 (1991); Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976); Francis v. Henderson, 425 U.S. 536 (1976); Davis v. United States, 411 U.S. 233 (1973).

168. 411 U.S. 233, 242 (1973).

and "prejudice" that affected the disposition of his case in order to gain federal review.[169] The Court found that such a standard avoided an unnecessary retrial by balancing the state interests against federal concerns protecting constitutional rights.[170]

In *Wainwright v. Sykes*,[171] the Court held that the states could define what constituted a procedural bar.[172] The Court held that the cause-and-prejudice standard afforded greater respect to state contemporaneous objection rules[173] than did *Fay*, while providing an adequate guarantee that federal claims involving miscarriages of justice will receive review.[174] The cause[175] the petitioner must demonstrate was later defined as an external influence that prevented the petitioner from meeting his procedural requirements over which neither the petitioner nor his attorney had control.[176]

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169. *Id.* The Court failed, however, to define the "cause" requirement. In Murray v. Carrier, 477 U.S. 478 (1986), the Court elaborated on the definition of "cause," explaining that the petitioner must demonstrate that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.

170. *Davis*, 411 U.S. at 241-43. The Court, in Younger v. Harris, 401 U.S. 37 (1977), asserted that it was necessary to recognize the "legitimate interests of both State and National governments, and . . . [that] the National government, anxious though it may be to vindicate and protect federal rights and federal interests, always [endeavors] to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* at 44.

171. 433 U.S. 72 (1977).

172. *Id.* at 88.

173. *Id.* The state contemporaneous objection rule requires that objections based upon constitutional claims be made at trial, when the witnesses' recollections are fresh, and allows the trial judge to evaluate the validity of the witness testimony because the judge alone is able to observe demeanor. *Id.* The Court hoped this process would encourage the proper determination of the issues. *Id.* However, the *Wainwright* Court asserted that allowing petitioners to raise federal issues on appeal that were not raised at trial deliberately encourages attorneys to save some of their potential appeals at the risk of conviction in state court, thereby creating a second chance to save their clients through the federal habeas process. *Id.* at 87-90.

174. *Id.* at 90-91.

175. In Murray v. Carrier, 477 U.S. 478 (1986), the Court noted that "cause" may exist where a factual or legal basis for a claim was not readily available to counsel, interference by officials made compliance impracticable, or a state deprived a defendant of adequate assistance of counsel. *See also* Reed v. Ross, 468 U.S. 1, 16 (1984) (finding "cause" if a constitutional claim is so novel that its legal basis is not reasonably available for counsel to raise at trial); Brown v. Allen, 344 U.S. 443, 486 (1953) (defining "cause" as a detention of a prisoner without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials).

176. *Murray*, 477 U.S. at 488.

In *Harris v. Reed*,[177] the Court hinted that *Fay* was superseded, but it did not expressly overrule *Fay*.[178] The petitioner in *Harris* raised only a single constitutional challenge on direct appeal in state court and brought a few additional claims in his petition for a writ of habeas corpus.[179] The state appellate court relied upon a "well settled" Illinois law that held that claims not raised on direct appeal are considered waived.[180] The *Harris* Court relied upon *Wainwright* and subsequent cases to find that adequate and independent state grounds for a procedural default will bar federal habeas review unless the petitioner can demonstrate "cause and prejudice" or a "miscarriage of justice."[181] The Supreme Court also held that the "plain statement" rule, established in *Michigan v. Long*,[182] applies to a federal habeas corpus petition.[183]

In *Engle v. Isaac*,[184] the Court conceded that in "appropriate cases" the principles of comity and finality, which provide the basis for the cause and prejudice test, "must yield to the imperative of correcting a fundamentally unjust incarceration."[185] The Court asserted that most victims of a fundamental miscarriage of justice will qualify for review under the cause and prejudice standard.[186] The Court, however, allowed the habeas review in the absence of cause for procedural default only in extraordinary cases where a constitutional violation probably resulted in the conviction of an innocent person.[187]

a. *The* Coleman *Decision: Attorney Error as a Constitutional Violation*

Coleman argued that the attorney's failure to meet the filing deadline resulting in his default on appeal constituted

177. 489 U.S. 255 (1989).
178. *Id.* at 262.
179. *Id.* at 257.
180. *Id.* at 258.
181. *Id.*
182. 463 U.S. 1032 (1983). The Court in *Long* held that if the state court decision "fairly appears" to rely primarily upon federal law, the Supreme Court may review federal questions in the case, unless the state court decision contains a plain statement that its decision relies upon adequate and independent state grounds. *Id.* at 1042 n.7.
183. Harris v. Reed, 489 U.S. 255, 264 (1989).
184. 456 U.S. 107 (1982).
185. *Id.* at 135.
186. *Id.*
187. *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 496 (1986).

"cause" to excuse the procedural default.[188] The *Murray* standard for "cause," however, required that the petitioner demonstrate that some objective factor external to the defense impeded his counsel's efforts to comply with the state's procedural rules.[189] The nature of these reasons differ greatly from the error that Coleman's attorney made. The attorney's actions failed to meet the "cause" standard because they were not instigated by a force external to the attorney.

The Court in *Murray* explained that the question of "cause" does not turn on whether the attorney erred or what type of error the attorney made.[190] Instead, the Court focused on the traditional principle that the client bears the burden for any error his or her attorney makes[191] and is bound by the judgments of his or her attorney.[192] The *Murray* Court found no inequity in requiring a defendant to forfeit further appeals due to attorney error.[193]

Similarly, Coleman could not successfully argue that his attorney's error constituted inadequate assistance of counsel at trial. The error occurred during proceedings following the first appeal.[194] While a prisoner has the right to assistance of counsel at the first post-conviction appeal,[195] there is no constitutional right to counsel at collateral state proceedings.[196] Consequently, an indigent petitioner must proceed pro se in any proceedings following the first appeal if he is unable to pay for an attorney. Additionally, ineffective or incompetent counsel at post-conviction proceedings does not constitute a constitutional violation.[197] So, while Coleman's claim did not satisfy the "cause" requirement under *Murray*, an ineffective assistance of counsel claim cannot qualify as a "fundamental

188. Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991).

189. *See Murray*, 477 U.S. at 492.

190. *Id.* at 488.

191. *Id.* (citing Strickland v. Washington, 466 U.S. 668, 690 (1984)).

192. *See* Estelle v. Williams, 425 U.S. 501 (1976).

193. Murray v. Carrier, 477 U.S. 478, 488 (1986).

194. *See supra* text accompanying note 3.

195. *See* Pennsylvania v. Finley, 481 U.S. 551 (1987) (affirming former decision that defendants have right to counsel through first post-conviction proceeding while granting individual states discretion to implement program).

196. *See* Murray v. Giarratano, 492 U.S. 1, 7 (1989) (denying death row inmates counsel at collateral proceedings because constitutional guarantee of assistance of counsel that protects defendant's presumed innocence is extinguished upon conviction).

197. *See* Coleman v. Thompson, 111 S. Ct. 2546, 2566 (1991).

miscarriage of justice" because the ineffective assistance must be a constitutional violation.[198]

4. *The* Coleman *Decision and Rationale*

In *Coleman v. Thompson*,[199] the Court expressly overruled *Fay* and held that where a state prisoner defaulted on his or her federal claims in state court based on adequate and independent state grounds, federal habeas review is barred unless the prisoner can demonstrate that the failure to consider the claims would result in a fundamental miscarriage of justice.[200] The Court held that the adequate and independent state grounds doctrine could be applied to Supreme Court appellate review of state court judgments, as well as to deciding whether a federal district court should review the habeas claims of state prisoners.[201]

The Court asserted the *Fay* decision was founded upon a concept of state and federal relations that undervalued the importance of state procedural rules.[202] The *Coleman* Court recognized both the importance of finality accomplished by state procedural rules and the "significant harm" to the states where the federal judiciary fails to respect the sovereignty of state courts.[203]

The Court highlighted that the application of the cause-and-prejudice standard varied depending upon which type of default occurred.[204] The *Coleman* Court found that applying the cause-and-prejudice standard eliminated the "irrational" distinction between disparate treatment of *Fay* and the rest of the procedural default cases.[205] Furthermore, the Court

198. *Id. See also* Murray v. Carrier, 477 U.S. 478, 495-96 (1986).

199. 111 S. Ct. 2546 (1991).

200. *Id.* at 2564. In *Murray*, the Court stated a "fundamental miscarriage of justice" occurs "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Murray, 477 U.S. at 496. The *Murray* Court applied the cause-and-prejudice standard to the failure to raise a particular claim on appeal. *Id.*

201. *Coleman*, 111 S. Ct. at 2554.

202. *Id.* at 2565.

203. *Id.*

204. Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991).

205. *Id.* The court applied the cause-and-prejudice standard to petitions based upon failure to make timely challenges to state contemporaneous objection rules. Murray v. Carrier, 477 U.S. 478 (1986) (challenging competent defense counsel's failure to make a substantive claim of error); Engle v. Isaac, 456 U.S. 107 (1982) (challenging jury instructions); Wainwright v. Sykes, 433 U.S.

believed that its ruling would eliminate any inconsistencies between deference given to the state and federal rules.[206] The *Coleman* Court reiterated that federal procedural rules serve important interests when they bar federal review of constitutional claims and that the importance should be equally recognized with regard to state procedural rules.[207]

III. The Problem Identified

The problem after *Coleman* is that a petitioner loses all further state and federal habeas appeals as a result of his or her attorney's failure to meet a filing deadline.[208] The Supreme Court held that independent state law regarding procedural defaults is an adequate ground to preclude all further state and federal appeals.[209] Yet, new evidence discovered after the close of a state trial—evidence that an attorney might have discovered through greater diligence—may cast considerable doubt upon the petitioner's guilt. Under the Court's current reasoning, however, federalism collides with the writ of habeas corpus, and the state's interests trump "the highest safeguard of liberty,"[210] thereby sacrificing the constitutional right of due process.

IV. Analysis

This analysis examines the *Coleman* Court's basis for denying federal habeas review and questions whether the considerations of federalism and comity would be met even if the Court allowed habeas review for petitioners in Coleman's circumstances. The procedural model that the Court and Congress established efficiently utilizes state and federal court time because it demands compliance with procedural laws re-

72 (1977) (challenging admission of inculpatory statements); Francis v. Henderson, 425 U.S. 536 (1976) (challenging composition of grand jury).

206. *Coleman*, 111 S. Ct. at 2565.

207. *Id.* Originally, the Court recognized this principle in Kaufman v. United States, 394 U.S. 217 (1969), and stated: "There is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants." *Id.* at 228.

208. *See supra* text accompanying notes 188-207.

209. *See supra* text accompanying notes 129-132.

210. *See supra* text accompanying notes 21-31.

quiring defendants and their lawyers to bring all state and federal claims in state court.[211]

The result in *Coleman*, however, is fundamentally unsettling. The petitioner never introduced what became the "newly discovered evidence" in the trial proceedings allegedly because of his attorney's lack of diligence at trial.[212] Petitioner failed to meet the state procedural requirements on appeal because his attorneys filed the papers three days late.[213] Potentially exculpatory evidence was never reviewed and Coleman was never afforded full procedural due process because the attorneys allegedly failed to vigorously represent the client at trial and allegedly failed to represent him adequately on a ppeal.[214]

A. *Fundamental Principles of Habeas Corpus*

The circumstances as they occured in *Coleman* were appropriate for habeas corpus review. Coleman followed and exhausted all state and federal appellate review available to him, which was limited by the Virginia rules regarding procedural default.[215] Habeas review was the only alternative. Coleman's case is a situation, as described in *Murray v. Carrier*,[216] where state procedural rules were followed and state law applied, but manifest injustice resulted.[217] Coleman pleaded his constitutional claims at the trial level and pursued his claims through the Virginia and United States supreme courts; the evidence, however, came to light after future review was barred.[218]

The Coleman case was not a situation where a petitioner serving many years in prison petitioned the court several times a month to advance his novel and frivolous legal defenses. Nor was this a situation where the petitioner deliberately withheld federal claims in past proceedings in anticipa-

211. *See supra* text accompanying notes 94-95, 98, 137-139. This is a much-needed remedy to the overburdened appellate process, which is crippling the American justice system. *See* Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Report on Habeas Corpus in Capital Cases*, 45 Crim. L. Rep. (BNA) 3239 (1989) [hereinafter Ad Hoc Committee].

212. *See supra* note 12 and accompanying text.

213. *See supra* text accompanying notes 3-5.

214. *See supra* text accompanying notes 3-8, 11-12.

215. Coleman v. Thompson, 111 S. Ct. 2546, 2553 (1991).

216. 477 U.S. 478 (1986).

217. *Id.* at 496.

218. *See supra* text accompanying notes 1-5.

tion of getting a second chance to win his freedom through the federal court.[219] In those cases, denial of habeas review serves the ends of procedural finality and elimination of unnecessary and burdensome work for the courts.[220]

Coleman's case was different. Here, possible exculpatory evidence was not previously reviewed, and state procedure prohibited any future review. Coleman never received full procedural due process due to the alleged negligence and inadequacy of his state-appointed attorney. The writ of habeas corpus was designed precisely for circumstances such as Coleman's, as no other legal alternatives exist and the writ is the last possible avenue of relief against an unjust conviction.[221] The Court has consistently proclaimed that habeas review is available in situations where the legal procedure and precedent produce a fundamentally unjust result.[222] In the past, the Court stated that the writ should be utilized to cut through legal procedure and provide just results.[223] Yet, Coleman was denied the writ due to an administrative error, and evidence material to his case was never considered.

B. *Statutory and Common Law Requirements*

Application of the writ in Coleman's circumstances would have been consistent with the language of Section 2254 of the habeas corpus statute, as there was no corrective state procedure available.[224] The section requires that the petitioner be in custody pursuant to a state conviction in violation of the Federal Constitution.[225] Coleman would have had general access to the writ had he been able to establish that he was in custody in violation of the United States Constitution.[226] His attorney's conduct, however, did not rise to the level of unconstitutional inadequacy of counsel, because a defendant has a constitutional right to counsel solely through the sentencing phase, and in capital cases, during the first appeal.[227] The

219. *See supra* text accompanying note 3.
220. *See* Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).
221. *See supra* text accompanying notes 4-8, 21-31.
222. *See supra* text accompanying notes 28-33.
223. *See supra* text accompanying note 29.
224. *See supra* note 2-5 and 68.
225. *See supra* note 65.
226. *See supra* text accompanying notes 13-15, 71.
227. *See supra* text accompanying notes 195-196.

attorney's error occurred during the second appeal[228] and therefore did not provide the basis for a constitutional challenge. Coleman was also unsuccessful in pleading any other constitutional violation.[229]

Coleman's strongest challenge to his conviction, however, appears to be in the spirit of the Constitution, rather than the letter of the law. It is difficult to believe that a denial of review of new evidence in Coleman's situation, without even considering its probative value, is not denial of the constitutional right to due process.[230] If his attorney had not procedurally defaulted and forfeited the right to further appeals, Coleman would have had access to the habeas process.[231] Thus, he could have included the allegations of new evidence in the habeas petition. In addition, any petitioner who has trial and appellate records identical to the records of Coleman, but has met his or her filing deadlines and pursued all available state remedies to completion, would have access to habeas review.[232] Establishing timely filing as the criteria for review is wholly capricious.

C. *Adequate and Independent State Grounds*

The Supreme Court held that when a state decision is based upon adequate and independent state grounds, the federal court is precluded from adjudicating the federal claim.[233] The Court in *Coleman* found that the Virginia procedural bar was adequate and independent state grounds, and therefore barred federal review of the case.[234] In light of the new evidence, however, Coleman's case as presented to the federal court would not be the same case presented to the state court.[235] Thus, assuming that the new evidence would be admitted and therefore result in a habeas corpus hearing, the Virginia state judgment, which did not take into considera-

228. *See supra* text accompanying note 3.

229. Coleman v. Thompson, 111 S. Ct. 2546, 2553 (1991).

230. *See* Herrera v. Collins, 113 S. Ct. 853, 876-84 (1993) (Blackmun, J., dissenting) (proposing procedures and standards of review for a petitioner who alleges actual innocence, because executing an innocent person violates the Due Process Clause, the Fourteenth Amendment, and the Eighth Amendment).

231. *Coleman,* 111 S. Ct. at 2554-55.

232. *Id.* Under these circumstances, a petitioner would have exhausted the available state remedies.

233. *See supra* text accompanying note 79.

234. Coleman v. Thompson, 111 S. Ct. 2546, 2559, 2560, 2565-66 (1991).

235. *See supra* text accompanying note 12.

tion potentially exculpatory evidence,[236] arguably cannot rest on adequate legal grounds because it does not reflect a consideration of the entire body of evidence.

The habeas court may have concluded that the new evidence does not substantiate any federal claim and thereby denied any further investigation into the issues. The evidence must first be subject to habeas corpus review for the court to make this determination. Thus, due process is eliminated whenever the procedural bar is invoked.

Commentator Paul Bator asserted that the federal judiciary's use of the writ as a "backstop" to unsatisfactory state court decisions was politically unwise.[237] He suggested that the preferred method is a reversal of the state court decision.[238] Bator's proposal suggests that the direct review and reversal procedure already exists for the purpose of responding to inadequate state procedure.[239] Thus, Bator suggests inappropriate application of the writ in this manner would undercut the sovereignty of the state to establish its own procedure.[240]

The weight of the recent common law, however, emphasizes deference to state laws and indicates that it would be unlikely that the federal judiciary would impose such a forceful directive upon the states in a situation similar to the one Coleman faced.[241] If the Court determined that the state court findings were based upon adequate state grounds, the Court would refrain from interfering in the state procedure.[242] Requiring the state to restructure its criminal procedure to accommodate the federal judiciary's wishes conflicts with a state's sovereign powers to establish its own laws.[243] It seems unlikely that the Court would interfere with state procedure in this manner if the federal government had a less obtrusive alternative for rectifying the petitioner's claim.[244]

Additionally, Coleman was precluded from further state appeals and therefore could not initiate his claim based upon

236. *See supra* text accompanying notes 2-5.
237. *See supra* text accompanying note 92.
238. *See supra* text accompanying note 93.
239. Bator, *supra* note 89, at 492.
240. *See* Coleman v. Thompson, 111 S. Ct. 2546, 2554 (1991).
241. *See supra* text accompanying notes 90-100, 115-18.
242. *See Coleman,* 111 S. Ct. at 2553-54.
243. *See id.* at 2555.
244. *See id.*

the new evidence in state court to advance his petition to the United States Supreme Court for direct review.[245] Waiting for another petitioner's challenge to raise the issue on direct review does not stay the executioner's hand or delay the time spent in prison for the first petitioner. Professor Bator's proposal may be appropriate for a petitioner who can still petition the United States Supreme Court for certiorari, but it is inadequate for the petitioner who cannot obtain direct review from the Supreme Court. Coleman's only remaining option was habeas corpus review in federal court.

D. *Exhaustion of State Remedies*

Coleman satisfied the exhaustion requirement under Section 2254 of the United States statute on habeas corpus.[246] The exhaustion doctrine requires that a petitioner bring all federal claims in state court and pursue full state and federal appellate review.[247] The Supreme Court held that because Coleman failed to appeal the state appellate court's adverse decision, he did not exhaust all possible state remedies.[248] The exhaustion doctrine, however, was designed to force defendants to bring their federal claims in state court and encourage the defendants to seek redress in the state courts before turning to the federal courts for review.[249] Coleman raised all federal claims in state court, pursued his claims through the Virginia state appellate process, and petitioned the United States Supreme Court for certiorari.[250] Those petitions included all federal claims applicable to him at the time of the appeals.

The evidence in question, however, came to light after the appellate process was completed and the state declared his case closed to further review.[251] His need for federal review was not due to deliberate withholding of federal claims in the state courts, but rather because the state courts were closed to him, and a new claim had arisen.[252]

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245. *See id.* at 2552-53.
246. *See supra* note 94 and accompanying text.
247. *See supra* text accompanying notes 94-99.
248. *See supra* text accompanying notes 2-5.
249. Fay v. Noia, 372 U.S. 391, 415-20 (1962), *overruled by* Coleman v. Thompson, 111 S. Ct. 2546 (1991).
250. *See supra* note 6 and accompanying text.
251. *See supra* notes 5, 12 and accompanying text.
252. *See supra* text accompanying notes 2-5.

E. *Federal Deference to State Procedure*

In *Coleman*, the Court continuously reiterated the importance of federal deference to state procedure, recognizing that substantive and procedural state law are within the sovereign domain of the state, and necessary in order for that public body to govern itself.[253] The proposition that the federal court may release a state prisoner on the basis of a habeas claim represents the most egregious imposition of state sovereignty.[254]

The *Coleman* Court determined that *Fay* was based upon a concept of state and federal relations that undervalued the importance of state procedural rules.[255] The Court noted that the Virginia procedure was designed to bring finality to cases, and the federal government significantly harms the state by failing to respect the state laws.[256] Virginia, however, has no state procedure to regulate a petitioner's post-default claim based upon new evidence. In fact, Virginia specifically barred further review in Coleman's case.[257] If the federal court issued a writ of habeas corpus, it would not have been acting in disregard of state procedure. No state corrective procedure existed to address Coleman's situation, so the federal habeas writ may have been issued.[258]

F. *Coleman's Challenge Meets the* Fay *Standard*

Coleman clearly qualified for habeas corpus review under the more lenient *Fay* standard of deliberate by-pass.[259] The *Fay* rule allowed for habeas corpus review if the procedural default resulted from inadvertence, but barred review if the default was a deliberate attempt to circumvent state procedure.[260] Coleman satisfied these criteria because the requisite papers, constituting a notice of appeal, which were at issue in the procedural default, were eventually filed three

253. *Coleman*, 111 S. Ct. at, 2554, 2555, 2564, 2565.
254. Coleman v. Thompson, 111 S. Ct. 2546, 2554 (1991).
255. *Id.* at 2565.
256. *Id.*
257. *See supra* text accompanying notes 2-5.
258. Coleman pursued all avenues of relief in state court before petitioning the federal court for a writ of habeas corpus. *See supra* text accompanying notes 2-5.
259. Fay v. Noia, 372 U.S. 391, 438-40 (1962) *overruled by* Coleman v. Thompson, 111 S. Ct. 2546 (1991).
260. *See supra* text accompanying note 111.

days after the deadline passed.[261] If the attorney were attempting to avoid state adjudication of the issue to preserve the claim for review in federal court, he never would have filed the papers. The *Fay* standard seems to have been designed to remedy the type of situation that Coleman faced.

The *Coleman* Court, however, expressly overruled the application of *Fay*, endorsing the *Wainwright* cause-and-prejudice standard.[262] The *Coleman* Court attempted to rectify what it perceived as *Fay*'s lack of deference to state procedure by demanding that petitioners demonstrate either "cause" and "prejudice" to their case or a constitutional violation with fundamentally unfair results.[263] The attorney error did not rise to the level of a constitutional violation because the Court ruled the petitioner must have a constitutional right to assistance of counsel in order for inadequacy of counsel to be considered a constitutional violation.[264] Attorney error in advanced post-conviction appeals cannot satisfy this requirement because assistance of counsel is not constitutionally protected at this stage of the proceedings.[265]

The new evidence that became available after the close of state proceedings, however, arguably could have constituted "cause" as defined in *Murray v. Carrier*.[266] The Court in *Murray* stated that a factual or legal basis for a claim that was not readily available to counsel could constitute "cause."[267] Coleman may have argued that the claim could not be made because the evidence that provided the basis for the claim was not discovered until after the state closed the case. The state could argue, and probably successfully, that the evidence was available during the state proceedings, but the attorney simply disregarded it. The Courts in *Murray* and *Reed v. Ross* seemed to indicate that the "new factual or legal basis" exception was designed for claims that did not exist at the time of the trial, rather than claims which could have been made but simply were disregarded by the attorney in the exercise of his or her professional judgment.[268] Tradition-

261. *See supra* text accompanying note 3.
262. Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991).
263. *Id.* at 2566.
264. *Id.*
265. Murray v. Giarratano, 492 U.S. 1, 7 (1989).
266. 477 U.S. 478, 488 (1986).
267. *See supra* note 175.
268. *See supra* notes 176-77.

ally, the Court has found that the client bears the burden of her or his attorney's decisions.[269]

The Court's endorsement of the cause-and-prejudice standard, however, ignores the fact that inadvertent attorney error will result in a client losing his or her right to federal review. The traditional recourse in a situation of attorney negligence or misconduct is a civil malpractice suit against the attorney.[270] Damages, however, are no remedy when the client faces prison or the death penalty. Attempting to deter attorneys from "sandbagging" their defenses by restricting habeas corpus review misdirects a sanction against a petitioner whose only misdeed was making an administrative error. Thus, the Court has created a vacuum in the possible and legitimate remedies by imposing the cause-and-prejudice standard in all cases of procedural default.

This tension highlights the problem that Coleman faced. Significant errors occurred in his case, yet they do not rise to the level of actionable constitutional error under the current standard. The fundamentally unjust result deserves redress, but under the current cause-and-prejudice standard, no remedy is available.

V. PROPOSAL

In *Coleman v. Thompson*,[271] the Court relied upon state procedure and the considerations of comity and federalism to determine that deference to state laws outweighs the opportunity to further appeals.[272] In this case, however, due process was sacrificed. This seems an unnecessary cost when both the state and federal governments are charged with the responsibility of upholding constitutional rights.

In the rare situation where a petitioner is denied access to further appeals because his or her attorney erred in post-conviction proceedings and new evidence is discovered that is

269. *See, e.g,* Murray v. Carrier, 477 U.S. 478, 488 (1986) (assigning defendant the burden of risk of attorney error if counsel representation is not constitutionally ineffective); Wainwright v. Sykes, 433 U.S. 72, 113-16 (1977) (Brennan, J., dissenting) (asserting traditional rationale for binding criminal defendant to actions of attorney founded in agency principles).

270. *See* W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 32 at 185-86 (5th ed. 1984).

271. 111 S. Ct. 2546 (1991)

272. *Id.* at 2554-55, 2564-66. *See also supra* text accompanying notes 97-100, 114-118.

sufficient to cast doubt upon the validity of the petitioner's conviction, the federal writ of habeas corpus should be issued.[273] The federal court should evaluate the sufficiency of the evidence and determine whether the evidence would cast reasonable doubt upon the validity of the conviction. The federal habeas court is already empowered to conduct independent evidentiary inquiries notwithstanding state court findings.[274]

This proposition does not require federal inquiry into the millions of habeas writs that inundate the federal courts every year.[275] Rather, the inquiry would be restricted to the few cases that resemble the *Coleman* fact pattern: procedural defaults, new material evidence, and applications for writs of habeas corpus. The legitimacy of the current Court's agenda to restrict the availability of access to the writ is unques-

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273. *See* Herrera v. Collins, 113 S. Ct. 853 (1993). In *Herrera,* the petitioner argued that the Eighth Amendment prohibition against cruel and unusual punishment and the Fourteenth Amendment guarantee of due process were violated by a court's refusal to review new evidence that could allegedly prove his innocence. *Id.* at 856. The Supreme Court ruled that if the petitioner could offer a truly persuasive post-trial demonstration of actual innocence and no state avenue were open to process such a claim, then federal habeas relief would be appropriate. *Id.* The Court, however, characterized that evidentiary threshold as "extraordinarily high" because granting a writ of habeas corpus at that point in the proceedings is very disruptive. *Id.* The Court identified two issues that weighed against granting such a post-conviction writ: the need for finality in capital cases and the enormous burden upon the State of retrying a case based upon stale evidence. *Id.*

The facts in *Coleman* are drastically different from those in *Herrera.* Herrera's claims of innocence were based upon the affidavits of a prison inmate and Herrera's nephew, both claiming that the actual murderer was Herrera's now-dead brother. *Herrera,* 113 S. Ct. at 855. Herrera raised the claim of "actual innocence" for the first time in his second habeus petition in 1992, ten years after a jury convicted him of murdering a police officer. In support of the writ petition, Herrera offered two affadavits of newly discovered evidence—affadavits that were taken eight and ten years after his conviction. *Id.* at 858. In *Coleman,* the claims of innocence were based upon physical evidence that was not available at time of trial due to the alleged lack of diligence of the trial counsel. Post-conviction investigation unearthed the evidence, which indicated that two persons participated in the violent attack. *See supra* note 12. A former cellmate of Coleman substantiated the significance of the physical evidence and implicated another person, who at the time of Coleman's appeals was apparently still alive and available for examination. *Id.* The validity of Coleman's claims could have been tested through further investigation and interrogation. The affiants in *Herrera,* however, offered no physical evidence and accused a dead man. *Herrera,* at 858.

274. *See* Brown v. Allen, 344 U.S. 433, 478 (1953) (finding the federal district court has broad power to hold an evidentiary hearing and determine the facts).

275. *See* Ad Hoc Committee, *supra* note 211.

tioned; redundant and frivolous petitions clog the judicial system every year.[276] The fundamental rights of a few, however, should not be sacrificed in order to alleviate the problem created by many other petitioners whose circumstances are greatly different than a prisoner in Coleman's situation.

VI. CONCLUSION

It is undisputed that a state has legitimate interests in finality and control over state law and proceedings against federal intrusion. The axiom of "justice delay is justice denied" highlights the problem now facing the American legal system, as hundreds of frivolous habeas corpus petitions are filed each year. Sacrificing one person's fundamental rights for the sake of federalism and efficiency, however, is manifestly unjust. Roger Keith Coleman was executed before the world ever discovered whether he was really guilty of the crime for which he was prosecuted. Requiring the exhaustion of state remedies was designed to inject further order into procedural conduct and respect for state law. The fundamental principle of all American law, state or federal, is the effectuation of justice. Sacrificing due process in the name of federalism and comity fails to accomplish this goal.

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276. *See generally* Collings, *supra* note 34.

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