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COMMENTS

LUNDY, ISAAC AND *FRADY*: A TRILOGY OF HABEAS CORPUS RESTRAINT

Liberal availability of federal habeas corpus review[1] has been praised as the bulwark of protection from unconstitutional confinement,[2] and decried as undermining the finality of judgments and the goals of deterrence and rehabilitation.[3] Federal habeas corpus for state prisoners has been particu-

1. The writ of habeas corpus is a post-conviction remedy by which a prisoner may challenge the constitutionality of his conviction and resulting confinement. *See* C. WRIGHT, LAW OF FEDERAL COURTS §§ 53, 236 (3d ed. 1977). The remedy is not limited, however, to post-conviction relief for prisoners. *See, e.g.*, Scaggs v. Larsen, 396 U.S. 1206 (1969) (ordering habeas corpus relief to United States Army reservist held under military custody beyond his enlistment contract). This Comment is solely concerned with the writ as a post-conviction remedy for state and federal prisoners. State prisoners seek habeas corpus relief from custody under 28 U.S.C. § 2254 (1976). *See infra* note 19. Federal prisoners utilize a motion to vacate judgment under 28 U.S.C. § 2255 (1976). *See infra* note 25. These present day statutory remedies evolved from the Judiciary Act of 1789, ch. 20, 1 Stat. 81 (habeas corpus provision applied to federal prisoners only), and from the Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (1867) (empowering federal courts to grant writs of habeas corpus to federal and state prisoners alike when detained "in violation of the Constitution") (currently codified at 28 U.S.C. § 2241 (1976)) (writs of habeas corpus may be granted to any prisoner in custody in violation of the Constitution, laws, or treaties of the United States). For a comprehensive history of federal habeas corpus, including a discussion of its ancient origins, see *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970) [hereinafter cited as *Developments*].

2. *See, e.g.*, Peyton v. Rowe, 391 U.S. 54, 58 (1968) (referring to the writ as "both the symbol and the guardian of individual liberty"); Townsend v. Sain, 372 U.S. 293, 311 (1963) ("an efficacious and imperative remedy for detentions of fundamental illegality"); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1868) ("the best and only sufficient defence of personal freedom").

3. Finality requires "the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting). Judge Friendly and Professor Bator suggest that the absence of finality frustrates the goals of deterrence and rehabilitation. Deterrence requires that one violating the law expects that he "will swiftly and certainly become subject to punishment, just punishment." Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963). Judge Friendly argues that "[u]nbounded willingness to entertain collateral attacks on convictions must interfere with at least one aim of punishment—'a realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation.' " Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 146 (1970) (quoting Bator, *supra* at 452).

larly controversial because of the repugnance toward federal court supervision and control over state court judgments.[4] In addition, critics have charged that state prisoners "abuse" the writ by "flooding" the federal courts with frivolous habeas petitions.[5] Despite attempts to reform or revoke federal habeas relief for state prisoners,[6] the scope of federal habeas corpus review expanded steadily from 1953 to 1975.[7] The federal habeas court was permitted to entertain all constitutional claims, absent a "deliberate bypass" of state procedural requirements[8] and failure to exhaust

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4. "There is an affront to state sensibilities when a single federal judge can order discharge of a prisoner whose conviction has been affirmed by the highest court of a state." C. WRIGHT, *supra* note 1, at 246. For discussion of resentment among state law enforcement officials and judges because of "indiscriminate expansion [of federal habeas corpus] without principled justification," see Bator, *supra* note 3, at 504-07. *But see Developments, supra* note 1, at 1057-62, expounding the thesis that a "dispassionate second look focused exclusively on the adjudication of constitutional issues at trial may be necessary to ensure that a defendant's federal constitutional rights are adequately protected." *Id.* at 1057.

5. Recently, for example, in support of the Crime Control Act of 1980, S. 2543, 90th Cong., 2d Sess., 128 CONG. REC. S5449 (daily ed. May 19, 1982), Senator Chiles, author of the proposed legislation, asserted that "[t]he abusive and repetitive use of habeas corpus petitions by State court convicts to attack their convictions is a problem which is clearly out of hand." 128 CONG. REC. S8871 (daily ed. July 22, 1982). *But see infra* notes 310-314 and accompanying text. In 1976, Chief Justice Burger reported that "[f]ully a sixth [19,500 or 16.6%] of the 117,000 cases of the civil docket of federal courts are petitions from prisoners, most of which could be handled effectively and fairly within the prison systems." Burger, *Annual Report to the American Bar Association by the Chief Justice of the United States*, 62 A.B.A. J. 189, 190 (1976). It is important to note, however, that of these 19,000 prisoner petitions, 14,260 were filed by state prisoners of which only 7,843 (6.7% of the total civil docket) were habeas petitions. *See* 1975 ANN. REP. OF THE JUD. CONF. OF THE U.S. at 206-08.

6. A proposed addition to the habeas statutes would have limited the review of state criminal convictions to the certiorari jurisdiction of the Supreme Court. *See* S. 1097, 90th Cong., 2d Sess. 10, 63-66, 122 (1967). Other proposals would have required a three-judge federal court for review of habeas corpus applications. *See* H.R. 1892, 89th Cong., 2d Sess. 36 (1966) and ANN. REP. OF THE JUD. CONF. OF THE U.S., at 313. *See also* C. WRIGHT, *supra* note 1, at 247; Robbins & Sanders, *Judicial Integrity, the Appearance of Justice, and the Great Writ of Habeas Corpus: How to Kill Two Thirds (or More) with One Stone*, 15 AMER. CRIM. L. REV. 63, 72 n.86 (1977); Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation?*, 61 GEO. L.J. 1221 (1973).

7. *See infra* notes 43-78 and accompanying text. *See generally Developments, supra* note 1, at 1056-66.

8. Prior to 1963, however, a petitioner's failure to comply with a state procedural requirement constituted an adequate state ground for denying federal habeas review. *See infra* notes 43-51 and accompanying text. This view was abandoned when, in Fay v. Noia, 372 U.S. 391 (1963), the Supreme Court adopted the deliberate bypass standard for determining whether federal habeas review would be barred by a procedural default. *See infra* notes 52-65 and accompanying text. Until 1977, failure to challenge grand jury composition was the exception to application of *Noia*'s deliberate bypass standard. *See infra* notes 79-93 and accompanying text.

available state remedies.[9]

In *Wainwright v. Sykes*,[10] however, the United States Supreme Court firmly curtailed liberal availability of federal habeas review for state prisoners in cases of procedural default.[11] In *Sykes*, the Court renounced the deliberate bypass waiver standard enunciated in *Fay v. Noia*,[12] and adopted the more stringent "cause" and "actual prejudice" requirement for overcoming procedural defaults.[13] Since *Sykes*, federal courts, legal practitioners and pro se petitioners have awaited fulfillment of the Court's promise that later cases would define the cause and prejudice standard.[14] In the 1981 Term,[15] the Supreme Court responded in opinions authored by Justice O'Connor,[16] addressing the issue of cause in *Engle v. Isaac*,[17] and actual prejudice in *United States v. Frady*.[18]

In *Isaac*, state prisoners who failed to comply with an Ohio rule mandating contemporaneous objections to jury instructions, were barred from challenging the constitutionality of those instructions in a federal habeas proceeding under section 2254[19] absent a showing of cause and actual prejudice excusing their procedural default.[20] The Supreme Court rejected the respondents' argument that the principles of *Sykes* should be limited to cases in which the constitutional error did not affect the truthfinding function of the trial.[21] The Court ruled that the futility of presenting an objection to the state court cannot alone constitute cause.[22] Furthermore, cause is not established by the alleged unawareness of a constitutional objection when that constitutional claim has been previously litigated by other defense counsel.[23] Because cause was found lacking in this case, the Court

9. *See infra* notes 48-50 & 58-60 and accompanying text.

10. 433 U.S. 72 (1977).

11. *Sykes* required a showing of cause and actual prejudice to excuse a habeas petitioner's failure to comply with an adequate state procedural requirement, which would otherwise operate to bar habeas corpus review. *Id. See infra* notes 94-108 and accompanying text.

12. 372 U.S. 391 (1963). *See infra* notes 52-65 and accompanying text.

13. *See infra* notes 95-101 and accompanying text.

14. *See* Wainwright v. Sykes, 433 U.S. at 87.

15. October Term, 1981.

16. Justice O'Connor was invested on September 25, 1981.

17. 102 S. Ct. 1558 (1982).

18. 102 S. Ct. 1584 (1982).

19. 28 U.S.C. § 2254(a) (1976) provides that federal courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

20. 102 S. Ct. at 1575.

21. *Id.* at 1572. *See infra* note 175 and accompanying text.

22. 102 S. Ct. at 1572. *See infra* notes 176-79 and accompanying text.

23. 102 S. Ct. at 1574-75. *See infra* notes 185-86 and accompanying text.

did not consider whether these state prisoners suffered actual prejudice.[24]

In *Frady*, a federal prisoner sought to have his sentence vacated under section 2255,[25] alleging that he was convicted by a jury erroneously instructed on the meaning of malice.[26] Frady had not objected to the instructions at trial or on direct appeal. The Supreme Court rejected application of the "plain error" standard of review[27] in motions under section 2255 and held the cause and actual prejudice requirement applicable to claims brought by federal prisoners.[28] The Court did not inquire whether Frady had demonstrated cause for his failure to object to the erroneous jury instructions because he had not demonstrated actual prejudice.[29] Frady failed to carry the burden of showing that the erroneous jury instructions "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[30] The Court found that this would have been a different case if Frady had been able to come forward with affirmative evidence that he had been wrongly convicted of a crime.[31]

Isaac and *Frady* are based upon policy considerations and the principles of comity,[32] federalism and finality of judgments which, in the Court's view, necessitate strict adherence to the *Sykes'* cause and actual prejudice requirement. These decisions, however, far exceed *Sykes*. *Isaac* requires a showing of cause for defects that may have affected the determination of guilt at trial.[33] *Frady* requires what amounts to a "colorable showing of

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24. 102 S. Ct. at 1575 n.43. *See infra* note 187.

25. Section 2255 is a motion to vacate, set aside, or correct the sentence. However, the term "habeas corpus" is commonly utilized to refer to petitions of federal prisoners under § 2255 and will be similarly addressed in this Comment. *See* United States v. Hayman, 342 U.S. 205, 219 (1952) (holding that § 2255 is as broad as habeas corpus); Wainwright v. Sykes, 433 U.S. 72, 84 (1977) (using the term "habeas corpus" in referring to its decision in Davis v. United States, 411 U.S. 233 (1973), which involved a federal prisoner's motion for collateral review under § 2255). *See also* Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050, 1053 & nn.23-24 (1978).

26. 102 S. Ct. at 1589.

27. FED. R. CRIM. P. 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they are not brought to the attention of the court." *See infra* notes 217-19 and accompanying text.

28. 102 S. Ct. at 1593-94. *See* notes 215-21 and accompanying text.

29. 102 S. Ct. at 1594. *See infra* note 222 and accompanying text.

30. 102 S. Ct. at 1596. *See infra* note 227 and accompanying text.

31. 102 S. Ct. at 1596. *See infra* note 229 and accompanying text.

32. In general, the doctrine of comity between courts advises 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." Fay v. Noia, 372 U.S. 391, 420 (1963) (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)). *See also* Covell v. Heyman, 111 U.S. 176, 182 (1884).

33. *See infra* note 175 and accompanying text. In contrast, *Sykes* involved an alleged

innocence"[34] to establish actual prejudice.[35] Synthesized with the Court's decision in *Rose v. Lundy*,[36] these cases indicate the Supreme Court's determination to restrain liberal allowance of federal habeas review for both state and federal prisoners.[37]

In order to promote the interests of comity and federalism, the Court in *Lundy* adopted a per se rule requiring federal district courts to dismiss every habeas corpus petition filed by a state prisoner under section 2254 presenting unexhausted claims.[38] Under this "total exhaustion" rule,[39] the petitioner may elect to return to state court to exhaust all claims, or to delete the unexhausted claims and proceed with those that have been exhausted in the state courts.[40] The plurality cautioned, however, that if the petitioner chooses to delete the unexhausted claims, federal review may be forfeited when those claims are resubmitted in a subsequent petition following exhaustion. The plurality asserted that under 28 U.S.C. § 2254, Rule 9(b),[41] a district court may dismiss those petitions if the court finds that "the failure of the petitioner to assert those [new] grounds in a prior petition constituted an abuse of the writ."[42]

This Comment presents an overview of the Supreme Court's progression in applying the requirements of exhaustion of state court remedies and compliance with adequate state procedures to limit federal habeas corpus

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violation of *Miranda* rights. Wainwright v. Sykes, 433 U.S. 72 (1977). *See* Friendly, *supra* note 3, at 163-64 (suggesting that *Miranda* claims generally do not involve "the kind of constitutional claim that casts some shadow of doubt upon the defendant's guilt." (quoting Kaufman v. United States, 394 U.S. 217, 242 (1969) (Black, J., dissenting))).

34. *See infra* note 299.

35. *See infra* notes 272-74 and accompanying text.

36. 102 S. Ct. 1198 (1982).

37. *See also* Stone v. Powell, 428 U.S. 465, 494 (1976) (holding that search and seizure claims may not be raised in federal habeas corpus review of state convictions "where the state has provided an opportunity for full and fair litigation of a fourth amendment claim."); Estelle v. Williams, 425 U.S. 501 (1976). *But see* Rose v. Mitchell, 443 U.S. 545 (1979).

38. 102 S. Ct. at 1205.

39. Previously, only two circuit courts of appeals required total exhaustion before affording habeas corpus review. *See infra* note 117.

40. *Id.* at 1204.

41. Rule 9(b) provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

28 U.S.C. § 2254, Rule 9(b) (1976).

42. *Id.* at 1204-05 (quoting 28 U.S.C. § 2254, Rule 9(b)) (only three members of the Court, Chief Justice Burger, and Justices Rehnquist and Powell, joined Justice O'Connor in this portion of the opinion).

review of petitions filed by state and federal prisoners. It examines the Supreme Court's increasing willingness to defer to state procedural requirements and to adhere strictly to the exhaustion requirement in order to accommodate the interests of comity, federalism, and finality of judgments. Following an examination of the Court's recent decisions in *Lundy, Isaac* and *Frady*, this Comment analyzes the implications of these decisions for the federal courts, pro se petitioners, and attorneys handling federal habeas claims. The Comment demonstrates that the Court has failed to assist adequately federal courts in defining the parameters of cause and actual prejudice, and has imposed a great burden of duplicative review upon the federal courts under the total exhaustion requirement. This Comment concludes that the deeper significance of *Lundy, Isaac* and *Frady* is their effective evisceration of habeas corpus as a federal forum for the vindication of the federal constitutional claims of state and federal prisoners.

I. THE SCOPE OF FEDERAL HABEAS CORPUS REVIEW: AN HISTORICAL PERSPECTIVE

A. Exhaustion of State Remedies and Procedural Forfeitures as Limiting Principles under Brown v. Allen

In the landmark case of *Brown v. Allen*,[43] the Supreme Court extended habeas corpus review to all federal constitutional questions presented by state prisoners. The Court placed within the "sound discretion" of the federal district court judge the decision whether to redetermine the federal constitutional claims of state prisoners, regardless of the adequacy of state procedure or the state court's full and fair consideration of the claim.[44]

43. 344 U.S. 443 (1953). Brown v. Allen was a consolidation of three cases: Brown v. Allen, Speller v. Allen, and Daniels v. Allen.

44. *Id.* at 460-65. In a separate opinion, Justice Frankfurter explained the underlying rationale. *Id.* at 497-513 (opinion of Frankfurter, J.). While the district judge must consider state proceedings, the prior state determination cannot foreclose consideration of such claims by the federal habeas court because Congress, by the Act of 1867, provided that the state court should not have the final say. *Id.* at 500. "[N]o binding weight is to be attached to the state determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." *Id.* at 508. Over a century prior to *Brown*, habeas corpus relief for a prisoner was available only for a lack of jurisdiction in the detaining court. *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830). *See also Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873) (court without jurisdiction to impose second sentence when first had been served as one of the alternative punishments provided by law); *Ex parte* Siebold, 100 U.S. 371, 376-77 (1879) (because the laws under which the defendant was convicted were unconstitutional and therefore void, the court acquired no jurisdiction over the causes before it). In 1915, however, the Supreme Court acknowledged that the

The Court provided that, although the federal court has the *power*, it need not "hold hearings on the merits, facts or law" when the state courts have adequately protected federal constitutional rights.[45] The district court, however, was directed to exercise jurisdiction to the extent of examining the record to determine whether the "ends of justice" require a hearing.[46]

The Supreme Court clarified two limitations upon the federal court's discretion to entertain the constitutional claims of state prisoners. First, although the petitioner must exhaust available state remedies under section 2254, that section does not require the prisoner to repeat attempts to utilize the same state remedy, nor to make more than one attempt where alternative state remedies are available.[47] Second, in the companion case

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inquiry on federal habeas corpus need not end upon a showing that the conviction was rendered by a court of competent jurisdiction. Frank v. Mangum, 237 U.S. 309 (1915). The federal court could review the state court determination of the petitioner's federal constitutional claim. Habeas corpus relief would be denied, however, when the state had afforded adequate corrective process for reviewing the petitioner's claim. *Id.* at 331, 335-36. This barrier was removed when, in Moore v. Dempsey, the Court determined that the existence of adequate state procedures could not prevent federal habeas review to secure a petitioner's constitutional rights if the state court had failed to correct the constitutional wrong. 261 U.S. 86, 91-92 (1923). Thereafter, habeas corpus review was extended on a case-by-case basis. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938) (ineffective assistance of counsel); Waley v. Johnston, 316 U.S. 101 (1942) (claims of coerced guilty plea). In *Waley*, the Court finally abandoned the concept of jurisdiction as a limiting ground for habeas corpus review.

For a discussion of the debate on the legal and historical significance of *Frank* and *Moore* concerning the scope of federal habeas review, see Bator, *supra* note 3, at 489 (interpreting *Frank* as the initiator of de novo habeas review). *But see* Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1329-30 (1961); Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 105 n.59 (1959) (interpreting *Moore* as the first decision allowing claims to be redetermined de novo). *See also Developments, supra* note 1, at 1051-56 (discussing *Moore* and the views of commentators Reitz and Hart).

45. 344 U.S. at 464.

46. *Id.* The petitioner in *Brown* alleged issues of jury discrimination and admission of a coerced confession. The Court found that the district court had not abused its discretion in declining to grant the writ of habeas corpus without conducting a hearing on the federal constitutional issues, because all issues were adequately presented to the state courts and the complete record had been before the district court. *Id.* at 465.

47. *Id.* at 502 (opinion of Frankfurter, J.). The Court determined that the petitioners in all three cases had exhausted all required state procedures and need not return to the state court for collateral relief. *Id.* at 447 (majority opinion).

The Supreme Court has long recognized the importance of the exhaustion doctrine. In *Ex parte* Royall, the Court held that although federal courts have the power to discharge a state prisoner restrained in violation of the Constitution, to facilitate accord between courts "equally bound to guard and protect rights secured by the Constitution," the federal court should abstain from proceeding on habeas corpus until the state court proceedings are completed. 117 U.S. 241, 251 (1886). *See also* Darr v. Burford, 339 U.S. 200, 204 (1950) ("[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation."). In 1948, Congress codified the exhaustion requirement, Act of June 25, 1948,

of *Daniels v. Allen*,[48] the Court acknowledged that, although section 2254 does not require repetitious applications to state courts for collateral relief, the state's procedure for relief must nonetheless be employed "in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings."[49]

In denying habeas corpus relief in *Daniels*, the Court reaffirmed the principle that a prisoner's unconstitutional detention "is not to be tested by the use of habeas corpus in lieu of an appeal."[50] Thus, when a state proce-

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ch. 646, 62 Stat. 967 (codified as amended at 28 U.S.C. § 2254(b)-(c) (1976)), incorporating the principles of the Supreme Court's decision in *Ex parte* Hawk, 321 U.S. 114 (1944). *See* Reviser's Note H.R. REP. NO. 308, 80th Cong., 1st Sess. A180 (1948); Brown v. Allen, 344 U.S. at 447-50. In *Hawk*, the Court provided that while a petitioner must ordinarily exhaust all available state remedies, the exhaustion doctrine does not bar relief when the state remedies are inadequate or fail to "afford a full and fair adjudication of the federal contentions raised." 321 U.S. at 118. Section 2254(b)-(c) provides:

> (b) 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.
>
> (c) 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(b)-(c) (1976).

48. 344 U.S. at 482.

49. *Id.* at 487.

50. *Id.* at 485 (footnote omitted). *See* Sunal v. Large, 332 U.S. 174, 180 (1947) (barring collateral review of petition brought by federal prisoners who failed to take an appeal). *But see* Kaufman v. United States, 394 U.S. 217 (1969) (construing the Court's decision in *Sunal* as limited to nonconstitutional claims asserted by federal prisoners). *See also* United States v. Addonizio, 442 U.S. 178 (1979) (an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment); Hill v. United States, 368 U.S. 424, 428 (1962) (an error of law does not provide a basis for collateral attack unless the claimed error constituted "a fundamental defect which inherently results in a complete miscarriage of justice"). The Court asserted that to hold otherwise would "subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime." *Id.*

In *Daniels*, the petitioners lost their right to proceed on habeas corpus because of their procedural default in the state courts. 344 U.S. at 482-87. The state procedure required that petitioners perfect their appeal within 60 days. The petitioners' counsel served the statement of appeal after 61 days had passed. The trial judge struck the appeal as out of time. That action precluded an appeal as of right to the state supreme court. *Id.* at 484-85. The Supreme Court found the denial of direct review constitutional, stating that "[a] period of limitation accords with our conception of proper procedure." *Id.* at 486. In contrast, federal habeas review was properly afforded to the petitioner in *Brown* because the alleged discriminatory selection of grand and petit jurors and admission of a coerced confession had been challenged by motions at trial and on appeal as required by state procedure. 344 U.S. at 466-67.

dural requirement did not violate the Constitution, and when noncompliance was sufficient to result in forfeiture on appeal, a state petitioner's failure to comply with the adequate state procedure operated as an absolute bar to federal habeas corpus review, absent some interference or incapacity.[51]

B. The 1963 Trilogy: Expanding the Scope of Federal Habeas Corpus Review

The severity of the *Daniels* forfeiture rule was alleviated in *Fay v. Noia*,[52] one of a 1963 trilogy of expansive habeas corpus cases. In *Noia*, the Supreme Court held that a state petitioner's failure to comply with a state procedural requirement, sufficient to preclude state court appellate review, would bar subsequent resort to the federal court for habeas corpus relief only if the petitioner had deliberately bypassed state procedural requirements.[53]

Noia was convicted with two other defendants of a felony murder. The sole evidence against each defendant was his unsigned confession. Noia was denied state postconviction relief because his coerced confession claim had been decided against him at trial and he had allowed the time for a direct appeal to lapse.[54] Noia was subsequently denied federal habeas corpus review on the ground that section 2254 requires that an applicant exhaust the remedies available in the state courts.[55] The United States Court of Appeals for the Second Circuit reversed, holding that exceptional circumstances existed excusing Noia's compliance with that section.[56] In affirming the Second Circuit's decision, the Supreme Court held that fed-

51. 344 U.S. at 486-87. Federal habeas corpus relief would be allowed when, for example, "time has expired without appeal, when the prisoner is detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials." 344 U.S. at 486. *See also* Dowd v. United States *ex. rel.* Cook, 340 U.S. 206 (1951) (prisoner's efforts to file proper appeals papers within required time limits were frustrated by the warden acting pursuant to prison rules); De Meerleer v. Michigan, 329 U.S. 663 (1947) (17 year old defendant was deprived of constitutional right to a fair hearing where he was arraigned, convicted on his guilty plea without benefit of counsel or apprisal of consequences of plea, and sentenced to life imprisonment on same day information was filed); Johnson v. Zerbst, 304 U.S. 458 (1938) (petitioner convicted and sentenced without the assistance of counsel).

52. 372 U.S. 391 (1963).

53. *Id.* at 438. *Noia* also overruled the holding of Darr v. Burford, 339 U.S. 200 (1950), that a state prisoner must ordinarily seek certiorari in the Supreme Court prior to applying for federal habeas corpus review. *Noia*, 372 U.S. at 435-38.

54. The other two defendants had appealed, unsuccessfully, but were released after subsequent legal proceedings found that their confessions had been coerced in violation of the fourteenth amendment. 372 U.S. at 394-95.

55. *Id.* at 394-96.

56. *Id.* at 397.

eral courts have power to grant habeas corpus relief despite a petitioner's failure to exhaust a state court remedy no longer available when his habeas corpus petition is filed.[57] The Court construed section 2254 as limited in its application to failure to exhaust state remedies "still open" to the petitioner at the time he seeks federal habeas corpus relief.[58] Since Noia could no longer appeal his conviction, he was not precluded from federal habeas corpus review on exhaustion grounds.[59]

The Court then addressed whether Noia should be barred from federal habeas corpus review because of his failure to comply with state appellate procedures. Recognizing the question's significance for the principles of comity and federalism,[60] the Court reasoned that the strong interest of the states in the application of their procedural rules must be balanced against the ideal of a fair procedure.[61] Moreover, deference to state procedural rules is not predicated on a lack of *power* to entertain a habeas application when a defendant commits a procedural default in the state courts.[62] The Court determined, therefore, that the "exigencies of federalism" would be adequately served by permitting the federal district judge to deny relief to a petitioner who "deliberately sought to subvert or evade the orderly adjudication of his federal defenses in the state courts."[63] The Court adopted the "knowing and intelligent" waiver standard of *Johnson v. Zerbst*[64] to govern the determination of whether the state petitioner had deliberately

57. *Id.* at 399, 432. The Court interpreted the nature of the writ at common law, the language and purpose of the Act of 1867, and precedent of the Court as being inconsistent with any limitation of the federal court's power to order a petitioner discharged because of a procedural forfeiture under state law. Indeed, "federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy." *Id.* at 426-27.

58. *Id.* at 399, 435. The Court did not disturb the application of the exhaustion doctrine in cases of presently available state remedies. *Id.* at 435 n.43 (citing Brown v. Allen, 344 U.S. 443, 447-50 (1953)).

59. 372 U.S. at 399.

60. *Id. See generally* Reitz, *supra* note 44; Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Hart, *supra* note 44, at 101-21 (discussing the issue of under what circumstances a state procedural default should bar federal habeas corpus review).

61. 372 U.S. at 431 (quoting Shaeffer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 5 (1956)).

62. 372 U.S. at 425 (emphasis in original). The Court has treated the problem of procedural default as "an aspect of the rule requiring exhaustion of state remedies, which is not a rule distributing power as between the state and federal courts." *Id.* By relying on a flexible discretionary rule that recognizes exceptional circumstances, the Court has refused "to concede jurisdictional significance to an abortive state proceeding." *Id.* at 426.

63. *Id.* at 433, 438.

64. 304 U.S. 458 (1938). *Johnson* furnished the classic definition of waiver—"an inten-

bypassed the state procedural requirement, thus barring resort to the federal courts for habeas corpus review. Applying that standard in Noia's case, the Court found that his failure to appeal could not be deemed a deliberate bypass of the state court system to justify withholding federal habeas corpus relief.[65]

Townsend v. Sain,[66] the second case of the 1963 trilogy, clarified the considerations that should govern the grant or denial of evidentiary hearings in federal habeas corpus proceedings. The Supreme Court observed that, in contrast to appellate review, the federal court's function on habeas is "to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations."[67] The Court emphasized that because detention obtained in violation of the Constitution is "intolerable," full plenary review including "the opportunity to be heard to argue, and present evidence, must never be totally foreclosed."[68] Thus, the federal habeas court has de novo power when the petition presents facts which, if proved, warrant relief.[69] Recognizing that *Brown* provided insufficient guidelines to govern federal habeas corpus review, the Court set out specific criteria under which an evidentiary hearing is mandatory.[70]

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tional relinquishment or abandonment of a known right or privilege". *Id.* at 464. *See Noia*, 372 U.S. at 439.

The Court in *Noia* reasoned that no other rule was required, because a man convicted of a crime has sufficient inducement to do his best to keep his state remedies open and not stake his interest solely on the outcome of a federal habeas proceeding which may be less advantageous to him than a state court proceeding. 372 U.S. at 433.

65. 372 U.S. at 439. Although Noia chose not to appeal, that choice was deemed not to be "a merely tactical or strategic litigation step," or a deliberate circumvention of state procedures, because he was faced with "the grisly choice" of life imprisonment versus the uncertain result of an appeal that could have led to retrial and imposition of the death sentence. *Id.*

66. 372 U.S. 293 (1963).

67. *Id.* at 311-12.

68. *Id.* at 312.

69. *Id.* at 312-13.

70. *Id.* The Court held that a federal court must grant an evidentiary hearing to a habeas applicant, if:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313.

In a 1966 amendment to § 2254, Congress codified these principles to provide a qualified res judicata effect applicable to review by lower federal courts of habeas petitions filed by

Finally, in *Sanders v. United States*,[71] the Supreme Court considered the standards by which a federal court should determine whether to grant a hearing on a second or successive motion of a federal prisoner under section 2255.[72] The Court specified that when an application is shown conclusively to be without merit, the application should be denied without a hearing.[73] Regardless of prior applications, however, "if a different ground is presented by a new application" or "if the same ground was earlier presented but not adjudicated on the merits," a full hearing must be afforded unless there has been "an abuse of the writ or motion remedy."[74] The criteria established in *Noia* and *Townsend* were to govern determinations of abuse.[75]

Noia, Townsend and *Sanders* established liberal standards for the exercise of federal habeas corpus review. Thereafter, *Kaufman v. United*

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state prisoners. The 1966 amendment provided that a state court factual determination, evidenced by "reliable and adequate written indicia, shall be presumed to be correct, unless" the state proceeding is shown to have been deficient in one of eight respects, five of which substantially resemble *Townsend*'s six criteria. Pub. L. No. 89-711, § 2, 80 Stat. 1105 (codified as amended at 28 U.S.C. § 2254(d) (1976)). For an in depth examination of the *Townsend* criteria and the 1966 codification, see *Developments, supra* note 1, at 1121-48.

71. 373 U.S. 1 (1963).

72. Section 2255 requires: "a prompt hearing" on the motion "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief . . . ." 28 U.S.C. § 2255 (1976). The statute also provides, however, that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." *Id.*

The federal court may, but is not required to, give controlling weight to the denial of a prior application only if: "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." 373 U.S. at 15. Congress codified these principles in 1966, Pub. L. No. 89-711, § 1, 80 Stat. 1104 (codified as amended at 28 U.S.C. § 2244 (1976)). *See* S. REP. NO. 1797, 89th Cong., 2d Sess. 2, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3663-64. For a detailed discussion of *Sanders* and the 1966 "codification," see *Developments, supra* note 1, at 1149-54.

73. 373 U.S. at 15.

74. *Id.* at 17.

75. We need not pause over the test governing whether a second or successive application may be deemed an abuse by the prisoner of the writ or motion remedy. The Court's recent opinions in *Fay v. Noia* . . . and *Townsend v. Sain* . . . deal at length with the circumstances under which a prisoner may be foreclosed from federal collateral relief. The principles developed in those decisions govern equally here.

Id. at 18.

In 1976, Congress amended Rule 9 of the rules governing § 2254 cases to permit the judge to dismiss a second or successive petition if the failure of the petitioner to assert new grounds in a prior petition constituted an abuse of the writ. Pub. L. No. 94-426, § 2(8), 90 Stat. 1335 (codified as amended at 28 U.S.C. § 2254, Rule 9(b) (1976)).

States[76] recognized that all constitutional claims are cognizable in a motion for collateral relief brought by federal prisoners under section 2255. The Court refuted arguments that expansion of collateral review under section 2255 undercuts the finality of criminal judgments and is undeserved because federal prisoners have already appeared before a federal forum. The Court stated that the prisoner's right is "not merely to a federal forum" but to the "full and fair consideration of constitutional claims."[77] To hold that federal prisoners are less entitled to such consideration than state prisoners would reflect "an anomalous and erroneous view of federal-state relations."[78]

C. The Emergence of "Cause" and "Prejudice" as the Standard for Excusing Procedural Defaults

The Supreme Court's decision in *Davis v. United States*[79] prefaced a new era in the forfeiture of habeas corpus review due to procedural defaults in the state courts. In *Davis*, the Court considered whether a federal prisoner could challenge the composition of the grand jury in a section 2255 motion. Federal Rule of Criminal Procedure 12(b)(2) requires a defendant to raise "defenses and objections based on defects in the indictment" by motion before trial.[80] The defendant is otherwise deemed to have waived the challenge except for "cause shown."[81] Although Davis did not make a Rule 12 motion, he sought to set aside his conviction under section 2255, alleging unconstitutional discrimination in the grand jury composition.[82]

In denying section 2255 relief, the Court asserted that Congress could not have intended to negate the purpose of Rule 12 by permitting a more

76. 394 U.S. 217 (1969). *Kaufman* allowed collateral review for search and seizure claims of federal prisoners and is generally cited as the federal counterpart of *Brown v. Allen*. *See, e.g., Developments, supra* note 1, at 1066. The *Kaufman* Court assumed that state prisoners had the right to collateral review of search and seizure claims, stating: "Our decisions leave no doubt that the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial." 394 U.S. at 225. Seven years later, the Court rejected this dictum. Stone v. Powell, 428 U.S. 465, 481 n.16 (1976).

77. 394 U.S. at 228.

78. *Id.* The Court observed that in a proper case, the federal court may deny relief to one who "deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal." *Id.* at 227 n.8.

79. 411 U.S. 233 (1973).

80. FED. R. CRIM. P. 12(b)(2) (as amended Apr. 22, 1974).

81. *Id.* The "cause shown" provision for relief from waiver is now set out in subdivision (f) of the Rule, as provided by a 1974 amendment. FED. R. CRIM. P. 12(f) (as amended Apr. 22, 1974).

82. 411 U.S. at 234-36.

liberal requirement of waiver in federal habeas proceedings.[83] Rather, congressional adoption of Rule 12(b)(2) provided, in effect, that once a claim is waived under Rule 12, it may not be resurrected in federal habeas proceedings without a showing of cause as required by the Rule.[84] The Court also endorsed the district court's requirement that the petitioner demonstrate actual prejudice.[85]

Francis v. Henderson[86] extended the *Davis* rule to untimely challenges by state prisoners to an allegedly unconstitutional grand jury composition. The petitioner in *Francis* failed to object before trial to the composition of the grand jury that indicted him, as required by Louisiana state law to prevent waiver of the objection on appeal.[87] Although Francis did not appeal his conviction, he sought collateral relief on the ground that blacks had been unconstitutionally excluded from the grand jury. In reversing the district court's grant of the writ, the United States Court of Appeals for the Fifth Circuit held that under *Davis* the state waiver provision must be given effect unless there is a showing of actual prejudice.[88]

The Supreme Court affirmed, finding that considerations of comity and federalism require a federal court to give effect to the state interests protected by timely procedures.[89] The Court asserted that the vindication and protection of federal rights and interests, while important, must not "unduly interfere with the legitimate activities of the States."[90] Because differential treatment for state and federal prisoners is undesirable,[91] the Court held that *Davis* requires a showing of cause for the state prisoner's failure to challenge the composition of the grand jury before trial. The Court

83. *Id.* at 242. The Court refused to apply the *Noia* deliberate bypass waiver standard, as it indicated in *Kaufman* that it might, *see supra* note 78, to a federal prisoner's challenge to the composition of the grand jury which indicted him, and to which he had not objected at trial or on appeal. 411 U.S. at 242. The Court distinguished *Kaufman* as having been decided upon the statutory basis of § 2255, and not on the basis of the express waiver provision of Rule 12(b)(2). *Id.* at 240.

84. *Id.* at 242. The Court relied upon its earlier decision in Shotwell Mfg. Co. v. United States, 371 U.S. 341, 362-63 (1963), in which it held that a claim of unconstitutional grand jury composition raised four years after conviction, but while the appeal was still pending, was governed by Rule 12(b)(2), and was therefore waived for failure to raise the issue by pretrial motion without a showing of cause for the failure. 411 U.S. at 238-41.

85. *Id.* at 245.

86. 425 U.S. 536 (1976).

87. *Id.* at 537.

88. *Id.*

89. *Id.* at 538-39. The Court did not question the federal court's *power* to entertain a writ of habeas corpus. *Id.*

90. *Id.* at 541-42 (quoting Younger v. Harris, 401 U.S. 37, 44 (1971)).

91. *Id. See Kaufman*, 394 U.S. at 228.

specifically required a showing of actual prejudice.[92] Although *Francis* seemed to overrule or sharply limit *Fay v. Noia*,[93] at least with reference to failures to object to grand jury composition, the *Noia* deliberate bypass standard was not discussed by the *Francis* Court.

Wainwright v. Sykes[94] resolved whatever doubts lingered after *Davis* and *Francis* concerning the continued application of *Noia*'s knowing and deliberate bypass exception. The Supreme Court rejected *Noia*'s deliberate bypass standard in favor of the more stringent cause and actual prejudice standard for excusing a state procedural default.

Sykes sought habeas corpus relief under section 2254 claiming that certain statements admitted at his trial were inadmissible because he did not understand his *Miranda* warnings.[95] Florida's contemporaneous objection rule required that a defendant's confession be challenged at trial.[96] Although Sykes had not raised the *Miranda* claim prior to his petition for habeas review, the federal district court granted habeas relief, finding that only exceptional circumstances of "strategic decisions at trial" can bar federal constitutional claims in a habeas action.[97] The United States Court of Appeals for the Fifth Circuit affirmed, concluding that Sykes' failure to object was not a trial tactic and, therefore, not a deliberate bypass.[98]

The Supreme Court reversed and held that Sykes' failure to comply with the state's contemporaneous objection rule was governed not by *Noia*, but by the *Davis* and *Francis* requirement of cause and actual prejudice.[99] Although the Court did not expressly overrule *Noia*, it rejected *Noia*'s sweeping language that applied the deliberate bypass standard not only to the waiver of the right to appeal, but also to failures to raise individual substantive objections in the state trial court.[100]

The *Sykes* Court rejected the deliberate bypass waiver standard for sev-

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92. 425 U.S. at 542. The Court concluded that the *Davis* ruling applied to a habeas corpus proceeding seeking to overturn a state-court conviction on the grounds of an allegedly unconstitutional grand jury indictment. *Id.* "[T]he interest in finality is the same with regard to both federal and state prisoners." *Id.* (quoting *Kaufman*, 394 U.S. at 228).

93. 372 U.S. 391. *See supra* notes 52-65 and accompanying text.

94. 433 U.S. 72 (1977).

95. *Id.* at 75.

96. *Id.* at 76.

97. *Id.* (referring to the unpublished order of Jan. 23, 1975 of the District Court for the Middle District of Florida, discussed in Wainwright v. Sykes, 528 F.2d 522, 523-24 (5th Cir. 1976)).

98. 528 F.2d at 527. The Fifth Circuit distinguished *Davis* on the basis that no prejudice was shown from the failure to object, whereas prejudice is "inherent" where the admissibility of an incriminating statement is concerned. *Id.* at 526-27.

99. 433 U.S. at 87.

100. *Id.* at 87-88.

eral reasons. First, the Court found that state contemporaneous objection rules deserve greater respect than was afforded by *Noia*, because they are employed by a judicial branch of coordinate jurisdiction within the federal system, and because of the many interests such rules serve in their own right.[101] These interests include the enhancement of finality of criminal judgments, increasing judicial efficiency, and promoting the perception of the trial as the main event.[102] Second, *Noia* served to undercut these interests by encouraging "sandbagging" on the part of defense attorneys "who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off."[103]

The Court emphasized that the cause and actual prejudice requirement would apply only when the state court had not reached the merits of the federal claim because of the petitioner's procedural default.[104] The cause and prejudice standard would not, however, preclude federal habeas review if a "miscarriage of justice" would result.[105]

Applying the cause and actual prejudice requirement to the facts of this case, the Court concluded that Sykes had forfeited his right to federal habeas review, having demonstrated neither cause for his procedural default, nor actual prejudice. Sykes failed to demonstrate cause for his failure to comply with state procedure, the Court observed, because he had "advanced no explanation whatever for his failure to object at trial."[106] Actual prejudice was absent because the substantial evidence of guilt presented at Sykes' trial negated any prejudice that resulted from the admission of the incriminating statements.[107] The Court left open "for reso-

101. *Id.* at 88. In Ulster County v. Allen, 442 U.S. 140 (1979), the Court clarified a limitation on the extent to which *Sykes* requires federal courts to observe state procedural requirements as a bar to federal habeas corpus review. The Court held that since the purpose behind *Sykes* is "to accord appropriate respect to the sovereignty of the States in our federal system," when the state does not invoke its own procedures, the federal court "implies no disrespect" in refusing to impose the state procedural default to bar habeas corpus review. *Id.* at 155.

102. 433 U.S. at 88-90. Contemporaneous objection at trial ensures that the constitutional claim is preserved on the record when witnesses' memories are freshest, or is resolved by the judge who is able to observe the witnesses' demeanor. A contemporaneous objection may also lead to the exclusion of challenged evidence and ensure that the trial is as error free as possible. *Id.*

103. *Id.* at 89.

104. *Id.* at 87. Thus, the Court preserved the rule of Brown v. Allen, 344 U.S. 443 (1953), permitting the federal habeas court to make an independent determination of the merits of the state petitioner's federal claim 433 U.S. at 87.

105. 433 U.S. at 91.

106. *Id.*

107. *Id.*

lution in future decisions the precise definition of the cause and prejudice standard," noting only that it is narrower than the dicta of *Noia*.[108]

II. IMPLEMENTING *SYKES* AND FEDERAL HABEAS RESTRAINT

The Supreme Court's current position on federal habeas corpus is unequivocal: liberal availability of the federal habeas corpus remedy must yield to considerations of comity, federalism, and finality of judgments. Accordingly, total exhaustion of state remedies is required under the rule enunciated in *Rose v. Lundy*.[109] The *Sykes* cause and actual prejudice standard for excusing procedural defaults is to apply to cases in which the constitutional error may have affected the truthfinding function at trial, as determined in *Engle v. Isaac*.[110] Finally, after *United States v. Frady*,[111] the cause and actual prejudice requirement governs petitions of federal prisoners under section 2255.

A. Rose v. Lundy: Total Exhaustion is the Rule

The Supreme Court in *Lundy* adopted a per se rule requiring federal district courts to dismiss all habeas corpus petitions containing claims that have not been exhausted in the state courts.[112] Lundy was convicted by a jury of rape and a crime against nature. After an unsuccessful appeal, the state supreme court denied review. Lundy's petition for state collateral relief was also denied. Subsequently, Lundy filed a petition in the federal district court for a writ of habeas corpus under section 2254, alleging both exhausted and unexhausted claims.[113] The Supreme Court noted that al-

108. *Id.* at 87.

109. 102 S. Ct. 1198 (1982) (Justice Blackmun filed a concurring opinion. Justice Brennan filed an opinion concurring in part and dissenting in part, in which Justice Marshall joined; Justice White filed an opinion concurring in part and dissenting in part. Justice Stevens filed a dissenting opinion).

110. 102 S. Ct. 1558 (1982) (Justice Blackmun concurred in the result. Justice Stevens filed an opinion concurring in part and dissenting in part; Justice Brennan filed a dissenting opinion in which Justice Marshall joined).

111. 102 S. Ct. 1584 (1982) (Chief Justice Burger and Justice Marshall took no part in consideration or decision of this case; Justice Stevens filed a concurring opinion. Justice Blackmun filed a concurring opinion; Justice Brennan filed a dissenting opinion).

112. 102 S. Ct. at 1199.

113. *Id.* Lundy alleged four grounds for relief:

> (1) that he had been denied the right to confrontation because the trial court limited the defense counsel's questioning of the victim; (2) that he had been denied the right to a fair trial because the prosecuting attorney stated that the respondent had a violent character; (3) that he had been denied the right to a fair trial because the prosecutor improperly remarked in his closing argument that the State's evidence was uncontradicted; and (4) that the trial judge improperly instructed the jury that every witness is presumed to swear the truth.

though the district court had determined that it could not consider the unexhausted claims "in the constitutional framework," the court referred to those claims collaterally "in assessing the atmosphere" of the trial.[114] The district court also entertained several allegations of prosecutorial misconduct that had neither been challenged in the state courts nor raised in Lundy's habeas petition. The district court concluded that Lundy had not received a fair trial[115] and the United States Court of Appeals for the Sixth Circuit affirmed.[116]

In a plurality opinion, the Supreme Court reversed, holding that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims."[117] The Court reviewed prior Supreme Court cases involving the exhaustion doctrine[118] and noted that none had applied the

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Lundy had not exhausted his state remedies for claims three and four. *Id.*

114. *Id.* at 1199-1200. The Tennessee Criminal Court of Appeals had ruled specifically on grounds one and two, holding that although the trial court erred in restricting cross-examination of the victim and the prosecuting attorney improperly alluded to the respondent's violent nature, the respondent was not prejudiced by these errors. Lundy v. State, 521 S.W.2d 591, 596 (Tenn. Crim. App. 1974).

115. 102 S. Ct. at 1200.

116. Lundy v. Rose, 624 F.2d 1100 (6th Cir. 1980) (decision without published opinion).

117. 102 S. Ct. at 1205. The Fifth and Ninth Circuits had adopted a "total exhaustion" rule requiring that mixed petitions presenting unexhausted and exhausted claims must be dismissed for failure to exhaust. *See, e.g.*, Galtieri v. Wainwright, 582 F.2d 348, 355-60 (5th Cir. 1978) (en banc); Gonzales v. Stone, 546 F.2d 807, 808-10 (9th Cir. 1976). A majority of circuits, however, permitted the district courts to review the exhausted claims in a mixed petition. *See, e.g.*, Katz v. King, 627 F.2d 568, 574 (1st Cir. 1980); United States *ex rel.* Tratino v. Hatrack, 563 F.2d 86, 91-98 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978); Cameron v. Fastoff, 543 F.2d 971, 976 (2d Cir. 1976); Meeks v. Jago, 548 F.2d 134, 137 (6th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977); Tyler v. Swenson, 483 F.2d 611, 614 (8th Cir. 1973); Brown v. Wisconsin State Dep't of Pub. Welfare, 457 F.2d 257, 259 (7th Cir.), *cert. denied*, 409 U.S. 862 (1972); Whiteley v. Meacham, 416 F.2d 36, 39 (10th Cir. 1969), *rev'd on other grounds*, 401 U.S. 560 (1971); Hewett v. North Carolina, 415 F.2d 1316, 1320 (4th Cir. 1969).

118. In developing its policy arguments, the Court relied upon *Ex parte* Royall, 117 U.S. 241, 251 (1886) (holding that as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act); *Ex parte* Hawk, 321 U.S. 114, 117 (1944) (reiterating that comity was the basis for the exhaustion doctrine); and Darr v. Burford, 339 U.S. 200, 204 (1950). *See also supra* note 47. The Court in *Lundy* noted that the exhaustion requirement "serves to minimize friction between our federal and state systems of justice." 102 S. Ct. at 1203 (quoting Duckworth v. Serrano, 102 S. Ct. 18, 19 (1981)). In *Duckworth*, the petitioner alleged ineffective assistance of counsel for the first time in the court of appeals, which reversed the district court's dismissal of his habeas corpus petition because his attorney's representation of a prosecution witness constituted a per se violation of the sixth amendment guarantee of effective representation. The Court declined to create an exception to the exhaustion requirement for clear constitutional violations, noting that "obvious constitutional errors, no less than obscure transgressions," are subject to the [exhaustion] requirement of § 2254(b)." *Duckworth*, 102 S. Ct. at 19.

doctrine to habeas petitions presenting both exhausted and unexhausted claims.[119] The Court also found that the legislative history of section 2254 contained no reference to the problem of mixed petitions.[120] Consequently, the Court examined the underlying policy considerations involved, relying on precedent and notions of federalism.[121] Noting that state and federal courts are equally bound to uphold the Constitution,[122] the Court recognized the well-established policy that state courts must be given the first opportunity to consider the constitutional claims of state prisoners.[123] The adoption of a total exhaustion requirement would not only ensure that state prisoners initially seek relief in the state courts, but would also enhance the state courts' familiarity with constitutional issues.[124]

The plurality asserted that the total exhaustion requirement will not impair prompt federal relief of the state prisoner's claims.[125] If the petitioner elects not to return to state court to exhaust all his claims, he can choose to amend his petition by deleting the unexhausted claims.[126] If, however, the petitioner elects to delete the unexhausted claims, he could be barred from federal habeas review of those claims in a subsequent petition.[127] Under

119. 102 S. Ct. at 1202.

120. Under § 2254 a remedy is not exhausted if a state procedure exists to raise "the question presented." *See* 28 U.S.C. § 2254(c); *supra* note 47. The Court found "this phrase to be too ambiguous to sustain the conclusion that Congress intended to either permit or prohibit review of mixed petitions." 102 S. Ct. at 1202.

121. *Id.* at 1203 (citing Braden v. 30th Judicial Cir. Ct. of Ky., 410 U.S. 484, 490-91 (1973)). *See also Developments, supra* note 1, at 1094.

122. 102 S. Ct. at 1203 (quoting *Ex parte* Royall, 117 U.S. at 251). *See supra* notes 47 & 118.

123. 102 S. Ct. at 1203 (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)) (*see supra* note 47); Duckworth v. Serrano, 102 S. Ct. 18 (1981) (per curiam) (*see supra* note 118). *See also* Picard v. Connor, 404 U.S. 270 (1971). In *Picard*, the Court upheld the requirement that a state prisoner must exhaust available state remedies, adding that, for the exhaustion requirement to be satisfied, "the *substance* of a federal habeas corpus claim must first be presented to the state courts." *Id.* at 278 (emphasis added).

124. 102 S. Ct. at 1203. In addition, the Court reasoned that total exhaustion will provide a more complete factual record for the federal courts to review, and will relieve the district court of the difficult task of deciding when exhausted and unexhausted claims are interrelated. 102 S. Ct. at 1204. *Cf.* 28 U.S.C. § 2254(d) (1976) (requiring a federal court reviewing a habeas petition to presume as correct factual findings made by a state court).

125. 102 S. Ct. at 1204. *See* Braden v. 30th Judicial Cir. Ct. of Ky., 410 U.S. at 490 (recognizing that the exhaustion doctrine is "a judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in the cases of illegal restraint or confinement.' ") (citation omitted).

126. 102 S. Ct. at 1204.

127. *Id.*

the plurality's interpretation of *Sanders*[128] and Rule 9(b) of the Rules Governing Section 2254 Proceedings,[129] the plurality suggested that a federal district court may dismiss the subsequent petition of a state prisoner who proceeds only with his exhausted claims and "deliberately" sets aside his unexhausted claims.[130]

Justice Blackmun concurred in the judgment, but disagreed with the plurality's adoption of a total exhaustion rule.[131] Instead, he would have adopted the approach of the majority of circuits, permitting review of the exhausted claims of a mixed petition.[132] Without disputing the value of comity, Justice Blackmun argued that a "total exhaustion" rule could be "read into" section 2254(b) and (c) "only by sheer force."[133] Allowing fed-

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128. The plurality referred to the following passage from *Sanders*:

> [I]f a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in *Wong Doo*, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

102 S. Ct. at 1205 (quoting Sanders v. United States, 373 U.S. 1, 18 (1963)). In Wong Doo v. United States, 265 U.S. 239 (1924), the petitioner sought release from custody of a deportation order. He brought two habeas petitions, each containing the same ground for relief. The Court held that, because the petitioner "had full opportunity to offer proof" in the first hearing, the lower court should not consider the second petition. 265 U.S. at 241. The Court in *Lundy* noted that *Wong Doo* did not control "because the respondent could not have litigated his unexhausted claims in federal court," but that the case provides guidance for the situation where a prisoner deliberately elects not to exhaust his claims in state court. 102 S. Ct. at 1205 n.13.

129. *See supra* note 42. The plurality noted "that Rule 9(b) incorporates the judge-made principle governing the abuse of the writ set forth in *Sanders*." 102 S. Ct. at 1204-05 (citing Advisory Committee Note to Habeas Corpus Rule 9(b), 28 U.S.C. § 2254 (1976)).

130. 102 S. Ct. at 1205. Having decided the case on the grounds of exhaustion, the Court did not reach the petitioner's claims that the grounds offered by the respondent did not merit habeas relief. *Id.* at n.14.

131. 102 S. Ct. at 1205 (Blackmun, J., concurring in the judgment).

132. *Id. See supra* note 117.

133. 102 S. Ct. at 1205. Justice Blackmun noted that "neither the language nor the legislative history of [these provisions] mandates the dismissal" of mixed habeas petitions. *Id.* at 1206. He also disagreed that precedent dictated the Court's result. He asserted that, with regard to the respondent's arguments concerning the trial court's restriction upon cross-examination of the victim and some of the prosecutor's allegedly improper comments, the respondent had complied with *Picard*'s directive that the exhaustion requirement is satisfied upon a fair presentation of the federal claim to state courts. *Id.* (citing Picard v. Connor, 404 U.S. 270, 275 (1971)). *See supra* note 123. Furthermore, Justice Blackmun noted, the Court's precedents suggest that "the state courts need not inevitably be given every opportunity to safeguard a prisoner's constitutional rights and to provide him relief before a federal court may entertain his habeas petition." *Id.* at 1206 (footnote omitted).

eral district courts to rule on the exhausted claims of mixed petitions while dismissing the unexhausted claims is consistent, he asserted, with the Court's concern for comity.[134] The state courts would have occasion to rule first on every constitutional challenge, having ample opportunity to correct any constitutional error before federal habeas review.[135] He concluded that the decision to entertain the exhausted claims should be left to the discretion of the federal judge.[136]

Justice Blackmun also argued that the plurality's interest in "efficient administration of the federal courts" militates against a total exhaustion requirement.[137] The federal court must review the record initially to determine whether all claims have been exhausted and must do so again when the petitioner resubmits the previously unexhausted claims.[138] In many cases, the federal court could easily dispose of the case on the merits in the initial review, and in other cases, the court might not realize that one or more of the claims is unexhausted until substantial work is done.[139]

Finally, Justice Blackmun expressed the fear that state prisoners might not be treated uniformly under the total exhaustion requirement.[140] If the petitioner is unaware that he may amend his petition, the opportunity to amend may depend upon a court's willingness to inform him of that right.[141] He may be required to refile the petition, thus incurring substan-

134. *Id.* at 1206-07. Justice Blackmun argued that in some respects the Court's ruling was "more destructive than solicitious of federal-state comity." A patently frivolous claim will be dismissed, only to be rejected on the merits by the state court after expenditure of its time and resources, receiving little, if any, consideration in the subsequent federal habeas proceeding. *Id.* at 1207.

135. *Id.* at 1205-07. Justice Blackmun contended that allowing district courts to rule on the exhausted claims of mixed petitions ensures that a § 2254 petition is accompanied by a complete factual record. *Id.* at 1207. He disagreed that the issue of interrelated claims must be resolved by a total exhaustion requirement, because federal courts have had no difficulty addressing the issue and have always been free to dismiss the entire petition if the exhausted claim depended upon resolution of the unexhausted claim. *Id.* (citing Miller v. Hall, 536 F.2d 967, 969 (1st Cir. 1976); United States *ex rel.* McBride v. Fay, 370 F.2d 547, 548 (2d Cir. 1966)).

136. 102 S. Ct. at 1207, 1210.

137. *Id.* at 1208.

138. *Id.*

139. *Id.* Justice Blackmun expressed the additional concern that delay occasioned by the total exhaustion requirement is likely to result in a stale record of the exhausted grounds, making resolution of the merits more difficult. *Id.* (footnote omitted) (citing United States *ex rel.* Irving v. Casscles, 448 F.2d 741, 742 (2d Cir. 1971), *cert. denied*, 410 U.S. 925 (1973); United States *ex rel.* DeFlumer v. Mancusi, 380 F.2d 1018, 1019 (2d Cir. 1967), which resulted in a delay of years before a federal court judgment was obtained on the merits of the exhausted claims following dismissal of the mixed habeas petitions).

140. 102 S. Ct. at 1209-10.

141. *Id.* at 1210.

tial delay.[142]

Justices Brennan and Marshall joined with the plurality in all but the view regarding forfeiture of the petitioner's unexhausted claims.[143] To hold that previously unexhausted claims may be dismissed as an "abuse" when resubmitted in a subsequent petition misreads *Sanders*, they asserted, which requires a *knowing* and *deliberate* choice to forego inclusion of all claims in a first petition "in order to get more than 'one bite at the apple.' "[144] Justices Brennan and Marshall contended that there can be no abuse of the writ when petitioner's abandonment of his unexhausted claim is not deliberate in the *Sanders* sense because the federal court refused to entertain a mixed petition.[145] Similarly, the petitioner does not "abandon" his unexhausted claim when he is not permitted to proceed.[146]

Justice Stevens, the sole dissenter, criticized the plurality's "inflexible, mechanical rule" as an arbitrary denial of the opportunity of district judges to administer their calendars effectively.[147] Calling the writ of habeas corpus "a fundamental guarantee of liberty,"[148] Justice Stevens argued that the availability of habeas corpus relief should not depend upon the procedural history underlying the prisoner's claim, but upon the character of the alleged constitutional violation.[149] Rather, those errors which make a trial fundamentally unfair demand immediate relief despite the

142. *Id.*

143. *Id.* at 1210-11 (Brennan, J., concurring in part and dissenting in part).

144. *Id.* at 1212. Justice Brennan noted that in promulgating Rule 9(b), Congress rejected the proposed words, "not excusable," in favor of, "constituted an abuse of the writ," because the former language *"gave a judge too broad a discretion to dismiss a second or sucessive petition."* *Id.* at 1211 (quoting H.R. REP. No. 1471, 94th Cong., 2d Sess. 5, 8, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2482, 2485). The House Judiciary Committee believed that the change to the "abuse" language "would bring Rule 9(b) into conformity with existing law." 102 S. Ct. at 1211 (quoting H.R. REP. No. 1471, *supra*, at 5, U.S. CODE CONG. & AD. NEWS, *supra*, at 2482).

145. *Id.* at 1213.

146. *Id.*

147. 102 S. Ct. at 1213 (Stevens, J., dissenting).

148. *Id.* at 1218.

149. *Id.* at 1215-16. In Justice Stevens' opinion, there are four types of claims of constitutional error:

> [1.] [A] claim that attaches a constitutional label to a set of facts that does not disclose a violation of any constitutional right. . . . [2.] constitutional violations that are not of sufficient import in a particular case to justify reversal even on direct appeal, when the evidence is still fresh and a fair retrial could be promptly conducted. . . [3.] errors that are important enough to require reversal on direct appeal but do not reveal the kind of fundamental unfairness to the accused that will support a collateral attack on a final judgment. . . . [and] [4.] those errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained.

Id. at 1216.

procedural history.[150] In this case, for example, if the prisoner were innocent and the trial was fundamentally unfair, postponing relief until another round of review in the state and federal judicial systems is completed would require the aggrieved prisoner to remain in jail because of a pleading error.[151] Justice Stevens would allow district judges to exercise their discretion in determining whether the existence of an unexhausted claim makes it inappropriate to consider the merits of a properly pleaded exhausted claim.[152]

B. Engle v. Isaac: No "Cause" to Complain

In *Engle v. Isaac*,[153] the Supreme Court extended the *Sykes* cause and actual prejudice standard for excusing the procedural defaults of state petitioners to claims of error that may have affected the determination of guilt at trial. Isaac was convicted of aggravated assault under an Ohio statute[154] that had been interpreted by the courts to require the defendant to carry the burden of proving self-defense.[155] The trial court instructed the jury that this burden must be met by a preponderence of the evidence. Isaac was convicted on the basis of that interpretation, but one year later the Ohio Supreme Court interpreted the statute to place only the burden of production, not the burden of persuasion, on the accused.[156]

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150. *Id.* at 1217. Justice Stevens cited several "classic grounds" of error that would support issuance of the writ and illustrate the fourth category: "that the proceeding was dominated by mob violence," *id.* (citing Moore v. Dempsey, 261 U.S. 86 (1923)); "that the prosecutor knowingly made use of perjured testimony,") 102 S. Ct. at 1217 (citing Mooney v. Holohan, 294 U.S. 103 (1935)) or "that the conviction was based on a confession extorted from the defendant by brutal means," 102 S. Ct. at 1217 (citing Brown v. Mississippi, 297 U.S. 278 (1936) (direct appeal)). 102 S. Ct. at 1216-17.

151. 102 S. Ct. at 1217. In Justice Stevens' view, however, the respondent's exhausted claims fell within the first category of claimed constitutional error. *Id.* at 1216. *See supra* note 149.

152. 102 S. Ct. at 1217.

153. 102 S. Ct. 1558 (1982). *Isaac* was a consolidation of three cases also reviewing the claims of respondents Hughes and Bell. For purposes of clarity, this Comment refers only to claims and proceedings concerning the respondent Isaac.

154. "Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused." OHIO REV. CODE ANN. § 2901.05(A) (1975). The jury acquitted Isaac of felonious assault, but convicted him of the lesser included offense of aggravated assault. 102 S. Ct. at 1564 (citing State v. Isaac, No. 77-412 (Ohio, July 20, 1977)).

155. The Supreme Court noted that the Ohio courts had required for over a century that criminal defendants carry the burden of proving self-defense by a preponderance of the evidence. 102 S. Ct. at 1562. Most Ohio courts assumed that § 2901.05(A) effected no change in Ohio's traditional burden-of-proof rules. *See* 102 S. Ct. at 1563 n.2 and cases cited therein.

156. State v. Robinson, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976) (holding that when self-

On appeal, Isaac relied upon the Ohio Supreme Court's interpretation to challenge the burden of proof instructions given at his trial. The Ohio Court of Appeals denied Isaac's appeal because he had failed to object to the jury instructions during trial as required by Ohio Rule of Criminal Procedure 30, a default that waived Isaac's claim.[157] The Supreme Court of Ohio dismissed Isaac's appeal for lack of a substantial constitutional question.[158]

In his petition, Isaac alleged that the Ohio Supreme Court had failed to give him relief despite its own pronouncement that the new construction of Ohio's affirmative defense statute would apply retroactively.[159] Isaac also claimed that the ruling of the Ohio Supreme Court was "contrary to the Supreme Court of the United States in regard to proving self-defense."[160] The district court determined that Isaac had waived any constitutional claims by failing to present them to the state trial court. Because he failed to show either cause for or actual prejudice from the waiver, federal habeas review was precluded.[161] In an en banc decision, the United States Court of Appeals for the Sixth Circuit ruled that *Wainwright v. Sykes* did not preclude consideration of Isaac's constitutional claims.[162] The court noted that at the time of Isaac's trial, defendants were consistently required to prove affirmative defenses by a preponderance of the evidence. Thus, the futility of objecting to this established practice constituted adequate cause for Isaac's waiver. Secondly, prejudice was " 'clear' since the burden

defense is raised and some evidence produced, the prosecutor must disprove self-defense beyond a reasonable doubt) (syllabus by the court).

157. 102 S. Ct. at 1565. At the time of Isaac's trial, OHIO R. CRIM. P. 30 provided that

> A party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

OHIO R. CRIM. P. 30. This Rule closely parallels FED. R. CRIM. P. 30. *See* 102 S. Ct. at 1565 n.15.

158. *Id.* (citing State v. Isaac, No. 77-412 (Ohio, July 20, 1977)). On the same day, the Ohio Supreme Court ruled that every criminal trial held on or after Jan. 1, 1974 was to be conducted in accordance with Ohio's affirmative self-defense statute. *Id.* (citing State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354, 1355 (1977)). This decision was not extended to a defendant who had not complied with OHIO R. CRIM. P. 30. 102 S. Ct. at 1565 (citing *Humphries*, 51 Ohio St. 2d at 102-03, 364 N.E.2d at 1359). Also on the same day, the Ohio Supreme Court decided State v. Williams, in which the court rejected a constitutional challenge to Ohio's traditional self-defense instruction because the defendant had failed to object to the instruction at trial. 102 S. Ct. at 1565 (citing State v. Williams, 51 Ohio St. 2d 112, 364 N.E.2d 1364 (1977), *vacated in part and remanded*, 438 U.S. 911 (1978)).

159. 102 S. Ct. at 1566 (citing Isaac v. Engle, No. C-2-78-278 (S.D. Ohio June 26, 1978)).

160. *Id.* *See supra* note 155 and accompanying text.

161. 102 S. Ct. at 1566 (citing Isaac v. Engle, No. C-2-78-278 (S.D. Ohio June 26, 1978)).

162. 102 S. Ct. at 1566 (citing Isaac v. Engle, 646 F.2d 1129, 1134 (6th Cir. 1980)).

of proof is a critical element of factfinding," and Isaac had emphasized the issue of self-defense.[163] A majority of the court also believed that the instructions given at Isaac's trial violated due process.[164]

The Supreme Court determined that the burden of proof argument stated a colorable constitutional claim.[165] Nevertheless, the claim had not been preserved before the state courts, as required by Ohio Rule of Criminal Procedure 30. The Court then determined that Issac could not litigate in a federal habeas corpus proceeding a constitutional claim that he forfeited before the state courts.[166]

At the outset, the Court noted that although the writ of habeas corpus is "a bulwark against convictions that violate 'fundamental fairness,' "[167] the writ also "entails significant costs."[168] Reviewing the considerations that supported its decision in *Sykes*,[169] the Court stated that collateral review

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163. *Id.*

164. *Id.*

165. 102 S. Ct. at 1568. The Court first dismissed respondent's argument that § 2901.05 "implicitly designated absence of self-defense as an element of the crimes charged against them" on the basis of their interpretation of *In re* Winship, 397 U.S. 358 (1970) (holding that juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law). 102 S. Ct. at 1567. *See also* Patterson v. New York, 432 U.S. 197 (1977) (holding that a New York law requiring a defendant in a prosecution for second-degree murder to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance to reduce the crime to manslaughter does not violate due process when the affirmative defense does not negate any facts of the crime which the state must prove beyond a reasonable doubt); Mullaney v. Wilbur, 421 U.S. 684 (1975) (holding that a Maine statute requiring a defendant charged with murder to prove that he acted in the heat of passion or sudden provocation does not comport with due process requirement that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged). The Court specified that these decisions "do not suggest that whenever a State requires the prosecution to prove a particular circumstance beyond a reasonable doubt, it has invariably defined that circumstance as an element of the crime." Furthermore, the state need not treat absence of an affirmative defense as an element of the crime for all purposes. 102 S. Ct. at 1567. The Court noted that several courts had applied *Mullaney* and *Patterson* to require, on constitutional grounds that the prosecution prove absence of self-defense. *Id.* (citing Tenon v. Ricketts, 642 F.2d 161 (5th Cir. 1981); Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028 (1981); Wynn v. Mahoney, 600 F.2d 448 (4th Cir.), *cert. denied*, 444 U.S. 950 (1979); Commonwealth v. Hilbert, 476 Pa. 288, 382 A.2d 724 (1978)).

166. 102 S. Ct. at 1570. The Court distinguished the problem of waiver from the question whether a state prisoner has exhausted state remedies. The exhaustion requirement applies only to those remedies available in the courts of the state. *Id.* at 1570 n.28 (citing 28 U.S.C. § 2254(b) (1976)). Isaac had exhausted state remedies because he had long ago completed his direct appeal. *Id.* In addition, Ohio's limited collateral review of convictions which was not available to Isaac because he did not litigate his claim before judgment or on direct appeal. *Id.* (citing OHIO REV. CODE ANN. § 2953.21(A) (1975)).

167. 102 S. Ct. at 1570 (quoting Wainwright v. Sykes, 433 U.S. 72, 97 (1977)).

168. 102 S. Ct. at 1571.

169. 433 U.S. 72 (1977). *See supra* notes 94-108 and accompanying text.

of a criminal conviction "extends the ordeal of trial for both society and the accused," thereby undermining finality of litigation.[170] "Liberal allowance of the writ . . . degrades the prominence of the trial itself," suggesting to trial participants that it is unnecessary to adhere to the legal and constitutional safeguards afforded the accused during trial.[171]

Furthermore, the Court reasoned, habeas corpus may "cost society the right to punish admitted offenders," because "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult," if not impossible.[172] The Court noted that the writ imposes "special costs" on our federal system, permitting federal intrusions upon the states' sovereign power to administer their criminal justice systems and their "good faith attempts to honor constitutional rights."[173] Finally, the Court asserted that when a prisoner is barred by procedural default from obtaining adjudication of his constitutional claim in the state courts, "the trial court has had no opportunity to correct the defect and avoid problematic retrials." Issuance of the writ in such cases undermines the states' procedural rules.[174] Finding that these "costs" are not lessened by the nature of the constitutional claim alleged, the Court refused to limit the *Sykes* cause and actual prejudice standard to cases in which the constitutional error has not affected the truthfinding function of the trial.[175]

In applying the cause and actual prejudice standard, the *Isaac* Court first ruled that "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial," even if the state court has previously rejected that constitutional argument.[176] The

170. 102 S. Ct. at 1571 (quoting Sanders v. United States, 373 U.S. at 24-25 (Harlan, J., dissenting). *See also* Bator, *supra* note 3, at 452; Friendly, *supra* note 3, at 146.

171. 102 S. Ct. at 1571. Society's resources are invested in the criminal trial, the Court noted, to determine the question of guilt or innocence at that time and place. *Id.* (quoting Wainwright v. Sykes, 433 U.S. at 90).

172. 102 S. Ct. at 1571.

173. *Id.* Noting that our "constitutional jurisprudence has recognized numerous new rights for criminal defendants" over the past two decades, the Court commented that state courts are "understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a § 2254 proceeding, new constitutional commands." *Id.* at 1571-72 n.33. Over an extended period of time, the Court continued, "federal intrusions may seriously undermine the morale of our state judges," and thereby "diminish the fervor of state judges to root out constitutional errors on their own." *Id.*

174. 102 S. Ct. at 1572. While counsel's default "may stem from simple ignorance or the pressures of trial . . . a defendant's counsel may deliberately choose to withhold a claim in order to 'sandbag'—to gamble on acquittal while saving a dispositive claim in case the gamble doesn't pay off." *Id.* at 1572 n.34 (citing Wainwright v. Sykes, 433 U.S. at 89-90).

175. 102 S. Ct. at 1572.

176. *Id.* at 1572-73 n.35 (citing Estelle v. Williams, 425 U.S. 501, 515 (1976)) ("the policy disfavoring inferred waivers of constitutional rights need not be carried to the length of allowing counsel for a defendant deliberately to forego objection to a curable trial defect,

claim must be presented to the state court to permit the court to decide if the contention is valid.[177] In addition, the Court asserted, allowing criminal defendants to deprive the state courts of the opportunity to consider constitutional arguments before they are presented to the federal court violates the principles of *Sykes*.[178]

The Court then addressed Isaac's argument that a criminal defendant may not waive due process claims unknown at the time of his trial.[179] The Court chose not to decide "whether the novelty of a constitutional claim ever establishes cause for a failure to object,"[180] declining to adopt a rule that would require trial counsel to "exercise extraordinary vision" or to object at every instance that "might mask a latent constitutional claim."[181] Furthermore, the Court noted, the original trial need not be rendered fundamentally unfair by subsequent discovery of a latent constitutional error.[182]

The Court did not have to determine whether novelty constituted cause in Isaac's case because his claims were cognizable at the time of his trial. Several defendants had relied upon *In re Winship*[183] to challenge the constitutionality of burden of proof rules.[184] Although recognizing that not every astute counsel would have relied upon *Winship*, the Court held that "[w]here the basis of the constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default."[185] Having had "the tools" to

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even though he is aware of the factual and legal basis for an objection, simply because he thought objection would be futile.").

177. 102 S. Ct. at 1573.

178. *Id.* The Court likened this result to a decision to withhold a known constitutional claim resembling the type of deliberate bypass disavowed in Fay v. Noia, 372 U.S. 391 (1963), which is an even less demanding standard than cause and actual prejudice. 102 S. Ct. at 1573 n.36.

179. *Id.* at 1573.

180. 102 S. Ct. at 1572 (footnote omitted).

181. *Id.* (footnote omitted).

182. *Id.* (footnote omitted).

183. 397 U.S. 358, 364 (1970) (holding that the due process clause precludes convictions "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). *See supra* note 165.

184. 102 S. Ct. at 1513. The Court noted that Isaac also had the benefit of the Court's opinion in Mullaney v. Wilbur, 421 U.S. 684 (1975), *see infra* note 165, decided three months before his trial, in which the Court "explicitly acknowledged the link between *Winship*, and constitutional limits on assignment of the burden of proof." *Id.* at 1574 n.42. Furthermore, "[e]ven those decisions rejecting the defendant's claim . . . show that the issue had been perceived by other defendants . . . and was a live [issue] in the courts at the time." *Id.* at 1574 n.41.

185. *Id.* at 1574-75 (footnote omitted).

construct his constitutional argument, Isaac failed to demonstrate cause for his failure to object at trial.[186] The Court did not consider the question of actual prejudice since Isaac failed to demonstrate cause for his procedural default.[187]

The Court asserted that cause and actual prejudice are not rigid concepts, but "take their meaning from the principles of comity and finality."[188] Although in appropriate cases, the principles of cause and prejudice "must yield to the imperative of a fundamentally unjust incarceration," the Court maintained "that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard."[189]

In dissent, Justices Brennan and Marshall objected to the Court's "eagerness to expatiate" upon the "significant costs" of habeas corpus, which led it to misread Isaac's claim for habeas relief.[190] They contended that Isaac's habeas petition presented only one claim, which did not exist until his last direct appeal was denied. Thus, they concluded, there was no claim to preserve, and because Isaac committed no procedural default, *Sykes* was inapplicable.[191]

Justice Brennan vigorously asserted that the majority's decision could not withstand the *Sykes* Court's reasoning.[192] *Sykes* adopted the cause and prejudice standard to promote "greater respect" for state contemporaneous objection rules than was assertedly provided by *Noia*.[193] Contemporaneous objection rules (1) enable the record of the constitutional claim to be made when witnesses' memories are freshest, (2) assist the presiding judge in properly deciding the federal constitutional question based on his observation of witness demeanor, (3) lead to the exclusion of challenged

186. *Id.* at 1574.

187. *Id.* at 1575 n.43. Isaac argued "that [his] prejudice was so great that it should permit relief even in the absence of cause." *Id.* The Court rejected this argument, noting that *Sykes* "stated these criteria in the conjunctive" and that the facts of Isaac's case did not warrant a departure from that position. In Justice Stevens' view, however, both the cause and the actual prejudice prongs should involve an inquiry into fundamental fairness. *Id.* at 1576 n.1 (Stevens, J., concurring in part and dissenting in part). In this case, the Court applied the cause prong without relating its application to the fairness of Isaac's trial. Justice Stevens would not apply this standard to bar habeas corpus relief "simply as a matter of procedural foreclosure." *Id.*

188. *Id.* at 1575.

189. *Id.* Justice Stevens disputed the Court's "preoccupation with procedural hurdles" which, he stated, will complicate rather than simplify the processing of habeas petitions. *Id.* at 1576. (Stevens, J., concurring in part and dissenting in part). Instead, he would have rejected Isaac's claims on the merits. *Id.*

190. *Id.* at 1576 (Brennan, J., dissenting).

191. *Id.* at 1577.

192. *Id.* at 1580-81.

193. *Id.* at 1580 (citing *Sykes*, 433 U.S. at 88).

evidence, and (4) encourage error free criminal trials. Finally, he observed, *Sykes* rejected the deliberate bypass standard of *Noia* which was thought to encourage "sandbagging" on the part of defense lawyers.[194]

Justice Brennan contended that none of these rationales has force in this case. The first three are valid only with regard to objections to the admission of evidence,[195] and the fourth reason is irrelevant to inchoate constitutional claims which are unlikely to contribute to error-free trials. Finally, he asserted, the sandbagging rationale offends common sense.[196]

The dissent also objected to the Court's application of *Sykes* to cases involving error affecting the determination of guilt. Applying *Sykes* to such claims ignores the "manifest differences" between claims that affect the truthfinding function of the trial and claims that do not.[197] Although a defendant's fourth amendment rights[198] or his *Miranda* rights[199] arguably may be different from other constitutional rights, the entire result of the trial is untrustworthy when the burden of proof has been unconstitutionally allocated.[200] The dissent concluded that even if *Sykes* is applicable, "[i]t should not be allowed to insulate from all judicial review all violations of the most fundamental rights of the accused."[201]

C. *United States v. Frady: Prejudice Requires Actual and Substantial Disadvantage*

The Supreme Court determined in *United States v. Frady*[202] that federal, as well as state prisoners, must demonstrate cause excusing their proce-

194. *Id.* at 1581 (citing *Sykes*, 433 U.S. at 88-90).

195. *Id.* at 1581.

196. *Id.* Additionally, Justice Brennan objected to the Court's claim that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights." *Id.* at 1582 (quoting 102 S. Ct. at 1571-72 n.33). Brennan argued "that the 'intrusion' complained of is that of the supreme law of the land." 102 S. Ct. at 1582. Furthermore, "[i]t is inimical to the principle of federal constitutional supremacy to defer to state courts' 'frustration' at the requirements of federal constitutional law as it is interpreted in an evolving society." *Id.*

197. *Id.*

198. *See* Stone v. Powell, 428 U.S. 465 (1976). *See supra* note 37. *See also* Friendly, *supra* note 3, at 161-64.

199. *See* Wainwright v. Sykes, 433 U.S. 72 (1977). *See supra* notes 94-108 and accompanying text.

200. 102 S. Ct. at 1583. "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Id.* (quoting Speiser v. Randall, 357 U.S. 513, 525 (1958)).

201. 102 S. Ct. at 1583.

202. *Frady*, 102 S. Ct. 1584 (1982). Frady and another defendant were charged with the murder of Thomas Bennett under circumstances which suggested that Bennett's death was a contract killing. *See id.* at 1587-88. The victim was brutally beaten to death. Frady defended solely by denying all responsibility for the killing, suggesting that the real murderer

dural defaults and actual prejudice resulting from the challenged errors. In 1963, Frady was convicted of robbery and first-degree murder. He was sentenced to death by a federal district court jury. His conviction was affirmed, but the United States Court of Appeals for the District of Columbia Circuit set aside the death sentence and resentenced Frady to life imprisonment.[203] The Supreme Court denied certiorari.[204]

In 1979, Frady filed a motion under section 2255 alleging that the jury instructions given at his 1963 trial were defective because they compelled the jury to presume malice, and thereby wrongfully eliminated any possibility of a manslaughter verdict in violation of his right to a fair trial.[205] Frady argued that cases decided after his trial and appeal had disapproved instructions identical to those used in his case.[206]

The district court denied Frady's motion because Frady failed to challenge the jury instructions on direct appeal or in one of his earlier motions.[207] The United States Court of Appeals for the District of Columbia Circuit reversed, finding the challenged instructions to be plainly erroneous under Rule 52(b) of the Federal Rules of Criminal Procedure.[208]

The appellate court determined that Rule 30 of the Federal Rules of Criminal Procedure,[209] which requires timely objection, must be read in conjunction with Rule 52(b), which provides that plain errors affecting substantial rights may be raised on direct appeal, even though no objection was raised at trial.[210] The court reasoned that since *Davis v. United States*[211] held that "the standard for allowing a section 2255 motion on an

had left the victim's house while the police pursued Frady and the other defendant. Accordingly, Frady raised no justification, excuse or mitigating circumstance. *Id.* at 1588.

203. *Id.* at 1588-89 (citing Frady v. United States (Frady I), 348 F.2d 84 (D.C. Cir.) (en banc), *cert. denied*, 382 U.S. 909 (1965)).

204. 102 S. Ct. at 1589. Frady filed four motions to vacate or reduce his sentence in 1965, and one each in 1974, 1975, 1976, and 1978. *See* United States v. Frady, 636 F.2d 506, 508 n.2 (D.C. Cir. 1980). In 1978, the United States Court of Appeals for the District of Columbia Circuit directed that Frady's separate sentences for robbery and murder run concurrently rather than consecutively. 102 S. Ct. at 1589 n.4 (citing United States v. Frady, 607 F.2d 383 (D.C. Cir. 1979)).

205. United States v. Frady, 636 F.2d 506 (D.C. Cir. 1980). *See supra* note 25 for pertinent language of § 2255.

206. *Id.* Frady relied on United States v. Wharton, 433 F.2d 451, 455-56 (D.C. Cir. 1970); Green v. United States (Green I), 405 F.2d 1368, 1369-70 (D.C. Cir. 1968); Belton v. United States, 382 F.2d 150, 153-54 (D.C. Cir. 1967). *See* 102 S. Ct. at 1589 n.6.

207. *See* 102 S. Ct. at 1589-90.

208. United States v. Frady, 636 F.2d 506, 512-13 (D.C. Cir. 1980). *See supra* note 27 for text of Rule 52(b).

209. "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict." FED. R. CRIM. P. 30.

210. *Frady*, 636 F.2d at 510.

211. 411 U.S. 233, 240-42 (1973). *See supra* notes 79-85 and accompanying text.

issue not raised at trial should be no less stringent than the standard in the Federal Rules of Criminal Procedure for review on direct appeal," the appropriate standard for review in this case is the plain error standard of Rule 52(b).[212]

The court concluded that although the result in this case would be the same under the cause and prejudice standard set forth in *Davis*, the *Davis* rationale, which applied the requirements of Rule 12(b)(2) on collateral review, suggested that the "plain error" standard is the appropriate standard for review of section 2255 motions involving Rule 52(b).[213] The Supreme Court granted the United States government's petition for a writ of certiorari to review whether the court of appeals properly invoked the plain error standard in considering Frady's section 2255 motion.[214]

The Supreme Court acknowledged that Rule 52(b) provides a means for the prompt redress of a miscarriage of justice. Accordingly, the rule may only be invoked on appeal "from a trial infected with error so 'plain' that the trial judge and prosecutor were 'derelict' in countenancing it," despite the defendant's failure to object in a timely fashion.[215] The Court asserted, however, that the rule was intended for use solely on direct appeal, and is inappropriate in motions for collateral relief. Once a defendant has waived his right to appeal, or his conviction is affirmed, the Court reasoned, society has a legitimate interest in the finality of the judgment "perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal."[216]

The Court found that the District of Columbia Circuit improperly interpreted the *Davis* statement that "no more lenient standard of waiver should apply" on collateral attack than on direct review, to mean "no more stringent," and thereby incorrectly applied the "plain error" standard to collateral review of Frady's motion, despite precedent holding that a collateral challenge may not substitute for an appeal.[217] Having waived or exhausted the chance to appeal, the Court stated, the defendant is pre-

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212. 636 F.2d at 510.

213. *Id.* n.9.

214. 102 S. Ct. at 1590. The Court first dismissed an objection by Frady to the Court's grant of certiorari. Frady argued that federal courts in the District of Columbia exercise a purely local jurisdictional function when they rule on a § 2255 motion brought by a prisoner convicted of a local law offense. The Court ruled that general federal law applies to all § 2255 motions. *Id.* at 1590-91.

215. *Id.* at 1592-93.

216. *Id.*

217. 102 S. Ct. at 1592-93 (citing United States v. Addonizio, 442 U.S. 178, 184-85 (1979); Hill v. United States, 368 U.S. 424, 428-29 (1962); Sunal v. Large, 332 U.S. 174, 181-82 (1947)). *See supra* note 50.

sumed to stand fairly and finally convicted, particularly in the case of a federal prisoner who has already had an opportunity to present his federal claims to a federal forum.[218] Moreover, the Court had already rejected the plain error standard for collateral review of a state prisoner's claim in *Henderson v. Kibbe*.[219]

The Court held that the proper standard for review of Frady's motion is the cause and actual prejudice standard of *Davis, Francis*, and *Sykes*.[220] Under this standard, to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show "both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains."[221] The Court did not have to determine whether Frady had demonstrated cause, because "he suffered no actual prejudice of a degree sufficient to justify collateral relief nineteen years after his crime."[222]

In considering the existence of prejudice in Frady's case, the Court noted that *Sykes* expressly reserved further elaboration of actual prejudice to future cases.[223] Accordingly, the Court left open the import of actual prejudice in other situations, but found "no doubt about its meaning for a defendant who has failed to object to jury instructions at trial."[224] The Court obtained guidance from its decision in *Kibbe*, which required that the degree of prejudice resulting from jury instruction error be evaluated

218. 102 S. Ct. at 1593. The Court emphasized that "[o]ur trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless post-conviction collateral attacks. To the contrary, a final judgment commands respect." *Id.* Furthermore, since the federal prisoner has already had an opportunity to present his federal claims in federal trial and appellate forums, there is "no basis for affording federal prisoners a preferred status when they seek post-conviction relief." *Id.*

219. 431 U.S. 145 (1977). *Kibbe* established that the burden of showing prejudice from an erroneous jury instruction is much greater on collateral attack than the showing required to establish plain error on direct appeal. *Id.* at 154.

Kibbe involved a state prisoner, thus considerations of comity involving federal court supervision over state court judgments were not at issue. The Court in *Frady* noted, however, that the federal government's interest in the finality of its judgments is no less than that of the states. 102 S. Ct. at 1593.

220. *Id.* at 1594.

221. *Id.* *Frady* addresses the proper standard to be used by a district court engaged pursuant to § 2255 in the *collateral* review of the original criminal trial. The Court did not hold that the plain error standard cannot be applied by a court of appeals on *direct* review of a district court's conduct of the § 2255 hearing itself. 102 S. Ct. at 1594 n.15. The Court's use of the term "double procedural default" suggests that the cause and actual prejudice standard is to apply to procedural defaults on appeal, as well as at trial. *See infra* note 282.

222. *Id.* at 1594 (footnote omitted).

223. *Id.* at 1595 (citing *Sykes*, 433 U.S. at 91).

224. 102 S.Ct. at 1595.

in the total context of the events at trial.[225] The Court, therefore, rejected Frady's claim that erroneous jury instructions "concerning an element of the crime charged amounts to prejudice per se, regardless of the particular circumstances."[226] Rather, the Court held, Frady must demonstrate "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[227]

The Court concluded that because of "the strong, uncontradicted evidence of malice in the record," together with Frady's failure to present a "colorable claim that he acted without malice," Frady failed to demonstrate the requisite degree of actual prejudice to justify reversal of his nineteen-year-old conviction.[228] This would be a different case, the Court emphasized, if Frady had presented "affirmative evidence indicating that he had been convicted wrongly of a crime of which he was innocent."[229] Because Frady had presented no "colorable claim that he acted without malice," the Court found "no risk of a fundamental miscarriage of justice."[230]

Justice Brennan vigorously dissented from the Court's holding.[231] He maintained that "the power to notice plain error at any stage of a criminal proceeding is fundamental to the court's obligation to correct substantial

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225. *Id.* *Kibbe* summarized the required degree of prejudice accordingly: " '[W]hether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' "not merely whether" 'the instruction is undesirable, erroneous, or even universally condemned.' " 102 S. Ct. at 1595 (quoting *Kibbe*, 431 U.S. at 154) (citations omitted). *See supra* note 219.

226. 102 S. Ct. at 1595-96.

227. *Id.* at 1596 (emphasis in original).

228. *Id.*

229. *Id.*

230. *Id.* The Court examined the jury instructions that were given at Frady's trial and found that despite the erroneous malice instructing a rational jury, believing Frady had formed "a plan to kill . . . a positive design to kill" with "reflection and consideration amounting to deliberation," could not also have believed that he acted in "sudden passion . . . aroused by adequate provocation . . . causing him to lose his self-control." *Id.* at 1597 (quoting the unpublished trial court manuscript).

Justice Blackmun concurred in the judgment because he agreed that Frady did not demonstrate actual prejudice. He objected, however, to the Court's assertion that Rule 52(b) was intended solely for use on direct appeal. In his view, the plain error doctrine is specifically made available to all stages of all criminal proceedings, including collateral review under § 2255. He argued that the plain error doctrine constitutes an exception to Rule 30's requirement that defendants make timely objections to instructions, so that *Sykes* does not apply. Failing "to give effect to the plain error exception to the federal contemporaneous objection rule, while recognizing exceptions to the analogous state rules— . . . gives some state prisoners a 'preferred status.' " 102 S. Ct. at 1599 (citing Ulster County v. Allen, 442 U.S. 140, 148-54 (1979)).

231. 102 S. Ct. at 1600 (Brennan, J., dissenting).

miscarriages of justice."[232] He asserted that the plain error rule does not undermine the interest in finality of judgments because it is a permissive, rather than a mandatory rule.[233] In contrast to section 2254, which is a civil proceeding, Justice Brennan observed, section 2255 is a criminal collateral review procedure.[234] Congress has specifically provided that a section 2255 motion is a continuation of the criminal trial, authorizing the application of the Federal Rules of Criminal Procedure on collateral review for motions brought by federal prisoners.[235] The Court's decision thus fails to provide parity between state and federal prisoners, Justice Brennan argued, because state courts can waive a procedural default and permit the state petitioner to seek collateral review in the federal courts.[236] Furthermore, state court judges can notice plain error in collateral review of state court convictions.[237] The Court's decision, however, deprives the federal judge of the right to recognize plain error on collateral review, restricting the federal prisoner more tightly than the state prisoner.[238]

Justice Brennan concluded that the Court's decisions in *Davis, Francis*, and *Sykes* were not only inconsistent, but contrary to congressional intent, evidencing the Court's willingness "to subordinate a prisoner's interest in substantial justice to a supposed government interest in finality."[239] He would have decided the case on the ground offered by the government and adopted by Justice Blackmun, that the instructions at Frady's trial did not constitute plain error affecting his substantial rights.[240]

232. *Id.*

233. *Id.* at 1601. Justice Brennan noted that "the significant differences between § 2255 and direct appeal remain unaffected by the application of Rule 52(b) to § 2255 actions." An error, even if properly preserved, is not cognizable under § 2255 unless it is "a constitutional violation or an error of law or fact of such 'fundamental character' that it 'renders the entire proceeding irregular or invalid.' " *Id.* at n.2.

234. 102 S. Ct. at 1601.

235. *Id.* at 1602. *See* S. REP. NO. 1596, 80th Cong., 2d Sess. 2 (1948); *see also* Advisory Committee's Notes to § 2255 Rules 1, 3, 11, 12, 28 U.S.C. §§ 280, 287.

236. 102 S. Ct. at 1602 (citing Mullaney v. Wilbur, 421 U.S. 684, 688 n.7 (1975)).

237. *Id.*

238. *Id.* at 1602-03. Furthermore, the "tensions" inherent in federal court review of state court convictions do not exist in a § 2255 proceeding, because the prisoner is directed back to the same court that first convicted him. *Id.* "The plain error doctrine merely allows federal courts the discretion common to most courts to waive procedural defaults where justice requires." *Id.*

239. *Id.* at 1604.

240. *Id.*

III. Comity, Federalism, and Finality of Judgments Prevail: Limiting Federal Court Discretion and the Scope of Federal Habeas Corpus Review

A major premise underlying the Supreme Court's decisions in *Brown v. Allen*,[241] the *Noia* trilogy,[242] and *Kaufman*,[243] is that federal habeas courts have *power* to review prior judicial determinations of the federal constitutional claims presented by state and federal prisoners. The Supreme Court viewed power of federal habeas corpus review as inhering in the Constitution and derived from congressional authority manifested in the Acts of 1789 and 1867.[244] The procedural requirements of exhaustion of state remedies and compliance with adequate state procedural rules were created by the Supreme Court as limitations upon the exercise of the power of habeas corpus review, designed to accommodate federal-state comity, federalism and the finality of state court judgments.

Congressional modification of sections 2254 and 2255 of the Judicial Code following *Townsend* and *Sanders*,[245] was a powerful sanction of the Supreme Court's interpretation of the nature and proper scope of federal habeas corpus review of the constitutional claims presented by state and federal prisoners. Although the exhaustion requirement has been codified

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241. Brown v. Allen, 344 U.S. 443 (1953). *See supra* notes 43-51 and accompanying text.

242. Fay v. Noia, 372 U.S. 391 (1963). *See supra* notes 52-65 and accompanying text; Townsend v. Sain, 372 U.S. 293 (1963). *See supra* notes 66-70 and accompanying text; Sanders v. United States, 373 U.S. 1 (1963). *See supra* notes 71-75 and accompanying text.

243. Kaufman v. United States, 394 U.S. 217 (1969). *See supra* notes 76-78 and accompanying text.

244. In Fay v. Noia, the Court recognized that the writ of habeas corpus was given explicit recognition in our Constitution, 372 U.S. 391, 400 n.7 (1963). The Constitution provides that: "the 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." U.S. CONST. art. I, § 9, cl. 2. In addition, the writ was incorporated in the first grant of federal court jurisdiction in the Act of 1789, ch. 20, § 14, 1 Stat. 81-82. 372 U.S. at 400. The Court noted that, although neither the Constitution nor the Judiciary Act of 1789 anywhere defines the writ, *id.* at 405, there has been support for the view that "[t]he use of the writ . . . as an 'incident of the federal judicial power' is implicitly recognized by art. I, § 9, cl. 2 of the Constitution." *Id.* at 406 (quoting McNally v. Hill, 293 U.S. 131, 135 (1934)). Furthermore, the Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-86, extended "[t]he habeas corpus power of the federal courts evidently to what was conceived to be its constitutional limit." *Noia*, 372 U.S. at 417 (citing *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325-26 (1867)) ("This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction . . . every possible case of privation of liberty contrary to the National Constitution, treaties, or laws."). *See also* Townsend v. Sain, 372 U.S. 293, 310-12 (1963). The motion remedy under § 2255 for federal prisoners is as broad as habeas corpus. *See* United States v. Hayman, 342 U.S. 205 (1952), *supra* note 25.

245. *See supra* notes 70, 72 & 75.

as defined by the Supreme Court,[246] Congress has expressed no view regarding the treatment of "mixed" habeas petitions and the procedural "cause and actual prejudice" requirement.[247] The tensions between the federal interest in the vindication of constitutional rights through the remedy of habeas corpus and the state interest in orderly judicial administration of its own procedures exist, in part, because neither the Constitution nor the Congressional Acts of 1789 and 1867 define the writ. The Supreme Court has not directly addressed the extent to which federal judicial action curtailing federal habeas corpus review by means of the exhaustion doctrine and procedural forfeiture would violate the habeas corpus jurisdiction conferred upon the federal courts by Congress.

Lundy, Isaac, and *Frady* do not expressly attempt to limit the power of the federal court to review allegations of unconstitutional restraint, but require that the exercise of that power be further restrained to promote considerations of comity, federalism and finality of judgments. The import of the Court's opinions in these cases, however, is the increased potential for foreclosure of a state or federal prisoner's constitutional claims from federal habeas corpus review. The effective foreclosure from federal habeas corpus review, despite the nature of the constitutional violation, is not easily harmonized with Supreme Court precedent and expressed congressional intent. Although it is clear that the Court has reversed its position regarding the scope of federal habeas corpus review from that of twenty years ago, the Court has failed to provide workable guidelines to assure that fundamental miscarriages of justice will receive federal habeas corpus relief.

A. Total Exhaustion: Effective Deterrent or Superfluous Result?

The Supreme Court's adoption of the total exhaustion requirement in *Lundy* may be viewed as theoretically consistent with the exhaustion requirement codified in section 2254(b)-(c). The federal court's power to review the state habeas petitioner's constitutional claim is not affected. Instead, *Lundy* further limits the exercise of that power by requiring that the federal district court entertain only those petitions containing exhausted claims.

Nevertheless, it is debatable whether the total exhaustion requirement is commanded by precedent, the provisions of section 2254, or by the policy

246. 28 U.S.C. §§ 2254(b)-2254(c) (1976). *See also supra* note 47.

247. Currently, however, proposals to codify the cause and actual prejudice requirement are before the Senate. *See* Crime Control Act of 1982, tit. 10—Habeas Corpus Reform, S. 2543, 97th Cong., 2d Sess. (1982); Finality of Criminal Judgments Improvements Act, S. 2838, 97th Cong., 2d Sess. (1982).

considerations discussed by the Court.[248] Although the Court contended that the total exhaustion requirement is necessary to promote federal-state comity, a flexible rule of partial exhaustion, under which the federal district court entertained the exhausted claims while dismissing the unexhausted claims, was a sufficient accommodation of the federal-state balance. Because comity considerations are not defeated under the partial exhaustion rule favored by the majority of the circuit courts of appeals,[249] any usefulness of a per se rule is superflous.[250]

The Court's decision may, in fact, be "premised on the spectre of the 'sophisticated litigious prisoner intent upon a strategy of piecemeal litigation' . . . whose only aim is to have more than one day in federal habeas court."[251] What little discussion there is on the subject suggests that most state petitioners attempt to consolidate all of their claims in one petition.[252] Additionally, as the dissent indicated, it is unlikely that the Court's total exhaustion rule will seriously affect the "sophisticated prisoner" who will

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248. *See supra* text accompanying notes 120, 133-35 and accompanying text.

249. *See supra* notes 117, 133-35.

250. As Justice Blackmun observed, "[t]o the extent that prisoners are permitted simply to strike unexhausted claims from a § 2254 petition and then proceed as if those claims had never been presented, I fail to see what all the fuss is about. In that event, the Court's approach is virtually indistinguishable from that of the Court of Appeals, which directs the district court itself to dismiss unexhausted grounds for relief." Rose v. Lundy, 102 S. Ct at 1209 (Blackmun, J., concurring in the judgment). *See also* Galtieri v. Wainwright, 582 F.2d 348, 370 (5th Cir. 1978) (Goldberg, J., dissenting) ("[T]his [partial exhaustion] rule protects the petitioner's interest in speedy consideration of his federal claim while at the same time giving full effect to the policies underlying the exhaustion doctrine."). Furthermore, the district courts have adequately addressed the problem of interrelated claims. The majority of circuits that permitted the district courts to review the exhausted claims in a mixed petition, *see supra* note 117, handled the problem of interrelated claims by allowing the district court to decide the exhausted issues unless the exhausted and unexhausted claims were so interrelated that they could not be independently decided. In that event the entire petition was dismissed. *See, e.g.*, Johnson v. United States District Court, 519 F.2d 738, 740 (8th Cir. 1975); Hewett v. North Carolina, 415 F.2d 1316, 1320 (4th Cir. 1969); United States *ex rel.* Levy v. McMann, 394 F.2d 402, 404-05 (2d Cir. 1968); United States v. Myers, 372 F.2d 111, 112-13 (3d Cir. 1967).

251. 102 S. Ct. at 1209 (Stevens, J., dissenting) (quoting Galtieri v. Wainwright, 582 F.2d at 369 (Goldberg, J., dissenting)).

252. *See* Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973). Of 257 cases studied, only 34 habeas petitions were filed by prisoners who had filed any previous petitions. Twenty-three of these thirty-four had filed only one other petition. *Id.* at 353-54. This data suggests that the repeat petition is of rather minor significance in the habeas corpus caseload. Thus, even if a rule of total exhaustion induces each repeat petitioner to bring every one of his claims in a single proceeding, the efficiency gains achieved may be offset by the time spent by the federal courts in duplicative examination of the record, especially when non-meritorious claims are involved. *See* Galtieri v. Wainwright, 582 F.2d 348, 374 (5th Cir. 1978) (Thornberry, C.J., dissenting).

simply present successive petitions presenting only exhausted claims.[253] In practical application, the total exhaustion requirement limits the discretion of the federal district court to entertain meritorious exhausted claims when paired with unexhausted claims,[254] requires duplicative review of state habeas petitions,[255] and fails to promote uniformity in the disposition of the federal habeas petitions of state prisoners.[256]

While potentially burdensome to state petitioners and federal district courts, however, the total exhaustion requirement should not, by itself, deprive the state petitioner of his day in federal habeas court. The petitioner may delete the unexhausted claims, proceed to review of his exhausted claims, and resubmit the previously unexhausted claims following their exhaustion in state court.[257] The plurality's application of the abuse of the

253. 102 S. Ct. at 1209 (Blackmun, J., concurring in the judgment).

254. As a result, the petitioner's interest in speedy relief on his federal constitutional claims may be frustrated. He may be required to repeat his journey through the federal courts before his meritorious claims are heard. Professor Shapiro discusses one exhaustion case, for example, which was remanded for a hearing on the ground that, if the facts had been as petitioner alleged, "requiring him to further seek state relief in some unguided, open-ended way, thereby countenancing further delay, would [have] deprive[d] him of due process of law." Shapiro, *supra* note 252, at 357 (citing Odsen v. Moore, 445 F.2d 806, 807 (1st Cir. 1971)). In *Odsen*, the petitioner alleged that he filed a pro se writ with a single justice of the Massachusetts Supreme Judicial Court. The Massachusetts Defenders Committee was appointed to represent him. Three years later no action had been taken despite correspondence with the Committee and the state court. The federal district court had dismissed for failure to exhaust and had denied a certificate of probable cause to appeal. *Id.* at 806.

255. *See, supra* note 138-39 and accompanying text. Duplicative review will not necessarily be an insignificant burden. In Shapiro's study of 257 cases, for example, 135 cases, more than 50%, were dismissed for failure to exhaust. In approximately 100 of the cases dismissed, failure to exhaust was the sole ground for dismissal. Shapiro, *supra* note 252, at 356.

256. *See, supra* notes 140-42 and accompanying text.

257. *See supra* note 126 and accompanying text. Moreover, lower federal courts are interpreting *Lundy* broadly to prevent foreclosure from habeas corpus review on total exhaustion grounds. *See, e.g.*, Romano v. Wyrick, No. 81-2110, slip op. (8th Cir. July 7, 1982). In *Romano*, although the petitioner presented a petition containing both exhausted and unexhausted claims, the court did not dismiss the petition in its entirety for failure to exhaust under *Lundy*. The Eighth Circuit reasoned that because the petitioner did not raise the probation-revocation issue in his petition to the district court, that court addressed a petition containing only fully exhausted claims.

> We think the *Lundy* rule should not be applied mechanically in this situation. Vacating the district court's determination in those circumstances would provide prisoners with the opportunity to relitigate an issue before the district court by merely adding a claim on appeal, getting the entire petition dismissed, and once again going through the state courts. This would be a great waste of time and effort and cannot be what *Rose* intended.

Id. at 4 n.3. *See also* Dunn v. Wyrick, No. 81-2429, slip op. (8th Cir. June 1, 1982) (total exhaustion rule inapplicable where the exhausted claims were fully litigated and decided in

writ doctrine may effect that result, however. Although the plurality did not direct federal district courts to dismiss subsequent petitions containing previously unexhausted claims as an abuse of the writ, the plurality suggested that federal courts have complete license to do so.[258]

The plurality's construction of the abuse of the writ doctrine, as applied in the context of the total exhaustion requirement, departs significantly from the knowing and deliberate standard enunciated in *Sanders* and incorporated by Congress in Rule 9(b) to determine whether abuse is present. *Sanders* provided that the principles developed in *Noia* and *Townsend* would govern whether a second or successive application may be deemed an abuse of the writ or motion remedy. *Noia* adopted the definition of an "intentional relinquishment or abandonment of a known right or privilege" as the standard controlling the determination of a deliberate bypass of state procedure and then, only after the federal court has conducted a hearing or determined the issue by some other means.[259] *Townsend* discussed a petitioner's inexcusable neglect in bringing evidence to the attention of the state court in terms of *Noia*'s deliberate bypass standard.[260] In enacting the provisions of Rule 9(b), Congress rejected an inexcusable standard for review of second or subsequent petitions in favor of the *Sander's* abuse standard, finding that the inexcusable standard would provide too much discretion to the federal district judge to dismiss subsequent petitions.[261] As noted by Justice Brennan in *Lundy*, a petitioner's failure to have asserted previously unexhausted claims in a prior petition

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the district court prior to the *Lundy* decision); Floyd v. Marshall, 538 F. Supp. 381 (N.D. Ohio 1982). The *Floyd* court considered the defendant's habeas corpus petition even though it presented an unexhausted claim. The Ohio post-conviction statute afforded the defendant no avenue to present such grounds to Ohio's courts, and the defendant was unable to pursue a delayed appeal of his conviction. The court reasoned that *Lundy* could not "have intended to legislate away clearly-stated provisions of the habeas corpus statute" which requires a petitioner to have exhausted the state remedies *actually available* to him prior to consideration of the issues in a habeas corpus action. *Id.* at 383 (emphasis in original). In addition, the district court observed that the Supreme Court in *Lundy* referred to its decision in *Ex parte* Hawk, which recognized that the exhaustion doctrine did *not* bar relief "where the state remedies are inadequate or fail to 'afford a full and fair adjudication of the federal contentions raised.'" 538 F. Supp. at 384 (quoting *Ex parte* Hawk, 321 U.S. 114, 118 (1944)), *noted in* 102 S. Ct. at 1202 n.7.

258. *See supra* notes 127-30 and accompanying text.

259. Fay v. Noia, 372 U.S. at 439 (citing Price v. Johnston, 334 U.S. 266, 291 (1948) (proposing as an alternative to a hearing "an amendment or elaboration" of the petitioner's pleadings)).

260. Townsend v. Sain, 372 U.S. at 317. "The standard of inexcusable default set down in Fay v. Noia adequately protects the legitimate state interest in orderly criminal procedure, for it does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by-passing of state procedure." *Id.*

261. *See supra* note 144.

will have been required by the habeas court itself as a condition for consideration of the exhausted claims.[262] To dismiss the subsequent petition as an abuse of the writ merely because it presents the previously unexhausted claims, without further inquiry into factual circumstances truly suggesting abuse, disregards the principles and considerations expressed by the Court in *Sanders* and by Congress in Rule 9(b), and dilutes the concept of abuse.[263]

The effect of the plurality's interpretation of the abuse of the writ doctrine as applied to the total exhaustion requirement is not entirely predictable. It is unlikely, however, that federal courts will dismiss a subsequent petition as an abuse of the writ simply because it presents grounds for relief not assertable in the first petition because those grounds were not exhausted at that time. The doctrine has been regarded as one of "rare and extraordinary application."[264] Courts have required as a factual predicate that the petitioner deliberately bypassed the opportunity to present his available claim in the first proceeding.[265] Some courts have dismissed unexhausted claims without prejudice, facilitating the petitioner's opportu-

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262. *See supra* notes 143-46 and accompanying text.

263. The burden is on the government to plead abuse of the writ. *See* Sanders v. United States, 373 U.S. 1, 10-11 (1963). Once the government has done this, the petitioner has the burden of proving that he has not abused the writ. *See* Price v. Johnston, 334 U.S. 266, 292 (1948). The Advisory Committee suggests that, if it appears to the court after examining the petition and answer that there is a high probability that the petition will be barred under Rule 9, the court should afford the petitioner an opportunity to explain his apparent abuse. 28 U.S.C. § 2254, Rule 9, Advisory Committee Notes, at 1139 (1976). *See also* Johnson v. Copinger, 420 F.2d 395, 399 (4th Cir. 1969) ("[A] procedure which allows the imposition of a forfeiture for abuse of the writ, without allowing the petitioner an opportunity to be heard on the issue, [does not comport] with minimum requirements of fairness"). Some commentators contend that the problem of abuse of the writ of habeas corpus is greatly overstated. *See, e.g., Developments, supra* note 1, at 1153 ("Most prisoners, of course, are interested in being released as soon as possible; only rarely will one inexcusably neglect to raise all available issues in his first federal application.") *See also* ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES, § 6.2, commentary at 92 (Approved Draft, 1968) ("The occasional, highly litigious prisoner stands out as the rarest exception.").

264. Simpson v. Wainwright, 488 F.2d 494, 495 (5th Cir. 1973) (abuse of the writ doctrine "could not apply to bar a return to the federal court by one who has been remitted to the state courts to exhaust and reappears alleging that he has done just that").

265. *See, e.g.*, Halley v. Estelle, 632 F.2d 1273, 1276 (5th Cir. 1980) (pro se petitioner "should not be penalized because his inexperience in jurisprudence left him unaware of claims he had not considered at the time of his first application for habeas corpus."); Mays v. Balkcom, 631 F.2d 48, 51 (5th Cir. 1980); Turnbow v. Beto, 464 F.2d 527, 528 (5th Cir. 1972); Tannehill v. Fitzharris, 451 F.2d 1322, 1324 (9th Cir. 1971) (no deliberate omission where failure to bring all claims in earlier petition resulted from good faith belief that claims earlier presented would have been barred on exhaustion grounds); Johnson v. Copincer, 420 F.2d 395 (4th Cir. 1969) (judge may not dismiss petition on ground of abuse without first giving notice to petitioner, affording him opportunity to amend his petition to offer any explanation which would justify omission or show that omission was not deliberate).

nity for review of the previously unexhausted claims once he has exhausted them in state court.[266] Consequently, although *Lundy* has erected greater procedural hurdles to satisfy the exhaustion requirement, federal habeas corpus review of a state prisoner's constitutional claims should not be significantly curtailed.

B. Isaac Cause and Frady Prejudice: Reinterpreting Sykes and the Nature of Federal Habeas Corpus Review

Although federal habeas corpus review should not be significantly curtailed in the wake of *Lundy*, that argument does not apply with equal force in a discussion of *Isaac* and *Frady*. As in *Lundy, Isaac* and *Frady* do not limit the power, but the exercise of the power of federal habeas corpus review in cases of procedural default. The federal district court is directed to abstain from collateral review when the petitioner has failed to demonstrate cause and actual prejudice excusing a failure to object to errors at trial. But the Court's application of the concepts of cause and actual prejudice in *Isaac* and *Frady* may effectively preclude the federal district court from considering meritorious constitutional claims, particularly claims of error that may have affected the determination of the petitioner's guilt at trial. This result conflicts with Supreme Court precedent recognizing federal habeas corpus as a remedy for constitutional violations that are fundamentally unfair.[267] Instead, under *Isaac* and *Frady*, the lower federal courts must determine what constitutes a fundamental miscarriage of justice sufficient to satisfy or supplant the cause and actual prejudice inquiry.[268]

266. *See, e.g.*, Romano v. Wyrick, No. 81-2110, slip op. (8th Cir. July 7, 1982) (dismissing without prejudice claim of unconstitutional revocation of probation for failure to exhaust available state remedies). Lamberti v. Wainwright, 513 F.2d 277, 283-84 (5th Cir. 1975); Harris v. Estelle, 487 F.2d 1293, 1297 (5th Cir. 1974); Smith v. Cupp, 457 F.2d 1098, 1101 (9th Cir. 1972).

267. The Court in *Noia* described habeas corpus as a remedy for "whatever society seems to be intolerable restraints," which "lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void." 372 U.S. 391, 401, 423 (1963). *See also* Townsend v. Sain, 372 U.S. 293, 312 (1963). In Stone v. Powell, the Court distinguished the withdrawal of exclusionary rule claims from habeas corpus review as justified because in asserting such claims "a convicted defendant is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration." 428 U.S. 465, 492 n.31 (1976). In contrast, as Justices Brennan and Marshall noted, there is a distinction between claims that affect the truthfinding function of the trial and claims that do not. Engle v. Isaac, 102 S. Ct. 1558, 1583 (1982) (Brennan, J., dissenting). In *Isaac*, Justice Brennan emphasized that "a defendant's right to a trial at which the burden of proof has been constitutionally allocated can *never* be violated without rendering the *entire* trial result untrustworthy." *Id.* (emphasis in original).

268. *See infra* notes 303-08 and accompanying text.

The cause and actual prejudice requirement is a judicially created doctrine of waiver or forfeiture. Since federal habeas review is designed to protect the prisoner's interests in freedom from illegal or unconstitutional confinement, denying him the opportunity to assert federal constitutional rights is a rather drastic step. Therefore, to guard against indiscriminate forfeiture of federal habeas review of constitutional claims, the criteria for determining when a procedural default will bar federal habeas review should be clear and easily applied.[269] *Isaac* and *Frady* fail to provide much more clarity than did *Sykes* in their application of the concepts of cause and actual prejudice to other situations involving procedural default.[270] This lack of clarity will result in disparate applications of the cause and actual prejudice standard. Courts will either be too lax or too harsh in attempting to apply the concepts of cause and actual prejudice. When the lower court's application is too harsh, a person's liberty, as well as important constitutional rights may be affected.

1. "Cause": The Absence of "Tools" to Construct the Constitutional Argument

The Court in *Sykes* noted that the cause and actual prejudice standard was narrower than the deliberate bypass standard of *Noia*. Beyond that, the Court did not define cause for application in future cases. As to the respondent Sykes, the Court observed that cause did not exist because he had provided no explanation for his failure to object to the testimony obtained in violation of his *Miranda* rights which was admitted at his trial.[271] In *Isaac*, the Court noted that the nature of a claim alleging unconstitutional allocation of the burden of proving self-defense, in contrast to a *Miranda* claim, may affect the determination of guilt at trial. Nevertheless, the Court imposed the requirement that a habeas petitioner make the threshold showing of cause and actual prejudice to excuse a procedural default.[272] Rather than address the nature of federal habeas corpus review and the constitutional interests it is designed to protect, the Court merely asserted that the principles of *Sykes* are not limited by the nature of the

269. *Noia's* "primary virtue" was that it provided a "coherent yardstick for federal district courts in rationalizing their power of collateral review." Wainwright v. Sykes, 433 U.S. 72, 116 (1977) (Brennan, J., dissenting).

270. "The Court still refuses to say what 'cause' *is*. . . . [b]ut . . . is more than eager to say what 'cause' is *not*." Engle v. Isaac, 102 S. Ct. 1558, 1580 (1982) (Brennan, J., dissenting) (emphasis in original). In *Frady*, the Court left open the import of "actual prejudice" in situations other than failures to object to erroneous jury instructions at trial. United States v. Frady, 102 S. Ct. 1584-95 (1982).

271. 433 U.S. 72, 91 (1977).

272. 102 S. Ct. 1558, 1572 (1982).

constitutional claim presented.[273] Thus, under *Isaac*, if defense counsel fails to raise constitutional arguments that he had the tools to construct, the petitioner is barred from asserting those claims on habeas corpus review, despite the substantive nature of the constitutional claim involved or the error's effect upon the determination of guilt at trial.[274]

The Court's decision in *Isaac* does not automatically follow from *Sykes*. In *Sykes*, the Court did not weigh the cost considerations[275] of federal habeas review of state court judgments against the forfeiture of constitutional claims affecting the determination of guilt at trial. In fact, the Court has consistently acknowledged that habeas corpus is designed to protect against convictions that violate fundamental fairness.[276] Furthermore, the sandbagging rationale of *Sykes* makes no sense as a trial tactic when applied to an attorney's failure to raise a claim that is inchoate, as was arguably the case in *Isaac*, or when the failure to object is due to attorney neglect or negligence.[277] Apparently, the sandbagging concern has been replaced in *Isaac* with a prohibition against attorney failure to utilize the tools with which to construct the constitutional argument at trial.[278]

As in *Sykes*, the *Isaac* Court did not resolve whether attorney ignorance or error beyond the habeas petitioner's control could ever adequately discharge the cause burden.[279] *Isaac* suggests, however, that at least some sixth amendment claims alleging ineffective assistance of counsel may be excluded from federal habeas corpus review. The Court rejected adoption of a rule requiring trial counsel to exercise "extraordinary vision" or "to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim."[280] Moreover, the Court commented that the Constitution guarantees criminal defendants "only a fair trial and a competent attorney," and not that every conceivable constitu-

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273. *Id.* at 1572. *See supra* notes 168-75 and accompanying text.

274. *Id.* at 1574. *See supra* notes 185-86 and accompanying text.

275. *See supra* notes 168-74 and accompanying text.

276. *See supra* note 267. Moreover, *Wainwright v. Sykes* may be justified, as was *Stone*, on the grounds that it involved a *Miranda* claim. *See supra* note 33. As Justice Stevens observed, because "the police fully complied with *Miranda*, the deterrent purpose of the *Miranda* rule [was] inapplicable" and there was "clearly no basis for claiming that the trial violated any standard of fundamental fairness." *Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring).

277. *See supra* notes 193 & 196 and accompanying text.

278. *See supra* notes 185-86 and accompanying text.

279. *See* Wainwright v. Sykes, 433 U.S. 72, 116-17 (1977) (Brennan, J., dissenting). Justice Brennan presents a formidable argument against punishing a lawyer's errors by closing the federal courthouse door to his client when fundamental constitutional rights are at stake. *Id.* at 114-18.

280. 102 S. Ct. at 1573.

tional claim will be recognized and raised.[281] It is inconceivable that the Court would permit a habeas petitioner to circumvent the cause requirement set forth in *Isaac* by claiming ineffective assistance of counsel as cause because the attorney failed to perceive and litigate a "knowable" constitutional claim.[282] In determining that the alleged unawareness of an objection does not constitute cause where the basis of a constitutional claim is available and other defense counsel have perceived and litigated the constitutional claim,[283] the Supreme Court may have effectively excluded newly-recognized constitutional claims from habeas corpus review.[284] The Court refused to decide whether the novelty of a constitutional claim ever constitutes cause for a failure to object at trial.[285] But habeas petitioners are held to such a "high standard of foresight," as emphasized by the dissent, that the Court's holding amounts to a complete rejection that a claim may be so inchoate that adequate cause exists for the the failure to raise it.[286]

Isaac creates an additional area of confusion for the lower federal courts in attempting to apply the concepts of cause and actual prejudice to other cases of procedural default. In refusing to decide whether the novelty of a constitutional claim ever establishes cause excusing a procedural default, the Court stated that subsequent discovery of a latent constitutional defect "does not invariably render the original trial fundamentally unfair."[287] This statement was made in the context of the Court's discussion of cause, making it difficult to discern whether the Court means to incorporate such

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281. *Id.* at 1574.

282. *See supra* note 185 and accompanying text. This argument has been raised with respect to a defendant's attempt to base an appeal upon ineffective assistance of counsel rather than upon the issue not raised by counsel in an attempt to satisfy *Sykes. See* Tague, *The Attempt to Improve Criminal Defense Representation*, 15 AMER. CRIM. L. REV. 109, 129 & n.114 (1977). *See also* Washington v. Gibson, 50 U.S.L.W. 3866 (1982). In Gibson v. Spalding, 665 F.2d 863 (9th Cir. 1981), the court of appeals held that the petitioner's failure to challenge on direct appeal a jury instruction that improperly shifted the burden of proof to the defense under Mullaney v. Wilbur, 421 U.S. 684 (1975), did not preclude federal habeas corpus consideration of that claim because the defense lawyer's failure to raise the *Mullaney* issue amounted to ineffective assistance of counsel, providing cause for petitioner's failure to timely raise that claim timely. *Id.*. The Supreme Court ordered the judgment vacated and the case remanded "for further consideration in light of *Isaac* and *Frady*," Washington v. Gibson, 50 U.S.L.W. 3915 (1982). Apparently, the cause and actual prejudice standard applies to procedural defaults on appeal, as well as at trial. *See also supra* note 221 and accompanying text.

283. 102 S. Ct. at 1574-75.

284. *See supra* note 173.

285. 102 S. Ct. at 1573.

286. *Id.* at 1580 (Brennan, J., dissenting).

287. 102 S. Ct. at 1573. *See supra* notes 180-82 and accompanying text.

an inquiry in the calculation of cause, or is merely referring to the requirement that the habeas petitioner also demonstrate actual prejudice.

2. *"Actual Prejudice": No Less Than a Colorable Showing of Innocence?*

Frady extends the cause and actual prejudice standard of *Sykes* to cases of procedural default by federal prisoners seeking collateral relief under section 2255. *Francis* applied the cause and actual prejudice requirement of *Davis* to a state prisoner's failure to object to grand jury composition in order to achieve parity between state and federal prisoners. *Frady*'s application of *Sykes* to instances of procedural default by federal prisoners may therefore be logically consistent. Moreover, *Davis* provides a foundation for extending the cause and actual prejudice standard to other instances of procedural default by federal prisoners.[288] It is not entirely clear, however, that Congress intended the plain error standard to apply only on direct review.[289] Accordingly, the Court's rejection of the plain error standard was not necessarily warranted, but result-oriented to permit application of the cause and actual prejudice standard to bar review of a federal prisoner's section 2255 motion.

The Court arrived at this result to accommodate the government's interest in the finality of judgments. Although it is well-settled that collateral review may not substitute for an appeal,[290] precedent does not suggest that collateral review should be withheld from a federal prisoner because his trial and appeal took place before a federal tribunal. The Court in *Frady* rejected, without squarely confronting, the *Kaufman* premise that the federal prisoner's right to collateral review is not merely a right to a federal forum, but a right to full and fair consideration of federal constitutional claims.[291] The issue is not, as framed by the Court, whether "[o]ur trial and appellate procedures are . . . so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of

288. Justice Brennan argued vigorously to the contrary, however. 102 S. Ct. at 1600. In his opinion, *Francis* and *Sykes* applied an appropriate rule of criminal procedure from *Davis* to a civil proceeding. Moreover, in *Frady*, he argued, the Court excluded

> the applicability in a criminal proceeding of a rule of criminal procedure plainly intended by Congress to be available to federal prisoners. The inconsistency in these decisions lies in their announcement that even under the pressures of clear congressional direction to the contrary, this Court will strain to subordinate a prisoner's interest in substantial justice to a supposed interest in finality.

102 S. Ct. at 1604 (Brennan, J., dissenting).

289. *See supra* notes 230, 232-35 and accompanying text.

290. *See supra* notes 50 & 217 and accompanying text.

291. Kaufman v. United States, 394 U.S. 217, 228 (1969). *See supra* notes 76-78, 218 and accompanying text.

endless post-conviction collateral attacks."[292] In enacting section 2255, Congress deemed it appropriate to provide federal prisoners a remedy collateral to the available appellate procedures by which to challenge his conviction.

The Court also failed to address the fact that, unlike the statutory provision governing habeas corpus for state prisoners under section 2254, Congress has specifically provided in section 2255 that "[a] motion for such relief may be made at any time."[293] The Court's repeated reference to Frady's "long-delayed" section 2255 motion was therefore inappropriate and misleading. Indeed, Congress has provided for collateral review of a federal prisoner's constitutional claims, no matter how long the original judgment is final, subject only to the limitation of proof of prejudice to the government resulting from delay in filing the motion.[294]

After *Frady*, the federal prisoner will forfeit collateral review unless he is able to meet the cause and actual prejudice standard. The standard of actual prejudice presented in *Frady* differs considerably from that established in *Sykes*, however. Prejudice did not exist in *Sykes* because "[t]he other evidence of guilt presented at trial . . . was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement."[295]

In contrast, the *Frady* Court established that the petitioner is required to "shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[296] The precise actual prejudice standard to be applied after *Frady* is difficult to discern. In addition to the Court's "actual and substantial disadvantage" test, the Court discussed two other formulations of the actual prejudice requirement. At one point, the Court suggested what more nearly resembles an "overwhelming evidence" test which some courts have viewed as the applicable test under *Sykes*.[297] The Court stated

292. 102 S. Ct. at 1592. *See supra* note 218 and accompanying text.

293. 28 U.S.C. § 2255 (1976). Furthermore, as the Court observed in *Kaufman*, "[t]he opportunity to assert federal rights in a federal forum is clearly not the sole justification for federal post-conviction relief; otherwise there would be no need to make such relief available to federal prisoners at all." 394 U.S. at 226.

294. 102 S. Ct. at 1593. *See* 28 U.S.C. § 2255(h) (1976). In *Kaufman*, the Court recognized that "[t]he provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." 394 U.S. at 226.

295. 433 U.S. 72, 91 (1977).

296. 102 S. Ct. at 1596 (emphasis in original). *See supra* note 225-27 and accompanying text.

297. Justice Brennan likened the *Sykes* standard to the harmless-error doctrine. Wain-

that "the strong uncontradicted evidence of malice in the record, coupled with Frady's utter failure to come forward with a colorable claim that he acted without malice, disposes of his contention that he suffered such actual prejudice that reversal of his conviction 19 years later could be justified."[298] Elsewhere, however, the Court stated that Frady would have had a different case had he presented "affirmative evidence indicating that he had been convicted wrongly of a crime of which he was innocent."[299] Under the first formulation, actual and substantial disadvantage is potentially shown by an absence of overwhelming evidence of guilt. The final statement, however, suggests that actual prejudice may not be demonstrated absent a colorable showing of innocence.[300]

Without regard to proving cause, this construction of actual prejudice may alone extinguish federal habeas corpus review in cases involving procedural default. The habeas petitioner may have difficulty merely presenting his claim, much less producing affirmative evidence of his innocence. He does not automatically receive a free trial transcript, appointment of an attorney to assist him, or discovery to enable him to present his case at his habeas corpus hearing.[301] In the case of erroneous jury instructions charging the defendant with the burden of proving self-defense, the petitioner faces the seemingly impossible task of showing that the jury would have found him innocent but for the erroneous instructions. Although, as in *Sykes*, the Court left open the import of the term "actual prejudice" in situations other than a defendant's failure to object to jury instructions at trial,[302] lower federal courts have only the *Sykes* and *Frady* definitions of actual prejudice to rely upon. Of course, as demonstrated in *Isaac*, even if

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wright v. Sykes, 433 U.S. 72, 117 (Brennan, J., dissenting). A majority of lower federal courts surveyed after *Sykes* applied similar overwhelming evidence tests, much like that of harmless error. *See* Goodman & Sallett, *Wainwright v. Sykes: The Lower Courts Respond*, 30 HASTINGS L.J. 1683, 1702-03 (1979).

298. 102 S. Ct. at 1596.

299. *Id.*

300. The term "colorable showing of innocence," which is not used by the Court in identical form, is attributable to Judge Friendly. *See* Friendly, *supra* note 5, at 160. Judge Friendly's formulation of the criterion appears less stringent than the *Frady* "actual and substantial disadvantage" text. The petitioner seeking collateral relief must show that there is

> a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.

Id.

301. *See* Tague, *supra* note 282, at 129 and cases cited therein.

302. 102 S. Ct. at 1595.

the petitioner is able to demonstrate actual prejudice, he will be barred from federal habeas review of that allegation if he is unable to surmount the cause requirement.[303]

In order to ensure that cases of a fundamental miscarriage of justice will receive federal habeas corpus review despite a petitioner's procedural default, the Supreme Court has provided that, in appropriate cases, the concepts of cause and actual prejudice must yield to the "imperative of a fundamentally unjust incarceration."[304] According to the Court, "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice requirement."[305] The concepts of a fundamentally unjust incarceration and a fundamental miscarriage of justice are not self-defining, however, and the Court has provided little guidance for making such a determination. In *Frady*, the Court could simply "perceive no risk of a fundamental miscarriage of justice."[306] In *Isaac*, although the Court stated that the concepts of cause and actual prejudice are to yield to a fundamentally unjust incarceration,[307] the Court also specified that the nature of the claim does not negate the need to make the threshold showing of cause and actual prejudice.[308] It remains unclear whether in an appropriate case, the cause and actual prejudice principles are simply not applied when a fundamental miscarriage of justice is demonstrated, or whether a demonstration of a miscarriage of justice satisfies the cause and actual prejudice requirement.

The Court is able to restrict habeas review through deference to procedural rules with statutory impunity, because cause and actual prejudice are judicially created concepts, which do not attempt to limit the power of habeas corpus review. The concepts of cause and actual prejudice derive their meaning from the principles of comity and finality.[309] Accordingly, as courts attribute more value to comity and finality, the cause and actual prejudice standard will be interpreted more stringently to limit federal habeas corpus review. Thus, the application of the cause and actual

303. Cause and actual prejudice is a dual standard. *Frady*, 102 S. Ct. at 1594. In *Isaac*, the Court disagreed that the existing prejudice was so great that habeas relief should be granted even in the absence of "cause," noting that *Sykes* stated these criteria in the conjunctive. *Isaac*, 102 S. Ct. at 1575 n.43.

304. 102 S. Ct. at 1575.

305. *Id.* (citing Wainwright v. Sykes, 433 U.S. at 91).

306. 102 S. Ct. at 1596.

307. 102 S. Ct. at 1575. If Justices Brennan and Marshall are correct in stating that the entire trial result becomes untrustworthy when the burden of proof is improperly allocated, as it was in *Isaac*, see *supra* notes 200, 267, 267, Isaac's resulting incarceration was, arguably, fundamentally unjust.

308. *Id.* at 1572.

309. *Id.* at 1575.

prejudice requirement to constitutional claims that affect the truthfinding function at trial was justified in *Isaac* to balance the petitioner's interest in federal habeas corpus review of his constitutional claims against the state's interest in administering its criminal justice system without unwarranted federal court interference. Comity considerations underlie *Lundy*'s total exhaustion requirement as well. In *Frady*, the Court's view of the need for finality in criminal judgments was controlling.

Unfortunately, the Court's determination to tighten up on liberal allowance of habeas corpus may be founded upon a totally erroneous premise. The Court in *Isaac* asserted that "federal intrusions may seriously undermine the morale of our state judges,"[310] but very few habeas petitions are actually granted to state prisoners.[311] Similary, if *Lundy* derives from the belief that state petitioners are abusing the writ of habeas corpus solely because of a presumed increase in the number of habeas petitions filed, that decision is based on an erroneous premise. The number of state habeas petitions has, indeed, increased since *Brown v. Allen* was decided,[312] but the State prison population has also increased dramatically.[313] Moreover, over the last ten years, the number of state habeas petitions filed has not increased, but fluctuated slightly, despite the more than two-fold increase in State prison population.[314] Any increases in habeas petitions filed may more accurately reflect this two-fold increase in the state prison population rather than state prisoner abuse of the habeas corpus remedy.

Although comity, federalism, and finality of judgments are important societal interests, Congress has chosen to provide a federal forum for the collateral review of the constitutional claims of state and federal prisoners. As Justice Brennan noted in his *Sykes* dissent, the Court has never taken issue with *Noia*'s foundation principle that "federal courts possess the *power* to look beyond a state procedural forfeiture in order to entertain [a

310. 102 S. Ct. at 1572 n.33. *See supra* note 173.

311. Empirical data is scarce and antiquated. In 1971, the administrative office of the United States Court reported that in 96% of prisoner petitions "the matter prayed for is not granted." *See* Shapiro, *infra* note 252, at 333 (quoting ANN. REP. OF THE JUD. CONF. OF THE U.S. 167-79 (1971)). In the 12-year period from 1946 to 1957, state habeas petitioners were reportedly successful in 1.4% of the cases. *See* Fay v. Noia, 372 U.S. at 445 n.1 (citing H.R. REP. No. 548, 86th Cong., 1st Sess. 37 (1959)). A 1950's study of 126 different petitioners disclosed that in only one case was the writ of habeas corpus granted. *See* Brown v. Allen, 344 U.S. 443, 526 (1953) (appendix to opinion of Frankfurter, J.).

312. 549 petitions were filed by state prisoners in 1953. That number increased to 7,790 in 1981. Source: Annual Report of the Director, Administrative Office of the U.S. Courts.

313. The State prison population increased from 154,184 in 1953 to 340,876 in 1981. Source: Bureau of Justice Statistics.

314. In fact, there has been a dramatic decrease of habeas petitions filed, when expressed as a percentage of the state prison population:

petitioner's] contention that [his] constitutional rights have been abridged."[315] Perhaps the decisive question, then, is whether "[u]nder the guise of fashioning procedural rules," the Court is justified "in wiping out the practical efficacy of a jurisdiction conferred by Congress on the District Courts."[316] Nevertheless, the vitality of federal habeas corpus review may be assured by the vigilance of the lower federal courts in broadly interpreting the concepts of cause and actual prejudice and in identifying fundamental unfairness when determining whether a prisoner's procedural default should bar federal habeas corpus review.[317] Similarly, the federal

STATE PRISONERS CONFINED
AND PRISONER PETITIONS
FILED IN U.S. DISTRICT COURTS

YEAR	TOTAL STATE PRISON POPULATION[a]	TOTAL PETITIONS FILED BY STATE PRISONERS[b]	HABEAS PETITIONS FILED BY STATE PRISONERS[c]	HABEAS PETITIONS FILED BY STATE PRISONERS EXPRESSED AS A PERCENTAGE OF STATE PRISON POPULATION
1971	117,113	12,145	8,372	7.2%
1972	174,470	12,088	7,949	4.6%
1973	181,534	12.683	7,784	4.3%
1974	207,630	13,423	7,626	3.8%
1975	229,685	14,260	7,843	3.4%
1976	249,408	15,029	7,833	3.1%
1977	260,747	14,846	6,866	2.6%
1978	276,799	16,969	7,033	2.5%
1979	287,635	18,502	7,123	2.5%
1980	304,332	19,574	7,031	2.3%
1981	340,876	23,607	7,790	2.3%
1982[d] ...	355,887	24,975	8,059	2.3%

NOTE: [a]The prison population consists of all prisoners who have been sentenced as adults or youthful offenders and whose maximum sentence length is a year and a day or longer. Beginning in 1972, this definition was adopted by the Law Enforcement Assistance Administration and the Bureau of the Census for use in compiling statistics for the National Prisoner Statistics (NPS) program. Beginning in 1977, the data reflects prison population with state or federal jurisdiction, therefore, the figures exclude local or county jurisdiction. Source: Bureau of Justice Statistics.

[b]Includes mandamus, civil rights, habeas corpus, and all other state prisoner petitions filed. Filings for the year ended June 30. Source: Annual Report of the Director, Administrative Office of the U.S. Courts.

[c]Filings for year ended June 30. Source: Annual Report of the Director, Administrative Office of the U.S. Courts.

[d]As of March 31, 1982.

315. 433 U.S. 72, 100 n.2 (1977).

316. Brown v. Allen, 344 U.S. at 498-99.

317. In large measure, the position to which federal habeas corpus review is elevated or relegated reflects society's attitude toward the imprisoned. A judge's time is, indeed, precious, *see* Galtieri v. Wainwright, 582 F.2d 348, 375 (5th Cir. 1978) (Goldberg, C.J., dissenting), but so are the "precious commodities" of human life and liberty and the constitutional

courts may exercise their discretion to assure that abuse of the writ is found only when substantially indicated.

IV. Conclusion

Lundy, Isaac, and *Frady* evidence the very different nature of federal habeas corpus review from that of twenty years ago when the writ was regarded as the guardian of fundamental rights of personal liberty. The Court has not returned to pre-*Noia* standards entirely in cases of procedural default, and a petitioner's inclusion of unexhausted claims is not an absolute foreclosure from federal habeas review of those claims. Under the Court's construction of cause and actual prejudice in *Isaac* and *Frady*, however, and the plurality's application of the abuse of the writ doctrine in *Lundy*, the Court may accomplish the restriction of habeas corpus review of substantive, meritorious constitutional claims by going in through the procedural back door. The Court has provided insufficient guidance in defining and applying the concepts of cause and actual prejudice. As a result, procedural defaults will place a heavy burden upon practitioners and pro se petitioners to conform within vaguely delineated parameters or forever forfeit post-conviction federal habeas relief. In curbing the scope of federal habeas corpus review, the Court has come perilously close to disregarding, if not reinterpreting, the habeas corpus statutes.

Mary Ann Snow

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guarantees the great writ is designed to preserve. *See id.*. As one distinguished jurist has observed:

> The aim which justifies the existence of habeas corpus is not fundamentally different from that which informs our criminal law in general, that it is better that a guilty man go free than that an innocent one be punished. . . . What is involved . . . . [i]s . . . the creative process of writing specific content into the highest of our ideals. So viewed, the burdensome test of sifting the meritorious from the worthless appears less futile, and there is less room for the emotions of federalism.

Schaefer, *Federalism and Criminal Procedure*, 70 Harv. L. Rev. 1, 25 (1956).