Western New England Law Review

Volume 1 *1 (1978-1979)*
Issue 1

Article 9

1-1-1978

HABEAS CORPUS—STATE CONTEMPORANEOUS OBJECTION RULE—EFFECT OF STATE PROCEDURAL DEFAULT ON AVAILABILITY OF FEDERAL HABEAS CORPUS REVIEW—Wainwright v. Sykes, 433 U.S. 72 (1977)

John P. Letourneau

HABEAS CORPUS—STATE CONTEMPORANEOUS OBJECTION RULE —EFFECT OF STATE PROCEDURAL DEFAULT ON AVAILABILITY OF FEDERAL HABEAS CORPUS REVIEW—*Wainwright v. Sykes*, 433 U.S. 72 (1977).

Respondent Sykes was convicted of third degree murder after a jury trial in a Florida state court. After his arrest he had been given his *Miranda* warnings, but he waived his right to remain silent and made a confession which was introduced at his trial.[1] His attorney did not challenge the admission of the confession nor did the judge question its admissibility. Sykes was unsuccessful in his direct appeals in the Florida state courts. Only later, in a collateral attack in a state habeas corpus proceeding, did he raise the issue of the voluntariness of his confession. The state collateral attack was unsuccessful because under Florida's contemporaneous objection rule the procedural default barred relief.[2] Sykes was successful, however, in having his federal habeas corpus petition entertained in the United States District Court in Florida. The State of Florida appealed the federal district court's decision to entertain the petition. Although the Court of Appeals for the Fifth Circuit affirmed the decision, the Supreme Court reversed, holding that a criminal defendant's failure to comply with a valid state procedural rule concerning the admission of a confession would bar federal habeas corpus review of his claim unless there is a showing of cause for

---

1. Wainwright v. Sykes, 433 U.S. 72, 74 (1977). No written statement was offered into evidence because Sykes refused to sign the statement once it was typed. *Id.* at 74 n.1.

2. FLA. R. CRIM. P. § 3.190(i) (West 1967) provides:

Motions to Suppress a Confession or Admissions Illegally Obtained.

(1) *Grounds.* Upon motion of the defendant or upon its own motion, the Court shall suppress any confession or admission obtained illegally from the defendant.

(2) *Time for Filing.* The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

(3) *Hearing.* The court shall receive evidence on any issue of fact necessary to be decided in order to rule on the motion.

Sykes' first argument was that this was not a contemporaneous objection rule and that it put the burden on the trial judge to raise on his own motion the question of the admissibility of any inculpatory statement. This interpretation was rejected by the Court because of the language of the statute and because of Florida case law interpreting the rule. 433 U.S. at 85-86.

the noncompliance and a showing of prejudice resulting from the procedural default.[3]

I. BACKGROUND

The federal habeas corpus statute concerning state prisoners 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."[4] This statutory version of the common law writ of habeas corpus has given rise to four different questions which have often confronted the Supreme Court.[5] The first three questions concern, respectively, the type of federal claim that can be heard by a federal habeas court,[6] the degree of deference to which a state court's

---

3. *Id.* at 86-87.

4. 28 U.S.C. § 2254(a) (1970). The earlier version of this statute was in the Judiciary Act of 1789 and was applicable only to prisoners detained by federal authority. Act of September 24, 1789, ch. 20, § 14, 1 Stat. 81 (current version at 28 U.S.C. § 2254 (1970)). Its scope was greatly expanded in 1867, when Congress authorized federal courts in all cases, including state cases, to grant the writ where a person was being held in violation of the Constitution of the United States. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 238 (3d ed. 1976).

5. Three of these questions were not at issue in the *Sykes* case but they are relevant because they illustrate the Court's willingness to modify its views about the scope of habeas corpus even when the statutory language has remained unchanged. *See* 433 U.S. at 80-81 and notes 6-8 *infra*.

6. Until the early twentieth century, the Court confined argument to the issue of whether the state court had the required jurisdiction to detain the prisoner. This jurisdictional viewpoint gradually changed. C. WRIGHT, *supra* note 4, at 239. In Moore v. Dempsey, 261 U.S. 86 (1923), the Court held that if a court was under sway of mob rule, the proceedings, although formally proper, would be a mere mask depriving the court of jurisdiction. A prisoner convicted in such circumstances could then attack his conviction by filing a habeas corpus petition. In Johnson v. Zerbst, 304 U.S. 458 (1938), an indigent federal prisoner's claim that he was denied the right to counsel at his trial was held to challenge the "power and authority" of the trial court. His claim, therefore, could be reviewed in a habeas corpus proceeding. *Id.* at 463. In 1942, the Court finally abandoned its jurisdictional analysis stating:

> [T]he use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.

Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (citations omitted). The writ had evolved over several decades from a mere checklist of jurisdictional requirements to a proceeding available whenever the state proceeding allegedly violated a prisoner's federal constitutional rights. "Its province, shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person." Carafas v. LaVallee, 391 U.S. 234, 238 (1968) (footnotes omitted).

resolution of the federal claim is entitled,[7] and the extent to which a defendant must exhaust state remedies before resorting to federal habeas corpus.[8] In *Sykes*, the Court considered the fourth question: what constitutes an independent and adequate state ground for a conviction that will bar otherwise cognizable federal issues from review in a federal habeas corpus proceeding.

The independent and adequate state ground doctrine originally developed as a jurisdictional limitation on direct Supreme Court review of state court decisions.[9] When a case is resolved on state substantive or procedural grounds so that the federal question is not reached,[10] or when the federal question is decided along with a

---

7. In Brown v. Allen, 344 U.S. 443 (1953), the Supreme Court held that a federal judge is not barred by res judicata from deciding the federal question involved in a claim that had been rejected by a state court. *Id.* at 458. Justice Frankfurter, in a concurring opinion, stated that the federal judge could accept the determination of the facts by the state court unless there had been a "vital flaw" in the state factfinding process. *Id.* at 506. He reasoned that the prior factfinding hearing would be more accurate than a new hearing because the recollections of those witnesses still available would be affected by the passage of time. In 1963, in Townsend v. Sain, 372 U.S. 293 (1963), the Court held that the federal court had the power to receive evidence and try facts anew on a habeas corpus petition. The majority summarized six circumstances in which a federal evidentiary hearing was mandatory:

> 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. The six circumstances were codified in somewhat different form in 28 U.S.C. § 2254(d) (1970) (added by Act of Nov. 2, 1966, Pub. L. 89-711, 80 Stat. 1105).

8. In *Ex parte* Royall, 117 U.S. 241 (1886), the petitioner claimed that his indictment was based on an unconstitutional statute and sought habeas corpus relief in advance of the trial. The Court held that the federal courts had the power to decide the issue, but that the importance of maintaining good relations among the state courts and the federal court system weighed against taking up the matter until it had been considered in the state trial. *Id.* at 251. *See also Ex parte* Hawk, 321 U.S. 114 (1944); Mooney v. Holohan, 294 U.S. 103 (1935); Urquhart v. Brown, 205 U.S. 179 (1907). The requirement of exhaustion of state remedies is codified in 28 U.S.C. § 2254(b) & (c) (1970), which states that an application for a writ will not be granted if the prisoner has a state-provided right to raise the issue by any available procedure. An application for direct review to the Supreme Court was initially required as well, Darr v. Burford, 339 U.S. 200 (1950), but this requirement was overruled by the Court in Fay v. Noia, 372 U.S. 391, 435 (1963).

9. The origin of the doctrine is found in the statutory construction of 28 U.S.C. § 1257 (1970), defining the appellate jurisdiction of the Supreme Court over cases decided in state courts. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1340 (1961).

10. In one case, for example, a contract was held by a state court to have an

nonfederal claim which is sufficient to support the judgment independently, there is no appellate jurisdiction in the Supreme Court of the United States.[11] A decision on the federal question by the Supreme Court would not affect the outcome of the case and would constitute an advisory opinion.[12] A decision on the nonfederal question would unduly infringe on the principles of federalism.[13]

The independent and adequate state ground doctrine eventually reached the habeas corpus area.[14] In that context, however, reliance on the doctrine by the Supreme Court depended on whether the state law grounds were substantive or procedural. When the state law grounds for a conviction were substantive and were the only issues raised or were dispositive of the case, it was accepted that no federal habeas corpus review would be available.[15] The law has been unclear, however, when federal claims could have been dispositive of the case in state court but were not heard because they were not presented in accordance with state procedural rules. Whether such a procedural default was an independent and adequate state law ground to bar federal habeas corpus review is the subject of the *Sykes* case, which represents the Court's most recent attempt to deal with this difficult issue.

Earlier decisions demonstrate the Supreme Court's varied approach to the treatment of state court procedural defaults. In 1953, in *Daniels v. Allen*,[16] the defendant's lawyer filed an appeal with the state supreme court one day after the filing deadline. The state appellate court refused to hear the case. The Supreme Court held

---

invalid arbitration clause which was not severable from the contract, so that the whole contract was invalid. The determination of non-severability made it unnecessary for the state court to decide whether the contract violated the Sherman Antitrust Act. The determination of the nonfederal question resolved the case. The Supreme Court would thus have no jurisdiction to review the federal question involved in such a decision. Fox Film Corp. v. Muller, 296 U.S. 207, 211 (1935).

11. There are times when both state and federal questions are decided but it is unclear on which ground the state court has rested its decision. In such cases, the decision will not be reviewable if the state ground is an independent and adequate ground for the decision. Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1872). If the state ground does not have fair and substantial factual support, then the Supreme Court will exercise jurisdiction and review the case. NAACP v. Alabama, 357 U.S. 449, 455 (1958).

12. Fay v. Noia, 372 U.S. 391, 429-30 (1963). *See also* Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

13. *See* Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1875).

14. *See* Irvin v. Dowd, 359 U.S. 394, 407-18 (1959) (dissenting opinions).

15. *See* Wainwright v. Sykes, 433 U.S. 72, 81 (1977); Durky v. Mayo, 351 U.S. 277 (1956); Meeks v. Lainson, 236 F.2d 395 (8th Cir. 1956).

16. 344 U.S. 443 (1953) (decided *sub nom.* Brown v. Allen).

that federal habeas relief was not available to the defendant. The Court reasoned that failure to perfect an appeal according to reasonable state procedural rules would bar collateral attack through federal habeas corpus because the state decision rested on independent and adequate state law grounds.[17]

In 1963, however, in a sweeping opinion by Justice Brennan, the Court overruled *Daniels* in *Fay v. Noia*.[18] In *Noia*, the defendant had personally decided not to directly appeal his conviction of murder fearing that if he were successful in his appeal a second trial could result in the death penalty. His two codefendants appealed and lost. Fourteen years later, the codefendants were released on federal habeas corpus writs because of a finding that their confessions had been coerced. Noia then sought federal habeas corpus relief. The state argued that Noia's petition should not be entertained because of his earlier failure to directly appeal his conviction and thus exhaust his state remedies at that time.[19] The Court disagreed, stating that while a procedural default such as the failure to make a timely appeal constituted an independent and adequate state law ground that would bar direct review by the Supreme Court, such a procedural default would not bar federal habeas corpus review.[20]

Under *Noia*, a procedural default in state court would not bar a federal court from providing habeas corpus relief unless there had been a deliberate by-pass of state procedural rules. A federal district judge would be required to entertain a habeas corpus petition, but there would be a "limited discretion" in the federal judge to "deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies."[21]

The determination of whether there had been a deliberate by-pass of state procedural rules under *Noia* was governed by the traditional waiver test set forth in *Johnson v. Zerbst*.[22] The *Zerbst* Court defined waiver as "an intentional relinquishment or aban-

---

17. *Id.* at 458.

18. 372 U.S. 391 (1963).

19. *See* note 8 *supra* and accompanying text.

20. "[T]he doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute." 372 U.S. at 399.

21. *Id.* at 438.

22. 304 U.S. 458 (1938).

donment of a known right or privilege."[23] The *Noia* Court used this personal waiver standard in determining that the defendant's decision not to appeal was not such an intentional relinquishment as to amount to a "deliberate by-pass."[24] The Court in *Noia* noted that the defendant had a "grisly choice" between his life sentence or pursuit of an appeal which could have resulted in the death penalty at a second trial and ruled that there had been no deliberate by-pass of the state system in order to have the claim heard for the first time on the federal level.[25]

II. THE *SYKES* CASE

In *Sykes*, the Court rejected the deliberate by-pass standard established in *Noia* and replaced it with a cause and prejudice standard. This standard was meant to be narrower than the *Noia* standard, thus decreasing the availability of federal habeas corpus relief.[26] A default caused by a deliberate by-pass of state procedures and a default caused by an inadvertent attorney failure to abide by state procedures must both meet the cause and prejudice standard of *Sykes* before federal habeas corpus review will be granted.

In *Sykes*, the Court first determined that the attorney's procedural default in not challenging the use of the confession at trial forfeited the right to a hearing on this issue at the trial level.[27] Justice Rehnquist, writing for the Court, then examined whether the procedural default would constitute an independent and ade-

---

23. *Id.* at 464. In the *Zerbst* case, this standard was to be applied on remand by the district court to determine whether the accused had competently and intelligently waived his right to counsel.

24. 372 U.S. at 399.

25. *Id.* at 440.

26. "We leave open for resolution in future decisions the precise definition of the 'cause' and 'prejudice' standard, and note here only that it is narrower than the standard set forth in dicta in *Fay v. Noia*, ..." 433 U.S. at 87.

27. In Jackson v. Denno, 378 U.S. 368 (1964), the Court invalidated a New York procedure which, rather than providing a hearing on the voluntariness of a confession, allowed the jury to decide the issue. Justice Rehnquist, in *Sykes*, stated that *Jackson* was not to be read as requiring a hearing when the defendant has not objected to the admission of his confession. 433 U.S. at 86. Rather, it was to be read as requiring a hearing on the issue only when the confession has been challenged. The Court reasoned that a defendant has a " 'right at some stage in the proceedings *to object* to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness. . . .' " *Id.* (quoting Jackson v. Denno, 378 U.S. at 376-77) (emphasis added by the Court). As Sykes' attorney had not challenged the use of the confession, a hearing on its voluntariness was not constitutionally required. 433 U.S. at 86.

quate state law ground that would bar federal habeas corpus review. He noted that under *Fay v. Noia*, such a procedural default would not bar federal habeas corpus relief unless it was shown that the default was a deliberate by-pass of the state procedural system.[28] However, he then cited two later decisions involving challenges to grand jury selection, *Davis v. United States*[29] and *Francis v. Henderson*,[30] which he viewed as providing an alternative to the deliberate by-pass standard of *Noia*.

In *Davis*, a federal prisoner's habeas corpus petition under the relevant habeas statute sought for the first time to challenge the makeup of the grand jury which indicted him.[31] Rule 12(b)(2) of the Federal Rules of Criminal Procedure required that such a challenge to the grand jury be made in a motion before trial.[32] The rule further stated that failure to make objections to an issue would constitute a waiver thereof, but the court, for cause shown, can grant relief from the waiver.[33] The *Davis* Court held that this rule, "promulgated by this Court and, . . . 'adopted' by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived. . . ."[34] The Court in *Davis* stated that this standard, derived from the Federal Rules rather than the *Fay v. Noia* concept of waiver, should apply not only to direct review of the criminal proceedings, but also to

---

28. *Id.* at 87.

29. 411 U.S. 233 (1973).

30. 425 U.S. 536 (1976).

31. 411 U.S. 233, 235 (1973). Federal prisoners are provided relief through 28 U.S.C. § 2255, which represents the counterpart to the remedy afforded state prisoners under 28 U.S.C. § 2254.

32. The Federal Rule applicable at the time stated in pertinent part:

(b) The Motion Raising Defenses and Objections.

. . . .

(2) Defenses and Objections Which Must Be Raised.

Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment of information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

FED. R. CRIM. P. 12(b)(2). (Rule 12 was amended in 1975 and 12(b)(2) was recodified in the new sections, 12(b) and 12(f). Federal Rules of Criminal Procedure Act of 1975, Pub. L. No. 94-64, 89 Stat. 370 (1975)).

33. *Id.*

34. 411 U.S. 233, 241 (1973).

collateral proceedings involving federal habeas corpus petitions of federal prisoners.[35] The *Davis* Court concluded that the claim should be barred from habeas corpus as it would be from a hearing on direct appeal, absent a showing of cause for the noncompliance and a showing of actual prejudice resulting from the procedural default.[36] The Court ignored the *Noia* decision, stating that the congressional purpose behind rule 12(b)(2), which governed waiver during the criminal proceedings, would be perversely negated if an entirely different and much more liberal requirement of waiver in federal habeas corpus proceedings was to be used.[37]

In 1976, in *Francis v. Henderson*,[38] the rule of *Davis* was applied in the case of a state prisoner attempting to challenge the grand jury composition despite a state procedural requirement that such challenges be raised before trial. The Court in *Francis* noted that the federal courts had the power to entertain such a habeas corpus petition but that it would not do so, based on "considerations of comity and concerns for orderly administration of criminal justice."[39] The *Francis* Court ruled that the cause and prejudice standard derived from the Federal Rules of Criminal Procedure should be applied to the state prisoner's federal habeas petition as

---

35. *Id.* at 242.

36. *Id.* The *Davis* Court derived the prejudice element from Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963), which stated that where "objection to the jury selection has not been timely raised under 12(b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule." Davis v. United States, 411 U.S. 233, 244 (1973) (quoting Shotwell Mfg. Co. v. United States, 371 U.S. at 363). The district court in the *Davis* case relied upon the element of prejudice and this was accepted by the Supreme Court. 411 U.S. at 244.

37. *Id.* at 242. The *Noia* concept of waiver in federal habeas corpus was applied to federal prisoners in Kaufman v. United States, 394 U.S. 217, 222 (1969). *See also* Sanders v. United States, 373 U.S. 1 (1963). The *Davis* Court explained that in *Kaufman* it had rejected a claim that 28 U.S.C. § 2255 limited the availability of federal habeas corpus relief when there was a waiver due to failure to assert a claim on appeal. 411 U.S. at 240. The Court noted, however, that the claim of the government in *Davis* was that because of a waiver rule 12(b)(2), and not § 2255, limited the availability of federal habeas corpus proceedings. The government also argued that rule 12(b)(2) governed waiver of grand jury composition in the context of the criminal proceedings themselves. The Court concluded that rule 12(b)(2) governed not only during the criminal proceedings, but also later at the habeas corpus proceedings. *Id.* at 242. As to the burden on federal courts using a more liberal standard of waiver for habeas corpus review, see note 46 *infra* and accompanying text.

38. 425 U.S. 536 (1976).

39. *Id.* at 539 (citing Fay v. Noia, 372 U.S. 391 (1963)). This was the only mention of *Noia* in the majority opinion. Justice Brennan, dissenting in *Francis*, challenged the Court to perform its "institutional duty" to overrule Fay v. Noia if that was what it intended. 425 U.S. at 547.

"[t]here is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants."[40]

In these two decisions, the *Sykes* Court discovered an alternative analysis which it could use to limit the apparently all-inclusive deliberate by-pass standard of *Noia*. In *Davis*, the Court ignored *Noia*, relying instead on a questionable interpretation of congressional intent behind the Federal Rules of Criminal Procedure.[41] In *Francis*, the Court applied the cause and prejudice standard to state prisoners to bar review of a challenge to the makeup of a grand jury.[42] The *Sykes* Court then extended the rule of *Francis v. Henderson* to a waived objection to the admission of a confession at trial.[43] The *Sykes* Court thus identified this type of procedural default as an independent and adequate state ground that would bar federal habeas corpus review as well as direct federal review.

III. ANALYSIS

In analyzing *Wainwright v. Sykes*, it is important to note the dramatic increase in federal habeas corpus petitions since *Noia*.[44] The effect of this increase may be overemphasized, however, as many of the petitions do not require much time.[45] The volume of applications can lead to the type of comment made by Justice Jackson: "He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[46]

---

40. *Id.* at 542 (quoting Kaufman v. United States, 394 U.S. 217, 228 (1969)).

41. *See* notes 48-54 *infra* and accompanying text.

42. *See* note 38 *supra* and accompanying text.

43. 433 U.S. at 87. *See* notes 38-40 *supra* and accompanying text.

44. Petitions for habeas corpus filed by state prisoners jumped from 1,020 in 1961 to 7,949 in 1972. Schneckloth v. Bustamonte, 412 U.S. 218, 260 n.14 (1973). *See* REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT II-5, 22, 28-32 (1972).

45. In 1968, over 6,300 petitions were filed in federal district courts by state prisoners. This was an increase of 286 percent in just five years. Yet it is all too easy to overstate the strain that an expanded habeas jurisdiction and expanded federal constitutional rights put on the judicial system. Most of the petitions were quickly dismissed: less than 500 reached the hearing stage, and most of those hearings lasted less than one day. Nor was the burden on the states staggering; many petitions do not even require a response; less than ten percent of the state convictions attacked had to be defended in a hearing, and so few prisoners were released that the burden of retrial must be small.

Developments in the Law—Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1041 (1970) (footnotes omitted).

46. Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

But as one commentator has noted, "it is not a needle we are looking for in these stacks of paper, but the rights of a human being."[47]

In *Davis*,[48] the Court had already started its retreat from the broad accessibility of federal courts through habeas corpus petitions represented in the approach of *Fay v. Noia*.[49] The Court stated that rule 12(b)(2) of the Federal Rules of Criminal Procedure indicated congressional intent to narrow such access.[50] Congressional intent, however, is often difficult to ascertain accurately. Justice Brennan, dissenting in *Sykes*, stated that:

> [s]ince at least *Brown v. Allen*, it has been recognized that the "fair effect [of] the habeas corpus jurisdiction as enacted by Congress" entitles a state prisoner to such federal review. . . . While some of my Brethren may feel uncomfortable with this congressional choice of policy, . . . the Legislative Branch nonetheless remains entirely free to determine that the constitutional rights of an individual subject to state custody, . . . are best preserved by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights. . . ."[51]

Justice Brennan also noted that alternative measures were available to Congress when it made its policy choices regarding federal determination of constitutional rights in the habeas corpus area,[52] such as removing all state criminal cases to the federal courts whenever constitutional defenses were raised.[53] He observed that despite the availability of these alternatives, "liberal post-trial federal review is the redress that Congress ultimately chose to allow and the consequences of a state procedural default should be evaluated in conformance with this policy choice."[54] Notwithstanding Justice Brennan's comments, the Supreme Court, in decisions

---

47. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 25 (1956). A 1966 study of this burden on federal courts concluded that: "While the burden of state-prisoner habeas corpus petitions on the federal courts is increasing, it has not yet reached alarming proportions, and presently represents only a small percentage of the courts' total work load." 52 VA. L. REV. 486, 506 (1966). *See also* Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 372 (1973).

48. *See* note 31 *supra* and accompanying text.

49. *See* note 18 *supra* and accompanying text.

50. 411 U.S. at 241.

51. 433 U.S. at 105-06 (quoting Brown v. Allen, 344 U.S. 443, 500 (1953); Mitchum v. Foster, 407 U.S. 225, 242 (1972)).

52. *See* 28 U.S.C. § 2254 (1970); note 4 *supra* and accompanying text.

53. 433 U.S. at 106-07.

54. *Id.*

subsequent to *Davis*, continued to reduce the number of situations in which state prisoners would have access to the federal habeas corpus remedy.

In *Stone v. Powell*,[55] the Court held that where a state has provided a full and fair hearing of a fourth amendment claim, a state prisoner would not be granted federal habeas corpus review. The rationale given was that the deterrent purpose of the exclusionary rule would not be served by providing habeas corpus relief to state prisoners and the harm to society would be great if the exclusionary rule were to be applied.[56] Justice Brennan, dissenting in *Powell*, feared that the decision contained the seeds for the exclusion of a variety of constitutional rights—perhaps those that were not thought to be "guilt related."[57]

Unlike *Stone v. Powell*, which denied a federal hearing to a state prisoner who had had a full hearing to challenge the state's conduct at the state level, *Wainwright v. Sykes* denied a federal hearing to a state prisoner who did not have a hearing at the state level. Under *Powell*, federal habeas relief is only barred when the state court has investigated the state government's conduct in a full and fair hearing. In *Sykes*, there was no hearing on the challenge to the state's conduct at any level, state or federal. Both decisions curtail the proper role of the federal courts of "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights. . . ."[58]

Over Justice Brennan's vigorous dissent, the *Sykes* Court has

---

55. 428 U.S. 465, 482 (1976).

56. The *Powell* Court stated that exclusion at the trial level serves to discourage police conduct that violates the fourth amendment. The Court noted, however, that the additional deterrent effect of allowing the exclusionary rule to operate at federal habeas corpus review when there was a prior hearing on the matter would be small in relation to the consequences. *Id.* at 493. As to the consequences of applying the exclusionary rule in habeas proceedings, the Court stated that it "deflects the truthfinding process and often frees the guilty" and that "[t]he disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice." *Id.* at 490 (footnotes omitted).

57. Justice Brennan, dissenting in *Powell*, stated that:

> [T]he groundwork is being laid today for a drastic withdrawal of federal habeas jurisdiction, if not for all grounds of alleged unconstitutional detention, then at least for claims—for example, of double jeopardy, entrapment, self-incrimination, *Miranda* violations, and use of invalid identification procedures—that this Court later decides are not "guilt related."

428 U.S. 465, 517-18 (footnotes omitted). Justice Brennan reiterated this view in *Sykes*. 433 U.S. at 110.

58. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

closed the federal door on many state prisoners who have lost their right to present federal claims at the state level due to procedural defaults. Under the *Noia* standard of review the premise was that a federal court would be required to entertain the habeas corpus petition unless a deliberate by-pass of state procedures was found. Under *Sykes*, however, there will be no hearing unless the defendant can satisfy the cause and prejudice standard. This shift in emphasis will make the task of federal habeas petitioners more difficult even though they have always had the burden of proof in habeas corpus proceedings.[59] It can no longer be said, as it could after *Noia*, that "the interest in achieving finality in criminal proceedings is to be valued less highly than the interest in assuring that no individual is deprived of life or liberty in violation of the Constitution."[60]

The desire for finality at the trial level has traditionally been compromised in the interest of achieving justice for the criminal defendant. The entire system of liberal post-trial relief rests on the assumption that at times the interest in finality in criminal proceedings must give way to the belated correction of error through direct appeal and collateral review.[61] Collateral relief through habeas corpus to remedy inadvertent procedural defaults should not be severely restricted because of undue deference to local procedure. *Noia* recognized that:

> [a] man under conviction for crime has an obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him than a state

---

59. Eagles v. United States *ex rel.* Samuels, 329 U.S. 304, 314 (1946); Walker v. Johnston, 312 U.S. 275, 287 (1941); Johnson v. Zerbst, 304 U.S. 458, 466 (1938).

60. Pollak, *The Supreme Court 1962 Term*, 77 HARV. L. REV. 62, 140 (1963) (footnote omitted).

61. Justice Brennan, dissenting in *Sykes*, stated that:

> The federal criminal system, to take one example, expressly disapproves of interlocutory review in the generality of cases even though such a policy would foster finality by permitting the authoritative resolution of all legal and constitutional issues prior to the convening of the "main event." . . . Instead, it relies on the belated correction of error, through appeal and collateral review, to ensure the fairness and legitimacy of the criminal sanction. Indeed, the very existence of the well-established right collaterally to reopen issues previously litigated before the state courts, . . . represents a congressional policy choice that is inconsistent with notions of strict finality—and probably more so than authorizing the litigation of issues that, due to inadvertence, were never addressed to any court.

433 U.S. at 115 (citations omitted).

> court proceeding . . . . And if because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits his state remedies, appellate and collateral, as well as direct review thereof in this Court, those consequences should be sufficient to vindicate the State's valid interest in orderly procedure.[62]

The Court in *Sykes* emphasized the importance of maintaining the integrity of the state's procedural rules. The Court indicated its desire to have all parties view the criminal trial as the "main event," not a meaningless ritual which precedes the real adjudication of a defendant's claim in a federal habeas corpus proceeding.[63] Justice Rehnquist noted that, "[s]ociety's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens."[64] The value of a state contemporaneous objection rule is that it forces a decision on an issue at the trial if an objection is raised. It also enables a better and more accurate record to be made because recollections are fresh and the trial judge is able to observe the demeanor of the witnesses. Justice Rehnquist, for the majority, stated that the *Noia* rule could be used to ignore state procedures:

> We think that the rule of *Fay v. Noia*, broadly stated, may encourage "sandbagging" on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court and intend to raise their constitutional claims in federal habeas corpus court if their initial gamble does not pay off.[65]

Justice Brennan, in his dissent, answered this charge by outlining what would be involved in a "sandbagging" effort by defense counsel under the *Noia* rule. First, the possibility of conviction would increase as evidence which might have been excluded is allowed in by the deliberate failure of the attorney to object. Second, as a result of the waiver, all direct review in the state court would be lost. Third, defense counsel would then have to deceive a federal habeas court and convince the federal judge that he did not deliberately by-pass the state procedures. Justice Brennan concluded that the belief that many lawyers were induced into the "sandbagging" defense simply offended common sense.[66] The fear of

62. 372 U.S. 391, 433 (1963) (citation omitted).
63. 433 U.S. at 90.
64. *Id.*
65. *Id.* at 89.
66. *Id.* at 103-04 n.5 (Brennan, J., dissenting).

"sandbagging," moreover, does not square with the *Noia* opinion. It was just this type of deliberate by-pass that *Noia* sought to prevent.

Justice Rehnquist failed to recognize that there are other reasons, besides the unlikely "sandbagging" maneuver, why all the issues of a criminal trial may not be resolved at the "main event." One such situation occurs when an attorney inadvertently fails to object in order to preserve claims for appeal. A similar problem is raised when the state court uses an erroneous interpretation of constitutional law as the basis for its decision. When an attorney objects for appeal purposes, he saves the client's federal claims for direct review in both the state and federal systems. When an attorney inadvertently fails to object, the defendant forfeits his right to direct review, leaving habeas corpus review as the last forum available. Therefore, courts should be careful to distinguish an attorney's inadvertent failure to object from the situation in which the attorney chooses to forego raising a claim for tactical reasons. To deny habeas corpus relief because of an inadvertent procedural default would ignore the "primary responsibility" of the federal courts to "[preserve] federal rights and privileges,"[67] and work undue hardship on the criminal defendant. The *Sykes* Court failed to make this distinction and chose simply to conclude that Sykes had failed to meet the cause and prejudice standard.

It remains to be seen if the cause and prejudice standard of *Sykes* will maintain the Writ's great tradition as "the best and only sufficient defence of personal freedom"[68] and "both the symbol and guardian of individual liberty."[69] The standard was intentionally left undefined by the Court. Because it is meant to be narrower than the *Noia* standard,[70] the number of habeas corpus petitions entertained by federal courts will decrease. The Court intended the *Sykes* standard to provide the leeway necessary to obtain review when a procedural default has occurred. Whether it will or not is an open question. The cause and prejudice standard was not clearly defined in the earlier decisions of *Davis v. United States* or *Francis v. Henderson*.[71] Justice Brennan, dissenting in *Sykes*, noted wryly that, "although some four years have passed since its introduction in *Davis v. United States*, . . . the only thing clear about the

67. *Id.* at 106 (Brennan, J., dissenting).
68. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1868).
69. Peyton v. Rowe, 391 U.S. 54, 58 (1968).
70. *See* note 26 *supra* and accompanying text.
71. *See* notes 29-40 *supra* and accompanying text.

Court's 'cause'-and-'prejudice' standard is that it exhibits the notable tendency of keeping prisoners in jail without addressing their constitutional complaints."[72]

In failing to distinguish between a deliberate by-pass of state procedure and an inadvertent default, the *Sykes* Court has necessarily rejected traditional notions of personal informed waiver by a criminal defendant in the trial context. The *Noia* Court defined the deliberate by-pass formula through the traditional waiver test of *Johnson v. Zerbst* which required an "intentional relinquishment or abandonment of a known right or privilege."[73] By rejecting the deliberate by-pass standard, the *Sykes* Court has also rejected this personal waiver test. In its place, the Court has suggested a system of procedural forfeitures, based not upon the client's informed decisions but rather upon the attorney's procedural choices or mistakes.[74]

---

72. 433 U.S. at 116 (Brennan, J., dissenting).

73. *See* note 23 *supra* and accompanying text.

74. *See* Loud v. Estelle, 556 F.2d 1326 (5th Cir. 1977); Nichols v. Estelle, 556 F.2d 1330 (5th Cir. 1977); Jiminez v. Estelle, 557 F.2d 506 (5th Cir. 1977). The personal informed waiver test of *Zerbst* did not preclude attorneys from waiving the accused's rights. Comment, *Criminal Waiver: The Requirement of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262 (1966). The rationales for this result, however, do not support the conclusion that inadvertent attorney action should be permitted to waive the client's rights.

One traditional rationale for allowing the attorney to waive his or her client's rights rested upon notions of agency law. *Id.* at 1278-81. In *Sykes*, however, Justice Brennan observed that this rationale is inapposite in criminal proceedings:

> With respect to ordinary commercial matters, the common law established and recognized principal-agent relationships for the protection of innocent third parties who deal with the latter. In the context of a criminal trial, this analogy is not apt, for the State, primarily in control of the criminal process and responsible for qualifying and assigning attorneys to represent the accused, is not a wholly innocent bystander. Consequently, the dominant relationship of the trial counsel with respect to his client more recently has been found simply to inhere in "our legal system" or "our adversary system."

433 U.S. at 114 n.13 (citation omitted) (Brennan, J., dissenting).

A second view justified attorney waiver as part of trial strategy and tactics devised by the attorney, who was regarded as the manager of the defendant's case. *See, e.g.*, Nelson v. People, 346 F.2d 73, 78 (9th Cir.), *cert. denied*, 382 U.S. 964 (1965). However, inadvertent attorney waiver by hypothesis cannot be considered a tactical maneuver or part of trial strategy.

The Supreme Court has on occasion limited the circumstances in which an attorney may waive his or her client's rights. *See, e.g.*, Henry v. Mississippi, 379 U.S. 443, 451-52 (1965) (counsel may waive accused's rights at trial unless there are exceptional circumstances). When fundamental rights are involved, a personal waiver by the client is required. Miranda v. Arizona, 384 U.S. 436, 475-76 (1966) (fifth amendment rights); Patton v. United States, 281 U.S. 276, 312 (1930) (right to a jury

This suggested system of procedural forfeitures is contrary to the view that "courts indulge [in] every reasonable presumption against waiver"[75] of fundamental rights and that the courts "do not presume acquiescence in the loss of fundamental rights."[76] While the concept of waiver is based on informed consent, the *Sykes* system of forfeiture of rights fails to distinguish informed consent from the unknowing failure to assert rights at the appropriate time. Because the rights involved in the criminal process directly affect the defendant's life and liberty, this system should not be allowed to replace a system based on informed waiver of rights.

If a system of waiver is to be retained, the *Sykes* focus on the attorney's actions rather than on the client's actions creates the need for a standard against which the nature of the attorney's waiver of his client's rights can be judged. The standard for determining whether a valid attorney waiver has occurred should be the same as that used in the past to judge the client's own actions: the *Zerbst* standard of intentional relinquishment or abandonment of a known right or privilege.

A standard requiring that attorney waiver of client rights be informed may be too burdensome in the context of direct review in state and federal courts since, "the trial of a criminal defendant [should] not inevitably be followed by a trial of his attorney's performance."[77] Concern for the value of state procedures would require a less stringent standard for attorney waiver of claims in the context of direct appellate remedies. This would allow state contemporaneous objection rules to operate to cause a forfeiture of state remedies, appellate and collateral, as well as direct review in the Supreme Court. Such a forfeiture should foster adherence to state procedural requirements.[78] However, a stringent informed waiver standard is appropriate in examining the attorney's actions in the context of a habeas proceeding because that forum is the defendant's last resort for any hearing. Access to the federal habeas

---

trial). These cases illustrate situations in which the client must participate in the waiver decision. They do not support the conclusion that inadvertent attorney action should be viewed as an effective waiver of the client's rights.

75. Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937) (jury trial) (footnote omitted); Hodges v. Easton, 106 U.S. 408, 412 (1882) (jury trial). *See also* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (right to counsel).

76. Ohio Bell Telephone Co. v. Public Utils. Comm'n, 301 U.S. 292, 307 (1937). *See also* Carnley v. Cochran, 369 U.S. 506, 516 (1962) (waiver of counsel is not to be presumed from a silent record).

77. 433 U.S. at 114 n.13 (Brennan, J., dissenting).

78. *See* note 62 *supra* and accompanying text.

corpus forum should not be cut off because of the attorney's inadvertence in causing the procedural default. This informed waiver standard should not unduly burden the federal habeas corpus system.[79]

It is unclear from the *Sykes* decision whether the cause and prejudice standard will be satisfied by a showing of inadvertent attorney waiver. If the proper measure used to judge a valid attorney waiver of client rights for habeas corpus purposes is the *Zerbst* informed waiver standard, then only such a waiver by the attorney will serve to deny federal habeas corpus review to the client. Thus, a showing of inadvertent waiver by the attorney should be sufficient to satisfy *Sykes'* two requirements of showing cause for the disregarding of state procedural rules and prejudice resulting from the default.

The *Sykes* Court did not consider whether the attorney waiver in that case was inadvertent, finding simply that the cause and prejudice standard was not met.[80] It left to later decisions the task of defining that standard and its application to an inadvertent attorney waiver. Therefore, in subsequent cases, the Court can reject the suggested system of forfeitures and return to a system of informed waiver focusing not on the client's informed waiver, but rather on the attorney's knowing relinquishment of his client's rights to allow access to federal habeas corpus for inadvertent defaults.

Justice Brennan strongly objected to the decision in *Sykes* because he assumed that the facts indicated an inadvertent waiver by the attorney. He attempted to retain the *Zerbst* standard as applied to the defendant's own actions, stating that the defendant should

---

79. *See* note 45 *supra* and accompanying text.

80. 433 U.S. at 91. Justice Brennan believed that it was because of simple error that Sykes' attorney failed to object to the admission of the confession. *Id.* at 105. Although the majority opinion did not reach this issue, *see* note 26 *supra*, it left the door open for a different rule in situations in which a defendant was faced with a "grisly choice" as in *Noia*:

> We have no occasion today to consider the *Fay* rule as applied to the facts there confronting the Court. Whether the *Francis* rule should preclude federal habeas review of claims not made in accordance with state procedure where the criminal defendant has surrendered, other than for reasons of tactical advantage, the right to have all of his claims of trial error considered by a state appellate court, we leave for another day.

433 U.S. at 88 n.12. In *Noia*, the defendant waived his right to appeal for fear of the possibility of the death sentence in a subsequent retrial. *See* note 16 *supra*. Since an inadvertent waiver, although not a waiver in the face of a "grisly choice," is nonetheless a waiver made other than for reasons of tactical advantage, a different rule could apply in that situation as well.

knowingly and intelligently participate with his lawyer *where possible* in the trial.[81] The requirement of personal participation by the accused where possible would be difficult to define. Justice Burger, concurring in *Sykes*, objected to this requirement reasoning that the *Zerbst* standard, which had been thought to govern the accused's waiver, was inappropriate as a standard for attorney waiver. Justice Burger concluded that this vague standard would be unmanageable.[82]

The standard proposed by Justice Brennan would indeed be difficult to administer. It would require an inquiry into whether it was possible for the accused to consult with the attorney regarding each attorney waiver. A more workable approach would be to use the *Zerbst* standard as applied directly to attorneys to determine the quality of their waiver of client rights at the trial. The *Zerbst* standard would serve as a standard for attorney waiver of client rights as well as a standard for personal waiver by the client where personal waiver by the client is required.[83] Whether the attorney had an opportunity to consult with the accused in trial strategy would not be the issue. Rather, the Court would ask whether the attorney made a knowing waiver of his client's rights. The application of the *Zerbst* standard in this way takes into account the difficulty of consulting with the accused about every possible tactical maneuver in the trial. It accepts the reality that the "vast array of trial decisions, strategic, and tactical"[84] are for the attorney to make. The stress is not on personal participation by the accused but on the attorney's knowing waiver. In this way, the *Zerbst* standard, as applied directly to attorneys regardless of their consultation with the accused, becomes a workable definition for valid attorney waiver of client rights for purposes of federal habeas corpus review in the face of a procedural waiver at the state trial.[85]

---

81. 433 U.S. at 116 (Brennan, J., dissenting).

82. *Id.* at 94.

83. *See* note 74 *supra*.

84. Estelle v. Williams, 425 U.S. 501, 512 (1976).

85. Because the attorney can waive many of the accused's rights, a question must be raised as to how much knowledge is required of the attorney in order to make an effective waiver. Counsel need not know for certain that a valid objection to a substantive right exists. He must know simply that there is an arguable basis for such an objection. If he then decides not to object, it has been held that this constitutes a valid waiver. Kuhl v. United States, 370 F.2d 20, 25-26 (9th Cir. 1966) (waiver found when an attorney who was not certain he had a valid ground to object to a certain fourth amendment claim decided not to object). *See also* Estelle v. Williams, 425 U.S. 501 (1976). There, the attorney's failure to object when the defendant was dressed in prison garb at his trial was held to be a waiver. *Id.* at 512-13. The

It is especially important that an inadvertent attorney waiver not preclude habeas relief when illegal government conduct has procured the conviction. A conviction procured by unconstitutional means remains unconstitutional,[86] and a rule forfeiting the defendant's remedies does not legitimize the unconstitutional conduct that helped procure the conviction.[87] It must be remembered that the state, which initiates the prosecution, initially decides how the case is to be presented. It should not be allowed to benefit from illegal conduct and hope that procedural error on the part of defense counsel will foreclose the chances of righting the wrong.[88]

As it is unclear whether a showing of inadvertent attorney waiver will satisfy the cause and prejudice standard of *Sykes*, an alternative method of gaining access to federal habeas corpus courts is desirable. That method might be found in a claim of ineffective assistance of counsel resting in part on counsel's inadvertent waiver of client rights. The Supreme Court has denounced the "denial of effective and substantial"[89] assistance of counsel and the appointment of counsel in a manner which precludes "the giving of effective aid."[90] The attorney in an inadvertent waiver situation should argue for a standard that defines the denial of effective representation as the failure to give representation that is "within the range of competence demanded of attorneys in criminal cases."[91] Such a standard would make ineffective assistance of counsel a viable claim.[92]

---

attorney did not object, believing that such an objection would have been futile. The applicable law, however, would have supported such an objection if it had been made. *Id.* at 514 (Powell, J., concurring). In both these cases, counsel was aware that an objection might have been made. They were not inadvertent waivers but waivers due to a conscious choice which later proved to be an error in judgment.

86. Fay v. Noia, 372 U.S. 391, 428 (1963). *See also* Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1229 (1970).

87. Fay v. Noia, 372 U.S. 391, 428 (1963).

88. United States *ex rel.* Vanderhorst v. LaVallee, 285 F. Supp. 233, 244 (S.D. N.Y. 1968).

89. Powell v. Alabama, 287 U.S. 45, 53 (1932).

90. *Id.* at 71.

91. McMann v. Richardson, 397 U.S. 759, 771 (1970) (standard used to evaluate attorney advice to defendant to assure that defendant's plea of guilty was voluntary). *See also* Tollette v. Henderson, 411 U.S. 258, 266 (1973).

92. The "mockery of justice" standard has been used in some cases dealing with ineffective assistance of counsel. Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965). This standard, however, did not adequately protect the right of the accused to effective assistance of counsel. Relief was granted only, "when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense,

IV. CONCLUSION

The overriding conflict that is apparent in the line of cases leading to *Sykes* occurs between the desire for finality and the need for justice in state criminal proceedings. In this balancing effort, *Noia* was decided in favor of the need for justice. *Noia* sought to remove "all procedural hurdles to the achievement of swift and imperative justice on habeas corpus . . . ."[93] It emphasized that all

---

or without adequate opportunity for conference and preparation." *Id.* (citations omitted). For cases denying relief under the mockery test, see: United States v. Currier, 405 F.2d 1039 (2d Cir. 1969); Hayes v. Russell, 405 F.2d 859 (6th Cir. 1969); Vizcarra-Delgadillo v. United States, 395 F.2d 70 (9th Cir. 1968); United States v. Stahl, 393 F.2d 101 (7th Cir.), *cert. denied*, 393 U.S. 879 (1968); Kienlen v. United States, 379 F.2d 20 (10th Cir. 1967); Cardarella v. United States, 375 F.2d 222 (8th Cir.), *cert. denied*, 389 U.S. 882 (1967); United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d Cir.), *cert. denied*, 346 U.S. 865 (1953); Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945); Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945).

Modern tests for effective assistance of counsel require a certain level of competence from attorneys. These tests can be used as a basis for relief when the mockery of justice test would provide no relief. In United States *ex rel.* Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975), the state-appointed lawyer did not seek to postpone the start of the trial in order to investigate the role of a codefendant in the alleged crime. This failure to adequately prepare the case was held to be grossly incompetent professional conduct. *Id.* at 640-41. The court broadened the mockery test in order to grant relief, requiring "legal assistance which meets a minimum standard of professional representation." *Id.* at 641. *See also* United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973) (*"a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent and conscientious advocate"*) (footnote omitted) (emphasis in original). ABA STANDARDS, THE DEFENSE FUNCTION, states that "[t]he basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate, with courage, devotion and to the utmost of his learning and ability and according to law." *Id.* § 1.1(b) (1971). Though these standards are not intended "as criteria for the judicial evaluation of the effectiveness of counsel to determine the validity of a conviction; they may or may not be relevant in such judicial evaluation . . . depending upon all the circumstances." *Id.* § 1.1(f).

In Jiminez v. Estelle, 557 F.2d 506 (5th Cir. 1977), a case decided after the *Sykes* decision and involving a procedural default, counsel for the defendant objected to the introduction of evidence of prior uncounselled convictions which were used for purposes of the Texas Sentence Enhancement Statute. *Id.* at 507. His objections, however, were not based on grounds that were supportable despite the existence of such grounds. *Id.* at 510. Counsel consequently violated the state contemporaneous objection rule which required an objection based on the very ground on which later relief is sought. *Id.* at 507. The Fifth Circuit Court of Appeals reversed the lower district court's refusal to entertain the habeas petition and remanded the case to determine if counsel's incompetence satisfied the *Sykes* requirement of showing cause for the procedural default. *Id.* at 511. While this is not a case of inadvertent attorney waiver, as counsel was aware of the proper time to object, the court's analysis could be used to allow relief for a defendant who has lost rights because of the inadvertence of counsel which amounted to professional incompetence.

93. 372 U.S. 391, 435 (1963).

habeas petitions would be entertained despite the procedural default unless the default was a deliberate by-pass of the state procedures. The *Sykes* Court was content to let procedural hurdles block a state prisoner's access to the federal habeas corpus forum. The *Sykes* view is that no petitions will be heard because of the existence of the procedural default unless a petitioner can show cause for the default and prejudice resulting from it.

Justice Brennan stated in his dissent in *Sykes* that the defendant had two interests to assert. One was to preserve his access to the federal courts despite the state procedural default. The other interest was to have *some* court hear his constitutional claims.[94] The *Sykes* decision subordinates both of these interests to the goal of achieving finality in the local procedure. It not only accepts the denial of access to a state forum because of a violation of the state procedural rules, but also denies access to the federal habeas forum in many cases.

In applying the cause and prejudice standard of *Sykes*, courts should attempt to accommodate the state prisoner who has lost rights through inadvertent attorney error. It is senseless and misdirected to deny habeas relief to such a defendant. It is

> senseless because unplanned and unintentional action of any kind is not subject to deterrence. . . . And it is a misdirected sanction because even if the penalization of incompetence or carelessness will encourage more thorough legal training and trial preparation, the habeas applicant, as opposed to his lawyer, hardly is the proper recipient of such a penalty.[95]

If the *Sykes* standard cannot provide relief for such a prisoner, then Justice Brennan's warning may become reality:

> If the standard adopted today is later construed to require that the simple mistakes of attorneys are to be treated as binding forfeitures, it would serve to subordinate the fundamental rights contained in our constitutional charter to inadvertent defaults of rules promulgated by state agencies and would essentially leave it to the States, through the enactment of procedure and the certification of the competence of local attorneys, to determine whether a habeas applicant will be permitted the access to the federal forum that is guaranteed him by Congress.[96]

John P. Letourneau

---

94. 433 U.S. at 108 (Brennan, J., dissenting).
95. *Id.* at 113.
96. *Id.* at 107 (footnote omitted).