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## Beyond *Wainwright v. Sykes*: Expanding the Role of the Cause-and-Prejudice Test in Federal Habeas Corpus Actions

*We think of habeas corpus as an important safeguard of liberty. To Chief Justice Chase it was "the best and only sufficient defence of personal freedom." To Chief Justice Warren it was "both the symbol and the guardian of individual liberty."<sup>1</sup>*

In recent years, the number of federal habeas corpus<sup>2</sup> petitions

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1 Wright, *Habeas Corpus: Its History and Its Future*, 81 MICH. L. REV. 802, 803 (1983)(quoting *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868) and *Peyton v. Rowe*, 391 U.S. 54, 58 (1968)).

Professors Wright, Miller, and Cooper wrote:

The most controversial and friction-producing issue in the relation between the federal courts and the states is federal habeas corpus for state prisoners. Commentators are critical of its present scope, federal judges are unhappy at the burden of thousands of mostly frivolous petitions, state courts resent having their decisions reexamined by a single federal district judge, and the Supreme Court in recent terms has shown a strong inclination to limit its availability. Meanwhile, prisoners thrive on it as a form of occupational therapy and for a few it serves as a means of redressing constitutional violations.

17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 558 (1978)(footnote omitted).

2 "Habeas corpus is a collateral attack on a proceeding, usually criminal, which results in some type of confinement. It is not a substitute for an appeal; rather it is a civil remedy for testing the legality of the petitioner's detention." Comment, *The Scope of Federal Habeas Corpus Relief for State Prisoners*, 32 U. MIAMI L. REV. 417, 417 (1978).

For a general discussion of federal habeas corpus, see R. SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS (1965); Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337 (1983). For a general discussion of federal habeas corpus for state prisoners, see Symposium, *State Prisoner Use of Federal Habeas Corpus Procedure*, 44 OHIO ST. L.J. 269 (1983); Comment, *Habeas Relief for State Prisoners*, 71 GEO. L.J. 759 (1982).

Habeas corpus for state prisoners is controlled by 28 U.S.C. § 2254:

§ 2254. State custody; remedies in State courts (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court 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. (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. (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant

has increased dramatically. The number of prisoners challenging state convictions through federal habeas corpus petitions rose nearly 700 percent from 1961 through 1982,<sup>3</sup> although only a small number of inmates obtained release.<sup>4</sup> The United States Supreme Court has

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to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit— (1) that the merits of the factual dispute were not resolved in the State court hearing; (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed at the State court hearing; (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding; (5) that the applicant was an indigent and the State Court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding; (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or (7) that the applicant was otherwise denied due process of law in the State court proceeding; (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous. (e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination. (f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

3 U.S. DEP'T OF JUSTICE, *Advance Release* to SPECIAL REPORT NCJ 92948, HABEAS CORPUS—FEDERAL REVIEW OF STATE PRISONER PETITION, at 2.

4 An examination of the habeas corpus petitions filed in six federal courts and one court

responded to this explosion of habeas corpus litigation by limiting state prisoners' access to federal habeas review.

In 1977 the Supreme Court held, in *Wainwright v. Sykes*,<sup>5</sup> that a state prisoner who fails to lodge a timely objection under a state contemporaneous objection rule is barred from federal habeas review of his constitutional claim unless he can show cause for his noncompliance and actual prejudice from the alleged violation (the "cause-and-prejudice" test).<sup>6</sup> Typically, contemporaneous objection rules require a defendant to raise certain objections at trial; if defendant's counsel does not object at the appropriate time, the objection is waived. The contemporaneous objection rule on which the court relied in *Wainwright* required that a motion to suppress an illegally-obtained confession or admission 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 trial."<sup>7</sup> The courts have extended this "cause-and-prejudice" test to apply not only to defaults under state contemporaneous objection rules, but to all state procedural defaults.<sup>8</sup>

Immediately after *Wainwright*, the law appeared to be settled—if the state denied the claim on the merits, the petitioner was automatically entitled to federal habeas review of his constitutional claim;<sup>9</sup> if, on the other hand, the state denied the claim on procedural grounds, the petitioner was barred from federal habeas review absent a showing of cause and prejudice.<sup>10</sup> Since *Wainwright*, however, the courts of appeals have heard cases in which the states' denials of petitioners' claims were based alternatively on procedural grounds and the merits of petitioners' claims. In each of these cases, the state court noted that a procedural default precluded review of the petitioner's claim; the court nevertheless addressed and denied the claim on its merits. *Wainwright* itself gave no clear-cut guidance as to whether the federal courts ought to apply the "cause-and-prejudice" test in such a case. Some of the circuits have chosen to

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of appeals showed that only 33 of 1,899, or 1.8 percent of the total petitions filed, resulted in prisoner release. *Id.* at 1.

5 433 U.S. 72 (1977).

6 *Id.* at 87.

7 FLA. R. CRIM. P. 3.190(i)(2).

8 See note 30 *infra*.

9 See *Sumner v. Mata*, 449 U.S. 539 (1981).

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

apply the *Wainwright* test in these circumstances, while others have declined to do so.

Part I of this note briefly discusses recent Supreme Court decisions on federal habeas review. Part II examines the approaches adopted by the circuits which have encountered a state decision alternatively based on substantive and procedural grounds. Part III then analyzes *Wainwright v. Sykes* and attempts to distill from it a guiding principle to which the lower federal courts should look in deciding whether to apply the cause-and-prejudice standard in habeas cases.

The clear message of *Wainwright* is that a state prisoner whose claim was denied at the state level due to a procedural default must demonstrate cause and prejudice in order to obtain federal habeas review; the presence of an alternate holding on the merits does not and should not alter this rule. Ultimately, then, the federal courts should apply the *Wainwright* test whenever the state court's procedural holding is dispositive of the petitioner's constitutional claim.

## I. Overview of Supreme Court Decisions on Federal Habeas Corpus for State Prisoners

The scope of federal habeas corpus review has greatly expanded since the Judiciary Act of 1789 first empowered the federal courts to issue the writ.<sup>11</sup> Originally, only federal prisoners challenging the jurisdiction of the sentencing court could invoke the writ of habeas corpus.<sup>12</sup> After the Civil War, the scope of federal habeas review was expanded to include state prisoners "in all cases where any person may be restrained in violation of the Constitution."<sup>13</sup> Although it had long since ceased to have any practical effect, the rule limiting habeas review to federal prisoners challenging the jurisdiction of the sentencing court technically remained in force until 1942, when the Supreme Court decided *Waley v. Johnston*.<sup>14</sup> In *Waley*, the Court acknowledged that habeas review is available for claims of "disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights."<sup>15</sup>

In *Brown v. Allen*,<sup>16</sup> the Court held that a federal court consider-

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11 Act of Sept. 24, 1789, ch. 20, 1 Stat. 81-82.

12 *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830).

13 Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. § 2254(a) (1976)).

14 316 U.S. 101 (1942).

15 *Id.* at 104-05.

16 344 U.S. 443 (1953).

ing a habeas petition could relitigate any constitutional claim, even if it had been considered fairly in the state courts.<sup>17</sup> However, the *Brown* Court also held that "where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed."<sup>18</sup> Thus, *Brown* stood for the proposition that an independent and adequate state ground could preclude federal habeas review.

Ten years later, the Court decided *Fay v. Noia*.<sup>19</sup> The petitioner in *Fay* had decided not to appeal his murder conviction, fearing that if he were successful he might face retrial and a possible death sentence. The Supreme Court upheld the power of a federal court to grant habeas corpus relief, notwithstanding the petitioner's decision not to avail himself of direct appeal. The Court determined that a state prisoner had a right to federal habeas review of his federal constitutional claim unless he deliberately by-passed presenting that claim on the state level.<sup>20</sup>

In *Fay*, the Court overruled *Brown's* holding on independent and adequate state procedural grounds, holding that the adequate state ground principle is a function of the limitations of appellate review and does not apply in habeas corpus proceedings. The Court stated that "the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute."<sup>21</sup>

In *Fay*, the Warren Court greatly expanded the scope of federal collateral review of state procedural defaults. In more recent years, however, the Burger Court has reversed this trend.<sup>22</sup> The Burger

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17 *Id.* at 463-64.

18 *Id.* at 458.

19 372 U.S. 391 (1963).

20 *Id.* at 438-39. The Court, noting the petitioner's "grisly choice" between accepting his life sentence and pursuing an appeal which might result in a death sentence, held that petitioner had not deliberately by-passed state procedure.

The kind of deliberate by-passes which the Court contemplated precluding federal habeas corpus review were "calculated strategic choices to circumvent state procedures." Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. CHI. L. REV. 741, 753 (1982).

21 *Fay v. Noia*, 372 U.S. at 399. "In *Fay v. Noia* . . . the Court abolished the adequate state procedural ground rule on collateral attack . . . . To the Court, the penalty of forever losing a meritorious constitutional defense was unnecessarily severe for disobedience of a state procedural rule." Brilmayer, *supra* note 20, at 753.

22 See Brilmayer, *supra* note 20, at 753 ("After expanding enormously under the Warren Court, federal collateral review of procedural defaults has contracted under the Burger Court."); Remington, *State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts*, 44 OHIO ST. L.J. 287 (1983) (The likelihood

Court's first important habeas corpus decision came in 1976 in *Stone v. Powell*.<sup>23</sup> In *Stone*, the Court held that challenges resting on the fourth amendment are not cognizable in federal habeas courts where there has been a full and fair opportunity to raise them in the state court.<sup>24</sup> One year later, the Court decided *Wainwright v. Sykes*.<sup>25</sup>

During Sykes' trial for murder, the court admitted inculpatory statements which Sykes had made to police officers. At the time of trial, Sykes did not challenge this evidence, and he was convicted. Sykes asserted, in his motion to vacate the conviction and in his state habeas corpus petitions, that the statements were inadmissible because he had not understood the warnings which police read to him pursuant to *Miranda v. Arizona*.<sup>26</sup> The Florida courts denied Sykes' motion to vacate and his petition for habeas relief because he had not complied with Florida's contemporaneous objection rule.<sup>27</sup>

On review, the United States Supreme Court held that a state prisoner who fails to lodge a timely objection under a state contemporaneous objection rule is barred from federal habeas review of his constitutional claim, unless he can show cause for noncompliance with the rule and actual prejudice resulting from the constitutional

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of a favorable decision for a state habeas petitioner is increasingly remote, particularly because of the difficulty of meeting the procedural prerequisites for federal habeas corpus review and, when review is gained, the reluctance of federal courts to reverse the state court conviction on the merits.); Michael, *The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Corpus Proceedings*, 64 IOWA L. REV. 233 (1979) (The Burger Court increasingly relies on state courts to protect individuals' constitutional rights.).

One commentator believes that the Burger Court is shifting the emphasis from the validity of the conviction to the validity of the petitioner's claim of innocence. See Comment, *The Scope of Federal Habeas Corpus Relief for State Prisoners*, 32 U. MIAMI L. REV. 417 (1978). Another commentator contends that the Burger Court demonstrates a regrettable lack of concern for the guilt or innocence of the criminal defendant. See Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980).

23 428 U.S. 465 (1976).

24 *Id.* at 481-82.

The *Stone* majority believed that a trial untainted by illegally-seized evidence is not a personal constitutional right and thus is unrelated to the merits of continued incarceration, because the purpose of the exclusionary rule is to deter illegal police conduct. In effect, the *Stone* majority held that a purely deterrent policy, with a justification extraneous to the merits of the particular case, will be honored on direct review but not on habeas.

Brilmayer, *supra* note 20, at 772-73.

25 433 U.S. 72 (1977).

26 384 U.S. 436 (1966).

27 Sykes was unsuccessful before the Florida District Court of Appeals, *see* *Sykes v. State*, 275 So. 2d 24 (Fla. Dist. Ct. App. 1973), and before the Florida Supreme Court, *see* *Sykes v. State*, 274 So. 2d 235 (Fla. 1973). For a discussion of contemporaneous objection rules, see text accompanying note 7 *supra*.

violation.<sup>28</sup> In *Wainwright*, the Burger Court took from state prisoners petitioning for federal habeas relief much of what the Warren Court had given them in *Fay*. As one commentator noted, *Wainwright* "seemed to revive the pre-*Fay* deference on habeas to state procedural grounds."<sup>29</sup>

The lower federal courts wasted no time in extending the *Wainwright* test to defaults under state procedural rules other than contemporaneous objection rules.<sup>30</sup> In 1982, in *Engle v. Isaac*, the Court held that the *Wainwright* cause-and-prejudice standard applies to any state procedural default.<sup>31</sup>

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28 *Wainwright v. Sykes*, 433 U.S. at 87. The cause-and-prejudice test was first developed in *Davis v. United States*, 411 U.S. 233 (1973), in which a federal prisoner sought to challenge the makeup of the grand jury which indicted him. The Government contended that he was barred by FED. R. CRIM. P. 12(b)(2), which requires that such challenges be made by motion before trial. The Supreme Court held that review of the claim should be barred on habeas absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation. Three years later, in *Francis v. Henderson*, 425 U.S. 536 (1976), a state prisoner sought federal habeas review of his challenge to the composition of the grand jury which indicted him. A state procedural rule required that all such challenges be made before trial. The Supreme Court applied the *Davis* cause-and-prejudice standard and denied habeas review. In *Wainwright*, the Court noted that, "[a]s applied to the federal petitions of state convicts, the *Davis* cause-and-prejudice standard was thus incorporated directly into the body of law governing the availability of federal habeas corpus review." 433 U.S. at 85. The Court then applied the cause-and-prejudice standard in the case of a *Miranda* challenge to the admissibility of a confession.

The *Wainwright* Court chose to leave the definitions of "cause" and "prejudice" for future cases:

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* . . . , which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention.

*Id.* at 87 (citation omitted).

29 Brilmayer, *supra* note 20, at 754. Another commentator agreed:

*Wainwright v. Sykes* restored the concept of an adequate state ground in federal habeas corpus proceedings, but the extent to which a procedural default in the state courts will preclude a federal habeas corpus consideration of the issue affected will depend on future interpretations of the concepts of "cause" for the failure to comply with the state rule and "prejudice" resulting from the alleged constitutional violation.

Michael, *supra* note 22, at 267-68.

30 Some of the state procedural defaults to which the federal courts have applied the *Wainwright* test are: failure to make an offer of proof, *see* *United States ex rel. Veal v. DeRobertis*, 693 F.2d 642 (7th Cir. 1982); default under a state rule imposing a time limitation on filing of petition for post-conviction relief, *see* *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435 (3d Cir. 1982); failure to appeal, *see* *Norris v. United States*, 687 F.2d 899, 903 (7th Cir. 1982); *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir.) (en banc), *cert. denied*, 449 U.S. 1004 (1980).

31 456 U.S. 107, 129 (1982) (A state prisoner whose federal constitutional claim is barred



Thus, where the state court has denied a petitioner's claim on procedural grounds, the *Wainwright* test clearly applies and the petitioner must demonstrate cause and prejudice in order to obtain federal habeas review. On the other hand, where the state court does not rely on procedural grounds but, rather, on the merits of a federal constitutional claim, federal habeas review is available without a showing of cause and prejudice.<sup>32</sup>

*Wainwright*, however, gives no express guidance to federal courts faced with a habeas claim where the state court had denied the petitioner's claim on alternate procedural and substantive grounds. To date, the Supreme Court has not heard a case of this type; and the federal courts of appeals addressing the issue have approached it in several different ways. After examining these approaches, this note will focus on *Wainwright* with a view to discovering which of the approaches taken by the circuit courts comports with the Supreme Court's views and policy objectives in habeas review.

## II. How the Circuits Have Applied *Wainwright v. Sykes* to Alternate Substantive and Procedural Holdings

### A. *The Fifth, Ninth, and Eleventh Circuits*

#### 1. The Fifth Circuit

The first post-*Wainwright* case to come before the Court of Appeals for the Fifth Circuit involving both procedural and substantive holdings at the state level was *Ratcliff v. Estelle*,<sup>33</sup> in 1979. Ratcliff sought to collaterally challenge the composition of the grand jury which indicted him. The state appellate court held that Ratcliff's failure to comply with the state contemporaneous objection rule precluded consideration of this claim.<sup>34</sup> The state court also considered and rejected the claim on the merits. The Fifth Circuit stated:

The difficult part of this case arises because the state habeas corpus court in its opinion proceeded to discuss the merits of the constitutional challenge after ruling that there was a procedural default.

Proper resolution of such a case turns on careful attention to

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by a procedural default must demonstrate cause and actual prejudice in order to obtain federal habeas review.)

32 See *Sumner v. Mata*, 449 U.S. 539 (1981); see also *Rogers v. McMullen*, 673 F.2d 1185 (11th Cir. 1982), cert. denied, 103 S. Ct. 740 (1983); *United States ex rel. Ross v. Franzen*, 668 F.2d 933 (7th Cir. 1982)(en banc); *Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982).

33 597 F.2d 474 (5th Cir.), cert. denied, 444 U.S. 868 (1979).

34 *Ratcliff v. State*, 504 S.W.2d 883 (Tex. Ct. Crim. App. 1974).

the basis of the state court decision.<sup>35</sup>

The *Ratcliff* court held that since the state court had applied its procedural default rule, the federal courts must abide by that decision absent a showing of cause and prejudice.<sup>36</sup> Thus, the Fifth Circuit applied the *Wainwright* test where the state court had based its decision alternatively on the merits of the petitioner's claim and on procedural grounds.

The Fifth Circuit, however, seems to have taken a different approach to this problem in *Thompson v. Estelle*,<sup>37</sup> decided just two years after *Ratcliff*. Thompson claimed that evidence of his prior convictions was improperly admitted at trial. The state court had denied Thompson's claim both on the merits and on the grounds that he had failed to make a contemporaneous objection at trial as required by state law. The Fifth Circuit held: "Because the state courts have not relied *exclusively* upon Thompson's procedural default, *Wainwright v. Sykes* does not prevent federal habeas review."<sup>38</sup>

Although this holding is clearly inconsistent with the holding in *Ratcliff*, the court did not distinguish or even mention *Ratcliff*.<sup>39</sup> Since the Fifth Circuit has not heard any more cases of this type, its current position must be that of its most recent case addressing the problem—*Thompson*. The Fifth Circuit view, then, is that the *Wainwright* test applies only if the state court relied exclusively on the procedural ground.

## 2. The Ninth Circuit

In 1979, the Court of Appeals for the Ninth Circuit decided *Bradford v. Stone*.<sup>40</sup> The petitioner, Bradford, contested his attempted robbery and murder convictions, arguing that prosecutorial misconduct had deprived him of a fair trial. The court of appeals held:

The absence of any demonstrated "cause" for this failure to comply with the California contemporaneous objection rule might bar review of petitioner's federal constitutional claim in this proceeding (*Wainwright v. Sykes* . . .), were it not for the fact

35 *Ratcliff v. Estelle*, 597 F.2d at 477.

36 *Id.* at 476.

37 642 F.2d 996 (5th Cir. 1981).

38 *Id.* at 998 (emphasis added).

39 A recent case decided by the United States District Court for the Middle District of Florida, however, addressed the same problem of whether to apply the *Wainwright* test where the state court's decision was alternatively based on substantive and procedural grounds. The district court followed *Ratcliff* and applied the *Wainwright* test despite the presence of a holding on the merits. *Hall v. Wainwright*, 565 F. Supp. 1222 (M.D. Fla. 1983).

40 594 F.2d 1294 (9th Cir. 1979).

that the state courts did not rely solely upon the procedural default in ruling on petitioner's direct appeal. . . . Although the intermediate state court did not pass unequivocally on the merits of the federal claim, we have chosen to assume *the state's failure to rest exclusively upon the procedural default permits us to reach the federal question*.<sup>41</sup>

Thus, the Ninth Circuit has taken the same view the Fifth Circuit took in *Thompson*—that *Wainwright* applies only if the state court relied exclusively on procedural grounds. If the state court addressed the merits, *Wainwright* does not apply.<sup>42</sup>

### 3. The Eleventh Circuit

The habeas petitioner in *Rogers v. McMullen*<sup>43</sup> challenged his murder conviction on the ground that one of the jurors who heard his case was less than eighteen years old. The state court did not rely on a procedural default but instead reached the merits of petitioner's claim.<sup>44</sup> The Court of Appeals for the Eleventh Circuit held that *Wainwright* did not apply, citing the holding in *Thompson v. Estelle*<sup>45</sup> that *Wainwright* does not prevent federal habeas review where "the state courts have not relied exclusively upon [the petitioner's] procedural default."<sup>46</sup>

The adoption of the *Thompson* position was dictum, since the lack of a state procedural holding would have been sufficient grounds for not applying *Wainwright*. Nevertheless, *Rogers* clearly indicates that the Eleventh Circuit embraced the Fifth Circuit's position as expressed in *Thompson*. The *Rogers* court stated: "Because the Florida Supreme Court reached the constitutional issue, we are not fore-

41 *Id.* at 1296 n.2 (citation omitted)(emphasis added).

42 *Bradford* supports this proposition even more strongly than *Thompson*, for in *Bradford*, the merit holding which rendered *Wainwright* inapplicable was a tenuous one. The California District Court of Appeals had denied relief on alternate grounds: that petitioner failed to object or request a curative instruction; and that the error, if any, was not prejudicial in view of the evidence against petitioner. *Id.* The California Supreme Court denied review without comment. *Id.* The court of appeals noted that "the intermediate state court did not pass unequivocally on the merits of the federal claim." *Id.*

43 673 F.2d 1185 (11th Cir. 1982), cert. denied, 103 S. Ct. 740 (1983).

44 *State v. Rodgers*, 374 So. 2d 610 (Fla. 1977).

45 642 F.2d 996 (5th Cir. 1981). In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981)(en banc), the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on Sept. 30, 1981. *Id.* at 1209. This includes *Thompson v. Estelle*, which held that *Wainwright* applies only where the state court relied exclusively on procedural grounds.

46 *Rogers v. McMullen*, 673 F.2d at 1188 (quoting *Thompson v. Estelle*, 642 F.2d at 998).

closed from addressing the merits by *Wainwright v. Sykes*.<sup>47</sup> The implication was that whenever the state court addresses the merits of the claim, *Wainwright* would not bar federal habeas review.

The Eleventh Circuit has remained true to this position. In 1983, that court decided *Darden v. Wainwright*,<sup>48</sup> in which Darden claimed that prosecutorial misconduct deprived him of due process. The state court had rejected Darden's claim both on the merits and on the ground that he had failed to make a timely objection.<sup>49</sup> The court found that *Wainwright* did not apply: "It is well settled that where a state appellate court has adjudicated an issue on its merits, federal courts may consider it in a petition for habeas corpus. . . . *Wainwright v. Sykes* is therefore not a bar to our consideration of Darden's claim."<sup>50</sup>

### B. *The Sixth Circuit*

The first case to come before the Court of Appeals for the Sixth Circuit involving a habeas claim where a state court denied the claim on alternate procedural and substantive grounds was *Hockenbury v. Sowders*.<sup>51</sup> The petitioner, Hockenbury, contended that improper questions and statements by the state invalidated his robbery conviction. The state court denied Hockenbury's claim both on the merits and on the ground that he had failed to comply with the state's contemporaneous objection rule.<sup>52</sup>

The court of appeals in *Hockenbury* looked to the rationale behind *Wainwright* in deciding whether to apply the cause-and-prejudice analysis:

In view of the rationale of the *Wainwright* rule, . . . it is clear that the central question is whether the state court denied petitioner's claim based on *an* adequate and independent state procedural ground. In cases such as this where the state court has arguably given more than one reason for the denial of petitioner's claim,

47 *Rogers v. McMullen*, 673 F.2d at 1188.

48 699 F.2d 1031 (11th Cir. 1983), *rev'd in part on other grounds*, 725 F.2d 1526 (11th Cir. 1984).

49 *Darden v. State*, 329 So. 2d 287 (Fla. 1976). The *Darden* court pointed out in a footnote that the state court's discussion of the merits was lengthy, while the procedural holding which followed it comprised a single paragraph. "We therefore agree with the district court that the Supreme Court of Florida 'clearly entertained and determined the fair trial issue on its merits as the primary basis of its decision.'" *Id.* at 1034 n.4 (quoting *Darden v. Wainwright*, 513 F. Supp. 947, 952 (M.D. Fla. 1981)). Nothing in the opinion suggests, however, that this finding was necessary to the result reached.

50 *Darden v. Wainwright*, 699 F.2d at 1034.

51 620 F.2d 111 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981).

52 *Hockenbury v. Commonwealth*, 565 S.W.2d 448, 450 (Ky. 1978).

we hold that the federal court must determine whether the petitioner's failure to comply with the contemporaneous objection requirement was a substantial basis of the state court's denial of petitioner's claim.<sup>53</sup>

In 1983, three years after *Hockenbury*, the Sixth Circuit, in *Hollin v. Sowders*,<sup>54</sup> followed the *Hockenbury* "substantial basis" standard and denied habeas review of a claim which alleged that the trial court had improperly admitted evidence of a prior conviction.

The Sixth Circuit's "substantial basis" standard differs materially from the view of the Fifth, Ninth, and Eleventh Circuits. Under the latter analysis, the *Wainwright* test will never apply where the state court has decided the merits of the claim. Under the Sixth Circuit view, however, *Wainwright* may apply notwithstanding a substantive holding.

### C. *The Eighth Circuit*

The only case involving state alternate substantive and procedural holdings to come before the Court of Appeals for the Eighth Circuit is *Dietz v. Solem*.<sup>55</sup> In *Dietz*, the petitioner claimed that erroneous jury instructions deprived him of a fair trial. Dietz raised this issue for the first time in a post-conviction proceeding in which he applied for federal habeas corpus relief. The Circuit Court for Turner County, South Dakota, denied the petition, holding that failure to object to the instruction either at trial or on direct appeal barred the claim.<sup>56</sup> The state court also held that even had Dietz properly objected to the "intent" instruction, the trial instructions taken as a whole contained no constitutional violation of due process.<sup>57</sup>

On appeal, the Eighth Circuit stated: "We view the last sentence [merit holding] as dicta since the preceding paragraph [procedural holding] disposed of the case and the last statement is based on a hypothetical assumption."<sup>58</sup> *Dietz* may suggest that the Eighth Circuit will construe any merit holding which is preceded by a proce-

53 *Hockenbury v. Sowders*, 620 F.2d at 115.

54 710 F.2d 264 (6th Cir. 1983), cert. denied, 104 S. Ct. 1300 (1984).

55 640 F.2d 126 (8th Cir. 1981).

56 640 F.2d at 131-32 n.1. The Supreme Court of South Dakota affirmed on appeal but did not address the "intent" instruction issue. *State v. Dietz*, 264 N.W.2d 509 (S.D. 1978). The Eighth Circuit remanded for a determination of whether Dietz had satisfied the "cause" requirement. The district court granted the habeas petition on remand, and the state appealed. The Eighth Circuit reversed, holding that Dietz had failed to show sufficient cause. *Dietz v. Solem*, 677 F.2d 672 (8th Cir. 1982).

57 *Dietz v. Solem*, 640 F.2d 131-32 n.1.

58 *Id.*

dural holding as dictum, leaving a purely procedural state holding to which *Wainwright* applies. If a merit holding on the heels of a procedural holding is dictum, it follows that a procedural holding stated after a merit holding might also be dictum. In such a case, the petitioner would be entitled to automatic habeas review without the necessity of showing cause and prejudice, since *Wainwright* was not intended to govern cases in which the state court's decision is based solely on the merits of the petitioner's claim. While this interpretation of *Dietz* is logical, it is also speculative. The Eighth Circuit's position will remain somewhat obscure until that court addresses a case in which the state court has placed its merit holding before its procedural holding.

#### D. *The Third, Seventh, and Second Circuits*

##### 1. The Third Circuit

In 1982, the Court of Appeals for the Third Circuit decided *United States ex rel. Caruso v. Zelinsky*.<sup>59</sup> Caruso alleged that his trial counsel had failed to communicate a plea-bargain offer to him. This was the first Third Circuit case in which the state court had denied the petitioner's claim on both substantive and procedural grounds. The court of appeals evaluated the approaches which the Fifth, Sixth, and Eighth Circuits had taken in *Thompson*, *Hockenbury*, and *Dietz* and chose to adopt its own standard:

Because we believe that the policies that justify deference to a valid state procedural rule at all are equally applicable *whenever the state court actually relies on a procedural bar*, we conclude that state court reliance on a procedural rule as an alternate holding suffices to implicate the procedural default doctrine.<sup>60</sup>

Thus, the Third Circuit determined that *Wainwright* applies whenever the state court relied *expressly* on a procedural ground, regardless of whether that court had considered the merits. The court of appeals gave several reasons for its decision. Initially, it noted that an alternate holding carries the same weight as a single holding: it is binding precedent.<sup>61</sup> Also, the state interests which underlie procedural rules are no less present or valid if the holding on the procedural ground is accompanied by a discussion of the merits of the case.<sup>62</sup>

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59 689 F.2d 435 (3d Cir. 1982).

60 *Id.* at 440 (emphasis added).

61 *Id.*

62 *Id.*

The *Caruso* court also stated that interests of justice are sometimes better served by denying the prisoner's claim for both procedural and substantive reasons: "Typically, decisions on procedural grounds are not as satisfying as decisions on the merits, and it is understandable that a court would want to show that it does not think its reliance on a procedural rule is causing any great injustice."<sup>63</sup> For this reason, the Third Circuit believed the federal courts ought not to adopt a policy which would penalize alternate holdings by state courts.

Finally, the court noted that the Supreme Court's decision in *County Court of Ulster County v. Allen*<sup>64</sup> indicated that, where it is unclear whether the state courts have applied the procedural default rule, the Supreme Court has nevertheless searched for procedural defects.<sup>65</sup> The Third Circuit stated that there is at least as much justification for respecting a procedural default ruling when there are alternate holdings as when there is no clear holding.<sup>66</sup>

The Third Circuit was the first to carefully analyze the policies underlying *Wainwright* in deciding whether the cause-and-prejudice analysis should be extended to cover alternate state holdings. The rule which emerged is that *Wainwright* applies whenever the state court relied *expressly* on a procedural ground, regardless of whether the court considered the merits.

## 2. The Seventh Circuit

The Court of Appeals for the Seventh Circuit, like the Third Circuit, applies the *Wainwright* cause-and-prejudice test whenever the state court relied expressly on the procedural ground. In *United States ex rel. Veal v. DeRobertis*,<sup>67</sup> the court cited *Wainwright* in its decision that a state prisoner who claimed that he was denied due process in his state murder trial was not entitled to federal habeas review absent a showing of cause and prejudice. The court stated: "[T]his

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<sup>63</sup> *Id.*

<sup>64</sup> 442 U.S. 140 (1979).

<sup>65</sup> In *Ulster County*, the state court had explicitly decided the merits of the federal constitutional claim in denying post-conviction relief. Its opinion was ambiguous, however, and did not clearly indicate whether a procedural default was involved. The Supreme Court examined the record and New York law at length in search of the basis of the state court decision. Although the Court concluded that the state court had decided on the merits, "[i]t is implicit in the *Ulster County* decision that the Court would have respected a procedural default, had it found one, even if the default had not been clear from any state court opinion." *United States ex rel. Caruso v. Zelinsky*, 689 F.2d at 440.

<sup>66</sup> *Id.*

<sup>67</sup> 693 F.2d 642, 650 (7th Cir. 1982).

case was decided *in part* on an independent state procedural ground to which *Sykes* and *Isaac* apply."<sup>68</sup>

The court reiterated this view the following year in *Farmer v. Prast*.<sup>69</sup> In *Farmer*, the petitioner's disorderly conduct necessitated his removal from the courtroom during his state trial. Farmer claimed that he was impermissibly excluded from the courtroom. The Wisconsin Court of Appeals held that a defendant loses the right to be present in the courtroom when he conducts himself in a manner so disruptive and disrespectful of the court that his trial cannot proceed with him in the courtroom.<sup>70</sup> The state court also held that Farmer's default under the Wisconsin contemporaneous objection rule precluded relief.<sup>71</sup>

The Seventh Circuit, in denying the habeas corpus petition, held that:

Federal habeas corpus is precluded when, as here, the state appellate court affirms a trial court decision on the twin grounds of lack of merit in the constitutional claim and of appellant's failure, without justification, to comply with a state procedural rule. . . . Invocation of the state procedural rule by the state appellate court amounts to an "independent and adequate" state ground barring federal review, absent the "cause and prejudice" requirements of *Wainwright*.<sup>72</sup>

### 3. The Second Circuit

The Court of Appeals for the Second Circuit faced the question of habeas review after state denial of a petitioner's claim on both substantive and procedural grounds in *Phillips v. Smith*,<sup>73</sup> decided in 1983. Phillips was convicted in New York State Supreme Court of murder and attempted murder. Four years later he moved to vacate the judgment in state court, contending that the trial court had violated his fifth and sixth amendment rights when it admitted allegedly-immunized testimony into evidence. The state judge denied the motion, ruling alternatively that Phillips' claim of immunity was not timely made and that, in any event, the error was harmless.<sup>74</sup>

The court of appeals noted at the outset that the circuits were

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68 *Id.* at 650 (emphasis added).

69 721 F.2d 602 (7th Cir. 1983).

70 *State v. Farmer*, No. 80-2235-CR, slip. op. at 4-5 (Wis. Ct. App. Oct. 12, 1981).

71 *Id.*

72 *Farmer v. Prast*, 721 F.2d at 605-06.

73 717 F.2d 44 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984).

74 *People v. Phillips*, 97 Misc. 2d 665, 412 N.Y.S.2d 94 (N.Y. Sup. Ct. 1979).



divided as to whether *Wainwright* applies in such a case. It adopted the standard of the Third and Seventh Circuits, which apply the cause-and-prejudice test whenever the state court relied expressly on the procedural ground.<sup>75</sup> The court gave four reasons for preferring this approach over the available alternatives: (1) it is more consistent with the policies underlying *Wainwright*—comity, finality, accuracy, and trial integrity;<sup>76</sup> (2) it is more consistent with the greater weight of courts of appeals decisions; (3) it is more consistent with related decisions of the Second Circuit and the Supreme Court; and (4) it is more logical.<sup>77</sup>

### E. *The Four Approaches*

The Fifth, Ninth, and Eleventh Circuits have chosen to apply the *Wainwright* cause-and-prejudice test only when the state court relied exclusively on the procedural ground. Thus, any holding on the merits makes *Wainwright* inapplicable and results in the petitioner being automatically entitled to federal habeas review.

The Sixth Circuit applies *Wainwright* if the procedural default was a “substantial basis” of the state court’s denial of petitioner’s claim. Under this view, the fact that the state court addressed the merits is not necessarily determinative.

The Eighth Circuit uses a technical approach. In its sole decision in this area, the Eighth Circuit brought its analysis under the *Wainwright* rule by dismissing as dictum a holding on the merits which was preceded by a procedural holding. This in itself does not reveal a great deal about the Eighth Circuit’s position. A logical extrapolation from this holding is that the decisional ground which appears first in the state court opinion is determinative and that which follows is dictum. Therefore, if the state court addresses the procedural ground first, *Wainwright* applies. If, on the other hand, the court addresses the merits of the claim first, the petitioner may have habeas review in the federal courts without meeting the *Wainwright* requirements.

The Third, Seventh, and Second Circuits require a petitioner to meet the cause-and-prejudice test whenever the state court relied expressly on the procedural ground, regardless of whether the state court considered the merits of the claim. The rationale behind this is that “an alternative disposition on the merits does not undermine the

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75 *Phillips v. Smith*, 717 F.2d at 48.

76 See text accompanying notes 94-110 *infra*.

77 717 F.2d at 49; see text accompanying note 63 *supra*.

validity, adequacy or independence of the procedural ground."<sup>78</sup>

The standards used by the courts of appeals vary widely and are, to some degree at least, incompatible. The federal courts need a workable, uniform standard. The logical place to begin a quest for such a standard is *Wainwright v. Sykes*.

### III. Analysis of *Wainwright v. Sykes*

*Fay v. Noia*<sup>79</sup> represents the outer limit to which the Supreme Court has gone, to date, in affording state prisoners access to federal habeas review. The Court, in *Fay*, held that a state prisoner has a right to federal habeas review of his federal constitutional claim unless he deliberately by-passed presentation of that claim at the state level.<sup>80</sup> Justice Harlan, in his lengthy dissent in *Fay*, suggested that the "effect [of the decision] on state procedural rules may be disastrous."<sup>81</sup> Justice Rehnquist, writing for the majority in *Wainwright*, emphasized the same concerns that Harlan had expressed.<sup>82</sup> While

78 *Id.*

79 372 U.S. 391 (1963).

80 *Id.* at 438-39.

81 *Id.* at 471 (Harlan, J., dissenting).

82 *Wainwright v. Sykes*, 433 U.S. at 89. The Supreme Court decided another case involving the scope of federal habeas corpus relief to state prisoners in the same year in which it decided *Fay*. In *Townsend v. Sain*, 372 U.S. 293 (1963), the Court held that a federal court to which a state prisoner applies for writ of habeas corpus may receive evidence and try the facts anew if the petitioner alleges facts which, if proved, would entitle him to relief. *Townsend* required the federal court to grant an evidentiary hearing if newly-discovered evidence arises or if the state trier of fact did not afford the petitioner a full and fair fact hearing. *Id.* at 312-18. The Warren Court intended that *Townsend*, like *Fay*, would protect prisoners' rights to federal habeas review. Also like *Fay*, *Townsend* contained a strong dissent, this time by Justice Stewart. One writer has observed:

The history of federal habeas corpus since 1963 has demonstrated that *Townsend* and *Fay* have not withstood the test of time and that the Justices who dissented in those cases perceived correctly the abuses which would result and the effect they would have upon the administration of justice. Indeed, the decision in *Wainwright v. Sykes* vindicated the position espoused by Justice Harlan in *Fay* and undercut the basic premise of *Townsend* that state courts were not competent to dispose of and protect the federal constitutional rights of persons tried in state courts.

Smith, *Federal Habeas Corpus—A Need for Reform*, 73 J. CRIM. L. & CRIMINOLOGY 1036, 1037 (1982).

*Wainwright* itself boasts a strong dissent, in which Justice Brennan stated:

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.

433 U.S. at 107 (Brennan, J., dissenting)(footnote omitted).

*Wainwright* does not specifically overrule *Fay*, it has done so in effect by limiting *Fay* to its facts.<sup>83</sup> The cause-and-prejudice analysis of *Wainwright* has effectively replaced the "deliberate by-pass" standard of *Fay*.

*Wainwright* held that a state prisoner whose constitutional claim was denied by the state court for failure to comply with a contemporaneous objection rule is barred from federal habeas review absent a showing of cause for noncompliance and prejudice resulting from the violation.<sup>84</sup> *Wainwright* is a decision grounded in fundamental concerns of comity, finality, and trial integrity in a bi-level judicial system.<sup>85</sup> In *Engle v. Isaac*,<sup>86</sup> the Court reviewed *Wainwright's* rationale, with particular attention to the concepts of comity and finality. It then reaffirmed that the *Wainwright* test applies to *any* procedural default, not just defaults under contemporaneous objection rules.<sup>87</sup>

The relevant inquiry, then, is whether *Wainwright* instructs the federal courts on whether to apply the cause-and-prejudice test when the state court has denied petitioner's claim on both substantive and procedural grounds. Unfortunately, *Wainwright* itself fails to give a direct answer to the question. The Supreme Court, in deciding *Wainwright*, does not appear to have envisioned such a scenario. Only one portion of the opinion seems to touch upon this possibility:

[I]t has been the rule that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings. This rule . . . is in no way changed by our holding today. Rather, *we deal only with contentions of federal law which were not resolved on the merits in the state proceedings due to respondent's failure to raise them there as required by state procedure.*<sup>88</sup>

While the Fifth, Ninth, and Eleventh Circuits did not rely upon this language in limiting *Wainwright* to cases in which the state court relied exclusively on the procedural grounds, they could perhaps have done so. *Wainwright* itself addressed a limited factual situation. However, it does not necessarily follow that the Court intended that

83 *Wainwright v. Sykes*, 433 U.S. at 87-88 & n.12.

84 *Id.* at 87.

85 See text accompanying notes 94-110 *infra*.

86 456 U.S. 107 (1982).

87 *Id.* at 129.

88 *Wainwright v. Sykes*, 433 U.S. at 87 (emphasis added).

its rule should not be extended to different, appropriate factual situations as they arise. If the *Wainwright* rule is applied to a case in which the state court *did* reach the merits of the petitioner's claim, the petitioner is still not bound by the determination on the merits of that claim reached in the state proceedings. Rather, the petitioner is bound by the determination on the *procedural ground* reached in the state proceedings.

The only case which has commented on this portion of the *Wainwright* opinion is *United States ex rel. Caruso v. Zelinsky*.<sup>89</sup> In *Caruso* the Third Circuit chose to apply the *Wainwright* test in spite of the presence of an alternate holding on the merits. The *Caruso* court acknowledged that *Wainwright* contains language supporting the petitioner's view, although *Caruso* did not rely on it.<sup>90</sup> The court then quoted two portions of the *Wainwright* opinion. In the first, the *Wainwright* Court identified the area of controversy before it as "the reviewability of federal claims which the state court has declined to pass on because not presented in the manner prescribed by its procedural rules."<sup>91</sup> The second quotation from *Wainwright* was: "[W]e deal only with contentions of federal law which were not resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure."<sup>92</sup> The *Caruso* court then stated:

The quoted language could certainly be interpreted as restricting the procedural default rule to those cases in which the procedural bar resulted in the state court not indicating its view of the merits of the constitutional claim. On the other hand, the *Wainwright* Court's attention was not focused on the issue before this court now, and we must be circumspect in attributing decisive weight to language employed in a significantly different factual context.<sup>93</sup>

When looking to *Wainwright* for guidance on whether to grant federal habeas review, what ought to be attributed decisive weight? The obvious answer is the policy objectives which the Supreme Court focused on and set out in *Wainwright*. From these basic policy objectives, a rule emerges which lower federal courts can apply when faced with a question of habeas review of a state's alternate substantive and procedural denials of a petitioner's claim.

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89 689 F.2d 435 (3d Cir. 1982).

90 *Id.* at 440.

91 *Wainwright v. Sykes*, 433 U.S. at 81-82 (emphasis omitted).

92 *Id.* at 87.

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

The *Wainwright* Court gave four reasons for adopting the cause-and-prejudice test over the *Fay* deliberate by-pass standard.<sup>94</sup> First, state procedural rules deserve greater respect than the *Fay* standard gave them. Second, honoring state procedural rules contributes to finality in criminal litigation. Third, if the federal habeas courts refuse to honor state rules of procedure, the state courts themselves may become less stringent in enforcing them. Finally, the failure of the habeas courts to honor state procedural rules detracts from the perception of the criminal trial as a “decisive and portentous event.”<sup>95</sup> These reasons were given within the factual context of *Wainwright*—that is, where the state appellate court had denied the petitioner’s claim on a procedural ground only. However, they apply with equal force where the state court denied petitioner’s claim on both substantive and procedural grounds.

The first reason the *Wainwright* Court gave in support of its cause-and-prejudice test was that the state’s contemporaneous objection rule “is by no means peculiar to Florida, and deserves greater respect than *Fay* gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right.”<sup>96</sup> The Court was concerned with comity.

One writer has defined comity as “the recognition that the courts of coordinate systems can and must exercise forbearance in cases in which both are interested, lest they interfere with each other, create confusion and distrust, and sacrifice the utility that comes with cooperation.”<sup>97</sup> In the context of habeas review, comity means that the federal courts should respect and abide by state court determinations. The *Wainwright* Court found this concern highly persuasive in its decision to require a showing of cause and prejudice before the federal habeas courts will review state court denials based on procedural defaults.

The argument loses none of its force merely by virtue of the fact that an alternate holding on the merits is present. In fact, interests of comity weigh even more strongly in favor of erecting the cause-and-prejudice barrier in such a case: the state has provided two alternative grounds for its denial of petitioner’s claim, instead of just one, as in a case like *Wainwright*. In *Wainwright*, the Supreme Court adopted

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94 *Wainwright v. Sykes*, 433 U.S. at 88-90.

95 *Id.* at 90.

96 *Id.* at 88.

97 Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393, 394 (1983).

the cause-and-prejudice test in order to avoid stepping on a state court's toes.<sup>98</sup> Courts which decline to apply the *Wainwright* test where the state court relied alternatively on procedural and substantive grounds—as the Fifth, Ninth, and Eleventh Circuits have done<sup>99</sup>—are stepping on twice as many toes, or perhaps stepping on the same number, but with a heavier boot.

Considering the problem from the perspective of the state judge adds momentum to this argument. In *Phillips v. Smith*,<sup>100</sup> the Second Circuit refused to declare the *Wainwright* test inapplicable where the state judge had provided an alternate holding on the merits. "We will not penalize the state court for addressing the merits in the alternative, particularly when it may have done so in order to provide an alternative basis for affirmance in the event the procedural ruling is reversed."<sup>101</sup> If adding a substantive holding to an independent and adequate procedural ground results in the claim becoming fair game for the federal courts on collateral review, state courts will surely hesitate to address the merits at all.<sup>102</sup>

The adoption of the cause-and-prejudice test in *Wainwright* was motivated largely by these considerations of comity. Comity considerations weigh even more heavily in favor of applying the *Wainwright* test where the state court has provided an alternate holding on the merits.

The second reason the *Wainwright* Court gave for adopting the cause-and-prejudice standard was that insulating state court decisions based on procedural defaults under contemporaneous objection

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98 Of course, the Court was concerned about more than just incurring the wrath of state judges. As Justice O'Connor, writing for the majority in *Engle v. Isaac*, 456 U.S. 107 (1982), stated: "Federal intrusions into state criminal trials frustrate both the State's sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* at 128. In a footnote to this statement, she observed:

In an individual case, the significance of this frustration may pale beside the need to remedy a constitutional violation. Over the long term, however, federal intrusions may seriously undermine the morale of our state judges. As one scholar has observed, there is "nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else." . . . Indiscriminate federal intrusions may simply diminish the fervor of state judges to root out constitutional errors on their own.

*Id.* at 128-29 n.33 (quoting Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963))(citation omitted).

99 See text accompanying notes 33-50 *supra*.

100 717 F.2d 44 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984).

101 *Id.* at 49.

102 See *id.* at 51.

rules would make "a major contribution to finality in criminal litigation."<sup>103</sup> The concern over finality in litigation is substantial in habeas corpus actions.<sup>104</sup> Justice Powell, in his concurring opinion in *Schneckoeth v. Bustamonte*,<sup>105</sup> succinctly stated a position which would later be embraced by a majority of the Court in *Wainwright*:

No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen.<sup>106</sup>

State procedural rules are generally formulated with an eye to accuracy, efficiency, and finality in trials. Clearly, the *Wainwright* rule promotes finality in criminal litigation where the state decision was purely procedural in nature. It seems equally clear that the rule would serve the same, no less important, function where the state court has included an alternate holding on the merits. In fact, as with comity, interests of finality weigh even more strongly in favor of applying the cause-and-prejudice test in such cases, since granting

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103 *Wainwright*, 433 U.S. at 88. Closely related to the Court's concern for finality was its concern that the *Fay* rule may encourage "sandbagging" on the part of defense lawyers. A lawyer may deliberately choose to withhold a viable constitutional claim in the state trial court with the intent to raise it in a federal habeas court in the event the defendant is convicted. Since the *Fay* rule did not protect a "deliberate by-pass" of state procedure, it is difficult to see why the *Wainwright* Court felt that it was inadequate to prevent "sandbagging." One author has noted that the *Fay* rule "was expected to be broad enough to deal with calculated strategic choices to circumvent state procedures." Brilmayer, *supra* note 20, at 753. In any event, however, the Court believed that the cause-and-prejudice standard of *Wainwright* would more effectively discourage sandbagging. The validity of this view is in no way altered by the addition of a substantive holding by the state court.

104 In *Engle*, the Court observed:

[W]rits of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.

456 U.S. at 127-28.

105 412 U.S. 218 (1973).

106 *Id.* at 262 (Powell, J., concurring)(footnote omitted). Judge Friendly and Professor Bator have suggested that this absence of finality also frustrates deterrence and rehabilitation. Deterrence depends upon the expectation that "one violating the law will swiftly and certainly become subject to punishment, just punishment." Bator, *supra* note 98, at 452. Rehabilitation demands that the convicted defendant realize "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).

federal habeas review undermines the finality of two state court holdings, instead of just one. Thus, the second *Wainwright* rationale, finality, supports extension of the cause-and-prejudice standard to a case involving a state denial alternatively based on substantive and procedural grounds.

The third and fourth policy reasons given in *Wainwright* were that the federal habeas courts' refusal to honor state procedural rules may cause the state courts themselves to become less stringent in their enforcement, and may detract from the perception of the criminal trial as a "decisive and portentous event."<sup>107</sup> These two reasons really address a single concern which the Second Circuit characterized, in *Phillips v. Smith*, as the promotion of trial integrity.<sup>108</sup>

The *Phillips* court endorsed the view that "by giving effect to state procedural rules designed to preserve the trial as 'a decisive and portentous event,' the procedural default standard help[s] to ensure the integrity of the trial and the accuracy of the verdict."<sup>109</sup> If this is true where the state court declined to review the merits due to a procedural defect, it is no less true where the state court denied the claim on the merits in spite of the procedural defect. Once again, the addition of a substantive holding actually strengthens the argument for imposing the cause-and-prejudice test. The federal courts ought not to penalize state courts for explaining (through merit holdings) why the petitioner does not suffer by denial of his claim.<sup>110</sup>

Thus, the three interests which prompted the Supreme Court to adopt the *Wainwright* test—comity, finality, and trial integrity—would be best served by applying that test where the state court's decision contains an alternate substantive holding. This approach comports with the current Supreme Court policy of conservatism in granting federal habeas review. Additionally, where the procedural ground in and of itself is sufficient to determine the outcome of the case, it is difficult to see the efficacy of giving the petitioner a windfall—automatic federal habeas review—merely because the state court chose to include an alternate ground for denial.

The message *Wainwright* presents is this: A state prisoner whose claim was denied at the state level due to a procedural default must demonstrate cause and prejudice in order to obtain federal habeas review. Judge Jerome Frank of the Second Circuit once wrote that,

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107 *Wainwright v. Sykes*, 433 U.S. at 89-90.

108 *Phillips v. Smith*, 717 F.2d at 48.

109 *Id.* at 48 (quoting *Wainwright v. Sykes*, 433 U.S. at 90).

110 *See* text accompanying note 63 *supra*.



“when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it.”<sup>111</sup> In a footnote to this statement, Judge Frank added: “To use mouth-filling words, cautious extrapolation is in order.”<sup>112</sup>

“Cautious extrapolation” of the sort recommended by Judge Frank leads to the conclusion that the *Wainwright* test ought to apply in the event of a state denial on procedural grounds, notwithstanding the presence of an alternate holding on the merits. The Third, Seventh, and Second Circuits engaged in cautious extrapolation and concluded, as stated by the Second Circuit, that “an alternative disposition on the merits does not undermine the validity, adequacy or independence of the procedural ground.”<sup>113</sup>

The Sixth Circuit’s “substantial basis” test<sup>114</sup> seems well-founded, but may not go quite far enough in protecting independent and adequate state procedural grounds. It is conceivable that a state court decision the substantial basis of which is a holding on the merits might also contain a valid independent and adequate state procedural ground. Under the Sixth Circuit’s approach, the procedural ground will be given less weight than ought to be given an independent and adequate state ground, and the petitioner will get automatic habeas review in the federal courts.

The view which the Eighth Circuit took in *Dietz v. Solem*,<sup>115</sup> although not yet fully developed, appears to be arbitrary. If developed as logic would suggest, it would further *Wainwright*’s objectives in some, but not all, cases. The approach of the Fifth, Ninth, and Eleventh Circuits,<sup>116</sup> limiting *Wainwright* to purely procedural holdings by the state court, clearly frustrates the policy objectives of the Supreme Court.<sup>117</sup>

111 *Perkins v. Endicott Johnson Corp.*, 128 F.2d 218 (2d Cir. 1942), *aff’d*, 317 U.S. 501 (1943).

112 *Id.* at 501 n.30.

113 *Phillips v. Smith*, 717 F.2d at 49; *see* text accompanying notes 55-58 *supra*.

114 *See* text accompanying notes 51-54 *supra*.

115 640 F.2d 126 (8th Cir. 1981); *see* text accompanying notes 55-58 *supra*.

116 *See* text accompanying notes 33-50 *supra*.

117 *See* text accompanying notes 94-110 *supra*. Professor Walter Murphy has examined the ways in which state and lower federal courts modify or resist Supreme Court pronouncements. *See* Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959). “The Supreme Court typically formulates general policy. Lower courts apply that policy, and working in its interstices, inferior [court] judges may materially modify the High Court’s determinations.” *Id.* at 1018.

One example of such lower court resistance is the reaction of the lower federal courts to the Supreme Court’s decision in *Rhodes v. Chapman*, 452 U.S. 337 (1981). Professor James

#### IV. Suggested Approach

##### The decisions of the Second, Third, Sixth, and Seventh Circuits

Robertson, in a recent law review article, has thoroughly discussed the lower federal courts' resistance to the *Rhodes* decision. Robertson, *When the Supreme Court Commands, Do the Lower Federal Courts Obey? The Impact of Rhodes v. Chapman on Correctional Litigation*, 7 *HAMLIN L. REV.* 79 (1984). *Rhodes* held that double-celling of prisoners per se and as practiced at the Southern Ohio Correctional Facility was not cruel and unusual punishment within the meaning of the eighth amendment. According to Professor Robertson:

Read against the backdrop of the majority's dicta urging deference to the actions of prison administrators, the Court's restrictive application of the eighth amendment to prison conditions presented a clear message to the federal judiciary: Federal courts should exercise considerable caution before interjecting themselves into the operation of state prisons.

Robertson, *supra*, at 80. Professor Robertson examines the post-*Rhodes* decisions of the lower federal courts, concluding that "both the will and the constitutional basis for judicial intervention in overcrowded state prisons find continuing expression among the district courts." Robertson, *supra*, at 98.

*Wainwright* presents a similar picture. Read against the backdrop of the majority's dicta urging deference to the decisions of state courts, *Wainwright's* restriction of state prisoners' access to federal habeas review likewise presented the federal judiciary with a clear message: Federal courts should avoid reviewing state court decisions which are grounded in an independent and adequate state procedural ground. The Fifth, Ninth, and Eleventh Circuits, like the district courts in the *Rhodes* situation, are not following that message. The Eighth Circuit's stance is unclear at this point, but it seems too arbitrary to be in harmony with the Supreme Court's directive in *Wainwright*.

According to Professor Murphy, there are three principle ways in which lower courts modify or resist Supreme Court determinations. First, the lower court may refuse to extend a Supreme Court decision to other areas, by limiting it to its facts. Second, the lower court may base its decision on what it perceives the Supreme Court would do if presented with the case at hand, a "kind of speculation [which] comes close to giving oneself a blank check." Murphy, *supra*, at 80. Third, the lower court may focus on a particular facet of the Supreme Court decision, thus in effect reinterpreting it.

Professor Robertson contends that "*Rhodes*' restrictive eighth amendment analysis has been negated by lower federal courts distinguishing *Rhodes* on the facts." Robertson, *supra*, at 97. The Fifth, Ninth, and Eleventh Circuits may also be distinguishing *Wainwright* on its facts. The Fifth Circuit gave no supporting rationale for its decision in *Thompson v. Estelle*, 642 F.2d 996 (5th Cir. 1981). In *Rogers v. McMullen*, 673 F.2d 1185 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 740 (1983), the Eleventh Circuit seems to have accepted the precedent of the Fifth Circuit, *see note 41 supra*, without any concern for its rationale. The Ninth Circuit, in *Bradford v. Stone*, 594 F.2d 1294 (9th Cir. 1979), "assumed" that the state's failure to rest exclusively on the procedural default permitted it to reach the federal question. 594 F.2d at 1296 n.2. These cases appear to distinguish *Wainwright* on its facts, contending that the addition of the alternate merit holding makes the *Wainwright* standard inappropriate. This, however, is a distinction without a difference.

Professor Robertson suggests that three attributes of a Supreme Court decision foster significant compliance: (1) the clarity of the ruling; (2) the unanimity of the Justices; and (3) the Court's periodic reiteration of the announced policy. Robertson, *supra*, at 99. *See generally* S. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES* (1970); R. JOHNSON, *THE DYNAMICS OF COMPLIANCE* (1967); Barth, *Perception and Acceptance of Supreme Court Decisions at the State and Local Level*, 17 *J. PUB. L.* 308, 314 (1968). Under this analysis, the lower courts ought to comply with *Wainwright*: its message is clear, six Justices joined in the majority opinion, and the Court reiterated the policies behind *Wainwright* in its

are in keeping with the objectives of the Supreme Court. These approaches vary somewhat: the Sixth Circuit applies the *Wainwright* test whenever the procedural ground is a "substantial basis" of the state court's denial of petitioner's claim, while the Third, Seventh, and Second Circuits apply *Wainwright* whenever the state court relied expressly on the procedural ground. The courts should adopt a consistent standard which works toward the policy objectives which the Supreme Court elucidated in *Wainwright*.

The federal courts should require a petitioner whose federal claim was denied by the state court on the basis of both substantive and procedural grounds to meet the *Wainwright* cause-and-prejudice test *if the procedural ground was dispositive of the claim*. Under this standard, the federal courts would give the proper respect to state procedural holdings which are independent and adequate state grounds. At the same time, no state prisoner would be deprived of federal habeas review on the basis of a procedural holding which is inadequate to support the denial of his claim.

In order to facilitate fair and consistent application of this standard, the federal courts should adopt a rule like that which the Supreme Court established in *Michigan v. Long*.<sup>118</sup> Under the "plain statement" rule of *Michigan v. Long*, the Supreme Court will decline

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decision in *Engle*. Additionally, *Wainwright* itself should have presented no surprises in terms of policy, since it came on the heels of *Stone v. Powell*, 428 U.S. 465 (1976).

Another possible explanation for lower court resistance to a Supreme Court directive is a hostile social and political environment surrounding the ruling. In this respect, *Wainwright* is much like *Rhodes*:

*Rhodes* is free of social and political contention. One cannot detect a hostile social and political environment surrounding the ruling; indeed, the Court held against an insular, powerless minority—inmates who command little public sympathy. Accordingly, the social and political environment of *Rhodes* should be supportive of compliance. The limited impact of *Rhodes* on the lower federal courts cannot, therefore, be attributed to controversy and resistance by influential groups.

Robertson, *supra*, at 99. *Wainwright*, like *Rhodes*, does not appear to have been a controversial decision. Robertson suggests that in such a case, one must look to "the attributes of the decision and the predilections of lower federal court judges." *Id.*

118 103 S. Ct. 3469 (1983). In *Michigan v. Long*, the Court considered whether it had jurisdiction to review a state court decision which "referred twice to the state constitution . . . , but otherwise relied exclusively on federal law." *Id.* at 3474. The Court stated:

[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

*Id.* at 3476. But, "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.*

to review directly a state court decision that rests on independent and adequate state grounds. Only those state court decisions which contain plain statements that they rest upon independent and adequate state grounds are immune from direct review by the Supreme Court.

This rule could be adapted for use in collateral review. If a state court wishes the federal courts to recognize its alternate procedural holding in their decision of whether to afford habeas review to the state prisoner, it must include in its opinion a plain statement that the procedural ground is dispositive of the claim. Such a statement would trigger the application of the *Wainwright* test.

## V. Conclusion

In *Wainwright v. Sykes*, the Supreme Court held that a state prisoner whose claim was denied on the state level due to a procedural default must show cause for his noncompliance and actual prejudice resulting from the alleged constitutional violation in order to obtain federal habeas review. This cause-and-prejudice standard was intended to serve the Court's interests in comity, finality, and trial integrity.

*Wainwright* itself did not indicate whether the same standard ought to attach where the state court based its denial of petitioner's claim on the merits, as well as a procedural default. The circuits are split on this question. However, careful analysis of the *Wainwright* decision shows that the federal courts must apply the cause-and-prejudice standard in such situations if they wish to further the Supreme Court's policy objectives.

The federal courts need a uniform standard by which to determine whether to apply the *Wainwright* test. The cause-and-prejudice test ought to apply where the procedural ground relied upon by the state court is dispositive of the petitioner's claim. Additionally, the federal courts ought to impose a "plain statement" rule like that of *Michigan v. Long*. A state court wishing to insulate its procedural holdings from federal habeas corpus review must include in its opinion a plain statement that the procedural ground is dispositive of the case. Where such a plain statement exists, the federal courts will not undertake habeas review absent a showing of cause and prejudice.

This approach would not be burdensome for the state courts and would greatly ease the interpretive burden of the federal courts.

Most importantly, it would ensure that the federal courts give the decisions of state courts the respect and weight they deserve.

*Marian J. Kent*