St. Mary's Law Journal

Volume 23 | Number 2 Article 11

1-1-1991

An Independent and Adequate Procedural Rule Bars a State Prisoner, Who Has Defaulted His Entire Appeal, from Asserting a Federal Claim Unless the Prisoner Demonstrates Cause for, and Actual Prejudice Resulting from, the Procedural Default, or in the Alternative, Proves a Fundamental Miscarriage of Justice Will Result if the Federal Habeas Court Fails to Hear the Claim.

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HABEAS CORPUS—Procedural Default Rule—An Independent and Adequate Procedural Rule Bars a State Prisoner, Who Has Defaulted His Entire Appeal, From Asserting a Federal Claim Unless the Prisoner Demonstrates Cause for, and Actual Prejudice Resulting From, the Procedural Default, or in the Alternative, Proves a Fundamental Miscarriage of Justice Will Result if the Federal Habeas Court Fails to Hear the Claim.

Coleman v. Thompson,
__ U.S. __, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

On April 23, 1982, Roger Keith Coleman was convicted for the rape and murder of Wanda Faye Thompson.[1] After exhausting his appeal on the rape and murder conviction,[2] Coleman then filed a petition in state court requesting the Circuit Court for Buchanan County to issue a writ of habeas corpus.[3] The circuit court rejected Coleman's claims and denied the writ.[4] Thirty-three days after judgment was rendered on Coleman's petition for state habeas, he filed a notice of appeal.[5] The Virginia Supreme Court dismissed Coleman's petition holding that his notice of appeal was untimely.[6] The

1. Coleman v. Commonwealth, 307 S.E.2d. 864, 865 (Va. 1983). Coleman was found guilty of rape and the "deliberate, and premeditated killing of the same victim during the commission of rape" which is capital murder in Virginia. The jury sentenced Coleman to death. *Id.*; *see also* VA. CODE ANN. § 18.2-31 (Michie 1988) (stating that willful and deliberate killing while committing rape constitutes capital murder).

2. *See Coleman*, 307 S.E.2d at 877 (affirming rape and murder convictions). The United States Supreme Court denied certiorari. Coleman v. Virginia, 465 U.S. 1109 (1984).

3. Coleman v. Thompson, __ U.S. __, __, 111 S. Ct. 2546, 2552, 115 L. Ed. 2d 640, 654 (1991). Coleman's petition included numerous federal constitutional claims not argued on direct appeal. *Id.*

4. *Id.* On September 24, 1986, after a two-day evidentiary hearing, the Buchanan County Court refused to issue a writ of habeas corpus citing the procedural default as a direct bar to review. *Id.*

5. *Id.* at __, 111 S. Ct. at 2552, 115 L. Ed. 2d at 654.

6. *Id.* at __, 111 S. Ct. at 2553, 115 L. Ed.2d at 654. Counsel for the Commonwealth of Virginia filed a motion to dismiss based on the appellee's violation of Virginia Supreme Court Rule 5:9(a). *Id.* Virginia Supreme Court Rule 5:9(a) states:

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

court reasoned that the notice violated Virginia Supreme Court Rule 5:9(a).[7] The United States Supreme Court refused to hear Coleman's appeal after the denial of his petition.[8]

Coleman reinitiated his state habeas claim in federal court by seeking a writ of habeas corpus from the United States District Court for the Western District of Virginia.[9] The court held that Coleman's procedural default while seeking state habeas precluded him from asserting any claims before the court.[10] On appeal, the United States Court of Appeals for the Fourth Circuit affirmed reasoning that the claims initially presented during the state habeas proceedings had been procedurally defaulted.[11] Thereafter, the United States Supreme Court granted certiorari to resolve unanswered questions involving the relationship between federal habeas review and violations of state procedure.[12] Held—*affirmed*. An independent and adequate state procedural rule bars a state prisoner, who has defaulted his entire appeal, from asserting a federal claim unless the prisoner demonstrates cause for, and actual prejudice resulting from, the procedural default, or in the alterna-

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VA. CODE ANN. § 5:9(a) (Michie 1991).

7. Coleman, __ U.S. at __, 111 S. Ct. at 2553, 115 L. Ed. 2d at 654. The Virginia Supreme Court order stated:

> On December 4, 1986 came the appellant, by counsel, and filed a petition for appeal in the above styled case. "Thereupon came the appellee, by the Attorney General of Virginia, and filed a motion to dismiss the petition for appeal; on December 19, 1986 the appellant filed a memorandum in opposition to the motion to dismiss; on December 19, 1986 the appellee filed a reply to the appellant's memorandum; on December 23, 1986 the appellant filed a surreply in opposition to the appellee's motion to dismiss; and on January 6, 1987 the appellant filed a reply brief upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed.

Id.

8. Coleman v. Bass, 484 U.S. 918, 918 (1987). Justice Brennan argued that the death penalty constituted cruel and unusual punishment and was therefore a violation of the Eighth and Fourteenth Amendments. *Id.* (Brennan, J., dissenting).

9. *Coleman*, __ U.S. at __, 111 S. Ct. at 2553, 115 L. Ed. 2d at 655. The petition asserted the seven claims initiated in state habeas and the four federal constitutional claims asserted before the Virginia Supreme Court on direct appeal. *Id.*

10. *Id.* The district court ruled that the seven claims raised before the Virginia Supreme Court had been procedurally defaulted. *Id.* However, the court addressed the claims, held them invalid and therefore denied the petition. *Id.*

11. Coleman v. Thompson, 895 F.2d 139, 147 (4th Cir. 1990). Coleman asserted that the plain statement standard established in *Harris v. Reed*, 489 U.S. 255 (1989), mandated federal habeas review of his petition because it was not clear that the procedural default was the basis of the Virginia Supreme Court's decision. *Coleman*, __ U.S. at __, 111 S. Ct. at 2553, 115 L. Ed. 2d at 655. However, the fourth circuit held that the Virginia Supreme Court's opinion satisfied the plain statement rule required by the *Harris* decision. *Id.* Additionally, Coleman's inability to demonstrate cause for the default and respect for the independent and adequate state ground of the Virginia Supreme Court, barred the court from hearing the federal claims raised in state habeas. *Id.*

12. Coleman v. Thompson, 498 U.S. at __, 111 S. Ct. 340, 112 L. Ed.2d 305 (1990).

tive, proves a fundamental miscarriage of justice will result if the federal habeas court fails to hear the claim.[13]

The right to challenge the legality of a criminal conviction in a separate civil action is commonly referred to as habeas corpus,[14] and can be traced to early Roman law.[15] However, the writ of habeas corpus was not formally established until the mid-fourteenth century.[16] Accepted as law during the

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13. *Coleman*, __ U.S. at __, 111 S. Ct. at 2565, 115 L. Ed. 2d at 669.

14. *See, e.g.*, Nishimura Ekiu v. United States, 142 U.S. 651, 662 (1891) (function of habeas corpus is to question legality of detention); Coleman v. Tennessee, 97 U.S. 509, 519 (1878) (granting judges authority to issue habeas corpus writ where individual detained illegally or unconstitutionally); *Ex parte* Bollman, 8 U.S. 75, 125 (4 Cranch) (1807) (prisoner detained for crime he did not commit must be discharged under habeas corpus writ); People *ex rel.* Luciano v. Murphy, 290 N.Y.S. 1011, 1016 (N.Y. Co. Ct. 1936) (writ functions as mechanism for releasing prisoners who have been unlawfully detained); *Ex parte* Presnell, 49 P.2d 232, 234 (Okla. Crim. 1935) (writ of habeas corpus concerns due process rights of the prisoner, not guilt or innocence of party); *see also* BLACK'S LAW DICTIONARY 709 (6th ed. 1990) (habeas writ questions legality of detention). *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 27.1, at 1010 (1985) (writ of habeas corpus is separate civil action where petitioner contests his detention); RICHARD B. MCNAMARA, CONSTITUTIONAL LIMITATIONS ON CRIMINAL PROCEDURE 321 (Trial Practice Series 1982) (proceeding to determine legitimacy of criminal conviction).

15. *See* WILLIAM CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS § 1, at 2-3 (2d ed. 1893) (writ of habeas corpus dates back to Roman law); *see also Acts* 21-23 (New International Version) (discussing Paul's detention).

> While they were trying to kill [Paul], news reached the commander of the Roman troops that the whole city of Jerusalem was in an uproar. . . . The commander came up and arrested him and ordered him to be bound with two chains. . . . He directed that [Paul] be flogged and questioned in order to find out why the people were shouting at him like this. As they stretched him out to flog him, Paul said to the centurion standing there, "Is it legal for you to flog a Roman citizen who hasn't even been found guilty?" . . . The commander himself was alarmed when he realized that he had put Paul, a Roman citizen, in chains. . . . Paul looked straight at the Sanhedrin and said, . . . "you sit there to judge me according to the law, yet you yourself violate the law by commanding that I be struck!" . . . "I stand on trial because of my hope in the resurrection of the dead" . . . [S]ome of the teachers of the law who were Pharisees stood up an argued vigorously, "We find nothing wrong with this man." *Id.*

16. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 27.1, at 285 (1984). Prior to the fourteenth century, the writ took the form of mesne process, whereby a lord was positioned between a chief lord and tenant, requiring the individual to attend the proceedings. *Id.* However, during the mid-fourteenth century, the writ evolved into an independent proceeding used to question the legality of a detention. *Id.* The writ was used during the fourteenth century as a mesne process designed to bring the parties before the court to facilitate the proceedings. Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 459 (1966). Prior to the sixteenth century, the writ of habeas corpus was used in conjunction with the writ of *audita querela*, certiorari, and privilege. *Id.* The first glimpse of habeas corpus as an independent proceeding did not occur until the sixteenth century. *Id.* During the reign of Edward I, the writ of *habeas corpus ad respondendum* secured the appearance of a party to the proceedings. *See* 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 108 (3d ed. 1944) (secured appearance of defendant). Writs estab-

colonial period,[17] acknowledged in the Federal Constitution,[18] and assimilated into the first grant of federal court jurisdiction,[19] the "great writ"[20] was regarded not merely as a procedural tool but was deemed fundamental to the rights of personal liberty.[21] English jurisprudes applied the habeas corpus principles in the Habeas Corpus Act of 1679[22] and English common

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lished during the medieval period to protect the liberty of the subject, including the writ of De Homine Replegiando, intended to rescue a person from unlawful imprisonment; the writ of Mainprize, used to bail out a man who by law was considered bailable; and the writ of De Odio et Atia, which as early as Glanvil's time was used to release a man not capable of being released under mainprize, were ineffective safeguards of personal liberties. Therefore, in response to the ineffectiveness of these writs a new writ was established—the writ of habeas corpus. *Id.* at 105-8.

17. *See* WILLIAM CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS § § 38-45, at 33-39 (2d ed. 1893) (discussing colonists' use of writ). The early colonial charters provided the colonists with all the privileges and liberties of natural-born subjects of England. *Id.* § 38. The common law assumed that all colonist were to have the same privileges as their English counterparts, and the early colonial legislation confirmed this. The writ of habeas corpus was one of the writs used during the colonial period that the colonists inherited from their English heritage. *Id.* In his analysis of the judicial history of Massachusetts, Washburn states: "It seems to have been adopted at first as a common-law remedy . . . [and] was regarded as one of the existing privileges of the colonists." *Id.* § 40 (quoting from WASHBURN'S JUDICIAL HISTORY OF MASSACHUSETTS 195).

18. U.S. CONST. art. I, § 9, cl. 2. The article provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id.*

19. *See* Act of September 24, 1789, ch. 20, § 14, 1 Stat. 81-82 (codifying English common law version of writ of habeas corpus). The Judiciary Act of 1789 gave the federal courts the authority to issue writs of habeas corpus. *Id.*

20. *See* Fay v. Noia, 372 U.S. 391, 401 (1963) (describing writ of habeas corpus as the "great writ"); *Bollman*, 8 U.S. (4 Cranch) at 95 (referring to writ of habeas corpus as "great writ"). *See generally* William Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise In Federalism*, 7 UTAH L. REV. 423, 424 (1961) (most important writ).

21. *See Fay*, 372 U.S. at 401 (1963) (writ intertwined with development of personal liberties); Bowen v. Johnson, 306 U.S. 19, 26 (1939) (duty to enforce writ of habeas corpus). During times of national crises, where fundamental liberties clash with governmental actions, the writ of habeas corpus has played a crucial role. *See Ex parte* Endo, 323 U.S. 283, 285 (1944) (people of Japanese descent used writ to challenge their detention during World War II); *Ex parte* Quirin, 317 U.S. 1, 5-6 (1942) (German saboteurs requested issuance of writ after trial by secret military court); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 5-9 (1866) (discussing power of executive to institute proceeding by a military court during Civil War). Historically, the writ has served to remedy violations of Due Process.

22. 31 Car. II; *see Fay*, 372 U.S. at 403 (writ codified in Habeas Corpus Act of 1679). The writ of *habeas corpus ad subjiciendum*, which mandates release of prisoner, was defined in The Habeas Corpus Act of 1679. McNally v. Hill, 293 U.S. 131, 136 (1934). The original act focused primarily on procedural problems. LARRY YACKLE, POSTCONVICTION REMEDIES § 4, at 12 (1981). The Habeas Corpus Act of 1679 influenced the English courts' application of the writ of *habeas corpus ad subjiciendum*. *McNally*, 293 U.S. at 136. However, the act did not supersede the common-law function of the writ as an instrument for enforcement of individual's fundamental rights. *Fay*, 372 U.S. at 403-04 n.13.

law decisions.[23] The history of the writ of habeas corpus has informed numerous Supreme Court interpretations of federal habeas review.[24]

Although the historical roots of the writ pre-date the Constitution,[25] federal habeas review of state convictions has continually been one of the most debated aspects of federalism.[26] The writ was first extended to state prison-

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23. *See* Bushell's Case, 124 Eng. Rep. 1006, 1007 (P.C. 1670) (common remedy for intolerable judicial and executive restraints); *see also* Darnel's Case, 3 Cobbett's St. Tr. 1, 1 (1627) (writ challenging five knights' detention). In *Fay v. Noia*, the United States Supreme Court used *Bushell's Case* to help define the appropriate function of the writ. *See Fay*, 372 U.S. at 403 (*Bushell's Case* demonstrates writ's function of preventing intolerable restraints).

24. *Cf.* McCleskey v. Zant, 499 U.S. __, __, 111 S. Ct. 1454, 1462-74, 113 L. Ed. 2d 517, 535-50 (1991) (emphasizing history of writ of habeas corpus); *Fay*, 372 U.S. at 403 (Court emphasized importance of history in determining federal court's authority to issue writ); Townsend v. Sain, 372 U.S. 293, 310-12 (1963) (Court inquired into historical development of writ to determine extent of their obligation to hear constitutional questions articulated by state prisoners); Jones v. Cunningham, 371 U.S. 236, 238, 241 (1962) (Court traced history of habeas corpus to English common law); *McNally*, 293 U.S. at 136 (examination of English common law required for understanding of writ's meaning); *Bollman*, 8 U.S. (4 Cranch) at 93-94 (Chief Justice Marshall emphasized significant role of common law in interpreting federal habeas corpus statute). *See generally*, 3 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 27.1, at 275(1984) (emphasizing role of history in federal habeas cases); Dallin Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 459-60 (1966) (discussing Supreme Court's use of history to define writ of habeas corpus).

25. *See, e.g.*, *Bushell's Case*, 124 Eng. Rep. at 1006 (writ used to release juror held in contempt); *Darnel's Case*, 3 Cobbett's St. Tr. at 1 (writ used to challenge detention of five knights); Habeas Corpus Act of 1679, 31 Car. 2, ch. 2 (1679) (providing illegality of recommitting person for same offense once released by habeas corpus). *See generally* WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 104-12 (3d ed. 1944) (common law courts used writ during fifteenth and sixteenth centuries); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1042 (1970) (evidence of habeas corpus existed in 1220 A.D).

26. *See* Ira P. Robbins, *Death Penalty Habeas Corpus: Defining the Issues*, 73 JUDICATURE 215, 215 (1990) (habeas corpus debate began over two hundred years ago). The vernacular used to describe the writ of habeas corpus illustrates the writs' controversial function. *See, e.g.*, Smith v. Bennett, 365 U.S. 708, 712 (1961) ("common law world's 'freedom writ' "); *Ex parte* Yerger, 75 U.S. 85, 95 (1868) ("only sufficient defence of personal freedom"); 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129 (London, Dawsons 1966) (most acclaimed writ in English law); Harvey E. Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 959 (1973) ("broom to clean the judicial house"); Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U.L. REV. 143, 143 (1952) ("most important human right in the constitution"); George N. Leighton, *Federal Supremacy and Federal Habeas Corpus*, 12 ST. LOUIS U.L.J. 74, 101 (1967) ("an attribute of our way of life"). However, the opposing side has a different view of the writ. *See, e.g.*, Sunal v. Large, 332 U.S. 174, 184 (1947) (Frankfurter, J., dissenting) ("an untidy area of the law"); *In re* Wainwright, 678 F.2d 951, 953 (11th Cir. 1982) (Fay, J., dissenting) (describing writ as "troublesome"); Galtieri v. Wainwright, 582 F.2d 348, 365 (5th Cir. 1978) (en banc) (Hill, J., specially concurring) ("Greatly abused Writ"); Frank A. Hooper, *Habeas Corpus Under 28 U.S.C. Section 2254—Bane or Blessing*, 9 CUMB. L. REV. 391, 391 (1978) (describing habeas as "bane"). *See generally* Ruthan Robson and Michael Mello, *Ariadne's Provison: A "Clue of Thread" to the Intricacies of Procedural Default, Ade-*

ers by the Habeas Corpus Act of 1867.[27] That act reflected a change in the American federal system; a structural reversal which made the federal judiciary the guardian of federal rights.[28] "Reconstruction federalism,"[29] as it has been termed, served as the catalyst for conflict between state and federal

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quate and Independent State Grounds, and Florida's Death Penalty, 76 CAL. L. REV. 87, 92 n.17 (1988) (emphasizing hostile rhetoric accompanying debate over habeas corpus). The Eleventh Circuit's holding evidences the controversy surrounding the writ. *See* Coleman v. Kemp, 778 F.2d 1487, 1543 (llth Cir. 1985) (adverse pretrial publicity entitled petitioner to presumption of prejudice and thus change of venue in his habeas corpus claim).

27. Habeas Corpus Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. §§ 2241-55 (1982). The Act provides: "When in any suit begun in a State court and removed to the circuit court of the United States, the defendant is in actual custody under the State process, the clerk of the circuit court shall issue a habeas corpus cum causa." *Id.* Under the Judiciary Act of 1789, federal courts did not have the power to hear claims presented by state petitioners. 28 U.S.C. § 2255 (1982). The modern habeas corpus acts is found in 28 U.S.C. § 2255 and states:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that, the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. . . . An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Id.

28. *Compare* Willson v. Black-Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829) (pre-Civil War decision holding Delaware statute was not violative of federal commerce power and was proper assertion of state's police power) *with* Mitchum v. Foster, 407 U.S. 225, 238-39 (1972) (post-Civil War period has left federal government as protector of federal rights) *and* McNeese v. Board of Educ., 373 U.S. 668, 671-73 (1963) (stating that purpose of 42 U.S.C § 1983 was to provide relief when state law was insufficient) *and* Monroe v. Pape, 365 U.S. 167, 171-187 (1961) (post-Civil War case allowing individual to avoid state prejudice by providing a federal right in federal forums to insure privileges and immunities of Fourteenth Amendment). *See generally* RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 158 (1987) (discussing negative effect secession had on states' rights doctrine); Stephanie Dest, Comment, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263, 263-64 (1989) (discussing change in American federal system occurring after Civil War). Originally, the states were responsible for preventing abuses of governmental power. The Bill of Rights was adopted to protect the individual from abuses of federal government power. *Id.* at 263 n.2. However, after the Civil War, a structural reversal occurred and the federal government became the primary protector of individual rights. *Id.* at 263.

29. *See* Stephanie Dest, Comment, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263, 263 (1989) (referring to change in American federal system after Civil War).

interests in federal habeas review.[30] The controversy centers around two competing philosophies.[31] According to one side, the debate's focus is the importance of the individual's fundamental constitutional rights;[32] the opposing view emphasizes the importance of judicial economy, comity, and finality in state court decisions.[33] The recent renaissance of procedural de-

30. *Compare Fay*, 372 U.S. at 399 (state procedural defaults should not curtail federal habeas review) *with* Francis v. Henderson, 425 U.S. 536, 537 (1976) (applying *Davis v. United States* to federal habeas petitioner who failed to raise grand jury challenge before trial as required by Louisiana state law) *and* Davis v. United States, 411 U.S. 233, 236-43 (1973) (default standard in FED. R. CRIM. P. 12(b)(2) barred an assertion of grand jury prejudice raised in collateral review). *See generally* Stephanie Dest, Comment, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263 (1989) (discussing conflict between state and federal interests when enforcing writ of habeas corpus); Charles Wright, *Habeas Corpus: Its History and Its Future*, 81 MICH. L. REV. 802, 806-09 (1983) (book review) (discussing conflict between state and federal interests in federal habeas review).

31. *See* Graham Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321, 321-35 (1987-88) (discussing debate over scope of federal habeas review). *Compare* Coleman v. Balkcom, 451 U.S. 949, 956-64 (1981) (Rehnquist, J., dissenting from denial of certiorari) (classifying it as "stalemate" in application of constitutional law, "mockery" of judicial system, and "state of savagery") *with id.* at 954-56 (Marshall, J., joined by Brennan, J., dissenting from the denial of certiorari) (reasoning unique finality of death penalty mandates careful scrutiny during post-trial review) *and id.* at 950-53 (Stevens, J., concurring in the denial of certiorari) (stating novel procedural tactics do not result in constitutional errors). *See generally* Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Claims in Capital Cases*, 23 LOY. L.A. L. REV. 193, 194 (1989) (discussing controversy surrounding federal habeas review of claims brought by state prisoners); Charles Wright, *Habeas Corpus: Its History and Its Future*, 81 MICH. L. REV. 802, 807-08 (1983) (book review) (stating Court's strict adherence to procedural default rule limits access to writ).

32. *See, e.g.*, *Fay*, 372 U.S. at 401-02 (emphasizing relationship between writ of habeas corpus and fundamental rights); Brown v. Allen, 344 U.S. 443, 508-09 (1953) (Frankfurter, J., concurring) (stating liberty interests of individuals require that courts refrain from answering constitutional questions intended for federal habeas review); Moore v. Dempsey, 261 U.S. 86, 91-92 (1923) (preventing state procedural default from barring federal review); Frank v. Mangum, 237 U.S. 309, 331-36 (1915) (Holmes, J., dissenting) (federal habeas vindicates state abuses of essential liberties); *see also* Graham Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321, 338 (1987-88) (discussing importance of not convicting an innocent person). *See generally* WILLIAM DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 127-40 (1980) (discussing important liberty interest involved in federal review of state detentions).

33. Reed v. Ross, 468 U.S. 1, 10 (1984); *see* Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (discussing federal/state habeas relationship). The *Stone* Court, defining the impact of federal habeas review, stated: "Resort to habeas corpus . . . results in serious intrusions on values important to our system of government. They include i) the most effective utilization of limited judicial resources, ii) the necessity of finality in criminal trials, iii) the minimization of friction between our federal and state systems of justice . . ." *Id.* (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring)); *see also* Kaufman v. United States, 394 U.S. 217, 231-42 (1969) (Black, J., dissenting) (discussing importance of finality in

fault as an independent and adequate state ground for barring federal habeas review of a claim reflects a judicial attentiveness to the interests of comity and federalism.[34] The Supreme Court has suppressed the federal habeas revolution[35] by limiting successive petitions for federal habeas review,[36] imposing a strict exhaustion requirement,[37] limiting the scope of federal habeas

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state court judgments). *See generally* Henry Friendly, *Is Innocence Irrelevant? Collateral Attack On Criminal Judgments*, 38 U. CHI. L. REV. 142, 148-51 (1970) (criticizing federal habeas review as violative of state interests); Graham Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321, 321-22 (1987-88) (discussing state interest of economy and finality in state court decisions).

34. *See Coleman*, __ U.S. at __, 111 S. Ct. at 2565, 115 L. Ed. 2d at 669 (respect for independent and adequate state ground barred federal habeas review); *see also McCleskey*, 499 U.S. at __, 111 S. Ct. at 1468, 113 L. Ed. 2d at 542 (recognizing importance of finality in state court decisions); *Francis*, 425 U.S. at 538 (states' interest in finality supported where failure to raise claim prior to trial as mandated by state law results in waived claim). *See generally* Robert Batey, *Federal Habeas Corpus and the Death Penalty: "Finality with a Capital F"*, 36 U. FLA. L. REV. 252, 255 (1984) (discussing Chief Justice Rehnquist's view of federal habeas in capital murder cases); Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Corpus Claims In Capital Cases*, 23 LOY L.A. L. REV. 193, 195 (1989) (discussing procedural "hurdles" Rehnquist court has built upon to prevent federal habeas review); Philip Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After* Stone v. Powell, 82 COLUM. L. REV. 1, 1 (1982) (discussing limiting impact *Stone v. Powell* had on federal habeas review).

35. *See* Smith v. Murray, 477 U.S. 527, 533-39 (1986) (adopting strict default standard); Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977) (enforcing modern procedural default rule); *see also* Murray v. Carrier, 477 U.S. 478, 516 (1986) (Brennan, J., dissenting) (discussing change in federal system as related to procedural default rule); Engle v. Issac, 456 U.S. 107, 136-37 (1982) (Stevens, J., dissenting) (Court's emphasis on procedural default rules demonstrates change in federal system); Ferguson v. Knight, 809 F.2d 1239, 1242 (6th Cir. 1987) (applying procedural default rule); Hockenbury v. Sowders, 620 F.2d 111, 116 (6th Cir. 1980) (applying procedural default doctrine to bar habeas review), *cert. denied*, 450 U.S. 933 (1981). *See generally* DONALD E. WILKES, JR., FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF § 8-24, at 193-207 (1987) (discussing evolution and application of modern procedural default rule); Carole Cooke, Note, *Procedural Defaults at the Appellate Stage and Federal Habeas Corpus Review*, 38 STAN. L. REV. 463, 463 (1986) (discussing procedural default rule); Alfred Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050, 1088-96 (1978) (discussing actual prejudice aspect of procedural default rule).

36. *McCleskey*, 499 U.S. at __, 111 S. Ct. at 1468, 113 L. Ed. 2d at 541; *see* Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (concluding that "ends of justice" only require federal habeas courts to hear case when constitutional claim coupled with proof of factual innocence). *But cf.* Sanders v. United States, 373 U.S. 1, 15-17 (1963) (affording broad meaning to the ends of justice exception). *See generally* Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Corpus Claims in Capital Cases*, 23 LOY L.A. L. REV. 193, 195 (1989) (discussing Rehnquist Court's limitation of scope of federal habeas review).

37. *See* 28 U.S.C. § 2254(b) (1982) (must exhaust state remedies to access writ); Urquhart v. Brown, 205 U.S. 179, 181 (1907) (petitioner must exhaust state remedies); *Ex parte* Royall, 117 U.S. 254, 255 (1886) (habeas petition should not be extended prior to trial). *See generally* DONALD E. WILKES, JR., FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF

review of Fourth Amendment claims,[38] implementing a retroactive threshold requirement,[39] and establishing a procedural default rule.[40]

The beginning of the Court's counterrevolution, and the subsequent development of the modern procedural default doctrine, can be traced to *Fay v. Noia*.[41] In *Fay*, the Warren Court categorically denied the significance of a state procedural default, stating instead that the assertion of an unconstitutional restraint, detention simpliciter, was sufficient to establish federal habeas jurisdiction.[42] However, the Court noted that an applicant who has

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§ 8-15 (2d ed. 1987) (discussing exhaustion requirement); Ruthann Robson & Michael Mello, *Ariadne's Provision: A "Clue of Thread" to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty*, 76 CAL. L. REV. 89, 93 (1988) (discussing implications of exhaustion requirement).

38. *See* Kimmelman v. Morrison, 477 U.S. 365, 375-77 (1986) (holding claim under Fourth Amendment only cognizable where unlawfully obtained evidence admitted and claim not fully litigated in state court); Rose v. Mitchell, 443 U.S. 545, 559-64 (1979) (limiting scope of Fourth Amendment claims); *Stone*, 428 U.S. at 481-82 (limiting cognizability of Fourth Amendment claims which have been fully and fairly litigated in state courts); *see also* Bruce Ledewitz, *Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence*, 24 CRIM. L. BULL. 379, 383 (1988) (discussing *Stone* decision and its limitation on federal habeas review). *But cf.* Robert Batey, *Federal Habeas Corpus and the Death Penalty: "Finality with a Capital F"*, 36 U. FLA. L. REV. 252, 257-62 (1984) (asserting that *Stone* was not based on limiting scope of federal habeas review).

39. Teague v. Lane, 489 U.S. 288, 304-05 (1989). Justice O'Connor asserted that in federal habeas cases, a retroactive threshold requirement was appropriate. *Id.*; *see also* Sawyer v. Smith, __ U.S. __, __, 110 S. Ct. 2822, 2831, 111 L. Ed. 2d 193, 211 (1990) (following rule established in *Teague*). This view of retroactivity was also articulated in 1969 by Justice Harlan. Desist v. United States, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting). The view holds that a new constitutional provision is applicable only to direct review cases that are not final. *Id.*; *see also* Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Corpus Claims in Capital Cases*, 23 LOY. L.A. L. REV. 193, 195 (discussing "procedural hurdles" Rehnquist Court has built to deny federal habeas review). *See generally* Joseph L. Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 170-71 (discussing retroactive threshold requirement of *Teague*); Elliot F. Krieger, *The Court Declines in Fairness-Teague v. Lane*, 25 HARV. C.R.-C.L.L. REV. 164-82 (1990) (discussing retroactive threshold requirement of *Teague*).

40. *See* Smith v. Murray, 477 U.S. 527, 533-39 (1986) (implementing procedural default rule); Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977) (adopting cause and prejudice test); *cf. Smith*, 477 U.S. at 537-38 (procedural default will bar federal habeas review in capital cases where there would be no "miscarriage of justice"). *See generally* Stephanie Dest, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263, 280-88 (1989) (discussing modern procedural default standard); Bruce S. Ledewitz, *Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence*, 24 CRIM. L. BULL. 379, 379-80 (1988) (discussing revitalization of procedural default rule).

41. 372 U.S. 391 (1963). *See generally* Stephanie Dest, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263, 266-74 (1989) (discussing evolution of modern procedural default doctrine).

42. *Fay*, 372 U.S. at 398-99. Ten years prior to *Fay*, in *Brown v. Allen*, the Court denied

"deliberately by-passed" the state court's orderly procedure has forfeited his state court remedies and thus, the federal courts could deny relief to the applicant.[43]

The Fay regime's deliberate by-pass standard ended fourteen years later with the adoption of the cause and prejudice standard articulated in *Wainwright v. Sykes*.[44] After rejecting the "sweeping language"[45] of *Fay*, the *Sykes* Court held that a state procedural default would prevent federal review unless the claimant could demonstrate cause for, and prejudice resulting from, his state procedural default, or in the alternative, demonstrate the necessity of review to prevent a fundamental miscarriage of justice.[46] However, the Court's formulation and application of the procedural default rule in *Sykes* left unanswered the question as to whether the deliberate by-pass

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federal habeas review to a prisoner who had procedurally defaulted on his state court claims. Brown v. Allen, 344 U.S. 443, 489-97 (1953). The criticism resulting from the decision explains the Court's ideological change in *Fay*. DONALD E. WILKES, JR., FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF § 8-24, at 194 (2d ed. 1987).

43. *Fay*, 372 U.S. at 438. The deliberate bypass standard supports the idea that a defendant's fundamental rights can not be waived unless he voluntarily chooses to ignore the right. *See* Estelle v. Williams, 425 U.S. 501, 524 (1976) (Brennan, J., dissenting) (asserting that deliberate by-pass standard protects fundamental rights). Some assert that *Fay* was based on the Warren Court's effort to expand federal rights and remedies. DONALD E. WILKES, JR., FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF § 8-24, at 194 (2d ed. 1987).

44. *Sykes*, 433 U.S. at 90-91. In *Francis v. Henderson*, the Court emphasized the importance of comity and federalism. Francis v. Henderson, 425 U.S. 536, 539 (1976). In *Wainwright v. Sykes*, the Court extended the *Francis* holding. *Sykes*, 433 U.S. at 82. The petitioner in *Sykes*, contended that his murder conviction was unconstitutional because evidence of a confession which violated his Miranda rights was admitted by the trial court. *Id.* at 74. However, Florida's rules of criminal procedure required a pre-trial objection to the admissibility of testimony. *Id.* Because Sykes' attorney failed to raise this pre-trial objection, the Court concluded that federal habeas review was barred until the petitioner could show cause and prejudice for the pre-trial waiver. *Id.* at 87. *See generally* Abigail Shaine & William Shaine, *Note on* Wainwright v. Sykes, 19 N.H. B.J. 109, 118-23 (1977) (discussing *Syke*'s impact on deliberate by-pass standard); Rowland Young, *Supreme Court Report*, 64 A.B.A. J. 115, 117-18 (1978) (discussing Court's holding in *Wainwright v. Sykes*).

45. *See Sykes*, 433 U.S. at 87-88 (stating that *Fay* expanded power of federal habeas courts too far).

46. *Id.* at 90-91. The origins of the actual prejudice test can be traced to *Davis v. United States*. Davis v. United States, 411 U.S. 233, 245 (1973). In *Davis*, the Court denied relief to a prisoner who failed to comply with Federal Rule of Criminal Procedure 12(b)(2). *Id.* The Court concluded that allowing Davis to bypass the rule would be contrary to Congress' intent when forming the rule. *Id.* at 242. However, in an effort to recognize the prisoner's constitutional rights, the Court concluded that upon a showing of cause, relief may be awarded. *Id.* *See generally* Robert Burbank, *Federal Habeas Corpus: Further Erosion of Its Efficacy as a Remedy for State Incarceration*, 24 LOY. L. REV. 275, 275-83 (1978) (discussing impact of *Sykes* on federal habeas review); Gary Gushard, *Recent Decisions*, 16 DUQUESNE L. REV. 403, 403-16 (1977) (discussing holding in *Sykes*); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 215-21 (1977) (reviewing Court's decision in *Sykes*).

standard of *Fay* still applied to a prisoner who defaults his entire appeal.[47] In addition, the *Sykes* Court neglected to define the threshold needed to invoke the cause and prejudice exemptions.[48] By shifting its focus from federal power to comity, *Sykes* relegated to the lower federal courts the labyrinthian task of defining the bounds of federalism in future cases.[49]

The Court has never explicitly defined cause for the purpose of procedural default habeas corpus claims.[50] However, in *Murray v. Carrier*,[51] Justice O'Connor stated that cause "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule."[52] Reasserting the

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47. *See* Coleman v. Thompson, __ U.S. __, __, 111 S. Ct. 2546, 2564, 115 L. Ed. 2d 640, 668-69 (1991) (*Wainwright* Court did not expressly state that "cause and prejudice" standard applied to prisoner who had defaulted his entire appeal).

48. *Sykes*, 433 U.S. at 87. In *Sykes*, the Court stated that the rule of *Brown v. Allen*, 344 U.S. 443 (1953), which allowed federal habeas courts to make the decision as to whether to review constitutional errors at the state level, was not changed by the holding in the instant case. *Id.* Instead, the *Sykes* Court dealt with a federal question procedurally defaulted in a state court. *Id.* The Court did state that the definition of the threshold requirement was not as broad as the *Fay* dicta might indicate. *Sykes*, 433 U.S. at 90-91. One commentator suggested five relevant threshold questions:

> 1) Does the state indeed have the particular procedural rule that it claims has been violated, with forfeiture of state review of the claim as a sanction? 2) If so, does the state procedural rule furnish an adequate and independent state ground for denying relief? 3) If so, was the procedural rule intended to apply to the facts of this particular case? 4) If so, did the defendant satisfactorily comply with the rule? 5) If not, did the state rely on the procedural bar to deny relief?

Ira P. Robbins, *Whither (or Wither) Habeas Corpus?: Observations on the Supreme Court's 1985 Term*, 111 F.R.D. 265, 294 (1986). *See generally* DONALD E. WILKES, FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF § 8-24, at 196-98 (1987) (discussing implications of *Sykes*); Abigail Shaine & William Shaine, *Note on* Wainwright v. Sykes, 19 N.H. B.J. 109, 123 (1977) (discussing *Sykes* Court's failure to define cause and prejudice standard).

49. *See Sykes*, 433 U.S. at 88 (emphasizing importance of finality and federalism in habeas corpus proceedings). *See generally* Saul B. Goodman & Jonathan B. Sallet, Wainwright v. Sykes: *The Lower Federal Courts Respond*, 30 HASTINGS L.J. 1683, 1687-725 (1979) (discussing *Wainwright* and its implications); Jon M. Kinnamon, *Defenses to the Preclusive Rule of* Wainwright v. Sykes, 28 DRAKE L. REV. 571, 594-97 (1978-79) (discussing application of cause and prejudice standard); Saskia A. Stephenson, Comment, *Habeas Corpus: The Sixth Circuit Interprets the Cause and Prejudice Test of* Wainwright v. Sykes, 48 U. CIN. L. REV. 860, 862-75 (1979) (discussing evolution of "cause and prejudice" standard).

50. *See Sykes*, 433 U.S. at 87 (definition of "cause" left to future cases); *see also* Amadeo v. Zant, 486 U.S. 214, 221 (1987) (contours of cause and prejudice standard have not been developed); *Smith*, 477 U.S. at 533-34 (declining to define "cause and prejudice" standard); Reed v. Ross, 468 U.S. 1, 13 (1984) (stating that Court has not defined cause and prejudice). The cause standard was derived from Federal Rule of Criminal Procedure 12(f), which states that a party who fails to make a pretrial motion has waived the right without a showing of cause. FED. R. CRIM. P. 12(f).

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

52. *Id.* at 488; *see The Supreme Court—Leading Cases*, 100 HARV. L. REV. 100, 240-49

comity and federalism concerns of previous decisions, the *Murray* Court specifically held that attorney error did not constitute cause.[53] Additionally, the Court has held that judicial definitions of prejudice must be concrete, not hypothetical, and contain constitutional errors which substantially disadvantage the petitioner's entire trial.[54] If the petitioner demonstrates that the constitutional violation contributed to the conviction of an innocent person, then a fundamental miscarriage of justice has occurred.[55]

Application of the cause and prejudice standard is preceded by an inquiry into adequacy of the procedural default as an independent and adequate state ground.[56] This two step inquiry requires the federal habeas court to ascertain whether denial of review was based on an adequate state ground

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(1986) (discussing Murray v. Carrier). The Court strictly applied the procedural default rule. *Smith*, 477 U.S. at 529 (Stevens, J., dissenting). Justice Stevens, writing a dissenting opinion in *Smith*, contended that the *Carrier* test was fundamentally unfair. *Id.* at 541-43. He reasoned that the purpose of the writ of habeas corpus was to prevent fundamental unfairness and, therefore, the test was too narrow. *Id.* The Court in *Amadeo v. Zant*, held that proof of cause was satisfied because the predicate for the grand jury challenge could not be demonstrated. *Amadeo*, 486 U.S. at 221-29.

53. *Smith*, 477 U.S. at 485-90; *see* Strickland v. Washington, 466 U.S. 668, 684-87 (1984) (counsel's error must be constitutionally ineffective to constitute cause); Engle v. Isaac, 456 U.S. 107, 134-35 (1982) (counsel's failure to raise claim did not satisfy cause standard). A state court's failure to clearly indicate whether the claim has been procedurally defaulted warrants an examination by the federal court. *See, e.g.*, Ulster County Court v. Allen, 442 U.S. 140, 147-54 (1979) (independent and adequate state ground is basis for federal habeas review); Lindsey v. Smith, 820 F.2d 1137, 1140-44 (11th Cir. 1987) (state decision not based on independent and adequate state ground can be reviewed); Sinclair v. Wainwright, 814 F.2d 1516, 1518 (11th Cir. 1987) (federal habeas court reviewed state court decision); Gore v. Leeke, 605 F.2d 741, 743 (4th Cir. 1979) (South Carolina law was independent and adequate basis for decision); Lumpkin v. Ricketts, 551 F.2d 680, 681-82 (5th Cir. 1977) (federal habeas court must determine if decision was based on independent and adequate state ground).

54. United States v. Frady, 456 U.S. 152, 170 (1982). *See generally* JAMES LIEBMAN, FEDERAL HABEAS CORPUS: PRACTICE AND PROCEDURE § 5-24, at 357-61 (1988) (discussing procedural default rule); Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Corpus Claims in Capital Cases*, 23 LOY L.A. L. REV. 193, 199-200 (1989) (discussing prejudice and its application in applying procedural default rule).

55. *See Smith*, 477 U.S. at 537 (miscarriage of justice exemption); *see also* Dugger v. Adams, 489 U.S. 401, 415 n.4 (1989) (Blackmun, J., dissenting) (refusal to review constitutionality of capital murder case is not necessarily "miscarriage of justice").

56. *See* Caldwell v. Missippi, 472 U.S. 320, 327 (1985) (it must be clear that state relied on independent and adequate default rule); *Sykes*, 433 U.S. at 86-87 (federal court must determine whether state ground is adequate and independent); Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986) (must determine whether state default rule is a valid use of state power); *see also* Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Corpus Claims in Capital Cases*, 23 LOY L.A. L. REV. 193, 198-99 (1989) (discussing application of independent and adequate state ground standard). *See generally* JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS: PRACTICE AND PROCEDURE § 5-24, 346-50 (1988) (discussing *Syke's* approach to determining independent and adequate state grounds).

and independent state default rule.[57] However, ambiguity of state court decisions makes application of the independent and adequate ground standard difficult.[58] In *Michigan v. Long*,[59] the Court articulated the plain statement rule holding that in the absence of a plain statement, the federal habeas court should assume that the state court's decision was not based on an independent and adequate state ground.[60] In *Harris v. Reed*,[61] the Court applied the plain statement rule to federal habeas claims "fairly appear[ing] to rest primarily on federal law, or to be interwoven with the federal law."[62] When the adequacy and independence of any possible state law ground is not clear from the face of the opinion, the federal court assumes that the state court's holding is based on federal law.[63] Application of this conclusive presump-

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57. *Sykes*, 433 U.S. at 78-80. The *Sykes* Court phrased the question in the following manner: "In what instances will an adequate and independent state ground bar consideration of otherwise cognizable federal issues on federal habeas review?" *Id.* at 78-79. In addition, the Court stated that dealing with state procedural default rules can be "somewhat tortuous." *Id.* at 82; *see* James W. Dobbins, Note, *Applying* Wainwright v. Sykes *to State Alternative Holdings and Summary Affirmances*, 53 FORDHAM L. REVIEW 1357, 1364-65 (1985) (discussing federal habeas court's ability to review decision based on state procedural default). *See generally* Saul B. Goodman & Jonathan B. Sallett, Wainwright v. Sykes: *The Lower Federal Courts Respond*, 30 HASTINGS L. J. 1683, 1690-92 (1979) (*Sykes* Court first determined whether state ground was independent and adequate); Ruthann Robson & Michael Mello, *Ariadne's Provisions: A "Clue of Thread" to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty*, 76 CAL. L. REV. 89, 99-110 (1988) (discussing independence and adequacy of state default rules).

58. *Coleman*, __ U.S. at __, 111 S. Ct. at 2555, 115 L. Ed. 2d at 657 (1991).

59. 463 U.S. 1032 (1983).

60. *Long*, 463 U.S. at 1044. The Court stated that based on "the absence of a plain statement that the decision below rested on an adequate and independent state ground" the Court had jurisdiction to determine whether the police officer's search of Long's car was reasonable. *Id.* Additionally, the Court held:

> [I]n determining . . . whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.

Id. at 1042 (citations omitted).

61. 489 U.S. 255 (1989).

62. *Harris*, 489 U.S. at 266. *But cf. Maupin*, 785 F.2d at, 138 n.2 (holding in *Fay* still valid); Brownstein v. Director, Ill. Dep't of Corrections, 760 F.2d 836, 839-44 (7th Cir. 1985) (demonstrating that *Fay's* deliberate bypass standard is still applicable in certain areas) *cert. denied*, 474 U.S. 858 (1985). *See generally* David Berchelmann, Jr. & Mary Kay Sicola, *The Supreme Court Revisits the Reach of the Great Writ*, 53 TEX. B.J. 326, 326-28 (1990) (discussing *Harris v. Reed*); Richard A. Powers, III *State Prisoners' Access to Federal Habeas Corpus: Restrictions Increase*, 25 CRIM. L. BULL. 444, 444-53 (discussing restriction of access to federal habeas courts); Jason M. Halper, Comment, Harris v. Reed: *A New Look at Federal Habeas Jurisdiction Over State Petitioners*, 58 FORDHAM L. REVIEW 493 *passim* (1989) (discussing Court's holding in *Harris v. Reed*).

63. *See Long*, 463 U.S. at 1037-44 (presumption favoring federal law).

tion is based on the generalization that correct results will almost always be achieved.[64] The *Harris* opinion did not specifically address the continuing validity of the deliberate by-pass standard or the applicability of its holding to a state prisoner who forfeits direct review.[65] However, the opinion strongly hinted that the broad brush of *Fay* was superseded[66] by the cause and prejudice standard of *Wainwright v. Sykes*. Not until *Coleman v. Thompson* was the modern procedural default rule directly applied to a state prisoner who defaulted his entire appeal.[67]

In *Coleman*, the United States Supreme Court held that all cases involving a state prisoner who has forfeited his federal claims pursuant to an independent and adequate state procedural rule will be denied federal habeas review.[68] However, the bar is not applicable to a claimant who demonstrates cause for the default and proves actual prejudice resulting from the asserted abuse of federal law, or demonstrates that a fundamental miscarriage of justice will result if the federal court does not hear the claims.[69] To corroborate its reasoning, the majority traced the evolution of the cause and prejudice standard finding that "a common problem [requires] a common solution."[70] Justice O'Connor, writing for the majority, concluded that the Virginia court's decision was based on an independent and adequate state ground and that Coleman failed to satisfy the requirements of the cause and prejudice standard.[71] The Court rejected the assertion that the *Harris* presumption mandates federal review when the state decision is not clearly and expressly founded on a state procedural rule.[72] This broad interpretation of the *Harris* presumption, the Court reasoned, fails to recognize the predicate to the presumption that the federal claim must appear "to rest primarily on federal law or to be interwoven with federal law."[73]

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64. *Coleman*, __ U.S. at __, 111 S. Ct. at 2558, 111 L. Ed. 2d at 661.

65. *See Harris*, 489 U.S. at 261 (applying "plain statement" rule to direct and habeas review).

66. *See id.* at 262 (using broad terms to describe application of cause and prejudice standard); *see also Coleman*, __ U.S. at __, 111 S. Ct. at 2564-65, 111 L. Ed. 2d at 669 (suggesting that *Sykes* superseded *Fay*). The *Sykes* Court specifically stated that they were not "consider[ing] the *Fay* rule as applied to the facts there confronting the Court." *Sykes*, 433 U.S at 88 n.12. Clearly, most of the deliberate bypass standard was overruled, however, there was uncertainty as to whether the *Fay* rule still applied to fact situations similar to *Fay*. *See* Rinehart v. Brewer, 561 F.2d 126, 130 n.6 (8th Cir. 1977) (recognizing vitality of *Fay*).

67. 69.*Coleman*, at __, 111 S. Ct. at 2565, 115 L. Ed. 2d at 669.

68. Coleman v. Thompson, __ U.S. __, __, 111 S. Ct. 2546, 2565, 115 L. Ed. 2d 640, 669 (1991).

69. *Id.*

70. *Coleman*, __ U.S. at __, 111 S. Ct. at 2556, 115 L. Ed. 2d at 659 (quoting Harris v. Reed, 489 U.S. 255, 263 (1989)).

71. *Id.* at __, 111 S. Ct. at 2568, 115 L. Ed. 2d at 673-74.

72. *Id.* at __, 111 S. Ct. at 2558, 115 L. Ed. 2d at 659-60.

73. *Id.* at __, 111 S. Ct. at 2557-58, 115 L. Ed. 2d at 660-61.

The majority justified its limitation of the *Harris* presumption by emphasizing the burden which a broad interpretation would put on state courts.[74] The Court stated that Coleman's interpretation would amount to a conclusive presumption requiring state courts to use particular language to avoid federal habeas review.[75] Such a rule, the Court held, would require a federal habeas court to review state court decisions based on an independent and adequate state ground.[76] Balancing the results of a conclusive presumption, Justice O'Connor recognized that any efficiency gained by applying the presumption was outweighed by federal respect for independent and adequate state procedural rules.[77]

The majority rejected Coleman's claim that attorney error satisfied the cause and prejudice standard of *Wainwright v. Sykes*.[78] The Court emphasized that cause must be external and not attributable to the petitioner.[79] The external requirement is satisfied only when the attorney error constitutes a violation of the petitioner's Sixth-Amendment right to counsel.[80] The majority further reasoned that because there is no constitutional right to an attorney during collateral review, the habeas applicant is the proper recipient of the attorney error.[81] Coleman's failure to demonstrate that the procedural default was an independent and adequate state ground,[82] unsuccessful application of the cause and prejudice standard,[83] and failure to raise the miscarriage of justice exemption[84] persuaded the Court to affirm the judgment of the United States Court of Appeals for the Fourth Circuit.[85]

The dissent, authored by Justice Blackmun, criticized the majority for

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74. *Coleman*, __ U.S. at __, 111 S. Ct. at 2558-59, 115 L. Ed. 2d at 660.

75. *Id.* at __, 111 S. Ct. at 2558, 115 L. Ed. 2d at 660.

76. *Id.*

77. *Id.* at __, 111 S. Ct. at 2558, 115 L. Ed. 2d at 660.

78. *Coleman*, __ U.S. at __, 111 S. Ct. at 2567, 115 L. Ed. 2d at 672; *see* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977) (adopting cause and prejudice standard); *see also* Irwin v. Veterans Admin., 498 U.S. __, __, 111 S. Ct. 453, 456, 112 L. Ed. 2d 435, 442 (1990) (parties bound by lawyer's actions).

79. Coleman, __ U.S. at __, 111 S. Ct. at 2566, 115 L. Ed. 2d at 671. The *Coleman* Court stated, "[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* (quoting Murray v. Carrier, 477 U.S. 478, 488 (1985)).

80. *Id.* at __, 111 S. Ct. at 2566, 115 L. Ed. 2d at 670-71. The Court concluded that if the petitioner was represented by a counselor whose conduct was not unconstitutional under the *Strickland v. Washington* standard, then the petitioner should bear the risk of his counselor's error. *Id.* at __, 111 S. Ct. at 2566-67, 115 L. Ed. 2d at 671.

81. *Id.*

82. *Id.* at __, 111 S. Ct. at 2561, 115 L. Ed. 2d at 665.

83. *Coleman*, __ U.S. at __, 111 S. Ct. at 2568, 115 L. Ed. 2d at 673-74.

84. *Id.* at __, 111 S. Ct. at 2568, 115 L. Ed. 2d at 674.

85. *Id.*

misapplying the principles of federalism.[86] Justice Blackmun argued that because the Bill of Rights guarantees the right of a federal habeas petitioner to be heard in a federal forum, federalism should be interpreted to protect this fundamental interest.[87] He reasoned that the sovereignty of state courts is limited and a procedural default rule, which hinders federal habeas review of constitutional claims, misconstrues the principles of federalism.[88] Justice Blackmun further argued that the *Harris* presumption was to apply in all cases where federal courts reviewed a state claim.[89] He noted that the majority opinion recognizes the ambiguity in the Virginia Supreme Court's dismissal order.[90] Because of this ambiguity, the *Harris* presumption requires a federal forum for Coleman's claims.[91]

In *Coleman*, the Court categorically claims that the case is about federalism and then cavalierly assumes that federalism is advanced when ambiguous state court decisions are undisturbed by federal habeas review.[92] By assuming that the sovereign interests of the federal and state governments

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86. *Id.* at __, 111 S. Ct. at 2569-70, 115 L. Ed. 2d at 675 (Blackmun, J., dissenting). Justices Marshall and Stevens joined in the dissent written by Justice Blackmun. *Id.* at __, 111 S. Ct. at 2569, 115 L. Ed. 2d at 674 (Blackmun, J., dissenting).

87. *Coleman*, __ U.S. at __, 111 S. Ct. at 2574, 115 L. Ed. 2d at 681 (Blackmun, J., dissenting).). Federalism is a device used to ensure the liberty of citizens and the promotion of fairness. *Id.* at __, 111 S. Ct. at 2570, 115 L. Ed. 2d at 675 (Blackmun, J., dissenting).

88. *Id.* Federalism requires the federal courts to freely grant access to federal habeas forums. *Id.* at __, 111 S. Ct. at 2570, 115 L. Ed. 2d at 676 (Blackmun, J., dissenting).

89. *Id.* at __, 111 S. Ct. at 2572, 115 L. Ed. 2d at 678-79. Justice Blackmun contends that the *Harris* presumption includes all cases where a state court hears federal claims. *Id.* The majority, Justice Blackmun states, improperly defined the Harris presumption and rejected its preference for fundamental rights. *Id.* at __, 111 S. Ct. at 2572, 115 L. Ed. 2d at 678-79 (Blackmun, J., dissenting).

90. *Id.* at __, 111 S. Ct. at 2572, 115 L. Ed. 2d at 678 (Blackmun, J, dissenting).

91. *Coleman*, __ U.S. at __, 111 S. Ct. at 2572, 115 L. Ed. 2d at 678 (Blackmun, J., dissenting). The *Harris* Court concluded that plain-statement rule should be applied to summary orders. Even assuming the majority's interpretation of the Harris presumption is correct, the ambiguity in Coleman's dismissal order warrants review by a federal forum. *Id.*

92. *See* Coleman v. Thompson, __ U.S. __, __, 111 S. Ct. 2540, 2552, 115 L. Ed. 2d 640, 654 (1991) ("This is a case about federalism."). The majority, without defining the purpose of federalism, assumes that their procedural default analysis is consistent with the goals of federalism. *Id.* at __, 111 S. Ct. at 2569, 115 L. Ed. 2d at 675 (Blackmun, J., dissenting). However, since 1862 courts have recognized that federalism requires federal habeas courts to provide a freely accessible forum for federal claims. *See Ex parte* Bridges, 4 F. Cas. 98, 106 (C.C.N.D. Ga. 1875) (No. 1862) (law permits federal habeas court to release prisoner convicted by state court). Because the 1868 term of the Supreme Court was prohibited from hearing habeas corpus decisions, the Dock Bridges case was never heard by the Court. *See Ex parte* McCardle, 74 U.S. 506, 515 (1869) (Court does not have jurisdiction to hear federal habeas corpus claims). *But see* Act of March 3, 1885, ch. 353, 23 Stat. 437, 437 (reinstating Court's jurisdiction to hear habeas claims). *See generally* William Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 *passim* (1961) (discussing historical relationship between federalism and federal habeas corpus); Louis Pollack, *Proposals*

are equal, the majority's definition of federalism has little in common with the framer's original interpretation.[93] This presumption of equality is undermined by the Constitution's explicit limit of the sovereignty of the states.[94] As Justice Brennan observed, "Federalism is a device for realizing the concepts of decency and fairness which are among the fundamental principles of liberty and justice lying at the base of all our civil and political institutions."[95] Because federal habeas courts act as guardians of constitutional

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to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 YALE L.J. 50, 64-65 (1956) (federalism requires that writ be issued freely).

93. U.S. CONST. art. VI., cl. 2. The article states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." *Id.* James Madison commented that if the Constitution lacked this clause (Art. VI., cl. 2) it "would have been evidently and radically defective." THE FEDERALIST NO. 44, at 286 (James Madison) (Clinton Rossiter ed., 1961); *see also* Louis Pollak, *Proposals to Curtail Federal Habeas Corpus For State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 65 (1956) (justice outweighs states interest in finality); *cf.* Reed v. Ross, 468 U.S. 1, 10 (1984) (Congress placed federal courts between state and people to protect individual's fundamental rights from abuse by state courts); Brown v. Allen, 344 U.S. 443, 512 (1953) (object of writ is enforcement of personal liberty); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (habeas corpus is unique procedural tool). *But cf.* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 54-55 (1923) (Constitution designed to limit growth of federal judiciary).

94. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 548 (1985) (Constitution limits sovereignty of states). *But cf.* Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 HARV. L. REV. 966, 967 (1947) (framers desired to curtail growth of federal judiciary); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 54-55 (1923) (Constitution limits federal power). By establishing the Constitution and the laws made by Congress as the "supreme law of the land," Article VI, Clause 2 of the United State Constitution relegates the states to an inferior status. *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause). Additionally, the Constitution emphasizes the importance of the writ of habeas corpus by stating that "the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." U.S. CONST. art. I, § 9, cl. 2. Justice Frankfurter, in *Brown v. Allen*, concludes:

> Insofar as [federal habeas] jurisdiction enable[s] federal district courts to enter claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law.

Brown, 344 U.S. at 510. Moreover, the adoption of the Fourteenth Amendment evidences an expansion of federal power at the expense of state sovereignty. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 453-456 (1976) (Fourteenth Amendment limits power of states); South Carolina v. Datzenbach, 383 U.S. 301, 308 (1966) (Fourteenth Amendment changes federal/state balance); *Ex parte* Virginia, 100 U.S. 339, 344-48 (1879) (Fourteenth Amendment limits state sovereignty).

95. William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 442 (1961); *see* Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 279-83 (1985) (Court held state rule limiting bar admission violated Privileges and Immunities Clause); *Brown*, 344 U.S. at 498 (Frankfurter, J., dissenting) (discussing rela-

rights, federalism requires the court to freely exercise the power Congress has conferred on the tribunal.[96]

According to the majority, a procedural default rule should be formulated to reduce the risk of reviewing a state court decision based on an independent and adequate state ground.[97] However, the majority fails to recognize that federal review of state court decisions was founded on distrust of state tribunals and that the writ's venerable function was to ensure a federal forum for federal rights.[98] Historically, the federal habeas power was established to protect the federal rights of state prisoners.[99] Thus, the Court's

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tionship between federalism and fundamental liberties); Testa v. Katt, 330 U.S. 386, 389-90 (1947) (federalism requires federal and state courts to uphold constitutional rights of individual); *see also* The Federalist No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961) (goal of society is justice). *See generally* Bruce Fein, *The Waxing and Waning of Federalism*, A.B.A. J., Jan., 1986, at 118 (discussing federalism and its relation to federal power); Andrzej Rapacyzinski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341 *passim* (discussing federalism and its relation to the Constitution).

96. *See Coleman*, __ U.S. at __, 111 S. Ct. at 2570, 115 L. Ed. 2d at 676 (Blackmun, J., dissenting) (duty of federal habeas courts to enforce individuals constitutional rights); *Reed*, 468 U.S. at 10 (federal courts serve to protect the individuals' fundamental rights); Desist v. United States, 394 U.S. 244, 262-63 (1969) (habeas courts needed to regulate conduct of state trial and appellate courts); *Virginia*, 100 U.S. at 346 (federal habeas court employed to protect federal rights); *see also* WAYNE R. LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE 1010 n.1 (1985) (citing Mackey v. United States, 401 U.S. 667 (1971)) (federal habeas courts have obligation to overturn state court decisions containing constitutional errors); Elliot Krieger, *The Court Declines in Fairness*—Teague v. Lane, 25 HARV. C.R.-C.L.L. REV. 164, 164-82 (1990) (habeas corpus serves as incentive for trial and court of appeals to abide by constitutional standards).

97. *Coleman*, __ U.S. at __, 111 S. Ct. at 2557, 115 L. Ed. 2d at 659-60. The Court rejected Coleman's broad interpretation of the *Harris* presumption and, therefore, curtailed access to federal habeas courts in an attempt to preserve state court decisions based on an independent and adequate state ground. *Id.*

98. *See* Monroe v. Pape, 365 U.S. 167 (1960) (post-Civil War case stating purpose of R.S. 1979 was to allow individual to avoid state prejudice by providing federal right in federal forums to insure privileges and immunities of Fourteenth Amendment); Broad River Power Co. v. South Carolina *ex rel.* Daniel, 281 U.S. 537, 540 (1930) (federal habeas courts duty to review state court decisions originated from distrust of state courts). The duty to review state court decisions was intended to maintain and enforce the supremacy of the Constitution. Ward v. Board of County Comm'rs, 253 U.S. 17, 23 (1920); *see also* Robert M. Cover & T. Alexander Aleinikoff, *Dialectic Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1092 (1977) (function of writ to uphold rights of individual). Historically, states have made it difficult to obtain post-conviction remedies: "As a result, many claims of denial of federal right, when sought after conviction, are cognizable in state courts only with difficulty, or not at all." Note, *Effect of the Federal Constitution in Requiring State Post-Conviction Remedies*, 53 COLUM. L. REV. 1143, 1145 (1953).

99. *See* Mitchum v. Foster, 407 U.S. 225, 242 (1972) (federal courts designed to protect federal rights from state abuse). Although Congress had the opportunity to leave enforcement of the Federal Constitution solely to the state courts, it chose not to. *Brown*, 344 U.S. at 499 (Frankfurter, J., concurring). State courts are under the obligation, as are federal courts, to

artful interpretation of *Abie State Bank v. Bryan*,[100] which vested in the federal courts a duty to determine its jurisdiction, fails to recognize that the independent and adequate state ground analysis of the decision was adopted to ensure enforcement of the Constitution.[101] In prior cases, the Court has recognized that the obligation to review state court decisions "cannot be disregarded without neglecting or renouncing a jurisdiction conferred by the law and designed to protect and maintain the supremacy of the Constitution."[102] The *Coleman* Court abdicates its constitutional allocation of power by de-emphasizing the federal habeas court's role as a protector of federal rights.[103]

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uphold the rights conferred under the United States Constitution. *See Testa*, 330 U.S. at 389-90 (state and federal tribunal must uphold Constitution); Claflin v. Houseman, 93 U.S. 130, 137 (1876) (state and federal courts have duty to enforce Constitution); *see also* Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 HARV. L. REV. 966, 971-73 (1947) (discussing jurisdiction of federal and state habeas courts). Moreover, the first judiciary act limited the ability of federal courts to issue writs of habeas corpus to prisoners in custody under authority of the United States. Judiciary Act, § 14, 1 Stat. 81-82. Only after the Judiciary Act of 1867, did the writ include an applicant sentenced by a state court. *Brown*, 344 U.S. at 443 (Frankfurter, J., concurring). The law affords the federal judge an opportunity to release a prisoner convicted by a state tribunal. *Bridges*, 4 F. Cas. at 106.

100. 282 U.S. 765 (1931).

101. *See Coleman*, __ U.S. at __, 111 S. Ct. at 2571, 115 L. Ed. 2d at 676 (Blackmun, J., dissenting) (discussing misapplication of *Abie State Bank*). The Coleman majority strategically reconstructs the quote in *Abie State Bank* to read, "[i]t is . . . incumbent upon this Court . . . to ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the [state court] judgment." *Coleman*, __ U.S. at __, 111 S. Ct. at 2558, 115 L. Ed. 2d at 660. However, the uncensored quote stated, "it is incumbent upon this Court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, *in order that constitutional guarantees may appropriately be enforced*, whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank*, 282 U.S. at 773 (emphasis added).

102. *Ward*, 253 U.S. at 23 (1920). The founding fathers recognized the importance of the writ and, therefore, incorporated the writ into the provisions of the Constitution. *See* U.S. CONST. art. I, § 9, cl. 2 (acknowledging writ of habeas corpus). The federal habeas court has an obligation to ensure that constitutional guarantees are enforced when determining whether a state decision was based on an independent and adequate state ground. *See, e.g.*, *Broad River Power Co.*, 281 U.S. at 540 (court must enforce constitutional rights); *Ward*, 253 U.S. at 22 (duty of federal court to uphold constitutional rights of the individual); Union Pacific R.R. v. Public Service Comm., 248 U.S. 67, 69-70 (1918) (federal courts guard against unconstitutional burdens levied by state).

103. *See Coleman*, __ U.S. at __, 111 S. Ct. at 2571, 115 L. Ed 2d at 677 (Blackmun, J., dissenting) (Court has duty to protect federal rights). Justice Oliver Wendell Holmes emphasized the federal habeas court's constitutional role: "[Federal] habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." Frank v. Magnum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). Federalists believed that the Constitution intended the federal

By adopting the analysis of *Michigan v. Long*,[104] which was not a capital case, the *Coleman* Court fails to distinguish between capital and non-capital habeas prisoners.[105] Such an oversight reflects a judicial disposition that relegates constitutional rights to insignificant utilitarian interests.[106] More-

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judiciary to have exclusive jurisdiction over federal laws. *See* Martin v. Hunter's Lessee, 14 U.S. 304, 334-35 (1816) (federal courts have jurisdiction over federal law); *see also* Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 HARV. L. REV. 966, 967 (1947) (discussing Federalist views). The Judiciary Act of 1801, established almost all of the federal jurisdiction in the federal courts. Judiciary Act of 1801, ch. 4, § 1, 2 Stat. 89 (1801). However, this Federalist victory was short lived, and the Jeffersonian Congress repealed the act a year after its adoption. *See* Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 (1802) (repealing Judiciary Act of 1801).

104. 463 U.S. 1032; *see Coleman*, __ U.S. at __, 111 S. Ct. at 2556, 115 L. Ed. 2d at 658-59 (adopting *Long* presumption). However, *Long* was not a federal habeas capital claim, but instead was a direct review case involving a non-capital claim. *See Long*, 463 U.S. at 1035-36 (involved possession of marijuana). Although the presumption in *Long* has been applied to capital cases, the Court in *Coleman* has failed to distinguish between capital and non-capital prisoners when administering the presumption. *Compare Coleman*, __, U.S. at __, 111 S. Ct. at 2556-57, 115 L. Ed. 2d at 658-59 (*Long* presumption applied to capital case) *and* Harris v. Reed, 489 U.S. 255, 263 (1989) (Court applied *Long* presumption to capital case) *with* Teague v. Lane, 489 U.S. 288, 326 (1989) (applying *Long* presumption to non-capital case) *and* Montana v. Hall, 481 U.S. 400, 401, 404 n.3 (1987) (applying *Long* presumption to sexual assault case). *See generally* Robert Batey, *Federal Habeas Corpus Relief and the Death Penalty: "Finality with a Capital F"*, 36 U. FLA. L. REV. 252, 272 (1984) (discussing harshness of modern procedural default rule); Graham Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321, 329-34 (1987-88) (discussing procedural default and its relation to death penalty).

105. *See Coleman*, __ U.S. at __, 111 S. Ct. at 2563, 115 L. Ed. 2d at 667 (opinion fails to distinguish between capital and non-capital federal habeas prisoners). *But cf.* Gardner v. Florida, 430 U.S. 349, 357-60 (1977) (Court recognized unique character of death penalty); Bell v. Ohio, 438 U.S. 637, 642 (1978) (distinguishing death penalty from other forms of punishment). *See generally*, Robert Catz, *Federal habeas Corpus and the Death Penalty: Need For a Preclusion Doctrine Exception*, 18 U.C. DAVIS L. REV. 1177, 1180-81, 1196-1210 (1985) (discussing impact procedural default rules have had on capital punishment cases); John Morris, Note, *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 YALE L.J. 371, 376 (1985) (discussing accessibility of death penalty as result of changes in procedural default rules).

106. *Coleman*, __ U.S. at __, 111 S. Ct. at 2572-73, 115 L. Ed. 2d at 679 (Blackmun, J., dissenting); *see* McCleskey v. Zant, __ U.S. __, __, 111 S. Ct. 1454, 1468-70, 113 L. Ed. 2d 517, 542-45 (1991) (implementing procedural default rule which places rules over rights). The Court, in its pursuit of guilt and innocence, should not let the culpability of the accused become the sole issue. *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1092 n.253 (1977) (urging prevention of dominant value as exclusive concern). Justice Brennan's dissent in *Stone v. Powell* states:

> The Court . . . argues that habeas relief for non-"guilt -related" constitutional claims is not mandated because such claims do not affect the "basic justice" of a defendants detention, this is presumably because the "ultimate goal" of the criminal justice system is "truth and justice." This denigration of constitutional guarantees and *constitutionally mandated procedures*, relegated by the Court to the status of mere utilitarian tools, must

over, the majority's discussion of habeas jurisprudence de-emphasizes the significance of a death sentence through the rhetoric of federalism and the functional dialect of the states interest in finality.[107] "[T]he unique finality of the death penalty" warrants extended review of state convictions applying death sentences.[108] Novel procedural shortcuts should not limit a prisoner's access to federal habeas courts because "[t]he penalty, once imposed, is irrevocable."[109] Although the procedural doctrines imposed by the *Coleman* Court may be valid for the common non-capital federal habeas claim, such strict procedural policies should not apply to a state petitioner sentenced to

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> appall citizens taught to expect judicial respect and support for their constitutional rights. Even if punishment of the "guilty" were society's highest value—and procedural safeguards denigrated to this end—in a constitution that a majority of the members of this Court would prefer, that is not the ordering of priorities under the Constitution forged by the Framers, and this Court's sworn duty is to uphold that Constitution and not to frame its own.

Stone v. Powell, 428 U.S. 465, 523-24 (1976) (Brennan, J., dissenting) (citations and footnote omitted).

107. *See Coleman*, __ U.S. at __, 111 S. Ct. at 2565, 115 L. Ed. 2d at 669 (1991) (emphasizing importance of finality in state court decisions); *see also* Murray v. Carrier, 477 U.S. 478, 486-87 (1985) (stating that importance of finality in state court decisions requires that unawareness of objection not be cause for procedural default analysis); Reed v. Ross, 468 U.S. 1, 10 (1983) (discussing importance of finality in state court rulings); Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Corpus Claims in Capital Cases*, 23 LOYOLA L.A. L. REV. 193, 193-96 (discussing policies behind modern procedural default rule). *See generally* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 146-47 (discussing state's interest in finality of its decisions).

108. Coleman v. Balkcom, 451 U.S. 949, 955 (1981) (Marshall, J., dissenting), *reh'g denied*, 452 U.S. 955 (1981). There are numerous examples of capital cases where a state procedural default prevented federal habeas review. *See, e.g.*, Straight v. Wainwright, 772 F.2d 674, 677-78 (11th Cir. 1985), *cert. denied*, 475 U.S. 1099 (1986) (state procedural default barred federal habeas review); Francois v. Wainwright, 741 F.2d 1275, 1282-83 (11th Cir. 1984) (state procedural default basis for denying federal habeas review). *See generally* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA THE DEATH PENALTY 9-18 (1987) (discussing historical background of death penalty); IRA P. ROBBINS, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES APPENDIX 76-103 (1990) (discussing state procedural default rule and its relation to death penalty). *See generally* Robert Batey, *Federal Habeas Corpus Relief and the Death Penalty: "Finality With a Capital F"* 36 U. FLA. L. REV. 252, 256 (1984) (discussing severity of death sentence).

109. *Balkcom*, 451 U.S. at 955 (Marshall, J., dissenting from denial of certiorari); *see* Beck v. Alabama, 447 U.S. 625, 637 (1980) (death penalty differs significantly from all other forms of punishment); *Gardner*, 430 U.S. at 357-58 (distinguishing uniqueness of death sentence); *see also* John Morris, Jr., Note, *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 YALE L.J. 371, 376 (1985) (emphasis on finality is misplaced when federal habeas case involves death sentence). *See generally* Jack Guttenberg, *Federal Habeas Corpus, Constitutional Rights and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617, 679-85 (1984) (finality should not be goal of procedural default rules).

death.[110]

The death penalty, unlike other forms of punishment, has received special significance from the United States Supreme Court.[111] However, the majority fails to recognize that death is different and instead, blindly extends the *Long* presumption to a capital case.[112] In doing so, the Court's reasoning overlooks the evolution of procedural fairness standards in capital sentencing.[113] Because capital prisoners are afforded broader rights during trial and

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110. *Balkcom*, 451 U.S. at 953 (Stevens, J., concurring in denial of certiorari); *see Beck*, 447 U.S. at 638 (unreliable procedural rules governing sentencing should be rejected); Lockett v. Ohio, 438 U.S. 586, 605-06 (1977) (discussing reliability of procedural rules). In *Lockett*, the Court stated the reason reliable procedural guidelines were needed in capital sentencing: "When the choice is between life and death, the risk is unacceptable and incompatible with the commands of the eight and Fourteenth Amendments." *Id.* at 605. Death sentences are unique and should be distinguished from other forms of punishment. Woodson v. North Carolina, 428 U.S. 280, 305 (1975). The *Woodson* Court stated:

> Death, in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id.; *see also* Robert Batey, *Federal Habeas Corpus Relief and the Death Penalty: "Finality With a Capital F"*, 36 U. FLA. L. REV. 252, 256 (1984) (in death penalty cases state court must closely examine procedural default rules to ensure there was no constitutional error). However, Professor Rosenberg has asserted: "Where finality is insisted upon in the absence of such an adjudication on the merits, however, a value choice has been made that in a world of finite resources it is preferable that the matter be resolved quickly than that it be resolved correctly." Yale Rosenberg, *Jettisoning* Fay v. Noia: *Procedural Defaults by Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341, 423-24 (1978).

111. *See, e.g.*, Pulley v. Harris, 465 U.S. 37 (1984) (evaluating constitutionality of death penalty); California v. Ramos, 463 U.S. 992 (1983) (upholding constitutionality of death penalty); Barefoot v. Estelle, 463 U.S. 880, 903-05 (1983) (death penalty constitutional); Zant v. Stephens, 462 U.S. 862 (1983) (discussing procedures required in capital sentencing); *see also* Robert Batey, *Federal Habeas Corpus Relief and the Death Penalty: "Finality with a Capital F"*, 36 U. FLA. L. REV. 252, 253 (1984) (Court recognizes special character of death penalty). *See generally* Lewis Powell, Commentary, *Capital Punishment*, 102 HARV. L. REV. 1035 *passim* (1989) (discussing Court's evaluation of capital punishment).

112. *Gardner*, 430 U.S. at 357 (plurality opinion) (Justices Brennan, Stewart, Marshall, Powell, and Stevens distinguishing death penalty from other sentences). After the *Gardner* decision, three justices recognized that the death penalty is unlike other forms of punishment. *See* Godrey v. Georgia, 446 U.S. 420, 433-42 (1980) (Justice Blackmun acknowledged difference of death sentence); *Lockett*, 438 U.S. at 605 (Chief Justice Burger recognizing unique status of death sentence); Coker v. Georgia, 433 U.S. 584, 591-600 (1977) (Justice White distinguishing between death and non-death sentences); *see also* William McDaniel, Jr., Note, Gardner v. Florida: *The Application of Due Process To Sentencing Procedures*, 63 VA. L. REV. 1281, 1287 (death penalty differs from other forms of punishment). *See generally* Rowland Young, *Supreme Court Report: Court Reverses Florida Sentence of Death*, 63 A.B.A. J. 688 *passim* (1977) (discussing *Gardner*'s impact on death sentencing).

113. *See Gardner*, 430 U.S. at 357-62 (1977) (new standards of procedural fairness warrant total disclosure in death penalty cases). The Court has recognized constitutional reform in capital-sentencing procedures. *Id.*; *see also* Mempa v. Rhay, 389 U.S. 128, 128 (1967) (stat-

on review, uniformity within the law warrants a reevaluation of the Court's indiscriminate procedural default policy.[114]

Chief Justice Rehnquist was most likely persuaded by his belief that prompt enforcement of capital sentences is necessary to promote "the integrity of the entire criminal justice system" and time consuming review of federal habeas petitions is a "mockery of our criminal justice system."[115] However, such a view fails to recognize that the inherent delay in the adjudicatory process should insure that an innocent man does not unjustly pay the ultimate price—his life.[116] Moreover, the period between sentencing and ex-

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ing that effective assistance of counsel during sentencing is constitutional guarantee); Ira Robbins, *Death Penalty Habeas Corpus: Defining the Issues*, 73 JUDICATURE 215, 215 (1990) (special procedural standards have been applied to capital cases); *cf.* THE CRIMINAL LAW REPORTER EDITORS, THE CRIMINAL LAW REVOLUTION 149-53 (1969) (discussing *Witherspoon v. Illinois* and injustice resulting from jury pool which excludes persons objecting to capital punishment). *But cf.* Williams v. New York, 337 U.S. 241, 241 (1949) (allowing testimony from witnesses who were not confronted or cross-examined as bases for death sentence). *See generally* Robert Batey, *Federal Habeas Corpus Relief and the Death Penalty: "Finality With a Capital F"*, 36 U. FLA. L. REV. 252, 254 *passim* (1984) (discussing procedural fairness standards in capital sentencing).

114. *See Long*, 463 U.S. at 1040 (discussing "important need for uniformity in the law"); *see also* Ira Robbins, *Death Penalty Habeas Corpus: Defining the Issues*, 73 JUDICATURE 215, 215 (1990) (capital prisoners afforded broader rights). The plain statement rule was adopted to promote uniformity in the law. *Long*, 463 U.S. at 1032.

115. *See Balkcom*, 451 U.S. at 959 (Rehnquist, J., dissenting from denial of certiorari) (integrity of criminal justice system destroyed by not satisfying promise to punish by death). The Chief Justice has stated, "Given so many bites at the apple, the odds favor petitioner finding some court willing to vacate his death sentence because in its view his trial or sentence was not free from constitutional error." *Id.* at 957; *see also* Estelle v. Jurek, 450 U.S. 1014, 1015 *reh'g denied*, 451 U.S. 1011 (1981) (Rehnquist, J., dissenting) (petitioner should not have too many opportunities to have his trial or sentence overturned); Paul Bator, *Finality in Criminal Law and Federal habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 446-49 (1963) (finality as goal in criminal process means that some errors will go uncorrected). *But cf. Balkcom*, 451 U.S. at 955 (Marshall, J., dissenting from denial of certiorari) (emphasizing importance of scrutiny that must be given to application of procedural rules in post-trial review of death penalty cases). Justice Marshall states:

> [S]urely those . . . who believe that there are circumstances in which the State may legitimately impose the ultimate sanction would not want to see an innocent individual put to death. Certainly no Member of this Court would countenance a conviction obtained in violation of the Constitution. Because of the unique finality of the death penalty, its imposition must be the result of careful procedures and must survive close scrutiny on post-trial review.

Id. Inherent in 28 U.S.C § 1651 is an exhaustive appeal process which freely extends the federal forum to capital prisoners. *See* 28 U.S.C. § 2255 (1982) (granting power to court to vacate sentence of person unlawfully detained); 28 U.S.C. § 1651 (1982) (granting Supreme Court and all "courts established by Congress" the power to issue writ of habeas corpus).

116. *See Balkcom*, 451 U.S. at 955 (Marshall, J., dissenting from denial of certiorari) (finality of death sentence requires slow and deliberate review of sentence at all stages of adjudicatory process); *Gardner*, 430 U.S. at 357-58 (Court emphasized finality of death sentence);

ecution serves as an important form of punishment and the psychological effect could be equivalent to the ultimate step.[117] The majority's cost-benefit analysis assumes that the efficient use of judicial resources justifies application of the cause and prejudice standard.[118] However, a more liberal proce-

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see also Robert Batey, *Federal Habeas Corpus Relief and the Death Penalty: "Finality with a Capital F"*, 36 U. FLA. L. REV. 252, 255-56 (1984) (delay enhances societal respect for death penalty). There is no constitutional provision that requires speed in enforcing a death sentence. *See Balkcom*, 451 U.S. at 958 (Rehnquist, J., dissenting) (emphasizing slow enforcement of death sentences). Delay in the adjudicatory process helps insure that all arguments are addressed in the conviction process, thus assuring that the inmate sentenced to death was afforded his constitutional rights. Ira Robbins, *Death Penalty Habeas Corpus: Defining the Issues*, 73 JUDICATURE 215, 217 (1990).

117. *Balkcom*, 451 U.S. at 952 (Stevens, J., concurring). One prisoner stated, "I beg of you to please let me withdraw the appeal as quickly a[s] possible!" Potts v. Zant, 638 F.2d 727, 731 n.5 (5th Cir. 1981) *cert. denied*, 454 U.S. 877 (1981), *aff'g*, 492 F. Supp. 326 (N.D. Ga. 1980). "Let me get a date set immediately and most of all let me die while in a state of grace!" *Id.* at 731 n.5; *see also* Peter Lewis, et al., *A Post-Furman Profile of Florida's Condemned—A Question of Discrimination in Terms of the Race of the Victim and a Comment on* Spinkellink v. Wainwright, 9 STETSON L. REV. 1 *passim* (1979) (study of Florida death row inmates). Fifty-eight percent of the prisoners on death row expressed that they had contemplated suicide while waiting for punishment. *Id.* at 27-28. A description of death row lends some insight into the living arrangements of an individual awaiting execution: "Death Row is made of concrete and steel and is painted a dull green. In the winter, it is cold. In the summer, it is unbearably hot. No air conditioning or fans are available." *Id.* at 19. "A typical day begins at 5:45 . . . [and] . . . [p]owdered scramble eggs or dry cereal are common breakfast items. The coffee is undrinkable." *Id.* at 17. Each inmate is confined in an individual cell which measures six feet by nine feet." *Id.* at 19. Some death row inmates seek a quick execution to avoid the psychological burdens of incarceration. *See* Gilmore v. Utah, 429 U.S. 1012, 1015 n.4 (1976) (mem.) (Gilmore stated that he did not "care to languish in prison for another day"). *But cf. Barefoot*, 463 U.S. at 892-96 (death penalty, unlike a life sentence, is ineffective until legal issues are resolved).

118. *See Coleman*, __ U.S. at __, 111 S. Ct. at 2563, 115 L. Ed. 2d at 667 (stating that state trial should be "main event" instead of "tryout on the road"); *see also* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1092 (1977) (relegating rights to their functional utility fosters cost benefit analysis contrary to individual rights); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1071-78 (1975) (cost benefit analysis leads to violation of rights); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 280-85 (1973) (cost benefit analysis usually detrimental to rights of the individual). The Court's fear that individuals will intentionally withhold their claims to extend post-trial proceedings such "sandbagging" is the basis of the Court's cost-benefit analysis as applied to the modern procedural default rule. Yale L. Rosenberg, *Jettisoning* Fay v. Noia: *Procedural Defaults by Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341, 424 (1978). However, it is unlikely that counsel will miss the opportunity to win early and, therefore, will not conceal a meritorious claim. Wainwright v. Sykes, 433 U.S. 72, 90 (1977) (Brennan, J., dissenting). Because it is unlikely that a case will be won on appeal, such a strategy would be unadvisable. *See* Judith Resnick, *Tiers*, 57 S. CAL. L. REV. 837, 897 (1984) (criticizing sandbagging argument). Therefore, "Rip Van Winkle" claimants are precluded from abusing section 2254. Yale L. Rosenberg, *Jettisoning* Fay v. Noia: *Procedural Defaults by Reasonably Incompetent*

dural default rule is necessary to prevent a prisoner from paying the price of his counselor's inadvertence, negligence, or incompetence and closing the courthouse door because of a lawyer's negligence is a misdirected sanction.[119]

The current jurisprudential regime accepts a blanket procedural default policy that denies the federal habeas court its proper constitutional role. What is needed is an ideological *coup d'etat* that reappraises the modern procedural default doctrine and supplants it with a rule fashioned in the spirit of *Fay v. Noia*. Such a revolution would emphasize the federal habeas court's historic role as a defender of constitutional rights. In an era of multifarious litigation and sociological jurisprudence, a habeas prisoner should not lose his life simply because a negligent public defender failed to preserve the right in procedural formaldehyde.

By allowing the prisoner to become the victim of his lawyer's negligence, the modern procedural default rule improperly substitutes a prisoner's valid constitutional claim for minor improvements in judicial efficiency. Assuming that Coleman's claims were valid and that his trial would have turned out differently had the errors not been present, the inescapable conclusion is that a man was improperly forced to pay the ultimate price for a notice requirement filed seventy-two hours late. Levying such a high price for a procedural default is insensitive. Levying the ultimate price for a lawyer's inadvertence is intolerable.

Jared R. Woodfill V

Counsel, 62 MINN. L. REV. 341, 424 (1978). Professor Rosenberg contends: "Where finality is insisted upon in the absence of such an adjudication on the merits, however, a value choice has been made that in a world of finite resources it is preferable that the matter be resolved quickly than that it be resolved correctly." *Id.* at 423-24.

119. *Sykes*, 433 U.S. at, 104 (Brennan, J., dissenting); *see id.* at 110-11 (Brennan, J., dissenting) (deliberate bypass standard should be applied to procedural defaults); *see also* Fay v. Noia, 372 U.S. 391, 438 (1963) (procedural default rule must be equitable and flexible). Justice Brennan asserted that a relaxed procedural default rule was necessary to prevent the prisoner from being victimized by his counselor's error. *Sykes*, 433 U.S. at 104-05. Only when a defendant "knowingly and intelligent[ly]" fails to assert a claim should the procedural default bar federal habeas review. *Id.* at 116. *Compare* Spinkellink v. Wainwright, 578 F.2d 582, 590-91 (5th Cir. 1978) (counsel's error barred capital-petitioner's access to federal habeas court), *cert. denied*, 440 U.S. 976 (1979) *with* Jurek v. Estelle, 623 F.2d 929, 984-85 (5th Cir. 1980) (reversing lower courts refusal to grant writ of habeas corpus because of procedural default), *cert. denied*, 450 U.S. 1001 (1981). *See generally* Robert Batey, *Federal Habeas Corpus Relief and the Death Penalty: "Finality With a Capital F"*, 36 U. FLA. L. REV. 252, 262, 266 (1984) (discussing procedural default standard as applied to capital cases). *See generally* Jack Guttenberg, *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617, 683 (1984) (Court has failed to properly analyze its procedural default rule).