Roger Williams University Law Review

Volume 9 | Issue 2 Article 8

Spring 2004

Rhode Island Interest: Justice in Rhode Island: Edson Toro and Procedural Default

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INTRODUCTION

On August 5, 1992, a year before Roger Williams University School of Law was to take in its first class, Richard Marshall was shot in the chest at 98 Waverly Street in Providence, Rhode Island. Two weeks later, Edson Toro, then sixteen years old, after consulting an attorney, surrendered to authorities. Toro was

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charged with assault with intent to commit murder and carrying a pistol without a license. The Rhode Island Family Court waived and transferred jurisdiction to the Superior Court for prosecution as an adult. He was convicted of assault with intent to commit murder and sentenced to fifteen years imprisonment, with ten years to serve, five years suspended, and five years probation. This is a story about Edson Toro and his quest for justice, which ended on April 29, 2003, when his conviction was vacated. The State has indicated that it will not seek to retry Mr. Toro, who has completed service of the ten years imprisonment. "Justice delayed is justice denied."[1]

Edson Toro testified at his trial that he acted in self-defense – that Marshall pulled a gun on him and, as they wrestled for control of the weapon, it went off and Marshall was shot. The trial judge, who did not believe Toro's testimony, refused to give the self-defense instruction. Any first-year law student knows that the trial judge cannot judge the credibility of the testimony – it's not his job. If there is any evidence of self-defense, a self-defense instruction must be given. The jury decides the credibility of the witnesses, not the judge.

How could it take the courts so long to correct such an obvious mistake?

Edson Toro doggedly pursued justice. He appealed the conviction to the Rhode Island Supreme Court; he filed a post-conviction proceeding in the state court and appealed that decision to the Rhode Island Supreme Court; and he filed a federal habeas corpus petition and appealed that decision to the United States Court of Appeals for the First Circuit. The legal theory consistently used by the courts to avoid addressing the obvious error by the trial judge was "procedural default" – that defense counsel had not submitted a self-defense instruction in writing as required by Rule 30 of the Rhode Island Superior Court Rules of Criminal Procedure.[2]

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1. "[T]he 40th clause of Magna Carta provided that justice be to none denied or delayed. 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 57-58 (3d ed. 1922). This ancient tenet of the law has been capsulized in the expression 'justice delayed is justice denied.'" Strachan v. Colon, 941 F.2d 128, 129 (2d Cir. 1991).

2. R.I. SUPER. CT. R. CRIM. P. 30. Generally, within the context of this article, "procedural default" refers both to the failure to raise a claim at the proper time and to the failure to raise a claim in the proper manner. Requirements for contemporaneous objections, limitations on the time period

This article will discuss the concept of "procedural default," but there is far more to this story. It is intended to be a retrospective examination of the errors in this case. Why did the system fail Edson Toro? How could he serve ten years in prison before such an obvious error could be addressed? Are there lessons to be learned by a "post-mortem" examination and analysis of the case?

It has been said that one reason for the founding of Roger Williams University School of Law, the only law school in Rhode Island, was to provide an institution that would be in a position to critically examine the administration of justice in Rhode Island, without being dampened by special interests, with the goal of improving the system. This Article attempts to critically explore Edson Toro's case and the application of the procedural default doctrine.

I. THE TRIAL[3]

The State's theory of the case was that Toro shot Marshall for no apparent reason, other than to "make a name for himself." The

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within which claims must be made, and requirements that objections, requests or motions be raised or made in a specific manner, e.g., in writing or with an affidavit attached, are the sorts of procedures imposed by statutes, rules or case law that, if not complied with, may result in a "default" or "waiver" of the underlying error. Specifically, Mr. Toro's alleged "procedural default" was in not making the request for a self-defense instruction in writing, as required by Rule 30.

3. The author of this Article was appointed by the United States Court of Appeals for the First Circuit to represent Edson Toro in his appeal of the denial of his federal habeas corpus petition. The factual information contained in this Article is taken entirely from the public record in the case and is not supplemented by any information obtained through confidential communications between lawyer and client. *See* Toro v. Wall, No. 01-2478, 2002 WL 31159486 (1st Cir. Sept. 27, 2002); Trial Transcript, State v. Toro, R.I. Super. Ct. (July 11-14, 1994) (No. P2/93-0837) [hereinafter Trial Transcript]; Sentencing Transcript, State v. Toro, R.I. Super. Ct. (Sept. 13, 1994) (No. P2/93-0837A) [hereinafter Sentencing Transcript]; Motion for Post Conviction Relief Transcript, Toro v. State (March 9, 2000) (No. PM-97-5454) [hereinafter Round One Hearing Transcript]; Hearing Transcript, Toro v. State, R.I. Super. Ct. (July 15, 2002) (PM/00-22) [hereinafter Round Two Hearing Transcript] (all on file with author). The author, however, has chosen to avoid tedious specific citations to the record and transcripts. A constructive critique is intended, not useless and inappropriate criticism of anyone involved in the case. There is no doubt in the mind of the author that everyone involved in the case was trying to do the right thing. That is precisely why an historical examination of the case, factual and legal, may be useful.

defense theory of the case was that Toro acted in self-defense after Marshall pulled a gun on him, and that Marshall was shot with his own gun during the struggle.

Mr. Marshall, who was twenty-two years old at the time of the shooting, testified that on August 5, 1992, at around 5 p.m., he went to 98 Waverly Street to visit friends. On his arrival, he met eight or nine of his friends in front of the house, including Edson Toro. After greeting them, within four or five minutes, Marshall went to the side of the house to urinate. While urinating, he heard someone behind him say "watch this." He turned and saw Toro four to five feet away pointing a gun at him. Two shots were fired, one right after the other. One shot went through his arm and into his chest. At the time this happened, Marshall's eight or nine friends were within eight feet of him. Two of his friends took him to the hospital, where he remained for four or five days. The bullet is still in his chest; it was not removed.

According to Marshall, Toro was his friend, who he had known for two to six years, and there had been no trouble between them. Marshall testified that Toro had no reason to shoot him. He said Toro shot him to prove a point, to make a name for himself, to get a reputation.

Edson Toro's version of the events surrounding the shooting were quite different. Toro, who was sixteen years old at the time of the shooting, testified that he first met Marshall in 1991 in front of James Shorts' house. Toro saw a motorcycle in front of Shorts' house, and he sat on it. Marshall came up from behind Toro and was angry that Toro was on his motorcycle. Marshall pointed a gun at Toro. Shorts came over and vouched for Toro. Marshall put the gun away and left on his motorcycle.

On June 12, 1992, nearly two months before the shooting, an incident occurred on Cranston Street that was the cause of the shooting on August 5. Toro was sitting on a porch in front of a house as Marshall was walking down the street toward him. Marshall had a bag in his hand. A police car was coming down the street behind Marshall. Marshall turned, saw the police car and, when he was four or five feet from Toro, tossed the bag in Toro's lap. Believing that the bag contained drugs, Toro got up, walked away, and threw the bag in the sewer. Meanwhile, the police officer, who Toro recognized as Officer Green, stopped his car, got out, and stopped and frisked Marshall.

Toro did not see Marshall again until August 5. During the interval between June 12 and August 5, Toro had been to New Jersey with his mother visiting relatives. On the fifth, Toro was in front of 98 Waverly Street with a number of his friends. There were a lot of people around. Marshall arrived, greeted a few people, and then demanded that Toro pay him money for the "dope" that Toro had thrown away. Toro replied that he was not going to go to jail for Marshall, and that he was not going to pay him. Marshall became upset and went around the side of the house. Marshall turned around and reached for a gun at his waist, underneath his shirt. Toro, who was sitting on the stairs, saw a small, chrome gun in Marshall's hand. Toro jumped up, grabbed Marshall's wrist and arm, head-butted him, and pushed him against the wall. During the struggle, the gun went off. Only one shot was fired. Marshall crouched down and dropped the gun. Toro kicked the gun away from Marshall, picked it up, ran off, and threw the gun into the sewer. He was scared, and he ran home. Later, when he heard the police were looking for him, he called an attorney, and, on August 21, he surrendered himself to the authorities.

On cross-examination of Marshall, Toro's counsel inquired about Marshall's employment at the time of the shooting. Marshall said that he worked for Slam Entertainment, a New York company owned by his cousin Flipper. Marshall was a production manager and promoter and ran the Providence office of Slam Entertainment, which promoted various artists and musicians. His office was in his home; he lived with his parents in an apartment complex. Marshall said he first started working for his cousin in 1991, and that he was paid on a commission basis. At the time of the shooting, he had a beeper that he used for production matters, although the beeper was in his girlfriend's name. Marshall admitted that, in his statement to the police, he told them he worked for Service Master, a cleaning company, but that information was wrong. He had recently been laid off, although he had worked for Service Master for two years.

Marshall also stated that he told the police the gun was a nine millimeter weapon, because his doctor told him that the bullet inside his chest was a nine millimeter bullet. Although at trial he could not remember what the gun looked like, in his statement to the police he said the gun was small and shiny. Marshall ad-

mitted that on three prior occasions he had entered pleas of *nolo contendere* to charges of assault, driving with a suspended license, and obstructing a police officer.

The prosecution called James Shorts as a witness. Shorts had known Marshall for five years and Toro for a year or two; he was a friend of both of them. On August 5, Shorts had been with Marshall prior to the shooting, but they separated when Marshall went to Waverly Street and Shorts went to get some food. After Shorts got his food, he cut through the lot next to 98 Waverly Street and saw Toro coming up the block and Marshall urinating at the side of the house. There were lots of people on the stairs and in front of the house. Shorts passed by them and was crossing the street when he heard someone say "watch this." He then heard two shots. Shorts turned around and saw people running, including Toro, who had something in his hand that looked like a gun. Shorts said that a lot of people were in the street, playing ball and hanging around, and he didn't know who said "watch this" or whether the statement was connected with the shooting. Shorts said that he was drunk at the time and that he doesn't remember the incident very well; he has a problem with alcohol and memory.

Shorts also testified that Marshall carries a gun sometimes, but that he did not know whether Marshall had a gun on August 5. He recalled an incident involving Marshall and Toro about nine months before the shooting. It occurred in front of Shorts' house. Marshall was bullying Toro, testing him, and pointed a gun at him. Shorts intervened, vouching for Toro, and Marshall left. He never saw Toro with a gun prior to the day that Marshall was shot.

Shorts was declared a hostile witness and the prosecutor impeached him with a prior statement given to the police. The pertinent part of the prior statement was:

> I got across a lot towards 98 Waverly Street that's Neil Degales's house. I saw Richard Marshall taking a piss in the alley next to the house. Edson Toro came up and said, "watch this" and he came up with a gun. He fired two shots at Richard and he was running around like he

didn't know what to do next. He then ran down Waverley towards Bucklin.[4]

Although admitting that he signed the statement, Shorts said that he did not read it before he signed and that he did not say those things to the police. The statement was dated October 1, nearly two months after the shooting. Marshall asked Shorts to go to the police station and give the statement. Marshall gave Shorts a ride to the station and waited for him in the hallway as he talked to the police.

Another prior statement, testimony given by Shorts at the waiver hearing in Family Court, was consistent with his trial testimony.

Three other witnesses, all police officers, were presented by the prosecution. Officer Figueiredo responded to the hospital on August 5 and briefly talked to Marshall, who told him that he had been shot by "Edison." Officer Katsetos testified that he took the statement from Shorts at the police station and that Shorts signed it. The officer had no specific recollection of the statement. The third officer to testify was Detective Wight, the investigating officer in the case.

About a week after the shooting, Detective Wight took a statement from Marshall and visited 98 Waverly Street. Marshall told him that no one who was present at the time of the shooting would be able to give a statement because no one saw the shooting. When Detective Wight asked Marshall for the names of people who were there, Marshall told him Dwayne, Rick and Butch were there, but that he did not know their last names and he could provide an address only for Dwayne. When Detective Wight spoke to four to six people at 98 Waverly Street, they all said they had nothing to tell the police. Detective Wight told Marshall that if he found anyone who had seen the shooting, to bring them to the police station. It was nearly two months later that Marshall brought Shorts to the station.

At the end of the State's case, the judge granted a motion for a judgment of acquittal of the count charging possession of a firearm without a license. The information specifically charged possession of a nine millimeter handgun and the judge, prosecutor and inves-

4. Trial Transcript, *supra* note 3, at 131.

tigating detective all agreed that there was no way that a doctor could determine the caliber of a bullet that had not been removed from the body.

The defense, in addition to Toro, called two witnesses. Victor Pichette, a self-employed private investigator, testified that he checked the Yellow Pages in New York and Providence and found no listing for Slam Entertainment. He also checked the Providence white pages, as well as records at City Hall and in the Secretary of State's office, and found no listing for Slam Entertainment. Stanley Gregory, Jr., testified that he owned Service Master and that Marshall had worked for him from September 1986 until the end of 1987, but did not work for him during the five years prior to the shooting.

The prosecution called Officer Green in rebuttal. Although Officer Green knew both Marshall and Toro from seeing them on the street, he had never stopped and frisked Marshall. He had no specific recollection of June 12, 1992.

In his closing argument, defense counsel argued that Toro was acting in self-defense. The judge, however, gave no instructions on self-defense. Before the jury was sent out, defense counsel requested an instruction on self-defense. The exchange was as follows:

> *Defense Counsel*: Judge, the only thing that I request is that the jury be given some instruction that a person is entitled to use reasonable force.
>
> *The Court*: Did you give it to me in writing? I asked for the instruction in writing. Did you ask for that instruction?
>
> *Defense Counsel*: Judge, we had gone back and forth on whether I was going to request that. I just ask that they be given an instruction somewhere along those lines that he is entitled to use reasonable force to repel an attack and that –
>
> *The Court*: I don't think self-defense is a part of this case, quite frankly, based on any view of the evidence.[5]

5. *Id.* at 372, 373.

On July 14, 1994, Edson Toro was convicted in Rhode Island Superior Court of assault with intent to commit murder. On September 13, 1994, at the sentencing hearing, the trial judge further elaborated on his disbelief of the defense case. He stated: "I found Mr. Toro's testimony was totally unbelievable, in fact, ludicrous. How he thought that anyone would believe the version that he told this jury in this court about the shooting, how it happened, I can't even fathom."[6]

The trial judge's comments at the time of refusing to give the self-defense instruction and at the sentencing hearing quite clearly show that the reason for the refusal was that he did not believe the testimony of Edson Toro.[7] A refusal to give an instruction based on such a rationale is clearly erroneous. This mistake on the part of the trial judge was the first of many errors affecting Toro's right to present a defense, his right to a jury trial, and his freedom. The self-defense instruction was required as a matter of Rhode Island law.

The law relating to self-defense in Rhode Island is that:

> [O]ne may defend oneself whenever one reasonably believes that he or she is in imminent danger of bodily harm at the hands of another. Such a person, having the fear, need not wait for the other to strike the first blow. However, such a person must use only such force as is reasonably necessary for his own protection. The permissible degree of force used in defense of oneself varies with the particular set of circumstances in which he or she acts, but in no set of circumstances may one apply more than that degree of force necessary to prevent bodily injury. One who uses excessive force is held accountable for his or her actions . . . . It is clear then that "the very essence of the defense of self-defense is how the defendant per-

6. Sentencing Transcript, *supra* note 3, at 11.

7. On two separate occasions in the later state post-conviction proceedings, the trial judge again made it quite clear that the reason he did not give the instruction was his disbelief of the testimony of Edson Toro. For his precise comments, see the discussion of the state post-conviction proceedings *infra* Parts IV and VII.

> ceived the situation at the time of the incident in question."[8]

It is also clear under Rhode Island law that once the defendant introduces some evidence of self-defense, the burden is on the prosecution to negate that defense beyond a reasonable doubt.[9]

As for the responsibility of the trial judge to give a requested instruction on self-defense, it was stated in *State v. Butler*:[10]

> The state concedes that there was limited evidence raising the issue of self-defense, but argues that the trial justice was not impressed thereby. This argument, however, completely misconceives the trial justice's obligation. The fact that a trial justice does not believe the accused's defense does not alter his obligation to submit such defense to the jury under proper instructions.
>
> However slight and tenuous the evidence may be on which the self-defense hypothesis is advanced, it is nevertheless there for the jury's consideration, and the fair trial concept requires that the jury consider it under an appropriate instruction.
>
> . . . .
>
> However tenuous such hypothesis may be, the weight of the evidence on which it rests is exclusively for the jury.[11]

II. THE APPEAL

Edson Toro appealed his conviction to the Supreme Court of Rhode Island. He was represented in the appeal by his trial counsel. One of the issues raised was the failure of the trial judge to in-

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8. State v. D'Amario III, 568 A.2d 1383, 1385 (R.I. 1990) (quoting State v. Tribble, 428 A.2d 1079, 1085 (R.I. 1981)); *see also* State v. Fetzik, 577 A.2d 990, 993 (R.I. 1990); State v. Quarles, 504 A.2d 473, 475 (R.I. 1986).

9. *Quarles*, 504 A.2d at 475; State v. Amado, 433 A.2d 233, 237 (R.I. 1981); State v. Baker, 417 A.2d 906, 910 (R.I. 1980).

10. 268 A.2d 433 (R.I. 1970).

11. *Id.* at 436-37 (citations omitted); *see also* State v. Martinez, 652 A.2d 958, 961 (R.I. 1995); *Fetzik*, 577 A.2d at 993; *D'Amario III*, 568 A.2d at 1385; State v. Cipriano, 430 A.2d 1258, 1261-62 (R.I. 1981); State v. Vargas, 420 A.2d 809, 815 (R.I. 1980).

struct the jury on self-defense. The Supreme Court, on November 4, 1996, dismissed the issue in a paragraph, which read:

> The defendant's fifth claim was that the trial justice erred in failing to give an instruction that a person is entitled to use reasonable force in self-defense. This Court has stated that a trial justice must instruct on self-defense even if a claim is based on "slight and tenuous" evidence. *State v. Martinez*, 652 A.2d 958, 961 (R.I. 1995) (quoting *State v. Butler*, 107 R.I. 489, 496, 268 A.2d 433, 436 (1970)). In this case, however, the requirements of Rule 30 of the Superior Court Rules of Criminal Procedure were not satisfied insofar as defendant failed to file a written request that the court instruct the jury in this regard. Thus the issue is waived on appeal.[12]

The Rhode Island Supreme Court stated the correct standard regarding the requirement for an instruction on self-defense, but affirmed the conviction without reaching the merits of the claim as a result of two errors. The first mistake was an apparent assumption that the reason for the denial of the instruction was that the instruction was not submitted in writing,[13] rather than the clear indication from the trial judge's comments at two points in the trial transcript that the reason for the denial of the instruction was his disbelief of Toro's testimony. The second mistake was the conclusion that the requirements of Rule 30 were not satisfied.

Rule 30 of the Rhode Island Superior Court Rules of Criminal Procedure provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the request. At the same time copies of such request shall be furnished to adverse parties.

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12. State v. Toro, 684 A.2d 1147, 1149 (R.I. 1996).

13. The testimony of trial counsel at the later post-conviction proceeding, with no disagreement from the trial judge, was that counsel had a written instruction at the charge conference, but that it was discarded when he agreed that he preferred the self-defense instruction prepared by the trial judge. See *infra* Part VII, for the discussion of the post-conviction proceeding. This later testimony added context to the statement of counsel at the trial, when asked by the trial judge if he submitted the instruction in writing, that "Judge, we had gone back and forth on whether I was going to request that."

> If a defendant relies upon an affirmative defense, or justification, or matter in mitigation and wishes the court to instruct the jury with respect to such, he or she shall so advise the court in writing no later than at the close of the evidence. No party may assign as error any portion of the charge or omission therefrom unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the party's objection. Objection shall be made out of the presence of the jury.[14]

According to the Reporter's Notes:

> The provision requiring a defendant who is relying upon an affirmative defense, justification, or matter in mitigation to give the court written notice if he wishes the jury to be instructed with respect to such . . . assures that the trial judge will be fully advised of the nature of the defenses being relied upon and will have appropriate opportunity to instruct the jury accordingly.[15]

The Reporter's commentary parrots the reasons typically given for the existence and enforcement of contemporaneous objection rules. If the trial judge is alerted to a claim of error at the time of its occurrence, he has the opportunity to minimize the risk of error and avoid the need for a mistrial, thus contributing to finality in criminal litigation.[16] But such a rationale isn't applicable to the circumstances of Mr. Toro's trial.

Before the trial began, defense counsel made the judge aware that his client would be arguing self-defense. Opening statement by defense counsel laid out a story of self-defense. The cross-examination of Marshall and the direct examination of Toro focused on the defense of self-defense. In closing, defense counsel argued that his client had acted in self-defense. Self-defense had been discussed during the charging conference. Self-defense was the only defense presented. From the beginning of the trial until

14. R.I. SUPER. CT. R. CRIM. P. 30.

15. R.I. SUPER. CT. R. CRIM. P. 30 reporter's note.

16. *See, e.g.*, Massaro v. United States, 538 U.S. 500, 503 (2003); Wainwright v. Sykes, 433 U.S. 72, 88-89 (1977); Henry v. Mississippi, 379 U.S. 443, 458-59 (1965) (Harlan, J., dissenting); State v. Parker, 472 A.2d 1206, 1210 (R.I. 1984).

its conclusion, the trial judge was aware that the defense was relying on a theory of self-defense.

At the conclusion of the instructions, before the jury was sent out for deliberations, defense counsel objected to the lack of any self-defense instruction and orally requested such an instruction. The procedural default relied on by the Rhode Island Supreme Court was not the failure to object to the instruction given or to request a self-defense instruction, but it was the failure to request the instruction in writing. The trial judge knew throughout the trial that Toro was relying on the theory of self-defense. There was no additional information that would assist him in determining the propriety of a self-defense instruction based on the evidence presented. The trial judge refused to give the self-defense instruction because he didn't believe the testimony of Edson Toro, not because he was unaware of a self-defense claim or lacked the knowledge or ability to craft a self-defense instruction. Under the circumstances, Toro's asserted due process right to an instruction on self-defense "should not depend on a formal 'ritual . . . [that] would further no perceivable state interest.'"[17]

Moreover, there is no Rhode Island decision that directs flawless compliance with Rule 30 in the unique circumstances of this case. On the contrary, there are Rhode Island decisions that excuse compliance with the rule.[18] The Rhode Island Supreme Court's erroneous reliance on Rule 30 to avoid Mr. Toro's meritori-

17. Lee v. Kemna, 534 U.S. 362, 366-67 (2002) (quoting Osborne v. Ohio, 495 U.S. 103, 124 (1990) (quoting James v. Kentucky, 466 U.S. 341, 349 (1984) (quoting Staub v. Baxley, 355 U.S. 313, 320 (1958)))).

18. *See* State v. Fetzik, 577 A.2d 990, 993 (R.I. 1990) (stating that Rule 30's time limit was intended to promote the orderly conduct of trial, and was never intended to be an unalterable condition in the face of an otherwise meritorious request for an instruction of considerable importance to a defendant); State v. Amado, 433 A.2d 233, 237-38 (R.I. 1981) (holding that when a basic constitutional right is at issue, the Rhode Island Supreme Court will review the alleged error, notwithstanding defendant's failure to make a timely objection at trial, if defendant's failure to object was not a deliberate trial tactic and if the alleged error consists of more than harmless error); State v. Vargas, 420 A.2d 809, 815-16 (R.I. 1980) (stating that although failure to request a specific instruction does not excuse the trial justice from his general obligation mandated by statute to instruct the jury with respect to those rules of law that of necessity must be applied to the issues raised at trial in order for the parties to secure a fair trial, on appeal a defendant may not challenge the trial justice's failure to so instruct the jury unless at trial he objected to the charge as given).

ous claim continued the unlawful detention of Edson Toro. Were the facts and the applicable law clearly elaborated in the Appellant's Brief? Was the court overly protective of the Superior Court Rules, or of the finality of the underlying conviction?

After Toro's conviction was affirmed on appeal, he filed a state claim for post-conviction relief and a complaint against his counsel with the Disciplinary Board of the Supreme Court of Rhode Island.

III. THE DISCIPLINARY BOARD COMPLAINT

Based on the opinion of the Rhode Island Supreme Court affirming his conviction, Mr. Toro filed a complaint with the Disciplinary Board in which he alleged that his trial counsel was ineffective because he failed to file a written request for an instruction on self-defense. Toro's trial counsel, in a letter to the Chief Disciplinary Counsel dated January 22, 1998, responding to the ineffective assistance of counsel claim, stated:

> Prior to instructing the jury, there was a charging conference between the Court, the prosecutor and myself. During the charging conference [the trial judge] read a boilerplate self-defense instruction. I had, in fact, prepared an instruction on self-defense, however, I liked the instruction that [the trial judge] had indicated he was going to give and consequently, I did not file my requested instruction . . . . [A]fter the closing arguments, [the trial judge] instructed the jury on the law but failed to give a self-defense instruction. I asked to approach the bench and requested that a self-defense instruction be given . . . . [T]he trial justice responded, "I don't think self-defense is a part of this case, quite frankly, based on any view of the evidence." . . . In essence, I felt that I had been somewhat tricked by the Court since I clearly remember [the trial judge] reading his boilerplate self-defense instruction to me and my indicating that I was satisfied with that instruction during the charging conference. Nevertheless, it is true the instruction was not given and it is likewise true that I objected to the trial judge's failure to give the self-defense instruction. How-

ever, the Court was of the mind that self-defense played absolutely no role in this case.[19]

This letter from Toro's trial counsel to the Disciplinary Board was attached as an exhibit to his state petition for post-conviction relief and to his federal petition for a writ of habeas corpus. From this point, every court to consider Mr. Toro's claims was aware of trial counsel's account of the charge conference.

IV. THE STATE POST-CONVICTION PROCEEDING (ROUND ONE)

On November 12, 1997, Edson Toro filed, in state court, a *pro se* petition for post-conviction relief,[20] alleging that the trial judge erred in failing to instruct the jury on self-defense and that trial counsel was ineffective because he failed to request a self-defense instruction in writing as required by Rule 30. The petition was assigned to the trial judge, who, on December 11, 1998, more than a year later, appointed counsel to represent Mr. Toro.[21] After the passing of another fifteen months, a hearing took place on March 9, 2000. Court-appointed counsel filed a report, appeared at the hearing, and recommended that the application for post-conviction relief be dismissed with prejudice.[22]

The basis of court-appointed counsel's recommendation was that the trial judge clearly indicated on the record that the instruction was not given because the judge did not believe that it was warranted by the testimony presented at the trial. During the hearing, the trial judge again stated that the reason he did not give a self-defense instruction was that he did not believe such an instruction was warranted on the facts of the case. The application for post-conviction relief was denied with prejudice.

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19. Letter from Trial Counsel to Chief Disciplinary Counsel, Disciplinary Board of the Supreme Court of Rhode Island (Jan. 22, 1998) (on file with author).

20. *See* R.I. GEN. LAWS §§ 10–9.1–1 to –9 (1997) (procedures for a prisoner to petition for post-conviction relief on a claim that his conviction was in violation of the Constitution of the United States or the Constitution or laws of the State of Rhode Island).

21. Counsel was appointed under the authority of Rhode Island General Laws section 10–9.1–5.

22. Round One Hearing Transcript, *supra* note 3, at 3.

In the quixotic hearing before the trial judge, court-appointed counsel and the trial judge focused on Toro's ineffective assistance of counsel claim and the actual reason for the denial of the instruction – that the trial judge did not feel that the testimony supported a self-defense instruction. Since this was the reason for the denial, there was no ineffective assistance on the part of trial counsel from the alleged failure to submit a written request for the instruction. There was, however, no consideration given to Edson Toro's consistent, repeated argument that the judge erred in concluding, because he did not believe the testimony of Toro, that the self-defense instruction was not warranted.

The delay in resolving the state post-conviction proceeding and the failure to examine the crux of Toro's complaint were arguably the result of assigning the petition to the trial judge, who apparently felt no urgency to resolve the issues and superficially examined the allegations, perhaps because he was convinced that his resolution of the issue at trial was correct. If so, then maybe the trial judge saw Toro as an inmate with little to do to amuse himself other than file frivolous petitions collaterally attacking what the judge regarded as a valid conviction. As for court-appointed counsel's failure to address the argument regarding the self-defense instruction on the merits, was it inadvertence, negligence, confusion regarding his role, or ineffective assistance of counsel?[23] Did the trial judge and appointed counsel pay too little attention to Toro's claims because they knew he had not been successful in the Rhode Island Supreme Court? Whatever the reason, Toro's meritorious claims were ignored once more.

Toro then proceeded on two fronts. He filed an appeal in the Rhode Island Supreme Court of the denial of his state petition for

23. The federal courts and the United States Congress have concluded that there can be no ineffective assistance of counsel in state or federal post-conviction proceedings because the federal constitutional right to counsel does not extend to post-conviction proceedings. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 752 (1991); Mackall v. Angelone, 131 F.3d 442 (4th Cir. 1997) (en banc); 28 U.S.C. § 2254(i) (1996). However, the State of Rhode Island provides the right to counsel in post-conviction proceedings. R.I. GEN. LAWS § 10–9.1–5 (1997); *see also* Shatney v. State, 755 A.2d 130 (R.I. 2000). Thus, in Rhode Island, there is a state right to the effective assistance of counsel in state post-conviction proceedings.

post-conviction relief, and he resorted to the "Great Writ,"[24] given special protection in the United States Constitution.[25] Toro filed a petition for a writ of habeas corpus in the United States District Court for the District of Rhode Island.

V. APPEAL OF THE DENIAL OF THE STATE PETITION FOR POST-CONVICTION RELIEF

Toro appealed the denial of the petition for post-conviction relief to the Rhode Island Supreme Court. The Rhode Island Public Defender's Office was appointed to represent Mr. Toro on appeal. On October 22, 2001, the Rhode Island Supreme Court handed down an opinion, in which it stated:

> On appeal, the petitioner argues that the hearing justice failed to comply with the procedures set forth by this court in *Shatney v. State*, 755 A.2d 130 (R.I. 2000) (per curiam). Those procedures require that if a hearing justice agrees with the assessment of a petitioner's attorney that the post-conviction relief petition has no arguable merit, then the justice must conduct a hearing with the petitioner present. If a justice decides to permit the attorney to withdraw, then the petitioner must be allowed the opportunity to proceed *pro se*, or the court must appoint new counsel to proceed with the petition. *Id.* at 135, 136-37. In this case, the hearing justice failed to follow these procedures.[26]

Because of the Rhode Island Supreme Court's concerns regarding the fairness of the procedures followed in the post-conviction proceeding, the denial of the petition for post-conviction relief was vacated and the case was remanded for a hearing in accordance with the dictates of *Shatney v. State*. But, once again, the merits were not addressed and further delay ensued.

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24. "[T]he Great Writ, habeas corpus . . . 'the most celebrated writ in the English law.'" Fay v. Noia, 372 U.S. 391, 399-400 (1963) (citing 3 BLACKSTONE COMMENTARIES 129).

25. "The privilege of the Writ of Habeas Corpus shall not be suspended . . . ." U.S. CONST. art I, § 9.

26. State v. Toro, 785 A.2d 568 (R.I. 2001).

VI. THE FEDERAL HABEAS CORPUS PROCEEDING

On November 7, 2000, Mr. Toro filed a *pro se* 28 U.S.C. § 2254 petition for a writ of habeas corpus in the United States District Court for the District of Rhode Island. The issues raised included the denial of due process of law, specifically the denial of the ability to present a defense by the trial judge's refusal to instruct the jury on self-defense, and the denial of the right to have his defense heard and determined by a jury.[27] Toro also alleged ineffective assistance of counsel resulting from the failure of trial counsel to file a written request for an instruction on self-defense. A United States District Judge assigned the case to a United States Magistrate Judge for a report and recommendation.

The Magistrate Judge, finding the ineffective assistance of counsel issue unexhausted at the state level (the state post-conviction proceeding was still pending),[28] offered Toro the option of withdrawing that claim, without prejudice, and proceeding with the self-defense instruction claim, or having his entire petition denied without prejudice pending state exhaustion on all grounds.[29] Toro opted to withdraw the ineffective assistance of counsel claim.

On Toro's claims regarding the failure to give a self-defense instruction, the U.S. Magistrate Judge, without appointing coun-

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27. Petitioner's *Pro Se* Brief at 3, Toro v. Wall, No. 01-2478, 2002 WL 31159486 at *2 (1st Cir. 2002) (No. 00-561 ML) [hereinafter Petitioner's *Pro Se* Brief]; *see also* Report and Recommendation of the Magistrate Judge at 2 (No. 00-561ML) (Sept. 12, 2001). The question of whether the federal question, here the federal due process argument regarding the failure to give the self-defense instruction, has been presented to the state courts for purposes of the exhaustion requirement, is one governed by federal law standards. *See infra* note 28. As explained in *New York ex rel. Bryant v. Zimmerman*:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.

278 U.S. 63, 67 (1928).

28. A petition for a writ of habeas corpus by a state prisoner will not be granted unless the petitioner has exhausted the remedies available in state courts. 28 U.S.C. § 2254(b) (2000). If a prisoner has the right under state law to raise the question presented, he shall not be deemed to have exhausted the available remedies. 28 U.S.C. § 2254(c) (2000).

29. Report and Recommendation at 2, Toro v. Wall, No. 00-561 (D.R.I. Sept. 12, 2001) [hereinafter Magistrate's Report].

sel or conducting an evidentiary hearing, filed a report and recommendation on September 12, 2001, recommending that the *pro se* petition be denied. He concluded: "This court is precluded from hearing this petition on its merits because the Rhode Island Supreme Court's determination of procedural default on this issue is an independent and adequate state ground."[30]

On October 1, 2001, the U.S. District Judge entered an order accepting the magistrate's report and recommendation and denying the petition.[31] The District Judge denied a certificate of appealability on November 9, 2001.[32]

The U.S. Magistrate Judge and the U.S. District Judge were wrong. Did the lack of counsel for Mr. Toro or the lack of an evidentiary hearing result in the U.S. Magistrate Judge paying too little attention to Toro's claims? Did the U.S. District Judge read the twenty-two page handwritten "Petitioner's Brief" prepared by Mr. Toro in support of his petition?[33] Did either the Magistrate Judge or the District Judge look beyond the Memorandum and Supplemental Memorandum prepared by the State in support of its Motion to Dismiss the habeas petition? Did they look beyond the opinion of the Rhode Island Supreme Court in Mr. Toro's direct appeal?

A federal judge may issue a writ of habeas corpus freeing a state prisoner if the prisoner is in custody in violation of the Constitution of the United States. The right of a defendant in a criminal trial to assert self-defense is a fundamental right, and failure to instruct the jury on self-defense when the instruction has been requested and there is sufficient evidence to support such a charge

30. *Id.* at 10.

31. Toro v. Wall, No. 00-561ML (D.R.I. Oct. 1, 2001) (District Court Order adopting Magistrate's Report and Recommendation).

32. Toro v. Wall, No. 00-561ML (D.R.I. Nov. 9, 2001) (Memorandum and Order denying certificate of appealability). An appeal from the denial of a federal petition for a writ of habeas corpus may not be taken unless a judge issues a certificate of appealability, certifying that the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c) (2000).

33. Mr. Toro has learned a lot about the law and advocacy during his lengthy incarceration. His brief in support of his petition for a writ of habeas corpus was well-written and factually and legally accurate, and contained the appropriate citations. It is the opinion of the author of this article that the brief and other papers submitted by Mr. Toro were on par or better than many similar documents prepared by lawyers.

violates a criminal defendant's rights under the due process clause.[34] This right flows from indisputable federal law that a defendant in a criminal trial has a right to "a meaningful opportunity to present a complete defense."[35]

> A necessary corollary of this holding is the rule that a defendant in a criminal trial has the right, under appropriate circumstances, to have the jury instructed on his or her defense, for the right to present a defense would be meaningless were a trial court completely free to ignore that defense when giving instructions.[36]

Federal cases have recognized that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor," including the defense of self-defense.[37]

Toro's due process right to a trial by jury was also violated by the trial judge's failure to give the requested self-defense instruction. The Sixth Amendment guarantees to a defendant the opportunity for a jury to decide guilt or innocence.[38] "A necessary corollary is the right to have one's guilt determined only upon proof beyond the jury's reasonable doubt of every fact necessary to constitute the crime charged."[39]

> [I]n a jury trial the primary finders of fact are the jurors. Their overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For

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34. Taylor v. Withrow, 288 F.3d 846, 852 (6th Cir. 2002); Davis v. Strack, 270 F.3d 111, 131-33 (2d Cir. 2001); Barker v. Yukins, 199 F.3d 867, 875-76 (6th Cir. 1999); United States *ex rel.* Means v. Solem, 646 F.2d 322, 332 (8th Cir. 1980); Government of the Virgin Islands v. Smith, 949 F.2d 677, 681 (3d Cir. 1991).

35. California v. Trombetta, 467 U.S. 479, 485 (1984); *see also* Lee v. Kemna, 534 U.S. 362, 375-76 (2002); Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

36. *Taylor*, 288 F.3d at 852.

37. Mathews v. United States, 485 U.S. 58, 63-64 (1988); *see also* Stevenson v. United States, 162 U.S. 313, 322 (1896); Montana v. Egelhoff, 518 U.S. 37, 56 (1996) (stating that the the right to have the jury consider self-defense evidence may be a fundamental right).

38. Duncan v. Louisiana, 391 U.S. 145 (1968).

39. United States v. Mentz, 840 F.2d 315, 319 (6th Cir. 1988); *see In re* Winship, 397 U.S. 358, 364 (1970); United States v. Bello, 194 F.3d 18, 25 (1st Cir. 1999).

> this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, . . . regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused.[40]

In the context of self-defense, it is not the proper role for a court:

> to stand in the place of the jury, weighing competing evidence and deciding that some evidence is more believable than others. Rather, it is for the jury, with the proper self defense instruction, to decide whether the amount of force was justifiable or unjustifiable . . . . Only the jury has the responsibility of arriving at a final determination of [] guilt or innocence, and a [] court cannot usurp this role.[41]

As stated in a slightly different context, "[w]here [the right to a jury trial] is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty."[42]

The trial judge's failure to give a self-defense instruction is a constitutional error remediable under the federal habeas corpus statute. 28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2)

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40. United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977); *see also* Rose v. Clark, 478 U.S. 570, 578 (1986); United States v. Argentine, 814 F.2d 783, 788 (1st Cir. 1987); United States v. White Horse, 807 F.2d 1426, 1429 (8th Cir. 1986); United States v. Johnson, 718 F.2d 1317, 1321-22 (5th Cir. 1983).

41. Barker v. Yukins, 199 F.3d 867, 874-75 (6th Cir. 1999).

42. *Rose*, 478 U.S. at 578.

> resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Supreme Court clarified the standard of review required by § 2254(d)(1) in *Williams v. Taylor*.[43] The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) have independent meaning.[44] A state court decision will be "contrary to" clearly established precedent if the state court either "applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent."[45] The state court decision will be an "unreasonable application of" clearly established Supreme Court precedent if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of the particular prisoner's case."[46]

The deprivation of Toro's fundamental right to present a defense, by the failure to give a self-defense instruction, was contrary to *California v. Trombetta*[47] and *Mathews v. United States*,[48] and the deprivation of Toro's right to have his defense presented to a jury was contrary to *United States v. Martin Linen Supply Co.*[49] and *Rose v. Clark*.[50] Moreover, the "unreasonable application" clause applies to a due process challenge to the trial judge's failure to give a self-defense instruction when merited by the evidence.[51] Toro's claims also fit under subsection (2) of § 2254(d) in

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43. 529 U.S. 362 (2000).

44. *Id.* at 404.

45. *Id.* at 405-06.

46. *Id.* at 407-08; *see also* O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir. 1998).

47. 467 U.S. 479, 485 (1984). ("We have long interpreted this [due process] standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.").

48. 485 U.S. 58, 62 (1988) (holding that a defendant is entitled to a jury instruction on any defense presented whenever there is sufficient evidence from which a reasonable jury could find in the defendant's favor, even if one or more elements of the crime are denied by the defendant).

49. 430 U.S. 564, 573 (1977) (holding that a trial judge is barred from "overrid[ing] or interfer[ing] with the jurors' independent judgment in a manner contrary to the interests of the accused").

50. 478 U.S. 570 (1986) (holding that it is reversible error for a judge to enter a judgment of conviction or to direct the jury to deliver such a verdict).

51. Davis v. Strack, 270 F.3d 111, 133 (2d Cir. 2001).

that the failure to give a self-defense instruction resulted in a "decision that was based on an unreasonable determination of the facts in the light of the evidence."[52]

A. *The Issue of Procedural Default*

An effort to obtain federal review will be rejected on the basis that there is an independent and adequate state procedural ground precluding the exercise of jurisdiction.[53] A judge may not issue a federal writ of habeas corpus if an adequate and independent state law ground justifies the prisoner's detention, regardless of the federal claim.

> As to the role of adequate and independent state grounds, it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts. The application of this principle in the context of a federal habeas proceeding has therefore excluded from consideration any questions of state *substantive* law, and thus effectively barred federal habeas review where questions of that sort are either the only ones raised by a petitioner or are in themselves dispositive of his case. The area of controversy which has developed has concerned the reviewability of federal claims which the state court has declined to pass on because they were not presented in the manner prescribed by its *procedural* rules.[54]

A "state ground" often asserted as an adequate, independent basis for holding a state prisoner in custody is a state law "procedural default," such as the prisoner's failure to raise his claim at the proper time.[55] *Wainwright v. Sykes* held that federal constitutional claims made to state courts, like claims under state law,

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52. *Id.*

53. Murdock v. City of Memphis, 87 U.S. 590, 635-36 (1875); *see generally* STERN ET AL., SUPREME COURT PRACTICE 1195-97 (8th ed. 2002).

54. Wainwright v. Sykes, 433 U.S. 72, 81-82 (1977) (citations omitted) (emphasis added).

55. In his dissent in *Brown v. Allen*, 344 U.S. 443 (1953), Justice Black, remarking on such a result, stated: "I find it difficult to agree with the soundness of a philosophy which prompts this Court to grant a second review where the state has granted one but to deny any review at all where the state has granted none." *Id.* at 552 (Black, J. dissenting).

must meet the requirements of state procedural rules, as long as the rules do not discriminate against federal claims.[56] Procedural rules determining the time when and the mode by which claims must be asserted are designed to alert the court to problems at a time and in a manner that facilitate correction of errors and promotes finality of judgments. The violation of such rules provides a basis for denying review of alleged errors, whether the issue is raised on appeal or in a collateral proceeding. There is an added problem when a federal court is reviewing a decision of a state court – due regard for the constitutional distribution of power between the federal and the state judicial systems.

Wainwright v. Sykes reversed *Fay v. Noia* and declared a new "cause and prejudice" standard for federal review after state procedural default – the federal claim will be reviewed only if the habeas petitioner can establish acceptable cause for the noncompliance with the procedural rule and actual prejudice resulting from the alleged constitutional violation.[57] However, "[t]he procedural default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest

56. *Wainwright,* 433 U.S. at 90.

57. *Id.* at 88-89. In *Fay v. Noia*, the Court "reject[ed] . . . the suggestion that the federal courts are without power to grant habeas relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision." 372 U.S. 391, 434 (1963). The Court stated,

> [W]hile our appellate function is concerned only with the judgments or decrees of state courts, the habeas corpus jurisdiction of the lower federal courts is not so confined. The jurisdictional prerequisite is not the judgment of a state court but detention simpliciter . . . . Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner.

Id. at 430-31. However, the Court did "recognize a limited discretion in the federal judge to deny relief to an applicant" who "has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." *Id.* at 438. But, "[a] choice made by counsel not participated in by the petitioner does not automatically bar relief." *Id.* at 439. For an account of the journey from *Noia* to *Sykes*, see Peter W. Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do*, 31 STAN. L. REV. 1, 6-19 (1978).

in the finality of judgments."[58] If the state procedural rule does not promote these objectives, it will not be followed.[59]

Under certain conditions, the state's assertion of procedural default is not an "adequate" independent ground for the decision and does not bar assertion of the federal law claim. Whether the procedural default is adequate to bar the federal claim is a matter of federal law.[60] Situations in which an otherwise valid state ground will not bar federal claims include: (1) where the procedural rule in question fails to serve a legitimate state interest;[61] (2) where the state procedural rule was not "firmly established and regularly followed;"[62] (3) where the prisoner had good "cause" for not following the state procedural rule and was "prejudiced" by not having done so;[63] and (4) where the constitutional violation probably resulted in the conviction of one who was actually innocent.[64] Edson Toro's alleged circumstances, even if there was a procedural default, fit rather clearly within three of these exceptions and arguably within the fourth.

1. *Failure to Serve a Legitimate State Interest*

Under the circumstances of Toro's case, the inadequacy of procedural default to preclude review of the federal right follows from "the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is

58. Massaro v. United States, 123 S. Ct. 1690, 1693 (2003).

59. *Id.* In *Massaro*, the Court was reviewing a claim of procedural default in a federal post-conviction proceeding under 28 U.S.C. § 2255. The Second Circuit had found that a claim of ineffective assistance of counsel must be raised on direct appeal of a conviction, or it was procedurally forfeited. The Supreme Court disagreed, finding that "requiring a criminal defendant to bring ineffective-assistance-of-counsel claims on direct appeal does not promote the[] objectives [of the procedural default rule]." *Massaro*, 123 S. Ct. at 1693.

60. Lee v. Kemna, 534 U.S. 362, 375 (2002); Douglas v. Alabama, 380 U.S. 415, 422 (1965).

61. *Lee*, 534 U.S at 387.

62. Ford v. Georgia, 498 U.S. 411, 423-24 (1991).

63. Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

64. Schlup v. Delo, 513 U.S. 298, 327 (1995); Murray v. Carrier, 477 U.S. 478, 496 (1986).

sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here."[65]

The facts in Toro's case are remarkably similar to those in *Lee v. Kemna*, where the defendant on trial for first-degree murder presented an alibi defense, which surfaced at each stage of the proceedings (opening statement, examination of witnesses, and closing argument). This was his only defense. However, at some point during the third day of trial, the alibi witnesses failed to return to the courtroom. Lee's counsel orally moved for a continuance to find the witnesses. The trial judge denied the motion, stating that it looked as though the witnesses had in effect abandoned Lee, that the hospitalization of the judge's daughter would prevent him from being in court the next day, and that he would be unavailable on the following business day because he had another trial scheduled. In his federal habeas petition, Lee argued that the refusal to grant his continuance motion deprived him of his federal due process right to a defense.[66]

Toro, on trial for assault with intent to commit murder, defended on the ground of self-defense, which surfaced at each stage of the proceedings (opening statement, examination of witnesses, and closing argument). This was his only defense. At the close of the instructions, counsel orally requested a jury instruction on self-defense. The trial judge denied the request, stating that, "I don't think self-defense is a part of this case, quite frankly, based on any view of the evidence."[67] In his federal habeas petition, Toro argued that the refusal to instruct on self-defense deprived him of his federal due process right to a defense.[68]

In *Lee*, the state appellate court determined that Lee had procedurally defaulted his claim based on his failure to comply with state rules requiring that a motion for a continuance be in written form accompanied by an affidavit addressing the factual showing required by the rule. The motion for a continuance was made orally at trial and the factual reasons for the request "were either covered by the oral continuance motion or otherwise conspicuously

65. *Lee*, 534 U.S. at 378 (quoting Osborne v. Ohio, 495 U.S. 103, 125 (1990) (quoting *Douglas*, 380 U.S. at 422)).

66. *Id.* at 367-71.

67. Trial Transcript at 372-73.

68. Petitioner's *Pro Se* Brief, *supra* note 27, at 6.

apparent on the record."[69] The trial judge, therefore, was made aware of the problem and the underlying facts, with a timely request for a resolution of the problem.

In Toro's case, the Rhode Island Supreme Court determined that Toro had procedurally defaulted his claim based on his failure to comply with Rule 30 of the Superior Court Rules of Criminal Procedure, which required that requests for instructions on affirmative defenses be in writing.[70] The request for a self-defense instruction was made orally at trial and the factual reasons supporting the request were conspicuously apparent from the arguments of counsel and the testimony at trial. The trial judge was made aware of the problem at a point in time when it could be corrected.

In *Lee*, the Court found that three considerations, in combination, led to the conclusion that the asserted state grounds were inadequate to block adjudication of Lee's federal claim. First, when the trial judge denied Lee's motion, he stated a reason that could not have been countered by a perfect motion for continuance: he said he could not carry the trial over until the next day because he had to be with his daughter in the hospital and he further informed counsel that another scheduled trial prevented him from concluding Lee's case on the following business day.[71]

In Toro's case, the trial judge denied the oral request for a self-defense instruction stating a reason that could not have been countered by a written request for the instruction: he said, "I don't think self defense is a part of this case, quite frankly, based on any view of the evidence."[72] The trial judge denied the request on the merits, although he did, earlier in the colloquy, ask counsel if he gave him the instruction in writing.[73]

The second consideration referred to in *Lee* was that no published state decision directed flawless compliance with the state rules dealing with continuance motions in the unique circumstances of that case. Lee's predicament, from all that appeared in the record, was one that the state courts had not confronted before. Although there were a number of state court decisions ad-

69. *Lee*, 534 U.S. at 383.
70. State v. Toro, 684 A.2d. 1147, 1149 (1996).
71. *Lee*, 534 U.S. at 381.
72. Trial Transcript, *supra* note 3, at 372-73.
73. *Id.* at 372.

dressing these rules, no prior decision suggested strict application to a situation such as Lee's.[74]

There is also no published state court decision directing flawless compliance with Rule 30 in the unique circumstances of Mr. Toro's case. Toro's precise circumstances had not previously been addressed by the Rhode Island courts. Although there are a number of state court decisions addressing Rule 30, they generally deal with the failure to make an oral or a timely request for an instruction regarding an affirmative defense. Furthermore, there are Rhode Island decisions that excuse compliance with the rule.[75]

In *Lee*, the third and "most important" consideration addressed by the Court was that Lee substantially complied with the state rules and that the purpose of the rules was served by Lee's oral submissions. Lee's oral request for a continuance, the information presented by counsel's arguments, and the testimony at the trial provided all that the trial judge needed to know to correct the problem when there was still time to do so.[76]

Likewise, Toro substantially complied with the state rule, and the purpose of the rule was served by Toro's oral request. At the trial, following the jury instructions, counsel requested an instruction on self-defense. Self-defense is a common affirmative defense and there are numerous Rhode Island cases discussing the elements of the defense. Counsel's objection came at a time when the court could easily have corrected the error and at a time when the court was fully aware of all information needed to rule on the request. The information presented by counsel's arguments and the testimony at the trial provided all that the trial judge needed to know to correct the error when there was still time to do so. The legitimate state interest in Rule 30 is met in Toro's case.

If *Lee v. Kemna* presents an exceptional case in which exorbitant application of a generally sound procedural rule renders the state ground inadequate to stop consideration of a federal question, then Toro's case also presents such an exceptional circumstance.

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74. *Lee*, 534 U.S. at 382.
75. *See* cases cited *supra* note 18.
76. *Lee*, 534 U.S. at 382-84.

2. *State's Failure to Show Strict Adherence to Rule 30 as a Firmly Established and Regularly Followed State Practice.*

In the habeas context, procedural default is an affirmative defense that the state is obligated to raise and preserve or it will lose the right to assert the defense thereafter.[77] Only a "firmly established and regularly followed state practice" may be interposed by a state as a procedural default that is sufficient to prevent review in a federal habeas case of a federal constitutional claim.[78] The prosecutor is "undoubtedly in a better position to establish the regularity, consistency, and efficiency with which [the court] has applied [Rule 30] in the past . . . than are habeas petitioners, who often appear *pro se*, to prove the converse."[79] It is fairer to place the burden of proof and persuasion on the party claiming its existence.[80] Therefore, the state should bear the burden of proving the adequacy of the state procedural bar, i.e., that it is "regularly followed," in order to preclude federal habeas review.[81]

In its Supplemental Memorandum in Support of its Motion to Dismiss Petitioner's Application for a Writ of Habeas Corpus, the State argued the plain language of Rule 30, but did not address the regularity with which it is applied. Perhaps this was because there are Rhode Island decisions that excuse compliance with the rule.[82] The Rhode Island Supreme Court has not demanded flawless compliance with Rule 30. Since the rule has not been regularly followed, it does not provide an adequate basis for procedural default that would preclude review of Toro's claims.

77. Trest v. Cain, 522 U.S. 87, 89 (1997); Grey v. Netherland, 518 U.S. 152, 165-66 (1996).

78. Ford v. Georgia, 498 U.S. 411, 423-24 (1991); James v. Kentucky, 466 U.S. 341, 348-49 (1984); Barr v. City of Columbia, 378 U.S. 146, 149 (1964); NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 297 (1964).

79. Hooks v. Ward, 184 F.3d 1206, 1217 (10th Cir. 1999).

80. *Id.* (citing MCCORMICK ON EVIDENCE § 337 (John W. Strong ed. 4th ed. 1992)).

81. *See* Mitchell v. Mason, 257 F.3d 554, 562 (6th Cir. 2001). *But see* Stokes v. Anderson, 123 F.3d 858, 860 (5th Cir. 1997) (holding that petitioner bears the burden of showing that the State did not regularly follow a procedural bar around the time of his direct appeal).

82. *See* cases cited *supra* note 18.

3. *Good Cause for Not Following State Rule and Resulting Prejudice to Toro*

a. *Cause*

As "cause" for not submitting a written instruction, Toro asserted that his trial counsel relied on the trial judge's indication in conference that he would give a self-defense instruction. The Magistrate Judge, in his report and recommendation that was adopted by the District Judge, found such an allegation of cause insufficient for two reasons. The first was that trial counsel could still have filed "a written request for a self-defense instruction regardless of the trial judge's comment."[83] He overlooked the fact that such a request would have been futile because the judge had determined that the evidence did not support a self-defense instruction. The second reason he dismissed Toro's allegation was that there was no transcript of the charging conference and he felt there was no record to review.[84] Toro had attached, as an exhibit to his petition, the letter written by his trial counsel to the Disciplinary Board, which was acknowledged by the Magistrate Judge. Within that letter, counsel indicated that he had submitted a written instruction at the charge conference, but withdrew it when he liked better the self-defense instruction proposed by the trial judge.[85] All it would take to have a complete record would have been to hold an evidentiary hearing in which trial counsel would testify, but no hearing was held and no counsel was appointed.

"The existence of cause for a procedural default [may be shown by] some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule, [such as] that 'some interference by officials' made compliance impracticable."[86] In *Strickler v. Greene*, where the prosecutor had an "open file" policy and counsel failed to make a discovery motion for exculpatory *Brady* material, the Court found that:

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83. Magistrate's Report, *supra* note 29, at 9.

84. *Id.*

85. Letter from Trial Counsel to Chief Disciplinary Counsel 3 (Jan. 22, 1998) (on file with author).

86. Murray v. Carrier, 477 U.S. 478, 488 (1986) (citations omitted); *see also* Amadeo v. Zant, 486 U.S. 214, 222 (1988) (concealment of District Attorney's memorandum by county officials is ample cause for failure to raise jury challenge).

> [I]t was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination.[87]

In Mr. Toro's case, it was reasonable for trial counsel to rely on the judge's representation that he would give a specific self-defense instruction. It was also reasonable for counsel to believe that, after the trial judge specifically ruled that he found the evidence did not support a self-defense instruction, the submission of a written instruction would have been futile.

Even if counsel's reliance on the judge's representation that he would give a self-defense instruction was not reasonable, ineffective assistance of counsel, as alternatively alleged in Toro's petition, may also be cause for procedural default. But, while ineffective assistance of counsel is cause for a procedural default, a claim of ineffective assistance is generally required to be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.[88] Otherwise, the prisoner could avoid the exhaustion requirement with regard to the ineffective assistance claim by raising the claim for the first time in federal court as "cause" for the procedural default.[89] The

87. 527 U.S. 263, 284 (1999).

88. Edwards v. Carpenter, 529 U.S. 446, 451-52 (2000); Murray v. Carrier, 477 U.S. 478, 488-89 (1986).

89. The Court's opinions on the issue lead to odd results. In *Edwards*, the Court stated that "a procedurally defaulted ineffective-assistance-of-counsel claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas petitioner can satisfy the 'cause and prejudice' standard with respect to the ineffective-assistance claim itself." 529 U.S. at 450-51. Since the attorney who represented the accused at trial is often the attorney who represented him on appeal, and since evidentiary hearings are often required on the alleged deficiencies of counsel, the first time that ineffective-assistance claims can effectively be raised is in state post-conviction proceedings. Usually, prisoners lack counsel in such proceedings and fail to properly raise the ineffective-assistance claim. And even if the prisoner has counsel appointed to assist him, since there appears to be no *federal* right to counsel in state or federal post-conviction proceedings, there is no right to claim ineffective-assistance of counsel *at* the post-conviction proceeding as "cause" for the failure to raise ineffective assistance of counsel *in* the post-conviction proceeding. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 752 (1991); Mackall v. Angelone, 131 F.3d 442 (4th Cir. 1997) (en banc); 28 U.S.C. § 2254(i) (2000).

result is that ineffective assistance of counsel as "cause" for a procedural default adds nothing to the prisoner's ability to attack his conviction, since he is required to directly assert ineffective assistance of counsel at trial in the state proceedings as a reason for habeas relief.[90]

Toro's trial counsel represented him on his direct appeal to the Rhode Island Supreme Court, in which the issue of ineffective assistance of counsel was not presented. Toro, who was not present at the charge conference, had no notice that his counsel had made any mistake during the trial until after the Rhode Island Supreme Court opinion in the direct appeal, where the court found counsel had procedurally defaulted the self-defense instruction issue by failing to request the instruction in writing. In his state post-conviction proceeding, Toro raised ineffective assistance of his trial counsel, in that counsel failed to file a written request for a self-defense instruction, which resulted in procedural default of the issue. The trial judge presided at the post-conviction proceeding and, after appointed counsel concluded that Toro's petition lacked merit and recommended that the application for post-conviction relief be dismissed, denied the petition. However, on appeal, the Rhode Island Supreme Court remanded the case for a hearing at which Toro would be allowed to proceed *pro se.* The state post-conviction proceeding was therefore still ongoing and unexhausted at the time he filed his federal habeas petition.

In his federal petition for a writ of habeas corpus, Toro claimed both ineffective assistance of counsel and that the trial judge's indication that he was going to give a self-defense instruc-

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The result would be that someone who never received effective assistance of counsel at any stage of the proceedings could be convicted and sentenced to confinement, or even death, without being able to obtain federal judicial review of the effectiveness of trial counsel on the ground that an incompetent lawyer failed to raise the ineffective-assistance claim in post-conviction proceedings. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1377-78 (5th ed. 2003).

90. In a manner similar to that in which *Edwards* made an "ineffective-assistance" claim ineffective as an allegation of "cause" for a procedural default, *Teague v. Lane* made the novelty of a constitutional claim ineffective as "cause" for a procedural default. 489 U.S. 288, 297-98 (1989). In *Reed v. Ross*, the Court had found that the novelty of a constitutional claim did constitute cause for procedural default. 468 U.S. 1, 4 (1984). But *Teague* generally bars a habeas petition (even absent a procedural default) based on new law, unless it can fit within one of *Teague*'s very narrow exceptions.

tion was "cause" for the alleged procedural default. Trial counsel's defense throughout the trial was self-defense, yet the Rhode Island Supreme Court found he failed to follow Rule 30, which requires that self-defense instructions be presented in writing. If trial counsel did not rely on the trial judge's representation that he would give a self-defense instruction, then he made a phenomenal mistake that clearly violates the standards espoused in *Strickland v. Washington*.[91] Such a mistake kept his only defense from being presented to the jury. These two alternatives are the only conceivable explanations for counsel's failure. This was not mere inadvertence that doesn't amount to ineffective assistance. Nor could there be any reason for "sandbagging"[92] on the part of counsel. Should there be some exception to asserting ineffective assistance as "cause" in the alternative when it can be determined from the record that, other than the reason given by counsel, there is no other explanation for the default?

b. *Prejudice*

Where an error in a jury instruction is alleged, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."[93] The question is not whether the trial court gave a faulty instruction, but rather "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process."[94]

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91. 466 U.S. 668 (1984). The *Strickland* standard for judging whether the accused received the effective assistance of counsel is to measure counsel's performance against an objective standard of "reasonably competent counsel." *Id.* at 687. There will be no finding of ineffective assistance unless counsel's deficient performance prejudiced the defense. *Id.* at 691.

92. The Court has often used this term, suggesting a tactical reason for avoiding the issue in state courts and raising it for the first time in federal courts, as a reason for regarding counsel's procedural default with suspicion. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 89 (1977). For an argument that there is little risk of sandbagging, see Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1196-1200 (1986).

93. Cupp v. Naughten, 414 U.S. 141, 146 (1973).

94. *Id.* at 147; *see also* Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); United States v. Frady, 456 U.S. 152, 169 (1982).

In order to show prejudice, Toro must establish three things: that he was entitled to the self-defense charge as a matter of Rhode Island law, the failure to give the self-defense instruction violated due process of law, and that the state's failure was of such a nature that it was remediable by habeas corpus, given the limitations prescribed by 28 USC § 2254.[95] These issues have been addressed above,[96] but there is an even greater suggestion of prejudice in Toro's case. Not only did the trial judge refuse to give a self-defense instruction, precluding the jury from considering Toro's only defense, but at the end of the charge, the judge told the jury: "I will tell you *as a matter of law*, firing a loaded weapon at a vital part of the body of another, having the projectile go into the vital part of another person is Assault With Intent to Murder."[97]

The jury left to begin deliberations at 11:53 a.m. At 3:45 p.m., the jury returned with written questions from the foreman. They were: "Q: (1) What are our guidelines for Intent to Murder? (2) What are considered vital organs? Arms alone?"[98] After instructing on the reasonable inference to be drawn from the use of a deadly weapon, the judge charged:

> Now, vital organs. If someone fires a weapon and whether or not it goes–it hits the arm–you asked about the arm; if it just struck an arm I would say to you that is not a vital organ, but if it struck the arm and went through the arm and hit the chest that is a vital organ. Does that help you any?[99]

Shortly thereafter, the jury came back with a verdict of guilty on the Assault With Intent to Murder charge.

The jury, not having been given a self-defense instruction, still had a problem with the intent issue. This is some indication that the jury might have found self-defense if it had the option of so doing.

The magistrate judge, in his report and recommendation, seemingly addressing the issue of prejudice, stated:

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95. Davis v. Strack, 270 F.3d 111, 124 (2d Cir. 2001).

96. The right to a self-defense instruction is addressed in Part I; the violation of due process and the fact that the issue is remediable by habeas corpus is addressed in Part VI.

97. Trial Transcript, *supra* note 3, at 372 [emphasis added].

98. *Id.* at 378.

99. *Id.* at 379.

> [W]hether the evidence offered by Toro was sufficient to support a claim of self-defense would first be determined by the trial judge. If the trial judge found that the evidence was insufficient to support any such affirmative defense, he would not be required to give a specific instruction to the jury. Here, the transcript of the trial clearly indicates that the trial judge did not accept the contention that self-defense was a part of the case. Consequently, there is no basis to conclude that, even if the requested instruction was made in writing, the trial judge would have given that charge to the jury.[100]

The magistrate judge and the district judge, in accepting the report and recommendation, never addressed the issue of whether the trial judge could, in light of the testimony of Toro, decide that a self-defense instruction was not warranted. The ruling was based on procedural default.

4. *Actual Innocence*

A procedural default will not be found to bar consideration of petitioner's federal claims, even in the absence of a showing of cause, where the constitutional violation probably resulted in the conviction of one who was actually innocent. The innocence excuse for procedural default was mentioned in *Murray v. Carrier.*[101] The standard adopted by the Court for resolving the issue of innocence was stated in *Schlup v. Delo* to be that, absent the constitutional error, "it is more likely than not that no reasonable juror would have convicted."[102] There is no Supreme Court case where the standard has been met, and few lower court cases have found that procedural default has been overcome by a showing of actual innocence.[103]

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100. Magistrate's Report, *supra* note 29, at 8.
101. 477 U.S. 478, 495-96 (1986).
102. 513 U.S. 298, 327 (1995).
103. Jordan M. Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 341 (1993). The Court recently held "that a federal court faced with allegations of actual innocence . . . must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default." Dretke v. Haley, 124 S. Ct. 1847, 1852 (2004). Such a requirement ironically makes the "actual innocence" exception to the procedural default doctrine even less important.

In view of the credibility issues in self-defense, even though the jury seemed to have problems with Toro's intent without the instruction it is unlikely that Toro would fit within this exception, but he fit within the first three, and one is enough.

VII. THE STATE POST-CONVICTION PROCEEDING (ROUND TWO)

Meanwhile, in the state post-conviction proceeding, following the remand from the Rhode Island Supreme Court, the trial judge held a hearing on July 15, 2002. In that hearing, the testimony of trial counsel clearly established that there was no procedural default on the part of trial counsel, who took a written request for a self-defense instruction to the charge conference.[104] It was also, once again, made clear that the trial judge did not give the self-defense instruction because he did not believe the testimony of Edson Toro. The following colloquy took place:

> *The Court*: Merely because the defendant feels that self-defense should be charged to a jury, I go on the facts of the case as I heard them from the witness stand. If I find there's no evidence which would allow a self-defense charge, I won't give it. If I do find one, I will give it.
>
> *Mr. Toro*: I understand.
>
> *The Court*: In your case, I didn't believe your story – he turned around and shot himself.[105]

During the cross-examination of his trial counsel, Mr. Toro elicited the following information:

> *Mr. Toro*: Do you recall what the judge told you during that charging conference?
>
> . . . .

104. The testimony of trial counsel was consistent with the letter that trial counsel sent to the disciplinary counsel in response to Toro's complaint years earlier – the same letter that was attached as an exhibit to the post-conviction proceeding at both the state and federal levels. But now, the account was finally subject to cross-examination by the parties and the trial judge. The trial judge, by his comments and his silence, took no issue with the facts as recounted by trial counsel.

105. Round Two Hearing Transcript, *supra* note 3, at 21.

Trial Counsel: [M]y recollection was the judge read the self-defense charge. I was satisfied with it and then, when he instructed the jury, he didn't give a self-defense instruction. As I recall, I approached at that point in time for an objection because he hadn't given self-defense, and the judge asked me if I filed a request in writing. At that time, obviously, I didn't file a request in writing. I was satisfied with the one you read in chambers, and the judge at that time said that he did not find there was any evidence to support a self-defense instruction and he was not going to give a self-defense instruction. That's my recollection.

. . . .

Mr. Toro: Did the judge in chambers indicate to you that he was going to give the instruction?

Trial Counsel: That was my understanding when he read it, yes.

Mr. Toro: All right. When the judge requested for you to submit that instruction in writing, how come you didn't do it?

Trial Counsel: It was at the bench while the jury was seated right in the courtroom. I didn't have an instruction physically on me to submit at that point in time, so that's why I couldn't submit something. I didn't physically have one on me at the moment.

Mr. Toro: Isn't it true, responding to David Curtin of the Disciplinary Board, that you stated you did have the instruction prepared already?

Trial Counsel: Yeah, I had drafted a self-defense instruction. When I heard the Court's self-defense instruction, I thought it was, frankly, a little clearer than what I had written up. I intentionally did not file one at that point in time because I thought it would be clearer, a standard boilerplate self-defense instruction, and I think actually when I was responding to the disciplinary complaint, at

one time I was looking for the instructions and I didn't find the final instruction. I saw the draft of the instruction. I didn't see the final, which means I probably misplaced it or just tossed it at that point in time. It wasn't going to be given. I do recall I had a draft of my instruction in my case file when I was responding to your complaint.

Mr. Toro: During that time when you made the objection, you approached sidebar. You were specific on that objection?

Trial Counsel: I believe so. There should be a transcript of that also.

Mr. Toro: And during that time, was it evident that even if you did submit that request for instruction, that the judge wasn't going to give it to you?

Trial Counsel: It seemed pretty clear from his comments that he found that self-defense was not an issue in the case.

Mr. Toro: Did you find it fruitless then to submit the request?

Trial Counsel: For the sake of the record, if I had the request on me, I certainly would have just handed it in at that point in time to make the record clearer. I thought I made the record as clear as I could, but, again, because I didn't have it on me, I couldn't do that.

Mr. Toro: From that point on, how did you think the jury could consider the defense of the defendant without any instruction in regard to this theory of self-defense to the case?

The Court: Well, he said – I told him I'm not going to give it, so anything he tried to produce would be fruitless.[106]

At the conclusion of the hearing, the trial judge continued the proceeding to a later date.

106. *Id.* at 27-30.

VIII. THE APPEAL OF THE DENIAL OF THE FEDERAL HABEAS CORPUS PETITION

Edson Toro filed an appeal and a petition for the issuance of a certificate of appealability in the United States Court of Appeals for the First Circuit, which, on March 29, 2002, granted a certificate of appealability in an order indicating an interest in having various issues regarding procedural default briefed on appeal. Following briefing and oral argument, a panel of the First Circuit, on September 27, 2002, filed a per curiam opinion, "not for publication – not to be cited as precedent," which stated:

> [T]he appeal cannot (or, at least, should not) be decided without further factfinding. Accordingly, we *vacate* the order appealed from and remand the matter to the district court to (1) conduct an evidentiary hearing with respect to what transpired at the charge conference in the petitioner's original trial, (2) make the necessary findings as to whether the petitioner's trial attorney was misled by the trial justice, and (3) make such other findings and conclusions, and consider such other issues and arguments, as may be appropriate under the circumstances. We hasten to add, however, that the district court may, if it so chooses, await a reasonably prompt decision from the state courts in order to see if the state courts, in the course of adjudicating the petitioner's ineffective assistance of counsel claim, determine whether or not any misleading conduct took place at the charge conference.[107]

IX. BACK TO STATE COURT – THE FINAL RESOLUTION

Following the death of the trial justice, the state motion for post-conviction relief, having been taken under advisement, was considered by the presiding justice of the Rhode Island Superior Court. On April 29, 2003, the presiding justice entered an order vacating Mr. Toro's July 1994 judgment of conviction and the sentence entered thereon. By letter dated April 22, 2003, the Rhode Island Attorney General's Office indicated that it will not seek to

107. Toro v. Wall, No. 01-2478, 2002 WL 31159486 at *2 (1st Cir. 2002).

retry Mr. Toro. Edson Toro had already completed service of the ten years' incarceration.

CONCLUSION

There may be two major lessons learned from Edson Toro's case. The first has to do with the concept of procedural default. While there may be good reasons for requiring objections to be made at certain times or in certain ways, the concept of "procedural default" to eliminate review of alleged errors is too often an excuse used to avoid review of errors on the merits. Everyone makes mistakes, including lawyers and judges. Some mistakes are harmful to others. If the mistake and the harm are clear, why not step in at the earliest possible moment to correct the error?

In Mr. Toro's case, both the error and the harm were clear from the trial transcript – the trial judge did not give a self-defense instruction because he did not believe the testimony of Edson Toro, leaving the jury with no option but to convict. The only thing that initially was not clear was whether there had been a written request by counsel at the charge conference for a self-defense instruction. Why should that uncertainty matter in Toro's case, when the request for a simple self-defense instruction was made at a time when it could be given? Why should it take so long to correct an obvious mistake? Is "finality of judgments" so important that we are willing to allow erroneous convictions in its name? Is it so bad to admit that mistakes are made by lawyers and judges? Is it about protecting our own – maybe not throwing stones in a glass house?

The Rhode Island Supreme Court, or the legislature, can certainly change the application of the procedural default doctrine. Perhaps the State of Rhode Island should use the *Fay v. Noia* standard for review of procedurally defaulted issues, where procedural default is a bar to review of errors only where there has been a "deliberate by-passing" of state procedures.[108] Or, exceptions to the doctrine can be expanded. In Toro's case, since the issue was raised by counsel, the court simply could have addressed the issue of whether the error was harmful. In the more typical case, where counsel does not raise the meritorious issue at all, Rhode Island could address the issue by using a combination of

108. 372 U.S. 391, 438 (1963); *see supra* note 57.

the "plain error" and "harmless error"[109] doctrines, except that the State of Rhode Island, unlike the federal courts[110] and the vast majority of state jurisdictions, does not recognize the "plain error" doctrine.[111] Without an expansion of exceptions to the procedural default doctrine, there is an increased need to raise ineffective assistance of counsel claims as the only means to address the underlying "defaulted" issue. But, perhaps because such "glass-house" allegations are so unpleasant, there are myriad obstacles to successfully raising ineffective-assistance claims.[112]

As for federal habeas corpus, it has been said that, "any realistic system of federal habeas corpus jurisdiction must be premised on the reality that the ordinary procedural default is born of the inadvertence, negligence, inexperience or incompetence of trial counsel."[113] It is not likely that the United States Supreme Court will return anytime soon to the *Fay v. Noia* standard. Rather, the Court seems content to expand the exceptions to the "procedural default" doctrine to address the worst errors. This makes it more important that lawyers keep abreast of federal law and the exceptions to the procedural default doctrine,[114] because if they are not,

109. It has been pointed out that the "prejudice" prong of the "cause and prejudice" exception to the procedural default rule "appears to bear a strong resemblance to harmless error doctrine." Wainwright v. Sykes, 433 U.S. 72, 117 (1977) (Brennan, J., dissenting). Justice Brennan also stated: "I disagree with the Court's appraisal of the harmlessness of the admission of respondent's confession, but if this is what is meant by prejudice, respondent's constitutional contentions could be as quickly and easily disposed of in this regard by permitting federal courts to reach the merits of his complaint." *Id.* at 117.

110. The Supreme Court has indicated that it can reach a federal issue not raised in the state courts as plain error. Wood v. Georgia, 450 U.S. 261, 265 n.5 (1981); Webb v. Webb, 451 U.S. 493, 502 (1981) (Powell, J., concurring); *see also* SUP. CT. R. 14.1(a), 24.1(a); Girardeau A. Spann, *Functional Analysis of the Plain-Error Rule*, 71 GEO. L. J. 945 (1983).

111. Patino v. Suchnik, 770 A.2d 861, 867 (R.I. 2001); State v. Rupert, 649 A.2d 1013, 1015 (R.I. 1994); State v. Williams, 432 A.2d 667, 670 (R.I. 1981).

112. *See generally* James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases,* 8 YALE J.L. & HUMAN. 417 (1996) (examining the process of representing defendants in capital cases); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1832 (1994) (examining reasons for deficient representation in capital cases).

113. *Wainwright*, 433 U.S. at 104 (Brennan, J., dissenting).

114. *See generally* Daniel Givelber, *Litigating State Capital Cases While Preserving Federal Questions: Can It Be Done Successfully?*, 29 ST. MARY'S

it is unlikely, if not impossible, that the prisoner can address the "procedural default" of the "procedural defaulted" issue.[115]

There may be a second lesson learned by this limited review of Edson Toro's case. Having looked at the record in Toro's case, and at the applicable law, the many errors made by many over many years are apparent. But the reasons for the errors are not. A few questions have been openly raised. Others have gone unwritten. Hopefully, many questions have come to the mind of the reader. One fact remains – Edson Toro served his ten years imprisonment before the error was recognized and his conviction vacated. In Edson's case, it could be argued that society (certainly not Edson) was lucky – there was no guilty man who went free, only the improper imprisonment of a man for ten years.

When an airliner crashes, an interdisciplinary team of experts descends on the scene, subjects the accident to rigorous study, and publishes its findings in the ways best suited to using the lessons of the tragedy to prevent a recurrence. When a patient dies unexpectedly during surgery, a detailed post-mortem is performed, and a peer-review team is mobilized. When an innocent man goes to prison or death row, and the guilty man who should be in prison or on death row in his place escapes as a consequence, nothing equivalent happens.

One by-product of the revolution in DNA analysis has been the identification of unmistakable miscarriages of justice. Where the criminal justice system has made episodic use of these findings, in, for example, the National Institute of Justice's *Eyewitness Evidence: A Guide for Law Enforcement,*[116] the results have been promising. But as yet, the criminal justice system has developed no tradition of analyzing its own mistakes. When retrospective

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L.J. 1009 (1998) (examining the importance of presenting federal claims in capital cases). Perhaps the strict procedural default doctrine should place added pressure on law schools to educate and inspire continuing education efforts, and on the organized bar to restrict entry into the profession to the best and the brightest and to require massive amounts of continuing legal education.

115. *See supra* note 89 (discussing the allegation of ineffective a§ssistance of counsel in the post-conviction proceedings as "cause" for failure to raise ineffective assistance of counsel at trial in the post-conviction proceedings as "cause" for the failure to raise the underlying defaulted issue at trial).

116. NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, NCJ 178240, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT III (1999).

analysis occurs at all, it is left to partisan advocates, or the "gotcha" oriented efforts of journalists. The product of these efforts are easy to disregard, easy to forget, and hard to translate into the advances in training, procedure and technology that can prevent the same tragedy from occurring twice.

Perhaps its time for a University, with a law school and a criminal justice studies program, to establish the first non-partisan, academic effort to establish a model system of "accident analysis" for the justice system. Teams of lawyers, investigators, trainers, forensic scientists, social scientists, academics and judges can investigate such questions as: Why was the innocent man convicted? Why was the guilty man set free? Why was this battered spouse not protected?

The assumption of such a suggestion is that no productive tradition of retrospective analysis and self-criticism has been established in the legal system because the construction of such a tradition presents enormous challenges extending beyond the idea's simple novelty. Institutional and personal careers are involved; sensitive issues of confidentiality arise. Nevertheless, the early experience of the National Institute of Justice Working Groups that wrestled with the problems of DNA evidence, crime scene investigation, eyewitness evidence, arson investigation and death investigation indicate the enormous potential for learning from past errors. As in all important efforts, there will be good ways to do this and ineffective ways. An underlying belief is that fifty states, thousands of individual jurisdictions, and tens of thousands of institutional prosecutors, police departments, courts, defender agencies, law schools and continuing legal education programs should not each have to re-invent the process from scratch.

How did this happen? Who are the appropriate participants in a clinical analysis of this mistake? How do you bring all of the actors to the table? What should they bring with them? How do you disseminate their findings? What was the impact of specifically local conditions and requirements? These are the sorts of questions a Center for Clinical Analysis of Miscarriages of Justice might aim to answer – for both the individual cases under study, and for similar cases that the myriad jurisdictions in our country can profitably analyze in the future.