Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance

Jack A. Guttenberg
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*Assistant Professor of Law, Cleveland-Marshall College of Law. B.A., 1973, University of Michigan; J.D., 1976, Wayne State University School of Law.

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INTRODUCTION

The United States Supreme Court's manipulation of federal habeas corpus jurisdiction represents a classic example of judicial activism across an entire spectrum of expansive and restrictive perspectives. An ambiguous, open-ended statute, coupled with apparent congressional carte blanche, has enabled the Supreme Court to expand and contract federal post-conviction relief to comply with the judicial, philosophical, and political agendas of a given majority of the justices. One aspect of these shifting tides involves the scope of federal post-conviction collateral review where the state courts and, to a lesser extent, the federal courts have refused to entertain a federal constitutional question because of the litigant's failure to properly raise and preserve the issue in accordance with legitimate procedural rules. These procedural forfeitures by state prisoners are


4. The failure to follow legitimate procedural rules that result in the loss of a remedy is often referred to as a "waiver," "forfeiture" or "default." As used in this article, the term "waiver" will refer to those instances where the prisoner makes a knowing and deliberate decision not to assert a constitutional right. E.g., Boykin v. Alabama, 395 U.S. 238, 242 (1969); Miranda v. Arizona, 384 U.S. 436, 475 (1966); Johnson v. Zerbst, 304 U.S. 458, 464.
enforced on direct appeal on the basis of the independent and adequate state ground doctrine. The Supreme Court, however, has unceremoniously failed to accord such forfeitures the same treatment upon federal collateral review.

In 1963, the Supreme Court radically altered the federal court's treatment of procedural forfeitures which had previously been enforced under the exhaustion doctrine. In *Fay v. Noia*, the Court

(1938). The use of the terms "forfeiture" or "default" will describe those situations where rights or remedies are lost by operation of law regardless of the parties' volitional actions. E.g., *Fed. R. Crim. P. 30* ("No party may assign as error any portion of the charge [to the jury] or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . ."); *Ohio R. Crim. P. 12* (B), (G) (failure to raise certain express defenses or objections prior to trial "shall constitute waiver thereof").

5. See Henry v. Mississippi, 379 U.S. 443, 445-49 (1965); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). The independent and adequate state ground doctrine is a principle employed on direct review to preclude a Supreme Court opinion that would not alter the outcome of the judgment. The doctrine has its origins in the Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 86-87, which restricted Supreme Court jurisdiction to appeals based on federal questions. Although this clause was removed from the Judiciary Act of 1867, ch. 28, § 2, 14 Stat. 386, the Supreme Court in *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 630 (1874), ruled that without an affirmative statement from Congress to the contrary, the restriction would remain in force on "general principles." There has been considerable debate whether the rule is constitutionally compelled or results from sound principles of judicial administration. Compare *Fay v. Noia*, 372 U.S. 391, 428-34 (1963) (implication that the doctrine results from statutory construction) with *id.* at 463-70 (Harlan, J., dissenting) (the doctrine is constitutionally compelled). The underlying premise of the rule was stated in *Herb v. Pitcairn*:

The reason [for the doctrine] is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. 324 U.S. at 125-26.

The adequate state ground doctrine has been applied to both substantive and procedural state grounds. See *Michigan v. Long*, 103 S. Ct. 3469 (1983); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Davis v. Wechsler*, 263 U.S. 22 (1923); see also *Hill*, *The Inadequate State Ground*, 65 COLUM. L. REV. 943 (1965); *Sandulow, Henry v. Mississippi and The Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Sup. Ct. REV. 187.


narrowed the scope of the exhaustion requirement and refused to apply the independent and adequate state ground doctrine to collateral review. Instead, the lower federal courts were vested with limited discretion to enforce procedural forfeitures only when the criminal defendant knowingly and deliberately failed to properly raise the forfeited issues. Noia's "deliberate bypass" standard vastly expanded the scope of federal collateral review to cover all constitutional questions existing at the time of or developed subsequent to the defendant's trial, except those which were deliberately waived. This decision engendered immediate and hostile debate and criticism on all fronts.

Ten years after Noia, the Supreme Court, with a significant change in personnel and philosophies, began to dismantle the deliberate bypass standard, eventually replacing it with the stricter "cause and actual prejudice" prerequisite. The demise of Noia and the advent of its more preclusive replacement reflected a shift in focus away from an overriding concern for the enforcement and vindication of federal constitutional rights. In addition, Noia's perceived need for providing a federal forum as an appropriate review and enforcement mechanism was displaced by a greater concern for finality in criminal judgments, procedural regularity, federalism and comity, and a reduction in the federal courts' workload.

While stating its reasons for restricting the excusal of procedural forfeitures, the Court has at the same time, however, been extremely reluctant to provide any content to its cause and actual prejudice prerequisite. After six years of the standard's general applicability, the Supreme Court recently decided two cases that have begun to establish the parameters of cause and actual prejudice. These cases, by defining cause and prejudice so as to further preclude post-conviction collateral relief, reestablish the Court's avowed hostility toward expansive federal collateral review. While offering

8. See 372 U.S. at 429-38.
reasons for the limitation on the federal courts’ collateral jurisdic-
tion, the Supreme Court has failed to analyze its formulation of
cause and prejudice in light of its restrictive policy considerations
and the various functions of federal post-conviction review.

The Supreme Court’s restriction of federal collateral review
through the strict enforcement of procedural rules fails to recognize
or consider the reality of criminal litigation in this country. The
Court never considers the actual impact post-conviction review has
on the states, their criminal convictions, the defense bar, or the indi-
vidual criminal defendants. The Court assumes that society desires
greater finality in criminal convictions without analyzing the con-
gressional grant of federal collateral jurisdiction and the impact a
forfeited constitutional question may have on the validity of the
guilty verdict. In addition, the Court binds the criminal defendant to
his attorney’s forfeitures without examining the nature of the attor-
ney-client relationship or the quality of representation provided to
the accused. Finally, the Court’s conjunctive cause and actual
prejudice prerequisite fails to provide adequate protection against
the conviction of the innocent by omitting some provision for review
of guilt-related constitutional questions.

An examination of the development of the cause and actual
prejudice prerequisite demonstrates the shortsightedness and inade-
quacy of the Court’s analysis. This article is divided into four sec-
tions: the first two sections explore the development, construction,
and application of the cause and actual prejudice prerequisite; the
third section focuses on the Supreme Court’s policy considerations
for restricting federal collateral review; and the fourth section illus-
trates the inadequacy of the cause and actual prejudice prerequisite
in protecting vital and important constitutional rights. In addition,
the fourth section proposes the elimination of the cause requirement
and the development of a prejudice standard that will safeguard the
interests of the state, the federal courts, and the individual criminal
defendants.

Finally, no pretense is made that the present Supreme Court
would be willing to moderate its approach to the procedural forfei-
ture dilemma in the direction proposed herein; however, one does not
write for the moment. Over time, people—and therefore courts—do
change and new directions are taken. It is the author’s hope that a
little light will be shed on the path toward resolving the forfeiture
dilemma to help insure that justice will be done in the future, if not
in the present.
I. THE DOWNFALL OF DELIBERATE BYPASS AND THE EMERGENCE OF CAUSE AND ACTUAL PREJUDICE

A. Davis v. United States—The Beginning of the End

The demise of Noia's deliberate bypass standard began almost surreptitiously in a series of cases decided by the Supreme Court in the early to mid 1970's. Without so much as a cursory discussion of the policies and principles supporting the deliberate bypass test, the Supreme Court, starting in 1973, laid the groundwork for Noia's downfall. These events began innocently enough in Davis v. United States, a case involving the application of rule 12(b)(2) of the Federal Rules of Criminal Procedure in a section 2255 federal collateral proceeding. Under rule 12(b)(2), the failure to raise a timely objection to the composition of the grand jury constitutes a "waiver" of such a claim; however, the trial court, for "cause shown," may grant relief from the waiver. Davis first raised the grand jury discrimination issue, in a section 2255 collateral proceeding, three years after his conviction.

The Supreme Court affirmed the lower court's application of rule 12(b)(2) in a section 2255 proceeding. The Court relied on perceived congressional intent and the belief that strong tactical incentives may categorically motivate the failure to raise a timely

15. Rule 12 was amended in 1975; rule 12(b)(2), in slightly different form, is currently embodied in sections (b) and (f) of rule 12. See Fed. R. Crim. P. 12(b), (f).
16. 28 U.S.C. § 2255 (1976). This section provides federal collateral post-conviction relief for federal prisoners and is the corollary to federal habeas corpus for state prisoners as found in 28 U.S.C. § 2254 (1976). In Kaufman v. United States, 394 U.S. 217 (1969), the Supreme Court held that the Noia deliberate bypass test should apply in a § 2255 proceeding to a federal prisoner's forfeitures. Id. at 231. Kaufman created parity between state and federal prisoners with respect to federal collateral review of previously forfeited constitutional claims.
18. 411 U.S. at 235. In effect, Davis involved a double forfeiture. After failing to raise the grand jury objection prior to trial, Davis defaulted again by failing to seek relief under rule 12(b)(2) at any time prior to the conclusion of the direct appeal process. Id. at 234-35.
19. Id. at 242.
20. Id. at 241. Since no court had ever found that the forfeiture in Davis was motivated by tactical considerations, the Supreme Court, therefore, had to rely on a hypothetical generalization of such tactics. The dissent also noted that tactical considerations are irrelevant because they would constitute a deliberate bypass that would preclude post-conviction review under Noia and Kaufman v. United States, 394 U.S. 217 (1969). See Davis, 411 U.S. at 250 (Marshall, J., dissenting); see also Rosenberg, Jettisoning Fay v. Noia: Procedural Defaults by Reasonably Incompetent Counsel, 62 MINN. L. REV. 341, 371-72 (1978) (criticizing introduction of abstract policy consideration as basis for denying relief).
objection to the composition of the grand jury. Justice Rehnquist, writing for the majority, noted that section 2255 did not address procedural forfeitures. While the "Federal Rules of Criminal Procedure do not ex proprio vigore govern post-conviction proceedings," he found it inconceivable that Congress would excuse an untimely objection only for "cause shown" during one stage of the criminal proceeding, but that it would have "nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings."

As a result, the Court, in the name of consistency and perceived congressional intent, concluded that the more restrictive "for cause shown" standard, as opposed to the deliberate bypass rule, should apply to all rule 12 forfeitures in both direct and collateral proceedings involving federal criminal convictions. The adoption of the "cause" requirement shifted the burden of proof from the government to show "deliberate bypass" to the prisoner to explain the forfeiture and altered the substance of the proof required to overcome a previous procedural forfeiture.

In applying the "cause shown" requirement to the facts of Davis, the Court affirmed the lower court's conclusion that Davis had

21. 411 U.S. at 241. The Court recognized that pre-trial resolution of the grand jury discrimination issue, in most instances, will only result in a new indictment for the same charge, with the defendant gaining nothing for his efforts. Id. A successful challenge after conviction, however, will require a new trial at a time when reprosecution may be difficult, if not impossible, due to faded memories or lost witnesses. See id. Justice Marshall, however, in his dissent, indicated that the original trial transcript will always be available in such a situation to insure retrial on the same evidence as the first trial. See id. at 250 (Marshall, J., dissenting).

22. Id. at 241. Section 2255 proceedings are a hybrid in that they are "an independent and collateral inquiry into the validity of the conviction," but not a habeas corpus proceeding, although very similar in nature. United States v. Hayman, 342 U.S. 205, 222 (1952); See id. at 216-22; Hill v. United States, 368 U.S. 424, 427 (1962). In 1976, Congress passed rules governing state and federal prisoner federal post-conviction collateral proceedings. See 28 U.S.C. § 2254 rules 1-11 (1976); 28 U.S.C. § 2255 rules 1-12 (1976). Section 2255 rule 12 provides that the Federal Rules of Criminal Procedure and Civil Procedure may be applied by the district court in federal prisoner post-conviction collateral proceedings whenever they are not inconsistent with the rules governing § 2255 proceedings and whenever the court deems them appropriate. This is in contrast to § 2254 rule 11 (governing state prisoner federal habeas proceedings), which only provides for a similar use of the Federal Rules of Civil Procedure.

23. 411 U.S. at 242. Beyond sheer speculation, Justice Rehnquist offers no support for this conclusion.

24. See id.


offered no reason for his lawyer's failure to discover and properly raise the alleged grand jury discrimination issue in a timely manner. In addition, Justice Rehnquist approved the district court's consideration of prejudice in resolving the "for cause shown" issue, an inquiry previously accepted in Shotwell Manufacturing Co. v. United States. Davis had attempted to avoid a showing of prejudice by relying on a presumption of prejudice in grand jury discrimination cases, an approach endorsed by the Court itself. In rejecting the use of presumed prejudice, the Court noted that this presumption was sanctioned in a case focusing on the existence of a constitutional right, as contrasted with Davis' case, which involved the forfeiture of a remedy. Justice Rehnquist concluded that the use of a presumption in evaluating the loss of a right is "not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert [the right] in a timely manner."

While approving the use of actual versus presumed prejudice, the opinion never clarified the relationship of this showing to the determination of cause. In addition, by not providing any content to either of these terms, the Court failed to suggest when a forfeiture will be excused. Of greater significance, Justice Rehnquist did not indicate whether Davis, or any variation thereof, applies to similarly situated state prisoners who raise grand jury discrimination issues, or other constitutional questions, for the first time in a federal collateral

27. The Court did not discuss whether the failure to object was intentional or inadvertent, or whether the defendant personally participated in the decision, if there were one, to forfeit the grand jury issue. The Court appeared to treat these considerations as irrelevant to the inquiry, despite the fact that this was not the type of decision that had to be made in the heat of the trial. See Rosenberg, supra note 20, at 370.

28. See 411 U.S. at 243-44. The district court also concluded that Davis was treated the same as his two white codefendants, thus alleviating the possibility that there were racial motivations for his indictment. In addition, that court noted that the case against Davis was a strong one with sufficient evidence to justify the indictment. See id.

29. Id. at 244.


32. See 411 U.S. at 245.

33. Id.

34. The Court's lack of clarity is evident in the lower federal courts' treatment of Davis. Compare Polizzi v. United States, 550 F.2d 1133, 1138 (9th Cir. 1976) (citing Shotwell and Davis as requiring a showing of actual prejudice or an excuse for failing to comply with rule 12 under the "cause" analysis) with Dumont v. Estelle, 513 F.2d 793, 797-99 (5th Cir. 1975) (cause must be satisfied by a strong showing of actual prejudice) and Newman v. Henderson, 496 F.2d 896, 899 (5th Cir. 1974) (procedural forfeiture would be excused by a showing of cause and actual prejudice), aff'd sub nom. Francis v. Henderson, 425 U.S. 536 (1976).
proceeding after failing to raise properly and preserve similar claims in the state courts. This uncertainty, however, did not last long. In 1976, the Supreme Court resolved the issue in favor of parity and applied Davis to a similarly situated state prisoner named Abraham Francis.

B. Francis v. Henderson—Davis and the Similarly Situated State Prisoner

The Court's decision in Francis v. Henderson, is somewhat like watching a magician pull a rabbit out of an apparently empty hat; as we watch we know the rabbit is in there, but we are still amazed at how swiftly and adeptly he makes it appear, and in the end, we are left wondering how he did it. With the same swiftness and adeptness, Justice Stewart, in Francis, modified and extended Davis to similarly situated state prisoners and significantly restricted the liberal deliberate bypass standard while relying, to a degree, on Fay v. Noia and Kaufman v. United States, which extended Noia's deliberate bypass test to federal prisoners, for support.

The Francis opinion began by reasserting the "federal district court's power to entertain an application for a writ of habeas corpus" to review a grand jury discrimination claim. The issue confronting the Court, in light of the state prisoner's failure to litigate this claim properly in the state courts, was "the appropriate exercise of that power." As a preface, Justice Stewart cautioned "that in

35. The lower federal courts' application of Davis to state prisoners was inconsistent. Compare Dumont v. Estelle, 513 F.2d 793, 797 (5th Cir. 1975) (parity rationale offered in Davis requires application of state forfeiture rules if substantially identical to Federal Rules of Criminal Procedure 12(b)(2)); Newman v. Henderson, 496 F.2d 896, 898-99 (5th Cir. 1974) (Louisiana forfeiture rule similar to the federal rule, but does not provide for the excusal of the forfeiture under any circumstances; fundamental fairness requires that the federal court engraft an "actual prejudice" exception onto the state rule), aff'd sub nom Francis v. Henderson, 425 U.S. 536 (1976) and Rivera v. Wainwright, 488 F.2d 275, 277 (5th Cir. 1974) (Davis applied where Florida forfeiture rule is similar to rule 12(b)(2)) with Guzewicz v. Slayton, 366 F. Supp. 1402, 1404-05 (E.D. Va. 1973) (Davis made no pretense of overruling Noia; the only issue in Davis was the scope of congressional intent) and Hairston v. Cox, 361 F. Supp. 1180, 1185-86 (W.D. Va. 1973) (limiting Davis to federal prisoner's claims involving rule 12(b)(2); Noia is otherwise controlling), aff'd on other grounds, 500 F.2d 584 (4th Cir. 1974) (en banc).
39. 425 U.S. at 538. Professor Alfred Hill believes that the Court erred in this determination, in that "it is the statute [28 U.S.C. § 2254] that prescribes 'comity,' leaving the courts without 'power' to take a contrary course." Hill, The Forfeiture of Constitutional Rights in Criminal Cases, 78 COLUM. L. REV. 1050, 1058-59 (1978) (emphasis in original).
40. 425 U.S. at 538-39.
some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forego the exercise of its habeas corpus power."\textsuperscript{41}

Relying upon \textit{Davis}, Justice Stewart reasserted that the orderly administration of criminal justice requires that criminal defendants not be permitted to take tactical advantage of a failure to raise a timely objection by securing a second trial at a time when retrial may be difficult.\textsuperscript{42} The Court, having previously identified this as an important and legitimate concern with respect to federal criminal proceedings,\textsuperscript{43} determined that "considerations of comity and federalism require that [the lower federal courts] give no less effect to the same clear interests when asked to overturn state criminal convictions."\textsuperscript{44} As a result, the Court concluded:

Plainly the interest in finality is the same with regard to both federal and state prisoners. . . . There is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations.\textsuperscript{45}

Almost cynically, Justice Stewart used the above quotation from \textit{Kaufman}, which extended \textit{Noia}'s deliberate bypass test to federal prisoners,\textsuperscript{46} to narrow significantly, if not overrule \textit{Noia}; just as the

\textsuperscript{41} Id. at 539. In support, Justice Stewart cited \textit{Noia}, a case that epitomizes expansive habeas corpus review. One commentator has referred to this citation of \textit{Noia} as "an Orwellian twist" citing George Orwell's Principles of Newspeak from 1984. "In describing the principles of Newspeak, Orwell noted that a favored technique was to purge words of their undesirable meanings." Rosenberg, supra note 20, at 372 n.133.

Justice Brennan strongly disagreed with the Court's use of the catchall phrase, "federalism and comity":

It is, unfortunately, but yet another example of the Court's current trend loosing the principle of "comity and federalism" from its original moorings and converting a doctrine of timing of federal adjudication of constitutional claims into a doctrine essentially precluding such adjudication. The increasingly talismanic use of the phrase "comity and federalism"—itself essentially devoid of content other than in the \textit{Younger} sense of determining the timing of federal review—has ominous portent; it has the look of an excuse being fashioned by the Court for stripping federal courts of the jurisdiction properly conferred by Congress.

\textit{Francis}, 425 U.S. at 551 (Brennan, J., dissenting) (emphasis in original) (citations omitted).

\textsuperscript{42} See 425 U.S. at 540-41. The Court also quoted Michel v. Louisiana, 350 U.S. 91, 98 n.5 (1955), concerning the administrative considerations requiring a timely objection to the make-up of a grand jury. \textit{Id.} at 541.

\textsuperscript{43} \textit{See Davis}, 411 U.S. at 240-41.

\textsuperscript{44} 425 U.S. at 541.

\textsuperscript{45} \textit{Id.} at 542 (quoting \textit{Kaufman}, 394 U.S. at 228).

\textsuperscript{46} \textit{See Kaufman}, 394 U.S. at 228.
magician works his magic, he was able to make things appear as they are not.

After extending Davis to similarly situated state prisoners, Justice Stewart interpreted Davis to require "'not only a showing of 'cause' . . . but also a showing of actual prejudice.'" This approach is distinctly different from that approved of in Shotwell Manufacturing Co. v. United States, the case from which Davis adopted the prejudice requirement. In Shotwell, the district court was permitted, but not required, to consider prejudice to the defendants in determining whether they had established sufficient cause to excuse their forfeiture. This use of prejudice stands in sharp contrast to the required separate and distinct actual prejudice inquiry that the Court mandates in Francis. Davis is the only authority cited for the dual "cause" and "actual prejudice" inquiry, even though Davis appears to permit the consideration of actual prejudice, versus presumed prejudice, in the district court's overall evaluation of cause. Thus, once again, the magician works his magic; while the rabbit was there all the time, only by sleight of hand is he able to produce it from thin air.

Justice Brennan's dissent, aside from its defense of the principles of Noia, is significant for indicating several factors that the majority failed to consider or even to recognize. The dissent correctly noted that the majority never addressed the obvious applicability of Noia or its jurisprudential foundations. Such glaring "oversights" led Justice Brennan to exclaim: "I, for one, do not relish the prospect of being informed several Terms from now that the Court overruled [Noia] this Term, . . . when the Court never comes to grips with the

47. 425 U.S. at 542.
51. 425 U.S. at 542.
52. There can be no doubt that actual prejudice viewed as a separate component will tend to produce results distinctly different from "actual prejudice viewed as a factor in the determination of cause." Hill, supra note 36, at 1095.
53. See 425 U.S. at 543-44 (Brennan, J., dissenting). Justice Brennan reasserted the conclusion he reached in Noia, that sufficient deference is paid to the state and its procedural rules by permitting the state to foreclose access to its courts on forfeited issues, but that such deference must give way in the federal court where the paramount interest is the vindication of federal constitutional rights. Id. Justice Brennan also noted that Noia created symmetry between the waiver of a federal right and the forfeiture of a remedy for the violation of that right by requiring that both the waiver and forfeiture be knowingly and intentionally made. See id. at 548-49 n.2 (Brennan, J., dissenting).
54. See id. at 546 (Brennan, J., dissenting).
constitutional and statutory principles and policy considerations underpinning that case.\footnote{55}

Related to the majority's failure to confront\textit{ Noia} directly is its failure to discuss congressional intent concerning the application of the waiver provisions of rule 12(b) to state prisoners.\footnote{56} While the Court could possibly infer in\textit{ Davis} that Congress meant to apply the "cause shown" provisions of rule 12(b) to excuse forfeitures in federal prisoner collateral proceedings under section 2255, there is absolutely nothing in the history, language, or content of section 2254 (governing state prisoner federal collateral relief) from which the Court can find that Congress intended to apply the Federal Rules of Criminal Procedure to state prisoners.\footnote{57} Justice Stewart apparently failed to comprehend that he was interpreting a federal statute, in which the will of Congress should prevail. The only conclusion which the majority appeared to draw is that Congress intended that state and federal prisoners be treated in a similar manner with respect to the availability of federal post-conviction relief.\footnote{58}

\\footnotetext{55}{\textit{Id.} at 547 (Brennan, J., dissenting).}

\footnotetext{56}{Although not directly addressed in his dissent, Justice Brennan alluded to the problem when he reviewed the merits of\textit{ Davis}. \textit{See id.} at 547-50 (Brennan, J., dissenting). The Court's failure to discuss congressional intent was not lost on the commentators. \textit{See P. Bator, P. Miskin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Court and the Federal System} 256-57 (2d ed. 1973 & Supp. 1980) [hereinafter cited as Hart & Wechsler]; Hill, \textit{supra} note 39, at 1056-59; Tague, \textit{Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do}, 31 Stan. L. Rev. 1, 15 (1978); Westen, \textit{Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure}, 75 Mich. L. Rev. 1214, 1244 n.61 (1977). In fact, in the same year that the Court decided\textit{ Francis}, Congress indicated that the Federal Rules of Criminal Procedure were not applicable to state prisoner federal collateral proceedings when it approved 28 U.S.C. § 2255 rule 11. \textit{See also supra} note 22 (noting distinctions between § 2255 and § 2254 proceedings).

\footnotetext{57}{The Court could not conclude that Congress intended to excuse state defaults according to state procedural rules, because Louisiana did not provide for any relief from the forfeiture. Under state law, it was absolute and binding forever. \textit{See Newman} v. Henderson, 496 F.2d 896, 898-99 (5th Cir. 1974), \textit{aff'd sub nom. Francis} v. Henderson, 425 U.S. 536 (1976); \textit{see also Westen, supra} note 56, at 1243-44 & n.61. Interestingly, the court of appeals used\textit{ Davis} as authority for applying the state's forfeiture and excusal rules, but when the state did not provide for any possibility of excusal, that court engrafted the "cause shown" standard onto the state rule, thereby preventing an "airtight" forfeiture. \textit{See Newman}, 496 F.2d at 899.

\footnotetext{58}{\textit{See 425 U.S.} at 541-42. The Court quotes\textit{ Kaufman} that it would be an "anomalous and erroneous view of federal-state relations" to give "greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants." \textit{Id.} at 542 (quoting\textit{ Kaufman}, 394 U.S. at 228).\textit{ Kaufman}, however, viewed the intended parity expansively, while\textit{ Francis} treated the same perceived parity restrictively, both within the context of the same statute, history, and legislative record. Professor Hill notes that:

there is no warrant for the minority's contention that Congress intended state prisoners to be treated differently from federal prisoners . . . , and no warrant for the

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The majority's modification of *Davis* to require a second component of actual prejudice is also criticized by Justice Brennan. He found this modification most disturbing in light of the facts of the particular case under consideration—facts that the majority conspicuously failed to consider. Francis, a black youth, was charged with felony murder as a result of a white robbery victim's killing one of his alleged accomplices. Two months after his indictment, Francis was provided with counsel who was not compensated and who was unqualified to defend against the death penalty. Pre-trial motions were not filed until the day before trial, and an attack on the grand jury was never raised. After a one-day trial, Francis was convicted and sentenced to life in prison. Francis was subsequently dissuaded from appealing his conviction by his trial counsel. In a federal majority's assumption that the statute leaves the Court free to decide for itself whether or not there shall be parity of treatment between both classes of prisoners.

*If parity is called for, it is because the statute, fairly construed, requires it.*


59. See 425 U.S. at 533-57 (Brennan, J., dissenting). Justice Brennan also pondered whether the Court's interpretation of *Davis* similarly contracts the application of rule 12(b)(2) during the course of trial or on appeal. See id. at 552 n.3 (Brennan, J., dissenting).

60. See 425 U.S. at 553-54 (Brennan, J., dissenting). One commentator has noted that in light of the facts in *Francis*, the majority could not have considered the case under the *Noia* standard without finding that there had not been a deliberate bypass. See Rosenberg, *supra* note 20, at 373.

61. See 425 U.S. at 554 (Brennan, J., dissenting); Rosenberg, *supra* note 20, at 373-76 & n.136-51. The novelty of charging a codefendant with his accomplice's death at the hands of one of their intended victims was such that the prosecuting attorneys could not recall it ever having been done in their county. *Id.* at 373-74 & n.137.

62. See 425 U.S. at 554 (Brennan, J., dissenting); Rosenberg, *supra* note 20, at 374 n.139. Francis' attorney had not tried a criminal case in 4 years and a capital case in 15 years. *Id.* at 374.

63. 425 U.S. at 554 (Brennan, J., dissenting). Francis' counsel filed motions seeking the production of statements made by Francis while he was unrepresented, to quash the indictment on vagueness grounds, and for a bill of particulars. *Id.*; Rosenberg, *supra* note 20, at 375 n.114. Adding insult to injury, however, Francis' counsel merely used copies of these motions from another defendant, crossing out his name and writing in Francis'. *Id.* at 375 n.144.

64. 425 U.S. at 554 (Brennan, J., dissenting). Francis was never informed by his attorneys of a possible objection to the grand jury nor that such a challenge would not be made. *Id.* This occurred despite the fact that cocounsel had raised the issue in other cases. Rosenberg, *supra* note 20, at 376 n.148.

65. 425 U.S. at 554 (Brennan, J., dissenting).

66. Rosenberg, *supra* note 20, at 376. The record revealed that Francis was informed by cocounsel that a successful appeal could result in the death penalty on retrial, besides subjecting him to a charge of robbery with an additional 30 year consecutive sentence. Cocounsel also stated that they did not wish to be tied down forever in an uncompensated court appointed case. *Id.* Although the trial judge concluded that trial counsel had competently represented their client, counsel's actions or inactions raise considerable doubt as to the quality of their representation, especially in light of the grave penalties involved. See *Newman v. Henderson*,
FEDERAL HABEAS CORPUS

habeas corpus proceeding, the district court found that the indicting grand jury had been unconstitutionally selected and that trial counsel's failure to render effective assistance constituted adequate cause to excuse the forfeiture.\(^7\)

Justice Brennan, in light of these facts, found the additional "actual prejudice" hurdle, without some explanation, extremely troublesome in conjunction with the "invocation of the felony murder doctrine in an extremely rare factual context laden with racial overtones."\(^6^8\) Along this line of analysis, the dissent pondered whether actual prejudice could ever be demonstrated short of showing that the prisoner would not have been indicted by a constitutionally selected grand jury, or that white codefendants were not indicted by the unconstitutionally composed grand jury.\(^6^9\) Justice Brennan, instead, would require the state to demonstrate that the constitutional deprivation was harmless error beyond a reasonable doubt, a test which he believes would permit relief in Francis.\(^7^0\)

The result of Davis and Francis is the culmination of the development of a forfeiture standard, containing the rebuttable presumption\(^7^1\) that the failure to adhere to procedural rules resulting in the loss of a remedy will foreclose federal collateral review of the forfeited issues. This formulation stands in sharp contrast to Noia's waiver doctrine that presumes that remedies/rights can only be intentionally and knowingly relinquished by the prisoner, or possibly by his counsel,\(^7^2\) and federal collateral review will only be denied, therefore, upon a showing that state procedures were deliberately by-

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496 F.2d 896, 897-98 (5th Cir. 1974), aff'd sub nom. Francis, 425 U.S. at 536; Rosenberg, supra note 20, at 379 & nn.151-62. While the issue was never directly addressed by the Supreme Court majority, the Court had to have found that counsel's actions were sufficiently competent to support the forfeiture of their client's remedies. See id. at 379.

67. See 425 U.S. at 555-56 (Brennan, J., dissenting).
68. Id. at 556-57 (Brennan, J., dissenting).
69. See id. at 556-57 (Brennan, J., dissenting). This point was exemplified by the state's action on remand to the federal district court: moving for summary judgment and arguing that Francis could never prove actual prejudice. See Tague, supra note 56, at 16 n.79 (interview with appellate counsel).
70. 425 U.S. at 557 (Brennan, J., dissenting).
71. The Court has not adopted a strict liability standard whereby all valid state procedural forfeitures automatically foreclose federal review. Instead, a prisoner is permitted to obtain relief from the forfeiture by showing cause and actual prejudice in the federal collateral court. This is in sharp contrast to the adequate and independent state ground doctrine, which will bar Supreme Court review of state convictions upon a federal finding of adequacy and independence of the state ground. See, e.g., Herb v. Pitcairn, 324 U.S. 117, 125-28 (1945). See also supra note 5 (discussion of the adequate and independent state ground doctrine).
passed. Under either standard, the Court emphatically upholds the federal courts' power to grant collateral relief, despite a procedural forfeiture. The two requirements only differ on what is an appropriate exercise of that power. Both standards require the federal courts to examine the reasons for the forfeiture and the nature of the remedies and rights involved. Even under the more restrictive Davis-Francis forfeiture analysis, the district court retains some residual discretion to excuse the default and to address the merits, if only in the interest of preventing a miscarriage of justice. For this reason, the Court's decision in Estelle v. Williams, decided on the same day as Francis, contains the seeds of a very disturbing development: merging the remedy into the right, so that the failure to assert the remedy precludes even the existence of the right—regardless of the reasons for the forfeiture or its impact on the trial itself—thereby precluding any excusal for the failure to properly raise the issue.

C. Estelle v. Williams—Merging Rights with Remedies, A Disturbing Approach

Williams involved the prosecution of a defendant at trial in clearly identifiable jail clothing. No objection, however, was made at trial concerning this fact. While noting the possible impairment of the presumption of innocence—a basic component of a fair trial—by presenting the defendant in jail clothing to the jury, Chief Justice

73. See Nola, 372 U.S. at 439.
74. See Francis, 425 U.S. at 538-39; Nola, 372 U.S. at 426-38; see also Wainwright v. Sykes, 433 U.S. 72, 100 n.2 (1977) (Brennan, J., dissenting); Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 436, 465 (1980).
75. Deliberate bypass requires an examination of the defendant's or counsel's knowledge of the right, their intent in failing to assert it properly, and the impact of that failure on the trial process itself. See Henry v. Mississippi, 379 U.S. 443, 450-52 (1965); Nola, 372 U.S. at 439. Cause and prejudice, likewise, but under different standards, requires an examination of the decisions behind the failure to object and the impact that the failure had on the outcome of the trial.
78. 425 U.S. at 502. Although no objection was raised before the trial court, the defendant asked an officer at the jail for his civilian clothing prior to going to court for his trial. This request was denied, and neither the defendant nor his counsel raised the issue at trial. See id.
79. Id. at 503-04. As the Court noted:
This is a recognition that the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike
Burger, writing for the majority, found that the real evil to be prevented is compelling the prisoner to be tried in such attire.\footnote{80} As a result, the Chief Justice concluded that the failure to raise a proper objection to the defendant's jail clothing, "for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation."\footnote{81} This conclusion is premised upon the belief that strong tactical considerations may motivate counsel's failure to object to his client's jail attire,\footnote{82} and that the proper allocation of responsibility in our adversarial system requires that the defense team, the defendant, and his counsel, not the trial judge, shall make the vast array of strategic and tactical decisions required during trial.\footnote{83}

The compulsion requirement is most troubling\footnote{84} because the placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play.

\textit{Id.} at 504-05 (citation omitted).

80. \textit{Id.} at 505-06. The dissent found the requirement of compulsion tied to an objection irrational on its face, because from the jury's perspective there is no difference between those who object and those who do not. As far as the taint of the prison clothing was concerned, it applied to both groups. See \textit{id.} at 520 (Brennan, J., dissenting).

81. \textit{Id.} at 512-13. The Court refused to apply a knowing and intentional waiver standard because they were "not confronted with an alleged relinquishment of a fundamental right [like] . . . the assistance of counsel . . . . The Court has not, however, engaged in this exacting analysis with respect to strategic and tactical decisions, even those with constitutional implications, by a counseled accused." \textit{Id.} at 508 n.3. The dissent questioned the accuracy and limitations of this reasoning, speculating that these principles, coupled with the decision in \textit{Francis}, would eventually be used to overrule the deliberate bypass test. See \textit{id.} at 521-22 n.5 (Brennan, J., dissenting). At least with respect to \textit{Francis}, Justice Brennan was correct. See \textit{Wainwright v. Sykes}, 433 U.S. 72, 84-85 (1977).

82. See 425 U.S. at 507-08. The Court noted that it is not an uncommon defense tactic to produce the defendant in jail clothing in order to elicit jury sympathy. See \textit{id.} at 508 (citing Anderson v. Watt, 475 F.2d 881, 882 (10th Cir. 1973); Watt v. Page, 452 F.2d 1174, 1176 (10th Cir.), \textit{cert. denied}, 405 U.S. 1070 (1972); García v. Beto, 452 F.2d 655, 656 (5th Cir. 1971)). Justice Powell exhibited the same type of reasoning in his concurring opinion. See \textit{id.} at 514 (Powell, J., concurring). There is no indication in the record, however, that the defense was motivated by tactical considerations, and the state conceded, at the federal habeas evidentiary hearing, that tactics were not involved. \textit{id.} at 531 n.11 (Brennan, J., dissenting). Justice Brennan also questioned the authority of the Court's finding that defense counsel would tactically produce their clients in jail attire. \textit{Id.} at 520 n.4 (Brennan, J., dissenting).

83. \textit{Id.} at 512. Two commentators have noted that the judge's "role is normally umpireal [sic] and he depends upon counsel to bring defects to his attention. But \textit{Estelle} is not such a case. Trying a defendant in prison garb is the kind of defect that glares up at the trial judge." Cover & Aleinikoff, \textit{Dialectical Federalism: Habeas Corpus and the Court}, 86 \textit{YALE L.J.} 1035, 1074 (1977); see Spritzer, \textit{Criminal Waiver, Procedural Default and the Burger Court}, 126 \textit{U. PA. L. REV.} 473, 511 (1978).

84. The Texas Court of Criminal Appeals did not rely on the forfeiture in deciding the case and the state never raised the issue before that court. \textit{Williams v. State}, 477 S.W.2d 24,
Court collapses the existence of a right and the failure to vindicate that right into a single determination, which ignores the circumstances under which the remedy was lost. This formulation runs contrary to traditional analysis which considers initially whether there is a right—a determination of which is independent of one's failure to assert that right—and then examines whether the right or the remedy for its vindication was waived or forfeited. This second evaluation under the traditional analysis permits the reviewing court to analyze the circumstances under which the waiver or forfeiture occurred and its impact on the fundamental fairness of the trial.

The Court's compulsion requirement, which circumvents this second stage, ignores whether there has been a valid waiver or forfeiture and denigrates the importance of the constitutional rights involved. The logical extension of this analysis would negate the existence of all constitutional trial rights by counsel's failure to object in a proper and timely manner, a most undesirable departure from the past and one which is far more restrictive than the cause and actual prejudice standards of Davis and Francis.

Davis, Francis, and Williams represent the emergence of a significant shift in the Supreme Court's analysis of federal post-conviction remedies. They demonstrate a growing concern with the possi-

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85. The dissent noted that the "compulsion" analysis is novel and dangerous because the Court has "totally eviscerated the traditional doctrine that loss of such rights cannot be presumed from inaction." 425 U.S. at 523 (Brennan, J., dissenting).
86. As Chief Justice Burger stated "the failure to make an objection . . . for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." Id. at 512-13 (footnote omitted). Two commentators have noted that the Williams decision struck principally at Noia's requirement that the prisoner, and not his counsel, must make the deliberate bypass decision. Cover & Aleinikoff, supra note 83, at 1074.
87. In his concurring opinion, Justice Powell noted that constitutional rights are relinquished either by waiver or forfeiture. He would find an "inexcusable procedural default" when counsel has made a tactical choice or a procedural default of the type in Williams, which he believes should, as a matter of federal law, preclude subsequent federal habeas litigation on the issue. 425 U.S. at 513-15 (Powell, J., concurring). Even in such a situation, Justice Powell would permit discretion on the part of the district judge to excuse the forfeiture under principles of plain error. Id. at 514 n.2 (Powell, J., concurring). This analysis is far different from the majority's and does not tie the right to the exercise of the remedy, but leaves the two as separate inquiries. See id. at 524-25 (Brennan, J., dissenting).
88. Under the Noia waiver-deliberate bypass standard, the forfeiture of a constitutional right must be intentional and knowing. Under Francis, the court will examine the cause for the forfeiture and whether actual prejudice resulted from it. See alsoSchneckloth v. Bustamonte, 412 U.S. 218 (1973) (discussing evidentiary requirements for fourth amendment "consent" search).
89. For example, compare the perspectives of the Court vis-a-vis procedural forfeitures in Noia, 372 U.S. at 433 ("A man under conviction for crime has an obvious inducement to do
bility that defense counsel will take tactical advantage of Noia’s liberal excusal of procedural forfeitures to obtain greater relief from the federal court than would have been available had the forfeited claims been properly and timely asserted at trial.\footnote{This can occur because of the nature of the rights and the remedies involved. Invariably, a timely assertion of a grand jury claim will result in the defendant being reindicted by a properly selected grand jury and the trial will proceed as if the claim had never been raised. Moreover, the Williams situation, if remedied before trial, would have resulted in the defendant’s being tried in street clothing, and depending on the strength of the evidence, being convicted nonetheless. When these claims are raised for the first time in the post-conviction collateral proceeding, the remedy is most often a new it trial for the defendant—offering him a second chance at an acquittal, or most likely, a more favorable plea bargain. Thus, the defendant gains more from the post-conviction court than he would have from the trial court.}{90} The Court has also become sensitive to the state’s annoyance with federal interference in the state criminal process and to the impact collateral review has on finality, federalism, and comity.\footnote{E.g., Burger, Annual Report to the American Bar Association by the Chief Justice of the United States, 67 A.B.A. J. 290 (1981).}{91} For the majority that decided Noia, these concerns, while important, were secondary to the vindication of federal constitutional rights.\footnote{See 372 U.S. at 422-24.}{92}

Interestingly, in light of this shift, the Court, in the three decisions just discussed, did everything it could to emasculate the Noia deliberate bypass test without directly overruling it. In each of the opinions, the Court consistently failed to consider the existing law of Noia and its progeny; instead, Noia went virtually unmentioned with its rule of law ignored as if it never existed. Although spurred on by the dissent in each case to confront Noia on its principles and holding, the majority chose each time to ignore it and delay the inevitable. Prophetically, Justice Brennan’s statement in Francis, that “I, for one, do not relish the prospect of being informed several Terms from now that the Court overruled [Noia] this Term . . . when the Court never comes to grips with the constitutional and statutory principles and policy considerations underpinning that case,” was only wrong in the optimistic reference to “several Terms.”\footnote{425 U.S. at 547 (Brennan, J., dissenting).}{93} For the very next term, the Court decided that the time had come to overrule, or at least to limit Noia and further extend the Davis-Francis
“cause and prejudice” prerequisite.

D. Wainwright v. Sykes — The Demise of Noia, Fait Accompli

The Supreme Court chose to limit, if not overrule Noia in the case of Wainwright v. Sykes,94 which provided the proper vehicle for expanding the Davis-Francis standard beyond issues pertaining to the initiation of criminal proceedings.95 Prior to and during John Sykes’ state trial, his attorney never challenged the admissibility of his pre-trial statements96 on voluntariness or Miranda97 grounds as required by Florida procedural rules.98 As a result, an evidentiary hearing was never held on the admissibility of these pretrial statements.99 The federal district court, on Sykes’ petition for a writ of habeas corpus, determined that the failure to raise a timely objection


95. While clearly rejecting the Noia deliberate bypass test in the context of pre-trial and trial objections, the Court left the question of the applicability of Francis to appellate forfeitures “for another day.” 433 U.S. at 88 n.12. The Court, however, recently indicated that counsel’s failure to raise specific issues on appeal is governed by the “cause and prejudice” standard. Jones v. Barnes, 103 S. Ct. 3308, 3314 n.7 (1983). Although clearly dictum, this footnote may become precedent for future decisions. E.g., Engle v. Isaac, 456 U.S. 107, 134 n.43 (1982) (giving precedential effect to dictum contained in footnote of an earlier Supreme Court opinion).

Generally, the lower federal courts have continued to apply the deliberate bypass standard to a defendant’s failure to take an appeal, e.g., Holcomb v. Murphy, 701 F.2d 1307 (10th Cir. 1983), cert. denied, 103 S. Ct. 3308 (1983); Crick v. Smith, 650 F.2d 860 (6th Cir. 1981), cert. denied, 455 U.S. 922 (1982); Byer v. Patton, 579 F.2d 284 (3d Cir. 1978); Jones v. Shell, 572 F.2d 1278 (8th Cir. 1978), while applying the cause and prejudice prerequisite to counsel’s failure to raise certain issues once an appeal has been initiated, e.g., Matias v. Oshiro, 683 F.2d 318 (9th Cir. 1982); Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982), vacated, 696 F.2d 804 (11th Cir. 1982) (en banc); Forman v. Smith, 633 F.2d 634 (2d Cir. 1980), cert. denied, 450 U.S. 1001 (1981).

96. The attorney never stated his reasons for not objecting. See id. at 75; id. at 104 (Brennan, J., dissenting); Rosenberg, supra note 20, at 395. Chief Justice Burger and Justice Stevens appear to treat the failure to raise objections as a tactical decision by trial counsel. See 433 U.S. at 93 & n.2 (Burger, C.J., concurring); id. at 96-97 (Stevens, J., concurring). At no time during the trial did the judge ever question the admissibility of the statements. Id. at 75.


98. FLA. R. CRIM. P. 3.190(i)(2), at the time of Sykes’ trial, dictated that motions to suppress pre-trial statements be made prior to trial, leaving the courts, however, with discretion to hear such motion at trial. The rule also called for an evidentiary hearing on such motion. FLA. R. CRIM. P. 3.190(i)(3). See 433 U.S. at 76 n.5.

99. 433 U.S. at 75; see also Jackson v. Denno, 378 U.S. 368 (1964) (requiring a hearing in state criminal trial as to admissibility of inculpatory out-of-court statements by the defendant). The confession issue was not raised on direct appeal, but was asserted for the first time in a state collateral proceeding. See 433 U.S. at 75. An intermediate state appellate court refused to consider the issue, incorrectly believing that it had been previously reviewed. Sykes v. State, 275 So. 2d 24 (Fla. Dist. Ct. App. 1973). The Florida Supreme Court denied Sykes’ petition for relief in an unpublished opinion. Rosenberg, supra note 20, at 396.
prior to, or at trial, was not a deliberate or strategic decision that would preclude federal collateral review. The court of appeals affirmed this decision and the Supreme Court seized the opportunity to further limit Noia in a case lacking the specter of racial prejudice and counsel ineffectiveness which haunted its decision in Francis.

1. Limiting Noia While Reaffirming the Federal Court's Collateral Power.—While desiring to restrict federal collateral review and the reach of Noia, the Court was initially confronted with nearly fifteen years of precedent supporting Noia as well as its own recent history of distinguishing rather than overruling the criminal-constitutional innovations of the Warren Court. Instead of overruling Noia, the Court chose to restrict that case to its facts, rejecting any broader application than those facts would require. Justice Rehnquist, writing for the majority, began his analysis by noting that the scope of federal collateral review is a matter of statutory interpretation, but that the Court does not write on a “clean slate in construing” the federal collateral jurisdiction statutes.

100. See 433 U.S. at 76. It cannot be said that Sykes delayed in seeking federal habeas relief or that the state would have been harmed in attempting to retry him, as his federal petition was filed 10 months after his state trial. See Rosenberg, supra note 20, at 396 n.243. The federal district court, instead of holding an evidentiary hearing on the admissibility of the confession, gave the state 90 days to hold such a hearing. See Sykes, 528 F.2d 522, 528 (1976), rev'd, 433 U.S. 72 (1977).
102. Sykes withdrew a claim of ineffective assistance of trial counsel because this issue had not been exhausted in the state courts. 433 U.S. at 105 n.6 (Brennan, J., dissenting). See Rose v. Lundy, 455 U.S. 509 (1982).


105. See 433 U.S. at 88 n.12.

106. Id. at 77. See 28 U.S.C. § 2254 (1976). Judge Carl McGowan believes that the decisions in Francis and Sykes are better explained as an exercise of equitable discretion, growing out of concerns for federalism, rather than any statutory or constitutional interpretation. See McGowan, Federal Jurisdiction: Legislative and Judicial Change, 28 CASE W. RES. L. REV. 517, 544 (1978). This may be, but the Court can only exercise its equitable discretion after it determines that Congress has not dictated another method of handling the issue and desires the federal courts to resolve the issue based on equitable principles.

107. See 433 U.S. at 77. The opinion reviewed the expansion of federal habeas jurisdiction. See id. at 78-80. This review demonstrated an uneven and, at times, inconsistent handling...
brief review of the original 1867 statute and of the various issues raised by the federal court's exercise of its collateral jurisdiction was then undertaken to illustrate the "Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." Justice Rehnquist attempted to free himself from the confines of precedent and prior statutory interpretation on the basis of the Court's inconsistent, schizophrenic, and unenviable record in the area of federal habeas corpus over the past one hundred years.

The opinion then reviewed the treatment of procedural forfeitures in federal collateral proceedings. As a preface, the Court observed that independent and adequate state procedural grounds that preclude direct federal review, have not been accorded the same weight in federal collateral proceedings. An examination of the Court's handling of procedural forfeitures in such proceedings led Justice Rehnquist to conclude:

To the extent that the dicta of *Fay v. Noia* may be thought to have laid down an all-inclusive rule rendering state contemporaneous-objection rules ineffective to bar review of underlying federal claims in federal habeas proceedings—absent a "knowing waiver" or a "deliberate bypass" of the right to so object—its effect was limited by *Francis*, which applied a different rule and barred a habeas challenge to the makeup of a grand jury.

By casting the application of *Noia* to trial forfeitures as dicta, Justice Rehnquist placed it on equal footing with *Francis*, which did not pretend to apply beyond its facts. As a result, the Court, not constrained by either case, found itself at the juncture of having to

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109. *See Sunal v. Large*, 332 U.S. 174, 184 (1947) (Frankfurter, J., dissenting) ("I think it is fair to say that the scope of habeas corpus in the federal courts is an untidy area of our law that calls for much more systematic consideration than it has thus far received."); *id.* at 188 (Rutledge, J., dissenting) ("Confusion in the opinions there is, in quantity.").

110. *See 433 U.S.* at 82.

111. *Id.* at 85. Chief Justice Burger, in a concurring opinion, argued that *Noia* was not a contemporaneous objection case where the lawyer plays a vital and pivotal role in the decision making process. As a result, according to Chief Justice Burger, *Noia* does not automatically apply in such situations. *See id.* at 91-93 (Burger, C.J., concurring); *see also Henderson v. Kibbe*, 431 U.S. 145, 157-58 (1977) (Burger, C.J., concurring) (*Noia* should not extend to midtrial procedural omissions since error could have been altogether avoided).
choose between two alternatives.\footnote{112} Given this analysis and the options presented, the Court’s choice to take the \textit{Davis-Francis} path is hardly surprising, as it is consistent with several of the Justices’ avowed hostility toward expansive federal post-conviction relief.\footnote{113}

The Court, while restricting, if not overruling, \textit{Noia}'s deliberate bypass test, once again reaffirmed the federal court’s “power” to exercise its federal collateral jurisdiction.\footnote{114} The focus of the inquiry, as it was in \textit{Noia}, remained on the appropriate exercise of that power.\footnote{115} In this determination, however, Justice Rehnquist’s majority opinion substantially departed from \textit{Noia}, which was premised upon the belief that this “power” should be exercised liberally.\footnote{116} The \textit{Sykes} Court, having preserved the “power,” sought to restrict its exercise significantly.\footnote{117} In so doing, the Court finally\footnote{118} offered reasons for its rejection of the deliberate bypass test and, presumably, for adopting the more restrictive cause and actual prejudice prerequisite.\footnote{119}

\footnote{112} See 433 U.S. at 87 (“We thus come to the crux of this case. Shall the rule of \textit{Francis} . . . barring federal habeas review absent a showing of ‘cause’ and ‘prejudice’ attendant to a state procedural waiver, be applied to a waived objection to the admission of a confession at trial? We answer that question in the affirmative.” (footnote omitted)).


\footnote{114} See 433 U.S. at 84.

\footnote{115} See id. The Court’s focus is an indication that it is not willing, as of yet, to return to the pre-\textit{Noia} days when there was a real and substantial question as to the power of the federal courts to entertain a petition containing an issue not properly presented to the state courts. E.g., Irvin v. Dowd, 359 U.S. 394, 405-06 (1959); Brown v. Allen, 344 U.S. 443, 485-87 (1953); United States ex rel. Kozicky v. Fay, 248 F.2d 520 (2d Cir. 1957), cert. denied, 356 U.S. 960 (1958); Dusseldorf v. Teets, 209 F.2d 754, 756-57 (9th Cir.), cert. denied, 347 U.S. 969 (1954); Schechtman v. Foster, 172 F.2d 339, 341 (2d Cir. 1949), cert. denied, 339 U.S. 924 (1950); \textit{Ex parte Whiteacre}, 17 F.2d 767, 768 (9th Cir. 1927). \textit{See Beverly, Federal-State Conflicts in the Field of Habeas Corpus, 41 CAI. L. REV. 483 (1953); Brennan, supra note 2; Reitz, supra note 7; Note, \textit{Federal Habeas Corpus For State Prisoners, 55 COLUM. L. REV. 196 (1955)}.}

\footnote{116} See \textit{Noia}, 372 U.S. at 421-23.

\footnote{117} See \textit{Sykes}, 433 U.S. at 84-85.

\footnote{118} As noted earlier, the Court’s opinions in \textit{Davis} and \textit{Francis} were conspicuous in their failure to address \textit{Noia}, or its policy underpinnings, a failing pointed out by the dissent in each case. \textit{See Francis}, 425 U.S. at 545-47 (Brennan, J., dissenting); \textit{Davis}, 411 U.S. at 249-50 (Marshall, J., dissenting).

\footnote{119} Justice Rehnquist structured his discussion in terms of reasons for rejecting \textit{Noia}, instead of in the affirmative with respect to the adoption of \textit{Francis}. \textit{See} 433 U.S. at 88. Were his reasons sufficiently convincing, they might support overruling \textit{Noia}, but they do not address a suitable replacement. The opinion automatically assumed that \textit{Francis} is the only alternative.
Noia is criticized by the Sykes Court for denigrating contemporaneous objection rules that the Court believed deserve greater respect because they are employed by a "coordinate jurisdiction within the federal system." Contemporaneous objection rules are viewed as furthering important administrative concerns by encouraging greater constitutional litigation in the state courts when "the recollections of witnesses are freshest, not years later in a federal habeas proceeding." These rules, according to Sykes, thereby encourage the timely development of a factual record in the state courts, and alleviate the need for federal fact-finding years after the alleged constitutional violations. In addition, the Court noted that if the objection is made and the evidence is suppressed, regardless of the outcome, there will be one less issue potentially subject to federal litigation, and even if the evidence is not suppressed, the federal court will "gain significant guidance from the state ruling.

Moreover, the deliberate bypass rule is also criticized by the Sykes Court for several other reasons: (1) It fosters calculated tactical forfeitures at trial in order to obtain an advantageous subsequent reversal of the conviction in the federal collateral court; (2) it...
makes the state appellate courts less attentive to their own proce-
dural rules by forcing those courts into the choice of either enforcing
their procedural rules and having the federal courts rule on the for-
feited issues without any state court input or ignoring the procedural
rules in order to review the issues in advance of the federal courts; and (3) it detracts from the prominence of the trial as the “main
event,” by reducing it to a tryout on the road to the federal courts. In contrast, contemporaneous objection rules are praised by the Sykes Court for encouraging the litigation of all claims that will have an impact on the outcome of the trial at a time when society has gathered all its resources for such a resolution, thereby promot-
greater finality and certainty in the criminal process.

2. Cause and Actual Prejudice, Applied But Not De-
defined.—Although the Supreme Court in Sykes presented reasons for
adopting the cause and actual prejudice standard, it once again
failed to provide any content or meaning to those terms, thereby
leaving that task for future resolution. The full impact and import of the Court’s restriction of federal post-conviction review cannot be
evaluated given its unfinished nature. The failure to define cause and prejudice makes it impossible to determine whether this requirement will enhance the administrative, finality, and federalism values which the Court perceived to be neglected or abused by the Noia standard. The Court, upon adopting a new prerequisite to federal relief, should provide notice to all the participants of what is expected. Unfortunately, the lower federal courts and the parties to the litigation are not given much guidance in determining what evidence must be

Review of State Criminal Convictions, 49 U. CH. L. REV. 741, 770 (1982). But see Sykes, 433 U.S. at 103-04 n.5 (Brennan, J., dissenting) (sandbagging argument unsupported and illogical); Hill, supra note 39, at 1061 (sandbagging illogical); Rosenberg, supra note 20, at 415 (sandbagging illogical).

125. 433 U.S. at 89-90. But see Rosenberg, supra note 20, at 416.
126. Id. at 90.
127. See id. Contra id. at 115-16 (Brennan, J., dissenting).
128. Id. at 87. Cause and actual prejudice, as developed in Davis and extended in Francis, was never defined in those opinions. Justice Stevens, however, expressed the belief that Sykes represented the manner in which the lower courts were actually applying the deliberate bypass test. Id. at 94 & n.1 (Stevens, J., concurring).
129. Justice Stevens agreed with the Court’s failure to provide a definition to the cause and prejudice standard. He perceived that the competence of counsel, the procedural context of the waiver, the constitutional rights at stake, and the overall fairness of the proceeding were more significant than the language of any test the Court might adopt. Id. at 95-96 (Stevens, J., concurring); see Rose v. Lundy, 455 U.S. 509, 538 (1982) (Stevens, J., dissenting); Hill, supra note 39, at 1076. But see Tague, supra note 56, at 21-22 (failure to define terms “cavalier, if not incomprehensible”).
presented and how this evidence is to be evaluated in deciding whether cause and actual prejudice exists.\textsuperscript{130}

Instead, Sykes indicates what is not cause and actual prejudice, a method of definition by elimination that is to be repeated in subsequent cases.\textsuperscript{131} The only explicit statement on cause is that it is a stricter standard than deliberate bypass.\textsuperscript{132} By definition, this precludes federal collateral review where the forfeiture results from the intentional and knowing action or inaction of the defendant or his attorney.\textsuperscript{133} Beyond this limited reference, guidance must be sought from the Court's reasoning for rejecting the deliberate bypass test and the facts of three cause and prejudice cases.

The Court's policy considerations, while possibly counseling a restriction of federal collateral review, do not help define cause and prejudice. The administrative and deterrent concerns advocate the enforcement of only deliberate forfeitures. The values of comity and finality speak in favor of precluding all federal collateral review regardless of the reason for the forfeiture.

In addition, the factual records of Davis, Francis, and Sykes are not very helpful. In Davis, the Court relied on the district court's statement that the prisoner had not offered a reason for counsel's failure to discover and to raise the grand jury discrimination issue properly.\textsuperscript{134} The Court did not clarify whether the inability to discover and properly present the constitutional claim is sufficient cause, or whether it was holding that the prisoner's failure to assert any reason simply precludes the finding of cause. The latter, while not defining cause, places the burden of proof on the prisoner, which

\textsuperscript{130} See Wells, The Role of Comity in the Law of Federal Courts, 60 N.C.L. REV. 59, 82 (1981). Although Noia may have painted with a broad brush, at least the strokes attempted to give notice of the standard to be applied. See Noia, 372 U.S. at 438-40. The Court could have taken a number of cases to review that would have permitted a fuller expression of the Court's intentions. Contra Sanders v. United States, 373 U.S. 1, 32 (1963) (Harlan, J., dissenting).


\textsuperscript{132} 433 U.S. at 87. Many commentators have assumed that Sykes marked a sharp departure from, and eviscerated Noia. See Hart & Wechsler, supra note 56, at 257-59; Hill, supra note 39, at 1051; Tague, supra note 56, at 4. Contra Seidman, supra note 74, at 464-66; see also Sykes, 433 U.S. at 94-96 (Stevens, J., concurring) (Sykes consistent with way federal courts are applying Noia).

\textsuperscript{133} Deliberate bypass has been defined as an intentional and knowing decision, by the defendant himself, not to raise the constitutional claim. See Noia, 372 U.S. at 439. This test may have been modified to include deliberate and intelligent decisions of counsel as well. See Henry v. Mississippi, 379 U.S. 443, 440-50 (1965).

\textsuperscript{134} 411 U.S. at 243-44.
burden will not be met by a silent record. The former may be interpreted as precluding a finding of cause any time the constitutional issue could have been timely discovered and presented, although the Davis opinion does not indicate what degree of diligence or competence counsel must exercise, or whether this is even a factor to be considered.\textsuperscript{136}

Both Davis and Francis applied the actual prejudice standard to alleged grand jury discrimination claims.\textsuperscript{138} The Davis opinion found no prejudice because the grand jury had indicted the black prisoner's two white codefendants, and the case against him justified the indictment.\textsuperscript{137} In Francis, the Court affirmed a remand to the district court for a determination of prejudice.\textsuperscript{138} The district court had already found a constitutional violation and cause for the failure to properly assert the claim.\textsuperscript{139} Given the nature of the constitutional violations alleged and the Court's action, it may be that actual prejudice requires the petitioner to demonstrate that the indictment would not have been returned by a constitutionally composed grand jury, an almost insurmountable requirement.\textsuperscript{140} A standard this stringent would raise serious questions as to the Court's intention to surreptitiously foreclose collateral review of certain previously forfeited constitutional claims.

Finally, in Sykes, the Court merely asserted that the prisoner did not offer any evidence to establish cause and that the evidence of guilt was "substantial to a degree that would negate any possibility of actual prejudice resulting . . . from the admission of his inculpatory statement."\textsuperscript{141} Unfortunately, the Court did not explain what quantum of evidence is needed to establish actual prejudice. Justices White and Brennan have interpreted the Sykes Court's formulation of actual prejudice as a variation of the harmless error test.\textsuperscript{142}
interpretation, however, is unpersuasive for two reasons. First, the harmless error rule already applies to federal post-conviction litigation, and merely restating the same test under a different name would be confusing and redundant. Second, the Court appears to be placing the burden of proof on the defendant to show cause and actual prejudice, while the harmless error rule places the burden of proof on the state. Had the Court intended to define actual prejudice as harmless error, even with the burden of proof on the defendant, it could have clearly stated so—yet, it did not. Rather, the *Sykes* opinion intended to change the *status quo* and significantly restrict collateral review in the event of a procedural forfeiture. The Court's conclusion that the evidence at *Sykes*’ trial was substantial was, most likely, not an approval of an already existing standard, as much as an indication that *Sykes* would not and could not meet whatever standard the Court would subsequently adopt.

Finally, Justice Rehnquist, writing for the Court, reassured that however cause and actual prejudice may be defined, it will not foreclose federal review when to do so would cause a "miscarriage of justice." The opinion, however, consistently failed to provide any content to the ambiguous terms it used, and "miscarriage of justice" is no exception. The Court left this term completely devoid of any content, thereby subjecting it to future manipulation as the majority sees fit. Justice Rehnquist did not clarify whether a miscarriage of justice represents an exception to the cause and prejudice requirements or whether it will qualify as cause and prejudice. Clearly, the conviction of an innocent person would be a miscarriage of justice, but short of this, the opinion did not state which constitutional violations coupled with what degree of prejudice would be considered such a miscarriage.

144. See Soloff, *supra* note 120, at 332.
146. See 433 U.S. at 90-91.
147. For a discussion of the Court's use of the term "miscarriage of justice," see infra text accompanying notes 234, 316-20.
148. See *Hill*, *supra* note 39, at 1075; *Tague*, *supra* note 56, at 29. It is not clear whether the Court will require a showing of factual innocence—based on all the facts the defendant was not guilty—or legal innocence—considering all the admissible evidence the prosecution did not establish all the elements of the crime beyond a reasonable doubt. In reality, the two forms of innocence may be significantly different and may dictate different results.
In the wake of the *Sykes* decision, the lower courts and the parties were left to litigate and formulate standards based on vague and inconsistent policy. Little guidance was provided to help establish which future cases would be evaluated to determine if cause and actual prejudice existed. As a result, the plethora of cases arising under *Sykes* reveal the entire spectrum of judicial philosophies on the scope of federal collateral review. The Supreme Court’s failure to establish the parameters of the cause and actual prejudice prerequisite is disconcerting given the realm of human conduct and the infinite reasons why a particular constitutional claim is not properly preserved.

See Cover & Aleinikoff, *supra* note 83, at 1088-91. It has been suggested that the Court is interested in only preventing the gross injustices of the 1930’s, 1940’s, and 1950’s, when brutally coerced confessions, mob dominated trials, extremely incompetent representation, and highly inflammatory pre-trial publicity were not uncommon and were found to violate fourteenth amendment due process. Rosenberg, *supra* note 20, at 439; see Rose v. Lundy, 455 U.S. 509, 543-44 (1982) (Stevens, J., dissenting).

149. E.g., Gibson v. Spalding, 665 F.2d 863, 866-67 (9th Cir. 1981) (tactical decision requires sixth amendment violation to show cause; attorney inadvertence or ignorance of the law may satisfy cause; prejudice is shown by burden shifting instruction), vacated and remanded, 456 U.S. 966 (1982); Runnels v. Hess, 653 F.2d 1359, 1363-64 (10th Cir. 1981) (rejects use of plain error; ineffective assistance of counsel short of a sixth amendment violation may equal cause); Huffman v. Wainwright, 651 F.2d 347, 350-52 (5th Cir. 1981) (court has difficulty defining cause and actual prejudice); Myers v. Washington, 646 F.2d 355, 360 (9th Cir. 1981) (cause is found where change in the law could not have been predicted), vacated and remanded, 456 U.S. 921 (1982); Carter v. Jago, 637 F.2d 449, 454 (6th Cir. 1980) (change in due process doctrine due to Mullaney v. Wilbur, 421 U.S. 684 (1975) (requiring, in some circumstances, for the prosecution to disprove affirmative defenses, equals cause; prejudice is presumed if burden of proof is shifted to the defendant), cert. denied, 456 U.S. 980 (1982); Cole v. Stevenson, 620 F.2d 1055, 1063 (4th Cir.) (change in the law due to *Mullaney* and futility do not equal cause), cert. denied, 449 U.S. 1004 (1980); Hockenberry v. Sowders, 620 F.2d 111, 114 (6th Cir. 1980) (cause and prejudice cannot be satisfied by plain error), cert. denied, 450 U.S. 933 (1981); Krzeminski v. Perini, 614 F.2d 121, 123 n.2 (6th Cir.) (plain error will equal cause and prejudice), cert. denied, 449 U.S. 866 (1980); Jurek v. Estelle, 593 F.2d 672, 682-83 (5th Cir. 1979) cert. denied, 450 U.S. 1001 (1981) (attorney misfeasance short of sixth amendment violation or ignorance of significant constitutional right is cause); Rachel v. Bordenkircher, 590 F.2d 200, 204 (6th Cir. 1978) (attorney inexperience, inattention, or lack of knowledge is cause where tactical decision not involved); Miller v. North Carolina, 583 F.2d 701, 705-06 (4th Cir. 1978) (where state exception to forfeiture rule requires analysis of prejudice and consequences of the failure to object, the federal court can review forfeited issues even if state courts did not excuse the forfeiture). See generally Goodman & Sallett, Wainwright v. *Sykes*: The Lower Federal Courts Respond, 30 HASTINGS L.J. 1683 (1979).
II. DEFINING CAUSE AND ACTUAL PREJUDICE, A MEAGER BEGINNING

A. Engle v. Issac—Cause Is Not Futility or Attorney Ignorance

In 1982, the Supreme Court decided that the time had come to start providing content to the terms "cause" and "actual prejudice," a task that the Sykes opinion had left to the future. Two cases were decided: Engle v. Isaac, which involved three separate state prisoner attacks on burden-shifting, self-defense jury instructions; and United States v. Frady, a District of Columbia prisoner's challenge to malice and intent jury instructions. Justice O'Connor, writing for the Court in both Engle and Frady, clearly indicated that the Court, consistent with the judicial and extra-judicial remarks of various members, would continue its determined drive to restrict federal collateral review at every possible instance. To a great extent, these cases were easy vehicles for the Court to further entrench the policies and standards enumerated in Sykes and to narrow significantly the hoop a defaulting post-conviction petitioner is required to jump through before obtaining federal review. Frady's conviction was almost twenty years old, and the trial record contained significant evidence of guilt, while the Isaac claims rested on dubious constitutional grounds, which, for at least one of the prisoners, may have been deliberately forfeited at trial. The Court, in these opin-

150. See 433 U.S. at 90-91.
151. 456 U.S. 107 (1982). Isaac involved three separate state prisoner habeas cases consolidated in the state's petition for a writ of certiorari. Id. at 107 n.*.
154. See 456 U.S. at 154-57. On direct appeal the United States Court of Appeals for the District of Columbia, sitting en banc, upheld Frady's first degree murder conviction by a vote of eight to one. See Frady v. United States, 348 F.2d 84 (D.C. Cir.) (en banc), cert. denied, 382 U.S. 909 (1965) (Frady I). Even Justice Brennan's dissenting opinion noted that "if the Court had concluded that there was not 'plain' error, it might be difficult to support a dissent from that conclusion, given the particular facts of this case." 456 U.S. at 187 (Brennan, J., dissenting). For the facts of Frady, see infra notes 241-52 and accompanying text.
155. The Supreme Court noted that the Isaac respondents had asserted two constitutional claims; it rejected one of them and was only willing to find the other "plausible." See 456 U.S. at 122. In addition, at oral argument, counsel for Isaac admitted to considering an objection to the jury instruction and rejecting the idea due to the apparent settled state of Ohio law. See Transcript of Oral Argument at 26-27, Isaac, 456 U.S. 107 (1982); cf. Noia,
ions, continued to define, at least, cause, and most likely, prejudice, by what they are not, leaving the realm of what they are to ever shrinking possibilities. Thus, the protection the federal courts can offer against injustice is significantly diminished.

The Court chose Isaac for an exposition on cause, leaving Frady to address the issue of actual prejudice. In Isaac, the Court, in rather sweeping language, extends the reaches of cause and actual prejudice to constitutional claims impugning the accuracy of the guilt-innocence determination, and at the same time, restricts the definitional scope of the cause requirement. In addition, while the Sykes Court had promised that the cause and prejudice standard would not preclude review in event of a miscarriage of justice, the Isaac Court adamantly reaffirmed the conjunctive nature of the dual prerequisite, regardless of the prejudice ensuing from the constitutional violation.

1. Extending the Cause and Prejudice Prerequisite to Guilt Related Constitutional Claims.—Isaac involved three consolidated cases arising out of separate criminal trials in the state of Ohio, all of which contained similar substantive and procedural federal questions. The defendants Isaac, Hughes, and Bell were each tried for an assaultive offense, with each asserting a claim of self-defense. At trial, the various defense counsel did not object to a jury in-
struction that placed the burden on the defendant to prove self-defense by a preponderance of the evidence, consistent with long standing Ohio case law. All three defendants were convicted of lesser included offenses. The Isaac respondents were precluded from litigating the constitutionality of the self-defense burden of proof instructions in the state courts because of their failure to raise this issue properly at trial. Unable to obtain redress in the state courts, these prisoners individually sought federal habeas review in entirety due to the uncertain nature of the new Ohio criminal code Hughes and the others were indicted under; the specific self-defense issue, however, was not delineated nor pursued on appeal. 456 U.S. at 112 n.6; Isaac Joint Appendix, supra note 145, at JA48, JA50.

164. See Isaac Joint Appendix, supra note 161, at JA3, JA43-JA47 (for the jury instructions given in Isaac's and Hughes' cases). The instruction from Bell's trial is not reproduced in the Joint Appendix, but is reported to be very similar to that used in Isaac's and Hughes' cases. See Brief of Respondent Kenneth L. Bell at 7 & n.4.

165. 456 U.S. at 110 (citing State v. Seliskar, 35 Ohio St. 2d 95, 298 N.E.2d 582 (1973); Szalkai v. State, 96 Ohio St. 36, 117 N.E. 12 (1917); Silvus v. State, 22 Ohio St. 90 (1872)). In 1974, the Ohio Legislature enacted a new criminal statute that ambiguously implicated the prosecution's burden of proof. OHIO REV. CODE ANN. § 2901.05A (Page 1975); See 456 U.S. at 111 (for the wording of the Ohio code). At the time of the Isaac respondents' trials, most of the Ohio courts assumed that the 1974 code did not change the traditional burden-of-proof rules. E.g., State v. Rogers, 43 Ohio St. 2d 28, 30, 330 N.E.2d 674, 676 (1975) ("self-defense is an affirmative defense, which must be established by a preponderance of the evidence"), cert. denied, 423 U.S. 1061 (1976); see 456 U.S. at 111 n.2. In 1976, subsequent to each of the Isaac respondents' trials, the Ohio Supreme Court ruled that the 1974 criminal code placed the burden of disproving self-defense beyond a reasonable doubt on the prosecution, once the defendant had presented enough evidence to raise the issue at trial. State v. Robinson, 47 Ohio St. 2d 103, 110-13, 351 N.E.2d 88, 91-95 (1976). The Robinson decision was based on an interpretation of state law and specifically avoided the federal questions involved. See id. at 113 n.11, 351 N.E.2d at 95 n.11.

166. Isaac was convicted for aggravated assault; Bell for murder; and Hughes for manslaughter. See 456 U.S. at 112-14.

167. For the wording of the Ohio procedural rule precluding appellate review of jury instructions that are not objected to before the jury retires to deliberate, see 456 U.S. at 115 n.15. Hughes and Bell did not raise an objection to the self-defense jury instruction in the state courts. 456 U.S. at 113-14. Isaac, subsequent to the Ohio Supreme Court's decision in State v. Robinson, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976), raised the jury instruction issue for the first time through a supplemental assignment of error in the Court of Appeals. See 456 U.S. at 115. That court denied Isaac relief due to his failure to raise the issue properly at trial. State v. Isaac, No. 346 (Ohio Ct. App. Feb. 11, 1977); see Isaac Joint Appendix, supra note 161, at JA10-JA11. The Ohio Supreme Court refused to grant Isaac leave to appeal, State v. Isaac, No. 77-412 (July 20, 1977), on the same day that it determined that Robinson was to be applied retroactively to the effective date of the 1974 criminal code, but only to those defendants who had properly preserved the issue at trial or who had been tried before a judge without a jury. State v. Humphries, 51 Ohio St. 2d 95, 102-03, 364 N.E.2d 1354, 1359 (1977). See 456 U.S. at 115-16.

168. All three prisoners had exhausted their state remedies because no state forum remained open to them. See 456 U.S. at 126 n.28. Section 2254(b) habeas applicants must exhaust those remedies available in state courts before seeking federal relief. See Noia, 372 U.S. at 434-35.
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the various federal district courts of Ohio. Each raised a due process claim with respect to the self-defense instruction. Three different district judges denied each of them relief. On appeal, the United States Court of Appeals for the Sixth Circuit eventually reviewed Isaac's case en banc and, based upon Sykes, reversed the district court, finding both cause, due to the futility of raising the constitutional issue at the time of Isaac's trial, and actual prejudice, due to the nature of the burden shifting instruction. Based upon the Sixth Circuit en banc decision, two Sixth Circuit panels ordered Bell and Hughes released or retried within a reasonable time.

Reviewing the court of appeals decision, Justice O'Connor found that the habeas applicants stated one "colorable" constitutional claim amongst their various allegations. This finding forced


171. Isaac v. Engle, 646 F.2d 1129 (6th Cir. 1980) (en banc), rev'd, 456 U.S. 107 (1982). Prior to the en banc decision, a panel had granted Isaac relief on both the procedural and the substantive issues. 646 F.2d 1122 (6th Cir. 1980).

172. 646 F.2d at 1133-34. The panel's resolution of the substantive issue varied from the en banc majority, with the panel concluding that Ohio's application of its contemporaneous objection rule to preclude Isaac review violated due process. 646 F.2d 1122, 1126 (6th Cir. 1980). They did not decide whether the jury instruction itself violated due process. Compare 646 F.2d 1122 (panel) with 646 F.2d at 1131, 1135-36 (en banc). The majority and dissent in the Supreme Court also engaged in a debate over the claims presented in Isaac's appeal. See 456 U.S. at 123 n.25 (various claims presented); id. at 137-44 (Brennan, J., dissenting) (one claim presented).

The Supreme Court appears to have formulated the substantive issues differently than the court of appeals. See 456 U.S. at 119-123; 646 F.2d at 1135-36.


174. 456 U.S. at 122. The Isaac respondents appear to have asserted three different claims at various times in the federal courts: (1) that the 1974 Ohio criminal code established the absence of self-defense as an element of the various assaultive crimes charged and, as a result, the prosecution has the burden of disproving this defense beyond a reasonable doubt; (2) that irrespective of the statutory change, each of the crimes charged contained an element of knowing and purposeful behavior that required the prosecution, in carrying its burden of proof, to disprove self-defense once the issue was raised by the defendant; and (3) that the selective retroactive application of the rule of State v. Robinson, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976), by the Ohio Supreme Court violated due process. See 456 U.S. at 119-23 & n.25. The Court rejected the first allegation by concluding that the 1974 statutory changes did not establish the absence of self-defense as an element of the charged offenses. The opinion
the Court to confront the forfeiture of this claim in the state courts. Initially, the Isaac respondents had argued that their claims differed from those presented in the prior cause and prejudice cases because they implicated the validity of the truth-finding function of the trial, and, therefore, a less stringent prerequisite should determine the availability of federal post-conviction review. In rejecting this argument, the Court reaffirmed many of the policies exalted in Sykes and concluded that the reasons for rejecting the more liberal Noia deliberate bypass standard in favor of the more restrictive cause and actual prejudice prerequisite are not altered by the nature of the constitutional claims presented. Instead, "while the nature of a constitutional claim may affect the calculation of cause and ac-

interpreted Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson v. New York, 432 U.S. 197 (1977), as permitting the state to determine who should bear the burden of proving self-defense. See 456 U.S. at 119-21. With respect to the second claim, the Court found this to state a "colorable" or "plausible" constitutional issue on the premise that several lower federal and state courts had agreed with the prisoners' position, while also indicating that numerous other courts had not, including the court out of which these cases arose. See id. at 121-23 & nn.23 & 24. The Court rejected the selective retroactive due process claim by noting that this issue was not part of Isaac's original habeas petition and that the district judge did not identify such a claim from the petition. Id. at 124 n.25. Justice Brennan, in contrast, found that Isaac had properly raised the retroactive due process argument in the lower courts, but that the issue had not been exhausted, which should have thereby required the Court to dismiss Isaac's petition because it contained exhausted and unexhausted claims. Id. at 137-144 (Brennan, J., dissenting). See Rose v. Lundy, 455 U.S. 509, 518-19 (1982) (requiring "total exhaustion" of state remedies before habeas application).

175. See Brief of Respondent Kenneth L. Bell at 28-31; Brief for Respondent Lincoln Isaac at 10-13. Accepting the Respondents' position, Justice Brennan concluded in his dissent:

In sum, this Court has heretofore adhered to the principle that "[i]n the administration of criminal justice, our society imposes almost the entire risk of error upon itself," because "the interests of the defendant are of such magnitude." In the context of the cases before us today, this principle means that a habeas claim that a mistake was made in imposing that risk of error cannot be cavalierly dismissed as just another "type of claim raised by the prisoner." In my view, the Sykes standard is misguided and insupportable in any context. But if it is to be suffered to exist at all, it should be limited to the arguable peripheries of the trial process: It should not be allowed to insulate from all judicial review all violations of the most fundamental rights of the accused.


176. The Isaac Court reaffirmed the virtues of finality. 456 U.S. at 126-27. Justice O'Connor also opined that federal collateral review detracts from the prominence of the trial and may cause a reduced attention to constitutional concerns by the trial participants. Id. at 127 & n.32. In addition, collateral review is criticized for depriving society and the state of the right to punish admitted offenders and for frustrating the state courts' good faith efforts at honoring and interpreting the Constitution. Id. at 127-28. These policy considerations are discussed infra text accompanying notes 338-455.

177. 456 U.S. at 129.
tual prejudice, it does not alter the need to make that threshold showing. Justice O'Connor then expansively reaffirmed "that any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief."

After this reiteration of the applicability of the cause and prejudice prerequisite, the Court proceeded to evaluate cause under the two circumstances advanced by the prisoners: first, that the advancement of any due process claim in the Ohio courts would have been futile due to long standing Ohio law requiring the defendant to prove affirmative defenses; and second, that at the time of their trials, the defendants could not have known that the due process clause addressed the burden of proving affirmative defenses.

2. Cause—Futility is No Excuse for a Procedural Forfeiture.—Justice O'Connor dismissed the futility argument in a single paragraph with the conclusion that the principles of Sykes do not permit the habeas petitioner to withhold his federal question from the state courts out of the belief that those courts would be unsym-

178. Id.
179. Id. (emphasis added).
180. The Court rejected the habeas applicants' claims of cause and, therefore, did not consider the existence of actual prejudice. See id. at 134 n.43. In so doing, the Court reaffirmed the conjunctive nature of the cause and prejudice requirement, despite the prisoners' argument that prejudice was so great that it should permit relief even in the absence of cause.
182. The Respondents had argued that futility is a generic term for at least three different situations: (1) Futility in fact—regardless of defense counsel's perceptions, the trial court (and the appellate courts) was constrained by a higher court decision which would have prohibited the relief sought, see Brief of Respondent Hughes at 15-21; (2) Practical futility—again regardless of counsel's mental perceptions, if it "seems reasonably likely that any such objection would not serve this purpose [the prevention of trial error] then "actual" or "practical" futility can be said to exist," see Brief of Respondent Kenneth L. Bell at 15-25; and (3) Perceived futility—where defense counsel at trial fails to object due to his determination that state law is so well settled that it would do no good to object, see Brief of Respondent Kenneth L. Bell at 53-54; Brief for the United States as Amicus Curiae at 17. While the Supreme Court did not distinguish between the various types of futility outlined above, the opinion—by referring to the defendant's failure to raise an issue due to his perceptions on the chances for relief in the state courts versus the federal courts—clearly indicated that it was addressing the third form of futility. See 456 U.S. at 130 & n.36. This would be consistent with the Court's formulation of a showing of cause that focuses on the attorney's reasons for failing to raise an issue in the state courts.
pathetic to his claim. Reliance on long standing state precedent will not excuse a procedural forfeiture because "[e]ven a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid," and alter its position.

The Court, however, failed to recognize that futility is an established exception to the exhaustion requirement and arguably reflects the intent of Congress. The habeas corpus statute, in codifying the judicially created exhaustion doctrine, specifically exempts the exhaustion of state remedies due to "the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." The federal courts have consistently interpreted this section as not requiring the pursuit of state remedies when they find that the state courts, due to their interpretation of the Constitution, would not provide the relief requested. While the nature of the

183. 456 U.S. at 130.
184. Id.
185. E.g., Hawkins v. West, 706 F.2d 437, 440-41 (2d Cir. 1983); Zelenka v. Israel, 699 F.2d 421, 423 (7th Cir. 1983); Wiley v. Sowders, 647 F.2d 642, 647 (6th Cir.), cert. denied, 454 U.S. 1091 (1981); Sweet v. Cupp, 640 F.2d 233, 236-37 (9th Cir. 1981); Perez v. Wainwright, 594 F.2d 159, 161 (5th Cir. 1979), vacated and remanded on other grounds, 447 U.S. 932 (1980); Tatzel v. Hanlon, 530 F.2d 1205, 1206 (5th Cir. 1976); Eaton v. Wyrick, 528 F.2d 477, 482 (8th Cir. 1975); Ham v. North Carolina, 471 F.2d 406, 407 (4th Cir. 1973); United States ex rel. Condon v. Erickson, 459 F.2d 663, 667 (8th Cir. 1972); Perry v. Blackledge, 453 F.2d 856, 857 (4th Cir. 1971), aff'd on other grounds, 417 U.S. 21 (1974). See also Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1098-1100 (1970) (given the economics involved, it makes little sense to require a state prisoner to present a claim to state courts when such claim has been recently and firmly rejected by them).
186. 28 U.S.C. § 2254(b) (1976) explicitly states:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

Id. (emphasis added); see also cases cited supra note 169.
187. The Supreme Court has noted that the congressional committee notes on the exhaustion section of 1948 amendments to the habeas corpus act specifically state that these amendments codify the exhaustion doctrine as stated in Ex parte Hawk, 321 U.S. 114 (1944); Darr v. Burford, 339 U.S. 200, 210-14 (1950); see also Ex parte Royall, 117 U.S. 241 (1886) (denying habeas relief before trial); Ex parte Fonda, 117 U.S. 516 (1886) (denying habeas relief after trial but before direct appellate review).
188. 28 U.S.C. § 2254(b) (1976).
189. E.g., Zelenka v. Israel, 699 F.2d 421 (7th Cir. 1983). The Zelenka court stated: [W]hen the state courts have held adversely to the petitioner's position in other cases or state law makes the pursuit of a state remedy futile, the prisoner need not exhaust the state procedures for that remedy. When the state's position on an issue is unclear or when a reasonable possibility exists that the state will change its view,
factual showing necessary to establish futility may vary from court to court, there has been a consistent determination that Congress did not intend to require the exhaustion of state remedies when such exhaustion would be futile.

The exhaustion doctrine, as developed by the Supreme Court and codified by Congress, is premised on principles of comity and federalism. These principles teach that in our dual system of state and federal courts, the state courts should be given the first opportunity to entertain and correct constitutional claims arising out of a state criminal trial. Once the state courts have had the opportunity to do so, the federal courts are permitted, by a grant of jurisdiction, to entertain the federal constitutional questions. In recognition of these principles, a federal habeas petitioner, prior to filing a federal habeas petition, is generally required to litigate his claims in

however, a state remedy is adequate and must be resorted to.

Id. at 423 (citation omitted). See also Sweet v. Cupp, 640 F.2d 233 (9th Cir. 1981). The Sweet court stated that:

[A] petitioner may be excused from exhausting state remedies if the highest state court has recently addressed the issue raised in the petition and resolved it adversely to the petitioner, in the absence of intervening United States Supreme Court decisions on point or any other indication that the state court intends to depart from its prior decisions.

Id. at 236. Accord Layton v. Carson, 479 F.2d 1275, 1276 (5th Cir. 1973) ("If the state's highest court has recently rendered an adverse decision in an identical case, and if there is no reason to believe that the state court will change its position, a federal court should not dismiss a petition for federal habeas corpus for failure to exhaust remedies."); Perry v. Blackledge, 453 F.2d 856, 857 (4th Cir. 1971) ("Futility exists where there are decisions of the highest state court directly against the claim of the petitioner and there appears no indication that the state court is inclined to change its position."), aff'd, 417 U.S. 21 (1974).

190. E.g., Sweet v. Cupp, 640 F.2d 233, 237 (9th Cir. 1981) (state high court pronouncement based on test discarded by the United States Supreme Court would not establish futility); Tatzel v. Hanlon, 530 F.2d 1205, 1207 (5th Cir. 1976) (state high court decision interpreting "lewdness" in statute involving "prostitution, lewdness and assignation" did not render futile state litigation on prostitution and assignation aspects); Ham v. North Carolina, 471 F.2d 406, 407-08 (4th Cir. 1973) (court found that North Carolina had ruled defendants claim meritless under both state and federal constitutions); Perry v. Blackledge, 453 F.2d 856, 857 (4th Cir. 1971) (North Carolina had twice in the past year unequivocally rejected claims precisely like those of the defendant), aff'd, 417 U.S. 21 (1974); Lott v. Dalsheim, 474 F. Supp. 897, 899-900 (S.D.N.Y. 1979) (no futility where state courts have become increasingly responsive to federal constitutional challenges to parole board decisions and recent amendments to state parole statute added uncertainty to scope of state review in parole decisions).

191. See cases cited supra notes 185, 189-90.


the state courts. Federalism and comity do not require state litigation, however, when the state courts have conclusively spoken on the issue in another case. In such an instance, the state courts have been provided with the opportunity to address the constitutional claim, even if this review occurs in a case other than the petitioner's. The excusal of the exhaustion requirement due to futility stems from a respect for the state courts and their pronounced judgment on federal constitutional issues, as well as from the realization that repeated litigation of a firmly resolved issue in the state courts overtaxes the state judiciary and deprives the habeas petitioner of the relief that he seeks, without any significant benefit to the state or the principles of federalism and comity.

The Sykes cause and prejudice standard is grounded on these same principles of federalism and comity, which provide the state courts with the first opportunity to address and correct federal constitutional violations. Consistent with this preference for initial state court review, the Supreme Court, as a means of encouraging full adherence to state procedural requirements, has determined that the failure to present an issue properly to the state courts, which forfeits the right to litigate that issue in the state courts, can only be litigated in the federal post-conviction courts under very narrow circumstances. In Isaac, however, Justice O'Connor did not explain why these concepts of federalism and comity will permit the federal litigation of unexhausted issues upon a showing of futility, but will not permit the excusal of a procedural forfeiture premised on the same proof of futility.

197. See L. Yackle, Post-Conviction Remedies § 17, at 89-90 (1981); see also cases cited supra notes 185, 189-90.
198. Cf. L. Yackle, supra note 197, § 67, at 281 (probability of success is not generally a criterion of state remedy's effectiveness, although futility doctrine may be helpful in some instances).
199. See 433 U.S. at 88-90; see also Francis, 425 U.S. at 541.
201. This is true, unless the Court in Isaac was also indicating that futility is no longer an acceptable alternative to the exhaustion of state remedies. The opinion did hint that the resolution of an issue in the state courts is not to be respected as final. "Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid." 456 U.S. at 130. The opinion did not indicate whether issues that have not been firmly resolved by the United States Supreme Court must be litigated in the state courts, regardless of how firmly those courts have spoken, in order to preserve the issue for federal habeas review. But see Hawkins v. West, 706 F.2d 437, 440-41 (2d Cir. 1983) (recognizing
In addition, the difference between the failure to exhaust and a procedural forfeiture may be temporal. An unexhausted claim after the passage of time may be forfeited under state procedural rules. Whether the federal court reviews the unexhausted issue on a proper showing of futility, before or after it has been forfeited, the consequences are the same; the state courts have affirmatively spoken on the issues presented, but they have not had the opportunity to examine these issues in a particular case in advance of the federal courts. From the state’s perspective, the issues have not been litigated in the state courts in either situation and for the same reason: a clear pronouncement on the federal question by the state’s highest court.

The Court’s opinion in *Isaac* creates an interesting and ironic situation with respect to futility. On the one hand, if the state is still willing to review an unexhausted claim, the federal courts can exercise their collateral power upon a showing that further litigation in the state courts would be futile, even though an adequate state forum remains open to review the issue. On the other hand, if the state courts have refused to consider the federal question because of a procedural forfeiture premised on the same showing of futility, the federal court is prohibited from addressing the issue, despite the fact that this prohibition will preclude any and all review of the constitutional question. Justice and fairness would appear to dictate exactly the opposite result.

The Court’s perfunctory rejection of futility as cause may also undermine some of the reasons enunciated in *Sykes* for limiting collateral review and may have a negative effect on the administration of the state courts. *Sykes* criticized the deliberate bypass standard for discouraging the enforcement of procedural forfeitures by the state courts. The rejection of futility as cause may have the same effect. Anytime counsel recognizes a federal issue that has been the dilemma created by the ambiguous language in *Isaac*, but nevertheless adhering to the use of futility as a means of circumventing the exhaustion doctrine; Zelenka v. Israel, 699 F.2d 421, 423 (7th Cir. 1983) (where state courts have clearly held adversely to the defendant’s position or state law makes pursuit of remedy futile, the defendant need not exhaust state procedures).


204. This is another example of the “double or nothing” irony created by the Court’s procedural forfeiture analysis. *See Brown v. Allen*, 344 U.S. 443, 552 (1953) (Black, J., dissenting).

clearly rejected by the state's highest court, that issue must now be raised at trial and pursued throughout the state appellate process. This is true even though the state's lower courts are bound by the state's highest court's pronouncement and there are no circumstances that would indicate that the state's highest court is willing to change its position.\textsuperscript{208} The litigation of such issues will only lengthen state trials, increase the work of the state appellate courts, and place further economic and manpower burdens on those courts,\textsuperscript{209} without any corresponding benefit to either the individual litigants\textsuperscript{208} or the state.\textsuperscript{209} The state, in response, may be inclined toward relaxing its procedural rules to the point where it does not require the litigation of such issues in its courts,\textsuperscript{210} thereby creating the very problem that the Court sought to avoid in \textit{Sykes}.

Instead of hastily rejecting futility as a means of establishing cause, the Court could have formulated a definition of futility that would have protected the states' interest in reviewing constitutional issues,\textsuperscript{211} while relieving the state courts of the burden of relitigating

\begin{quotation}
\textsuperscript{206} See 456 U.S. at 130. Redundant state litigation appears to be the Supreme Court's desire in light of its rejection of futility as a means of finding cause. See \textit{id}.

\textsuperscript{207} While decrying the workload of the federal courts, the Court appears to be impervious to burdens on the state courts where the real brunt of the excessive litigation burden is borne.

\textsuperscript{208} The defendant is clearly harmed by the Court's action. He is now required to spend the time, money, and effort to litigate his claim to a foregone conclusion in the state courts, while languishing in prison before he can enter the federal forum. Yet, the Court speaks of the rehabilitative benefits of finality. A rejection of futility postpones finality during the pendancy of state and federal litigation, while an acceptance of futility would move the litigation to a speedier conclusion. See \textit{Isaac}, 456 U.S. at 127 n.32; \textit{Sykes}, 433 U.S. at 88-89.

\textsuperscript{209} A finding of futility means that the state courts would not have corrected the errors at trial or on appeal. In contrast, rejection of futility delays a possible retrial until after the state appellate process has been exhausted, a procedure that in many states can take two to four years, thereby increasing the difficulties of retrying the defendant after the writ is finally granted. See \textit{Isaac}, 456 U.S. at 127-28.


\textsuperscript{211} A finding of futility could easily require a specific pronouncement on the federal issues by the state's highest court within a limited time frame, absent any intervening circumstances—such as significant federal or state litigation moving in a direction away from the state's highest court's position; changes in state law, or Supreme Court cases that are tangen-
issues that they have already settled. Such a solution was practical in Isaac, although the prisoner’s claim would still have been rejected. At the time of Hughes’, Bell’s, and Isaac’s trials, Ohio was operating under a new criminal code, the effects of which were far from settled. In addition, the burden of proof issue was being litigated throughout the country in light of In re Winship, and the effect of Winship on affirmative defenses was unclear. It is far from obvious that litigation on the issue in the state courts of Ohio would have been futile. The Court could have reasonably found that futility did not exist.

3. Cause—Attorney Ignorance, Developing Issues, and the Tools to Construct an Argument.—After rejecting futility as a means of establishing cause, Justice O’Connor turned to the second assertion of cause identified by the Court: At the time of their state trials the habeas petitioners could not have known that Ohio’s self-defense jury instruction raised constitutional questions. The essence of this contention is that the state of the law, at the time of Hughes’, Bell’s, and Isaac’s trials, was so embryonic that reasonably competent counsel would not have foreseen the due process issue and, as a result, trial counsel’s failure to raise a proper objection should be excused. This claim appears to require an examination

tially related to the futile issues—which would have an impact on the litigation. Cf. Sunal v. Large, 332 U.S. 174, 181 (1947) (definitive ruling of law had not yet occurred, therefore, the appeal could not be said to be futile).

Given this definition of futility it would be a gamble to avoid litigating the issue in the state courts and prudent counsel would almost always take his claim to the state courts, unless the issue was so firmly resolved so as to make the gamble clearly worth it.

212. Counsel for Hughes raised at trial, a general objection to the jury instructions due to the uncertain state of the law. 456 U.S. at 112 n.6 (“[w]e are operating now under a new code in which many things are uncertain”). See OHIO REV. CODE ANN. § 2901.05(a) (Page 1978). Compare State v. Rogers, 43 Ohio St. 2d 28, 330 N.E.2d 674 (1975) (the defendant has the burden of proving affirmative defenses), cert. denied, 423 U.S. 1061 (1976) with State v. Robinson, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976) (once the defendant raises an affirmative defense the prosecution must disprove it).

213. 397 U.S. 358 (1970) (requiring conviction beyond a reasonable doubt on “every fact necessary to constitute the crime . . . as charged.” Id. at 364.)


216. See Brief for Respondent Kenneth L. Bell at 55, Isaac, 456 U.S. 107 (1982) (“Under this interpretation, one aspect of cause is the lack of a firm legal basis upon which to make the objection. Myers v. Washington, [646 F.2d 355,] 359-60 [(9th Cir. 1981)]; United States v. Frady, [636 F.2d 506,] 512 [(D.C. Cir. 1980).]”) Bell’s reliance on both Myers and Frady stretches the “lack of a firm legal basis” argument. Both Myers and Frady were tried
of both its underlying premise and the development of the law upon
which constitutional arguments could have been formulated. More-
over, the contention then requires a determination of the constitu-
tional and procedural significance of defense counsel’s failure to as-
sert a proper objection at trial due to either his ignorance of the
developing law, its application to the self-defense instructions, or
both.

At the outset, Justice O'Connor stated that the Court did not
have to decide whether the novelty of a constitutional claim would
ever establish cause because the due process arguments asserted by
the habeas petitioners were not unknown at the time of their state
trials.\textsuperscript{217} In support of this conclusion, the Court noted that \textit{Winship},
which held that the due process clause requires proof beyond a rea-
sonable doubt “of every fact necessary to constitute the crime with
which [the defendant] is charged,”\textsuperscript{218} was decided four and one half
years before the first of the \textit{Isaac} defendants’ state trials.\textsuperscript{219} In the
intervening time between \textit{Winship} and the instructions complained
of in \textit{Isaac}, the Court observed that numerous defendants had relied
upon \textit{Winship} in raising due process burden of proof
claims\textsuperscript{220}—some of these defendants were successful, and others

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\textsuperscript{217} 456 U.S. at 131. The Court expressed some discomfort in an absolute rule of pre-
clusion due to the novelty of a constitutional issue: “We might hesitate to adopt a rule that
would require trial counsel either to exercise extraordinary vision or to object to every aspect
of the proceedings in the hope that some aspect might mask a latent constitutional claim.” \textit{Id.}
\textsuperscript{218} See \textit{Ross v. Reed}, 704 F.2d 705 (4th Cir.), \textit{cert. granted}, 104 S. Ct. 523 (1983); \textit{Myers v.
Washington}, 646 F.2d 355, 359 (9th Cir. 1981).
\textsuperscript{219} 397 U.S. at 364.
\textsuperscript{220} See Brief of Respondent Kenneth L. Bell at 18-24.

\textit{Isaac}, the Court noted the defendant’s argument:

Respondents also allege that, even without considering [the Ohio statute gov-
erning burden of proof allocation] Ohio could not constitutionally shift the burden
of proving self-defense to them. All of the crimes charged against them require a
showing of purposeful or knowing behavior. These terms, according to respondents,
imply a degree of culpability that is absent when a person acts in self-defense.

\textsuperscript{456} U.S. at 121. \textit{See Brief of Respondent Kenneth L. Bell at 18-24.}

\textsuperscript{42}
were not. While most of these challenges countered well-established principles of law, the very fact that this litigation was occurring led the Court to conclude, "we cannot say that respondents lacked the tools to construct their constitutional claim." This conclusion is correct in as much as certain defense counsel did perceive Winship as establishing a foundation for a due process challenge to criminal defendants being required to bear the burden of proof with respect to various defenses and mitigatory elements. A review of the cases and arguments formulated on the basis of Winship led certain counsel to conclude that requiring the defendant to prove self-defense violated due process. There is little doubt, however, that a large number of defense attorneys did not read Winship as establishing a foundational basis for raising a due process claim, or even perceive that Winship implicated such a claim. The Court recognized this limited perception of Winship by noting that not "every astute counsel would have relied upon Winship to assert the unconstitutionality of a rule saddling criminal defendants with the burden of proving an affirmative defense." Nevertheless, there was a basis for challenging burden shifting jury instructions and a few defendants were fortunate enough to have perceptive counsel who asserted the due process claim.

After concluding that there was a basis for articulating the constitutional challenges at the time of respondents’ trials and that the due process claim was being litigated at that time, the Court had to confront the constitutional and procedural significance, in a federal post-conviction proceeding, of trial counsel’s failure to recognize and to raise the due process issue. Although not specifically stated, the Court appeared to find that counsel’s ignorance of this developing issue did not render their representation constitutionally defective.

221. See authorities cited in Isaac, 456 U.S. at 132 n.40.
222. Id. at 133. Counsel for the State of Ohio first used this phrase at oral argument to characterize the state of the law at the time of the respondents’ trials. See Transcript of Oral Argument at 8-9; 456 U.S. at 131 n.37.
223. See Isaac, 456 U.S. at 132 n.40.
225. 456 U.S. at 133.
226. Bell argued that counsel’s failure to raise the burden shifting issue rendered his assistance constitutionally ineffective. See Brief of Respondent Kenneth L. Bell at 50.
227. Although the Supreme Court has never addressed the level of competence constitutionally required of defense counsel at trial, the Court has, in the guilty plea context, indicated in dictum that defendants should receive advice that is "within the range of competence de-
The Court recognized that the Constitution guarantees the criminal defendant a competent attorney and a fair trial, but "[i]t does not insure that defense counsel will recognize and raise every conceivable constitutional claim."228 The Court did not question the quality of the representation provided the Isaac respondents and did not seem troubled by counsel’s failure to litigate the burden shifting constitutional issue. In silence, the Court found that the Isaac respondents were provided effective representation and a fair trial despite their counsel’s failure to recognize and evaluate the due process question.

After finding or implying that the forfeiture did not render defense counsel’s representation constitutionally defective, the Court had to confront the procedural significance of the forfeiture for the federal collateral courts. The opinion concluded, in a single sentence, that "the demands of comity and finality counsel against labelling alleged unawareness of the objection as cause for a procedural default."229 Justice O'Connor offered no explanation or analysis for this conclusion, other than the rendition of the costs attributed to collateral review earlier in the opinion.230 The Court had promised that the nature of the constitutional violation would be considered in determining whether cause and actual prejudice existed,231 yet the opinion is completely devoid of any such analysis. Justice O'Connor never explained why the exaltation of finality should preclude the litigation of a rule "‘the major purpose [of which] . . . is to overcome an aspect of [a] criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accu-

228. 456 U.S. at 134.
229. Id. (footnote omitted).
230. See id. at 126-29.
231. See id. at 129.
The Court never balanced the nature of the burden shifting instructions and their impact on the validity of the jury's verdict against the demands of comity and finality.

Finally, in a footnote, the Court refused to excuse the forfeiture upon only a showing of actual prejudice, explicitly reaffirming the conjunctive nature of the cause and actual prejudice prerequisite.\textsuperscript{233} As a result, the failure to establish cause precludes an examination of the impact the forfeited constitutional claim may have had on the validity of the guilty verdict. By foreclosing an inquiry into the prejudicial effect of defense counsel's forfeitures, especially those resulting from ignorance, negligence, or inadvertence, the Court completely belied its earlier promise that the cause and prejudice standard would not prevent the federal collateral court from correcting a miscarriage of justice.\textsuperscript{234} Under the Court's conjunctive prerequisite, the miscarriage of justice inquiry is never undertaken absent a finding of adequate cause.\textsuperscript{235} At the very least, a determination of actual prejudice should be permitted to insure that an actual miscarriage of justice does not occur. The Court, however, appears unwilling to permit this inquiry.

B. United States v. Frady—Actual Prejudice: Anywhere from A Constitutional Violation to Proof of Factual Innocence

The Court's conclusion that the Isaac respondents had not shown sufficient cause to excuse their procedural forfeitures obviated the need for any discussion of actual prejudice in that case because of the conjunctive nature of the dual prerequisite.\textsuperscript{236} The case of United States v. Frady,\textsuperscript{237} however, provided an opportunity for just


\textsuperscript{233} 456 U.S. at 134 n.43.

\textsuperscript{234} Sykes, 433 U.S. at 91.

\textsuperscript{235} See 456 U.S. at 134 n.43.

Since we conclude that these respondents lacked cause for their default, we do not consider whether they also suffered actual prejudice. Respondents urge that their prejudice was so great that it should permit even in the absence of cause. Sykes, however, stated these criteria in the conjunctive and the facts of these cases do not persuade us to depart from that approach.

\textit{Id.} (emphasis added). \textit{But see infra} notes 475-82 and accompanying text (for an analysis of the possible prejudice to the Isaac respondents).

\textsuperscript{236} 456 U.S. at 134 n.43.


Prior to this Supreme Court decision in 1982, reversing the D.C. Circuit Court of Appeals (which will be referred to in text and notes \textit{infra} as \textit{Frady}), the D.C. Circuit had issued two
such a discussion, as it was the ideal vehicle for furthering the Court's restrictive desires since the evidence of guilt was substantial and clearly outweighed the significance of the constitutional issues involved.\textsuperscript{386} In \textit{Frady}, the Court was not confronted with a possible miscarriage of justice resulting from an erroneous jury instruction coupled with significant evidentiary deficiencies. Furthermore, \textit{Frady} would not prick the conscience of those marginally committed to restricting federal collateral review.

Although the Court in \textit{Sykes} left the definition of cause and actual prejudice to future litigation,\textsuperscript{389} the rejection of a per se finding of prejudice in \textit{Davis},\textsuperscript{240} means that any formulation of actual prejudice involves an interplay of the constitutional violation and its evidentiary significance to determine their impact on the judgment of conviction. For this reason, the facts of \textit{Frady} will be reviewed briefly.

1. \textit{The Facts of Frady}.—Joseph Frady was convicted in the fall of 1963, along with a codefendant Richard Gordon, of first degree premeditated murder and robbery.\textsuperscript{241} The evidence presented at their trial revealed that the victim, Thomas Bennett, had been brutally beaten to death in his Washington, D.C. home.\textsuperscript{242} Two police officers, summoned by a concerned neighbor, who had overheard a fight and pleas for help, observed Frady and his codefendant leaving

other separate but related opinions in the \textit{Frady} case.

In 1965, the D.C. Circuit affirmed Frady's conviction for robbery and murder, but vacated his death sentence, imposing instead a life sentence. Frady v. United States, 348 F.2d 84 (D.C. Cir.) (en banc), cert. denied, 382 U.S. 909 (1965) (\textit{Frady I}). \textit{See infra} note 253. In 1978, the D.C. Circuit ordered that Frady's sentence for murder was to run concurrently with his robbery sentence. United States v. Frady, 607 F.2d 383 (D.C. Cir. 1979) (\textit{Frady II}) \textit{See infra} note 254.

238. In addition, the conviction was almost 20 years old and had undergone extensive judicial review. \textit{See} 456 U.S. at 156-57 & n.4. \textit{See also} Spalding v. Aiken, 103 S. Ct. 1795 (1983) (Burger, C.J., statement concerning the denial of certiorari) (relief on claims dating back many years should be limited to cases where miscarriage of justice occurred or colorable claim of innocence presented).

239. 433 U.S. at 87.

240. \textit{See} 411 U.S. at 244-45. The \textit{Davis} Court rejected the use of presumed prejudice arising from the nature of the constitutional violation itself. Thus, the factual significance of the constitutional violation must play a part in the calculation of actual prejudice. Cf. Harrington v. California, 395 U.S. 230 (1969) (evidence unconstitutionally obtained merely cumulative, therefore harmless error); Chapman v. California, 386 U.S. 18 (1967) (same).

241. The grand jury had indicted Frady and his codefendant for premeditated murder, murder while perpetrating a robbery, and robbery. \textit{Frady I}, 348 F.2d 84, 119 n.1 (Miller, J., concurring in part, dissenting in part).

the residence. These officers apprehended the two defendants a short distance from the Bennett home, and, just before doing so, observed one of them throw something under a parked car. A pair of gloves and Bennett’s wallet, containing some money, were later retrieved from under the car. At the time Frady and Gordon were arrested, they had blood on their clothing that matched the blood type of the deceased.

Inside Bennett’s residence, other police officers found his body in a badly beaten condition and the front room in disarray. Other evidence presented at trial established that the two defendants had a meeting with Bennett’s brother shortly before the incident, at which time the three may have planned the murder. In addition, several witnesses observed the two defendants drive slowly by the scene of the homicide earlier in the day. At trial, the two defendants claimed a complete lack of responsibility and argued that another man was the real perpetrator. The jury convicted both defendants and imposed the death penalty.

2. Frady and United States Court of Appeals.—After a par-

243. 456 U.S. at 155; Frady I, 348 F.2d at 100.
244. 456 U.S. at 155. The two defendants were chased by the police and were apprehended just as they were about to pull away in a car which had been waiting with the motor running with a female friend of Gordon’s inside. Frady I, 348 F.2d at 100.
245. 456 U.S. at 155; Frady I, 348 F.2d at 100-01.
246. 456 U.S. at 155; Frady I, 348 F.2d at 100.
247. For a graphic description of Bennett’s badly beaten body, see Frady I, 348 F.2d at 100. Bennett also had wounds on his body similar in shape to a heel plate on one of the defendant’s shoes. Id. See 456 U.S. at 155.
248. Furniture was broken and blood was splattered on the walls. 456 U.S. at 155; Frady I, 348 F.2d at 100.
249. See 456 U.S. at 154. A friend of Frady’s codefendant Gordon testified to the meeting and fragments of the conversation during which the deceased’s brother stated “he needed time to get the furniture and things settled.” Id. This witness also overheard Frady asking Bennett’s brother “if he hit a man in the chest, could you break a rib and fracture or puncture a lung, could it kill a person?” Id. Finally, at the end of the meeting, Bennett’s brother was heard to say “If you do a good job you will get a bonus.” Id.; see also Frady I, 348 F.2d at 103.
250. 456 U.S. at 154. Two witnesses testified that they saw an old car occupied by two white persons, one of whom they identified as Frady, drive slowly by the Bennett residence earlier on the day of the homicide. Gordon’s friend, who was with the two defendants when they were arrested, testified that one of the men pointed out a house in the vicinity of Bennett’s about an hour or an hour and one half before the incident. Frady I, 348 F.2d at 102; see 456 U.S. at 154.
251. See 456 U.S. at 156. For defense counsel’s closing argument, see Joint Appendix at 41, 42, 54, 55, Frady, 456 U.S. 152 (1982) [hereinafter Frady Joint Appendix].
252. See 456 U.S. at 156. Both defendants were convicted of premeditated murder and robbery and were acquitted of felony murder. Frady I, 348 F.2d at 86; id. at 99 (Miller, J., concurring in part, dissenting in part).
Frady finally, in 1980, succeeded in obtaining a new trial. This action was the result of a section 2255 petition filed by Frady challenging the constitutionality of various jury instructions used during his trial. These instructions had not been objected to at trial, or in any of the prior appellate or post-conviction proceedings. Before discussing the procedural forfeiture issue, the court of appeals noted that it had previously found two of the instructions to be reversible.

In excusing Frady's procedural forfeitures, the court of appeals affirmed the first degree premeditated murder conviction, but vacated the death penalty, imposing a life sentence in its place. Eight of the nine circuit judges voted to uphold the first degree murder conviction. The sole dissenter, Judge J. Skelly Wright, believed the prosecution had failed to prove specific intent to kill, as distinguished from an intent to injure, which he perceived to be the distinguishing factor between first degree and second degree murder. Id. at 97 (Wright, J., dissenting in part, concurring in part). Judge Wright did believe there was sufficient evidence of an intent to injure to sustain a conviction for second degree murder. Id.; see 456 U.S. at 156 n.2. The decision to vacate the death penalty was by a five to four vote, with the majority unable to agree on the reasons for doing so. Four of the five found fault with the trial judge's instructions and procedures in polling the jury with respect to the death penalty. The fifth and deciding judge believed that a bifurcated guilt-penalty procedure should be employed in death penalty cases, although this was not the practice in the District of Columbia at the time. 348 F.2d at 87, 90 (Fahy, J., writing for four of the judges); id. at 91 (McGowan, J., concurring); see 456 U.S. at 156-57. Then Circuit Judge Burger voted to affirm the conviction and the death penalty. 348 F.2d at 111 (Burger, J., concurring in part, dissenting in part).

In July and August of 1965, Frady filed four motions or letters, which were treated as motions, to reduce or vacate his sentence. All of those motions were denied. Similar motions met the same fate in 1966, 1974, 1975, 1976, and 1978. On appeal of the 1978 denial, the D.C. Circuit Court of Appeals ordered that the robbery sentence was to run concurrently with the murder sentence. United States v. Frady, 607 F.2d 383 (D.C. Cir. 1979) (Frady I); see 456 U.S. at 157 n.4. For a chronological listing of all of Frady's motions and their disposition, see Frady Joint Appendix, supra note 251, at 4-6.

Frady alleged that the jury instructions were unconstitutional because: (1) equated specific intent with malice, thereby precluding a manslaughter conviction; (2) the jury was instructed that the use of a weapon without an explanation permitted the presumption of malice; and (3) that a person is presumed to intend the natural and probable consequences of his act. Id. See Frady Joint Appendix, supra note 251, at 10-17 (for a copy of the § 2255 petition). For the instructions complained of, see id. at 27-28; 636 F.2d at 508-09 & nn.6-7. See 456 U.S. at 158.

The first two allegations were sufficient to sustain the relief Frady requested the court refused to rule on his third claim. Id. at 509 n.7.

Fed. R. Crim. P. 30 provides: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its
peals, relying in part on *Davis v. United States*, used the Federal Rules of Criminal Procedure plain error standard. After reviewing several similar District of Columbia Circuit Court decisions involving plain error and jury instructions, the court concluded that two of Frady's allegations of error may "well have precluded a reasonable juror from considering manslaughter as a possible verdict" and because the "evidence of malice was equivocal"—the plain error standard had been met. In a footnote, the court of appeals indicated that if the *Davis* cause and prejudice requirements applied, although it did not believe they did, the futility of raising an objection at the time of Frady's trial established "cause." Furthermore, the court found "actual prejudice" based on a combination of the erroneous instructions and the evidence presented at Frady's trial.

3. Actual Prejudice—Rejection of Plain Error and an Interesting Use of Precedent.—In granting the government's petition for a writ of certiorari, the Supreme Court was initially confronted


262. 636 F.2d at 509-10. Fed. R. Crim. P. 52(b) reads: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the courts."

263. 636 F.2d at 510-13. The following cases were reviewed by the court of appeals: Mitchell v. United States, 434 F.2d 483, 488 (D.C. Cir.) (no plain error due to lack of multiple erroneous instructions), *cert. denied*, 400 U.S. 867 (1970); United States v. Wharton, 433 F.2d 451, 461 (D.C. Cir. 1970) (plain error because of two erroneous instructions and evidence of malice equivocal); United States v. Green, 424 F.2d 912, 913 (D.C. Cir. 1970) (no plain error due to lack of multiple erroneous instructions), *cert. denied*, 400 U.S. 997 (1971) (*Green II*); Logan v. United States, 411 F.2d 679, 681 n.10 (D.C. Cir. 1968) (no plain error due to lack of multiple erroneous instructions); Green v. United States, 405 F.2d 1368, 1369-70 (D.C. Cir. 1968) (*Green I*) (plain error because multiple errors raised substantial doubts as to the jury's finding of premeditation); Howard v. United States, 389 F.2d 287, 291 (D.C. Cir. 1967) (no plain error because evidence of malice was strong and error partly cured by subsequent instructions); Belton v. United States, 382 F.2d 150, 153-55 (D.C. Cir. 1967) (no plain error in instruction that law infers malice from use of a deadly weapon because only single phrase "infers," unlikely to mislead jury; and first degree murder verdict required a greater showing than just malice).

264. 636 F.2d at 513 n.17.

265. *Id.* On the government's motion for a rehearing en banc, four of the circuit judges dissented from the denial, asserting that the evidence of murder was substantial and that the plain error standard should not apply in a collateral attack on a final judgment of conviction. *Id.* at 514-16.


267. As a preliminary matter, the Court had to resolve Frady's objection to the grant of certiorari on the grounds that the issues presented in the lower courts pertained solely to local District of Columbia law with which the Court should not interfere. In rejecting this contention, the Court noted that this issue had not been raised in the lower courts, and that nothing in the District of Columbia Court Reform and Criminal Procedure Act, 84 Stat. 473 (1970) or
with the lower court's use of rule 52(b)'s plain error test as a means of excusing the federal prisoner's earlier procedural forfeiture. The Court forthrightly rejected the use of plain error and reiterated that cause and actual prejudice is the appropriate test for evaluating the excusal of procedural forfeitures in collateral proceedings.

Justice O'Connor found that the plain error rule is only intended for use on direct appeal and is inappropriate in a collateral setting for several reasons: (1) it significantly diminishes society's legitimate interest in finality; (2) it obscures the distinction between direct and collateral review contrary to the principle that a collateral challenge shall not do service for an appeal; and (3) it would give federal prisoners an unfair advantage over their state counterparts. Finally, the Court rejected the court of appeals' reliance on Davis in applying the plain error rule and asserted that Henderson v. Kibe had "expressly stated" that the use of plain error is inappropriate in a collateral proceeding. As a result, Justice O'Connor concluded that the lower court's use of the plain error rule "was contrary to long-established law from which we find no reason to depart."

§ 2255 precluded the Court from treating this case as it would any other federal prisoner collateral attack. 456 U.S. at 159-62.

268. Justices White and Powell had, on separate prior occasions, indicated that plain error may be an appropriate standard for excusing procedural forfeitures. See Wainwright v. Sykes, 433 U.S. at 99 (White, J., concurring); Estelle v. Williams, 425 U.S. at 514 n.2 (Powell, J., concurring); Tague, supra note 56, at 28. As a general rule, the lower courts have not adopted plain error as a means of excusing procedural defaults in state prisoner federal collateral cases. E.g., Pharr v. Israel, 629 F.2d 1278, 1280-81 (7th Cir. 1980), cert. denied, 449 U.S. 1088 (1981). The Sixth Circuit, however, has had a particularly difficult time resolving the plain error question. Compare Kremenski v. Perini, 614 F.2d 121, 125 (6th Cir.) (plain error applies), cert. denied, 449 U.S. 866 (1980); Cook v. Bordenkircher, 602 F.2d 117, 119 (6th Cir. 1979), cert. denied, 444 U.S. 936 (1979); Rachel v. Bordenkircher, 590 F.2d 111, 113-14 (6th Cir.) (plain error does not apply), reh'g denied, 633 F.2d 664 (6th Cir. 1980), cert. denied, 451 U.S. 933 (1981). In Engle v. Isaac, the Court observed that states have the primary responsibility for interpreting their own plain error rules, and that the mere existence of such a rule is not grounds for the federal courts to overlook a procedural forfeiture. 456 U.S. at 159 n.44.

269. 456 U.S. at 164-66. Justices Blackmun and Brennan objected to the Court's rejection of the plain error rule on many of the same grounds as contained in the text infra at notes 273-320. See 456 U.S. at 175-78 (Blackmun, J., concurring in the judgment); id. at 179-86 (Brennan, J., dissenting).

270. 456 U.S. at 163-66.


273. Id. at 166. The opinion had a condescending tone to it and implicitly ridiculed Frady for bringing his petition. The Court stated that "Frady now admits that the evidence
Unfortunately, Justice O'Connor failed to consider the nature of the section 2255 proceeding, rule 52(b) of the Federal Rules of Criminal Procedure, and the relationship between the two. No notice is taken of a line of authority specifically classifying a section 2255 collateral attack as a continuation of the original criminal proceeding, as distinguished from a section 2254 state prisoner federal collateral challenge, which is a separate and distinct civil action in the federal courts.\textsuperscript{274} Consistent with this line of authority, Congress has expressly directed that the Federal Rules of Criminal Procedure may apply in a federal prisoner's section 2255 proceeding, but not in a state prisoner's section 2254 federal action.\textsuperscript{276} In addition, the plain error rule appears in the section of the Federal Rules of Criminal Procedure that sets forth the general provisions of the Rules,\textsuperscript{276} thereby lending further credence to the rule's applicability in all stages of the federal criminal proceedings, including collateral review—a fact which the Court never addressed.

The heavy reliance in the opinion on principles of finality fails to recognize the very function that the plain error rule is designed to serve: counteracting the harsh realities of rule 30's forfeiture provisions by negating concepts of forfeiture and finality in exceptional circumstances.\textsuperscript{277} Any rule which excuses a procedural forfeiture and

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\textsuperscript{274} The Advisory Committee's Notes for § 2255 rules emphasize the unique nature of § 2255 proceedings. E.g., 28 U.S.C. § 2255 rule 1 advisory committee note (1976) ("a motion under § 2255 is a further step in the movant's criminal case and not a separate civil action"); id. rule 3 advisory committee note (no filing fee is required since § 2255 motion is a "continuation of criminal case whose judgment is under attack"); id. rule 11 advisory committee note ("A § 2255 action is a continuation of the criminal case"); id. rule 12 advisory committee note ("This rule differs from rule 11 of the § 2254 rules in that it includes the Federal Rules of Criminal Procedure as well as the civil. This is because of the nature of a § 2255 motion as a continuing part of the criminal proceeding . . . as well as a remedy analogous to habeas corpus by state prisoners."). See generally United States v. Hayman, 342 U.S. 205 (1952) (noting distinction between § 2254 and § 2255 writs). See also L. YACKLE, supra note 197, § 16, at 75 (federal habeas corpus not part of criminal prosecution but separate civil action).

\textsuperscript{275} 28 U.S.C. § 2255 rule 12 advisory committee note (1976).

\textsuperscript{276} FED. R. CRIM. P. 1 ("These rules govern the procedure in all criminal proceedings in the courts of the United States . . . .") See 456 U.S. at 176 (Blackmun, J., concurring in the judgment); id. at 179 (Brennan, J., dissenting).

\textsuperscript{277} See 456 U.S. at 177 (Blackmun, J., concurring in the judgment); id. at 179-80 (Brennan, J., dissenting); see also United States v. Atkinson, 297 U.S. 157, 160 (1936) (plain
thus negates finality cannot be criticized for violating the very principles that it is designed to contravene. Such criticism is similar to complaining about the procedural default rules because they preclude subsequent litigation, when barring such litigation is the rules' precise objective. The court may not care for the function of the plain error rule, since it contravenes notions of finality, but to find the rule inappropriate simply because it is used to negate finality begs the question.

After criticizing the plain error rule for interfering with society's legitimate interest in finality, the Court stated, "we have long and consistently affirmed that a collateral challenge may not do service for an appeal."\(^{278}\) This statement was followed by a long series of case citations,\(^ {279}\) concluding with a quotation from the most recent case, *United States v. Addonizio*:\(^ {280}\) "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment."\(^ {281}\) Based upon this, Justice O'Connor found that "the Court of Appeals erred in reviewing Frady's [section] 2255 motion under the same standard as would be used on direct appeal, as though collateral attack and direct review were interchangeable."\(^ {282}\)

The Court failed to reveal that the first three cases cited for this conclusion only involved errors of law,\(^ {283}\) as opposed to constitutional errors. In the fourth case, the Supreme Court affirmed the lower court's use of its collateral power to review a constitutional issue.\(^ {284}\) In addition, the last two cases are from the era when habeas corpus was relegated to purely jurisdictional issues, leaving all other claims

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error doctrine permits courts to correct errors that seriously impinge the "fairness, integrity or public reputation of judicial proceedings."); Reisman v. United States, 409 F.2d 789, 791 (9th Cir. 1969) (same).

278. 456 U.S. at 165.


281. Id. at 184, quoted in Frady, 456 U.S. at 165.

282. 456 U.S. at 165.

283. Addonizio, 442 U.S. at 179 (post-sentencing changes of United States Parole Commission prolonged sentence beyond period intended by the sentencing judge); Hill v. United States, 368 U.S. 424, 425 (1962) (the defendant was not allowed to make a statement on his own behalf at sentencing in violation of Fed. R. Crim. P. 32(a); Sunal v. Large, 332 U.S. 174, 176 (1947) (denial of right to show selective service classification was invalid at trial for draft evasion).

to be pursued by a writ of error.\textsuperscript{285} Consistent with this lack of candor,\textsuperscript{286} the Court—shortly after the quoted passage from \textit{Addonizio}—stated:

\textit{But unless the claim alleges a lack of jurisdiction or constitutional error, the scope of collateral attack has remained far more limited}. The Court has held that an error of law does not provide a basis for collateral attack unless the claimed error constituted "a fundamental defect which inherently results in a complete miscarriage of justice."\textsuperscript{287}

The reference in \textit{Frady} to a long distinction between direct and collateral review is correct with respect to errors of law or fact,\textsuperscript{288} but at least since \textit{Brown v. Allen},\textsuperscript{289} such has not been the case with constitutional issues. The absence of post-\textit{Brown} constitutional cases in the Court's long list of citations is glaringly apparent, and for good reason, since none support the general statement made.\textsuperscript{290} The Court's proffered authority and the conclusions drawn from it are of questionable and dubious validity.

Consistent with this disingenuous handling of precedent is the

\textsuperscript{285} Glasgow v. Moyer, 225 U.S. 420, 428-29 (1912) (finding that the trial court had jurisdiction, the Court refused to entertain a constitutional challenge to the law, which formed the basis for the indictment, since such a challenge had to be pursued by a writ of error); \textit{In re Gregory}, 219 U.S. 210, 213-14 (1911) ("The only question . . . is whether the . . . Court had jurisdiction. A habeas corpus proceeding cannot . . . perform the function of a writ of error [so] we are not concerned with the question whether the information . . . or . . . the acts . . . constituted a crime . . . .").


\textsuperscript{287} 442 U.S. at 185 (quoting \textit{Hill} v. United States, 368 U.S. 424, 428 (1962) (emphasis added) (citation omitted).


\textsuperscript{289} 344 U.S. 443 (1953).

\textsuperscript{290} This is not to say that constitutional issues have not been handled differently on direct and collateral review, just that this has generally not been the case. \textit{See}, e.g., Henderson v. \textit{Kibbe}, 431 U.S. 145 (1977); \textit{Stone} v. \textit{Powell}, 428 U.S. 465 (1976). In fact, this very area of litigation, the procedural forfeiture of an appropriate remedy, has been handled very differently with respect to state prisoners. As a general rule, on direct appeal a state forfeiture is considered an adequate and independent state ground barring Supreme Court review. \textit{See} Henry v. Mississippi, 379 U.S. 443, 446-47 (1965). While the same default has never been held to bar collateral review, even under the cause and actual prejudice test, such forfeitures may be excused more readily in a collateral proceeding than on direct review. \textit{See} Wainwright v. \textit{Sykes}, 433 U.S. 72, 84-85 (1977); \textit{Fay} v. \textit{Noia}, 372 U.S. 391, 438 (1963).
rejection of the apparent authority of *Davis v. United States*. The court of appeals had relied on *Davis* in applying the plain error rule to a collateral proceeding, a conclusion supported by much of the language and reasoning of the *Davis* opinion. The *Davis* majority found that the rule 12(b)(2) "for cause shown" standard should be applied in collateral proceedings, as well as on direct review, for evaluating the excusal of a procedural forfeiture of a grand jury discrimination claim. In adopting the cause standard, the *Davis* court distinguished *Kaufman v. United States*, which had incorporated the *Noia* "deliberate bypass" standard into a section 2255 proceeding, because a specific waiver provision of the Federal Rules did not control the constitutional issues presented in *Kaufman*. *Kaufman*’s deliberate bypass excusal standard was held to be “dispositive only if the absence of a statutory provision for waiver in [section] 2255 and the federal habeas [corpus] statute by implication precludes the application to post-conviction proceedings of the express waiver provision found in the Federal Rules of Criminal Procedure.

The *Davis* opinion then concluded that section 2255 did not contain or imply an express forfeiture provision, but that if it had, the Court believed it might have then been confronted with a situation governed by the repeal provisions of the Federal Rules of Criminal Procedure enabling legislation, which repealed any statutory provision inconsistent with the Rules, and any conflicting forfeiture provisions of section 2255. Thus, if *Kaufman*’s adoption of the deliberate bypass standard was statutorily mandated, the Federal Rules, which require a different standard, may have overriden the statutory standard. This reasoning strongly indicates that the Court, in *Davis*, considered the Federal Rules of Criminal Procedure appli-

292. 636 F.2d at 509-10. The court of appeals recognized that *Davis* was the leading case concerning the availability of collateral relief for federal prisoners who had failed to raise an objection at trial. That court also recognized that the *Davis* Court had rejected the use of *Noia*’s deliberate bypass standard in favor of the specific cause requirement of Fed. R. Crim. P. 12(b)(2). The court of appeals perceived that *Davis* was based on congressional intent to apply the Federal Rules of Criminal Procedure to collateral proceedings in determining the standard for excusing a federal prisoner’s previous forfeiture of the right to litigate constitutional issues. *Id.*
293. *See supra* text accompanying notes 14-34.
294. 411 U.S. at 242-44.
296. 411 U.S. at 239-40.
297. *Id.* at 240.
299. *See* 411 U.S. at 241-42; *see also* Rosenberg, *supra* note 20, at 370 n.123.
federal and binding in a federal prisoner post-conviction collateral proceeding. Justice Rehnquist, in *Davis*, found it inconceivable that Congress

having in the criminal proceeding foreclosed the raising of a claim such as this [i.e., a challenge to the racial composition of the grand jury] after the commencement of trial in the absence of a showing of "cause" for relief from waiver, nonetheless intended to pervertedly negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings.\(^{300}\)

As a result, Justice Rehnquist concluded that "the congressional adoption of Rule 12(b)(2)" mandates that procedural forfeitures only be excused in accordance with the rule's "cause" requirement.\(^{301}\)

Justice O'Connor's interpretation in *Frady* of the *Davis* Court's perceptions of congressional intent is similar to a one way street. The rules and perceived congressional intent will be adhered to only when they restrict collateral review, not when those same rules, including the plain error provision, and the same congressional intent might excuse a procedural forfeiture under a possibly less restrictive standard than what is generally applied in collateral proceedings. Justice O'Connor completely ignored the reasoning of *Davis*,\(^{302}\) despite the fact that the Court, as in *Davis*, was confronted with the application of the Federal Rules of Criminal Procedure in a federal prisoner collateral proceeding.\(^{303}\) There can be little doubt that Justice Rehnquist in *Davis*, applied the more restrictive forfeiture excusal provision of the federal rules, in part, on the basis of perceived congressional intent.\(^{304}\) *Davis* is premised on the belief that Congress had already provided a standard for excusing the forfeiture involved, and there was nothing to indicate that the congressional standard should not apply throughout all stages of the criminal process.\(^{305}\)

Yet, when consistency and logic would appear to require the application of a different section of the same federal rules—the plain error

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300. 411 U.S. at 242.
301. *Id.; see also* Tushnet, *supra* note 108, at 1319 n.91.
302. *See* 456 U.S. at 164-66. *Davis* is disposed of in one paragraph and then only as a summary of the court of appeals' reliance on the case. *Id*. at 164. The Court never discussed any of the implications *Davis* raises.
305. *See* 411 U.S. at 241-42.
provision—logic, consistency, and apparent precedent are cast to
the winds in favor of the more restrictive standard, simply to restrict
collateral review.

Justice Brennan, in his *Frady* dissent, pointed out an interesting
twist created by the majority’s rejection of both the *Davis* reasoning
and the plain error rule. According to Justice Brennan, *Davis* en-
grafted the rule 12(b) “for cause shown” standard into section 2255
proceedings on the basis of congressional intent; *Francis* then ex-
tended the *Davis* cause and prejudice standard to similarly situated
state prisoners who raise the same constitutional claims as in *Davis*,
despite a complete lack of congressional mandate to do so; *Sykes*
then expanded the application of the *Davis-Francis* cause and
prejudice standard beyond the claims covered in rule 12 and applied
it to all state prisoner trial forfeitures; and finally, “coming full cir-
cle,” the Court in *Frady* relied on the cause and prejudice standard
derived from rule 12 to defeat the application of the plain error pro-
vision of rule 52(b). The only consistency in these opinions “lies in
their announcement that even in the teeth of clear congressional di-
rection to the contrary, this Court will strain to subordinate a pris-
oner’s interest in substantial justice to a supposed government inter-
est in finality.”

Instead of relying on prior related case precedent and an evalua-
tion of congressional intent, Justice O’Connor found support in a
single sentence from *Henderson v. Kibbe*. In this sentence, the
Court declared that the showing of prejudice required by a state
prisoner to sustain a collateral attack on certain jury instructions is
greater than that needed to establish plain error on direct appeal.
While recognizing that *Kibbe* was a state prisoner federal collateral
action with attendant considerations of comity that were not ger-
mane to *Frady*, the *Frady* Court noted that the same interests in
finality pertain to both state and federal prisoner collateral proceed-
ings. The Court’s reliance on *Kibbe*, however, was inappropriate

306. The Court’s action in *Frady* seems to indicate that plain error is a less restrictive
standard than cause and actual prejudice. See infra note 320 and accompanying text.
307. 456 U.S. at 185-86 (Brennan, J., dissenting).
308. Id. at 186.
310. Id. at 154, construed in *Frady*, 456 U.S. at 166. The full quote reads: “The burden
of demonstrating that an erroneous instruction was so prejudicial that it will support a collat-
eral attack on the constitutional validity of a state court’s judgment is even greater than the
showing required to establish plain error on direct appeal.” Id.
311. 456 U.S. at 166.
because that case involved the proper standard for determining when erroneous jury instructions violate fourteenth amendment due process.\footnote{312} In fact, \textit{Kibbe} merely stated the unnoteworthy conclusion that the proof needed to establish a constitutional violation is greater than that needed to excuse a procedural forfeiture. The Court in \textit{Kibbe} was not commenting on the use of plain error in a collateral proceeding, since this issue was not under consideration.

Finally, the plain error rule was rejected in \textit{Frady} because it is viewed as providing the federal prisoner with a preferred status over his state counterpart, a distinction which the Court perceived lacked any basis.\footnote{313} The Court, however, failed to recognize that obvious and distinct differences \textit{do} exist between state and federal prisoners in federal collateral review.\footnote{314} The section 2255 federal prisoner action occurs within a unitary court system and resembles a process analogous to state post-conviction procedures. As Justices Blackmun and Brennan noted, state prisoners may actually have the advantage after \textit{Frady} because the states are free to excuse forfeitures as they see fit during any stage of the state proceeding, while the \textit{Frady} majority forecloses this option to the federal prisoner.\footnote{315} Ultimately, the treatment of federal prisoners must be resolved, at least in part, on the basis of congressional intent, an analysis the Court never pursued.

The rejection of the plain error rule in favor of the cause and actual prejudice standard was not based on any one of the above enumerated factors, but instead on a combination of them all. The Court's policy analysis was premised on the desire to restrict collateral review, and to that end, it summoned all the support it could muster. The Court's goals, however, do not permit it to neglect policy and authority contrary to its position. At some point, the Court must address the weaknesses in its analysis, if for no other reason than to insulate its agenda from future erosion.

The rejection of plain error as a means of excusing a procedural forfeiture calls into question the sincerity of the Court's promise in \textit{Sykes} that the cause and prejudice requirements would not prevent

\footnote{312} See 431 U.S. at 147-55. The claimed constitutional error in \textit{Kibbe} was based on the trial judge's failure to give an explanation of the causation element of the charged crime. \textit{Id.} at 155. \footnote{313} 456 U.S. at 166. \footnote{314} See supra notes 273-76 and accompanying text. \footnote{315} 456 U.S. at 178 (Blackmun, J., concurring in the judgment); \textit{Id.} at 183-84 (Brennan, J., dissenting).
collateral redress of a miscarriage of justice.\textsuperscript{316} In Frady, the Court stated that the plain error rule "was intended to afford a means for the prompt redress of miscarriages of justice."\textsuperscript{317} Although the lower courts have not been consistent in their interpretation or application of the plain error rule,\textsuperscript{318} there is substantial agreement that the rule is to be applied cautiously and, at a minimum, to correct errors which would cause a miscarriage of justice if left unattended.\textsuperscript{319} This leads to the puzzling dilemma of whether the Court's use of the terms "miscarriage of justice" differs according to the type of proceeding involved, whether direct or collateral review, or if the Sykes pledge of correcting miscarriages of justice is just an idle promise. As to the former, it is hard to conceive of differing definitions of "miscarriage of justice" depending upon the proceeding involved. The Court never indicated that it was referring to different connotations of the term. The Court did not explain why a miscarriage of justice raised on a direct appeal will permit excusing a trial forfeiture, while the same miscarriage of justice will not excuse the same forfeiture in a collateral proceeding. From the perspective of the individual defendant and society, justice has been denied in either event.

The only other explanation may lie in the Court's perception of plain error as a less stringent standard than cause and actual prejudice. Plain error is less concerned with the causal factors that brought about the forfeiture than with the prejudicial nature of the claimed violation.\textsuperscript{320} In this way, the plain error rule is consistent

\begin{footnotesize}
\textsuperscript{316} See Wainwright v. Sykes, 433 U.S. at 90-91.
\textsuperscript{317} 456 U.S. at 163.
\textsuperscript{318} Compare United States v. Giese, 597 F.2d 1170, 1199 (9th Cir.) (plain error will only be found where necessary to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process, but not where the evidence against a defendant is so strong that the absence of prosecutorial misconduct would not have changed the jury's verdict), \textit{cert. denied}, 444 U.S. 979 (1979) \textit{with} United States v. Lopez, 575 F.2d 681, 685 (9th Cir. 1978) (errors with constitutional implications should be deemed per se plain error), \textit{But cf.} Chapman v. California, 386 U.S. 18 (1967) (harmless constitutional error rule valid).
\end{footnotesize}
with the Court's promise in Sykes that cause and prejudice would not prevent the collateral review of a miscarriage of justice. After Frady and Isaac, however, the sincerity of the Court on this point must be questioned, since one is left wondering whether a forfeiture, regardless of its prejudicial nature, will ever be excused short of a finding of both cause and actual prejudice.

4. Actual Prejudice—Constitutional Violation or a Claim of Factual Innocence?—After rejecting the use of the plain error rule, the Court in Frady reaffirmed cause and actual prejudice as the appropriate standard for excusing federal trial forfeitures of jury instruction claims in a federal post-conviction collateral proceeding. Justice O'Connor's evaluation of actual prejudice began by noting that while Sykes left the term to future resolution, in the instance of jury instructions, past case law already provides the necessary guidance. The Court relied on its previous announcement in Henderson v. Kibbe that the challenged instructions must "so [infect] the entire trial that the resulting conviction violates due process." The Court reasserted that such a determination requires an evaluation of the prejudicial nature of the instruction in the total context of the trial. The Kibbe due process analysis is consistent with the fact that a trial is comprised of numerous components and that in certain cases a single error or even a series of errors may not affect the outcome, while in other situations a single error, in and of itself, may be sufficiently prejudicial to warrant reversal.

The Frady formulation of prejudice is just a restatement of the standard for obtaining relief in a collateral proceeding on a jury instruction claim, regardless of whether the issue was properly raised at trial. The ultimate issue then—as it should be—is whether the

321. 433 U.S. at 90-91.
322. 456 U.S. at 167.
323. The Court did not address Frady's allegations of cause because it found that Frady could not establish the prejudice prong of the conjunctive prerequisite. See id. at 168 n.16.
324. Id. at 168.
326. Id. at 169 (quoting Kibbe, 431 U.S. at 154).
327. Id.
329. Frady did not allege, and the court of appeals did not find, that the jury instructions under review violated the Constitution. Rather, Frady's claims involved the nature of the instructions under local District of Columbia law and the trial judge's errors with instructing the jury on that law. 636 F.2d at 508-09 & nn.4-7. As a result, the prejudice standard applied by the Court was identical to the standard used to determine when erroneous, but not unconstitutional, jury instructions cumulatively amount to a violation of due process. Compare Cupp v. Naughton, 414 U.S. 141, 147 (1973) (due process violation if instruction "by itself so in-
challenged jury instruction, when "evaluated in the total context of the events at trial, so infected the entire trial that the resulting conviction violates due process."\(^{330}\) This standard is significant only because it equates actual prejudice with the existence of a constitutional violation, a somewhat surprising result in light of the Court's avowed hostility toward collateral review.\(^{331}\)

To the extent that prejudice equals a due process violation, an actual prejudice requirement does not impose a substantial impediment to obtaining federal post-conviction review of allegedly unconstitutional jury instructions. Unfortunately, there are some statements in \textit{Frady} which disturbingly contradict this evaluation of actual prejudice. For example, prior to reviewing the facts of Frady's case, Justice O'Connor stated that "this would be a different case had Frady brought before the District Court affirmative evidence indicating that he had been convicted wrongly of a crime of which he was innocent."\(^{332}\) No explanation, however, is offered as to how or why Frady's case would have been different. Justice O'Connor may have been laying the groundwork for the adoption of Judge Henry Friendly's suggestion that federal collateral relief be limited to those who demonstrate a colorable claim of factual innocence.\(^{333}\) In advocating this limitation, Judge Friendly relied on many of the same costs and policy considerations articulated by the Court in \textit{Sykes}, \textit{Isaac}, and \textit{Frady} for restricting federal collateral review.\(^{334}\)

Although restructuring federal collateral review along the lines suggested by Judge Friendly would be consistent with the Court's determination to restrict the federal court's collateral power, it would also radically alter that review as it exists today. Furthermore, Justice O'Connor did not cite to the Friendly article in connection with her "innocence" statement and did not indicate that she was attempting to restrict collateral review beyond the confines of the cause and actual prejudice standard.

\(^{330}\) \textit{Frady}, 456 U.S. at 169; \textit{Kibbe}, 431 U.S. at 154.

\(^{331}\) \textit{See supra} text accompanying notes 316-20.

\(^{332}\) 456 U.S. at 171.


\(^{334}\) Friendly, \textit{supra} note 10, at 146-51; \textit{see} \textit{Sykes}, 433 U.S. at 88-90; \textit{Isaac}, 456 U.S. at 126-29.
Justice O'Connor's "innocence" statement may also have referred to Frady's failure to come forward with evidence that he acted without malice. At trial, Frady asserted a complete lack of involvement in the homicide, while the prosecution presented substantial evidence of malice by the perpetrator of the murder. In this connection, the "innocence" sentence only emphasized the insignificance of the erroneous jury instructions in the overall context of the facts presented at trial. Nonetheless, Justice O'Connor's injection of this statement, without any explanation, is troublesome and foreboding in light of the Court's current hostility toward federal collateral review.

Finally, the Court's formulation of prejudice demonstrates the bankruptcy of the conjunctive cause and actual prejudice standard. Conceivably, certain jury instructions could render a conviction violative of due process, thereby rendering the conviction clearly unconstitutional, yet because the prisoner cannot establish cause, the prisoner will not be permitted to obtain federal relief from an unconstitutional conviction. Whether such a situation would qualify as a miscarriage of justice under the Court's alleged exception to the cause and prejudice requirements remains extremely speculative. Despite the promise made in Sykes, the rejection of the plain error rule, the reaffirmation of the conjunctive prerequisite, and the strong desire to limit collateral review cast considerable doubt on the viability of any exceptions to the cause and actual prejudice requirements.

III. THE DELICATE BALANCE

A strong desire to restrict collateral review motivated the Supreme Court's development of the cause and actual prejudice prerequisite for excusing procedural forfeitures. The Court's action was not based on perceived congressional intent or case precedent, but

335. 456 U.S. at 171. Justice O'Connor, a few paragraphs later, stated:

We conclude that the strong uncontradicted evidence of malice in the record, coupled with Frady's utter failure to come forward with a colorable claim that he acted without malice, disposes of his contention that he suffered such actual prejudice that reversal of his conviction 19 years later could be justified.

Id. at 172.

336. See supra notes 241-52 and accompanying text.

337. See Isaac, 456 U.S. at 134 n.43.

instead on several policy considerations favoring a restraint of the federal courts' collateral power. This next section examines many of these policy considerations in order to develop an understanding of the Court's motivations, the strengths and weaknesses of the reasons behind such a development, and ultimately, the validity of the Court's treatment of previously forfeited constitutional claims.

The Supreme Court in recent years has criticized federal collateral review for denigrating the prominence of the trial, the enforcement of procedural rules, society's legitimate interest in finality, the proper balance of federalism, and the significant increase of the federal courts' workload. As a preface to reviewing these concerns, the actual impact of federal collateral review must be put into its proper perspective. From 1971 to 1981, the state prison population nearly tripled, while during this same period the number of state prisoner federal post-conviction petitions declined by almost 2000. As a result, the number of such petitions expressed as a percentage of the state prison population declined from 7.2% to 2.3%, representing over a 60% decrease. Therefore, assuming that each prisoner filed only one petition and that relief was granted in 10% of those cases, the federal courts would upset less than 0.25% of all state criminal convictions. These assumptions are obviously inaccurate,

342. The empirical research suggests that the success rate is approximately 4% of all petitions filed and that about one-third of all petitioners file more than one petition. P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 4(a), 4(e) (1982); Shapiro, Federal Habeas Corpus: A Study In Massachusetts, 87 HARV. L. REV. 321, 339-42, 353-55 (1973) (in a study of 257 cases, less than 4% were "successful"; however, in a number of cases the petitioner made a "significant gain.")
but only to the extent that they overstate the impact of federal collateral review. Based on these figures, the federal courts only have a minimal impact on the administration of the state criminal process.

Finally, during this same period the number of federal district judges increased from 400 to 516. As a result, in 1981, each federal district judge, on the average, was responsible for reviewing fifteen federal post-conviction petitions. This small number is rendered even smaller by the fact that a vast majority of these cases are dismissed in the prehearing stage, and those that involve a hearing rarely take more than a day to complete. Given these statistics, one has to question the validity of the Court's concern with the actual impact of federal collateral review on the state and federal courts.

A. Finality

The Supreme Court has identified finality as a virtue deserving greater respect than that provided by expansive federal collateral review. The Court's use of the term finality must be examined in reference to a specific time frame, because, in and of itself, it is devoid of any time limitations. Finality only indicates that at some point the litigation should come to an end. The Court's concept of finality is referenced to the traditional direct appeal process, whereby, in the absence of federal collateral review, a criminal conviction becomes final once the prisoner has been convicted and has exhausted the direct appeal route. Attendant to direct review are rules which generally preclude appellate or post-conviction litigation of any issues which have not been properly raised and preserved ac-

343. See supra note 322.


345. The available statistics suggest that over 50% of all petitions are denied for procedural reasons. See P. Robinson, supra note 342, at 13, 18, 31; Shapiro, supra note 342, at 356. In addition, evidentiary hearings are held in about 10% of the cases. See P. Robinson, supra note 342, at 4(c); Shapiro, supra note 342, at 336-37.


cording to the operating procedural guidelines. These rules of forfeiture normally preclude the Supreme Court’s direct review of a state criminal conviction of all forfeited claims under the independent and adequate state ground doctrine. The direct appeal process, coupled with rules of procedural forfeiture, determine those issues that can be litigated in a post-conviction appeal. Once this appellate process is completed, absent collateral review, the conviction becomes final and no longer subject to further court review.

Expansive federal collateral review, as developed in Brown v. Allen, and Fay v. Noia, altered these traditional notions of finality and opened the criminal conviction to repeated collateral litigation, including the examination of previously forfeited claims that had been precluded from direct review. Under the regime of Noia, criminal convictions were never truly final and remained open to collateral review as new constitutional rights were recognized by the courts or developed by the litigants. This concept of never ending collateral litigation is in sharp contrast to the direct review process that permits one avenue of appeal on only those issues that had been previously raised at trial, or when permitted, in the initial appeal. Moreover, expansive collateral review detracts from the terminal significance of the direct appeal. The Supreme Court, desiring that litigation shall cease at some reasonably identifiable time, has utilized the restoration and reinforcement of procedural forfeiture rules as a means of ensuring greater finality in criminal judgments. These rules, if enforced, limit the issues subject to direct and collateral review by preventing the post-conviction litigation of forfeited claims. As a result, only those issues which have been properly raised and preserved will be subject to post trial review. Once this process is

349. See Henry v. Mississippi, 379 U.S. 443, 446-49 (1965); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); see also supra note 5.
350. 344 U.S. 443 (1953) (opening collateral review to all constitutional questions and removing the bars of collateral estoppel and res judicata).
exhausted the judgment of conviction becomes final.

In seeking to reestablish finality in criminal convictions, the Court has expressed the view that society has an interest in insuring that the litigation will end at some point, and at that time, the parties can focus their attentions on other pressing matters, including the restoration of the prisoner as a productive member of society. Finality is premised on the concept that continued litigation reaches a point of diminishing returns, whereby the cost and uncertainty of endless review exceed the possibility of correcting any significant error, thereby rendering continued litigation undesirable. In a society of limited resources, there reaches a stage when the energies of the prosecution and the courts are better directed at the future, rather than constantly rehashing the past. The Supreme Court has determined that, to a great extent, this point is reached after the direct review of a criminal conviction.

Endless litigation is also blamed for hindering the prisoner's rehabilitation on two accounts. First, presenting the prospect that a court will eventually find the conviction invalid, collateral review prevents the prisoner from accepting the fact that he has been justly convicted and, therefore, properly subject to incarceration and rehabilitation. In addition, expansive collateral review encourages the prisoner to direct all his attention and energies toward vacating his conviction, instead of focusing them on improving himself and preparing himself to reenter society as a productive member.

The Court's discussion of finality, however, fails to explain why the goal of terminating the litigation holds an exalted position over the review of constitutional questions that affect a citizen's liberty and possibly his life. Professor Paul Bator, a chief advocate for

357. See id. at 128 n.32 (1982); Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring); Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. PA. L. REV. 378, 383-84 (1964); Bator, supra note 347, at 452; Friendly, supra note 10, at 146. But see Lay, Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Reserved, 21 DE PAUL L. REV. 701, 711 (1972) ("However, it is difficult to perceive that a prisoner who is procedurally barred from raising a constitutional right will consequently acknowledge that he is justly subject to sanction.").
358. See generally C. CHESSMAN, CELL 2455, DEATH ROW (1954).
greater finality in the criminal process, has admitted that an acceptance of finality is an acknowledgement that certain errors may go uncorrected. He also believes, however, that collateral review will not significantly enhance the attainment of an error free process.\textsuperscript{360} While such a conclusion may be valid when the state courts have already considered the constitutional claims, its validity is seriously diminished when those constitutional issues, because of the forfeiture, have never been presented to, or litigated in any court. Instead of having direct and collateral review, the prisoner has no review at all, which substantially increases the possibility of error.\textsuperscript{361}

Any acceptance of error also fails to recognize that our society

\begin{quote}
If any detention whatever is to be validated, the concept of “lawfulness” must be defined in terms more complicated than “actual” freedom from error; or, if you will, the concept of “freedom from error” must eventually include a notion that some complex of institutional processes is empowered definitively to \textit{establish} whether or not there was error, even though in the very nature of things no such processes can give us ultimate assurances: \\

\[\text{L}aw\text{ is not a simple concept . . . consisting as it does of rules distributing authority to make decisions as well as rules that govern the decisions to be made. There is a sense, therefore, in which a prisoner is legally detained if he is held pursuant to the judgment or decision of a competent tribunal or authority, even though the decision to detain rested on an error as to law or fact.}\]

That there must be some room for limiting conceptions of this kind seems clear enough: the writ [of habeas corpus] cannot be made the instrument for re-determining the merits of all cases in the legal system that have ended in detention.

Our analysis of the purposes of the habeas corpus jurisdiction must, thus, come to terms with the possibility of error inherent in any process. The task of assuring legality is to define and create a set of arrangements and procedures which provide a reasoned and acceptable probability that justice will be done, that the facts found will be “true” and the law applied “correct.”


There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.


361. As Professor Rosenberg has stated: “Where finality is insisted upon in the absence of such an adjudication on the merits, however, a value choice has been made that in a world of finite resources it is preferable that the matter be resolved quickly than that it be resolved correctly.” Rosenberg, \textit{supra} note 20, at 423-24; \textit{see also} Pollak, \textit{supra} note 359, at 65 \& n.84.
is very concerned with ensuring that the innocent are not wrongly convicted. Rules of procedure provide for numerous instances where a forfeiture can be excused and the conviction reviewed to determine the accuracy and validity of the judgment of guilt. There is no pleasure to be gained in the acceptance of error, nor in the blatant refusal to continue the quest for justice, especially when the state has refused to consider the constitutional questions due to an attorney’s failure to follow the proper rules of procedure. Any acquiescence to the possibility of error, especially error which undermines the validity of the determination of guilt, should not be undertaken lightly, but only when necessary and after a careful consideration of all the costs involved. Such a careful analysis, however, is missing from the Supreme Court’s restriction of federal habeas review.

The concept of finality is desirable because it dictates that at a certain point in time the parties can rely on the validity of a conviction and conduct their business accordingly. The enforcement of procedural forfeiture rules permits the state to rely on the forfeiture of all constitutional claims that have not been properly raised, thereby securing the conviction against future attack. The result, however, is that the state benefits from a coupling of its own constitutional wrongdoing and the defense counsel’s failure to raise these issues. This is significant when it is recognized that it is the state that sets the procedural forfeiture rules, decides when to excuse or enforce those rules, and licenses and appoints the defense bar. Un-


363. Most state rules of procedure permit the excusal of forfeitures and the granting of a new trial upon the discovery of new evidence raising significant questions as to the defendant’s guilt. See, e.g., CAL. PENAL CODE § 1181 (West 1970); N.Y. CRIM. PROC. LAW §§ 330.30, 440.10 (McKinney 1971); cf. FED. R. CRIM. P. 33.


365. Justice Brennan has perceptively observed that the reliance factor may be one of the strongest arguments in favor of enforcing rules of procedural forfeiture, even though the Court has failed to accord it any significance. See Wainwright v. Sykes, 433 U.S. 72, 112 n.11 (1977) (Brennan, J., dissenting); see also Westen, supra note 56, at 1236-39 (forfeiture of constitutional rights justified more by interests of state than actions of defendant).


368. See Brilmayer, supra note 124, at 751, 767 n.125, 769. Professor Rosenberg notes:
less and until the state can demonstrate real harm from excusing a
forfeiture, the state should not be permitted to benefit from its own
constitutional wrongdoing, which is insulated from court scrutiny
under its procedural rules, because of the state licensed, and often
state appointed, attorney's ignorance, inadvertence, or negligence.369

The virtues of finality are not easily measured, either qualita-
tively or quantitatively. The point at which criminal litigation is ter-
minated remains a value judgment that should only be rendered af-
after a balancing of the competing interests.370 Recently, the Supreme
Court has determined that there is a greater need for finality in
criminal convictions than previously recognized by the federal post-
conviction courts.371 The Court's analysis, however, fails to recognize
that there remain significant questions as to what place finality has
in our system of criminal justice, given the extensive state and fed-
eral appellate process and the clear congressional mandate of federal
collateral jurisdiction.372 While the concept of finality may appear
superficially appealing, no one has proved that it promotes rehabilita-
tion373 or a greater respect for the law. Although finality may be

In balancing the state's and society's interest in finality against defendant's and
society's interest in vindication of constitutional rights, it should be taken into ac-
count that the state, with its overwhelming power vis-a-vis the defendant, has volun-
tarily chosen its agents who have allegedly committed unconstitutional acts,
whereas, in the great majority of cases with which we are dealing, the indigent
defendant has had no opportunity to select the attorney of his or her choice. Indeed,
defense counsel is also, in a sense, the state's agent. Thus, one agent of the state has
engaged in an alleged constitutional violation, and another has committed a proce-
dural default that precludes any court from determining the merits of the resulting
constitutional claim. Accordingly, in terms of access to federal court, there should
be a recognition that imputation is a two-way street and there should, at the least,
be great reluctance to hold the defendant accountable for the defaults of his or her
attorney.

Rosenberg, supra note 20, at 426-27 (footnotes omitted).

369. The Supreme Court, by not excusing procedural forfeitures, encourages the states
to adhere strictly to their procedural rules, and to appoint criminal attorneys who are likely to
be less diligent in raising constitutional claims. These restrictions raise the incentives to com-
mit constitutional violations by lowering the risks that such violations will be litigated. See
infra notes 495-523 and accompanying text.

370. See Bator, supra note 347, at 448-49; Rosenberg, supra note 20, at 423-24; Schae-

371. E.g., Engle v. Isaac, 456 U.S. 107, 126-27 (1982); see also, Wainwright v. Sykes, 433


373. For both sides of the rehabilitation debate, compare Bator, supra note 347, at 452;
Bator, supra note 360, at 614; and Friendly, supra note 10, at 146; with Cardarelli & Finkel-
stein, Correctional Administrators Assess the Adequacy and Impact of Prison Legal Services
Programs in the United States, 69 J. CRIM. L. & CRIMINOLOGY 89, 96-98 (1974); Rosenberg,
supra note 20, at 427-29; and Schaefer, supra note 370, at 22.
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economically beneficial, values more significant than economics should be promoted because of the real cost in the loss of life or liberty from unvindicated constitutional rights. In addition, society has not indicated, through its legislators, that it desires greater finality. It is distressing that the Court would strike the balance in favor of ending the litigation by a forfeiture of remedies, without showing a proper concern for the rights lost or their impact on the correct determination of guilt or innocence. While collateral litigation may not ensure justice, it is important to note that what is final may not always be right.

B. Federalism and Comity

The Court has criticized the liberal excusal of state procedural forfeitures for failing to show appropriate concern for the often repeated concepts of federalism and comity. Anytime the federal courts examine a state judgment, whether on direct or collateral review, these concepts become relevant to the federal court’s exercise of its power, especially where such review ignores an independent and adequate state procedural ground supporting the conviction. Federalism and comity dictate that in our dual system of court jurisdictions the federal courts must show “a proper respect for state functions.”

Congress, as the arbiter of federal jurisdiction, must initially determine when it is appropriate for the federal courts to interfere in the state criminal process. Unfortunately, after vesting the federal courts with collateral jurisdiction, Congress has provided minimal direction on the scope and exercise of this jurisdiction. Absent con-

374. See Sunal v. Large, 332 U.S. 174, 189 (1947) (Rutledge, J., dissenting) (“Beside executing its great object, which is the preservation of personal liberty and assurance against its wrongful deprivation, considerations of economy of judicial time and procedures, important as they undoubtedly are, become comparatively insignificant.” (footnote omitted)).


377. See Tushnet, supra note 108, at 1320-21. It has been stated that Congress can provide for the type of review it desires on federal questions. See Brown v. Allen, 344 U.S. 443, 499-500, 508-10 (1953) (Frankfurter, J., dissenting).

378. Compare Wainwright v. Sykes, 433 U.S. 72, 78-81 (1977) with id. at 105-07
gressional guidance, the Supreme Court is therefore left to determine how and when the federal collateral courts are to review a state conviction.379

In Ex parte Royall,380 the first case in which the Court discussed the federal judiciary's collateral power over state prisoners, it was held that federalism and comity require the lower federal courts to exercise discretion in deferring action on a habeas corpus petition until the state prisoner has fully exhausted his federal claims in the state courts.381 This exhaustion requirement affords the state courts the opportunity to review constitutional claims in advance of any federal intervention, and in some instances, to preempt the federal courts intervention by correcting the error. In Royall, the Court relied on concepts of federalism and comity to stay federal action temporarily, but not to restrict that review if it should ultimately occur.382

The exercise of federal collateral jurisdiction to override a state procedural forfeiture clearly presents a conflict of competing state and federal interests.383 As a result, issues of federalism and comity

(Brennan, J., dissenting). Shortly after Fay v. Noia adopted the "deliberate bypass" standard for federal collateral review, 372 U.S. 391 (1963), Congress modified the habeas corpus statutes to incorporate the principles enunciated in Townsend v. Sain, 372 U.S. 293 (1963) (where state court has reliably found the relevant facts, federal district judge may defer to such findings), and to provide a limited res judicata effect for factual determinations by state courts. See 28 U.S.C. § 2254(d) (1976). At that time, Congress did not modify either Noia or Brown v. Allen, 344 U.S. 443 (1953) (federal district courts have broad power to hold evidentiary hearing on habeas petition concerning federal constitutional question). This silence has been taken by some to be a tacit approval of the principles of Noia and Brown. E.g., Robbins & Sanders, Judicial Integrity, the Appearance of Justice, and the Great Writ of Habeas Corpus: How to Kill Two Thirds (or More) with One Stone, 15 Am. Crim. L. Rev. 63, 84 (1977); Peller, supra note 3, at 669. Others have expressed the view that Congress felt it could not constitutionally modify habeas corpus jurisdiction. See Hill, supra note 39, at 1058; Note, Proposed Modification of Federal Habeas for State Prisoner—Reform or Revocation, 61 Geo. L.J. 1221 n.3 (1973). In any event, numerous proposals have been brought before Congress to restrict habeas review, but none have been successful. See Pollak, supra note 359, at 57-63; Sallett & Goodman, Closing the Door to Federal Habeas Corpus: A Comment on Legislative Proposals to Restrict Access in State Procedural Default Cases, 20 Am. Crim. L. Rev. 465, 466 & nn.4 & 5 (1983); Note, supra, at 1221.

379. Cf. Wells, supra note 130, at 60 (noting that the Court has not conducted an analysis balancing the relevant interests, but has arbitrarily divided decision making power between state and federal courts).

380. 117 U.S. 241 (1886).

381. See id. at 251-53; see also supra notes 192-98 and accompanying text.


must be considered. The Court's present incarnation of federalism and comity with respect to procedural forfeitures calls for the federal courts to pay greater respect to the state's criminal judgments, contemporaneous objection rules, and power to punish convicted offenders. The resolution of this conflict must depend, in part, on an evaluation of these interests.

1. The State's Right to Punish the Guilty. — The Supreme Court has stated that federal collateral review frequently interferes with the state's and society's right to punish admitted offenders due to the passage of time from the initial trial until the federal court orders a new trial. Such delay renders retrial impractical, if not impossible. There can be no doubt that some "admitted offenders" do evade punishment because of the availability of the post-conviction relief. There is no evidence, however, that this number is very

384. The Court and several commentators have indicated that broad federal collateral review undermines the state judges' good faith attempts to interpret and enforce the United States Constitution by permitting a single federal judge, or a small group of federal appeals judges, to overturn the state's highest court's constitutional pronouncements. See Engle v. Isaac, 456 U.S. 107, 128 n.33 (1982); Doub, supra note 10, at 323, 326; O'Connor, supra note 2, at 801; Note, In Search of the Optimum Writ: A Suggestion for the Improvement of Federal Habeas Corpus, 22 J. PUB. L. 466, 473-74 (1973). But see Brown v. Allen, 344 U.S. 443 (1953):

Insofar as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment of a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than state law. . . . The fact that Congress has authorized district courts to be an organ of the higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted.

Id. at 510 (Frankfurter, J., dissenting). Whatever validity such a claim may have with respect to constitutional issues initially litigated in the state courts and then relitigated in the federal courts, does not likewise apply to procedural forfeitures. By their very nature, forfeited claims have not received any scrutiny in the state courts, and there has been no state court decision for the federal judge to overrule or disregard.

385. In Engle v. Isaac, 456 U.S. 107 (1982), the Court stated:

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

Id. at 127-28.

386. Similarly, some clearly guilty defendants are freed as a result of constitutional violations committed by the government in investigating and prosecuting the accused, or because juries sometimes refuse to convict the guilty. Neither situation is, however, a valid argument for eliminating the Constitution or the jury system.
large or that a significant portion of habeas applicants have ever admitted committing the offenses for which they were convicted.\textsuperscript{387} Due to the narrow scope of review in guilty plea cases, which represent the vast majority of all criminal convictions, most post-conviction petitioners have been tried before a court or a jury where they entered a plea of not guilty.\textsuperscript{388} Where these prisoners raise constitutional issues that impugn the accuracy and validity of the conviction, their claims raise serious questions as to the validity of such conviction.

The state does not have any legitimate interest in punishing an innocent person. Similarly, the state has little interest in enforcing procedural rules that foreclose guilt-related claims.\textsuperscript{389} A procedural forfeiture does not reduce the impact of or cure constitutional violations that impugn the accuracy of the fact finding process. The state's failure to review the prejudicial nature of such constitutional violations renders the determination of guilt highly suspect. In fact, because the state must be concerned with the justice of its criminal judgments, it has an interest in litigating guilt-related issues regardless of whether or not they were forfeited. In addition, it is hard to understand how the state's responsibility for an accurate determination of guilt vanishes simply because the defense attorney did not adequately protect his client.\textsuperscript{390} The appointment of counsel does not abrogate the state's responsibility to see that justice is done. If defense counsel does not provide adequate protection, the state must do so. The state courts' refusal to review innocence-related claims does

\begin{footnotesize}
\begin{enumerate}
\item[388.] See P. Robinson, supra note 342, at 4(a), 7-8 (Only 18.2\% of those filing federal collateral petitions had pled guilty. The remaining 81.8\% had pled not guilty and were convicted by a judge or a jury. Habeas corpus "is used primarily by that small percentage of the population in custody that had a trial." Id. at 8.). Federal statistics indicate that 87\% of all federal defendants either plead guilty, are acquitted, or have their cases dismissed in the pre-trial stage. The remaining 13\% of federal defendants go to trial and are convicted. It is from this group that the vast majority of post-conviction petitioners come and they have all pled not guilty to the charges of which they are accused. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1981, at 404-08 (T. Flanagan, D. van Alstyne & M. Gottfredson eds. 1982) [hereinafter cited as SOURCEBOOK—1981]. See infra note 412.
\item[389.] See Hill, supra note 39, at 1077-78.
\item[390.] Several recent Supreme Court opinions impose exclusive responsibility for protecting the defendant's rights on the defense counsel and relieve the trial judge of any such responsibility. E.g., Wainwright v. Sykes, 433 U.S. 72, 85-86 (1977) (the trial judge does not have the responsibility to determine the voluntariness of a defendant's confession prior to permitting its use at trial); Estelle v. Williams, 425 U.S. 501, 512 (1976) (the trial court does not have to inquire on its own into the defendant's desire to be tried in obvious jail clothing). See Cover & Aleinikoff, supra note 83, at 1075, 1078-79.
\end{enumerate}
\end{footnotesize}
not mean, however, that the federal court can abandon its responsibility as well.\textsuperscript{391}

Regardless of the nature of the habeas applicant's admissions, the writ does not prevent society from punishing anyone.\textsuperscript{392} If punishment is prevented, it occurs because an agent of the state has violated an individual's constitutional rights and that violation was not corrected in the state courts.\textsuperscript{393} If the Constitution was followed in the first instance, the writ would be unnecessary and the conviction would therefore be impenetrable. The state should not be permitted to complain when the federal court reviews a conviction to determine if it violates the Constitution, because it was the state that committed the initial constitutional violation and then compounded the error by refusing to excuse the forfeiture. Furthermore, the prisoner should not be punished "for the logistical and temporal difficulties arising from retrial"\textsuperscript{394} when this remedy has been provided by Congress and endorsed by the Supreme Court. The Court's recent opinions leave the impression that the dislike for the remedy masks a deep-seated distaste for the rights that the remedy is only intended to vindicate.\textsuperscript{395}

2. The Legitimacy of the State's Procedural Rules.—Another of the Supreme Court's federalism concerns regards the possibility that the federal collateral courts may undermine the legitimacy of state procedural rules by excusing procedural forfeitures.\textsuperscript{396} There can be little doubt that in an orderly legal system there must be rules for when, where, and how certain issues are to be brought

\begin{itemize}
\item \textsuperscript{391} As the Supreme Court reminds us, the question is not whether federal courts have the power to review such claims, but, rather, what the appropriate exercise of that power is. See Francis v. Henderson, 425 U.S. 536, 538-39 (1976).
\item \textsuperscript{392} The argument that the granting of a habeas writ prevents the punishing of guilty people is similar to blaming the exclusionary rule for the suppression of evidence when adherence to the fourth amendment may have prevented discovery of the evidence in the first place. The real dislike is for the constitutional protection in the first place. See Mertens & Wasserstrom, \textit{The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law}, 70 Geo. L.J. 365, 459-62 (1981).
\item \textsuperscript{393} See Engle v. Isaac, 456 U.S. 107, 147-48 (1982) (Brennan, J., dissenting). The state court's failure to correct the constitutional defect results from a combination of the attorney's procedural forfeiture and the state's enforcement of that forfeiture. While some of the blame should focus on the attorney for depriving the state courts of the opportunity to correct the error, the Court's present scheme further punishes the victim of the constitutional violation.
\item \textsuperscript{394} Id.
\item \textsuperscript{395} See Mertens & Wasserstrom, supra note 392, at 459-62.
\end{itemize}
before a court. In order to give any significance to such rules, there
must be some way to insure that they will be followed. In addition to
the Federal Rules of Criminal Procedure, nearly all state court rules
of procedure dictate that all constitutional claims arising out of a
criminal prosecution must be raised before, at, or immediately after
trial.\(^{397}\) These rules primarily function to bring the matter before the
court at a time when it can make a ruling based on the freshest
evidence, and, wherever possible, avert the injection of error into the
trial process.\(^{398}\) As a means of requiring adherence, these rules fur-
ther dictate that all issues that have not been timely and properly
raised are precluded from future consideration. The Supreme Court
has long recognized the legitimacy of such procedural forfeiture
rules.\(^{399}\) When such rules are fairly and evenly applied, the Court
has relied upon them to foreclose direct review of criminal convictions.\(^{400}\) This recognition and enforcement has validated the states’
reliance on forfeitures as a legitimate means of insuring compliance
with their procedural rules.

The validity and legitimacy of procedural forfeiture rules raises
two separate federalism concerns. First, the Court recognizes that to
excuse procedural forfeitures in a federal collateral proceeding would
pressure the state courts to ignore their own procedural rules so as to
review the forfeited claims in advance of the federal collateral
courts.\(^{401}\) This problem occurs because of the inconsistent treatment
of procedural forfeitures on direct and collateral review.\(^{402}\) In mov-
ing to restrict federal collateral review, the Court has reduced the
tension of this conflict by limiting the situations in which the proce-
dural forfeiture will be excused.\(^{403}\) The Court has made a value
judgment in favor of strictly enforcing procedural forfeiture rules
and, as a result, has diminished the incentive of the state courts to

\(^{397}\) See supra note 348 and accompanying text.


\(^{399}\) E.g., Henry v. Mississippi, 379 U.S. 443 (1965).

\(^{400}\) E.g., id. at 446-47. See supra note 5.

\(^{401}\) See Wainwright v. Sykes, 433 U.S. 72, 90 (1977); see also Engle v. Isaac, 456 U.S.
107, 129 (1982) ("Issuance of a habeas writ ... [undercuts] the State's ability to enforce its
procedural rules ... ").

\(^{402}\) See supra note 290.

\(^{403}\) One commentator has noted that this "Hobson's choice" for the state court,
whether to enforce procedural forfeitures, is "less onerous than the everyday strategic and
tactical decisions that defendants and their attorneys must necessarily make in the course of
criminal litigation." Rosenberg, supra note 20, at 416.
ignore such rules.\textsuperscript{404}

The second federalism concern arising from the legitimacy of state procedural rules originates in the Court's reasons for creating the exhaustion doctrine: to provide the state courts with the opportunity to resolve the constitutional issues before the federal court addresses them.\textsuperscript{405} A procedural forfeiture enforced in the state courts, but ignored in the federal court, conflicts with the underlying premise of the exhaustion doctrine by permitting the federal courts to rule on the constitutional issues even though they have not been addressed in the state courts. By defaulting, the defendant or his attorney has not given the state courts the opportunity to correct any error in advance of federal intervention.\textsuperscript{406} Although the state court can ignore the forfeiture, there is no reason why it should have to, given the legitimacy and validity of such rules.

The Supreme Court recognizes that rules of procedural forfeiture are a legitimate means of enforcing certain procedural requirements and, to that extent, have upheld such rules on direct review.\textsuperscript{407} Any inconsistent or contrary treatment of these forfeitures by the federal collateral courts only tends to create confusion and undermines their legitimacy.\textsuperscript{408} Resolution of the federal collateral court's treatment of procedural forfeitures must weigh the legitimacy of such rules against the nature and impact of the federal constitutional issues that have not been reviewed as a result of such forfeitures.

C. \textit{The Main Event, Deliberate Forfeitures, and Preventing Constitutional Error}

The Supreme Court has stated that the liberal excusal of procedural forfeitures detracts from the prominence of the trial as the "main event"; encourages defense counsel to withhold certain constitutional claims deliberately; and diminishes the care and respect of the trial participants in detecting and preventing constitutional error. Before discussing each of these considerations separately, it should be noted that as a group they are all subject to the same criticism.

\begin{itemize}
\item \textsuperscript{404} See Wainwright v. Sykes, 433 U.S. 72, 89-90 (1977). \textit{But see} Reitz, \textit{supra} note 7, at 1352 ("On the level of sound policy, one very desirable goal is to define the federal habeas corpus jurisdiction so as to serve as an incentive for the improvement of state procedures.").
\item \textsuperscript{405} See \textit{Ex parte} Royall, 117 U.S. 241, 251-53 (1886).
\item \textsuperscript{406} See Engle v. Isaac, 456 U.S. 107, 128-29 (1982).
\item \textsuperscript{407} See Henry v. Mississippi, 379 U.S. 443, 447 (1965).
\item \textsuperscript{408} \textit{Contra} Fay v. Noia, 372 U.S. 391, 431-34 (1963) (adequate and independent state ground doctrine is a function of limited appellate review; federal habeas jurisdiction is not so limited).
\end{itemize}
The Court's perceptions in this area reflect a distorted view of the realities of the American criminal trial process and the responsibilities and concerns of the participants. The Court's analysis of the effect of liberal collateral review on the trial proceedings are not supported by any hard data or authority, and remain completely speculative and in conflict with the realities of criminal advocacy.

1. The Trial as the "Main Event."—Justice Rehnquist has criticized the excusal of procedural forfeitures for "detract[ing] from the perception of the trial of a criminal case in state court as a decisive and portentous event." This appraisal, however, stands in sharp contrast to the day-to-day practice in the criminal trial courts. From bail, through trial or plea of guilty, to the invocation of sentence, the accused's efforts are centered on immediately obtaining the most beneficial outcome. The trial counsel's efforts should be similarly focused. The vast majority of criminal cases never involve a trial. They are terminated by a guilty plea that normally precludes future litigation of constitutional claims. For this vast majority of


411. See Rosenberg, supra note 20, at 417.

412. Although statistics on guilty pleas in the state courts are often unavailable, federal statistics are readily available. From 1976 to 1980, 82% of all federally indicted defendants survived the pre-trial stage. Of this 82%, 80% pled guilty and 20% went to trial. Of the defendants going to trial, 25% were acquitted. Thus, 87% of all federal defendants who had their cases dismissed prior to a trial, pled guilty, or were acquitted, thereby precluding any significant post-trial litigation. This leaves only 13% of all federal defendants who were convicted after trial and who could pursue any meaningful post-conviction review. Sourcebook—1981, supra note 388, at 404; see Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 Yale L.J. 1179, 1206 nn.84 & 85 (1975) (presenting statistics that suggest that the incidence of guilty pleas in state courts might be higher than the federal figures). For figures on the number and percent of state prisoners who actually pursue federal post-conviction review, see supra notes 340-41 and accompanying text.


Only 18.2% of those filing [habeas petitions] have pled guilty even though 80 to 90% of all convictions result from guilty pleas and approximately 64% of sentenced prisoners have pled guilty. . . . In any case, this statistic significantly changes a common perception of the institution of habeas corpus. It is not used by a represen-
criminal defendants, there will be no post-conviction litigation of any real significance. The trial court, therefore, must be the primary and absolute focus of their attentions.

Of the 20% to 30% of the criminal cases that are tried, the primary goal for the defendant is an acquittal or conviction on a lesser charge. While making a record and preserving issues for post-trial litigation are also important, these goals pale in contrast to the more immediate concern of obtaining the best disposition of the client’s case at trial. Furthermore, the relatively high incidence in the change of attorneys after sentencing tends to cast doubt upon the reasonableness of the Court’s perceptions. Counsel could only intentionally default with an eye toward subsequent litigation if he knew he would remain with the case until it eventually ended up in federal court, or, if he relayed his intentions to his client or subsequent counsel handling the federal proceedings—all of which are highly unlikely.

Trial counsel is usually a trial specialist, whose primary, if not sole, concern is the representation of the criminal defendant at trial. Beyond properly preserving issues for appeal and establishing the necessary record for appellate litigation, the trial advocate’s attentions are only minimally directed at any subsequent proceeding because his responsibilities for a client will usually cease after sentencing. The judge and, to a great extent, the prosecutor are also limited in their concerns to the trial, in that they usually do not have any post-trial responsibilities. The post-sentencing litigation will typically occur in a different court between different advocates.

Finally, the relatively low success rate on appeal and even lower success rate in federal post-conviction proceedings dictate that the
trial must remain the central focus of the entire criminal process. To place one's hope on success in the appellate or collateral courts, especially with issues that may alter or affect the outcome of the trial, is simply foolish. From the top echelons of the judiciary, easy access to federal collateral review may appear to degrade the prominence of the trial, but from the bottom, in the trenches, where most of the action occurs, the reality is very different.

2. Sandbagging: Deceit, Deception, and Foolishness.—Liberal excusal of procedural forfeitures is also criticized by the Supreme Court for undermining the deterrent value of procedural rules. The Supreme Court perceives that such liberal excusal encourages defense counsel to forego intentionally litigating constitutional claims at trial while still hoping to obtain an acquittal. If this gamble fails, the forfeited issues then can be raised for the first time in the federal collateral proceeding where the defendant, to his great advantage, can obtain a new trial. Of all the reasons offered for restricting federal habeas review, this “sandbagging” analysis is not only the weakest, with the least attachment to reality, but paints a very grim picture of the criminal defense bar. Justice Rehnquist, the author of this sandbagging analysis, cites no evidence or authority in support of his hypothesis. Instead, he offers only his unfounded speculations on defense counsel’s conduct. The “sandbagging” analysis

4%). Based on the number of state prisoners who file federal post-conviction petitions and the success rate, less than 1/10 of 1% of all state prisoners actually obtain any relief from the federal collateral courts. See supra notes 340-41.


421. See Friendly, supra note 10, at 158; Rosenberg, supra note 20, at 415. But see Bonds v. Wainwright, 564 F.2d 1125, 1134 & n.4 (5th Cir. 1977) (Tjoflat, J., dissenting), vacated on reh’g en banc, 579 F.2d 317 (5th Cir. 1978); 4 AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE § 22-6.1 (2d ed. 1982).

422. See Wainwright v. Sykes, 433 U.S. 72, 89-90 (1977); Tague, supra note 56, at 43-44. This lack of evidence may be, in part, attributable to the deliberate bypass standard, which focuses on intentional conduct and was created to deny relief in those cases where defense counsel has engaged in the very tactics the Court was concerned with. See Sykes, 433 U.S. at 102-04 (Brennan, J., dissenting). Were sandbagging such a prevalent practice, or even a limited but accepted practice, one would think that there would be a number of lower court opinions that would have focused on or even mentioned the problem. Yet, the Court does not cite a single case for support. Perhaps, Justice Rehnquist’s critique—and his lack of supporting evidence—may be explained by the notion that federal courts are unable, or ill-equipped to detect those instances where defense counsel has intentionally defaulted in the hope of sandbagging. A successful sandbag would require defense counsel to deceive the federal court and even perjure himself when questioned on his intentions at the federal habeas hearing. Does the Court truly believe that most, or even many, defense attorneys would intentionally deceive the courts in the hope of helping their clients? Justice Rehnquist never addressed these
relies on the unsupported assumption that certain procedural forfeitures occur intentionally with an eye toward future collateral litigation. "Sandbagging" implies that defense counsel considered the strategic and tactical advantages of not presenting the constitutional claims in a proper and timely manner at trial, the chances of eventually deceiving the federal court, and finally the possibilities of obtaining relief on the merits in the collateral proceeding.

This view of defense strategy, however, is hard to reconcile with reality. Competent counsel would never undertake the calculated gamble of deceiving the federal court or the extremely slight chance

423. "Sandbagging" would require that defense counsel be fully cognizant of: the local procedural rules; the constitutional issues (and assess their impact on the state trial); and the prospects of favorable treatment in the state court versus success in the federal post-conviction court.

424. Such conduct would clearly violate the Canons of Ethics, its attendant disciplinary rules, and would be grounds for disbarment. See Model Code of Professional Responsibility DR 7-102 (1979).

425. As Justice Brennan has observed:

He [defense counsel] could elect to "sandbag." This presumably means, first, that he would hold back the presentation of his constitutional claim to the trial court, thereby increasing the likelihood of a conviction since the prosecution would be able to present evidence that, while arguably constitutionally deficient, may be highly prejudicial to the defense. Second, he would thereby have forfeited all state review and remedies with respect to these claims (subject to whatever "plain error" rule is available). Third, to carry out his scheme, he would now be compelled to deceive the federal habeas court and to convince the judge that he did not "deliberately bypass" the state procedures. If he loses on this gamble, all federal review would be barred, and his "sandbagging" would have resulted in nothing but the forfeiture of all judicial review of his client's claims. The Court, without substantiation, apparently believes that a meaningful number of lawyers are induced into [this] option . . . by Fay [v. Noia]. I do not. That belief simply offends common sense.

Wainwright v. Sykes, 433 U.S. 72, 103 n.5 (1977) (Brennan, J., dissenting); accord Rosenberg, supra note 20, at 415; Spritzer, supra note 83, at 507 n.178; Tague, supra note 56, at 43-45.

426. Intentional sandbagging will only occur where counsel does not wish to be bound by a state court determination of the facts or where there is no advantage to litigating certain issues in advance of trial. The former will occur when defense counsel believes that a federal fact-finder will resolve a certain factual dispute more favorably for the defendant than would the state courts. See Marshall v. Lonberger, 103 S. Ct. 843 (1983); Sumner v. Mata, 449 U.S. 539 (1981); 28 U.S.C. § 2254(d) (1976); see also Rosenberg, supra note 20, at 415, n.318; Spritzer, supra note 83, at 507 n.178. The latter situation will occur when there is no advantage to a favorable resolution of the constitutional claim prior to trial—e.g., a grand jury discrimination claim—or where there is no benefit to be derived from pre-trial litigation, i.e., no advantage to holding a pre-trial hearing, forcing the prosecution to rethink its case, or the possibility of obtaining a better plea bargain. See Hill, supra note 39, at 1061; Tague, supra note 56, at 44-46.
of obtaining relief in that court.\textsuperscript{427} Good defense tactics strongly favor litigating all constitutional issues in advance of trial.\textsuperscript{428} Regardless of the initial chances of success, pre-trial litigation may force the prosecution to offer a better plea bargain or may require a pre-trial hearing, with the attendant opportunity for the defense to examine prospective witnesses and gain vital information in advance of trial.\textsuperscript{429} A successful pre-trial challenge to any evidence permits the defendant to control the timing and manner of the introduction of this evidence, regardless of whether the prosecution can still make use of it\textsuperscript{430} or the defendant desires to use it.\textsuperscript{431}

The Court's deterrence analysis, premised on the belief that stricter enforcement of procedural rules will force defense counsel to be more solicitous toward those rules, falls prey to many of the Court's own criticisms of the deterrent value of the exclusionary rule.\textsuperscript{432} Like the exclusionary rule, rules of procedural forfeiture have minimal impact on the actual party committing the violation.\textsuperscript{433} The exclusionary rule only tangentially affects the police officer, while rules of forfeiture have even less impact on defense counsel. Defense counsel's role as the litigation strategist and decision-maker requires that he determine which constitutional claims will or will not be litigated.\textsuperscript{434} The impact of such action, however, has no direct

\begin{itemize}
  \item \textsuperscript{427} One commentator raises questions as to an attorney's competency in pursuing the course of action outlined by the Court. Tague, supra note 56, at 44-45.
  \item \textsuperscript{428} See F. Bailey & H. Rothblatt, Investigation and Preparation of Criminal Cases Federal and State §§ 352-353 (1970); Rosenberg, supra note 20, at 403-05.
  \item \textsuperscript{429} Several constitutional claims will require a pre-trial evidentiary hearing. See, e.g., Jackson v. Denno, 378 U.S. 368 (1964); Fed. R. Crim. P. 12(b).
  \item \textsuperscript{431} See Rosenberg, supra note 20, at 403-05; Tague, supra note 56, at 44-46. The defendant could subsequently waive his constitutional claim and the defense could introduce the evidence in a manner most beneficial to the defendant, thus deflecting the incriminating impact of the prosecution first introducing any harmful evidence.
  \item \textsuperscript{434} The Supreme Court has increasingly supported this role, which is often insulated from review. See Jones v. Barnes, 103 S. Ct. 3308, 3312-14 (1983); Estelle v. Williams, 425 U.S. 501, 512 (1976); see also Wainwright v. Sykes, 433 U.S. 72, 92-94 (Burger, C.J., concurring).
\end{itemize}
consequences for counsel. The defendant must bear the entire brunt of his counsel's conduct, usually long after the attorney has ceased to represent him or to have any contact with his case.

Just as the exclusionary rule has been criticized for having minimal deterrent value on nonintentional police conduct, this same complaint applies to the deterrent value of procedural forfeiture rules. Forfeitures often occur for other than intentional reasons, including the mistake, inadvertence, ignorance, or negligence of defense counsel. Procedural forfeiture rules will not deter this type of conduct even if absolutely enforced, and will only punish the defendant for his counsel's unintentional actions. Other than ethical, moral, or institutional incentives, there is little deterrent value in preventing or restricting collateral review in those instances where the forfeiture has not been intentional.

435. The forfeiture has little or no personal or economic impact on the defense attorney. Defense counsel has no interest in protracted litigation. To the contrary, the quickest resolution of the case is usually in counsel’s best interest. Malpractice claims are of such a minimal threat so as to have no impact on the defaulting attorney. Much the same can be said about the impact of professional discipline as well. See Kaus & Mallen, The Misguiding Hand of Counsel—Reflections On “Criminal Malpractice,” 21 U.C.L.A. L. Rev. 1191 (1974); Comment, Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel, 1981 Duke L.J. 542; Note, Indigents and Their Right to Sue for Legal Malpractice: A Review of the Liability Exposure of Court-Appointed Counsel in Missouri, 45 Mo. L. Rev. 759 (1980). Most defense counsel are not retained or paid by their clients; instead, they are paid by the state, the entity that has the most to gain by enforcing the default. Within limits, the state has little incentive not to appoint defaulting counsel. See infra notes 554-56 and accompanying text.

436. Justice Brennan persuasively argued that a fictional principal-agent relationship should not be employed to bind the defendant to errors of a constitutional magnitude made by his defense counsel. The criminal defendant, if indigent, has little input in selecting his agent. This selection is done by the state, which certifies, licenses, and appoints defense attorneys. As a result, the state should reasonably take some part of the blame for the fact that criminal defense lawyers are often ill-prepared or ill-equipped to represent carefully and knowledgeably the vast majority of indigent criminal defendants. See Wainwright v. Sykes, 433 U.S. 72, 113-15 (1977) (Brennan, J., dissenting); see also Cover & Aleinikoff, supra note 83, at 1079-82; infra notes 495-523 and accompanying text.

437. In most cases, the trial attorney is not the one who handles the post-conviction litigation, and by the time the defendant reaches the collateral review stage, he is usually not represented by anyone. See P. Robinson, supra note 342, at 4(a), 9-10.


439. See Tague, supra note 56, at 43, 46.

440. The Court has elsewhere determined that the deterrent value of enforcing the exclusionary rule at trial and on appeal was sufficient to warrant its continued enforcement, but that the incremental value of such deterrence was too slight to warrant its application in a federal collateral proceeding. Stone v. Powell, 428 U.S. 465, 494 (1976). As Justice Brennan
3. **Strict Enforcement of Procedural Rules and a Diminished Respect for Constitutional Rights.**—Finally, the Court has stated that “ready availability of habeas corpus may diminish . . . [the sanctity of federal constitutional rights afforded the accused] by suggesting to the trial participants that there may be no need to adhere to those safeguards during the trial itself.”\(^4\) The Court’s reasoning has in it a sense of irony and sarcasm: In order to protect the defendant’s rights at trial, there is a need to limit his remedies later. The reasoning of such a hypothesis ignores the duties of all the participants. The trial judge swears to uphold the Constitution and certainly does not desire to be reversed in a post-conviction proceeding.\(^4\) The prosecution is ethically and morally required to see that justice is done and that the Constitution is respected.\(^4\) Finally, defense counsel has a duty to protect his client’s interest.\(^4\) The Court’s statement, quoted above, if true, would be equally applicable to appellate review, and would similarly deter the trial participants from protecting the defendant’s constitutional rights, since the appellate court can always rectify the error after trial. If the Court’s perceptions are correct, they do not support an argument for removing or restricting appellate or federal collateral review but, instead, for increasing the scope of such review to ensure that the trial participants have adhered to the Constitution.

According to the Court’s analysis, trial participants view federal post-conviction review as a safety net, thereby decreasing their need to analyze carefully every situation to be certain that constitutional error has not infected the trial. This perception of federal collateral

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\(^4\) See United States v. Agurs, 427 U.S. 97, 110-11 (1976); Singer v. United States, 380 U.S. 24, 37 (1965); Berger v. United States, 295 U.S. 78, 88 (1935); MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-103 (1979); 1 AMERICAN BAR ASSOCIATION, supra note 421, §§ 3-1.1, 3-2.8, 3-3.9, 3-5.6(b).

\(^4\) MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1979); 1 AMERICAN BAR ASSOCIATION, supra note 421, §§ 4-1.6, 4-3.6.
review assumes that all those involved view a subsequent reversal of the conviction as an appropriate corollary to the federal safety net.\footnote{445} The trial judge, however, with his crowded docket, self-esteem, and professional ethics, does not wish to be reversed. Nor does the prosecution wish to retry the defendant, with the inherent cost and risks involved in a second trial. The defendant also has an interest in preventing error, since he does not wish to languish in prison during the entire post-conviction process only to learn that he may not have been convicted had the error not occurred. Thus, liberal collateral review creates the opposite effect on the trial judge and prosecutor than the Supreme Court’s analysis dictates, making them more solicitous to ferreting out error and preventing its occurrence, if for no other reason, than to insulate the conviction from any post-judgment attack.

The Supreme Court’s analysis of the impact that liberal collateral review has on a trial forfeiture neither withstands careful scrutiny nor justifies restricting such review. For the overwhelming majority of criminal defendants who plead guilty, there will not be any significant post-conviction litigation.\footnote{446} Those defendants who go to trial often risk their liberty and years of incarceration before they can petition the federal courts.\footnote{447} To say that liberal collateral review detracts from the prominence of the trial as the “main event,” completely ignores the reality of the criminal justice system. Furthermore, the enforcement of procedural forfeitures in the federal collateral courts may only deter intentional and knowing defaults, and may have little or no impact on the more common inadvertent, mistaken, or negligent ones. Finally, liberal post-conviction review will not reduce the trial participants’ attention to correcting trial error, but will increase their vigilance in order to prevent a reversal of the conviction in a subsequent proceeding. The Court’s restriction of federal collateral review, while not significantly enhancing the deterrent value of state procedural rules, severely punishes the criminal defendant by removing his last avenue for litigating constitutional claims that may have an impact on the legitimacy, validity, and accuracy of the judgment of guilt.

D. Administration of State and Federal Courts

The Supreme Court has expressed several administrative policy
objectives supporting the restriction of expansive federal collateral review. The basic thrust of these concerns is to promote the resolution of federal claims in the state courts so as to limit, and eventually reduce, the federal courts' case load. Consistent with this goal, the Court has noted that compliance with contemporaneous objection rules will encourage the presentation and resolution of factual disputes in the trial court, a task which once completed need not be repeated in federal court. In addition, if the trial court rules in the defendant's favor and the error is prevented or corrected, then regardless of the outcome of the trial, there will be one less issue for federal collateral resolution. Finally, the Court views the development of a factual record in the state courts as consistent with the statutory mandate that the federal court pay deference to the state court's findings of fact, because without it, the deference requirement is meaningless.

Beyond overstating the impact federal post-conviction litigation has on the lower federal courts' caseload, the Court fails to balance its administrative concerns against the congressional grant of jurisdiction and the constitutional questions left unresolved. By granting the federal courts power to entertain post-conviction collateral matters, Congress, as the arbiter of federal jurisdiction, intended for these actions to be part of the federal courts' caseload. To criticize the liberal excusal of procedural forfeitures for increasing the federal courts' workload ignores the very responsibility of the federal court to entertain petitions for collateral relief.

More importantly, the Court fails to balance its administrative concerns against the individual prisoner's right to litigate his federal

449. Id. at 88.
450. Id. at 89.
452. See supra notes 344-45 and accompanying text. In comparison to federal post-conviction cases, during the years 1977 through 1979 diversity of jurisdiction cases represented 23.1% of all civil cases filed in the federal district courts. Annual Report—1979, supra note 341, at 59. Diversity cases, which implicate significant state concerns and are less of a federal interest than state prisoner collateral petitions, therefore constitute a far greater percentage of the total federal caseload. See supra notes 340-41.
453. See 28 U.S.C. §§ 2241-2255 (1976); supra notes 377-78 and accompanying text.
454. Even while debating the scope of that jurisdictional grant, it cannot be denied that Congress has granted the federal courts jurisdiction to entertain federal post-conviction petitions and intends that they be a part of the federal court's work load. See Jackson v. Virginia, 443 U.S. 307, 323 (1979) ("But Congress in § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law.").
constitutional claims. Due to a combination of state rules of forfeiture and his attorney's conduct in failing to present his claims properly, the prisoner has been precluded from litigating those claims in the state courts. To punish the prisoner for increasing the federal workload when he seeks review of his constitutional claims perverts one of the very purposes of the federal court's existence: to protect and vindicate the federal Constitution. While the benefits of reducing the federal caseload are significant, they must be secondary to the right to litigate federal constitutional issues. The Court's administrative concerns, *ex proprio vigore*, should never foreclose access to the federal forum when the vindication of constitutional rights is at issue.

In summary, many of the Court's policy reasons for restricting the excusal of procedural forfeitures are overstated and out of touch with the reality of criminal litigation. The Court fails to address the clear congressional grant of collateral jurisdiction and the implications this may have on the restriction of such review. While these procedural rules are designed to encourage the orderly and timely litigation of important constitutional questions, the Court's analysis does not demonstrate that their strict enforcement will significantly promote these goals. Finally, the Court fails to balance the virtues of enforcing procedural forfeitures against the federal court's collateral responsibilities and the necessity for some review of previously unexamined constitutional issues to insure that the judgment of conviction is fair and just.

IV. The Final Analysis—Towards an Appropriate Standard of Excusing Procedural Forfeitures

The Supreme Court's current quest to restrict federal collateral review has been highlighted by a greater emphasis on enforcing rules of procedural forfeiture. The present cause and actual prejudice prerequisite has been developed as a means of promoting greater respect for procedural rules and for defraying some of the cost of federal post-conviction collateral review. While the Court has offered various reasons for restricting the federal courts' collateral jurisdiction, it has not evaluated the cause and actual prejudice standard in light of these policy concerns. In addition, the Court's extreme reluc-

457. *See supra* notes 338-455 and accompanying text.
tance to provide any content to this standard further complicates such a policy analysis.

This next section evaluates the cause and actual prejudice requirements and demonstrates that this prerequisite is not only particularly ill-suited to serve the Court's own policy objectives, but significantly diminishes any real protection the federal courts offer against a miscarriage of justice. Cause, as a prerequisite to federal collateral review, should be eliminated. Instead, the focus of the inquiry should be on the harm or actual prejudice resulting from the alleged constitutional infraction. The proposed resolution will satisfy most of the Court's legitimate concerns and will protect significant and important constitutional rights.

A. Cause—Is Blame and Punishment Necessary or Beneficial?

The Supreme Court's cause requirement is premised on the clear desire to encourage procedural regularity in the criminal trial and appellate courts. Compliance with procedural rules will promote early fact development and minimize trial error or, at least, encourage its timely correction, all of which significantly enhances the accuracy of the fact-finding process and the judgment of guilt. In addition, these rules promote greater finality and reduce the friction between the state and federal courts. The preclusion of future litigation of forfeited claims is designed to encourage defense counsel to adhere to legitimate procedural rules. The enforcement of these forfeitures, however, should not be absolute, but should depend on a balancing of these aforementioned goals with the impact the forfeiture has on the validity of the conviction.

The Supreme Court has been very reluctant to develop the parameters of its "cause" requirement and has addressed the issue in only one case since the prerequisite's inception in 1973. What little the Court has stated clearly implies that cause focuses on the

459. See id.
460. See id. at 88-89.
461. See id. at 89-90.
462. Engle v. Isaac, 456 U.S. 107, 130-35 (1982). In all of the other cases, either the petitioners did not offer an explanation for their counsel's forfeitures, or the issue before the Court involved prejudice. E.g., United States v. Frady, 456 U.S. 152, 168 n.16 (1982) (only issue is whether prejudice has been shown); Wainwright v. Sykes, 433 U.S. 72, 91 (1977) ("Respondent has advanced no explanation whatever for his failure to object at trial . . ."); Francis v. Henderson, 425 U.S. 536, 542 (1976) (prejudice was the only issue); Davis v. United States, 411 U.S. 233, 235-36 (1973) (affirmed district court's finding without discussing nature of cause).
defense attorney's reasons for failing to properly raise and to preserve federal constitutional questions.\textsuperscript{463} Cause and prejudice, formulated as a more restrictive standard than deliberate bypass, invariably precludes collateral review where there has been an intentional and knowing forfeiture.\textsuperscript{464} Beyond this limitation, the Court has indicated that futility, in and of itself, and attorney ignorance—where the tools exist to formulate the claim and other attorneys have advanced similar claims—will not excuse a prior procedural forfeiture.\textsuperscript{465} Finally, the Court has stated that a showing of cause is the first requirement of a two-part test that requires that both parts be demonstrated before the federal court can address the substantive issues raised, regardless of the prejudice ensuing from the constitutional violation.\textsuperscript{466}

In the present conjunctive form, the cause requirement fails to consider the impact a forfeited constitutional issue may have on the accuracy and validity of the guilty verdict. The cause requirement will also not significantly deter or prevent procedural forfeitures.\textsuperscript{467} At the same time, cause imposes a heavy penalty on the defendant for the misdeeds of his trial attorney. Finally, cause adds little to insure that justice will be done, while extracting much from the defendant, his counsel, the federal courts, and the state, all out of proportion to any benefits derived from the prerequisite.\textsuperscript{468}


\textsuperscript{464} See id.

\textsuperscript{465} See Engle v. Isaac, 456 U.S. 107, 130-35 (1982). Two lower federal courts, however, recently found cause where the government prevented defense counsel from obtaining the information needed to raise the constitutional claim in a timely manner. Thompson v. White, 680 F.2d 1173 (8th Cir. 1982), cert. denied, 103 S. Ct. 830 (1983), and where the constitutional issue was too embryonic to punish the defense for not properly raising it, Ross v. Reed, 704 F.2d 705 (4th Cir.), cert. granted, 104 S. Ct. 523 (1983).


\textsuperscript{467} Cf. Engle v. Isaac, 456 U.S. 107, 136-37 & n.1 (1982) (Stevens, J., concurring) (Court's "preoccupation" with procedural hurdles are more likely to complicate than simplify processing of habeas petitions).

\textsuperscript{468} The cause and prejudice standard is structured as a prerequisite that must be resolved to determine if the federal court will exercise its collateral powers. See Wainwright v. Sykes, 433 U.S. 72, 87 (1977). Scrupulously adhered to, this prerequisite will require that the federal court resolve the cause and prejudice matter before addressing the merits of the petitioner's claim. In many instances, however, the court will perceive that it is economical to address the merits immediately, thereby avoiding the forfeiture question. This will only happen when the petition will be dismissed on the merits. Where there is a substantial claim involved, the federal court will have to resolve the cause and prejudice question before granting relief. See Holmes v. Israel, 453 F. Supp. 864, 867 (E.D. Wis. 1978) ("However, this Court need not decide the interesting question of the applicability of Wainwright [v. Sykes] to the facts of this
1. The Paramount Concerns of Guilt and Innocence.—The fundamental concern of federal post-conviction collateral litigation, unless it is to be eliminated or reduced to a review of process, must focus on the accuracy of the determination of guilt and the vindication of federal constitutional rights.\(^4\) Cause, as currently formulated, is the antithesis of such protection. The Court’s formulation of cause and actual prejudice as a conjunctive prerequisite requires a showing of cause regardless of the nature and extent of the prejudice involved.\(^4\) As a result, constitutional rights that significantly impugn the accuracy of the guilt determination or claims of factual or legal innocence will not be reviewed unless the prisoner can establish adequate cause.\(^4\) In addition to betraying the congressionally mandated protection of federal post-conviction review of constitutional issues, thereby ensuring the accuracy of the guilt determination, the Court contradicts its own promise that the cause and actual prejudice prerequisite will not prevent federal review in the event of a “miscarriage of justice.”\(^4\) While the Court never defines “miscarriage of justice,” it is hard to believe that the violation of rights directly affecting the accuracy of the fact-finding process does not represent a miscarriage of justice.\(^4\) Yet, unless there is a showing of

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\(^4\) See also Stone v. Powell, 428 U.S. 465, 491 n.31 (1976); id. at 519-22 (Brennan, J., dissenting); Brown v. Allen, 344 U.S. 443, 499-500 (1953) (Frankfurter, J., concurring); Friendly, supra note 10, at 151-57. But see Bator, supra note 347, at 446-53 (no detention or decision of law can ever be “final” or “correct”).

\(^4\) See id. at 136 n.1 (Stevens, J., concurring); id. at 149-51 (Brennan, J., dissenting); see also Tyler v. Phelps, 643 F.2d 1095, 1100-02 (5th Cir. 1981), cert. denied, 102 S. Ct. 1992 (1982) (court concluded that defective jury instructions denied the defendant a “fundamentally fair trial,” but nevertheless denied relief because he could not adequately establish cause for his counsel’s default); Seidman, supra note 74, at 469-70 (noting difficulty of satisfying standard).
cause, the federal courts cannot correct such miscarriages of justice.

Procedural regularity is to be encouraged because it promotes the prevention of error in the trial process, thereby enhancing the accuracy of the guilt determination. When defense counsel fails to properly raise important constitutional issues for whatever reasons, error is not prevented and the prejudicial impact of this error is not reviewed by the state courts. Although the forfeiture may prevent state court review, it does not cure an existing constitutional violation or reduce its impact on the accurate resolution of guilt. The appointment of defense counsel does not abrogate the state's responsibility to insure that justice is done. If defense counsel does not provide adequate protection, the state must do so. The state court's refusal to review innocence-related claims does not justify the federal court's abandonment of its responsibilities as well.

The Court's conjunctive cause and actual prejudice prerequisite prevents the federal courts from correcting significant injustice. The facts of Engle v. Isaac demonstrate this shortcoming. In Isaac, all three of the defendants were charged with assaultive offenses and each asserted that they had acted in self-defense. The trial courts, in violation of state law and possibly the Constitution, instructed the juries that only if the defendants could prove their affirmative defense by a preponderance of the evidence could they be found not guilty. Instead of rejecting the defendants' proffered defenses outright and convicting them as charged, each defendant was convicted of a lesser included offense. If the jury found that the defendants did not carry their burden, but that the prosecution could not disprove the defense beyond a reasonable doubt, a proper jury instruction would have required a not guilty verdict. Yet, at trial there was a shift in the burden of proof from the prosecution to the defense. The defense failed to meet this burden and a guilty verdict resulted. Had the burden of proof been properly allocated, the prosecution's high standard of proof would have significantly reduced the prospects of a guilty verdict.

The verdicts in Hughes' and Isaac's cases further highlight this

359, at 65; Rehnquist Congressional Testimony, supra note 2.
475. Id. at 112-14.
476. Id.
477. Id. Hughes was charged with aggravated murder, but was convicted of voluntary manslaughter; Bell was charged with aggravated murder, but was convicted of murder, a lesser included offense; and Isaac was charged with felonious assault, but was convicted of aggravated assault. Id.
dilemma. Each was convicted of a lesser included offense that required proof of sufficient provocation to incite them to use deadly force, an element the prosecution was not likely to prove. Provocation is usually offered as a defense; in these cases it was probably an "imperfect" defense. As one court has succinctly stated:

If the blow was struck in self-defense, then the act was lawful, and the accused innocent of any crime. If the blow was not struck in self-defense, then the act was unlawful, and, death having ensued, the accused was guilty of manslaughter, unless the elements of murder in the first degree or murder in the second degree were present, and, the jury having found that he was not guilty of murder in the first degree and not guilty of murder in the second degree, it follows that, if he failed to sustain his plea of self-defense by a preponderance of the evidence, he was guilty of manslaughter.

Had the prosecution been properly required to prove that the defendant did not act in self-defense beyond a reasonable doubt, the outcome of the three trials in Isaac may have been significantly different.

Yet, in Isaac, the Supreme Court refused to excuse defense counsels' forfeiture of the burden-shifting issue on a showing of prejudice. The Court, failing to find adequate cause, declined to determine the degree to which the individual defendants were prejudiced by the improper shifting of the burden of proof. Thus, without a finding of cause, there will be no federal review, no matter how strong the evidence of self-defense may have been, regardless of the impact it may have had on the validity of the jury's verdict, or

478. Id. at 113 n.7, 114 n.13.
481. One can argue that these defendants were not factually innocent because their defense admits the criminal offense, but that upon sufficient proof of self-defense, society will excuse the offense. Yet, lack of factual innocence should not matter, because society has chosen to excuse criminal conduct upon proof of self-defense. The conviction of a defendant properly asserting such a defense is as unjust as if he had claimed he was not involved at all. See Jackson v. Virginia, 443 U.S. 307, 323 (1979) ("The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless.").
482. 456 U.S. at 134 n.43. The Court did not evaluate the strengths and weaknesses of the self-defense claims to determine if the invalid jury instructions could have been an element in the convictions.
even if an innocent person may have been convicted as the result of an unconstitutional shift in the burden of proof.

In sum, the federal court may not review the constitutional question and evaluate its impact on the determination of guilt when the prisoner cannot establish sufficient cause due to his trial counsel's failure, for whatever reasons, to raise the issue properly at the time of trial. The Supreme Court's cause requirement counteracts the primary objectives of legitimate procedural rules: the enhanced accuracy of the fact-finding process, the prevention of error, and ultimately, the protection of the innocent.

2. The Attorney-Client Relationship—Institutional, Economic, and Interpersonal Contradictions.—The underlying premise of the cause requirement is the encouragement of procedural regularity by binding the defendant to the actions or inactions of his defense attorney. The defendant and his attorney are seen as a single unit with a definite division of decision-making responsibility within that unit. The defense attorney is allocated the responsibility for making most, if not all, of the strategic and tactical decisions concerning the trial of his client's case, while the defendant's responsibilities are extremely limited. This division of labor furthers the Supreme Court's administrative and finality goals by permitting an orderly processing of the criminal trial and by precluding future litigation of forfeited issues. While these objectives may be important, counsel is provided to protect the criminal defendant's rights and interests, not to serve the extraneous goals of the state. Since prevention of procedural forfeitures is advantageous to both the state and the individual criminal defendant, binding the defendant to his counsel's forfeitures can be supported only where there is a sufficient

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486. See 1 AMERICAN BAR ASSOCIATION, supra note 421, § 4-5.2(a); see also Boykin v. Alabama, 395 U.S. 238, 242-44 (1969) (implies that a guilty plea must be the personal choice of the defendant); Brookhart v. Janis, 384 U.S. 1, 5-8 (1966) (counsel cannot waive a jury trial and agree to a bench trial, which is, in effect, a guilty plea without defendant's consent).
unity of interest that will motivate the attorney to protect his client adequately or where the enforcement of the forfeiture will deter counsel from breaching the proper procedural rules.\textsuperscript{489}

The Court has consistently failed to examine the nature of the attorney-client relationship to determine if the defendant should be tied to his attorney's forfeitures. Close scrutiny reveals serious questions about the quality of criminal defense representation and a rather tenuous relationship between the attorney and client in which competing interests may motivate each of the parties in different directions. Enforcing procedural rules by punishing the defendant for his attorney's forfeitures further complicates the matter by breeding mistrust between the two without significantly deterring the attorney's conduct. The cause inquiry, which forces the client to point an accusatory finger at his former attorney, further alienates an already marginal relationship and increases the risks that adequate representation will not be provided, thereby leaving the defendant's interest unprotected.

In binding the criminal defendant to his attorney's forfeitures, the Court fails to recognize that several commentators and jurists have decried the poor quality of representation provided by the criminal defense bar.\textsuperscript{490} Although some courts have exhibited an increased awareness of this problem,\textsuperscript{491} in most cases, the prisoner is

\textsuperscript{489} See Cover & Aleinikoff, \textit{supra} note 83, at 1078-79, 1080; see also Wainwright v. Sykes, 433 U.S. 72, 113-15 (1977) (Brennan, J. dissenting) (no principal-agent analysis can justify holding the defendant liable for counsel's errors).


\textsuperscript{491} In the past 10 years, almost all of the federal courts of appeals have abandoned the very stringent "farce and mockery" standard in favor of a "reasonably competent attorney" standard. \textit{E.g.}, Trapnell v. United States, 725 F.2d 149 (2d Cir. 1983); Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.), \textit{cert. denied}, 445 U.S. 945 (1980); Cooper v. Fitzharris, 586 F.2d 1325, 1328-30 (9th Cir. 1978) (en banc), \textit{cert. denied}, 440 U.S. 974 (1979); United States v. Bosch, 584 F.2d 1113, 1121-22 (1st Cir. 1978); United States ex rel. Williams v. Twomey, 510 F.2d 634, 639-41 (7th Cir.), \textit{cert. denied}, 423 U.S. 876 (1975); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); Herring v. Estelle, 491 F.2d 125, 127-28 & n.4 (5th Cir. 1974); Moore v. United States, 432 F.2d 730, 735-37 (3d Cir. 1970) (en banc). Numerous states, however, still adhere to the more stringent "farce and mockery" standard, making it very difficult for a criminal defendant to show that his counsel was constitutionally ineffective. \textit{E.g.}, Walker v. State, 355 So. 2d 755, 758 (Ala. Crim. App. 1978); Donnelly v. State, 516 P.2d 396, 401 (Alaska 1973); State v. Smith, 112 Ariz. 208, 209, 540 P.2d 680, 681 (1975) (en banc); Deason v. State, 263 Ark. 56, 60-61, 562 S.W.2d 79, 82, \textit{cert. denied}, 439 U.S. 839 (1978); Gibson v. State, 351 So. 2d 948, 950 (Fla. 1977), \textit{cert. denied}, 435 U.S. 1004 (1978);
plagued by an inability to discover and/or adequately litigate his counsel’s effectiveness. When the prisoner finally uncovers and obtains review of his lawyer’s misdeeds, most courts are very reluctant to vacate a criminal conviction solely because of the attorney’s misconduct. In addition, there is no remedy for marginal representation that is not so glaringly deficient as to be unconstitutional. The marginal attorney will not be aware of developing issues and will not perceive creative uses of well established doctrine. Moreover, such counsel will not be able to overcome the economic and institutional incentives militating against vigorous and competent representation.


493. See infra notes 498-511 and accompanying text.
Some of the blame for the poor quality of defense representation must lie with the states. They are the governmental units that generally determine who is initially qualified to practice law and who should continue to practice. The state, through its licensing practices and continuing education policies, can, to some extent, control the quality of the criminal defense bar. Currently, few states have significant continuing education programs; even fewer states require that the criminal defense lawyer be a specialist, with specialized training and skills.

The competency problem is further exacerbated by strong economic and institutional constraints which often cause a conflict of interest between the attorney and his client. The economics of criminal defense representation may motivate many attorneys to handle a high volume of cases and may necessitate a large number of guilty pleas or abbreviated trials where minimal issues are raised. Appointed attorneys are characteristically underpaid, while some are not even paid at all. Their clients rarely represent future business and often their ability to obtain future appointments depends upon not unduly burdening the courts which appoint them with extensive litigation. Retained counsel, while having greater incentives to provide quality representation, are usually paid by the


496. See Note, Proposals for the Improvement of Lawyer Competence, 18 WILLAMETTE L.J. 301, 317-328, 318 n.94 (1982) (for the states which have or are about to adopt mandatory continuing legal education); see generally Trakman, Competence in Law: An Unending Search, 11 CAP. U.L. REV. 401, 407-08 & n.12 (1982) (noting that “[t]here is a need for extending the boundaries of education as new legal procedures, novel problems of law and more complex issues of fact arise in the societal sphere.”) Wolkin, On Improving the Quality of Lawyering, 50 ST. JOHN’S L. REV. 523 (1976) (discussing the status of continuing education programs).

497. See Fromson & Miller, Specialty Certification, Designation, or Identification for the Practicing Lawyer—A Look At Midstream, 50 ST. JOHN’S L. REV. 550 (1976); Petrey, Professional Competence and Legal Specialization, 50 ST. JOHN’S L. REV. 561 (1976); Note, Regulation of Legal Specialization: Neglect by the Organized Bar, 56 NOTRE DAME LAW. 293 (1980).

498. See Cover & Aleinikoff, supra note 83, at 1081-83.

499. See Alschuler, supra note 412, at 1181-1206; Benner, supra note 416, at 683-84; Cover & Aleinikoff, supra note 83, at 1082; Kaufman, supra note 490, at 310. Professor Norman Lefstein, in a survey of five jurisdictions, found that public defender offices were generally underfunded, which lead to high caseloads and a low number of support services. Assigned counsel in these jurisdictions were significantly underpaid when compared to fees generally paid to retained counsel. N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 17-22 (1982).

500. See Benner, supra note 416, at 683-84; N. LEFSTEIN, supra note 499, at 17-22.

Institutional constraints are exemplified by the manner in which indigent defense services are provided: either some form of a public defender office, appointment of private practitioners, or a combination of both. When private counsel is assigned to represent the indigent, most courts have unbridled discretion in deciding who, amongst the private bar, will be appointed. This discretion, coupled with the never ending judicial concern for docket control, places strong demands on the court to appoint attorneys who will either plead their clients guilty, or when they do go to trial, proceed as expeditiously as possible. Clearly, such a process mandates that appointed defense counsel proceed accordingly, if they wish to maintain any number of criminal appointments.

Public defenders, in many instances, also serve at the sufferance of the local judiciary. As a result, they are subject to some of the same pressures that are exerted on private appointed counsel. Where the local judiciary has the power to hire and to fire the public defender, such an attorney must be attentive to docket concerns and must respond accordingly, if he desires long term appointment. Beyond this submission to external controls, budgetary and staffing problems can create large caseloads that necessitate expeditious case disposition, again either through guilty pleas or abbreviated trials. In addition, investigation, preparation, and client contact may also be minimized. Public defender offices are notorious for a high turnover in professional staff, thereby preventing the development of

502. See Alschuler, supra note 412, at 1199-1203.
503. Public Defender offices are usually one of two types. The most prevalent is a self-contained office which provides exclusive criminal defense services within a given locale. The other is a regular law firm which contracts with the courts to provide defense services to those designated by the courts. See Benner, supra note 416, at 668. Many jurisdictions have established a "mixed system" consisting of a public defender program and an assigned private counsel for indigent defense services. See Benner, supra note 416, at 669-71; N. Leistern, supra note 499, at 7-8; Wice & Suwak, supra note 416, at 161, 163-64.
504. See Alschuler, supra note 412, at 1261-62.
505. See id.
506. See Alschuler, supra note 412, at 1238-39; Mounts, Public Defender Programs, Professional Responsibility, and Competent Representation, 1982 Wis. L. Rev. 473, 482-83, 504-05.
507. See Mounts, supra note 506, at 487.
508. See Alschuler, supra note 412, at 1248-55; Wice & Suwak, supra note 416, at 164-65, 179, 182.
509. See Wice & Suwak, supra note 416, at 170-72, 179.
experienced and highly skilled attorneys. Finally, due to the necessity for, and as a result of, a close working relationship with the prosecution and the courts, there may be pressure exerted against vigorous representation; similarly, such influences may beneficially affect the interests of a few clients to the detriment of the rest.

These institutional and economic constraints are compounded by the nature of the attorney-client relationship, which is often one of mutual distrust and disrespect. The defendant most often has not chosen his attorney, has no prior relationship with him, does not pay him, and perceives that he is getting exactly what he has paid for. In many instances, the defense attorney is viewed by his client as acting in concert with the prosecution and the courts, all of which are perceived to be working against the client's interest. On the other hand, the defense attorney often does not believe his client, presumes that he is guilty, and may find his conduct personally reprehensible. The defense attorney may also view his client as unintelligent, irresponsible, and unable to make basic decisions concerning his own fate. It is often the case that the criminal client is not consulted on strategic and tactical decisions, is not informed of which issues will be raised and which will be forfeited, and is not generally kept advised on how his attorney is conducting his defense. All of these factors contribute to a very tenuous relationship in which there is no guarantee that the underpaid, overworked, or often inexperienced attorney will vigorously represent his client or that the client will be trusting and sufficiently cooperative to permit such representation.

510. See Benner, supra note 416, at 681, 682-84; N. Leifstein, supra note 499, at 56; Wice & Suwak, supra note 416, at 165-67.
511. See Alschuler, supra note 412, at 1210-24; Wice & Suwak, supra note 416, at 173-77.
512. See Alschuler, supra note 412, at 1241-48; Wice & Suwak, supra note 416, at 171.
514. See Alschuler, supra note 412, at 1208, 1241.
516. See Alschuler, supra note 412, at 1191-96, 1306-11; Wice & Suwak, supra note 416, at 176-77.
In this atmosphere, the Court places the sole responsibility for protecting the criminal defendant's constitutional rights on his defense attorney, thereby absolving the prosecution and the trial judge of any such duty. Such a model might be acceptable if the courts were willing to scrutinize counsel's conduct closely and to protect the defendant's constitutional rights when his attorney has failed to do so. To the contrary, however, the Supreme Court, by requiring a showing of cause, is willing to excuse counsel's defaults in only a minimal number of cases. This requires that the defendant suffer the forfeitures of his marginally competent attorney, without any inquiry into the prejudice or injustice which may result. Thus, the Court appears to be impervious to the nature and reality of criminal defense representation and litigation.

Finally, because of these economic, institutional, and interpersonal constraints, the strict enforcement of procedural rules will not deter most forfeitures of constitutional questions. These conditions, which are not alleviated by the cause requirement, promote the intentional, inadvertent, mistaken, or negligent forfeitures of constitutional claims. The only forfeitures that the cause requirement may possibly deter are those that are tactically motivated to avoid the state courts in favor of obtaining relief in the federal courts. As previously discussed, these are extremely rare and, more importantly, raise significant questions as to counsel's initial competence. Furthermore, the Court's concern with intentional forfeitures is belied by its treatment of Engle v. Isaac, in which counsel's ineffectiveness was not considered to be sufficient cause.

Ironically, it is the state that is responsible for many of the constraints upon quality criminal defense representation, since it designs the procedural rules and then ardently seeks to enforce procedural forfeitures against the criminal defendant. The state has the responsibility for determining who is qualified to practice law and for providing indigent criminal defense representation. The state also defines, enforces, and determines when to excuse procedural forfeitures. In the end, it is the same state that seeks to bind the criminal

519. See supra note 82 and accompanying text.
521. Id. at 133-34.
defendant to his counsel’s forfeitures and that seeks to avoid any of the responsibility for such forfeitures, while obtaining all the benefits. The Supreme Court has completely failed to recognize or evaluate these considerations in developing the cause requirement. Until the state takes active and creative measures to ensure that criminal defendants are provided with highly trained attorneys, whose primary interests are protecting their clients to the best of their abilities, the state should bear some of the responsibility for the forfeiture of constitutional rights and remedies.

In the end, the cause inquiry diverts the federal court’s attention away from the nature of the constitutional questions raised and their impact on the validity of the conviction, toward unrelated collateral matters. This diversion results in an unfortunate drain on the resources of the federal court system and the protection that it can provide as a screen to insure that justice is done. The cause inquiry does not promote or encourage procedural regularity or force the trial participants to show greater respect for the Constitution. Instead, the cause requirement induces and rewards the state for creating the economic and institutional environment that fosters only marginal defense representation and the forfeiture of important and vital constitutional rights. This prerequisite also discourages the state from examining the prejudicial nature of forfeited constitutional claims by insulating the conviction from federal review when the state enforces the forfeiture. The Supreme Court, by diverting the federal court’s inquiry, places the appearance of procedural regularity above the quest for justice, and, in the process, denigrates the Constitution and the protection of the innocent, both of which stand as the central tenets of our criminal justice system.

B. Actual Prejudice and the Constitution’s Impact on the Validity of the Determination of Guilt

The Supreme Court has been less than explicit in formulating a definition of actual prejudice. The vague language of Wainwright v. Sykes and the somewhat contradictory statements in United

524. See Isaac, 456 U.S. at 136-37 & n.1 (Stevens, J., concurring).
525. 433 U.S. 72, 91 (1977) ("The other evidence of guilt presented at trial, moreover, was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement."); see Rosenberg, supra note 20, at 399-401; Tague, supra note 56, at 29-34.
States v. Frady,\textsuperscript{528} can be interpreted as requiring anything ranging from proof that the forfeiture was not harmless constitutional error\textsuperscript{527} to a showing of factual innocence.\textsuperscript{528} In deciding when to excuse a prior procedural forfeiture, the various interests of the state and the criminal defendant should always be considered. The state desires that its legitimate procedural rules be respected and followed, that its criminal judgments be subject to minimal federal interference, and that some degree of finality be accorded its criminal convictions. On the other hand, the state, society, and those accused of criminal activity all have an interest in ensuring that a criminal conviction is fair and just, that the determination of guilt is as accurate as is humanly possible, and that the defendant is provided a fair opportunity to litigate related constitutional claims. Any resolution of the procedural forfeiture dilemma must consider these competing interests and, where they conflict, must balance them to resolve that conflict in a manner most consistent with the goals of our criminal justice system. This last section formulates a definition of prejudice consistent with such a balancing. It also demonstrates that this formulation of prejudice is the only prerequisite that the federal courts should consider in deciding whether to excuse a procedural forfeiture.

1. Protecting Fundamental Values—Reviewing Guilt Related Claims.—At an absolute minimum, the state must provide the criminal defendant with a fair opportunity to litigate constitutional questions related to the criminal charges brought against him.\textsuperscript{529} The state and federal courts are equally obligated to respect and to enforce the Constitution as the supreme law of the land.\textsuperscript{530} The Constitution's impact on criminal litigation is varied and numerous, involving procedural, evidentiary, and substantive issues that arise before, during, and after the trial. Anytime a trial or appellate court abrogates its constitutional duties, the federal courts must insure that the criminal defendant has a forum in which to litigate constitutional

\textsuperscript{526} 456 U.S. 152 (1982). Compare id. at 169 ("whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)) with id. at 171 ("this would be a different case had Frady brought before the District Court affirmative evidence indicating that he had been convicted wrongly of a crime of which he was innocent.").

\textsuperscript{527} See Sykes, 433 U.S. at 91; supra note 525.

\textsuperscript{528} See Frady, 456 U.S. at 171; supra note 526.


\textsuperscript{530} Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).
issues. The Supreme Court appears to recognize the need for an adequate forum by predicating the application of the cause and prejudice requirements on the existence of an adequate and independent state procedural ground. As a result, whenever the state has not provided the criminal defendant with a full and fair opportunity to litigate his constitutional claims, or the procedural forfeiture is not considered an adequate and independent state ground, the federal post-conviction court can exercise its power to review these constitutional issues, regardless of the cause for the forfeiture or the resulting prejudice to the defendant.

The harder question arises in the context of procedural forfeitures that occur despite fair and reasonable procedural rules as well as opportunities to litigate the forfeited issues. These forfeitures occur because counsel does not properly raise the constitutional issues in accordance with the appropriate procedural rules, rather than the state actively or passively interfering with such litigation. The historic pendulum has swung from rather strict enforcement of such forfeitures by the federal post-conviction court to a very limited enforcement and, currently, back again towards a significantly renewed emphasis on enforcing procedural rules. Some middle ground must be developed that respects the legitimate interest of the state, protects the rights of the criminal defendant, and considers the burdens of the federal courts.

Such a solution can be reached by requiring the federal courts to excuse forfeited constitutional issues that impugn the accuracy and validity of the fact-finding process and which the prisoner can demonstrate are not harmless error beyond a reasonable doubt. This standard, as will be discussed, is consistent with the central focus and function of our criminal jurisprudence and federal post-conviction review. Reviewing only guilt-related forfeitures will promote

533. See id. at 87.
534. Compare, for example, Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977) (a procedural forfeiture will bar federal collateral review absent a showing of cause and actual prejudice); Fay v. Noia, 372 U.S. 391, 438-40 (1963) (federal collateral review is only barred by a knowing and intentional failure to follow state procedural rules); Brown v. Allen, 344 U.S. 443, 482-87 (1953) (failure to comply with state required notice of appeal, which was served one day late and which foreclosed a state appeal, also precluded federal collateral review).
a proper respect for state procedural rules, will deter the violation of such rules, and will not interfere with the state's right to punish the guilty. At the same time, excusing guilt-related forfeitures will encourage greater attention to these constitutional questions at trial and will add assurance that only the guilty are convicted. This evaluation ensures that those rights that directly undermine the determination of guilt will be reviewed in some forum, and will thereby prevent defense counsel, through ignorance, indifference, negligence, or deliberate design, from forfeiting his client's rights.

As a preface, guilt-related constitutional claims are those which raise significant and serious questions about the accuracy of the fact-finder's determination of guilt. Some examples are the following: (1) the right to effective representation;536 (2) the right to a fair and unbiased forum;537 (3) the right to be free from due process identification violations;538 (4) the right not to give an involuntary confession;539 and (5) the requirement that the prosecution prove all the elements of the criminal offense beyond a reasonable doubt,540 which implicates burden shifting jury instructions541 and sufficiency of the evidence claims.542 These are only a few examples, but they demonstrate the nature and importance of the issues involved. This categorical approach focuses on the nature of constitutional rights and their impact on the ultimate determination of guilt.

Federal post-conviction review of constitutional questions related to the accuracy of the guilt determination is consistent with the basic focus of the criminal trial, federal collateral review, and our overall criminal justice system.543 A criminal proceeding, from initiation through resolution, serves two primary functions. Foremost is the accurate resolution of the guilt or innocence of the defendant,

and secondarily, the opportunity to litigate related constitutional questions. Some constitutional claims implicate both functions; other claims are only tangentially related to an accurate resolution of guilt; while still others may be in conflict with an accurate determination of guilt. At or before trial, it is important that some mechanism exist to litigate all three types of constitutional issues. Once the criminal defendant has been convicted, however, society’s primary concern must be with the accuracy of that judgment of guilt. On a hierarchy of priorities, appellate and post-conviction review must first insure that the judgment of guilt is as precise as possible and then, that the collateral issues were properly decided.

In the circumstance of a procedural forfeiture, there has been no review of the forfeited issues in any court. If any forfeitures are to be excused, those concerning the validity of the guilt determination should be first. Only after providing some review of these issues can society and the individual defendant be reasonably assured that the determination of guilt was accurate. At a minimum, when guilt-related constitutional claims are asserted for the first time in a federal post-conviction proceeding, some review should be provided to determine their impact on the validity of the verdict. This should occur despite counsel’s reasons for previously forfeiting the claim. A suspect conviction remains suspect, regardless of whether counsel’s actions were intentional, negligent, inadvertent, or mistaken.

In addition, excusing forfeited claims that significantly impugn the fact-finding process will not diminish the importance of the trial or detract from the deterrent value of procedural rules. The Supreme Court has stated the belief that a liberal excusal of procedural forfeitures detracts from the trial as the main event and encourages a disregard for constitutional concerns and the intentional evasion of procedural requirements. Limiting forfeiture excusals to nonharmless, guilt-related constitutional questions significantly reduces such criticism. The central function of the trial is the determination of guilt or innocence. All of the participants should have an interest in assuring that this task will be performed as accurately as post-

544. See Cover & Aleinikoff, supra note 83, at 1091-95.
Federal review of nonharmless, guilt-related claims will encourage the prosecution and the trial judge to act in a manner consistent with their ethical, moral, and constitutional obligations and to take notice of such issues, even when defense counsel has neglected to do so. The trial court will develop an increased sensitivity to guilt-related constitutional issues and will be encouraged to inquire whether the defense counsel or the defendant are aware of their existence and are truly waiving such claims. The availability of federal collateral review will also stimulate the trial participants to pay greater attention to these claims, if for no other reason than to avoid or preempt such review. Any rule that will promote the resolution of guilt-related claims at trial, regardless of who initiates the inquiry, should be encouraged.

The Supreme Court's concern with sandbagging by the defense may be overstated, since it is hard to believe that any competent defense attorney would ever take such a gamble with issues that directly affect the ultimate outcome of the trial. Occasionally, there may be reasons for sandbagging on non-guilt-related issues, such as when the evidence of guilt is overwhelming or where greater relief may be obtained by waiting until after the conviction. There can be no reason or incentive, however, to gamble on the small possibility that relief may be secured several years later in the federal court on issues that may change the outcome of the trial to the defendant's advantage. Guilt-related issues are the least likely to be intentionally forfeited. When there is a forfeiture, it is most probably the result of ignorance, inadvertence, indifference, or incompetence. When the forfeiture is due to incompetence, the forfeited claims have never been considered by defense counsel and he has never evaluated their impact on his client's case. For the criminal defendant in this situation, the federal courts may be the only protection available. Regardless of the reasons for the default, however, the prejudicial impact of the forfeited issues should be evaluated to ensure that justice is done.

The review of forfeited claims, in accordance with the standards...

548. See supra notes 389-91, 469-82 and accompanying text.
549. See Cover & Aleinikoff, supra note 83, at 1074; Rosenberg, supra note 20, at 413-14.
550. See supra notes 420-40 and accompanying text.
551. See Hill, supra note 39, at 1061.
552. See supra note 426.
advocated herein, will also encourage the states and their courts to improve the nature and quality of the criminal defense bar and to remove the constraints against early litigation of constitutional questions.\(^{554}\) By excusing guilt-related forfeitures, the federal courts would be placing a premium on the removal of those conditions that cause such forfeitures.\(^{555}\) To a great degree, the state and its courts are responsible for many of the economic and institutional constraints that encourage the forfeiture of constitutional claims.\(^{556}\) If the states want the right of first review, they must remove many of these conditions, do all they can to foster a competent and qualified defense bar, and encourage complete constitutional litigation at trial. The Supreme Court's present restrictive approach of not permitting review of the forfeited claims in federal court, encourages the enforcement of procedural forfeitures in the state courts. Such an approach also rewards the state for creating many of the institutional and economic constraints that are responsible for the forfeiture of important constitutional issues. As a result, under the Court's present standard, the state has no incentive to discourage forfeitures or remove the constraints that foster them.

The Supreme Court has also criticized the excusal of procedural forfeitures for interfering with the proper balance of federalism by denigrating the state's legitimate procedural rules, by denying the state courts the right of first review, and by depriving the state of its right to punish the guilty.\(^{557}\) While any federal review of a state criminal conviction interferes with the state's criminal justice functions, the excusal of nonharmless, guilt-related forfeitures significantly minimizes such interference. The state's procedural rules are designed, in part, to encourage early fact-finding and to prevent the infection of error in the judgment of guilt, both of which significantly increase the accuracy of the fact-finding process.\(^{558}\) When these rules are followed, they improve the chances that those who are convicted are in fact guilty. The same cannot be said when a forfeiture has prevented the state courts from determining the impact that an alleged constitutional error may have had on the deter-

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554. See supra notes 490-523 and accompanying text.
555. See Reitz, supra note 7, at 1352-53.
556. See supra notes 490-523 and accompanying text.
mination of guilt. The adamantine refusal to undertake such an inquiry perverts the primary function of the state's procedural rules.

As a corollary, the state cannot have any interest or right in punishing those who have not been accurately found guilty and who, in fact, may not be guilty of the offenses for which they were convicted.559 Excusing only guilt-related forfeitures limits federal interference to a review of the central function of the criminal trial, which, as previously noted, is the accurate determination of the guilt or innocence of the accused.560 The state invariably has the same interest as any other segment of society in insuring the accuracy of the guilt determination. The federal court will only interfere and override a forfeiture when the accuracy of that finding has been constitutionally questioned. Since the state has refused to exercise its option to excuse the forfeiture and to examine the impact of the forfeited constitutional claim, the federal court must undertake such a review to insure that the state is, in fact, punishing the guilty. Such review, at least where the state courts have not undertaken it, is completely consistent with the division of roles and responsibilities in our federal system and does not offend the doctrines of federalism and comity.561

Finally, the Supreme Court has criticized the excusal of procedural forfeitures for undermining the state's and society's interest in finality, reasoning that at some point the criminal litigation must cease and the conviction be recognized as fair and just.562 As a result, the Court has focused its finality concerns on the direct review process, restricting federal collateral review wherever it can. Generally, properly raised constitutional issues are reviewed in the trial court and on appeal. When there has been a procedural forfeiture, however, there has not been direct or collateral review of the forfeited claims. The essential question is whether a criminal judgment should be considered final when defense counsel has failed to litigate constitutional questions that impugn the accuracy and validity of the determination of guilt. The Supreme Court, through its cause and

559. See Hill, supra note 39, at 1077-78.
561. See Jackson v. Virginia, 443 U.S. 307, 322 (1979) ("It is the occasional abuse that the federal writ of habeas corpus stands ready to correct.").
actual prejudice prerequisite, has indicated its preference for finality over certainty. As previously discussed, however, neither Congress nor society has indicated that they support this approach. Before a conviction can be considered final, we must be reasonably certain that it is just and accurate. The failure to review forfeited constitutional questions that impugn the accuracy of the criminal judgment deprives society of the certainty and, therefore, the peace of mind, that such an examination brings.

When weighing the competing interests of finality, federalism, and procedural regularity, against the excusal of procedural forfeitures so as to review constitutional issues that significantly impugn the accuracy of the criminal judgment, the preservation of life and liberty dictate that the forfeiture be excused. While the Supreme Court’s concerns for the cost of federal collateral review have some validity, they pale in comparison to an accurate determination of guilt, which must always be the highest priority. Excusing the forfeitures of constitutional guilt-related claims will permit the federal courts, consistent with the goals of federal collateral review and our criminal justice system, to act as a screen for ensuring that the innocent are not wrongfully convicted and that justice will hopefully prevail.

564. See Jackson v. Virginia, 443 U.S. 307, 323 (1979) (“But Congress in § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law.”); supra notes 377-78 and accompanying text.
565. See Jackson v. Virginia, 443 U.S. 307 (1979). There, the Court opined:
The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur—reflecting as it does the belief that the “finality” of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right—is not one that can be so lightly abjured. Id. at 323.