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THE NEW ARBITRARINESS: PROCEDURAL DEFAULT OF FEDERAL HABEAS CORPUS CLAIMS IN CAPITAL CASES

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I. INTRODUCTION

Habeas corpus, "the most celebrated writ in the English law,"[1] has long enjoyed "extraordinary prestige" in the Anglo-American system of justice.[2] For hundreds of years, the right to petition the judiciary for freedom from unjust confinement, based upon the presumption that the government must always be prepared to set forth and defend the reasons for that confinement, has been steadfastly maintained and defended.[3]

In spite of its historical prominence, the operation of federal habeas jurisdiction, especially over the claims of state prisoners,[4] has been marked with ongoing controversy.[5] The review of state detentions through a federal habeas proceeding is alternatively embraced as a vindi-

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1. 3 W. BLACKSTONE, COMMENTARIES 129; *see also* Fay v. Noia, 372 U.S. 391, 400 (1963).

2. *Fay*, 372 U.S. at 399.

3. Harris v. Nelson, 394 U.S. 286, 290-92 (1969); *Fay*, 372 U.S. at 399-414; Townsend v. Sain, 372 U.S. 293, 311-12 (1963); *see generally* R. SOKOL, FEDERAL HABEAS CORPUS 3-27 (2d ed. 1969); Chafee, *The Most Important Human Right In The Constitution*, 32 B.U.L. REV. 143 (1952); Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ-I*, 18 CAN. B. REV. 10 (1940).

4. The common law writ was embraced by the framers in Article I, section 9 of the Constitution, as well as the Judiciary Act of 1789. *See* U.S. CONST. art. I, § 9; Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789) (codified as amended at 28 U.S.C. §§ 1-1631 (1982)); R. SOKOL, *supra* note 3, at 15-17. *See generally* W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 127-40 (1980). In 1867, Congress specifically authorized federal habeas jurisdiction over state prisoners. Act approved February 5, 1867, ch. 27, 14 Stat. 385 (codified as amended at 28 U.S.C. § 2254 (1982)). *See also* R. SOKOL, *supra* note 3, at 18.

5. *See* R. SOKOL, *supra* note 3, at 19-21; *see also* J. LIEBMAN, FEDERAL HABEAS CORPUS: PRACTICE AND PROCEDURE 5-24 (1988); Friendly, *Is Innocence Irrelevant? Collateral Attack On Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Robbins, *Whither (or Wither) Habeas Corpus?: Observations on the Supreme Court's 1985 Term*, 111 F.R.D. 265, 299-301 (1986). The disagreements over the purpose, scope and use of federal habeas corpus jurisdiction are apparent from the sharply competing views expressed throughout the years in the Court's opinions. *Compare* Teague v. Lane, 109 S. Ct. 1060, 1072-74 (1989) (plurality opinion) *with id.* at 1084 (Brennan, J., dissenting); *compare Fay*, 372 U.S. at 407-14 *with id.* at 448-70 (Harlan, J., dissenting); *compare* Moore v. Dempsey, 261 U.S. 86, 90-92 (1923) *with id.*

cation of essential liberties, sweeping aside procedural impediments and curing injustice,[6] or criticized as an encroachment on state court integrity preventing finality and clogging federal dockets.[7]

Nowhere is this controversy more acute than in the death penalty arena. On the one hand, federal habeas review of state death sentences has been crucial to the vindication of fundamental constitutional rights. The rate of reversal of death judgments has been very high,[8] and this federal intervention has clearly prevented the execution of many individuals who were sentenced to death in violation of the Constitution.[9] On the other hand, with increasing political pressure from states with high death row populations, federal habeas corpus jurisdiction has been attacked as an unwarranted, frustrating impediment to swift and sure justice.[10] No less an authority than the current Chief Justice of the Supreme Court of the United States has bemoaned the "mockery of our criminal justice system" resulting from the time-consuming review caused by the habeas petitions of the capitally sentenced.[11] With no fore-

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at 93 (McReynolds, J., dissenting); *compare* Frank v. Mangum, 237 U.S. 309, 326-31 (1915) *with id.* at 346-50 (Holmes, J., dissenting).

6. *See, e.g., Frank*, 237 U.S. at 346-47 (Holmes, J., dissenting); *see also* Coleman v. McCormick, 874 F.2d 1280, 1294 (9th Cir. 1989) (Reinhardt, J., concurring); W. DUKER, *supra* note 4, at 6-7; Lay, *Problems of Federal Habeas Corpus Involving State Prisoners*, 45 F.R.D. 45, 47-48 (1968).

7. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 475-77 (1976); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963); Friendly, *supra* note 5, at 148-51; *see generally* OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS (1988) [hereinafter REPORT].

8. Between 1976 and 1983, approximately 70% of federal habeas corpus petitions in capital cases resulted in guilt or sentence reversals. *See* Barefoot v. Estelle, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting); Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1671-72 (1986). Since 1983, the parameters of the constitutional limitations on death sentencing have continued to evolve, and the pronouncements of the high court in cases such as *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (instructions may not limit sentencer's ability to consider any evidence put forward to mitigate penalty), *Skipper v. South Carolina*, 476 U.S. 1 (1986) (defendant has a right to present evidence of past good behavior and probable future good behavior while incarcerated to mitigate potential death sentence), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (impermissible to lead sentencer to believe others have responsibility for defendant's death) have resulted in a high number of reversals.

9. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 436 (1972). In addition, the reversals achieved in federal habeas corpus proceedings almost certainly saved innocent defendants from execution. *See* Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

10. REPORT, *supra* note 7, at 37-38, 83-90; Powell, *Review of Capital Convictions Isn't Working*, CRIM. JUST., Winter 1988, at 10, 12-13.

11. Coleman v. Balkcom, 451 U.S. 949, 958 (1981) (Rehnquist, J., dissenting from denial of certiorari). Other justices have expressed similar concerns about the delay of executions and the potential loss in public confidence in the criminal justice system. *See, e.g.*, Darden v.

seeable abatement in the number of state-court death judgments and the consequent "enormous and taxing death penalty workload that looms on the horizon" for the federal courts,[12] the controversy will no doubt continue.

The Rehnquist Court, building upon a foundation left by the Warren/Burger Courts, has continued to construct procedural barriers to the assertion of claims of constitutional violations presented in federal habeas actions. These hurdles include a restricted review of fourth amendment claims,[13] impediments to successive petitions,[14] a stricter adherence to the exhaustion requirement,[15] and a possible retroactivity bar.[16] The most problematic and confusing procedural hurdle, however, was first imposed in *Wainwright v. Sykes*:[17] the use of the adequate and independent state grounds doctrine to restrict federal habeas review of a constitutional claim where a state court had defaulted the claim on a procedural ground.[18]

Wainwright, 477 U.S. 168, 187-88 (1986) (Burger, C.J., concurring); Powell, *supra* note 10, at 12-13.

12. *McCormick*, 874 F.2d at 1297 (Trott, J., concurring); *see also id.* at 1296 (Reinhardt, J., concurring).

13. In *Stone v. Powell*, the Court announced that federal habeas corpus relief is not available for a claim that evidence was admitted at trial in violation of the fourth amendment unless the state court denied an opportunity for a full and adequate hearing on the fourth amendment claim. 428 U.S. 465, 494 (1976). Thus, under the "opportunity" approach, an exclusionary rule challenge has two requirements: (1) The evidence has to have been admitted in violation of the fourth amendment; and (2) the state court denied a full opportunity to litigate this claim. *Id. See also* Kimmelman v. Morrison, 477 U.S. 365, 375-77 (1986); Rose v. Mitchell, 443 U.S. 545, 559-64 (1979). The *Stone* holding seems to be derived more from a hostility to the exclusionary rule than any established limitation on habeas power. *See* Batey, *Federal Habeas Corpus and the Death Penalty: "Finality with a Capital F,"* 36 U. FLA. L. REV. 252, 257-62 (1984); *see generally* Halpern, *Federal Habeas Corpus and the* Mapp *Exclusionary Rule After* Stone v. Powell, 82 COLUM. L. REV. 1 (1982).

14. In *Kuhlmann v. Wilson*, Justice Powell, writing for a plurality of the Court, favored equating the "ends of justice" exception to the prohibition against same-claim successor petitions, codified in Rule 9(b) of the Rules Governing § 2254 cases, with a "colorable claim of factual innocence." 477 U.S. 436, 454 (1986). The adoption of such a standard would restrict the scope of the ends of justice analysis tendered in *Sanders v. United States*, 373 U.S. 1 (1963). *See* J. LIEBMAN, *supra* note 5, at 428-30.

15. In *Rose v. Lundy*, the Court expressed the opinion that "mixed" petitions, containing both exhausted and unexhausted claims, should be dismissed. 455 U.S. 509, 510 (1982). *See also* Neuschafer v. Whitley, 860 F.2d 1470, 1479-80 (9th Cir. 1989) (Alarcon, J., concurring).

16. In *Teague v. Lane*, Justice O'Connor, writing for a four-Justice plurality, favored the adoption of a retroactivity threshold requirement in all habeas cases. 109 S. Ct. 1060, 1069-70 (1989). Such an approach would generally deny relief on any habeas claim grounded in "new law." *Id.* at 1069-72. *See also* Penry v. Lynaugh, 109 S. Ct. 2934, 2944 (1989).

17. 433 U.S. 72 (1977).

18. *Id.* at 89-90; *see also* Smith v. Murray, 477 U.S. 527 (1986); Murray v. Carrier, 477 U.S. 478 (1986).

This Article will discuss the use and effect of procedural default standards in capital cases and suggest that the *Sykes* approach has not only failed to promote its purported goals, but has introduced a disturbing new layer of arbitrariness into a system that is already producing inconsistent results.[19] The discussion will first briefly review the origin and parameters of the *Sykes* approach. Second, the application of the doctrine in two capital cases will be examined. The discussion will then move to a general assessment of the adequate and independent state grounds doctrine in capital habeas proceedings.

II. *WAINWRIGHT V. SYKES*: ADEQUATE AND INDEPENDENT STATE GROUNDS AS A RESTRICTION ON HABEAS POWER

In *Fay v. Noia*,[20] the Supreme Court held that federal courts could, in the context of federal habeas proceedings, grant relief despite an applicant's procedural default of the challenge in state court proceedings.[21] Rejecting the argument that the forfeiture of a constitutional challenge under a state court procedural rule should restrict the reach of the federal court's power, the Court in *Fay* concluded: "[T]he doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground" to preserve a petitioner's confinement "is not to be extended to limit the power granted the federal courts under the federal habeas statute."[22] However, because of considerations of comity and federalism, the federal courts could decline to exercise their discretion to review a claim if the applicant had "deliberately by-passed the orderly procedure of the state courts and in so doing . . . forfeited his state court remedies."[23] The Court set aside petitioner Noia's conviction despite the fact that Noia had failed to appeal his conviction in state court and the state court had defaulted the claim.[24]

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19. The overall inequities of the capital punishment system in the United States have been extensively catalogued. *See, e.g.*, B. NAKELL & K. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY (1987); Greenberg, *supra* note 8; Hubbard, *Reasonable Levels of Arbitrariness in Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C. DAVIS L. REV. 1113 (1985); Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797 (1986).

20. 372 U.S. 391 (1963).

21. *Id.* at 398-99.

22. *Id.* at 399.

23. *Id.* at 438. The deliberate bypass concept is the analogue to the knowing and intelligent waiver rule of *Johnson v. Zerbst*. *Fay*, 372 U.S. at 439 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Such an approach reflects the view that a defendant should not lose a fundamental right, either substantive or procedural, unless the defendant knowingly chooses to forego the exercise of that right. *See* Estelle v. Williams, 425 U.S. 501, 524 (1976) (Brennan, J., dissenting).

24. *Fay*, 372 U.S. at 426-34. The Court reversed the conviction after finding that Noia's

Fourteen years later, in *Wainwright v. Sykes*,[25] the Court rejected the deliberate-bypass standard and broad language of *Fay*, noting that it had an "historic willingness to overturn or modify its earlier views" regarding federal habeas corpus.[26] *Sykes* held that the adequate and independent state grounds doctrine should be applied in the federal habeas arena and that a state procedural default would generally bar federal review unless the petitioner could show "cause" for the failure to comply with the state procedural rule and also show actual "prejudice."[27]

Sykes, which enforced a contemporaneous-objection rule that the state court had invoked to bar relief,[28] rejected the "sweeping language"[29] of *Fay* because it failed to grant sufficient deference to the underlying purposes of state forfeiture rules, encouraged defense lawyers to "sandbag" claims, and detracted from the perception of the trial as the decisive event in the criminal adjudication.[30] In discussing the *Sykes* approach in later opinions, the Court has generally invoked the need for finality,[31] respect for state court adjudication of the claims,[32] and the social cost of overturning criminal convictions[33] as the rationales underlying this restriction on federal habeas relief.

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confession had been coerced. *Id.* Noia's post-conviction petition in state court had been denied on the procedural ground that he had waived his appellate rights by allowing the time for appeal to lapse. *Id.* at 394. Justice Harlan, in dissent, argued that this default was an adequate and independent state-law basis for Noia's detention and that the federal court should look no further. *Id.* at 453-56 (Harlan, J., dissenting).

25. 433 U.S. 72 (1977).

26. *Id.* at 81.

27. *Id.* at 90-91. The "cause-and-prejudice" standard has its roots in Rule 12(b)(2) of the Federal Rules of Criminal Procedure, which requires certain objections to be made before trial. *Sykes*, 433 U.S. at 84 (citing FED. R. CRIM. P. 12(b)(2)). *Shotwell Mfg. Co. v. United States* held that a failure to comply with Rule 12(b) could bar any later objection to certain challenges to federal criminal proceedings unless a defendant could show "cause" warranting relief. 371 U.S. 341, 362-63 (1963). In addition, in *Davis v. United States*, the Court held that the general restriction of review that Rule 12(b)(2) embodies was also applicable to federal habeas review of federal prisoners under 28 U.S.C. § 2255. 411 U.S. 233, 242 (1973). The Court in *Sykes* and *Francis v. Henderson* applied this standard to federal habeas review of the petitions of state prisoners. *Sykes*, 433 U.S. at 84; Francis v. Henderson, 425 U.S. 536, 538-39 (1976).

28. No objection was made at trial to the admissibility of the defendant's inculpatory statements. *Sykes*, 433 U.S. at 75. Under Florida's rules of criminal procedure, a motion to suppress an admission should have been made before trial. *Sykes*, 433 U.S. at 76 n.5 (citing FLA. R. CRIM. P. 3.190(i)).

29. *Id.* at 87-88.

30. *Id.* at 88-90.

31. *See* Murray v. Carrier, 477 U.S. 478, 487 (1986); Engle v. Isaac, 456 U.S. 107, 126-27 (1982).

32. *Carrier*, 477 U.S. at 487; Reed v. Ross, 468 U.S. 1, 10 (1984); *Engle*, 456 U.S. at 128-29.

33. *Engle*, 456 U.S. at 127-28; *but see id.* at 146-48 (Brennan, J., dissenting).

The approach annunciated in *Sykes*, filtered through subsequent discussion by the Court,[34] requires that the federal courts defer to the adequate and independent state procedural bar except where the petitioner demonstrates one of two exceptions. In summary, as recently expressed in *Harris v. Reed*:[35]

> Under *Sykes* and its progeny, an adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show "cause" for the default and "prejudice attributable thereto," or demonstrate that failure to consider the federal claim will result in a " 'fundamental miscarriage of justice.' "[36]

Thus, under the *Sykes* approach,[37] a federal court faced with an assertion of state default must first assess whether the default is an adequate and independent state ground for the state court's denial of the claim and then assess whether one of the two exceptions—"cause-and-prejudice" or "a fundamental miscarriage of justice"—is applicable.

The determination of whether an adequate and independent state ground exists is by no means easy.[38] The inquiry must assess whether the state default rule exists, whether the denial of relief was actually based on the state's default rule, and whether that rule represents a consistent and legitimate exercise of state power.[39] The state court must clearly, unam-

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34. *See generally* Dugger v. Adams, 109 S. Ct. 1211 (1989); Harris v. Reed, 109 S. Ct. 1038 (1989); Amadeo v. Zant, 108 S. Ct. 1771 (1988); Smith v. Murray, 477 U.S. 527 (1986); *Carrier*, 477 U.S. at 478; *Engle*, 456 U.S. at 107.

35. 109 S. Ct. 1038 (1989).

36. *Id.* at 1043 (citation omitted) (quoting Murray v. Carrier, 477 U.S. 478, 485 (1986)); *see also Amadeo*, 108 S. Ct. at 1776; *Smith*, 477 U.S. at 533; *Carrier*, 477 U.S. at 488.

37. As the *Sykes* opinion declined to paint with a "broad brush," the *Fay* analysis still appears to be valid in some limited areas. *See* Brownstein v. Director, Illinois Dep't of Corrections, 760 F.2d 836, 839-44 (7th Cir.), *cert. denied*, 474 U.S. 858 (1985); Maupin v. Smith, 785 F.2d 135, 138 n.2 (6th Cir. 1986); J. LIEBMAN, *supra* note 5, at 346-50.

38. Professor Robbins recognizes "at least five threshold questions" that must be addressed:

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

Robbins, *supra* note 5, at 294 (citations omitted). Professor Liebman notes the extensive analysis underlying the adequate and independent state ground inquiry. J. LIEBMAN, *supra* note 5, at 335-44. The precedent requires a clearly applicable state rule, the absence of substantial compliance, the absence of a decision on the merits, an unambiguous procedural ruling and showing of adequacy. *Id.* These extensive inquiries must be undertaken before either of the two exceptions can be addressed. Robbins, *supra* note 5, at 294.

39. *Maupin*, 785 F.2d at 138; *see generally* J. LIEBMAN, *supra* note 5, at 333-44; Robson &

biguously, and correctly rely on its default rule as the basis for denying the claim.[40] Once the independence is established, the federal court must look to adequacy: whether the state procedural default is a clearly articulated and regularly applied rule with its basis in legitimate state interests[41] and whether substantial compliance with the rule should excuse the technical default.[42] Once the default is established as an adequate and independent ground, the reviewing court then must turn to the two somewhat ill-defined exceptions: "cause-and-prejudice" and a "miscarriage of justice."[43]

"Cause" has been much discussed in the Court's opinions, but an explicit definition has yet to emerge. Indeed, the Court has repeatedly disavowed any set definition for "cause."[44] Writing for a slim majority in *Murray v. Carrier*,[45] Justice O'Connor advised that cause "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[46] Turning to the issue of prejudice, the Court has held that prejudice must be real, not hypothetical, and involve constitutional errors that worked to the petitioner's "actual and substantial disadvantage, infecting his entire trial with error of constitutional

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Mello, *Ariadne's Provisions: A "Clue of Thread" to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty*, 76 CALIF. L. REV. 89, 99-128 (1988).

40. *Harris*, 109 S. Ct. at 1043; Caldwell v. Mississippi, 472 U.S. 320, 327 (1985); *see also* Bruni v. Lewis, 847 F.2d 561, 562-63 (9th Cir.), *cert. denied*, 109 S. Ct. 403 (1988), *cert. denied*, 109 S. Ct. 1319 (1989); Sanders/Miller v. Logan, 710 F.2d 645, 654-55 (10th Cir. 1983); *see also* J. LIEBMAN, *supra* note 5, at 339-41; Robson & Mello, *supra* note 39, at 119-29.

41. Johnson v. Mississippi, 108 S. Ct. 1981, 1987 (1988); Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982); Reynolds v. Ellingsworth, 843 F.2d 712, 719 (3rd Cir.), *cert. denied*, 109 S. Ct. 403 (1988); Wheat v. Thigpen, 793 F.2d 621, 624-25 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987); Spencer v. Kemp, 781 F.2d 1458, 1469-70 (11th Cir. 1986).

42. James v. Kentucky, 466 U.S. 341, 351 (1984); *Hathorn*, 457 U.S. at 262-63 (1982); *Wheat*, 793 F.2d at 624-25; *Maupin*, 785 F.2d at 138; *Spencer*, 781 F.2d at 1469-70.

43. *Maupin*, 785 F.2d at 138-39; *Carrier*, 477 U.S. at 495-96; Robson & Mello, *supra* note 39, at 129.

44. *See Amadeo*, 108 S. Ct. at 1776 (Court has not established "contours" of cause and prejudice standard); *Smith*, 477 U.S. at 533-34 ("We have declined in the past to essay a comprehensive catalog of the circumstances that would justify a finding of cause."); *Reed*, 468 U.S. at 13 ("Because of the . . . virtually limitless array of contexts in which a procedural default can occur, this Court has not given the term 'cause' precise content."); *Sykes*, 433 U.S. at 100 (Brennan, J., dissenting) ("[T]oday's decision makes no effort to provide concrete guidance as to the content of those terms [cause and prejudice].").

45. 477 U.S. 478 (1986).

46. *Id.* at 488. In *Amadeo*, the Court approved a finding of cause where the factual prerequisite for the grand jury challenger, a district attorney's memorandum instructing the jury commission to underrepresent blacks and women, was not reasonably discoverable. 108 S. Ct. at 1776-77. The analysis of whether cause exists appears to be factually specific, with few general guidelines. *See* J. LIEBMAN, *supra* note 5, at 350-57.

dimensions."[47]

The second exception, "a fundamental miscarriage of justice" is similarly difficult to define precisely. Justice O'Connor has equated this standard with a showing that the "constitutional violation has probably resulted in the conviction of one who is actually innocent."[48] Obviously, the "actual innocence" standard is difficult to apply in a capital sentencing trial context: It is somewhat incongruous to inquire whether a defendant is actually innocent of a death sentence.[49]

Sykes clearly marked a shift toward restriction of federal habeas corpus relief and favors finality and expedience. The *Sykes* approach, however, is unquestionably difficult to apply. Neither the general rule nor the exceptions is easily defined or particularly workable. When the need for heightened scrutiny required in capital cases is introduced into this analysis, these problems become far more acute.

III. APPLICATION OF THE *SYKES* APPROACH IN *SMITH V. MURRAY* AND *DUGGER V. ADAMS*

The Court has used the adequate and independent state grounds doctrine to enforce procedural defaults in two capital cases, *Smith v. Murray*[50] and *Dugger v. Adams*.[51] Both cases used *Wainwright v. Sykes*[52] to ignore an otherwise valid challenge to a death sentence.[53] Both were five-to-four decisions with pointed dissents and ultimately re-

47. United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis omitted); *see also Carrier*, 477 U.S. at 494 (quoting United States v. Frady, 456 U.S. 152, 170 (1982)); *see generally* J. LIEBMAN, *supra* note 5, at 357-61.

48. *Smith*, 477 U.S. at 537 (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)); *see also Adams*, 109 S. Ct. at 1218 n.6, 1219 n.4 (Blackmun, J., dissenting). Professor Liebman has observed that in a sense, Justice O'Connor's use of an "actual innocence" standard to allow habeas relief where a procedural bar might otherwise exist amounts to a limited expansion of habeas corpus jurisdiction. J. LIEBMAN, *supra* note 5, at 17.

49. Justice O'Connor's majority opinion in *Smith* conceded that the actual innocence standard "does not translate easily" into the context of the review of error at a capital-sentencing-phase trial. *Smith*, 477 U.S. at 537. The Court has yet to clarify the law in this area, and recently declined "to define what it means to be 'actually innocent' of a death sentence." *Adams*, 109 S. Ct. at 1218 n.6.

50. 477 U.S. 527 (1986).

51. 109 S. Ct. 1211 (1989). The Court also discussed the *Sykes* standard in deciding the capital cases of *Caldwell v. Mississippi*, 472 U.S. 320, 326-28 (1985) (state procedural default not binding on federal court because it was not relied upon by state court); *Amadeo v. Zant*, 108 S. Ct. 1771, 1776-77 (1988) (cause established by concealment of evidence by officials); and *Johnson v. Mississippi*, 108 S. Ct. 1981 (1988) (state procedural bar not applied consistently or regularly is insufficient to prevent federal court from reviewing habeas challenge).

52. 433 U.S. 72 (1977).

53. *Adams*, 109 S. Ct. at 1213-18; *Smith*, 477 U.S. at 538-39.

sulted in execution of the petitioners.[54]

Smith arose out of a Virginia murder prosecution. Michael Smith was convicted of murder and sentenced to death in the late 1970s.[55] During the penalty phase of the trial, the prosecution introduced the testimony of a court-appointed psychiatrist who had conducted an examination of Smith without advising him that his statements might be used against him.[56] The psychiatrist, over defendant's objection, testified that Smith had admitted a prior sexual assault during the interview.[57]

On appeal, defense counsel raised thirteen issues but did not reallege the impropriety of the psychiatric testimony, having decided that Virginia law would not support such a challenge.[58] The conviction and sentence were affirmed by the Virginia Supreme Court in 1978.[59] The following year, a state habeas corpus petition was filed alleging that the admission of the psychiatric testimony violated the fifth and fourteenth amendments.[60] The Virginia courts defaulted the claim, ruling that the petitioner had forfeited this ground by failing to raise it on appeal.[61] Having exhausted his state remedies, Smith's lawyers turned to the federal courts and filed a petition for writ of habeas corpus.[62]

While the federal petition was being litigated, on May 18, 1981, the United States Supreme Court overturned the death sentence of a far more fortunate Mr. Smith in *Estelle v. Smith*,[63] holding that Ernest Smith's sentence was invalid because the prosecution had introduced the testimony of a court-appointed psychiatrist who, in violation of the fifth amendment, relayed information received during an interview with the defendant where the defendant had not been advised of his constitutional rights.[64] The *Smith* holding, according to a dissenting Justice Stevens,

54. *Adams*, 109 S. Ct. at 1212 (White, O'Connor, Scalia, Kennedy, JJ. & Rehnquist, C.J., majority opinion), 1218 (Blackmun, Brennan, Marshall & Stevens, JJ., dissenting); *Smith*, 477 U.S. at 528 (O'Connor, Rehnquist, White, Powell, JJ. & Burger, C.J., majority opinion), 539 (Stevens, Marshall, Blackmun & Brennan, JJ., dissenting).

55. *Smith*, 477 U.S. at 529-30.

56. *Id.* at 529. Pursuant to defense counsel's request, the psychiatrist had been appointed to examine Smith to determine whether there was any psychological basis for a defense. *Id.*

57. *Id.* at 529-30.

58. *Id.* at 531.

59. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978). The objections to the psychiatric testimony *were* raised in an amicus curiae brief filed by the Post-Conviction Assistance Project of the University of Virginia Law School, but the state court, pursuant to its rules, did not consider this challenge. *Id.* at 460 n.1, 248 S.E.2d at 139 n.1.

60. *Smith*, 477 U.S. at 531.

61. *Id.*

62. *Id.* at 532.

63. 451 U.S. 454 (1981).

64. *Id.* at 462-71.

made it "absolutely clear" that the psychiatric testimony introduced in Michael Smith's trial also violated the fifth amendment.[65]

Nonetheless, in an opinion written by Justice O'Connor, the Court affirmed the denial of Smith's habeas petition, holding that the challenge to the psychiatric testimony was barred under *Sykes*.[66] Finding the state court's forfeiture holding an adequate and independent ground to uphold the death sentence, the Court thought it "self-evident" that "cause" for the failure to raise the claim in state court had not been established[67] and further held that the "fundamental miscarriage of justice" exception did not apply.[68] Making it manifestly clear that *Sykes* was applicable to death penalty cases, the majority "rejected the suggestion that the principles of *Wainwright v. Sykes* apply differently depending on the nature of the penalty."[69] Justice Stevens, joined by three other justices, sharply dissented.[70] On August 1, 1986, Michael Smith was executed in Virginia's electric chair.[71]

In *Dugger v. Adams*,[72] the Court again wrestled with the question of whether an apparently meritorious constitutional challenge to a death sentence could be ignored because of a state court default.[73] As in *Smith v. Murray*, the result was a sharply split Court[74] and the execution of an individual whose constitutional rights were apparently violated during his sentencing trial.[75]

Aubrey Adams was convicted of murder and sentenced to death in 1978, in a proceeding that involved the trial court judge's constantly admonishing the jury that its decision as to penalty was strictly advisory and that the trial court was ultimately responsible for the penalty deter-

65. *Smith*, 477 U.S. at 551 (Stevens, J., dissenting).

66. *Id.* at 538-39.

67. *Id.* at 535-36. The Court held that neither the attorney's error nor the claim's novelty established cause for failing to raise the issue in the appeal. *Id.* Further, the Court refused to hold that Smith's appellate counsel had been ineffective, judging that the decision not to raise the claim on appeal, while obviously wrong in retrospect, was viable at the time. *Id.* at 534-36.

68. *Id.* at 538.

69. *Id.*

70. *Id.* at 539 (Stevens, J., dissenting). Justices Marshall and Blackmun joined Justice Stevens' dissent, with Justice Brennan joining in part. *Id.* (Stevens, J., dissenting). In addition, Justice Brennan wrote his own dissenting opinion, jointly responding to *Smith v. Murray* and *Murray v. Carrier*, and was joined by Justice Marshall. *Id.* at 516 (Brennan, J., dissenting).

71. N.Y. Times, Aug. 2, 1986, § A, at 29, col. 2.

72. 109 S. Ct. 1211 (1989).

73. *Id.* at 1214 (White, O'Connor, Scalia, Kennedy, JJ. & Rehnquist, C.J., majority opinion), 1218 (Blackmun, Brennan, Marshall & Stevens, JJ., dissenting).

74. *Id.* at 1212.

75. N.Y. Times, Aug. 2, 1986, § A, at 29, col. 2.

mination.[76] No objection to these admonitions was made at trial or on appeal.[77] On June 11, 1985, the Supreme Court of the United States decided *Caldwell v. Mississippi*.[78] In *Caldwell*, the Court overturned a death sentence because the prosecutor had argued to the jury that the ultimate sentencing decision was not its responsibility, and that its verdict would be reviewed by various courts.[79]

Adams subsequently brought a state post-conviction relief petition claiming *Caldwell* error, but the Florida Supreme Court refused to address the merits, finding that the failure to raise the challenge on appeal constituted a forfeiture.[80] In the federal habeas proceeding, Adams attacked the adequacy of this state-law forfeiture on grounds that the Florida courts did not regularly and consistently follow the procedural rule invoked in his case.[81] The Supreme Court of the United States held, however, that these cases were insufficient to undercut the adequacy of the Florida procedural rule.[82]

Although *Caldwell* had not been decided at the time of the trial and appeal, the *Adams* Court held that the claim was not so novel as to provide "cause" since an objection could have been made under existing state law.[83] The Court's resolution of the "fundamental miscarriage of justice" exception was marked by surprising brevity and a dearth of analysis.[84] Justice White, the author of the majority opinion, repeated

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76. *Adams*, 109 S. Ct. at 1213.

77. *Id.* at 1213-14.

78. 472 U.S. 320 (1985).

79. *Id.* at 328-29. The *Caldwell* Court concluded that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* Such an insulation of the capital-sentencing decision was found to violate the reliability requirements of the eighth amendment. *Id.* Justice O'Connor wrote a concurring opinion stressing that the prosecutor's comments mischaracterized state law. *Id.* at 341-43 (O'Connor, J., concurring). The *Caldwell* decision reflected a split court with a five-justice majority. 472 U.S. at 322 (Marshall, Brennan, Stevens, Blackmun & O'Connor, JJ., majority opinion), 343 (Rehnquist and White, JJ. and Burger, C.J., dissenting) (Justice Powell took no part in the decision).

80. Adams v. State, 484 So. 2d 1216, 1217 (1986), *cert. denied sub nom.* Dugger v. Adams, 475 U.S. 1103 (1986).

81. In support of this point, Adams gathered a number of decisions in which the Florida Supreme Court had ignored this procedural bar and had addressed *Caldwell* claims in a similar posture. *See Adams*, 109 S. Ct. at 1220-22 (Blackmun, J., dissenting); *see also id.* at 1217 n.6. The cases in which the state court failed to apply the procedural bar include Daugherty v. State, 533 So. 2d 287, *cert. denied*, 109 S. Ct. 402 (1988); Combs v. State, 525 So. 2d 853 (1988); Mann v. State, 482 So. 2d 1360 (1986); and Darden v. State, 475 So. 2d 217 (1985).

82. *Adams*, 109 S. Ct. at 1217 n.6.

83. *Id.* at 1216.

84. In dissent, Justice Blackmun not only disagreed with the majority's substantive conclusions but voiced objection to dismissive and "conclusory" treatment of the issues in the

the Court's earlier concession in *Smith v. Murray* that the "actual innocence" definition of the "miscarriage of justice" exception is difficult to apply in a sentencing context.[85] However, he declined to provide guidance for the resolution of this quandary, choosing instead to reject outright the seemingly sensible standard presented by the four-justice dissent that "a fundamental miscarriage results whenever there is a substantial claim that the constitutional violation undermined the accuracy of the sentencing decision."[86] Presumably, as with many other contours of the *Sykes* approach, a fuller explanation of the "miscarriage of justice" exception in the capital penalty context awaits another day. Aubrey Adams was executed by the state of Florida on May 5, 1989.[87]

Anyone concerned with the fairness of the application of the death penalty in this country and the integrity of the judicial system cannot view the results in *Smith v. Murray* and *Dugger v. Adams* without some discomfort. Both cases resulted in an execution where the death sentence, the Court assumed, was the product of an unconstitutional proceeding. Yet, in the interest of finality and comity, the Court allowed these executions to proceed, deferring to the severe forfeiture rules of the state courts.

IV. CRITIQUE OF THE *SYKES* APPROACH

Not only does the *Wainwright v. Sykes*[88] approach lead to the harsh results exemplified by *Smith v. Murray*[89] and *Dugger v. Adams*,[90] but its entire structure crumbles under close analysis. Unfortunately, as Justice Stevens expressed in his *Smith v. Murray* dissent, the Court may well have "lost its way in a procedural maze of its own creation."[91] The continued adherence to the rules that form this maze is neither wise nor necessary. As discussed below, the *Sykes* independent and adequate state grounds application is flawed by an illogical doctrinal derivation, vague and undefined terminology, rules of application that contradict its sup-

opinion. *Id.* at 1225 (Blackmun, J., dissenting) ("I would have expected that when this Court reinstates a death sentence . . . it would be particularly careful to consider fully all issues necessary to its disposition of the case. To judge by . . . the Court's opinion, this expectation was naive.").

85. *See supra* notes 48-49 and accompanying text.

86. *Adams*, 109 S. Ct. at 1219 & n.4.

87. N.Y. Times, May 6, 1989, § A, at 16, col. 1. In contrast, Bobby Caldwell, whose sentence was reversed in the *Caldwell* case, was retried and sentenced to life in prison. Caldwell v. State, 517 So. 2d 1360 (1987).

88. 433 U.S. 72 (1977).

89. 477 U.S. 527 (1986).

90. 109 S. Ct. 1211 (1989).

91. *Smith*, 477 U.S. at 541 (Stevens, J., dissenting).

posed rationales, and fundamental incompatibility with the entire basis for the writ of habeas corpus.

The initial problem with the *Sykes* approach is that it is derived from a concept of appellate jurisdiction. The Supreme Court of the United States has long held that "it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision."[92] This rule reflects the Court's obligation to avoid advisory opinions and refrain from deciding moot issues: if the state court judgment rests on an independent ground, the resolution of the federal question is not necessary to the resolution of the case.[93] In contrast, federal habeas jurisdiction is concerned with whether the confinement is constitutional.[94] A habeas court is not reviewing the judgment of the state courts; it is reviewing whether the state authorities' asserted grounds for a confinement and sentence meet the standards of the Constitution.[95] The denial of a constitutional right in a criminal proceeding should not cease to be the basis of the resulting unconstitutional confinement or sentence when the state court refuses to cure the injustice because of some procedural flaw in the presentation of the challenge.[96]

The Court has recognized the logical slippage involved in applying a rule fashioned from appellate jurisdiction in this context[97] but has nonetheless continued to use the *Sykes* approach because, unlike the use of the adequate and independent state grounds doctrine in the direct review context, the state ground is technically not a bar to jurisdiction but only

92. *See, e.g.*, Harris v. Reed, 109 S. Ct. 1038, 1042 (1989) (citing Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1875)).

93. Fay v. Noia, 372 U.S. 391, 429 (1963); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

94. Harris v. Nelson, 394 U.S. 286, 290-92 (1969); *Fay*, 372 U.S. at 399-414; Townsend v. Sain, 372 U.S. 293, 311-12 (1963). *See also supra* note 3 and accompanying text.

95. *Fay*, 372 U.S. at 430-31. As Justice Brennan explained in *Fay*: "The jurisdictional prerequisite [to habeas corpus] is not the judgment of a state court but detention simpliciter. . . . Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner." *Id.*

96. *Id.* at 426-31.

97. This recognition has come from both ideological poles. In his dissent in *Harris v. Reed*, Justice Kennedy protested the "mechanical application of the doctrines governing our appellate jurisdiction," favoring even greater deference to state court forfeitures. *Harris*, 109 S. Ct. at 1053 (Kennedy, J., dissenting). Justice Brennan made this same point in *Fay* in response to the argument that the adequate and independent state grounds doctrine should be applied to limit the ability of a federal court to cure unconstitutional confinements. *Fay*, 372 U.S. at 429-31.

a guidepost for discretion.[98] The discretionary basis of the *Sykes* restriction adds to the difficulty of its application. A level of inconsistency is inherent in any discretionary rule.

This inconsistency is exacerbated greatly by the terms the Court has used to define the doctrine. The "cause-and-prejudice" exception is not only ill-defined,[99] but it is, like the entire approach, derived from an appellate review context only marginally applicable to the principles of habeas jurisdiction.[100] Likewise, the "fundamental miscarriage of justice" exception is manifestly difficult to apply consistently and further hampered by the Court's failure to define more explicitly its application to death penalty cases.[101] Thus, the supposed standards for channeling the habeas court's discretion are set by vague terms without defined substantive content. Still worse, the Court's application of these standards, such as the holding that the futility of an objection cannot alone comprise "cause,"[102] seems flatly inconsistent with the purported rationales underlying the *Sykes* approach.[103]

Ultimately, such an approach is fundamentally incompatible with the purpose of the writ of habeas corpus. The entire concept of the writ is to provide the judiciary with the power to bypass procedural blockades and inquire into the fundamental questions of the fairness of the confinement or sentence.[104] Procedural obstacles are the very antithesis of the

98. Federal habeas jurisdiction includes the power to sweep aside any state procedural bar to vindicate constitutional rights. *Smith*, 477 U.S. at 541-42 (Stevens, J., dissenting); Reed v. Ross, 468 U.S. 1, 9 (1984); *Sykes*, 433 U.S. at 100 n.2 (Brennan, J., dissenting); Francis v. Henderson, 425 U.S. 536, 538 (1976).

99. *See supra* notes 44-47 and accompanying text. As Professor Robbins noted in observing the lack of development of the "cause-and-prejudice" exception between the *Sykes* opinion of 1977 and the *Murray v. Carrier* opinion of 1986: "Many days had come and gone until the 1985 term, and still we did not really know what cause was." Robbins, *supra* note 5, at 278.

100. The "cause-and-prejudice" standard was derived from the objection requirements promulgated in Federal Rule of Criminal Procedure 12(b). *See* Wainwright v. Sykes, 433 U.S. 72, 84 (1977) (citing FED. R. CRIM. P. 12(b)(2)); Davis v. United States, 411 U.S. 233, 241 (1973)(citing FED. R. CRIM. P. 12(b)(2)); *see also supra* note 27.

101. *See Adams*, 109 S. Ct. at 1218 n.6.

102. *Smith*, 477 U.S. at 535 (quoting Engle v. Isaac, 456 U.S. 107, 130 (1982)).

103. In the cases applying *Sykes*, the Court has held that federalism requires a certain deference to the state court's position as the "primary authority for defining and enforcing the criminal law." *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 128 (1982). The *Engle* Court noted that federal "intrusions" frustrate state courts' "good-faith attempts to honor constitutional rights." *Id. See also* Murray v. Carrier, 477 U.S. 478, 487 (1986). Allowing futility as an exception to the procedural default bar would not interfere with state court decisions or offend concepts of federalism. Rather, the command implicit in *Smith*, that litigants must continually raise futile objections and challenges in state courts in order to preserve them for federal habeas, is a much greater intrusion into the practices of the state court. *See Smith*, 477 U.S. at 535.

104. *See* Harris v. Nelson, 394 U.S. 286, 290-91 (1969).

Great Writ's purpose and power. As Justice Holmes wrote: "*[H]abeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings . . . [and] opens the inquiry. . . ."[105]

Given the manifest problems with the *Sykes* approach both in its derivation and in its application, it is useful to inquire whether it fulfills its stated goals. Courts have allowed state procedural defaults to restrict federal habeas review based on the following rationales: federalism,[106] finality,[107] and the cost of society's "right to punish admitted offenders."[108]

Federalism involves both a mutual respect between state and federal courts for their separate spheres of jurisdiction and a dialectical development in their interchange in areas such as the enforcement of federal constitutional rights.[109] In the *Sykes* context, "[t]he basis for these restrictive waiver rules . . . is federal respect for 'the state's interest in the integrity of its rules and proceedings and the finality of its judgments.' "[110]

It is not readily apparent, however, why the federal courts should grant deference to this state interest. Federal habeas jurisdiction is by definition a mandate to correct the state court's errors;[111] the "integrity" of state proceedings must necessarily bow to the inquiry. Further, the *Sykes* approach entails a critical and thorough assessment of the state forfeiture rules and a strict analysis of their purpose, consistency and application.[112] A simpler rule, bypassing the state forfeiture rules and going straight to the federal concern of whether the confinement is unconstitutional under federal standards, might well intrude less upon the state system and serve federalism better.[113]

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105. Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

106. *Carrier*, 477 U.S. at 487; *Ross*, 468 U.S. at 10; *Engle*, 456 U.S. at 128; *Sykes*, 433 U.S. at 88.

107. *Smith*, 477 U.S. at 533; *Ross*, 468 U.S. at 10-11.

108. *Engle*, 456 U.S. at 127.

109. *See* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048 (1977).

110. O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 11 (1985) (quoting Reed v. Ross, 468 U.S. 1, 10 (1984)).

111. *See supra* note 3 and accompanying text.

112. *See supra* notes 37-42 and accompanying text.

113. The federalism rationale is also apparent in the Court's concern for the purposes underlying state forfeiture rules and its admonitions that federal courts should be loath to allow litigants to circumvent procedural rules. *See Ross*, 468 U.S. at 10-11; *Sykes*, 433 U.S. at 88. As a reason for the harsh results of the *Sykes* approach, however, this concern is also unconvincing. To the extent a litigant has deliberately bypassed the state requirements, the *Fay* system is sufficient to mandate respect for the state rules. See *supra* notes 20-24 and accompa-

Finality can be a desirable goal, but the type and cost of finality must be considered. Finality was undoubtedly served by the executions of Aubrey Adams and Michael Smith. But the cost in fairness, consistency and integrity seems a high price.[114] Finality might be better served by avoiding the skirmishes over procedural default and pursuing a simpler and more direct route to a final adjudication of the merits of the constitutional claim.

The third general rationale for restricting the reach of federal habeas underlying the *Sykes* approach concerns the "social cost" of interfering with "the right to punish" offenders.[115] In *Engle v. Isaac*,[116] Justice O'Connor's majority opinion noted that "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible."[117] In response, Justice Brennan noted that it was unfair to punish a defendant by upholding an unconstitutional conviction because of the "logistical and temporal difficulties" of retrial.[118] While these opposing views reflect subjective value differences and cannot be easily resolved, a recognition of this social cost can be fully reconciled with the abandonment of the *Sykes* restrictions. As with almost all constitutional rights, the right to petition for a writ of habeas corpus involves costs to society. Yet this recognition does not entail the conclusion that our judicial system should undercut this right. Rather, it entails a corresponding recognition that the protection of essential liberties is not accomplished without sacrifice.

The application of *Sykes* has failed to make any clear contribution to fairness or the desirable interests of federalism. While the *Sykes* approach certainly favors a type of finality of criminal judgments and restricts the vindication of constitutional rights, such outcomes seem at odds with the constitutional and statutory mandate of the habeas guarantee.[119] Even assuming a marginal benefit to some legitimate judicial interest could be achieved through deference to state forfeiture rules, the

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nying text for a discussion of *Fay*. To the extent a state forfeiture rule operates to trap the defendant in an unconstitutional confinement, respect for the underlying purpose of such a rule would seem to fall to the mandate of habeas jurisdiction.

114. See *supra* notes 50-87 and accompanying text for a discussion of *Adams* and *Smith*.

115. *Engle*, 456 U.S. at 127.

116. 456 U.S. 107 (1982).

117. *Id.* at 127-28. Dissenting in *Vasquez v. Hillary*, Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, echoed these sentiments and expressed the view that the difficulty of retrial should be an affirmative consideration in assessing whether habeas relief should be granted at all. 474 U.S. 254, 279-82 (1986) (Powell, J., dissenting).

118. *Engle*, 456 U.S. at 147 (Brennan, J., dissenting).

119. *See* U.S. CONST. art. I, § 9; 28 U.S.C. § 2254 (1982).

problematic methodology of the Court's approach is crippling.[120] The fundamental unfairness of executing Aubrey Adams while Bobby Caldwell was sentenced to life at his retrial[121] is the legacy of *Sykes*.

V. SUGGESTIONS AND CONCLUSION

When Justice Stewart voted to hold the death penalty system unconstitutional in violation of the eighth amendment in *Furman v. Georgia*,[122] he pointed out that "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual" and concluded that the arbitrary, "wanton and freakish" imposition of this penalty was unacceptable.[123] Four years later, authoring the plurality opinion of *Gregg v. Georgia*[124] that effectively reinstated the death penalty in the United States, Justice Stewart upheld the new Georgia statute because, he concluded, it adequately provided guidance to prevent the arbitrary and capricious imposition of the death penalty.[125]

Furman, *Gregg*, and much of the Court's capital jurisprudence since, were concerned with the arbitrariness in the selection of those sentenced to death, and the Court took steps to correct this flaw.[126] In contradiction of this goal, *Smith v. Murray*[127] and *Dugger v. Adams*[128] introduced a whole new level of arbitrariness: having actual executions turn on whether the defendant was unlucky enough to have a lawyer who

120. Justice Stevens has bemoaned "the Court's preoccupation with procedural hurdles." *Engle*, 456 U.S. at 136 (Stevens, J. dissenting). Justice Brennan has consistently argued that the *Sykes* standard is "misguided and insupportable in any context." *Id.* at 151 (Brennan, J., dissenting); *see also Carrier*, 477 U.S. at 522-23 (Brennan, J., dissenting); *Sykes*, 433 U.S. at 108-11 (Brennan, J., dissenting). Even Justice Kennedy has criticized the logical flaws in the *Sykes* approach. *See Harris*, 109 S. Ct. at 1048-56 (Kennedy, J., dissenting).

121. *See supra* notes 72-87 and accompanying text.

122. 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

123. *Id.*

124. Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion).

125. *Id.* at 195.

126. The constitutional requirement that a capital sentencing process rationally and reliably select those most deserving of the extreme sentence, explicated in *Furman* and *Gregg*, underlies a number of subsequent decisions. In *Gardner v. Florida*, 430 U.S. 349 (1977), the Court struck down a capital sentence because the sentencer had relied on a sentencing report that contained information undisclosed to the defendant. *Id.* at 351-62. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), and *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988), the Court held that vague and arbitrarily applied statutory aggravating circumstances were unconstitutional. *Godfrey*, 446 U.S. at 428-29; *Maynard*, 108 S. Ct. at 1859. In *Booth v. Maryland*, 482 U.S. 496 (1987), and *Gathers v. South Carolina*, 109 S. Ct. 2207 (1989), the Court held that a death sentence could not be based on information concerning the victim that was not linked to the defendant's personal moral culpability. *Booth*, 482 U.S. at 504; *Gathers*, 109 S. Ct. at 2210.

127. 477 U.S. 527 (1986).

128. 109 S. Ct. 1211 (1989).

failed to make the appropriate objection at the appropriate time.[129]

The freakish and wanton execution of individuals because their attorneys failed to raise a challenge at the proper procedural hour, or because the attorney failed to press futile objections, thus stands in sharp contrast to the requirements the Court has placed on state legislatures,[130] trial courts,[131] and prosecutors.[132] It is one matter to recognize, as the Court did in *McCleskey v. Kemp*,[133] that a certain level of inconsistency must be accepted in a system that uses human beings as prosecutors and jury members.[134] It is quite another to introduce into the system a new layer of arbitrariness.

Escape from the procedural maze is not difficult. Two possible exits are already available. First, since the entire *Wainwright v. Sykes*[135] doctrine rests on a discretionary restriction of federal habeas review,[136] an exception for capital cases would be perfectly consistent with the Court's view that death as a penalty is different in kind and requires heightened regard for consistency and reliability.[137] A similar approach has been adopted in many state courts that have review procedures for challenges in death penalty cases despite procedural forfeitures.[138]

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129. *See supra* notes 50-87 and accompanying text.

130. For example, the Court has held that a state's capital sentencing statute must provide guidance to ensure that the sentencing discretion is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *See* Zant v. Stephens, 462 U.S. 862, 874 (1983); Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion). The Court insists that the state has an obligation to impose capital sentences "fairly with reasonable consistency or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). Furthermore, the Court has held that statutory terminology must identify specific factual criteria to "justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *See Zant*, 462 U.S. at 877; *see also Maynard*, 108 S. Ct. at 1858.

131. The Court has held that in addition to the general requirements of eighth amendment jurisprudence, trial courts must limit evidence of aggravation to factors directly related to the "moral culpability" and "blameworthiness of a particular defendant." South Carolina v. Gathers, 109 S. Ct. 2207, 2210 (1989); *Booth*, 482 U.S. at 504. The Court requires that a trial court be prepared to sweep aside technical adherence to state evidentiary rules if application would lead to the exclusion of reliable and crucial mitigating evidence. Skipper v. South Carolina, 476 U.S. 1 (1986); Green v. Georgia, 442 U.S. 95 (1979).

132. For example, the Court overturned one death sentence on the basis of a misleading prosecutorial argument. Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985).

133. 481 U.S. 279 (1987).

134. *Id.* at 311.

135. 433 U.S. 72 (1977).

136. *Id.* at 78-82.

137. *See* Catz, *Federal Habeas Corpus and the Death Penalty: The Need for a Preclusion Doctrine Exception*, 18 U.C. DAVIS L. REV. 1177, 1214-18 (1985); Meltzer, *State Court Forfeiture of Federal Rights*, 99 HARV. L. REV. 1128, 1222 (1986).

138. Justice Stevens noted in his dissent in *Smith*, "the prevailing practice in many States" of recognizing "a special duty in capital cases to overlook procedural defaults and review the

A second approach would be the reworking of the *Sykes* approach along the lines suggested by Justice Stevens' dissent in *Smith v. Murray*.[139] The central goal of federal habeas jurisdiction should be the correction of fundamental injustice. Thus, by making the "fundamental miscarriage of justice" criteria an exception to the default rule and narrowly construing it in terms of actual innocence, the Court has obscured the more appropriate inquiry.[140] Relief from a death sentence should be available when a constitutional violation effects the accuracy of the sentencing determination, whatever the procedural posture of the claim. Thus, technical errors would be vulnerable to a default rule, but constitutional violations that go to the fairness of the sentencing trial and the reliability of the result could be corrected by the federal courts.

Either approach would result in the elimination of hypertechnical barriers to habeas relief and refocus on the proper inquiry of whether the conviction and sentence were attained in conformity with constitutional protections. This new focus would benefit both litigants and the courts by reducing the time and effort devoted to litigating side issues such as "adequacy," "independence" and "cause and prejudice."

The writ of habeas corpus is "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action."[141] Twenty years ago, the Court explained that:

> The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of forms and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.[142]

The misguided adherence to a rule which defaults legitimate constitutional claims, lost in state court through no fault of the petitioner, and results in a post-conviction lottery as disturbing as any standardless trial proceeding represents an abrupt departure from the noble tradition of the writ of habeas corpus. At a time when the courts, both state and federal, are experiencing great pressure to expedite capital cases, there is a great

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trial record for reversible error, before affirming that most severe of all sentences." *Smith*, 477 U.S. at 548 (Stevens, J., dissenting) (citations omitted).

139. *Id.* at 544-47 (Stevens, J., dissenting).

140. *See id.* at 544-45; Dugger v. Adams, 109 S. Ct. 1211, 1224 n.15 (1989) (Blackmun J., dissenting).

141. Harris v. Nelson, 394 U.S. 286, 290-91 (1969).

142. *Id.* at 291.

risk that the undeserving and the innocent will be executed in an ill-conceived rush to reduce the perceived "backlog" in death sentence cases. Now is not the time to tie the Great Writ in a series of procedural bindings, but to restore it to its true and noble position as an instrument of justice.