would ordinarily not apply to pre-appeal flight, and the defendant's act of flight "is best sanctioned by the district court itself."

The Court refused, however, to adopt a bright-line rule that pre-appeal flight could never result in dismissal of an appeal. Justice Stevens noted that "some actions by a defendant, though they occur while his case is before the district court, might have an impact on the appellate process sufficient to warrant an appellate sanction." For example, the government may be prejudiced in locating witnesses for retrial if the appeal is significantly delayed; or the appellate court may be inconvenienced due to the inability to consolidate the fugitive defendant's appeal with other related appeals. The Court ruled that if such circumstances existed, "a dismissal rule could properly be applied."[10] The Court remanded the case to determine whether the defendant's pre-appeal flight imposed consequences on the appellate system sufficient to justify dismissal of his appeal.

Chief Justice Rehnquist, joined by Justices White, O'Connor, and Thomas, dissented. He stated that "there is as much of a chance that flight will disrupt the proper functioning of the appellate process if it occurs before the court of appeals obtains jurisdiction as there is if it occurs after the court of appeals obtains jurisdiction."

III. COLLATERAL ATTACK

A. REMEDIES GENERALLY

1. Collateral Attacks

After new trial motions have been made and all appeals are exhausted—or lost, perhaps for failure to comply with an appellate rule, such as a time limit on filing a notice of appeal—a defendant has a natural incentive to attempt additional attacks on the conviction.

Post-conviction remedies, of which habeas corpus is the most common, have always been regarded as *collateral* remedies, "providing an avenue for upsetting judgments that have become otherwise final." Mackey v. United States, 401 U.S. 667 (1971) (Harlan, J., separate opinion). They are not designed to substitute for direct review of convictions, nor can all the questions properly subject to appeal be raised collaterally. Because collateral attacks collide with principles of finality,

[10] See United States v. Reese, 993 F.2d 254 (D.C.Cir.1993) (applying *Ortega-Rodriguez* and dismissing an appeal where the defendant became a fugitive after the trial and before sentencing; the defendant's flight precluded the court from consolidating his appeal with that of his co-defendant); United States v. Rosales, 13 F.3d 1461 (11th Cir.1994) (dismissing an appeal where flight caused such a significant delay that the prosecution would be prejudiced in locating witnesses if a new trial were granted).

there are substantial limitations imposed on persons who want to bring such attacks.

2. Coram Nobis

One rarely used form of collateral attack is for the petitioner to obtain a writ of coram nobis. This is a remedy of last resort, available only to one otherwise remediless. Given the availability of a habeas corpus petition for those in custody, the coram nobis remedy has only very limited applicability. See Lowery v. United States, 956 F.2d 227 (11th Cir.1992) (coram nobis relief is not available where the defendant is still in custody and can petition for habeas relief). As the court in Telink, Inc. v. United States, 24 F.3d 42 (9th Cir.1994), put it:

> The writ of error coram nobis affords a remedy to attack an unconstitutional or unlawful conviction in cases when the petitioner has already served a sentence. The petition fills a very precise gap in federal criminal procedure. A convicted defendant in federal custody may petition to have a sentence or conviction vacated, set aside or corrected under the federal habeas statute, 28 U.S.C. § 2255. However, if the sentence has been served, there is no statutory basis to remedy the lingering collateral consequences of the unlawful conviction. Recognizing this statutory gap, the Supreme Court has held that the common law petition for writ of error coram nobis is available in such situations * * *.

Availability of the Writ of Coram Nobis in Federal Courts: United States v. Morgan and Korematsu v. United States

The Supreme Court held in United States v. Morgan, 346 U.S. 502 (1954) that the writ of coram nobis is available in federal courts. After Morgan was convicted in federal court and served his sentence, he was convicted in a state court and sentenced to a longer term as a second offender on the basis of the federal conviction. Collateral attack on the federal conviction under 28 U.S.C.A. § 2255, discussed infra, was not possible because Morgan was not in federal custody. But the Court held that an attack in the nature of coram nobis—in *Morgan* the challenge was that he had not been represented by counsel—was available. The burden of proving a right to relief was placed upon the convicted person. The Court stated that the grant of relief "should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice."

Subsequently the Court recognized "the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." Sibron v. New York, 392 U.S. 40, 55 (1968). Coram nobis, in the absence of other remedies, will allow a convicted person to attempt

to avoid these consequences—for example, disentitlement from the right to vote.

One of the most celebrated uses of the writ of coram nobis is Korematsu v. United States, 584 F.Supp. 1406 (N.D.Cal.1984), in which the court vacated the notorious conviction of an American citizen of Japanese ancestry for being in a place where all persons of Japanese ancestry had been excluded following the declaration of war by the United States against Japan in 1941. The conviction had been sustained by the Supreme Court in 1944. 323 U.S. 214 (1944). The district court relied upon a Report of the Commission on Wartime Relocation and Internment of Civilians (1982), which concluded that military necessity did not warrant the exclusion and detention of ethnic Japanese. It also relied upon internal government documents that demonstrated that the government knowingly withheld information from the courts when they were considering the critical question of military necessity in this case.

3. Habeas Corpus

Habeas corpus is a remedy for those who are in custody; the petitioner seeks a writ to be served against the official holding him in custody—usually the warden. The justification for the writ is that some error occurred that makes the custody illegal.

History of the Great Writ

"The early function of the writ of habeas corpus, say from 1150, was simply to get an unwilling party into court regardless of the kind of case involved." R. Sokol, Federal Habeas Corpus § B, at 4. It did not begin a proceeding; rather, it assured that once a proceeding was otherwise begun, it would not be futile because of the absence of a party. In the fourteenth century, the writ, in addition to its earlier function, also became an independent action to test the cause of a detention. With the development of this aspect of the writ, it took its place in the struggle between the common-law and the chancery courts. "Time and again * * * the common-law judges through habeas corpus released from custody persons committed by other courts," and thus undercut the authority of the Chancellor. D. Meador, Habeas Corpus and Magna Carta: Dualism of Power and Liberty 12 (1966).

Darnel's Case, 3 St.Trials 1, arose in 1627 and probably accounts significantly for the development of the writ. Darnel and four other knights were sent to prison for refusing to "loan" money to a demanding monarch. They sought habeas corpus to inquire into the power of the monarch to imprison them. Unsuccessful though they were, they invoked the concept of "due process of law," and they relied on Magna Carta in a way that led parliament to modify the decision by providing in its Petition

of Right that no person should be imprisoned without being charged in some way that allowed an opportunity for an answer. The writ of habeas corpus became the established vehicle for challenging confinement as denying due process of law. In the famous decision in Bushell's Case, 124 Eng.Rep. 1006, 6 St.Trials 999 (1670), the court utilized habeas corpus to order the release of a juror committed for contempt for returning a not guilty verdict in the trial of William Penn and others. A century later Blackstone would call the writ "the most celebrated in the English law."

But the writ was far from a perfect remedy for all illegal detentions. It developed that one court would not order the release of a person held by order of another court if the latter had proper jurisdiction. And, with respect to detentions ordered by the King, it was generally sufficient that the King asserted a right to detain a person despite the Petition of Right.

Following English common-law, the writ of habeas corpus became a part of American law. See generally Oaks, Habeas Corpus in the States—1776–1865, 32 U.Chi.L.Rev. 243 (1965). At the time of the constitutional convention, 4 of the 12 states with written constitutions had provisions regarding habeas corpus. In Article I of the Constitution, which sets forth the powers of Congress and restrictions upon those powers, clause 2 of section 9 provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Congressional Power to Restrict Habeas Corpus

It is unclear how far Congress could go in restricting the habeas corpus power of federal courts. If, for example, Congress did not authorize lower federal courts to hear any habeas corpus cases, would the anti-suspension clause be violated? Under the Constitution, Congress need not create federal courts at all. This might suggest that no habeas power necessarily must be placed in lower courts. See generally Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1049–50, 1263–66 (1970). Some suggestions have been made that even without statutory authority federal courts could grant writs of habeas corpus. See, e.g., Chafee, The Most Important Human Right in the Constitution, 32 B.U.L.Rev. 143 (1952).

Until 2006, no serious effort had been made by Congress to deprive federal courts of habeas corpus jurisdiction. Indeed, as will be seen below, Congress has passed statutes that authorize collateral attack by a petition for habeas corpus. But in the Military Commissions Act of 2006, Congress did purport to deny habeas jurisdiction over a certain set of claims of detained persons who were alleged to be enemy combatants after 9/11. The Military Commissions Act expressly provided that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an

application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination" and that "no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

In Boumediene v. Bush, 553 U.S. 723 (2008), a five-Justice majority invalidated the provision of the Military Commissions Act that purported to deprive the federal courts of habeas jurisdiction over the proceedings against alleged enemy combatants. The Court held that this provision of the Military Commissions Act operated as a suspension of the writ of habeas corpus. The Court rejected the government's argument that the alternative procedures provided by the Act were the functional equivalent of the habeas remedy.

State Habeas Provisions

At one time the Supreme Court granted certiorari to decide whether states are obliged under the Federal Constitution to provide persons convicted in state court with some post-conviction process to correct judgments of conviction obtained in violation of federal law. But the Court remanded the case to the Nebraska Supreme Court when the state legislature passed a post-conviction statute. Case v. Nebraska, 381 U.S. 336 (1965). Since then, all states have recognized some form of post-conviction attack after direct appeal in the state courts has been exhausted. See generally Whitmore v. State, 299 Ark. 55, 771 S.W.2d 36 (1989), for a discussion of the costs of allowing state post-conviction proceedings and the problems involved in integrating state and federal post-conviction proceedings.

In state habeas proceedings, state law governs the extent to which claims can be raised and the procedures that must be followed in raising the claims. If a convicted person wins collateral relief in state court, further proceedings will be unnecessary. But failure to win in state court often will not bar a subsequent federal action to set aside a state conviction.

The remainder of this Chapter will focus on federal actions and two basic questions: (1) What issues should be cognizable in collateral actions? (2) Should it matter (and if so, why) whether the collateral action is brought by a person convicted in a state or federal court? Because this

material involves, in part, complex questions of federal-state relations, only the surface is scratched here.

B. FEDERAL HABEAS CORPUS: THE PROCEDURAL FRAMEWORK

1. The Statutes

Federal habeas corpus remedies are available to challenge convictions rendered by both state and federal courts. The challenge must be brought by a person in custody—that person, who was originally the defendant in a criminal proceeding, is the "petitioner" in the habeas proceeding. The petitioner files a civil action in federal court, seeking a writ of habeas corpus on the ground that he is in custody in violation of federal law. Generally speaking, petitions for habeas corpus filed by state prisoners are governed by 28 U.S.C. § 2254 and are often referred to as section 2254 actions. Petitions in the nature of habeas corpus filed by federal prisoners are governed by 28 U.S.C. § 2255 and are often referred to as section 2255 actions.

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act (hereinafter referred to as AEDPA). The AEDPA imposes significant limitations on the habeas corpus remedy in federal courts. Some of these limitations are directed specifically to state death-row claimants, and are conditioned on the state's implementation of a mechanism for appointing competent counsel for state post-conviction proceedings. Other limitations are directed more generally toward any state claimant seeking relief in the federal district court under the provisions of 28 U.S.C. § 2254. Limitations similar to these are imposed by AEDPA on federal prisoners seeking collateral relief under 28 U.S.C. § 2255.

What follows are the statutory provisions that are pertinent to the habeas corpus remedy, as amended by AEDPA. *AEDPA amendments are italicized.*

Section 2241

28 U.S.C.A. § 2241 et seq. sets forth the powers of federal judges to issue writs of habeas corpus and the procedures to be utilized in habeas corpus actions. Section 2241 sets forth the reach of the writ and identifies the courts from which it may be sought.

§ 2241. Power to Grant Writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall

be entered in the records of the district court of the district wherein the restraint complained of is had. .

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; * * *

* * *

Section 2244

Section 2244, as amended by AEDPA, essentially provides that a habeas petitioner gets one collateral attack. Successive petitions are virtually always to be dismissed. It also provides for a statute of limitations on habeas petitions.

28 U.S.C. § 2244. Finality of Determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus *except as provided in Section 2255.*

(b)(1) A claim presented in a second or successive Habeas Corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive Habeas Corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) The applicant shows that the claim relies on a new rule of Constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a Writ of Certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in

the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Section 2253

Section 2253 limits the right of appeal from a district court's denial of a writ of habeas corpus.

28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Section 2254

Section 2254 is the basic section governing review of state court convictions by a federal district court in a habeas corpus action. The AEDPA requires federal courts to give substantial deference to state court determinations of federal law. And it requires the petitioner to exhaust state remedies before seeking a habeas corpus petition in federal court. It also limits the ability of a state petitioner to receive an evidentiary hearing in the federal court.

28 U.S.C. § 2254. State Custody; Remedies in Federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)*(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—*

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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

(e)*(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.*

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense; and

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. * * *

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Section 2255

Section 2255 is the main provision regulating habeas petitions by those who have been convicted in federal court. The AEDPA imposes a one-year statute of limitations on such petitions, and generally precludes successive petitions.

28 U.S.C. § 2255. Federal Custody; Remedies on Motion Attacking Sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. * * *

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Sections 2261–68

28 U.S.C. §§ 2261–68 are provisions added by AEDPA to limit collateral attacks by state death row inmates. Among other things, these sections: 1) limit the ability of death row inmates to obtain more than one stay of execution; 2) generally preclude considerations of claims that were not heard in state court because of the petitioner's failure to comply with a state procedural rule; 3) provide a "rocket docket" for expedited consideration of death penalty claims on habeas. To invoke these provisions, the state must prove that it has established "by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel."

2. General Principles Concerning Habeas Relief After AEDPA

The innovations of AEDPA have raised some important questions about the extent of habeas corpus relief.

a. Statute of Limitations

The AEDPA imposes a statute of limitations for habeas corpus petitions: for most petitioners a petition must be filed within one year after the conviction becomes final., There is potentially an even stricter

period for death row petitioners—if it is determined, under criteria provided in the statute, that the state provides competent counsel for state post-conviction proceedings, then a death row claimant must file a habeas petition within 180 days of the date his conviction becomes final, with a possible 30-day extension for cause. In Lonchar v. Thomas, 517 U.S. 314 (1996), the Court—applying pre-AEDPA law—held that there was no time limitation on an initial habeas petition, other than the equitable principle of laches. The Court in *Lonchar* declined to dismiss an initial petition filed just before the petitioner was scheduled to be executed six years after his conviction became final. But under the AEDPA, such a petition would have to be dismissed as untimely.[11]

Note that there the limitations period in AEDPA is tolled in section 2254 actions for the time taken to pursue state collateral relief. See Carey v. Saffold, 536 U.S. 214 (2002) (petition for state collateral review in California was "pending" in the time between the lower state court's decision and the filing of a new petition in a higher court, tolling the period for filing a federal habeas petition). See also Duncan v. Walker, 533 U.S. 167 (2001) (action for federal relief does not toll the AEDPA statute of limitations; section 2254 refers only to "state" collateral proceedings as tolling the limitations period).

Equitable Tolling: Holland v. Florida

In Holland v. Florida, 560 U.S. 631 (2010), the Court in an opinion by Justice Breyer held that the timeliness provision of AEDPA is subject to equitable tolling. While there is nothing in AEDPA about equitable tolling, Justice Breyer noted that the limitations period of AEDPA is not jurisdictional and stated that "a nonjurisdictional federal statute of limitations is ordinarily subject to a rebuttable presumption of equitable tolling." In the case of AEDPA, "the presumption's strength is reinforced by the fact that equitable principles have traditionally governed the substantive law of habeas corpus." Justice Breyer concluded as follows:

> The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, § 9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open.

[11] In Day v. McDonough, 547 U.S. 198 (2006), the Court held that a district court has the authority to raise an untimeliness defense *sua sponte*, but only in "exceptional circumstances." Thereafter in Wood v. Milyard, 132 S.Ct. 1826 (2012), the Court held that an appellate court has a similar authority to raise an untimely defense *sua sponte*, but stated that the authority was somewhat more narrow than the district court's because the appellate court must consider the fact that the district court has already expended time and consideration on the merits.

Justice Breyer stated that a petitioner is entitled to equitable tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Under the facts presented in *Holland*, the Court found that the limitations period was equitably tolled because Holland's lawyer (Collins)

> failed to file Holland's petition on time despite Holland's many letters that repeatedly emphasized the importance of his doing so. Collins apparently did not do the research necessary to find out the proper filing date, despite Holland's letters that went so far as to identify the applicable legal rules. Collins failed to inform Holland in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite Holland's many pleas for that information. And Collins failed to communicate with his client over a period of years, despite various pleas from Holland that Collins respond to his letters.

Justice Scalia, joined by Justice Thomas, dissented in *Holland*. Justice Alito wrote an opinion concurring in part and concurring in the judgment.

Relation Back: Mayle v. Felix

In Mayle v. Felix, 545 U.S. 644 (2005), the Court held that an amended habeas petition does not relate back (and thereby avoid AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those set forth in the original timely pleading. The Court applied the relation-back provision of Rule 15(c)(2) of the Federal Rules of Civil Procedure (because habeas petitions are civil cases). The Court concluded that a limitation on relation-back principles was necessary to accommodate the intent of the AEDPA. Justice Ginsburg, writing for the Court, explained as follows:

> Congress enacted AEDPA to advance the finality of criminal convictions. To that end, it adopted a tight time line, a one-year limitation period ordinarily running from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," 28 U.S.C. § 2244(d)(1)(A). If claims asserted after the one-year period could be revived simply because they relate to the same trial, conviction, or sentence as a timely filed claim, AEDPA's limitation period would have slim significance. Given AEDPA's "finality" and "federalism" concerns, it would be anomalous to allow relation back under Rule 15(c)(2) based on a broader reading of the words "conduct, transaction, or occurrence" in federal habeas proceedings than in ordinary civil litigation.

Justice Souter, joined by Justice Stevens, dissented.

b. Effect on Supreme Court's Appellate Jurisdiction: Felker v. Turpin

The AEDPA requires dismissal of a claim presented in a state prisoner's federal habeas application if the claim was also presented in a prior application. The Act also compels dismissal of a claim that could have been but was not presented in a prior federal application, unless certain extremely rigorous conditions are met. These limitations are directed at the perceived problem of successive habeas petitions. To effectuate these strict standards, the Act creates a "gatekeeping" mechanism, under which a petitioner must move in the court of appeals for leave to file a second or successive habeas application in the district court. A three-judge panel then determines whether the petitioner has made a prima facie showing that the strict substantive requirements for successive applications have been met. The Act further declares that a panel's grant or denial of authorization to file "shall not be appealable and shall not be the subject of a petition for . . . writ of certiorari." Thus, the Act limits the appellate jurisdiction of the Supreme Court over successive habeas applications.

In Felker v. Turpin, 518 U.S. 651 (1996), the Court unanimously rejected a constitutional attack on this statutory limitation of Supreme Court appellate jurisdiction. Chief Justice Rehnquist, writing for the Court, declared that the AEDPA did not alter the Supreme Court's power to exercise *original* jurisdiction over a habeas petition, as provided for by 28 U.S.C. §§ 2241 and 2254. (It should be noted, however, that the Supreme Court has not granted relief on original jurisdiction over a habeas petition in more than 100 years.) On the jurisdictional question, Chief Justice Rehnquist concluded as follows:

> The critical language of Article III, § 2, of the Constitution provides that, apart from several classes of cases specifically enumerated in this Court's original jurisdiction, "in all the other Cases . . . the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Previous decisions construing this clause have said that while our appellate powers "are given by the constitution," "they are limited and regulated by the [Judiciary Act of 1789], and by such other acts as have been passed on the subject." The [AEDPA] does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its "gatekeeping" function over a second petition. But since it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2.

On the merits, the Court refused, as an exercise of its original jurisdiction, to entertain Felker's claim for habeas relief on a successive petition. Felker challenged his conviction on the grounds of a *Brady* violation and an erroneous instruction on reasonable doubt. The Chief Justice set forth the standards for original jurisdiction, and the resolution of Felker's claims, in the following passage:

> [W]e now dispose of the petition for an original writ of habeas corpus. Our Rule 20.4(a) delineates the standards under which we grant such writs:
>
> > "* * * To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted."
>
> Reviewing petitioner's claims here, they do not materially differ from numerous other claims made by successive habeas petitioners which we have had occasion to review on stay applications to this Court. Neither of them satisfies the requirements of the relevant provisions of the [AEDPA], let alone the requirement that there be "exceptional circumstances" justifying the issuance of the writ.

c. *Certificate of Appealability*

The AEDPA limits the right to appeal from a district court's denial of a state defendant's petition for a writ of habeas corpus. The Act requires that the petitioner must obtain a "certificate of appeal" from a circuit judge. In Slack v. McDaniel, 529 U.S. 473 (2000), the Court set forth the standard that circuit judges are to apply in deciding whether to issue a certificate of appealability. It declared as follows:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. This construction gives meaning to Congress' requirement that a prisoner demonstrate substantial underlying constitutional claims and is in

> conformity with the meaning of the "substantial showing" standard * * * adopted by Congress in AEDPA. Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

See also Miller-El v. Cockrell, 537 U.S. 322 (2003) (finding that the petitioner met the *Slack* standard by providing circumstantial evidence that the prosecutor excused jurors on racial grounds in violation of Batson v. Kentucky, and remanding for a hearing of the appeal on the merits).

3. Factual Findings and Mixed Questions of Law and Fact

In a Section 2254 action, what deference does a federal court owe to the state court's determinations of law and fact? Before the AEDPA, the Court had held that federal habeas courts were not required to defer to a state court's interpretations of federal law, nor to mixed questions of fact and law. See, e.g., Miller v. Fenton, 474 U.S. 104 (1985) (state court's decision that a confession was voluntary is a mixed question of fact and law which federal courts do not presume to be correct).

But as amended by the AEDPA, section 2254 requires habeas courts to give substantial deference to *all* state court rulings in the case. The AEDPA makes no definite distinction, in terms of deference, between questions of law and mixed questions of law and fact. The pertinent provision states as follows:

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

Guidelines on the Deferential Standard of Review in Section 2254(d): Williams v. Taylor

In Williams v. Taylor, 529 U.S. 362 (2000), the Court construed section 2254(d) as amended by the AEDPA, and set forth the standard for federal review of state court determinations, as mandated by that section. The case involved a claim on habeas that Williams's counsel had been

ineffective at the penalty phase of his capital trial by failing to introduce evidence that Williams had been abused as a child and was borderline retarded. The State Supreme Court, applying Strickland v. Washington and subsequent Supreme Court cases, rejected Williams's ineffectiveness claim on the ground that Williams had not been prejudiced. Justice O'Connor, writing for the Court, analyzed the statutory language of the AEDPA in the following passage:

> [F]or Williams to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by § 2254(d)(1). That provision modifies the role of federal habeas courts in reviewing petitions filed by state prisoners.
>
> * * *
>
> The word "contrary" is commonly understood to mean "diametrically different," "opposite in character or nature," or "mutually opposed." The text of § 2254(d)(1) therefore suggests that the state court's decision must be substantially different from the relevant precedent of this Court. * * * A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. Take, for example, our decision in Strickland v. Washington. If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different." A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent. Accordingly, in either of these two scenarios, a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's "contrary to" clause.
>
> On the other hand, a run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s "contrary to" clause. Assume, for example, that a state-court decision on a prisoner's ineffective-assistance claim correctly identifies *Strickland* as the controlling legal authority and, applying that framework, rejects the prisoner's claim. Quite clearly, the state-court decision would be in accord with our decision in *Strickland* as to the

> legal prerequisites for establishing an ineffective-assistance claim, even assuming the federal court considering the prisoner's habeas application might reach a different result applying the *Strickland* framework itself. * * * Although the state-court decision may be contrary to the federal court's conception of how *Strickland* ought to be applied in that particular case, the decision is not "mutually opposed" to *Strickland* itself.

So a state court decision cannot be overturned on habeas simply because it is incorrect—under the "contrary to" clause, the state court decision must be diametrically opposed to Supreme Court precedent in order to justify habeas relief.

Justice O'Connor next construed the "unreasonable application" clause of § 2254(d)(1):

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.
>
> A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision "involv[ing] an unreasonable application of . . . clearly established Federal law."

Justice O'Connor noted that some lower courts had defined "unreasonable application of law" by determining whether any reasonable jurist would agree with the state court's determination—if so, this would preclude habeas relief. Justice O'Connor, however, rejected the "reasonable jurist" standard:

> Defining an "unreasonable application" by reference to a "reasonable jurist" * * * is of little assistance to the courts that must apply § 2254(d)(1) and, in fact, may be misleading. Stated simply, a federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case. * * *

> The term "unreasonable" is no doubt difficult to define. That said, it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning. For purposes of today's opinion, the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law. * * * In § 2254(d)(1), Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect." Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Justice O'Connor concluded as follows:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. * * * Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

On the merits, a majority of the *Williams* Court held that the state court's decision was both "contrary to" and an "unreasonable application" of *Strickland*. The state court held that the *Strickland* prejudice prong did not focus on what the outcome might have been had defense counsel acted effectively—when in fact that is the very focus of the prejudice prong. The state court also ignored the impact that the substantial mitigating evidence might have had on the jury at the penalty phase.

Section 2254(d) Deference Requires the Federal Court to Review All Grounds for the State Decision: Wetzel v. Lambert

In Wetzel v. Lambert, 132 S.Ct. 1195 (2012), the habeas petitioner challenged a 30 year-old conviction for robbery and murder on the ground that the government had suppressed a report that could be read to indicate that there was another suspect in the robbery (and related murder). The petitioner argued that the report was materially exculpatory evidence under *Brady*, for two reasons: 1) it could have created reasonable doubt that there was a different perpetrator; and 2) it could have impeached an important government witness. The state courts

rejected both grounds: the first because the report was ambiguous on whether the other person was suspected of the robbery at issue or some other robbery, and the second because the witness was effectively impeached on other grounds. The federal appellate court granted the writ, ruling that the state court was plainly unreasonable in concluding that the suppressed report would not have been useful to impeach the government witness—saying nothing about the other argument (ambiguity of the report) that the state court relied upon as an alternative ground for dismissal.

The Court, in a per curiam opinion, reversed the federal court and held that it could not grant the writ unless it found that the state court was unreasonable on *each* ground upon which it relied. The Court explained as follows:

> Under § 2254(d), a habeas court must determine what arguments or theories supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.
>
> In this case, however, the Third Circuit overlooked the determination of the state courts that the notations [in the suppressed report] were, as the District Court put it, "not exculpatory or impeaching" but instead "entirely ambiguous." Instead, the Third Circuit focused solely on the alternative ground that any impeachment value that might have been obtained from the notations would have been cumulative. If the conclusion in the state courts about the content of the document was reasonable—not necessarily correct, but reasonable—whatever those courts had to say about cumulative impeachment evidence would be beside the point.
> * * *

Justice Breyer, joined by Justices Ginsburg and Kagan, dissented on the ground that the Court should not have granted certiorari as the case presented only "fact-specific questions about whether a lower court properly applied the well-established legal principles that it sets forth in its opinion."

4. Retroactivity

As discussed in Chapter 1, in a habeas action, a state court's determination of federal law is assessed as of the time the state conviction was finalized (i.e., direct review is over). Once the defendant's conviction has been finalized, he is not entitled to subsequent changes in legal doctrine that might work to his advantage. The Court established this principle in Teague v. Lane, set forth as a principal case in Chapter 1. The AEDPA essentially codified Teague v. Lane in section 2254(d), set

forth above. The AEDPA's innovation is to treat the *Teague* concept not as one of retroactive application, but rather as a matter of deference to state court determinations. If the petitioner argues that a new rule should work to his benefit, this argument would be dismissed because new section 2254(d) requires a federal court to defer to a state court's determination of "clearly established" federal law. Arguing for a new rule on habeas is by definition prohibited because the state court decision is judged by whether it was contrary to clearly established law *at the time of the state court ruling.*

C. CLAIMS COGNIZABLE IN COLLATERAL PROCEEDINGS

Section 2254(a) makes it clear that a district court can only entertain an application for habeas corpus relief on behalf of a state prisoner if the prisoner alleges that state custody "is in violation of the Constitution or laws or treaties of the United States." In almost every case the prisoner claims that the state conviction was obtained in violation of the Federal Constitution. Section 2255 allows an attack on a federal conviction alleged to be in violation of the Constitution or laws of the United States and adds other grounds for attack. But not every claim of a violation of federal law is cognizable on habeas. If that were so, the collateral remedy might serve as a substitute for appeal.

1. Non-Constitutional Claims

Federal Defendants

The courts have limited section 2255 relief to "substantial" violations of federal law that have resulted in significant harm to the petitioner. See Hill v. United States, 368 U.S. 424 (1962) (defendant denied opportunity to make a statement before sentencing; no attack permitted); United States v. Timmreck, 441 U.S. 780 (1979) (technical violation of rule establishing procedures for accepting guilty pleas; no attack permitted). As the Court in *Hill* put it, habeas review for federal statutory violations is not available for federal defendants under section 2255 unless the statutory violation qualifies as a "fundamental defect which inherently results in a complete miscarriage of justice, or an omission inconsistent with the rudimentary demands of fair procedure."

The Court applied the principles of *Hill* and *Timmreck* in Peguero v. United States, 526 U.S. 23 (1999). Peguero sought habeas relief from a federal conviction because the district court at sentencing failed to inform him of his right to appeal the sentence. This failure to notify was a violation of Fed.R.Crim.P. 32(a)(2). The Court, in an opinion by Justice Kennedy, relied on *Hill* and *Timmreck* and declared that as a general

rule, "a court's failure to give a defendant advice required by the Federal Rules is a sufficient basis for collateral relief only when the defendant is prejudiced by the court's error." In this case, no prejudice could be found, because Peguero in fact had full knowledge of his right to appeal the sentence. Accordingly, he was not entitled to habeas relief.

State Defendants

In Reed v. Farley, 512 U.S. 339 (1994), the Court extended the "fundamental defect" test of *Hill* to claims of federal statutory violations brought by state defendants under section 2254. The statutory violation at issue in *Reed* concerned the Interstate Agreement on Detainers ("IAD"), a compact among 48 States, the District of Columbia, and the Federal Government. Article IV(c) of the IAD provides, among other things, that the trial of a prisoner transferred from one participating jurisdiction to another must commence within 120 days of the prisoner's arrival in the receiving State, and directs dismissal with prejudice when trial does not occur within the time prescribed. Reed's trial did not begin within this time limit. The trial court denied Reed's petition for discharge on the ground that the judge had previously been unaware of the 120-day limitation and that Reed had not earlier objected to the trial date or requested a speedier trial. Reed was convicted, and after unsuccessful appeals in the Indiana courts, he petitioned for a federal writ of habeas corpus under section 2254.

Justice Ginsburg, in an opinion for five Justices, rejected Reed's argument that the "fundamental defect" standard of *Hill* should not be applicable to habeas claims of state defendants brought under section 2254. She analyzed the issue as follows:

> [I]t is scarcely doubted that, at least where mere statutory violations are at issue, § 2255 was intended to mirror § 2254 in operative effect. Far from suggesting that the *Hill* standard is inapplicable to § 2254 cases, our decisions assume that *Hill* controls collateral review—under both §§ 2254 and 2255—when a federal statute, but not the Constitution, is the basis for the postconviction attack. * * *
>
> We see no reason to afford habeas review to a state prisoner like Reed, who let a time clock run without alerting the trial court, yet deny collateral review to a federal prisoner similarly situated.

The question remained whether the statutory violation suffered by Reed (i.e., the violation of the time limits of the IAD) rose to the level of a "fundamental defect" under *Hill*. Five members of the Court concluded that there was no "fundamental defect," but there was no majority opinion on this point. Justice Ginsburg, joined by Chief Justice Rehnquist and Justice O'Connor on this question, emphasized that Reed had not asserted his rights under the IAD in a timely manner. She did not,

however, preclude the possibility that some violation of the IAD might be cognizable on section 2254 habeas review under the "fundamental defect" standard. She noted that the IAD's purpose of providing a nationally uniform means of transferring prisoners between jurisdictions "would be undermined if a State's courts resisted steadfast enforcement, with total insulation from § 2254 review."

Justice Scalia, in an opinion joined by Justice Thomas, concurred in Justice Ginsburg's determination that the "fundamental defect" standard was applicable to claims brought for federal statutory violations by state defendants under section 2254. He concurred only in the result, however, on the question of whether the IAD violation suffered by Reed rose to the level of a "fundamental defect." He argued, more broadly than Justice Ginsburg, that a violation of the IAD could never result in a "fundamental defect" warranting habeas review, and he implied even more broadly that there could never be a federal statutory violation that would justify review under the "fundamental defect" standard. He elaborated as follows:

> The class of procedural rights that are not guaranteed by the Constitution * * * but that nonetheless are inherently necessary to avoid "a complete miscarriage of justice," or numbered among "the rudimentary demands of fair procedure," is no doubt a small one, if it is indeed not a null set. The guarantee of trial within 120 days of interjurisdictional transfer unless good cause is shown—a provision with no application to prisoners involved with only a single jurisdiction or incarcerated in one of the two States that do not participate in the voluntary IAD compact—simply cannot be among that select class of statutory rights.

Justice Blackmun dissented in *Reed* in an opinion joined by Justices Stevens, Kennedy, and Souter. He argued that the "fundamental defect" test of *Hill* was too stringent to be applied to federal statutory claims brought by state prisoners under section 2254. He reasoned that section 2255 actions "cover the ground already covered by federal courts" and so error should be egregious before collateral relief is granted. In contrast " a primary purpose of § 2254 is to provide a federal forum to review a state prisoner's claimed violations of federal law." Thus, "where no federal court previously has addressed the § 2254 petitioner's federal claims, there is less reason to sift these claims through so fine a screen" as *Hill* provides.

State Law Violations as Due Process Violations: Estelle v. McGuire

Federal due process claims are clearly cognizable under §§ 2254 and 2255. State defendants are often therefore tempted to characterize a

violation of some state law as tantamount to a due process violation. This ploy is not often successful, however. For example, in Estelle v. McGuire, 502 U.S. 62 (1991), McGuire was convicted in state court of the murder of his infant daughter. At the trial, the state offered medical evidence indicating that the infant had suffered severe injuries several weeks before her death. This evidence was offered to prove "battered child syndrome." The Ninth Circuit granted McGuire's habeas petition, reasoning that evidence of the child's prior injury was "incorrectly admitted pursuant to California law," and that the violation of a California rule of evidence also violated McGuire's due process rights.

The Supreme Court, in an opinion by Chief Justice Rehnquist, held that the alleged error did not "rise to the level of a due process violation" and reversed the grant of habeas relief. The Chief Justice concluded that "it is not the province of a federal habeas court to reexamine state court determinations on state law questions," and that "in conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Thus it was irrelevant that the evidence of prior injuries may have been inadmissible under state law. The only question was whether admission of the evidence violated McGuire's right to due process, and the Court held that it did not. The Chief Justice reasoned that the prior injuries were admissible even if they were not linked to McGuire, because they tended to show that the infant's death "was the result of an intentional act by *someone*, and not an accident." As the evidence met the low threshold of relevance, any due process inquiry was at an end. The Chief Justice stated that "we need not explore further the apparent assumption of the court of appeals that it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received at a criminal trial."

2. Constitutional Claims Generally

From the foregoing it is apparent that federal habeas review is generally limited to constitutional claims. The next question is whether all constitutional claims can be raised in § 2254 and § 2255 proceedings. On the face of the statutes, the answer might appear to be "yes," but that would not be a correct statement of the current state of the law. Nor would it reflect the status of the writ through most of its history.

In the early days, as our brief historical exegesis noted, the writ was used most frequently to attack the jurisdiction of the court imposing judgment. However, in cases like Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873) (permitting a challenge to a court's authority to impose sentence) and Ex parte Siebold, 100 U.S. 371 (1879) (permitting a challenge to the constitutionality of a statute), the writ was used more broadly for consideration of constitutional claims on the merits.

Consideration of Constitutional Claims: Brown v. Allen

In Brown v. Allen, 344 U.S. 443 (1953), claims of racial injustice in the South were at the heart of three consolidated cases involving collateral attacks on state convictions. Brown, convicted of rape and sentenced to death, alleged racial discrimination in the selection of the grand and petit juries and also the use of a coerced confession. Speller, also convicted of rape and sentenced to death, charged racial discrimination in the selection of the jury array in his case. Bernie and Lloyd Daniels were sentenced to death upon convictions for murder. They claimed that coerced confessions were used against them, that the procedure to determine the voluntariness of their confessions was invalid, and that there was racial bias in the selection of both grand and petit juries. Justice Reed delivered the opinion of the Court on most issues. The Reed opinion assumed that the lower federal courts had the power to issue writs of habeas corpus, even though there was no allegation of a jurisdictional defect in the state proceedings: "A way is left open to redress violations of the Constitution." The Court considered the merits of the Brown and Speller claims in affirming the denial of habeas corpus relief. But the Daniels's claims were barred because of the noncompliance with state procedures and the petitioners' failure to file a timely appeal: "A failure to use a state's available remedy in the absence of some interference or incapacity * * * bars federal habeas corpus."

After Brown v. Allen, it appeared that all constitutional claims were cognizable in habeas corpus cases. No Justice actually argued otherwise in *Brown*. Kaufman v. United States, 394 U.S. 217 (1969), established that the same scope of review was available to § 2255 litigants.

Fourth Amendment Claims Not Cognizable on Habeas: Stone v. Powell

In the landmark case of Stone v. Powell, 428 U.S. 465 (1976), the Court held that Fourth Amendment claims are generally not cognizable on habeas review. Justice Powell, writing for the Court, reasoned that the primary purpose of the Fourth Amendment exclusionary rule is deterrence of illegal police conduct; as such, the rule operates to exclude reliable evidence and has nothing to do with protecting innocent people from unjust convictions, which is the goal of the writ. Justice Powell concluded that the benefits of extending the exclusionary rule to collateral review of Fourth Amendment claims were outweighed by the costs—not only the costs of losing reliable evidence, but also the dislocation costs associated with upsetting finalized criminal convictions and thereby increasing (1) the prosecutorial burdens on the government, (2) the sense of frustration of state and federal judges whose decisions are

set aside, and (3) the general uncertainty costs associated with non-final judgments. Justice Powell concluded as follows:

> [W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the societal costs of the application of the rule persist with special force.

Justice Brennan, joined by Justice Marshall, dissented. He urged that the Court was rewriting jurisdictional statutes, those governing § 2254 and § 2255 cases, and arrogating Congressional power to itself. Justice White also dissented and argued that "[u]nder the amendments to the habeas corpus statute, which * * * represented an effort by Congress to lend a modicum of finality to state criminal judgments, I cannot distinguish between Fourth Amendment and other constitutional issues."

Full and Fair Opportunity

It is truly a rare case in which a state fails to meet the *Stone* requirement that it provide a full and fair opportunity for litigation of Fourth Amendment claims. The requirement has been held to mean that on factual issues the defendant had an opportunity to offer evidence, and that some appellate review was provided. See generally Willett v. Lockhart, 37 F.3d 1265 (8th Cir.1994) (en banc) (the only questions after *Stone* are whether the state has provided any corrective procedures at all, and whether an "unconscionable procedural breakdown" prevented the petitioner from using the corrective mechanism). The question is not whether state courts applied the Fourth Amendment correctly, but whether they provided sufficient *process* for the defendant to get some consideration of his Fourth Amendment claim. See also Capellan v. Riley, 975 F.2d 67 (2d Cir.1992) (summary affirmance of Fourth Amendment ruling, which was probably wrong on the merits, did not constitute an unconscionable breakdown in the state appellate process; claim barred on habeas).

Ineffective Assistance of Counsel: Kimmelman v. Morrison

In Kimmelman v. Morrison, 477 U.S. 365 (1986), Justice Brennan wrote for the Court as it held that Stone v. Powell did not bar a habeas petitioner from claiming ineffective assistance of counsel based upon his trial counsel's failure to file a timely motion to suppress evidence. The Court declined "to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters

affecting the determination of actual guilt." Justice Brennan reasoned as follows:

> Were we to extend *Stone* and hold that criminal defendants may not raise ineffective assistance claims that are based primarily on incompetent handling of Fourth Amendment issues on federal habeas, we would deny most defendants whose trial attorneys performed incompetently in this regard the opportunity to vindicate their right to effective trial counsel. We would deny all defendants whose appellate counsel performed inadequately with respect to Fourth Amendment issues the opportunity to protect their right to effective appellate counsel. * * * Thus, we cannot say, as the Court was able to say in *Stone,* that restriction of federal habeas review would not severely interfere with the protection of the constitutional right asserted by the habeas petitioner.

Justice Brennan also noted that unlike Fourth Amendment claims, there is usually no full and fair opportunity to bring ineffective assistance claims at trial or on direct review.

It should be noted that *Kimmelman* creates an anomaly when juxtaposed with *Stone*. If two defendants have the same meritorious Fourth Amendment claim, and both are prejudiced by the admission of the tainted evidence at trial, the defendant with the incompetent lawyer can reap the benefit of exclusion on habeas while the defendant with the competent lawyer cannot. See Friedman, A Tale of Two Habeas, 73 Minn.L.Rev. 247 (1988).

Miranda Claims: Withrow v. Williams

In Withrow v. Williams, 507 U.S. 680 (1993), the Court held that "*Stone*'s restriction on the exercise of federal habeas jurisdiction does not extend to a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by Miranda v. Arizona." Justice Souter wrote for the Court and began by noting that "*Stone's* limitation on federal habeas relief was not jurisdictional in nature, but rested on prudential concerns counseling against the application of the Fourth Amendment exclusionary rule on collateral review." He stressed that cases decided after *Stone* had read that case narrowly:

> Over the years, we have repeatedly declined to extend the rule in *Stone* beyond its original bounds. In Jackson v. Virginia, 443 U.S. 307 (1979), for example, we denied a request to apply *Stone* to bar habeas reconsideration of a Fourteenth Amendment due process claim of insufficient evidence to support a state conviction. We stressed that the issue was "central to the basic question of guilt or innocence," unlike a claim that a state court had received evidence in violation of the Fourth Amendment exclusionary rule, and we found

that to review such a claim on habeas imposed no great burdens on the federal courts.

Justice Souter concluded that with respect to *Miranda* claims, "the argument for extending *Stone* again falls short." He explained this conclusion by stressing the difference between Fourth Amendment claims and *Miranda* claims:

> [T]he *Mapp* rule "is not a personal constitutional right," but serves to deter future constitutional violations; * * * the exclusion of evidence at trial can do nothing to remedy the completed and wholly extrajudicial Fourth Amendment violation. Nor can the *Mapp* rule be thought to enhance the soundness of the criminal process by improving the reliability of evidence introduced at trial. * * *
>
> *Miranda* differs from *Mapp* in both respects. * * * [I]n protecting a defendant's Fifth Amendment privilege against self-incrimination *Miranda* safeguards a fundamental *trial* right. * * *
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> Nor does the Fifth Amendment "trial right" protected by *Miranda* serve some value necessarily divorced from the correct ascertainment of guilt. * * * By bracing against the possibility of unreliable statements in every instance of in-custody interrogation, *Miranda* serves to guard against the use of unreliable statements at trial.

Justice Souter also noted that barring *Miranda* claims on habeas "would not significantly benefit the federal courts in their exercise of habeas jurisdiction, or advance the cause of federalism in any substantial way." Justice Souter explained this assertion as follows:

> [E]liminating habeas review of *Miranda* issues would not prevent a state prisoner from simply converting his barred *Miranda* claim into a due process claim that his conviction rested on an involuntary confession. * * *
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> If that is so, the federal courts would certainly not have heard the last of *Miranda* on collateral review. Under the due process approach, * * * courts look to the totality of circumstances to determine whether a confession was voluntary. Those potential circumstances * * * include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation. We could lock the front door against *Miranda*, but not the back.

Justice O'Connor, joined by the Chief Justice, dissented on the *Stone* issue and reasoned that confessions obtained in violation of *Miranda* are not necessarily untrustworthy. She recognized that reversal of a conviction on direct review because of a violation of the *Miranda* rule may be "an acceptable sacrifice for the deterrence and respect for

constitutional values that the *Miranda* rule brings." But she concluded that "once a case is on collateral review, the balance between the costs and benefits shifts; the interests of federalism, finality, and fairness compel *Miranda*'s exclusion from habeas."

Justice Scalia, joined by Justice Thomas, also dissented on the *Stone* issue. Justice Scalia argued broadly that "[p]rior opportunity to litigate an issue should be an important equitable consideration in *any* habeas case, and should ordinarily preclude the court from reaching the merits of a claim, unless it goes to the fairness of the trial process or to the accuracy of the ultimate result."

D. LIMITATIONS ON OBTAINING HABEAS RELIEF

Even if the petitioner's claim is cognizable in a federal habeas proceeding, there are several important procedural limitations that must be overcome before habeas relief can be granted.

1. The Custody Requirement

Whether relief is sought under § 2254 or under § 2255, the applicant must be in custody. "Custody" is a term of art. Clearly if the petitioner is incarcerated at the time the habeas relief is sought, as a result of the conviction that he is challenging, he is in custody for purposes of the habeas statutes. But difficult questions arise if the petitioner has been released, or if he has completed his sentence for one crime and is serving a sentence on another.

In 1963, the Court found that parole was a custody status. Jones v. Cunningham, 371 U.S. 236 (1963). Subsequently, in Peyton v. Rowe, 391 U.S. 54 (1968), the Court held that habeas corpus could be used by a prisoner serving one sentence who wished to attack a consecutive sentence. In Carafas v. LaVallee, 391 U.S. 234 (1968), the Court held that a petitioner was in custody within the meaning of the statutes when he was incarcerated at the time the petition was filed, but released before his case was heard on the merits by the Supreme Court. Thus, discharge of a prisoner once properly before the court will not result in a finding of "no custody." The Court in *Carafas* noted that because of his conviction, the petitioner "cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these disabilities or burdens which may flow from petitioner's conviction, he has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him."

Subsequently, the Court found custody in Hensley v. Municipal Court, 411 U.S. 345 (1973), where a defendant sentenced to prison for one year had his sentence stayed pending appellate and post-conviction

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Subsequently, the Court found custody in Hensley v. Municipal Court, 411 U.S. 345 (1973), where a defendant sentenced to prison for one year had his sentence stayed pending appellate and post-conviction

attacks. After *Hensley*, release on bail has been held to constitute custody for purposes of federal habeas corpus. See. e.g., Campbell v. Shapp, 521 F.2d 1398 (3d Cir.1975). If a person is in custody in one jurisdiction and wishes to attack a conviction mandating future custody in another jurisdiction, Braden v. 30th Judicial Circuit Ct., 410 U.S. 484 (1973), suggests that any "detainer" or formal demand for custody by the expectant jurisdiction is "custody." In sum, "custody" is found even where the defendant is not incarcerated on the conviction he is challenging, so long as he is still suffering some significant harm from that conviction.

Collateral Harm and Mootness

In Lane v. Williams, 455 U.S. 624 (1982), the Court found that two defendants were not in custody for purposes of the habeas statutes. They pleaded guilty to burglary charges; each was incarcerated, released on parole, found to be a parole violator, and reincarcerated. When parole was revoked each challenged his guilty plea on the ground that he had not known of the mandatory parole requirement when he pleaded. But before the case reached the Supreme Court, each was released from custody. Because the parole terms had expired, Justice Stevens's opinion for the Court concluded that the case was moot. "No civil disabilities such as those present in *Carafas* result from a finding that an individual has violated parole. At most, certain non-statutory consequences may occur; employment prospects, or the sentence imposed in a future criminal proceeding, could be affected." Justice Marshall, joined by Justices Brennan and Blackmun, dissented, arguing that federal courts should presume the existence of collateral consequences to avoid the necessity of predicting how a state might use a conviction or parole revocation in future proceedings.

The Court reaffirmed the Lane v. Williams mootness principle in Spencer v. Kemna, 523 U.S. 1 (1998). Spencer's parole was revoked due to charges that he committed a rape. He attacked the parole revocation unsuccessfully in state courts, then brought a habeas proceeding. Largely due to state delay, the habeas petition was not considered until after Spencer's sentence had expired and he was released. Relying heavily on Lane v. Williams, the Court, in an opinion by Justice Scalia for eight Justices, held that the habeas petition was moot. The Court declared: "We adhere to the principles announced in *Lane*, and decline to presume that collateral consequences adequate to meet Article III's injury-in-fact requirement resulted from petitioner's parole revocation."

The Court rejected, as speculative, all the collateral harms asserted by Spencer. Spencer argued (1) that his parole revocation could be used to his detriment in a future parole proceeding; (2) that the revocation could be used to increase his sentence in a future sentencing proceeding should

he violate the law and be caught and convicted; (3) that the parole revocation could be used to impeach him should he appear as a witness in future proceedings; and (4) that it could be used directly against him should he appear as a defendant in a criminal proceeding. According to the Court, none of these asserted harms were concrete enough to create a case or controversy.

Finally, Justice Scalia rejected the notion that an exception to the mootness limitation should apply when the delay leading to mootness is caused by the State. He reasoned as follows:

> [M]ootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so. * * * As for petitioner's concern that law enforcement officials and district judges will repeat with impunity the mootness-producing abuse that he alleges occurred here: We are confident that, as a general matter, district courts will prevent dilatory tactics by the litigants and will not unduly delay their own rulings; and that, where appropriate, corrective mandamus will issue from the courts of appeals.

Justice Stevens dissented.

Custody and AEDPA

As seen above, custody questions have usually arisen after the petitioner has been released and is arguing that his conviction is causing him some collateral harm. The AEDPA has put a damper on such claims by imposing a one-year statute of limitations on habeas petitions. The year basically runs from the date on which a conviction becomes final. It is the rare habeas petitioner who has been freed from incarceration (and yet is still arguably in custody) within the one year AEDPA statutory period. It appears that many of the difficult custody questions have evaporated under the AEDPA.

2. Exhaustion of State Remedies

A petitioner challenging a state conviction on habeas must establish that he has exhausted his state remedies before proceeding to federal court. The exhaustion requirement originated in Ex parte Royall, 117 U.S. 241 (1886), and it is now codified in 28 U.S.C.A. § 2254(b)–(c).

The Purpose of the Exhaustion Requirement

The exhaustion requirement is rooted in federal-state comity. It allows the states the first opportunity to apply controlling legal principles to the facts bearing on the constitutional claim of a defendant in a state criminal action. It thereby preserves for state courts a role in the

application and enforcement of federal law and prevents interruption of state adjudication by federal habeas proceedings. Consequently, it is not enough that the petitioner has *been* to the state courts; he must have presented there the same ground he seeks to advance in his federal habeas corpus petition. See Byrnes v. Vose, 969 F.2d 1306 (1st Cir.1992) ("considerations of comity require that state courts be afforded the opportunity, in the first instance, to correct a constitutional violation before a federal court intervenes").

Which "Grounds" Have Been Exhausted?

Disputes arise when the petitioner's argument on habeas is different from that made in the state courts. The petitioner might argue that he exhausted his "claim" and the government argues that the claim he is making now was never made below. The petitioner's response is essentially "I did make that claim, and the state courts rejected it; I just made the claim in different words than I am using now." How to resolve this dispute?

The Court in Picard v. Connor, 404 U.S. 270, 278 (1971) provided the following basic definition: "the substance of a federal habeas corpus claim must first be presented to the state courts." Connor challenged the legality of an indictment, which had originally named John Doe, and then was amended to name him. In the state courts, he contended that the amending procedure did not comply with the Massachusetts statute, and therefore that he had not been lawfully indicted. In his habeas petition, he alleged a violation of equal protection. Justice Black, writing for the Court, concluded that the equal protection claim had not been exhausted in the state courts. He stated as follows:

> We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution, it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. * * *
>
> Until he reached this Court, respondent never contended that the method by which he was brought to trial denied him equal protection of the laws. * * * To be sure, respondent presented all the facts. Yet the constitutional claim * * * in those facts was never brought to the attention of the state courts. * * * [We] do not imply that respondent could have raised the equal protection claim only by citing book and verse on the federal constitution. We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts. The claim that an indictment is invalid

is not the substantial equivalent of a claim that it results in an unconstitutional discrimination.

In Duncan v. Henry, 513 U.S. 364 (1995), Henry was convicted in a state court for child molestation, and on his state appeal he argued that the admission of testimony concerning an uncharged act of molestation was a violation of the California evidence code and was also a "miscarriage of justice" under the California Constitution. The state appellate courts denied relief. Subsequently, in his federal habeas petition, Henry argued that admitting the challenged testimony caused a fundamentally unfair trial, violating his federal due process rights. Relying on *Picard*, the Court, in a per curiam opinion, held that Henry had not exhausted that federal claim in the state courts. The Court concluded that Henry "did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment." While recognizing that the state law "miscarriage of justice" claim and the federal law "fundamental fairness" claim were *similar*, the Court stated that "mere similarity of claims is insufficient to exhaust." The Court noted that the state appellate court had "confined its analysis to the application of state law."

Justice Stevens dissented, accusing the majority of imposing "an exact labeling requirement." He called the majority's opinion "hypertechnical and unwise" because the state and Federal claims were substantially similar. Justice Stevens argued that where the state court has already denied a claim of fundamental unfairness, "nothing is to be gained by requiring the prisoner to present the same claim under a different label to the same courts that have already found it insufficient."

Mixed Petitions: Rose v. Lundy

What if a habeas petition contains a number of claims, some of which have been considered and denied by the state courts, and some of which have not? Such petitions are referred to as "mixed petitions"—containing both exhausted and unexhausted claims.

The AEDPA provides that a district court faced with a mixed petition has three options:

1) it can dismiss the entire petition without prejudice, requiring the petitioner to exhaust the unexhausted claims in state court—this procedure was set forth by the Court in the pre-AEDPA case of Rose v. Lundy, 455 U.S. 509 (1982);

2) if the exhausted claims lack merit, the court can consider and dismiss them on the merits, then dismiss the unexhausted claims

without prejudice so that the petitioner can bring them to state court; or

(3) in limited circumstances discussed infra, the court can enter a stay until the petitioner gets a state resolution on the unexhausted claims.

Under the AEDPA, the district court does not have discretion to *grant* relief on the merits of exhausted claims that are included in mixed petitions. It only has discretion to deny relief on the merits.

As the Court in Rose v. Lundy made clear, the exhaustion requirement does not *preclude* habeas review; it merely *delays* habeas review. The exhaustion requirement is therefore unlike other limitations on collateral review (discussed later in this Chapter) such as the bar of procedural default in the state court, or the related bar of adequate state ground, both of which prevent claims from *ever* being heard on habeas.

Exhaustion and Multiple Habeas Petitions

What happens if a petitioner wants to split his claims, i.e., pursue the exhausted claims right now in federal court, then bring another habeas petition on the remaining claims once they were exhausted in the state court? This does not work, because the petitioner would run afoul of the severe limitations on successive habeas petitions that are found in the AEDPA. See Burris v. Parke, 72 F.3d 47 (7th Cir.1995) ("A prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions.").

What happens if a habeas petition is dismissed because it contains unexhausted claims, then the petitioner exhausts the claims in state court and brings another federal habeas petition? Is this petition of now-exhausted claims considered "successive," and thus dismissed, within the meaning of the AEDPA? In Stewart v. Martinez-Villareal, 523 U.S. 637 (1998), the Court, in an opinion by Chief Justice Rehnquist, held that such a petition setting forth claims previously dismissed as unexhausted could not be considered "successive" within the meaning of the AEDPA, and therefore such a petition could be considered on the merits. The Chief Justice declared that "[t]o hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." Justice Scalia and Justice Thomas dissented.

Mixed Petitions and the Statute of Limitations: Pliler v. Ford

In Pliler v. Ford, 542 U.S. 225 (2004), the Court considered the relationship between a mixed petition and the one-year statute of

limitations applicable to habeas petitions under the AEDPA. Justice Thomas, writing for the Court, noted the interplay:

> The combined effect of *Rose* and AEDPA's limitations period is that if a petitioner comes to federal court with a mixed petition toward the end of the limitations period, a dismissal of his mixed petition could result in the loss of all of his claims—including those already exhausted—because the limitations period could expire during the time a petitioner returns to state court to exhaust his unexhausted claims.

The case involved whether federal courts were required to notify pro se petitioners of this risk. The Court held that such notification was not required. Justice Thomas declared as follows:

> District judges have no obligation to act as counsel or paralegal to *pro se* litigants. * * * Explaining the details of federal habeas procedure and calculating statutes of limitations are tasks normally and properly performed by trained counsel as a matter of course. Requiring district courts to advise a *pro se* litigant in such a manner would undermine district judges' role as impartial decisionmakers.

Justices Ginsburg and Breyer dissented.

Staying a Mixed Petition to Allow Unexhausted Claims to Be Presented to the State Court: Rhines v. Weber

In Rhines v. Weber, 544 U.S. 269 (2005), the Court held that a federal court can, in narrow circumstances, enter a stay on a mixed petition; the stay will allow the petitioner to present his unexhausted claims to the state court in the first instance, and then to return to federal court for review of his perfected petition. The stay will protect the petitioner from having the AEDPA limitations period expire. Justice O'Connor, writing for the Court, noted that the "stay-and-abeyance" procedure was justified in certain cases because without it, a petitioner with mixed claims would risk dismissal of the unexhausted claims due to the statute of limitations provision added by the AEDPA. But the Court emphasized that the stay-and-abeyance procedure could be used only in limited circumstances. Justice O'Connor explained as follows:

> Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless.

> Even where stay and abeyance is appropriate, the district court's discretion in structuring the stay is limited by the timeliness concerns reflected in AEDPA. A mixed petition should not be stayed indefinitely. * * * [N]ot all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death. Without time limits, petitioners could frustrate AEDPA's goal of finality by dragging out indefinitely their federal habeas review. Thus, district courts should place reasonable time limits on a petitioner's trip to state court and back. And if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all.
>
> On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. * * * In such a case, the petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions. For the same reason, if a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief.

Justice Stevens, joined by Justices Ginsburg and Breyer, wrote a one-sentence concurring opinion. Justice Souter, joined by Justices Ginsburg and Breyer, wrote a short opinion concurring in part and concurring in the judgment.

Procedural Bars and Exhaustion of Claims

A petition is not a "mixed" petition within the meaning of Rose v. Lundy if the unexhausted claims are procedurally barred on other grounds. For example, if a petitioner fails to make an objection in the trial court, and state rules of procedure treat that failure as barring consideration on appeal, the defendant's claim is probably procedurally barred from consideration on habeas. (See the discussion of state procedural bars later in this Chapter). If the unexhausted claim is procedurally barred, "exhaustion is not possible because the state court would find the claims procedurally defaulted. The district court may not go to the merits of the barred claims, but must decide the merits of the

claims that are exhausted and not barred." Toulson v. Beyer, 987 F.2d 984 (3d Cir.1993).

Waiver by the State

Before the AEDPA, the state's failure to invoke the exhaustion requirement constituted a waiver and allowed the federal court to review an unexhausted claim. Granberry v. Greer, 481 U.S. 129 (1987). But this is no longer the case. Under the AEDPA the exhaustion requirement is not waived unless expressly by the state through counsel.

The Futility Exception to the Exhaustion Requirement

A habeas petitioner is not required to exhaust his claims in the state court if to do so would be futile—this futility exception, which was established by case law, has been retained in the AEDPA. A good example of the futility exception is Harris v. DeRobertis, 932 F.2d 619 (7th Cir.1991). The district court dismissed Harris's habeas petition, holding that Harris had not exhausted the state post-conviction remedy established by an Illinois statute. Harris had failed to assert his constitutional claim in his state appeal. An Illinois statute allowed claims such as Harris's to be brought on collateral attack; but if the proceedings were commenced more than ten years after final judgment, the petitioner had to prove that the delay was for some reason other than "culpable negligence." Harris's petition was filed twenty years after his conviction. The district court held that Harris could have tried to invoke the state remedy by demonstrating a lack of culpable negligence, and therefore his claim was unexhausted. The court of appeals disagreed. It noted that the Illinois statute had been in effect for more than forty years, and in that time "the Illinois courts have failed to produce even a single published opinion in which the court found a lack of culpable negligence." Based on the Illinois case law, the court found that "the culpable negligence standard is an exceptional means of relief which will be unavailable to virtually all prisoners." The court concluded as follows:

> We believe the better approach is to forego resort to the Illinois post-conviction process if a petition would be untimely, absent judicial precedent indicating that the culpable negligence exception would be met. Such a holding avoids the "merry-go-round procedure" * * * by which prisoners are shuttled back and forth between the state and federal courts before any decision on the merits is ever reached in order to exhaust meaningless remedies.

If, however, a state remedy is futile only because the petitioner has failed to comply with a rule of procedure, the question is no longer one of exhaustion or futility. The question is then whether the habeas petition is

barred by the petitioner's failure to comply with the state rule. See Jones v. Jones, 163 F.3d 285 (5th Cir.1998).

Inexhaustible State Review and the Exhaustion Requirement: Castille v. Peoples

Suppose the state provides for collateral review without limitation as to number of petitions or the time in which they may be brought. Would it follow that a federal habeas petition could never be brought because the state post-conviction remedy is *never exhausted*? The Court in Castille v. Peoples, 489 U.S. 346 (1989), addressed this question. Justice Scalia wrote for a unanimous Court as follows:

> Title 28 U.S.C. § 2254(c) provides that a claim shall not be deemed exhausted so long as a petitioner "has the right under the law of the State to raise, by any available procedure, the question presented." Read narrowly, this language appears to preclude a finding of exhaustion if there exists any possibility of further state-court review. We have, however, expressly rejected such a construction, holding instead that once the state courts have ruled upon a claim, it is not necessary for the petitioner to ask the state for collateral relief, based upon the same evidence and issues already decided by direct review. It would be inconsistent * * * to mandate recourse to state collateral review whose results have effectively been predetermined, or permanently to bar from federal habeas prisoners in States whose post-conviction procedures are technically inexhaustible.
>
> Thus, the rule is that state collateral review is relevant for exhaustion purposes only if direct appeal has been bypassed and only if the collateral review process is meaningful and not itself inexhaustible.

Exhaustion and Discretionary Review in the State Supreme Court: O'Sullivan v. Boerckel

If the habeas petitioner has failed to include a constitutional claim in his petition for leave to appeal to the state supreme court, must the claim be dismissed in a federal habeas action for lack of exhaustion? This was the question addressed by the Court in O'Sullivan v. Boerckel, 526 U.S. 838 (1999). Boerckel appealed his state conviction to an intermediate appellate court, asserting six constitutional claims. After the claims were denied, Boerckel sought leave to appeal to the Supreme Court of Illinois. Review in that Court, as in the United States Supreme Court, is discretionary. In his motion, Boerckel included only three of his constitutional claims. He then sought habeas review for the three claims that he did not include in his petition to the Illinois Supreme Court. If

Boerckel was required to bring those claims before the Illinois Supreme Court in order to satisfy the exhaustion requirement, his habeas petition would have to be dismissed. Moreover, it would have to be dismissed with prejudice, because the time to bring those claims to the Illinois Supreme Court had long since run out—meaning that he had committed a procedural default disentitling him from habeas review. However, if the exhaustion doctrine did not require him to bring those claims to the Illinois Supreme Court, then there was no bar to hearing them on habeas.

The Supreme Court, in an opinion by Justice O'Connor for six Justices, held that Boerckel had failed to exhaust his claims when he failed to bring them before the Illinois Supreme Court for discretionary review. She analyzed the rationale and application of the exhaustion requirement as follows:

> Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process. Here, Illinois's established, normal appellate review procedure is a two-tiered system. Comity, in these circumstances, dictates that Boerckel use the State's established appellate review procedures before he presents his claims to a federal court.

Boerckel argued that if he were forced to bring all his constitutional claims before the Illinois Supreme Court, that Court would be inundated by claims that it could not meaningfully review and would have no interest in reviewing—thus undercutting the very comity interests that are behind the exhaustion requirement. Justice O'Connor responded to this argument in the following passage:

> We acknowledge that the rule we announce today—requiring state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State—has the potential to increase the number of filings in state supreme courts. We also recognize that this increased burden may be unwelcome in some state courts because the courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court. * * * In this regard, we note that nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable. * * * We hold today only that the creation of a discretionary review system does not, without more, make review in the Illinois Supreme Court unavailable.

Justice Souter concurred in *Boerckel*, noting that a state can avoid a flood of appeals to its State Supreme Court by making it plain "that it does not wish to require such applications before its petitioners may seek federal habeas relief." Justice Stevens, joined by Justices Ginsburg and Breyer, dissented in *Boerckel*. Justice Stevens concluded that the majority's application of the exhaustion requirement to state appellate court discretionary review "will impose unnecessary burdens on habeas petitioners; it will delay the completion of litigation that is already more protracted than it should be; and, most ironically, it will undermine federalism by thwarting the interests of those state supreme courts that administer discretionary dockets."

Justice Breyer wrote a separate dissenting opinion in *Boerckel*, joined by Justice Ginsburg. He noted that discretionary review is rarely granted by any of the State Supreme Courts, and "would presume, on the basis of Illinois's own rules and related statistics, and in the absence of any clear legal expression to the contrary, that Illinois does not mind if a state prisoner does not ask its Supreme Court for discretionary review prior to seeking habeas relief in federal court."

3. Procedural Default

Like the exhaustion requirement, the procedural default doctrine is rooted in principles of federalism and comity. If the habeas remedy were always available despite the transgression of a state procedural rule, then state procedures—such as the requirement of a timely objection and the requirement of a timely notice of appeal—could be routinely disregarded. State defendants might not worry about complying if they could always seek habeas relief. Unlike the exhaustion requirement, however, which merely *delays* a collateral attack, the procedural default doctrine *precludes* it. The question, then, is whether and under what circumstances a habeas petitioner can be excused from a procedural default that was made in the state courts.

While the bar of procedural default is usually applied against state defendants, it is also applicable to federal defendants seeking habeas relief under section 2255. The reason is obvious: if the defendant violated a procedural rule that would bar *direct* review in the federal appellate court—such as failure to file timely notice of appeal—it would undermine that rule to excuse that default and allow collateral relief. This result is not, of course, due to federalism, but rather due to the respect for federal rules of procedure.

a. Deliberate Bypass

In Fay v. Noia, 372 U.S. 391 (1963), the Court created a very permissive test for lifting a state procedural bar to habeas relief. Noia brought a habeas petition, arguing that the confession admitted against

him at trial was coerced. However, Noia had not brought an appeal on this or any other issue in the state courts; he had failed to a file a timely notice of appeal. Justice Brennan, writing for the Court, held that a procedural bar would be lifted unless it could be shown that the petitioner had *deliberately bypassed* a state procedural rule. Justice Brennan argued that lifting a procedural bar in all other cases—including where the default was caused by inadvertence or neglect—was necessary to effectuate federal interests. He asserted that petitioners would be unlikely to flaunt state procedural requirements and that state interests would not be unduly impaired. He reasoned as follows:

> A man under conviction for crime has an obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him than a state court proceeding. And if because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits his state remedies, * * * those consequences should be sufficient to vindicate the State's valid interest in orderly procedure. Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy, drawn from the ancient principles of the writ of habeas corpus, * * * of affording an effective remedy for restraints contrary to the Constitution.

Justice Clark dissented in *Fay*, contending that a deliberate bypass test was insufficient to protect legitimate interests of the states in their procedural rules. He argued that the majority had in effect substituted federal habeas corpus review for an appeal in state court. Justice Harlan also dissented, in an opinion joined by Justices Clark and Stewart. He contended that the deliberate bypass standard "amounts to no limitation at all."

b. A Required Showing of Cause and Prejudice

Soon the Court began to cut back on Fay v. Noia, and ultimately it was overruled. In Francis v. Henderson, 425 U.S. 536 (1976), the petitioner challenged the make-up of his grand jury; but he had failed to comply with a state rule of procedure requiring that an objection to the composition of the grand jury must be made by motion prior to trial. The Court held that habeas corpus relief was barred, and expressed deference to state procedures. It distinguished *Fay* as a case where the petitioner had defaulted on his entire appeal (by failing to file a timely notice of appeal), rather than a specific claim.

The majority in *Francis* stated that the procedural bar could be lifted only if the petitioner 1) could show good "cause" (i.e., a legitimate excuse) for the procedural default, and 2) could establish that the alleged

violation of federal law had actually prejudiced his case.[12] *Francis* paved the way for the next case.

WAINWRIGHT v. SYKES

Supreme Court of the United States, 1977.
433 U.S. 72.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

[Sykes was convicted of murder. At his trial, his confession was admitted. Sykes did not object and made no *Miranda* argument. Nor did he contend the confession was inadmissible in his appeals to the state courts. He then sought federal habeas relief, arguing that his *Miranda* rights were violated and his confession was erroneously admitted. The district court granted habeas relief (finding no deliberate bypass) and the court of appeals affirmed.]

To the extent that the dicta of Fay v. Noia may be thought to have laid down an all-inclusive rule rendering state timely 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. Petitioner Wainwright in this case urges that we further confine its effect by applying the principle enunciated in *Francis* to a claimed error in the admission of a defendant's confession.

* * *

* * * [I]t has been the rule that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings. This rule * * * is in no way changed by our holding today. Rather, we deal only with contentions of federal law which were *not* resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure. We leave open for resolution in future decisions the precise definition of the "cause"-and-"prejudice" standard, and note here only that it is narrower than the standard set forth in dicta in Fay v. Noia, which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention. It is the sweeping language of Fay v. Noia, going far beyond the facts of the case eliciting it, which we today reject.

[12] Justices Marshall and Stevens did not participate. Justice Brennan dissented.

The reasons for our rejection of it are several. The contemporaneous-objection rule itself is by no means peculiar to Florida, and deserves greater respect than *Fay* gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right. A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding. It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question. * * *

A contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation. Without the evidence claimed to be vulnerable on federal constitutional grounds, the jury may acquit the defendant, and that will be the end of the case; or it may nonetheless convict the defendant, and he will have one less federal constitutional claim to assert in his federal habeas petition. If the state trial judge admits the evidence in question after a full hearing, the federal habeas court * * * will gain significant guidance from the state ruling in this regard. Subtler considerations as well militate in favor of honoring a state contemporaneous-objection rule. An objection on the spot may force the prosecution to take a hard look at its hole card, and even if the prosecutor thinks that the state trial judge will admit the evidence he must contemplate the possibility of reversal by the state appellate courts or the ultimate issuance of a federal writ of habeas corpus based on the impropriety of the state court's rejection of the federal constitutional claim.

We think that the rule of Fay v. Noia, broadly stated, may encourage "sandbagging" on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off. The refusal of federal habeas courts to honor contemporaneous-objection rules may also make state courts themselves less stringent in their enforcement. Under the rule of Fay v. Noia, state appellate courts know that a federal constitutional issue raised for the first time in the proceeding before them may well be decided in any event by a federal *habeas* tribunal. Thus, their choice is between addressing the issue notwithstanding the petitioner's failure to timely object, or else face the prospect that the federal habeas court will decide the question without the benefit of their views.

* * *

We believe that the adoption of the *Francis* rule in this situation will have the salutary effect of making the state trial on the merits the "main

event," so to speak, rather than a "tryout on the road" for what will later be the determinative federal habeas hearing. * * * If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection.

The "cause"-and-"prejudice" exception of the *Francis* rule will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice. Whatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here. Respondent has advanced no explanation whatever for his failure to object at trial, and, as the proceeding unfolded, the trial judge is certainly not to be faulted for failing to question the admission of the confession himself. 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.

* * *

[The concurring opinions of CHIEF JUSTICE BURGER and JUSTICE STEVENS are omitted].

[The opinion of JUSTICE WHITE, concurring in the judgment, is omitted].

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

* * *

Punishing a lawyer's unintentional errors by closing the federal courthouse door to his client is both a senseless and misdirected method of deterring the slighting of state rules. It is senseless because unplanned and unintentional action of any kind generally is not subject to deterrence; and, to the extent that it is hoped that a threatened sanction addressed to the defense will induce greater care and caution on the part of trial lawyers, thereby forestalling negligent conduct or error, the potential loss of all valuable state remedies would be sufficient to this end. And it is a misdirected sanction because even if the penalization of incompetence or carelessness will encourage more thorough legal training and trial preparation, the habeas applicant, as opposed to his lawyer, hardly is the proper recipient of such a penalty. * * *

Fay Overruled: Coleman v. Thompson

The Court finally overruled Fay v. Noia and its deliberate bypass standard in Coleman v. Thompson, 501 U.S. 722 (1991). Cases such as *Sykes* had limited *Fay* to its facts, so that the deliberate bypass standard essentially applied only when a state prisoner defaulted his entire appeal. That was the situation in *Coleman*, where the prisoner, by filing a late notice of appeal, defaulted his entire state post-conviction remedy. Justice O'Connor, writing for six members of the Court, recognized that the error in filing a late notice was "inadvertent" and the State conceded that Coleman had not deliberately bypassed his state post-conviction review. The Court nonetheless held that Coleman's habeas petition was barred in the absence of a showing of cause and prejudice. Justice O'Connor reasoned that the cause and prejudice standard was more compatible with interests of comity and finality than the deliberate bypass standard. She concluded as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules. The several cases after *Fay* that applied the cause and prejudice standard to a variety of state procedural defaults represent a different view. We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.

Justices Blackmun, Stevens, and Marshall dissented.

Cause and Prejudice for Federal Habeas Petitioners: United States v. Frady

United States v. Frady, 456 U.S. 152 (1982), holds that on collateral attack under § 2255 a petitioner convicted in federal court may not rely on the "plain error" doctrine of Fed.R.Crim.P. 52(b) to challenge an error as to which there was a procedural default. Frady, convicted in federal court of a vicious killing in 1963, moved to vacate his sentence on the ground that the jury instructions erroneously equated intent with malice and told the jury that the law presumes malice from the use of a weapon. He did not object to the instructions at trial. For the majority, Justice O'Connor wrote that the plain error standard, which is applicable on direct review and "was intended to afford a means for the prompt redress

of miscarriages of justice," "is out of place when a prisoner launches a collateral attack against a criminal conviction after society's legitimate interest in the finality of the judgment has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal." To prevail, Frady would have to meet the stricter standards of cause and prejudice under Wainwright v. Sykes. (Stricter even than the plain error standard, which is really saying something).

The *Frady* majority found, without reaching the question of cause, that Frady could not show prejudice. The Court noted that Frady had admitted the killing for which he had been convicted. Justice O'Connor stated that prejudice does not follow simply from the fact that a jury instruction was erroneous. Rather, prejudice must be evaluated by the effect of the error in the context of the whole trial. She concluded that a petitioner must show that errors at the trial "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Frady had failed to contradict strong evidence in the record that he had acted with malice, and therefore the instruction was not prejudicial.[13]

For an application of *Frady*, see United States v. Shaid, 937 F.2d 228 (5th Cir.1991) (en banc), where the court in a section 2255 case held that the cause and prejudice standard is "designed to be significantly more difficult than the plain error test that we employ on direct appeal." The court concluded that "Shaid's argument that the jury may have misinterpreted the trial court's instruction on *mens rea* * * * suggests only the *possibility* that he was prejudiced by the erroneous instruction. Shaid has not challenged the sufficiency of the *mens rea* evidence at his trial, and he has not presented new evidence indicating his actual innocence." After *Frady*, is a procedural bar lifted only for those who can establish their actual innocence?

Federal Defendant's Failure to Raise an Ineffective Assistance Claim on Direct Appeal; Is That a Procedural Default?: Massaro v. United States

In Massaro v. United States, 538 U.S. 500 (2003), the Court considered whether a federal defendant had procedurally defaulted an ineffective assistance of counsel claim by failing to assert it on direct review of his conviction. Justice Kennedy, writing for the Court, noted as "background" the general rule that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice. He explained that "[t]he procedural default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to

[13] Justice Stevens concurred. Justice Blackmun concurred in the judgment. Justice Brennan dissented. Chief Justice Burger and Justice Marshall did not participate.

by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." But he found an exception to that general requirement for claims of ineffective assistance of counsel at trial. He noted that claims of ineffective assistance of counsel are not ordinarily—and not efficiently—made on direct review because a factual record of counsel's performance was never developed at trial. He explained as follows:

> Under Strickland v. Washington [discussed in Chapter 10], a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. * * * The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. And evidence of alleged conflicts of interest might be found only in attorney-client correspondence or other documents that, in the typical criminal trial, are not introduced. Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.

Justice Kennedy also noted that "[s]ubjecting ineffective-assistance claims to the usual cause-and-prejudice rule also would create perverse incentives for counsel on direct appeal. To ensure that a potential ineffective assistance claim is not waived—and to avoid incurring a claim of ineffective counsel at the appellate stage—counsel would be pressured to bring claims of ineffective trial counsel, regardless of merit." Justice Kennedy concluded as follows:

> We do not hold that ineffective-assistance claims must be reserved for collateral review. There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*. * * * We do hold that failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate [collateral] proceeding.

c. *The Meaning of "Cause and Prejudice"*

An Objection That Could Have Been Brought: Engle v. Isaac

One of the Court's first attempts to explain the "cause" part of the cause and prejudice standard is Engle v. Isaac, 456 U.S. 107 (1982). The Court in *Engle* held that three habeas corpus petitioners could not collaterally challenge jury instructions given in a state criminal proceeding. The petitioners contended that Ohio had impermissibly shifted the burden of persuasion on self-defense issues to them, but none had objected at trial to the trial court's instructions. Without reaching the question of prejudice, the *Engle* Court found that there was no good cause for the petitioners' failure to object to the instructions in the state trial. The petitioners contended that their failure to raise the claim should be excused because the legal basis for an objection to the instructions was "novel" or unknown to them at the time of their trial. There was no clearly established law on point. But Justice O'Connor found that the basis of petitioners' constitutional claim (i.e., impermissible burden-shifting) had been apparent since *In re Winship,* decided before the petitioners were tried. (The Court in *Winship* held that due process requires the prosecution to prove every element of the crime beyond a reasonable doubt.)

The petitioners argued that the failure to invoke *Winship* had been justifiable, because *Winship* concerned the prosecution's burden to prove the *elements* of the crime, and did not specifically consider whether it was permissible to allocate to the defendant the burden of proof on affirmative defenses. But Justice O'Connor rejected this argument. She noted that *Winship* had been relied on by some lawyers making similar claims at that time. Thus, it could not be said that the petitioners had "lacked the tools to construct" an argument based on *Winship,* and consequently there was no good cause for failing to bring the argument. So long as the claim was "reasonably available" at the time of trial, there was no cause for the petitioners' failure to comply with the state's contemporary objection requirement. Justice O'Connor recognized that not "every astute counsel" would have made a constitutional objection in these circumstances. However, she concluded that the Constitution "does not insure that defense counsel will recognize and raise every constitutional claim."

Finally, Justice O'Connor rejected the petitioners' argument that an objection would have been "futile," because Ohio courts had routinely given the instruction shifting the burden of proving self-defense to the defendant. She stated that "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." Justice O'Connor reasoned that a contemporary objection was required

because "a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid." Thus, the question for determining cause is not whether an objection would be "futile" but rather whether the objection was "reasonably available."[14]

Failure to Bring a Novel Claim as "Cause": Reed v. Ross

The Court examined the concept of "cause" again in Reed v. Ross, 468 U.S. 1 (1984). Ross was convicted of first-degree murder in 1969, *prior* to the Supreme Court's holding in *Winship* that the Due Process Clause requires the state to prove beyond a reasonable doubt all of the elements necessary to constitute the crime with which a defendant is charged. (Thus, the case differed from *Engle*, where *Winship* had already been decided at the time of the state trial). Jury instructions had imposed upon Ross the burden of showing that he lacked malice and that he acted in self-defense. Ross did not properly object to the instructions. Ross then sought federal habeas corpus relief.

The Supreme Court held, 5–4, in an opinion by Justice Brennan, that Ross had established cause for his failure to challenge the instructions. The state conceded that Ross had been prejudiced by the claimed violation—challenging only whether there was cause—so the Court concluded that the state procedural bar was lifted.

On the question of cause, Justice Brennan stated that "[c]ounsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a State's procedural bar" and that "if we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt state court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition." The Court held, therefore, "that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." Justice Brennan concluded as follows:

> Whether an attorney had a reasonable basis for pressing a claim challenging a practice that this Court has arguably sanctioned depends on how direct this Court's sanction of the prevailing practice had been, how well entrenched the practice was in the relevant jurisdiction at the time of defense counsel's failure to challenge it, and how strong the available support is from sources opposing the prevailing practice.

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[14] Justice Blackmun concurred in the result without opinion. Justice Stevens concurred in part and dissented in part in a brief opinion. Justice Brennan, joined by Justice Marshall, dissented.

Applying those standards to Ross's case, the Court looked to the law as it existed prior to *Winship* and found only scant, indirect support for the challenge that Ross mounted in his habeas corpus petition. So while Ross's claim of error was similar to that of the petitioners in *Engle*, those petitioners had the benefit of *Winship* in constructing their arguments at trial, while Ross did not. Therefore, Ross had cause for his procedural fault while the petitioners in *Engle* did not.

Justice Rehnquist dissented, joined by the Chief Justice and Justices Blackmun and O'Connor. He noted that the equating of novelty of claims with cause not to bring them "pushes the Court into a conundrum which it refuses to recognize. The more novel a claimed constitutional right, the more unlikely a violation of that claimed right undercut the fundamental fairness of the trial." In Justice Rehnquist's view, the majority's construction meant that if there was "cause" for not bringing a novel claim, there would by definition not be prejudice.

The Reed-Engle/AEDPA Whipsaw

Reed v. Ross holds that if a development in the law could not have been reasonably anticipated by the petitioner, then there is cause for not invoking the rule in the state proceedings. But can the petitioner then rely on that rule in habeas proceedings to show a violation of the Constitution? Recall the discussion of nonretroactivity of new rules on habeas, and particularly Teague v. Lane, in Chapter 1. Under *Teague*, new rules are generally inapplicable to habeas cases. A new rule is defined as any rule as to which reasonable minds could have differed before it was adopted, i.e., a rule that was not dictated by existing precedent. That standard was codified in the AEDPA, which essentially prohibits federal courts from finding constitutional error if the state courts reasonably construed then-existing federal law as determined by the Supreme Court. How can the petitioner establish cause on grounds of "novelty" and yet argue that the state court decision was completely unreasonable because it failed to consider an admittedly novel federal claim? The "whipsaw" effect of *Ross* and the *Teague* principle is described by Professor Arkin in The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane, 69 No.Car.L.Rev. 371, 408 (1991):

> [I]f a petitioner is able to show that his claim is based on a "new" rule of law, the habeas court will excuse his state procedural default, assuming petitioner can show actual prejudice. But, having shown that the rule under which he seeks relief was not available to him at the time he should have raised it in the state courts, the petitioner may well have won the battle under *Wainwright* [v. Sykes] only to lose the war to *Teague*. Under most circumstances, the petitioner will

> have just shown that the very rule under which he seeks relief is not retroactive * * *.

See also Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir.1989) ("a holding that a claim is so novel that there is no reasonably available basis for it, thus establishing cause, must also mean that the claim was too novel to be dictated by past precedent").

Unavailability of Facts as Cause: Amadeo v. Zant

The *Ross* "reasonable availability" definition of cause can still have utility where the failure to assert a claim is due to a lack of *facts* that were not reasonably available to the defendant at the time of the state proceedings. A unanimous Supreme Court held in Amadeo v. Zant, 486 U.S. 214 (1988), that a state defendant who was convicted of murder and sentenced to death showed cause for a late challenge to the racial composition of the grand jury. The petitioner demonstrated that local officials had concealed a handwritten memorandum from the District Attorney to jury commissioners, which indicated that underrepresentation of black members of the grand jury was intentional. The memorandum was discovered by a lawyer in a civil suit challenging voting procedures. Amadeo's lawyer relied upon the report on direct appeal, but the state supreme court found that the challenge to the grand jury's composition came too late under state procedures.

Justice Marshall wrote for the Court as it found cause for the procedural default because the factual basis for the equal protection claim had been suppressed by the state. In articulating the meaning of "cause," the Court cited *Ross* and concluded as follows:

> If the District Attorney's memorandum was not reasonably discoverable because it was concealed by Putnam County officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established cause to excuse his procedural default under this Court's precedents.

Attorney Error Is Not Cause Unless It Constitutes Ineffective Assistance: Murray v. Carrier and Smith v. Murray

In Murray v. Carrier, 477 U.S. 478 (1986), Justice O'Connor wrote for the Court as it held that a federal habeas petitioner cannot show cause for a procedural default by establishing that competent defense counsel's failure to raise a claim of error was inadvertent rather than deliberate. In a rape and abduction case, the defendant's trial counsel had twice unsuccessfully requested an opportunity to review the victim's statements. Counsel failed to attack the trial judge's rulings in his

petition for appeal, thus defaulting under a state court rule limiting judicial consideration on appeal to errors raised in the petition. The Court held that this failure to comply with the state procedure barred federal habeas corpus review even if it resulted from ignorance or inadvertence. Justice O'Connor wrote that "we discern no inequity in requiring [the defendant] to bear the risk of attorney error that results in a procedural default" by "counsel whose performance is not constitutionally ineffective." To establish cause for a procedural default, a prisoner must ordinarily "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Justice O'Connor elaborated as follows:

> Without attempting an exhaustive catalog * * *, we note that a showing that the factual or legal claim was not reasonably available to counsel * * *, or that some interference by officials * * * made compliance impracticable, would constitute cause under this standard.
>
> Similarly, if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State [and it is therefore] cause for a procedural default.

Justice Stevens, joined by Justice Blackmun, concurred in the judgment. He argued that the cause and prejudice formula "is not dispositive when the fundamental fairness of a prisoner's conviction is at issue" and advocated an "overall inquiry into justice." Justice O'Connor responded that the Stevens approach would actually replace the cause requirement with a manifest injustice standard. She observed that the relationship of this standard to prejudice was uncertain. But in recognition of the fact that the cause and prejudice standard might produce a miscarriage of justice in some cases, Justice O'Connor stated that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas corpus court may grant the writ even in the absence of a showing of cause for the procedural default." The Court remanded for an inquiry into whether the victim's statements contained material that would establish the defendant's innocence.

Justice Brennan, joined by Justice Marshall, dissented and argued that the cause and prejudice limitation, a judicial form of abstention not required by the language of the habeas corpus statute, should permit federal consideration of claims not raised because of inadvertence or ignorance.

Decided with Murray v. Carrier was Smith v. Murray, 477 U.S. 527 (1986), a capital case. Once again Justice O'Connor found no cause for a procedural default. A psychiatrist who examined Smith was called to

testify by the state at the sentencing phase of the trial. He described, over Smith's objection, an incident that Smith had related to him. On appeal, Smith's counsel did not claim error in the use of the testimony, and so the claim was procedurally defaulted. In his habeas corpus petition, Smith claimed that the use of the statements violated his constitutional rights under the Fifth and Sixth Amendments. Justice O'Connor found that a deliberate decision had been made not to put the claim before the state supreme court and that, even if the decision was made out of ignorance of the claim's strength, this was not sufficient to demonstrate cause. She also concluded that the application of the cause and prejudice standard would not result in a fundamental miscarriage of justice, because "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones."

Justice Stevens dissented in *Smith*, joined in full by Justices Marshall and Blackmun, and in part by Justice Brennan. He disagreed with the idea that only a claim implicating "actual innocence" could rise to the level of a miscarriage of justice, and argued that accuracy is not the only value protected by the Constitution.

Attorney Abandonment as Cause and Prejudice: Maples v. Thomas

In Maples v. Thomas, 132 S. Ct. 912 (2012), a state prisoner's pro bono attorneys left the law firm representing him without notifying either him or the court, thus causing him to miss the deadline for filing a notice of appeal in his state post-conviction case. The Court found that under these circumstances the prisoner demonstrated "cause" that excused the procedural default. Justice Ginsburg, writing for a seven-Justice majority, noted that "under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." Reviewing the circumstances, the Court found that the prisoner's attorneys of record had abandoned him, thereby supplying the "extraordinary circumstances beyond his control" necessary to lift the state procedural bar to his federal petition. Justice Ginsburg concluded as follows:

> Through no fault of his own, Maples lacked the assistance of any authorized attorney during the 42 days Alabama allows for noticing an appeal from a trial court's denial of postconviction relief. As just observed, he had no reason to suspect that, in reality, he had been reduced to pro se status. Maples was disarmed by extraordinary circumstances quite beyond his control. He has shown ample cause,

we hold, to excuse the procedural default into which he was trapped when counsel of record abandoned him without a word of warning.

Justice Alito, in a concurring opinion, summarized the confluence of eight factors that prevented the petitioner from filing the notice:

> Unbeknownst to petitioner, he was effectively deprived of legal representation due to the combined effect of no fewer than eight unfortunate events: (1) the departure from their law firm of the two young lawyers who appeared as counsel of record in his state postconviction proceeding; (2) the acceptance by these two attorneys of new employment that precluded them from continuing to represent him; (3) their failure to notify petitioner of their new situation; (4) their failure to withdraw as his counsel of record; (5) the apparent failure of the firm that they left to monitor the status of petitioner's case when these attorneys departed; (6) when notice of the decision denying petitioner's request for state postconviction relief was received in that firm's offices, the failure of the firm's mail room to route that important communication to either another member of the firm or to the departed attorneys' new addresses; (7) the failure of the clerk's office to take any action when the envelope containing that notice came back unopened; and (8) local counsel's very limited conception of the role that he was obligated to play in petitioner's representation.

Justice Alito concluded that "[w]hat occurred here was not a predictable consequence of the Alabama system but a veritable perfect storm of misfortune, a most unlikely combination of events that, without notice, effectively deprived petitioner of legal representation. Under these unique circumstances, I agree that petitioner's procedural default is overcome."

Justice Scalia, joined by Justice Thomas, dissented on the ground that, although a procedural default may be excused when it is attributable to abandonment by his attorney, the petitioner failed to prove abandonment.

No Cause Based on Ineffectiveness of Counsel, Where There Is No Constitutional Right to Counsel: Coleman v. Thompson and Martinez v. Ryan

Carrier held that constitutionally ineffective assistance of counsel would establish the "cause" requirement that is part of the showing necessary to excuse a procedural default. In Coleman v. Thompson, 501 U.S. 722 (1991), Coleman had been convicted of capital murder; his direct appeals had been unsuccessful; he brought a petition in state court for relief under the *state* habeas corpus provisions; this petition was denied, and Coleman's counsel failed to file a notice of appeal from the denial. The failure to file the notice of appeal imposed a procedural bar to further

relief. Coleman argued that his counsel's failure constituted ineffective assistance, and that the procedural bar was therefore lifted after Murray v. Carrier. Justice O'Connor, writing for the Court, rejected this argument. She relied on the line of right to counsel cases (discussed in Chapters 5 and 10), which hold that the defendant has no constitutional right to appointed counsel beyond the first appeal of right. She reasoned that because Coleman had no constitutional right to counsel in the state habeas proceedings, there could be no claim of constitutionally ineffective counsel. She concluded that "Coleman must bear the risk of attorney error that results in a procedural default."

Justice O'Connor also rejected the argument that cause to excuse a procedural default should be found whenever counsel was so ineffective as to violate the standards of Strickland v. Washington (discussed in Chapter 10), even though no Sixth Amendment claim is possible because the ineffectiveness did not occur at a stage of the proceedings in which there is a constitutional right to counsel. She stated that this argument "is inconsistent not only with the language of *Carrier*, but the logic of that opinion as well." She reasoned that "cause" must be something "external to the petitioner, something that cannot be fairly attributed to him." She asserted that the only type of attorney error for which the State must take responsibility independent of the petitioner is where the Sixth Amendment has been violated, i.e., where ineffectiveness occurs before or during the trial or in the first appeal. She explained as follows:

> Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails. A different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel. As between the State and the petitioner, it is the petitioner who must bear the burden of a failure to follow state procedural rules.

Justice Blackmun, joined by Justices Marshall and Stevens in dissent, attacked the majority's holding as "patently unfair." He argued that to permit a procedural default to preclude habeas review, when it was caused by attorney error egregious enough to constitute ineffective assistance of counsel, "in no way serves the State's interest in preserving the integrity of its rules and proceedings."

The alleged failure of counsel in *Coleman* was on *appeal* from an initial-review collateral proceeding, and in that initial proceeding the prisoner's claims had been addressed by the state habeas trial court. Subsequently, the Court in Martinez v. Ryan, 132 S.Ct. 1309 (2012),

modified "the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." The Court, in an opinion by Justice Kennedy, qualified *Coleman* by recognizing "a narrow exception:

> Inadequate assistance of counsel at *initial-review* collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." (Emphasis added).

The Court explained that in *Coleman*, the substantive claim had already been addressed at the initial state collateral proceeding. In contrast, the substantive claim of the petitioner in *Martinez*—ineffective assistance of counsel at trial—had never been heard. Justice Kennedy explained as follows:

> Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim. This is because the state habeas court looks to the merits of the claim of ineffective assistance, no other court has addressed the claim, and defendants pursuing first-tier review are generally ill equipped to represent themselves because they do not have a brief from counsel or an opinion of the court addressing their claim of error.

Justice Kennedy concluded as follows:

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of Strickland v. Washington. To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Justice Scalia, joined by Justice Thomas, dissented, objecting to the modification of *Coleman*, on the ground that the majority had made "a radical alteration of our habeas jurisprudence that will impose considerable economic costs on the States and further impair their ability to provide justice in a timely fashion."

Cause and Prejudice in the Context of a Brady Violation: Strickler v. Greene

The Court considered how the cause and prejudice standards apply to *Brady* violations in Strickler v. Greene, 527 U.S. 263 (1999). One of the major prosecution witnesses in Strickler's capital murder trial had made several statements to police that were flatly inconsistent with her very evocative and detailed trial testimony. The prosecutor had an open file policy, but despite this, the witness's pretrial statements were not turned over to the defense. Defense counsel, in light of the open file policy, made no pretrial request for *Brady* material. Nor did defense counsel pursue a *Brady* claim at trial or on state appellate and collateral review—this was understandable, however, because defense counsel had no reason to think that any exculpatory information had been suppressed.

Strickler conceded that he had procedurally defaulted the *Brady* claim; but he argued that the very suppression of the witness's statements constituted cause. As to prejudice, he argued that in order for information to be "material" under *Brady*, it has to be information strong enough to undermine confidence in the outcome of the trial. (See Chapter 8, supra, for a full discussion of this standard). So if suppression of information violates *Brady*, it should by definition satisfy the standard for "prejudice" under the procedural default doctrine.

Justice Stevens, writing for the Court, agreed in principle with Strickler that the factors supporting the finding of a *Brady* violation could also be the factors that would lead to a finding of cause. He focused on three factors in the case at bar:

> The documents were suppressed by the Commonwealth; the prosecutor maintained an open file policy; and trial counsel were not aware of the factual basis for the claim. The first and second factors—i.e., the non-disclosure and the open file policy—are both fairly characterized as conduct attributable to the State that impeded trial counsel's access to the factual basis for making a *Brady* claim. As we explained in Murray v. Carrier it is just such factors that ordinarily establish the existence of cause for a procedural default.

Justice Stevens found it unnecessary to decide, however, whether "cause" for a procedural default would be found if the prosecutor did not maintain an open file policy, and the defendant failed to make a *Brady* request before trial or a *Brady* claim on state court appeal.

On the question of prejudice, Justice Stevens agreed with Strickler that suppressing information important enough to rise to the level of *Brady* material would by definition satisfy the standard for prejudice under the procedural default doctrine. On the merits, however, the Court found that the suppression of the witness's statements did not constitute

a *Brady* violation. Justice Stevens found that Strickler could not show that there was "a reasonable probability that his conviction or sentence would have been different had these materials been disclosed. He therefore cannot show materiality under *Brady* or prejudice from his failure to raise the claim earlier."

d. The Actual Innocence Exception

The Court in *Smith* and *Carrier* acknowledged that a procedural default could be lifted even in the absence of cause and prejudice, if the petitioner can show "actual innocence." This exception to the cause and prejudice requirement was described by the court in Johnson v. Singletary, 940 F.2d 1540 (11th Cir.1991) (en banc):

> [A]lthough factual inaccuracy in the guilt or sentencing context may well be *necessary* to a claim of actual innocence, factual inaccuracy is not *sufficient* unless the inaccuracy demonstrates, at least colorably, that the petitioner is * * * ineligible for either an adjudication of guilt or the sentence imposed. If prejudicial factual inaccuracy alone is enough to warrant review of a defaulted claim, then the actual innocence standard is meaningless.

Actual Innocence and the Death Penalty: Sawyer v. Whitley

In Sawyer v. Whitley, 505 U.S. 333 (1992), the Court applied the "actual innocence" exception to the cause and prejudice requirement in the context of a challenge to the death penalty. Chief Justice Rehnquist, writing for the Court, stated that in a habeas challenge to a death penalty, the petitioner will establish "actual innocence" only if he shows, "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."

Sawyer and his accomplice Lane brutally murdered a woman; they beat her, scalded her with water, poured lighter fluid on her, and ignited the fluid. The victim died of her injuries two months later. At the sentencing phase, Sawyer's sister testified to Sawyer's mistreatment as a child. The jury found aggravating factors—that Sawyer was engaged in aggravated arson and that the murder was committed in an especially atrocious manner. It found no mitigating factors and sentenced Sawyer to death.

Sawyer brought two claims on habeas, both of which were procedurally barred, and neither of which satisfied the cause and prejudice requirement. One claim, a *Brady* claim, concerned exculpatory evidence relating to Sawyer's role in the offense, including evidence impeaching the credibility of a star prosecution witness, and an affidavit claiming that a child who witnessed the event had stated that Sawyer's

accomplice had poured lighter fluid on the victim and ignited it, and that Sawyer had tried to stop him. The second claim was that Sawyer's trial lawyer had erred in failing to introduce at the sentencing phase the medical records from Sawyer's stays as a teenager in two mental hospitals.

The Chief Justice determined that there were three possible ways in which "actual innocence" might be defined in the death penalty context. The "strictest definition" would be to require the petitioner to show that the constitutional error negated an essential element of the capital offense of which he was convicted. The Chief Justice rejected this definition because the Court in Smith v. Murray had "suggested a more expansive meaning to the term of actual innocence in a capital case than simply innocence of the capital offense itself."

The "most lenient of the three possibilities" would be to allow the showing of actual innocence to extend to three factors: 1) the elements of the crime; 2) the existence of all aggravating factors; and 3) mitigating evidence "which bore, not on the defendant's eligibility to receive the death penalty, but only on the ultimate discretionary decision between the death penalty and life imprisonment." Put another way, "actual innocence" would be found under this view if the sentencer was presented with "a factually inaccurate sentencing profile." The Chief Justice rejected this definition, however, as too permissive. He reasoned that under this test, "actual innocence amounts to little more than what is already required to show prejudice." The majority therefore opted for a middle ground, and defined "innocent of the death penalty" as allowing a showing not only pertaining to innocence of the capital crime itself, but also permitting "a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met." The Court noted that this test "hones in on the objective factors or conditions which must be shown to exist before a defendant is eligible to have the death penalty imposed." The Chief Justice concluded as follows:

> [T]he "actual innocence" requirement must focus on those elements which render a defendant eligible for the death penalty, and not on additional mitigating evidence which was prevented from being introduced as a result of claimed constitutional error.

Applying this test to Sawyer's claims, Chief Justice Rehnquist found that the medical records that Sawyer's attorney failed to introduce were not pertinent to actual innocence, as they were in the nature of mitigating evidence and so did not affect his death-eligibility. The fact that Sawyer had spent time in mental hospitals as a teenager was not relevant to an aggravating factor nor to an element of the crime.

As to the *Brady* material, the affidavit relating the statement of the child-eyewitness—to the effect that Sawyer had tried to stop the burning

of the victim—was pertinent both to the crime and to the aggravating factor of arson. The Court concluded, however, that the affidavit, "in view of all the other evidence in the record, does not show that no rational juror would find that petitioner committed both of the aggravating circumstances found by the jury." The Court noted that the murder was atrocious and cruel "based on the undisputed evidence of torture before the jury quite apart from the arson" and that at any rate a reasonable juror could have discredited the affidavit in light of the other evidence. Thus, Sawyer had not established clear and convincing proof of his ineligibility for the death penalty.

Justice Stevens, joined by Justices Blackmun and O'Connor, concurred in the judgment. While agreeing that Sawyer had failed to establish "actual innocence," Justice Stevens took issue with the majority's definition of that standard. He argued that the majority's clear and convincing evidence standard imposed too severe a burden on the capital defendant. Justice Stevens found "no basis for requiring a federal court to be virtually certain that the defendant is actually ineligible for the death penalty, before merely entertaining his claim."

Justice Blackmun wrote a separate opinion concurring in the judgment. He launched a broad attack on the Court's habeas corpus jurisprudence. He criticized the "actual innocence" exception as assuming erroneously "that the only value worth protecting through federal habeas review is the accuracy and reliability of the guilt determination." He elaborated as follows:

> The accusatorial system of justice adopted by the Founders affords a defendant certain process-based protections that do not have accuracy of truth-finding as their primary goal. These protections *** are debased, and indeed, rendered largely irrelevant, in a system that values the accuracy of the guilt determination above individual rights. Nowhere is this single-minded focus on actual innocence more misguided than in a case where a defendant alleges a constitutional error in the sentencing phase of a capital trial.

Actual Innocence of the Crime Itself: Schlup v. Delo

The Court distinguished *Sawyer*, and applied a more permissive standard to claims of actual innocence of the crime itself (as opposed to the death penalty), in Schlup v. Delo, 513 U.S. 298 (1995). Schlup was subject to the cause and prejudice requirements, which would have barred his *Brady* and *Strickland* claims. He argued, however, that the bar should be lifted because he had discovered new evidence that established his innocence of the crime. The lower courts held that Schlup's new evidence did not provide "clear and convincing" proof of his innocence as

required by *Sawyer*. But the Supreme Court, in an opinion by Justice Stevens for a five-person majority, held that *Sawyer* was limited to challenges to the petitioner's sentence, and that "actual innocence" claims must be treated more permissively when the petitioner's challenge is to the conviction itself.

Justice Stevens explained the need to provide a more permissive standard of proof to claims of innocence of the crime:

> Claims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity than do claims that focus solely on the erroneous imposition of the death penalty. Though challenges to the propriety of imposing a sentence of death are routinely asserted in capital cases, experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful. * * *
>
> Of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent. * * *
>
> The overriding importance of this greater individual interest merits protection by imposing a somewhat less exacting standard of proof on a habeas petitioner alleging a fundamental miscarriage of justice than on one alleging that his sentence is too severe. * * * Though the *Sawyer* standard was fashioned to reflect the relative importance of a claim of an erroneous sentence, application of that standard to petitioners such as Schlup would give insufficient weight to the correspondingly greater injustice that is implicated by a claim of actual innocence.

Justice Stevens concluded that in order to lift a procedural bar relating to a conviction as opposed to a sentence, in the absence of cause and prejudice, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." He noted that a habeas petitioner "is thus required to make a stronger showing than that needed to establish prejudice" but that, at the same time, the showing of "more likely than not" imposes a lower burden of proof than the "clear and convincing" standard required under *Sawyer*. The Court remanded for a determination of whether Schlup's new evidence met the more permissive standard.

Chief Justice Rehnquist wrote a dissenting opinion joined by Justices Kennedy and Thomas. The Chief Justice complained that the Court had added to the complexity of habeas corpus jurisprudence by creating two standards of proof for "actual innocence"—one for attacks on a conviction and one for attacks on a sentence. Justice Scalia wrote a separate dissent joined by Justice Thomas.

Actual Innocence and an Untimely Petition: McQuiggin v. Perkins

In McQuiggin v. Perkins, 133 S.Ct. 1924 (2013), the Court held that the "actual innocence" exception serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in Schlup v. Delo, or expiration of the AEDPA statute of limitations—as in this case, where the petitioner filed a habeas petition (alleging ineffective assistance of trial counsel) more than 11 years after his conviction became final. Justice Ginsburg, for five members of the Court, found no reason to distinguish between the statute of limitations and any other procedural bar when the petitioner could show actual innocence. Justice Ginsburg emphasized, however, that "tenable actual-innocence gateway pleas are rare: a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. And in making an assessment of the kind *Schlup* envisioned, the timing of the petition is a factor bearing on the reliability of the evidence purporting to show actual innocence."

Justice Scalia filed a dissenting opinion joined in full by Chief Justice Roberts and Justice Thomas, and joined in part by Justice Alito. Justice Scalia argued that the AEDPA statute of limitations did not provide for an actual innocence exception. He concluded as follows:

> "Actual innocence" has, until today, been an exception only to judge-made, prudential barriers to habeas relief, or as a means of channeling judges' statutorily conferred discretion not to apply a procedural bar. * * * Where Congress has erected a constitutionally valid barrier to habeas relief, a court cannot decline to give it effect.

Justice Scalia also complained that the majority's decision would wreak havoc on principles of finality:

> Until today, a district court could dismiss an untimely petition without delving into the underlying facts. From now on, each time an untimely petitioner claims innocence—and how many prisoners asking to be let out of jail do not?—the district court will be obligated to expend limited judicial resources wading into the murky merits of the petitioner's innocence claim. * * * It has now been 60 years since Brown v. Allen, in which we struck the Faustian bargain that traded

the simple elegance of the common-law writ of habeas corpus for federal-court power to probe the substantive merits of state-court convictions. Even after AEDPA's pass through the Augean stables, no one in a position to observe the functioning of our byzantine federal-habeas system can believe it an efficient device for separating the truly deserving from the multitude of prisoners pressing false claims. * * * It must prejudice the occasional meritorious applicant to be buried in a flood of worthless ones.

Actual Innocence and Invalid Guilty Pleas: Bousley v. United States

The Court in Bousley v. United States, 523 U.S. 614 (1998), considered whether the actual innocence exception could apply to a procedurally defaulted attack on the validity of a guilty plea. Bousley pleaded guilty to drug crimes, as well as to a violation of a federal statute that prohibited "using" a firearm during the course of a drug transaction. At the time he pleaded guilty to the firearms offense, the local federal courts had construed "using" expansively, to cover basically any situation in which a defendant possessed a gun during the course of a drug offense. Bousley appealed his sentence, but did not challenge his guilty plea on direct appeal. His sentence was affirmed. Thereafter, the Supreme Court determined that the term "using" in the statute meant some kind of active use, such as brandishing or, of course, shooting. Bousley sought a writ of habeas corpus challenging the factual basis for his guilty plea to the firearms charge, on the ground that neither the "evidence" nor the "plea allocution" showed a "connection between the firearms in the bedroom of the house, and the garage, where the drug trafficking occurred."

The Supreme Court, in an opinion by Chief Justice Rehnquist for six Justices, held that Bousley would be entitled to a hearing on the merits of his involuntary guilty plea claim, if he could make the showing necessary to relieve the procedural default resulting from his failure to appeal his guilty plea. While he could not establish "cause" and "prejudice" under the circumstances, the Court held that Bousley would be entitled to relief if he could establish his actual innocence of the gun charge. However, the Court noted that the question of actual innocence was somewhat different in the context of an attack on a guilty plea. The Chief Justice elaborated:

> It is important to note in this regard that "actual innocence" means factual innocence, not mere legal insufficiency. In other words, the Government is not limited to the existing record to rebut any showing that petitioner might make. Rather, on remand, the Government should be permitted to present any admissible evidence of petitioner's guilt * * *. In cases where the Government has forgone

more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges.

The Chief Justice rejected the argument made by Justice Scalia, in dissent, that the actual innocence inquiry will be unduly complicated by the absence of a trial transcript in the guilty plea context. He found this concern "overstated," because in federal courts, where this case arose, "guilty pleas must be accompanied by proffers, recorded verbatim on the record, demonstrating a factual basis for the plea."

Justice Stevens wrote a separate opinion dissenting from the majority's application of the actual innocence standard. He argued that it was unnecessary for Bousley to establish actual innocence, because under the Supreme Court's subsequent construction of the firearms statute, he had never been found guilty of any criminal conduct. This in itself was enough to require that his guilty plea be vacated.

Justice Scalia, joined by Justice Thomas, dissented. He asked: "How is the court to determine 'actual innocence' upon our remand in the present case, where conviction was based upon an admission of guilt? Presumably the defendant will introduce evidence (perhaps nothing more than his own testimony) showing that he did not 'use' a firearm in committing the crime to which he pleaded guilty, and the Government, eight years after the fact, will have to find and produce witnesses saying that he did. This seems to me not to remedy a miscarriage of justice, but to produce one."

Avoidance of Actual Innocence Determinations: Dretke v. Haley

The Court in Dretke v. Haley, 541 U.S. 386 (2004), held that claims of actual innocence must be deferred if a habeas petition can be decided on other grounds. Haley received an enhanced sentence, and argued that this was in error because state law did not permit his prior crime to be used to enhance a sentence. Thus, he claimed that he was "actually innocent" of an enhanced sentence. He argued that this actual innocence excused his procedural default for failing to bring that claim in state court. But Haley also claimed that his state counsel was ineffective for failing to assert the claim that the enhancement did not apply. This ineffective assistance of counsel claim had not been defaulted. Under these circumstances the Court, in an opinion by Justice O'Connor, declared as follows:

> [A] federal court faced with allegations of actual innocence, whether of the sentence or of the crime charged, must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default. * * * To hold otherwise would be to license district courts to riddle the cause and prejudice standard

> with ad hoc exceptions whenever they perceive an error to be "clear" or departure from the rules expedient. Such an approach * * * would have the unhappy effect of prolonging the pendency of federal habeas applications as each new exception is tested in the court of appeals.

Justices Stevens and Kennedy wrote dissenting opinions.

4. Adequate and Independent State Grounds

A federal court is precluded from considering a habeas petition from a state prisoner—absent cause and prejudice or actual innocence—if the state decision rests on an adequate and independent state ground, such as a state procedural bar. The Supreme Court has stated that "in the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism" and that without this doctrine "habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court." Coleman v. Thompson, 501 U.S. 722 (1991).

The Court has recognized that it is often difficult to determine whether a state court has in fact relied on an adequate and independent state ground that would preclude review of any constitutional claim. In Harris v. Reed, 489 U.S. 255 (1989), the Court established the following presumption:

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

Thus, *Harris* requires the state court to make a plain statement that the ruling is based on state law, where it could fairly construed as resting on either federal or state law. But subsequent cases have found an adequate state ground in the absence of a plain statement.

Adequate State Ground Without an Explicit Statement: Coleman v. Thompson

The question in Coleman v. Thompson, 501 U.S. 722 (1991), was whether an adequate and independent state ground could be found in a state appellate court's summary order of dismissal. Coleman brought a state habeas proceeding alleging various federal constitutional errors. The trial court denied relief. Coleman's notice of appeal to the Virginia Supreme Court from the trial court's decision was untimely under Virginia law. The Commonwealth moved to dismiss the appeal on the sole ground that it was untimely. The Virginia Supreme Court delayed ruling

on the motion to dismiss, and consequently briefs on both the motion and the merits were filed. Six months later, stating that it had considered all the briefs, the Virginia Supreme Court summarily granted the motion to dismiss the appeal and dismissed the petition for appeal. So the question was whether the Virginia court relied on the procedural bar to dismiss the action (in which case habeas relief would be denied), or relied instead on its interpretation of Coleman's constitutional claim.

Justice O'Connor, writing for the Court, found that the summary order rested on the adequate and independent state ground, i.e., the state law allowing dismissal of an appeal that was untimely filed. She rejected, for two reasons, Coleman's argument that the state court should be required to state explicitly that it is relying on an independent state ground in order to preclude federal habeas review. First, she asserted that an absolute requirement of an explicit statement misreads *Harris*, which requires an explicit statement only upon a predicate finding that the state decision "must fairly appear to rest primarily on federal law or to be interwoven with federal law." Second, the proposal for a per se plain statement rule would "greatly and unacceptably expand the risk" that federal habeas courts would review state decisions that were in fact based on adequate and independent state grounds.

Justice O'Connor explained that where it does not fairly appear that the state court decision is based primarily on federal grounds, "it is simply not true that the most reasonable explanation is that the state judgment rested on federal grounds," and that a conclusive presumption to that effect "is simply not worth the cost in the loss of respect for the State that such a rule would entail." She concluded that "we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim * * * in order that federal courts might not be bothered with reviewing state law and the record in the case." Rather, federal courts on habeas must consider the nature of the disposition and the surrounding circumstances of the order to determine whether the state court relied on an adequate state ground.

On the facts, the Court found that the Virginia Supreme Court's summary order did not "fairly appear" to rest on or to be interwoven with federal law. Justice O'Connor noted that the summary order granted the Commonwealth's motion to dismiss, which was based solely upon Coleman's failure to meet the time requirements for a notice of appeal. Federal law was not mentioned in the order. She recognized that the Virginia Supreme Court's explicit consideration of briefs discussing the merits "adds some ambiguity," but concluded that this did not override the "explicit grant of a dismissal motion based solely on procedural grounds."

Justice White wrote a concurring opinion in *Coleman*, emphasizing that he was not convinced that the Virginia Supreme Court followed a practice of waiving a procedural bar when constitutional issues are at stake.

Justice Blackmun, joined by Justices Marshall and Stevens, filed a lengthy dissent, criticizing the Court's "crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims." He argued that the Court "is creating a Byzantine morass of arbitrary, unnecessary and unjustifiable impediments to the vindication of federal rights" and "subordinates fundamental constitutional rights to mere utilitarian interests."

Note that on the habeas corpus flow chart, the Court's finding that Virginia relied on a state rule to dismiss the appeal does not end the case. Rather, it means that the state applied a procedural bar. Coleman could still have his habeas petition heard—but only if he could establish cause and prejudice or actual innocence. As discussed above, Coleman could not do so. If the state procedural bar had not been applied, then Virginia would have ruled on the constitutional claims, there would have been no procedural defaults, and Coleman's habeas petition would have been heard.

Coleman and the Plain Statement Rule

After *Coleman*, is there anything left of the Harris v. Reed "plain statement" rule? Consider the views of Judge Williams, concurring in Young v. Herring, 938 F.2d 543 (5th Cir.1991) (en banc).

> [The plain statement] requirement is to be applied narrowly—only in those cases where the state court considers both the procedural bar and explicitly the federal constitutional issue on the merits. The fact that the [state] court is fully aware of the presence of the federal constitutional issue is not enough even though the court does not clearly and expressly rely upon the procedural bar.

State Ground That Is Not Adequate

A state procedural bar will be deemed "adequate" to preclude habeas review only if it is *regularly followed* and *firmly established* in practice. See James v. Kentucky, 466 U.S. 341 (1984), where the defendant asked the judge to admonish the jury not to draw an inference from his failure to testify. The judge refused the request, and James appealed the refusal. The state supreme court held that a request for an admonition was not adequate to preserve a claim on appeal for a failure to give an instruction. But the U.S. Supreme Court stated that "for federal constitutional purposes, James adequately invoked his substantive right to jury

guidance." The Court held that "Kentucky's distinction between admonitions and instructions is not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights."

In Ford v. Georgia, 498 U.S. 411 (1991), a unanimous Supreme Court held that a state procedural rule could not be applied retroactively to prevent federal review of a constitutional claim. Justice Souter's opinion for the Court concluded that a rule unannounced at the time of petitioner's trial could not have been firmly established at that time, and was thus "inadequate to serve as an independent state ground within the meaning of *James*." See also Johnson v. Mississippi, 486 U.S. 578 (1988) (no adequate state ground where Mississippi law did not consistently require a claim such as the defendant's to be asserted on direct appeal).

Discretionary Rules as Adequate State Grounds: Beard v. Kindler

In Beard v. Kindler, 558 U.S. 53 (2009), the Court considered whether a discretionary state rule could ever be an adequate state ground, the violation of which would preclude federal habeas review of a state conviction. Kindler challenged his Pennsylvania state court conviction, but the state court exercised its discretion under the state's "fugitive dismissal rule" to dismiss the challenge because he had fled to Canada. Chief Justice Roberts, writing for the Court, set forth the issue:

> "Is a state procedural rule automatically 'inadequate' under the adequate-state-grounds doctrine—and therefore unenforceable on federal habeas corpus review—because the state rule is discretionary rather than mandatory?"

The Court answered that question in the negative. The Chief Justice explained the result as follows:

> We have framed the adequacy inquiry by asking whether the state rule in question was "firmly established and regularly followed." We hold that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review. * * * [A] discretionary rule can be "firmly established" and "regularly followed"—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others.
>
> A contrary holding would pose an unnecessary dilemma for the States: States could preserve flexibility by granting courts discretion to excuse procedural errors, but only at the cost of undermining the finality of state court judgments. Or States could preserve the finality of their judgments by withholding such discretion, but only at the cost of precluding any flexibility in applying the rules.

> We are told that, if forced to choose, many States would opt for mandatory rules to avoid the high costs that come with plenary federal review. That would be unfortunate in many cases, as discretionary rules are often desirable. * * * The result would be particularly unfortunate for criminal defendants, who would lose the opportunity to argue that a procedural default should be excused through the exercise of judicial discretion.

Justice Alito took no part in the consideration of the case. Justice Kennedy, joined by Justice Thomas, wrote a concurring opinion.

Flexible Rules as Adequate State Grounds: Walker v. Martin

Most states set determinate time limits for collateral relief applications. But some like California apply a general "reasonableness standard" to judge whether a petition is timely filed. In Walker v. Martin, 131 S.Ct. 1120 (2011), Martin raised claims on state collateral review five years after his conviction. The California Supreme Court denied relief on the ground that Martin was not reasonably timely under the state case law. The Supreme Court, in a unanimous opinion by Justice Ginsburg, held that California's timeliness requirement qualified as an independent state ground adequate to bar habeas corpus relief in federal court. Justice Ginsburg concluded that California's time rule, although discretionary and flexible, met the Beard v. Kindler "firmly established" criterion. The California Supreme Court framed the requirement in a trilogy of cases, instructing habeas petitioners to allege with specificity the absence of substantial delay, good cause for delay, or eligibility for one of four exceptions to the time bar. And California's case law made it plain that Martin's nearly five-year delay was "substantial." Justice Ginsburg observed that state ground may be found inadequate when a court has exercised its discretion in a surprising or unfair manner, but Martin made no such contention here.

"Exorbitant" Application of an Adequate State Ground: Lee v. Kemna

In Lee v. Kemna, 534 U.S. 362 (2002), the Court found an exception to procedural default on an adequate state ground, for "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question" on habeas review. Lee was being tried for murder in Missouri, and had produced alibi witnesses from California, who would have testified that Lee was with them in California on the day of the murder. When it came time to present the witnesses, however, on the third day of trial, they were not in court and Lee's counsel did not know where they were. He asked for a day's continuance so that he could locate the witnesses, and

assured the court that the witnesses had not left the jurisdiction because they had business to attend to locally. The trial judge refused to continue the trial, because he wanted to be with his daughter (who was having surgery) the next day, and had other trials to attend to after that. Lee presented no witnesses and was convicted. He brought a habeas petition, arguing that the trial court's refusal to grant a continuance violated his due process rights; he presented affidavits from the alibi witnesses who stated that they were not in the courtroom on the third day of trial because they had been informed by court personnel that they would not be testifying that day.

The state appellate court refused to consider the merits of Lee's due process argument, relying on a procedural bar: Missouri rules of procedure (Court Rules 24.09 and 24.10) that require a motion for continuance to be submitted in writing with a supporting affidavit. The question for the Supreme Court was whether this procedural bar prohibited a habeas action in the absence of a showing of cause and prejudice or actual innocence.

Justice Ginsburg, writing for six Justices, declared that this case fit into the "limited category" of exceptional cases in which a generally sound state rule of procedure must be found inadequate. She summarized as follows:

> [W]hen the trial judge denied Lee's motion, he stated a reason that could not have been countered by a perfect motion for continuance. The judge said he could not carry the trial over until the next day because he had to be with his daughter in the hospital; the judge further informed counsel that another scheduled trial prevented him from concluding Lee's case on the following business day. Although the judge hypothesized that the witnesses had "abandoned" Lee, he had not a scintilla of evidence or a shred of information on which to base this supposition. * * * [N]o published Missouri decision directs flawless compliance with Rules 24.09 and 24.10 in the unique circumstances this case presents—the sudden, unanticipated, and at the time unexplained disappearance of critical, subpoenaed witnesses on what became the trial's last day. Lee's predicament, from all that appears, was one Missouri courts had not confronted before. * * * [A]nd most important, given the realities of trial, Lee substantially complied with Missouri's key Rule.

Justice Kennedy, joined by Justices Scalia and Thomas, dissented. Justice Kennedy argued that a regularly followed state rule had previously been found inadequate "only when the state had no legitimate interest in the rule's enforcement." The need to provide regulations on possibly spurious motions for continuance meant that the Missouri rules were "adequate" within the meaning of Supreme Court jurisprudence.

5. Abuse of the Writ

Even before enactment of AEDPA, successive habeas petitions—serial collateral attacks on the same judgment—ordinarily constituted "abuse of the writ," which generally precluded review regardless of the merits of the subsequent petitions. In McCleskey v. Zant, 499 U.S. 467 (1991), the Court held that a petitioner is generally not permitted to bring a successive habeas petition, but must ordinarily bring all claims in a single petition. Justice Kennedy wrote the opinion for six members of the Court. The majority held that it was not necessary for the state to show that the petitioner had deliberately abandoned a claim in a prior habeas petition; a petitioner may also abuse the writ by failing to raise a claim through neglect.

Justice Kennedy accepted McCleskey's argument that the comity notions behind the procedural default doctrine were not applicable to successive federal habeas petitions. He responded as follows:

> Nonetheless, the doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments.

The common purposes of "abuse of the writ" and "procedural default" led the Court in *McCleskey* to hold that a successive habeas petition could be entertained only if the petitioner could show cause and prejudice for failing to bring all claims together in a single petition, or, failing that, if he could show that the successive petition established his actual innocence.

Effect of the AEDPA

The AEDPA, however, tightens up the use of successive petitions even further than the Court had done in *McCleskey*. The *McCleskey* Court held that a showing of cause and prejudice, or actual innocence, would permit a successive petition. The AEDPA, in contrast, provides for absolute dismissal of claims identical to those previously brought (no exceptions), and dismissal of new claims with two minor exceptions: 1) if they are based on a new rule made retroactive to habeas cases by the Supreme Court (which essentially can never happen), or 2) if the claims were not included in the initial petition due to an unavailable factual predicate (as with the suppression of information that occurred in Amadeo v. Zant, supra). Moreover, assuming that one of these causes are shown, the petitioner then has to show by clear and convincing evidence that no reasonable factfinder could have convicted him. Thus, there is no actual innocence exception to excuse the cause requirement—the

petitioner must establish not only cause, but also a standard of prejudice more rigorous than the actual innocence exception to the cause and prejudice requirement had been, i.e., clear and convincing evidence that but for the constitutional violation, no reasonable factfinder could have convicted the petitioner. Finally, the petitioner must obtain clearance from a three-member panel of the court of appeals (which must be satisfied of a prima facie case) before a successive petition can even be brought.

In Felker v. Turpin, 518 U.S. 651 (1996), the petitioner argued that the above provisions operate as a "suspension" of the writ of habeas corpus, in violation of Article I, section 9 of the Constitution. That clause provides that "the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." But the Suspension Clause argument was unanimously rejected in an opinion by Chief Justice Rehnquist who viewed the statute as "a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'"

Premature Claims and Successive Petitions: Stewart v. Martinez-Villareal

In Stewart v. Martinez-Villareal, 523 U.S. 637 (1998), Martinez brought a habeas petition challenging his capital conviction. The petition contained a number of claims; one claim was that Martinez was incompetent and therefore could not be executed. Such a claim is called a "*Ford*" claim, after Ford v. Wainwright, 477 U.S. 399 (1986) (holding that the Eight Amendment prohibits the execution of an incompetent person). The lower courts held that the *Ford* claim was procedurally premature, and the remaining claims were eventually dismissed on the merits. When the state proceeded to set a date certain for the execution, Martinez sought to reopen his *Ford* claim. The state argued that this was a successive petition, barred by the terms of the AEDPA. But the Supreme Court, in an opinion by Chief Justice Rehnquist, held that the incompetence claim could not be treated as a successive petition because "[t]here was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe"; therefore the petitioner had the right to have it considered on the merits. The Chief Justice noted that if the government were correct, "the implications for habeas practice would be far-reaching and seemingly perverse" because "a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review."

Justices Scalia and Thomas dissented; each wrote separate opinions joined by the other. Both opinions made the point that however "perverse"

the result, the plain meaning of the AEDPA was that the revival of a petition dismissed or deferred on procedural grounds constitutes a successive petition, and is therefore prohibited, subject to the two very limited exceptions not at issue in this case.

Note that the *Martinez* rule would also apply in situations where a habeas claim is dismissed because the petitioner has not exhausted state remedies. If the petitioner then goes to state court and exhausts his remedies, but gets no relief, he can then refile his habeas petition. Such a petition is not "successive" within the meaning of the AEDPA, because, like Martinez, the petitioner never had his claims considered on the merits by the federal court. But it would be subject to another pitfall—the AEDPA statute of limitations. See the discussion of mixed petitions earlier in this Chapter.

6. Newly Discovered Evidence

Chief Justice Rehnquist wrote for the Court in Herrera v. Collins, 506 U.S. 390 (1993), as it rejected a habeas corpus challenge to a death penalty conviction based upon a claim of newly discovered evidence purporting to demonstrate innocence. Herrera was convicted of killing two police officers. He was identified by an eyewitness and in a dying declaration made by one of the officers. A note written by Herrera, implicating him in one of the murders, was found on his person when he was arrested. Forensic evidence also connected him to the crimes. Herrera filed a habeas corpus petition in state court. He did not contend that an error had been made at his trial. Rather, he contended that he had discovered new evidence proving that his brother Raul had actually killed the officers. He supported the petition with affidavits of Raul's lawyer and former cellmate, both relating inculpatory statements made by Raul, as well as an affidavit from Raul's son who purported to be an eyewitness to his father's murder of the officers. These affidavits were inconsistent with some details about the murders. Herrera's petition was filed 10 years after his conviction, and eight years after Raul's death.

Herrera's state habeas petition was dismissed as untimely by the Texas courts. He then filed a federal habeas petition asserting "that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of a person who is innocent of the crime for which he was convicted." In rejecting this assertion, the Chief Justice reasoned that innocence "must be determined in some sort of a judicial proceeding" and that when a defendant has been afforded a fair trial "and convicted of the offense for which he was charged, the presumption of innocence disappears." He stated that the writ of habeas corpus was not an appropriate vehicle for assessing factual innocence, in the absence of a claim a constitutional violation in the proceeding—and Herrera made no such claim:

> Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. * * * This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.

Herrera relied on Sawyer v. Whitley, supra, where the Court held that a habeas petitioner who procedurally defaulted his claim may still have his federal constitutional claims heard if he makes a proper showing of actual innocence. But the Chief Justice distinguished *Sawyer* on the ground that it "makes clear that a claim of actual innocence is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." The Chief Justice concluded that the "actual innocence" exception set forth in *Sawyer* did not extend to "freestanding claims of actual innocence." Compare Schlup v. Delo, 513 U.S. 298 (1995) (petitioner can rely on newly discovered evidence to establish actual innocence, where he claims—unlike Herrera—that there was a constitutional error at his trial).

In denying habeas relief, the Court relied on the fact that Herrera was not "left without a forum to raise his actual innocence claim." The Court noted that under Texas law, Herrera could seek executive clemency, and stated that clemency "is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriage of justice where judicial process has been exhausted."

Ultimately, the Court found it unnecessary to reach the question whether federal habeas relief would *ever* be available to prevent the execution of an innocent person when there is no possible state relief. The Chief Justice assumed *arguendo* that the Constitution prohibited such an execution; but he stated that, even if that were so, a defendant who claimed actual innocence after an error-free trial would have to make an "extraordinarily high" showing that the newly discovered evidence proved his innocence. This high threshold was required due to the "very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States."

The Court found that Herrera had not come close to satisfying an "extraordinarily high" threshold of proof of actual innocence. The Chief Justice stated that the evidence presented against Herrera at trial was strong, and that his purported evidence of innocence consisted of inconsistent and suspiciously-timed affidavits implicating a person who

was now dead. He concluded that "coming 10 years after petitioner's trial, this showing of innocence falls far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo,* to exist."

Justice O'Connor, joined by Justice Kennedy, wrote a concurring opinion and stated that she could "not disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution." However, she found that Herrera was not "an innocent man on the verge of execution. He is instead a legally guilty one who, refusing to accept the jury's verdict, demands a hearing in which to have his culpability determined once again."

Justice Scalia, joined by Justice Thomas, concurred and argued that "[t]here is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."

Justice White concurred in the judgment. He assumed that a persuasive showing of actual innocence would bar execution, but found that Herrera had not made a sufficient showing of his innocence.

Justice Blackmun, joined by Justices Stevens and in large part by Justice Souter, dissented. He argued that the Eighth Amendment and the Due Process Clause forbid the execution of a person who can prove his innocence with newly discovered evidence. Justice Blackmun contended that the remedy of executive clemency is not adequate to satisfy the Constitution, because that remedy is too idiosyncratic and politicized to protect against the execution of an innocent person. He would "hold that, to obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent."

7. Limitations on Obtaining a Hearing

What happens if a habeas petitioner claims that constitutional error occurred at his state trial, but the argument of error is dependent on a factual predicate that remains undeveloped? For example, if the defendant argues that the prosecutor exercised peremptory challenges in a discriminatory manner, certain factual issues will be important, e.g., how many were struck, who were they, what was said on voir dire, what rationale did the prosecutor give for striking the juror, etc.

If the facts supporting a habeas claim were not developed in the state court, the petitioner will need to move for an evidentiary hearing to develop his claims. However, if the petitioner should have developed the facts in the state system, and failed to do so, a question similar to that discussed in Wainwright v. Sykes, supra, arises—why should the petitioner be permitted an evidentiary hearing if he failed to develop the

necessary facts in the state proceeding? Such a petitioner would seem to have run aground on a state procedural bar.

In Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992), the Court relied on its procedural default cases such as Wainwright v. Sykes to hold that a petitioner who failed to develop facts in the state proceeding could be denied an evidentiary hearing in federal court (and thus, as a practical matter, denied habeas relief on the merits) unless he could establish "cause and prejudice" for the failure to develop the facts below. Tamayo-Reyes had pleaded nolo contendere to a charge of first-degree manslaughter. In his habeas action, he argued that his plea was not knowing and intelligent because his translator had not translated accurately and completely for him the *mens rea* element of the crime. He also contended that he did not understand the purposes of the plea form and the plea hearing, and that he thought he was agreeing to be tried for manslaughter rather than agreeing to plead guilty. The merits of his claim were obviously fact-dependent, but his counsel had failed to develop the necessary facts in state collateral proceedings. Justice White, writing for the Court, declared that "encouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance." He concluded that the state court "is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of factfinding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings. This is fully consistent with and gives meaning to the requirement of exhaustion."

The AEDPA Limitations on Obtaining a Hearing: Williams v. Taylor and Schriro v. Landrigan

After the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), there are only a few reasons for which a habeas court can hold a factfinding hearing; the standards set forth in *Tamayo-Reyes* are restricted even further. As amended by the AEDPA, 28 U.S.C. § 2254(e)(2)—the provision that controls whether a habeas petitioner may receive an evidentiary hearing in federal district court on claims that were not developed in the state court—provides as follows:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The Court construed the AEDPA provisions concerning hearings in Williams v. Taylor, 529 U.S. 420 (2000). In his habeas petition, Williams sought an evidentiary hearing to develop three claims: 1) a claim under *Brady* that the prosecution failed to disclose a psychological report on the prosecution's star witness; 2) a claim that a juror had lied on voir dire by failing to disclose a source of bias; and 3) a related claim that the prosecutor committed misconduct because he knew that the juror was biased and failed to disclose that fact.

In the Supreme Court, Williams conceded that he could not satisfy the stringent standards for relief set forth in subdivision (B) of the statute (i.e., clear and convincing evidence of actual innocence). Resolution of the right to an evidentiary hearing therefore depended on whether Williams had "failed to develop" the basis of the factual claim in state court. The parties agreed that the facts necessary to support Williams's habeas claims had *not* been developed in the state court. Williams argued, however, that he had not *failed* to develop the claims, because he was *unable* to pursue the claims during the state court proceeding, i.e., he was not at fault. The government argued for a no-fault interpretation of the statutory term "failed", i.e., if the claims were not developed in the state court—no matter the reason—then there is no right to an evidentiary hearing to develop the claims in the federal district court.

The Supreme Court, in a unanimous opinion by Justice Kennedy, rejected the government's strict construction of the AEDPA term "failed", and held that the term "failed to develop" requires some "lack of diligence" on the petitioner's part. Justice Kennedy explained this ruling in the following passage:

> In its customary and preferred sense, "fail" connotes some omission, fault, or negligence on the part of the person who has failed to do something. To say a person has failed in a duty implies he did not take the necessary steps to fulfill it. He is, as a consequence, at fault and bears responsibility for the failure. In this sense, a person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance. * * * We conclude Congress used the word "failed" in the sense just described. * * *
>
> Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of

> diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel. * * *

Justice Kennedy explained that the statute required the defendant and counsel to pursue factfinding with "diligence" in the state court:

> For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. * * * Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings. Yet comity is not served by saying a prisoner "has failed to develop the factual basis of a claim" where he was unable to develop his claim in state court despite diligent effort. In that circumstance, an evidentiary hearing is not barred by § 2254(e)(2).

Justice Kennedy then applied the "diligence" test to the facts of the case. He found that Williams had not been diligent in pursuing his *Brady* claim, because the witness's psychological history had been disclosed at that witness's sentencing proceeding, well in time for Williams to use it in his state proceedings. Williams and his counsel were thus aware of the report and yet took no steps to have it produced. In contrast, Williams was *not* at fault for failing to develop the claim of juror bias and the related claim of prosecutorial misconduct in not disclosing it. The juror had misrepresented her background in answering a question on voir dire. There was no reason for Williams or his counsel to believe that the juror and the prosecutor were hiding anything. The Court noted that it would be "surprised, to say the least, if a district court familiar with the standards of trial practice were to hold that in all cases diligent counsel must check public records containing personal information pertaining to each and every juror."

In Schriro v. Landrigan, 550 U.S. 465 (2007), the Court found that a district court had not abused its discretion in refusing to grant a habeas petitioner's request for an evidentiary hearing to develop the facts supporting defense counsel's alleged ineffectiveness at a capital sentencing proceeding. Justice Thomas, writing for five members of the Court, found that the record in the instant case demonstrated that the defendant himself objected to pursuing any avenues of mitigating evidence.

Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, dissented. He argued that the record was not as clear as the majority would have it, and that at any rate defense counsel's effectiveness was not dependent on the defendant's willingness to agree to foregoing favorable evidence.

8. Harmless Error in Habeas Corpus Cases

A Less Onerous Standard of Harmlessness for the State to Meet: Brecht v. Abrahamson

In Brecht v. Abrahamson, 507 U.S. 619 (1993), the Court considered the standard that should be applied by a federal habeas court in assessing whether a constitutional error in a state court was harmless. The state urged as a standard that an error should be presumed harmless unless it had a "substantial and injurious effect on the verdict." This standard, which is employed by the Court for review of non-constitutional error on direct review, is referred to as the "*Kotteakos*" standard. See Kotteakos v. United States, 328 U.S. 750 (1946). The *Kotteakos* standard is less onerous for the state to meet—the error is less likely to create a reversal—than is the "harmless beyond a reasonable doubt" standard applied by the Court to constitutional errors on direct review. The more stringent test of harmlessness—understandably advocated by the petitioner in *Brecht*—is known as the "*Chapman*" standard. See Chapman v. California, discussed earlier in this Chapter in the section on harmless error on direct review.

The 5–4 majority in *Brecht* held that the *Chapman* standard was too stringent to be applied in a collateral attack of a state court conviction. Instead the more permissive *Kotteakos* test applied. The Court concluded that the "*Kotteakos* harmless-error standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence."

Writing for the majority, Chief Justice Rehnquist emphasized the difference between collateral review and direct appeal:

> The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system. We have also spoken of comity and federalism. * * * Finally, we have recognized that liberal allowance of the writ degrades the prominence of the trial itself, and at the same time encourages habeas petitioners to relitigate their claims on collateral review.
>
> * * * State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. For these reasons, it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review.

The Chief Justice emphasized the following costs of "overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman*":

1) the State's interest in finality and in sovereignty over criminal matters is undermined;

2) granting habeas relief "merely because there is a reasonable possibility that trial error contributed to the verdict is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has grievously wronged"; and

3) the State suffers "social costs" due to the necessity to retry a case after a significant passage of time.

The Chief Justice was careful to note that the *Kotteakos* standard would be applied only to constitutional errors of the "trial type." If the constitutional error is "structural" in the sense that it tainted the entirety of the trial, then per se reversal is required whether the error is discovered on direct or habeas review. See the discussion earlier in this Chapter about errors that cannot be harmless.

Justice Stevens filed a concurring opinion in which he emphasized that, even under *Kotteakos*, the reviewing court must make a *de novo* examination of the trial record. He also emphasized that the reviewing court must focus on the effect of the error, not on whether it thinks that a defendant would have been convicted absent the error. He concluded that "the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied."

Justice White dissented, joined by Justice Blackmun and in substantial part by Justice Souter. He argued that the *Chapman* standard was essential to the safeguard of constitutional rights. Justice O'Connor dissented in a separate opinion in which she argued that "the harmless-error standard is crucial to our faith in the accuracy of the outcome" of a state proceeding.

Burden of Proof as to Harmlessness: O'Neal v. McAninch

Who bears the burden on the harmlessness question in habeas cases? Must the defendant show that the error was harmful, or must the state show that the error was harmless? In O'Neal v. McAninch, 513 U.S. 432 (1995), the Court held that where a judge has "grave doubt" as to whether an error was harmless or not under the *Kotteakos* standard, the petitioner is entitled to habeas relief. Justice Breyer, writing for six Justices, defined "grave doubt" as arising when, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." Where "grave doubt" as to harmlessness

exists, "the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict."

Justice Breyer reasoned that allowing the petitioner to win in cases of "grave doubt" as to harmlessness was a result that was consistent with other harmless-error cases such as *Kotteakos* and *Chapman*, where the Court imposed the burden of showing harmlessness on the government. He contended that a rule "denying the writ in cases of grave uncertainty, would virtually guarantee that many, in fact, will be held in unlawful custody—contrary to the writ's most basic traditions and purposes." Justice Breyer recognized the state's interest in finality but declared that "this interest is somewhat diminished by the legal circumstance that the State normally bears responsibility for the error that infected the initial trial."

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented. He argued that the burden should be placed on the petitioner, as it was the petitioner who was bringing the action. He emphasized that the habeas petitioner "comes to federal court as a plaintiff" and so "he naturally should be expected to bear the risk of failure of proof or persuasion." Justice Thomas also noted the limited impact that the majority's decision would have, because "cases in which habeas courts are in equipoise on the issue of harmlessness are astonishingly rare."