Wainwright v. Sykes: The Lower Federal Courts Respond

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Introduction

A defendant is brought to trial in a state criminal court. During his trial, the defendant fails to abide by a state procedural rule mandating that a particular constitutional claim be raised at a specific point during the judicial proceedings. The defendant is convicted and, on appeal, attempts to raise the constitutional claim that he should have raised at trial. The state supreme court finds that the defendant’s violation of the state procedure bars him from asserting the constitutional claim on appeal. On direct review, the Supreme Court of the United States similarly declines to reach the merits of the constitutional claim because it finds that the state procedure is an adequate and independent state ground precluding direct review. The defendant, now incarcerated in a state prison, files a petition for a writ of habeas corpus in a United States district court based on the same constitutional claim he attempted to raise on appeal. Is the defendant eligible for the writ and, if so, under what circumstances?

This question was recently addressed in *Wainwright v. Sykes*,¹ where the Supreme Court, following a path established by earlier Burger Court cases, sharply limited its suggestion in *Fay v. Noia*² that such a prisoner could obtain habeas relief unless he had “deliberately bypassed” the state procedural rule. The Court in *Sykes* held instead that a state prisoner having committed a state procedural default³ in raising a *Miranda* claim was eligible for federal habeas relief only if he could

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¹ In this Article, the authors, though recognizing that the feminine gender may be equally appropriate, use the masculine gender for personal pronouns. This convention is adopted for the purpose of style and consistency.
² A.B., 1975, Yale University; J.D., 1978, University of Virginia.
³ A.B., 1974, Brown University; J.D., 1978, University of Virginia.
3. As the term is used in this Article, a “procedural default” means a defendant’s failure to raise a constitutional claim in accordance with a procedural rule that is sufficient
demonstrate both “cause” for his failure to raise the claim in accordance with state procedures and “actual prejudice” arising from the constitutional claim. The Sykes Court, however, reserved for future resolution the precise definition of the two prongs of the “cause-and-prejudice” test.

This Article is an examination of the cause-and-prejudice test. It begins with a brief overview of the Supreme Court jurisprudence culminating in Sykes and the issues left unresolved in that opinion. The Article then explores three theoretical definitions of “actual prejudice” and the lower court cases applying the term. This survey reveals that, although courts have employed all three approaches, the vast majority have utilized a variant of harmless-error analysis. The Article next explores the definition of “cause,” with an emphasis on the question of what, if any, attorney conduct constitutes a reasonable and valid explanation for failure to abide by a state procedural rule. Examination of the cases reveals that the lower courts have divided sharply over what type of attorney conduct constitutes cause, but that courts generally define cause most expansively when a habeas petitioner suggests the possibility of an unjust incarceration.

Historical Overview

The circumstances under which the failure of a state prisoner to raise a federal constitutional claim in accordance with state procedures will foreclose federal habeas review are different today than they were in 1963 and were different in 1963 than they had been ten years earlier. A brief overview of this changing Supreme Court jurisprudence and the significant issues as yet unresolved provides a necessary backdrop to this Article.

From Brown to Francis

It was not until 1953 that the Supreme Court in Brown v. Allen4 addressed the question of whether a state prisoner’s noncompliance with a state procedural rule would foreclose access to federal habeas review. In Brown two state prisoners sought habeas review of constitutional claims that, although properly raised at trial, had been filed one day late on appeal. Neither the state supreme court, which enforced the filing deadline, nor the United States Supreme Court, which denied
a writ of certiorari, addressed the merits of these claims on direct appeal. Reviewing a subsequent request for a federal writ of habeas corpus, the Supreme Court held that the state prisoners' failure to comply with the state filing deadline prevented them from seeking collateral relief in federal court on their constitutional claims. In reaching this result, the Court in Brown suggested that an adequate and independent state procedural ground precluding direct review in the Supreme Court also barred habeas review in federal district court.

This suggestion was abandoned a decade later in Fay v. Noia, a case involving a habeas petitioner who, although having raised constitutional claims at trial, failed to appeal his conviction. The Court in Fay ruled that "the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute." The Court further stated, however, that if a state prisoner had "deliberately by-passed the orderly procedure of the state courts," a federal habeas court, as a matter of comity, retained "limited discretion" to hold that the prisoner had "forfeited," or waived, his right to federal habeas review. "Deliberate by-pass," the waiver standard enunciated in Fay, was defined narrowly as "an intentional relinquishment or abandonment of a known right or privilege." In 1973, the Supreme Court in Davis v. United States began to cast doubt on the continuing vitality of the Fay waiver standard. Davis involved a federal prisoner who sought to vacate his sentence pursuant to 28 U.S.C. § 2255 by asserting a claim he had not previously raised, namely, that blacks had been excluded from the grand jury that had indicted him. The Davis Court opted not to apply Fay to determine whether the prisoner had waived his right to collateral review.

5. Id. at 487.
6. Id. at 485-86.
8. Id. at 399.
9. Id. at 438.
10. Id. at 439 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The Court in Fay held that insofar as the state prisoner there involved had been confronted with the "grisly choice" of accepting a life sentence or taking an appeal which carried the risk of a death sentence, he had not "deliberately by-passed" state procedures by failing to take a direct appeal. Id. at 439-40.
12. The Court distinguished Kaufman v. United States, 394 U.S. 217 (1969), in which the "deliberate by-pass" standard was applied to a federal prisoner who raised a fourth amendment claim at trial but not on appeal, on the ground that the Kaufman Court had no
Rather, the Court held that Rule 12 of the Federal Rules of Criminal Procedure, which bars litigation of claims not raised before trial based on defects in the institution of criminal proceedings, absent “cause shown” for failing to assert those claims, applied on collateral review as well as on direct appeal. To hold otherwise, the Court concluded, would be to “perversely negate” the legitimate federal interests underlying Rule 12, which the Court identified as, first, having such claims resolved before trial when a defect can easily be cured by obtaining a new indictment, and, second, discouraging lawyers from delaying the litigation of constitutional claims for tactical reasons.¹³

Three years later, the Court in Francis v. Henderson¹⁴ applied the Davis rule in the case of a state prisoner had not complied with a state procedural rule requiring that claims of grand jury discrimination be raised before trial. “If, as Davis held, the federal courts must give effect to [the] important and legitimate concerns [underlying Rule 12] in § 2255 proceedings,” the Court reasoned, “surely considerations of comity and federalism require that they give no less effect to the same clear interests when asked to overturn state criminal convictions.”¹⁵ Accordingly, although without explaining why the waiver standard in Fay was not controlling, the Court in Francis held that the state prisoner was foreclosed from federal habeas review, for he had failed to present “not only a showing of ‘cause’ for [his] failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice.”¹⁶

This two-part waiver standard, under which a petitioner must show both cause and actual prejudice to overcome a procedural de-

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¹³ 411 U.S. at 240 n. 7; see notes 41-48 & accompanying text infra.
¹⁴ 425 U.S. at 536 (1976). On the same day Francis was decided, the Court in Estelle v. Williams, 425 U.S. 501, 512-13 (1976), held that although a state cannot compel an accused to stand trial before a jury while garbed in prison clothing, the failure of an accused to object to his being so tried, for whatever reason, was “sufficient to negate the presence of compulsion necessary to establish a constitutional violation.” In a concurring opinion, Justice Powell, joined by Justice Stewart, characterized the failure of defense counsel to object at trial as an “inexcusable procedural default” that deprived the defendant of an otherwise valid constitutional claim. Relief from such a default, in Justice Powell’s view, ought “not be carried to the length of allowing counsel for a defendant deliberately to forego objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection, simply because he thought objection would be futile.” Id. at 515 (Powell, J., concurring). See text accompanying notes 141-44 infra.
¹⁵ 425 U.S. at 541.
¹⁶ Id. at 542 (footnote omitted).
fault, was derived from *Shotwell Manufacturing Co. v. United States*, the leading case interpreting the "cause shown" exception to Rule 12. The petitioners in *Shotwell* raised an untimely challenge to the selection of their grand and petit juries on the basis of what they termed "newly discovered" evidence. The Supreme Court, denying relief, found no "cause shown" under Rule 12 because the "facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial," and because the alleged jury irregularities did not prejudice the petitioners. "[I]t is entirely proper," the *Shotwell* Court indicated, "to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from [Rule 12]." This admonition that the absence of prejudice may alter the showing necessary to establish "cause shown" under Rule 12 emerged later in *Davis* and *Francis* as the two-part cause-and-prejudice test governing the waiver of grand jury claims in the collateral review of both state and federal convictions.

Wainwright v. Sykes

During its next Term, the Court in *Wainwright v. Sykes* extended its decision in *Francis* beyond grand jury claims. *Sykes* involved a state prisoner seeking federal habeas relief on the ground that he had not validly waived his *Miranda* rights with regard to several incriminatory statements introduced at trial. His trial counsel, however, had not raised the *Miranda* claim at or before trial as mandated by a state contemporaneous-objection rule. The district court granted habeas relief.

On appeal, the Court of Appeals for the Fifth Circuit focused on whether the state prisoner had forfeited his right to federal habeas review by failing to comply with the contemporaneous-objection rule. Reasoning that prejudice was inherent in a case involving the admissibility of an incriminating statement, the appellate court distinguished *Davis v. United States* as a case involving a nonprejudicial claim and turned instead to *Fay v. Noia* for the applicable waiver standard. The *Davis* court concluded that the prisoner's failure to object was not a trial tactic and thus not a deliberate by-pass.

The Supreme Court reversed and held that the prisoner's failure to
comply with the state contemporaneous-objection rule in raising his *Miranda* claim was governed not by the deliberate by-pass waiver standard in *Fay*, but rather by the *Davis* and *Francis* cause-and-actual-prejudice standard. This holding reflected the Court's fear that *Fay*’s "deliberate by-pass" test might "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."²²

Moreover, the Court expressed the view that the state contemporaneous-objection rule at issue in *Sykes* "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."²³ Those interests were identified as enhancing the finality of criminal judgments by forcing the litigation of constitutional issues at the trial court level, and promoting judicial efficiency by enabling the trial court in a single and timely proceeding to develop the factual record underlying a constitutional claim. Accordingly, the Court, although not overruling the *Fay* holding that an adequate and independent state procedural ground does not deprive a federal court of the power to entertain a habeas petition, rejected as dictum the suggestion in *Fay* that the deliberate by-pass test was an "all-inclusive" waiver standard applicable whenever a state prisoner had committed a procedural default.²⁴

The Court in *Sykes* left “open for resolution in future decisions the precise definition of the ‘cause’-and-‘prejudice’ standard.”²⁵ Apart from its observation that the standard was narrower than the deliberate by-pass test, the Court noted only that:

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.²⁶

This test, it added, would “not prevent a federal habeas court from

²². 433 U.S. at 89.
²³. *Id.* at 88.
²⁴. The precise extent to which *Sykes* restricted the applicability of the *Fay* waiver standard is somewhat uncertain. See notes 28-35 & accompanying text *infra.*
²⁵. 433 U.S. at 87.
²⁶. *Id.* at 91 (footnote omitted).
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." The Court concluded that the state prisoner, having demonstrated neither cause nor actual prejudice, had forfeited his right to federal collateral review.

The Unresolved Issues

Four major issues remain unresolved in the aftermath of Sykes. First, the Court left uncertain the extent to which the cause-and-prejudice test had displaced the deliberate by-pass test. The Court, without explicitly overruling Fay, rejected as "going far beyond the facts of [that] case," the "sweeping language" of Fay suggesting that the deliberate by-pass test applied to all habeas cases involving a procedural default.28 The Sykes Court, impliedly criticizing the Fay Court for having strayed far from the facts before it,29 concluded that "[w]e do not chose to paint with a similarly broad brush here."30 It is clear, therefore, that the waiver standard in Fay has been substantially overruled, but whether its continued vitality is at present restricted only to the facts in Fay remains uncertain.31

The lower federal courts, in response to this uncertainty, have looked to Sykes for guidance in determining whether to apply the deliberate by-pass test or the cause-and-prejudice test in specific factual contexts. Such guidance has been found not in the majority opinion in Sykes but rather in Chief Justice Burger's concurring opinion. Chief Justice Burger argued that "the 'deliberate bypass' standard . . . was never designed for, and is inapplicable to, errors—even of constitutional dimension—alleged to have been committed during trial."32 Requiring a knowing and intelligent waiver by the defendant was appropriate, he conceded, in the context of procedural decisions entrusted to the defendant himself, such as the decision to take an appeal or to request the representation of counsel. Requiring such a waiver, however, was particularly inappropriate in the context of trial decisions normally committed to counsel, for "[t]he trial process simply does not permit the type of frequent and protracted interruptions which would

27. Id.
28. Id. at 87-88.
29. The court even reserved for future resolution the question whether Fay still governed the facts of that case, namely, when a criminal defendant has waived all state rights to direct review of constitutional claims by failing to appeal a conviction. Id. at 88 n.12.
30. Id.
31. See, Rinehart v. Brewer, 561 F.2d 126, 130 n.6 (8th Cir. 1977).
32. 433 U.S. at 91-92 (Burger, C.J., concurring).
be necessary if it were required that clients give knowing and intel-
ligent approval to each of the myriad tactical decisions as a trial pro-
ceeds."

This distinction, also endorsed by Justice Stevens in his concurring opinion in Sykes, has prevailed in the lower federal courts. The majority view to date is that Fay governs decisions "of the sort entrusted to the defendant himself," whereas Sykes governs decisions "of the kind normally committed to counsel." A second issue confronting the lower federal courts is whether the Court in Sykes intended that a federal habeas court, as a condition precedent to applying the cause-and-prejudice test, must find that the failure of a habeas petitioner to raise his claim in accordance with state procedures is an adequate and independent state ground that would preclude direct review in the Supreme Court. This issue arises because of the way in which the Sykes opinion is structured. After dividing the law of federal habeas corpus into four areas, the Sykes court

33. *Id.* at 93 (Burger, C.J., concurring).
34. *Id.* at 94-95 & 95 n.2 (Stevens, J., concurring).
35. Frazier v. Czarnetsky, 439 F. Supp. 735, 737 (S.D.N.Y. 1977); accord, Rinehart v. Brewer, 561 F.2d 126, 130 n.6 (8th Cir. 1977). Courts have applied this distinction between decisions committed to counsel and those reserved for the defendant in cases involving not only the waiver of claims at trial, but also the waiver of claims on appeal. The prevailing rule is that Fay governs the decision whether to appeal at all, whereas Sykes governs the decision whether to appeal a particular claim. *See, e.g.*, Boyer v. Patton, 579 F.2d 284, 286 (3d Cir. 1978); Evans v. Maggio, 557 F.2d 430, 433-34 (5th Cir. 1977); Ennis v. LeFevre, 560 F.2d 1072, 1075-76 (2d Cir. 1977) (Meskill, J.) (nonplurality opinion); United States ex rel. Carbone v. Manson, 447 F. Supp. 611, 619 & n.4 (D. Conn. 1978); Ramsey v. United States, 448 F. Supp. 1264, 1273-74 & 1273 n.18 (N.D. Ill. 1978). *But see* Buckelew v. United States, 575 F.2d 515, 518-19 & 519 n.3 (5th Cir. 1978); Ennis v. LeFevre, 560 F.2d 1072, 1077 (2d Cir. 1977) (Gurfein, J., concurring).

By way of example, the court in Frazier v. Czarnetsky, 439 F. Supp. 735, 737 n.4 (S.D.N.Y. 1977), listed as decisions of the sort normally entrusted to the defendant himself the decision whether to plead guilty, whether to forego assistance of counsel, and whether to refrain from taking an appeal. Such decisions were, in the court's view, still governed by the deliberate by-pass test.

36. If the adequate and independent state ground doctrine does not form an independent inquiry, then it may be subsumed as part of the "cause" test. In other words, a habeas petitioner could show cause for failure to abide by a state rule if the rule itself would not preclude direct review of the constitutional claims in the Supreme Court. Use of the doctrine as a definition of cause would, however, mandate that a prisoner show actual prejudice in addition to the presence of an inadequate state ground. Such a result would be more restrictive than either the application of the doctrine on direct review or the application of Stone v. Powell, 428 U.S. 465, 494 (1976), which allows a federal court to hear the merits of a fourth amendment claim if the habeas petitioner did not have a "full and fair opportunity" to present his claim in state court. See text accompanying notes 54-60 infra. The "full and fair opportunity" test has not been read to incorporate any form of actual prejudice. *See, e.g.*, Note, *Circuits Split over Application of Stone v. Powell’s “Opportunity for Full and Fair Litigation,”* 39 VAND. L. REV. 881 (1977).
identified the relevant inquiry in the case before it to be determining: "[i]n what instances . . . an adequate and independent state ground [will] bar consideration of otherwise cognizable federal issues on federal habeas review." Upon concluding that the state contemporaneous-objection rule there at issue was adequate and independent, the Court then held that the cause-and-prejudice test should be applied to determine whether, as a matter of federal law, the habeas petitioner had waived his right to federal habeas review. The Sykes Court may thus have indicated that the adequacy and independence of a state ground must form a preliminary inquiry in each Sykes case.

Requiring such an inquiry would have two practical consequences. First, the adequate and independent state ground doctrine, a body of law that long has been within the Supreme Court's exclusive domain, would be applied routinely by the lower federal courts in each procedural default case. Second, and more importantly, a federal habeas court, by finding that a state ground is not adequate or independent, could avoid the cause-and-prejudice inquiry altogether and proceed directly to the merits of a habeas petitioner's claim. Already some lower federal courts have avoided application of the Sykes test by explicitly invoking, or relying on lines of analysis appropriate to, the adequate and independent state ground doctrine.

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37. 433 U.S. at 78-79.
38. Id. at 86-87. Sykes did not overrule Fay's holding that an adequate and independent state ground does not bar federal habeas review; instead the Court simply revised the federal waiver standard. Id. at 87-88, 100-01 n.2 (Brennan, J., dissenting).
39. There can be no dispute that even if Sykes does not mandate an inquiry into the adequacy and independence of a state ground, a federal habeas court, before applying the cause-and-prejudice test, must determine whether the habeas petitioner in fact violated a state procedural rule in raising his claim. The waiver standard in Sykes is not applicable where the habeas petitioner was not required under state procedures to raise his federal constitutional claim in a particular manner or at a particular time during the state court proceeding, see, e.g., Rummel v. Estelle, 587 F.2d 651, 653-54 (5th Cir. 1978) (en banc) (defendant not required under Texas law to challenge at trial the constitutionality of the statute under which he is convicted); where the petitioner has not violated a state procedural rule because his case falls within an exception to that rule, see, e.g., Miller v. North Carolina, 583 F.2d 701, 705 (4th Cir. 1978) (defendant, contrary to general rule, not required under North Carolina law to object at trial to prosecutor's closing statement where "argument of counsel in a capital case is so grossly improper that removal of its prejudicial effect, after a curative instruction, remains in doubt"); Cole v. Stevenson, 447 F. Supp. 1268, 1272 (E.D.N.C. 1978) (defendant, contrary to general rule, not required to object at trial to jury instructions containing presumptively prejudicial errors of law); or where the habeas petitioner has in fact complied with the state procedure in question, see Thomas v. Estelle, 582 F.2d 939, 940-41 (5th Cir. 1978); Henne v. Fike, 563 F.2d 809, 811 (7th Cir. 1977) (per curiam).
40. A line of adequate and independent state ground cases that refuses to countenance the application of a state rule in a manner violative of due process has been invoked by some
The lower federal courts have focused on yet a third question: whether the cause-and-prejudice test governs cases involving federal prisoners seeking to vacate their convictions, pursuant to 28 U.S.C.

The federal courts confronted with a *Sykes* situation. *Compare* White v. Estelle, 566 F.2d 500, 504 (5th Cir. 1978) (state trial court's denial of a motion for continuance not made in conformance with a state procedural rule amounted to "manifest injustice") and United States v. McCloud, No. 78-C-1424 (E.D.N.Y. Dec. 4, 1978) (it "would shock the conscience" to bar a youthful offender from seeking habeas corpus relief from unconstitutional sentencing because he did not comply with a state rule that the challenge be raised at trial) with Reece v. Georgia, 350 U.S. 85, 89-90 (1955) (federal claim should have been considered by state supreme court on the merits where defendant was not given a constitutionally adequate opportunity to raise the claim). Other adequate state ground cases, which support the proposition that a state court's decision not to exercise its discretion to hear a federal claim will not constitute an adequate state ground, have been similarly invoked. *Compare* Taylor v. Reid, No. 78 Civ. 862 (S.D.N.Y. Dec. 1, 1978) (Because under state law "a failure to object does not necessarily foreclose an attack based upon an alleged constitutional infirmity . . . petitioner's claim is not foreclosed by failure to object at trial.") with Williams v. Georgia, 349 U.S. 375, 389 (1955) (Supreme Court has jurisdiction to consider federal claim where state supreme court declines to grant motion for a new trial "though possessed of power to do so under state law."); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 233-34 (1969) (Supreme Court reaches a federal claim where a state court, exercising its discretion, refused to hear the claim despite the arguable violation of a state procedural rule); Henry v. Mississippi, 379 U.S. 443, 449 n.5 (1965), *and id.* at 454-57 (Black, J., dissenting).

The adequate state ground case of Henry v. Mississippi, 379 U.S. 443, 447-48 (1965), which suggests that application of a state procedural rule might be inadequate "unless the State's insistence on compliance . . . serves a legitimate state interest," offers another avenue for federal courts to avoid application of the *Sykes* test. See St. John v. Estelle, 563 F.2d 168, 177-78 (5th Cir. 1977) (en banc) (per curiam) (Tjoflat, J., dissenting) (motion for mistrial made eight questions after damaging testimony adequately served state's interest in demanding contemporaneous objection to witness' testimony); Holmes v. Israel, 453 F. Supp. 864, 867 (E.D. Wis. 1978) (*Sykes* may be inapplicable where counsel failed to make specific objection to evidence as required by state rule but did make general objection and moved for mistrial). The continued viability of *Henry* has been questioned, however. *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and The Federal System* 558-62 (2d ed. 1973); Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050, 1052 (1978). *See also* Monger v. Florida, 405 U.S. 958 (1972) (Supreme Court upholds as adequate a state court's dismissal of an appeal because, contrary to state procedure, it had been filed after oral judgment but before the written judgment was handed down). Nevertheless, the *Sykes* Court cited *Henry* in support of its conclusion that the Florida contemporaneous-objection rule constituted an adequate and independent state ground. 433 U.S. at 87.

In addition to the formulations of the adequate state ground rule noted above, the Supreme Court has held state grounds to be inadequate where the state ground could not have been foreseen, NAACP v. Alabama, 357 U.S. 449, 457-58 (1958), if its application amounted to an "arid ritual of meaningless form," Staub v. City of Baxley, 355 U.S. 313, 320 (1958), or if the application of the state rule appeared to have been arbitrary or designed to frustrate federal constitutional rights, Rogers v. Alabama, 192 U.S. 226, 230-31 (1904). *See also* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *supra*, at 526-62; L. Tribe, *American Constitutional Law* 120-29 (1978); C. Wright, A. Miller, B. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction and Related Matters* §§ 4025-28 (1977); Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943 (1965).
§ 2255, on grounds not raised in accordance with applicable federal procedures. In *Davis v. United States,* the Court confronted the case of a federal prisoner seeking section 2255 relief on a claim of grand jury discrimination not raised before trial as required by Rule 12 of the Federal Rules of Criminal Procedure. The Court, in order not to undermine the important federal interests underlying Rule 12, held that the "cause shown" exception to Rule 12 applied with equal force on direct and collateral review. The rationale of *Davis,* therefore, strongly suggests that in section 2255 proceedings the cause-and-prejudice test applies not only to grand jury claims, but rather to all claims governed by Rule 12.42 A more difficult question is whether, in light of the strong language in *Sykes* emphasizing the important interests underlying procedural rules requiring timely objections to asserted errors, *Sykes* mandates that the cause-and-prejudice test apply not just to claims governed by Rule 12, but rather to all claims not raised in accordance with applicable federal procedures. To date, the lower federal courts have read *Sykes* expansively, applying the cause-and-prejudice test in section 2255 proceedings involving a variety of non-Rule 12 claims.44 Thus, the lower federal courts have faced three major issues relating to the applicability of the *Sykes* cause-and-actual-prejudice standard for collateral review.

The resolution of the three preceding issues would, however, be far from a complete settlement of the unresolved questions after *Sykes.* The fourth issue confronting the lower federal courts, and the issue to which this Article is addressed, is the meaning of the terms "cause" and "actual prejudice," the two prongs of the *Sykes* waiver standard. The Article turns first to the definition of "actual prejudice," for, as ex-

41. 411 U.S. 233 (1977). For a discussion of *Davis,* see text accompanying notes 11-13 *supra.*
42. See *United States v. Underwood,* 440 F. Supp. 499, 501-02 (D.R.I. 1977) (*Davis* rule applied in a § 2255 proceeding to a fourth amendment claim that the federal prisoner had not raised before trial as required by Rule 12).
43. 433 U.S. at 88-90.
44. See *Buckelew v. United States,* 575 F.2d 515, 519-20 (5th Cir. 1978) (failure to raise on direct appeal, pursuant to Federal Rule of Appellate Procedure 10(e), the claim that the trial transcript was incomplete because of the alleged suppression of judicial misconduct); *Sincox v. United States,* 571 F.2d 876, 879 (5th Cir. 1978) (failure to raise at trial or on direct appeal claim that petitioner had been denied right to a unanimous verdict); *Brawer v. United States,* 462 F. Supp. 739 (S.D.N.Y. 1978) (failure to object at trial to impeachment on the basis of prior uncounseled convictions); cf. *Fanow v. United States,* 580 F.2d 1339, 1356-57 (9th Cir. 1978) (assuming, without deciding, that *Sykes* governs the waiver of a claim, not raised either at time of sentence as required by Federal Rule of Criminal Procedure 32(a)(1) or on direct appeal, that petitioner's sentence was improperly enhanced on the basis of prior uncounseled convictions).
plained below, the factors relevant to defining "actual prejudice" may also have a bearing on the definition of "cause."

**Actual Prejudice**

One prong of the *Sykes* waiver standard requires a habeas petitioner seeking to overcome a procedural default to make some showing of actual prejudice resulting from the constitutional violation he has alleged.45 This section examines three sources of authority suggesting possible definitions of actual prejudice and then explores the Supreme Court and lower court interpretations of the term.

**Sources of Authority to Define "Actual Prejudice"**

One source of authority to define actual prejudice is the view, advocated by Justice Black and Judge Friendly, that the availability of collateral review under habeas corpus and section 2255 should depend on a petitioner's ability to make a colorable showing that he did not in fact commit the crime for which he was convicted. The assumption underlying this view was first voiced by Justice Black in his dissenting opinion in *Kaufman v. United States.*46 In *Kaufman* where the Court permitted a federal prisoner to obtain collateral relief under section 2255 for a search and seizure claim he had not raised on direct review,47 Justice Black argued that not every conviction involving a constitutional error should be subject to collateral review. He singled out the petitioner's "probable or possible innocence" as an important factor that should govern the availability of collateral relief, noting that "few would think that justice requires release of a person whose allegations clearly show that he was guilty of the crime of which he had been convicted."48

Following Justice Black's dissent in *Kaufman,* Judge Friendly, in an influential article,49 advanced the thesis "that, with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence."50 Arguing that collateral review runs counter to impor-

47. Finding no "deliberate by-pass" of the direct appeal, the Court held that, under the then applicable *Fay* standard, the prisoner had not waived his right to collateral review. *Id.* at 220 n.3.
48. *Id.* at 233.
50. *Id.* at 142.
tant values underlying the criminal system, Judge Friendly took issue with the maxim that "'[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.'"51 He agreed "that 'conventional notions of finality' should not have as much place in criminal as in civil litigation," but disagreed "that they should have none."52 Balancing the state interest in the finality of criminal judgments against the defendant's interest in vindicating his innocence, Judge Friendly argued that although any defendant should have the opportunity on direct review to litigate constitutional claims, only a defendant with "a colorable claim of innocence" should have that opportunity on collateral review.

In clarifying what he meant by "a colorable claim of innocence," Judge Friendly emphasized that he did not mean a showing that the petitioner, but for the alleged constitutional error, might not or would not have been convicted. Instead, he defined his threshold criterion as requiring a petitioner for collateral relief to show "a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have become wrongly excluded or to have become available only after the trial, the trier of facts would have entertained a reasonable doubt of his guilt."53 This would mean that, under the Sykes standard, a petitioner suffers "actual prejudice" from a constitutional claim only when he can make a colorable showing of factual innocence.

Such an interpretation of actual prejudice embodies the assumption, endorsed by both Justice Black and Judge Friendly, that the proper role of collateral review is not to remedy every unconstitutional conviction, but rather to remedy every unconstitutional conviction of an innocent person. A guilty prisoner, so the argument goes, suffers no actual prejudice from the procedural foreclosure of his constitutional claims. The crucial inquiry under this interpretation of actual prejudice is, once again, whether the petitioner can demonstrate, based on all available evidence (legal and illegal, admitted and not admitted) the existence of a reasonable doubt as to his guilt.

A second source of authority for defining "actual prejudice" is the view apparently underlying Justice Powell's majority opinion in Stone v. Powell54—that the primary purpose of habeas corpus is to ensure

51. Id. at 149 (quoting Sanders v. United States, 373 U.S. 1, 8 (1963)).
52. Id. at 150 (emphasis in original).
53. Id. at 160.
that a petitioner has been accorded those constitutional guarantees bearing on the reliability of the guilt-determining process. In Stone, the Court held that where a state petitioner has had a full and fair opportunity to litigate his fourth amendment claims on direct review, the petitioner may not invoke habeas corpus to litigate those claims in federal court.

A concise statement of the Stone Court’s view of the appropriate role of habeas corpus appears in a footnote of the majority opinion, where, after listing those societal values undermined by habeas corpus, it concluded:

We nevertheless afford broad habeas corpus relief, recognizing the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty. . . . But in the case of a typical Fourth Amendment claim, asserted on collateral attack, a convicted defendant is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration.55

In the first quoted sentence, the Court seems to suggest that the role of habeas corpus is to remedy all constitutional errors in cases where the petitioner was convicted of a crime that he did not in fact commit. This would create a system of habeas review akin to the Black-Friendly approach. The second sentence as well as the actual holding in Stone, however, focus not upon the guilt or innocence of the petitioner, but rather upon the type of claim asserted.56 The thrust of Stone is to provide collateral relief only for the violation of those constitutional rights “bearing on the basic justice of [a convicted defendant’s] incarceration.”

A constitutional right “bearing on the basic justice of [a convicted defendant’s] incarceration” is one that increases the accuracy of the trier of fact’s determination that an individual committed the crime for which he was convicted (hereafter referred to as a “truth-furthering” right).57 The classic example of a truth-furthering right is the sixth

55. Id. at 491 n.31.
56. In assessing the availability of habeas corpus in cases where the habeas petitioner has had a full and fair opportunity to litigate his claims on direct review, Justice Powell consistently has focused upon the nature of the petitioner’s claim rather than upon the petitioner’s actual guilt or innocence. See Brewer v. Williams, 430 U.S. 387, 414 (1977) (Powell, J., concurring) (Massiah violation); Castaneda v. Partida, 430 U.S. 482, 508 n.1 (1977) (Powell, J., dissenting) (grand jury discrimination); Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (search and seizure claim); Schneckloth v. Bustamonte, 412 U.S. 218, 266 (1973) (Powell, J., concurring) (search and seizure claim).
57. See Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, 1092 (1977) (“Truth-furthering rights are rights that foster sound guilt/innocence determinations with the requisite degree of certainty.”)
amendment right to effective assistance of counsel. A criminal defendant, in the Supreme Court's view, "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." Effective assistance of counsel thus reduces the likelihood of an erroneous conviction. In contrast, fourth amendment claims are non-truth-furthering because illegally seized evidence is "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." Exclusion of such evidence, therefore, often bears a negative correlation to the reliability of the truth-determining process.

Applying Stone to all non-truth-furthering rights would yield a system of collateral review designed primarily to ensure that every habeas petitioner has been accorded those constitutional rights bearing on the reliability of the guilt-determining process. Those claims cognizable under Stone guarantee, in effect, a minimum degree of fact-finding accuracy in the criminal process. The model of habeas corpus contemplated by Stone suggests an interpretation of the "actual prejudice" standard focusing on whether the claim that the habeas petitioner failed to raise properly involves a truth-furthering right. If so, the petitioner would satisfy the actual prejudice test; if not, the petitioner would have lost his right to collateral review.

A third source of authority for defining actual prejudice is the harmless-error rule, which measures the prejudicial effect of a trial court error. The doctrine of harmless error, which assumes that some trial errors simply are too insignificant to warrant reversal of the trier of fact's judgment, is invoked by appellate courts to determine whether a litigant asserting an error is entitled to a new trial.

60. The Supreme Court has not yet applied Stone v. Powell to claims other than the fourth amendment, although it is currently considering a case which offers the opportunity to extend Stone to the claim that the foreman of a grand jury was chosen in a racially discriminatory manner. See Mitchell v. Rose, 570 F.2d 129 (6th Cir. 1977), cert. granted, 47 U.S.L.W. 3221 (U.S. Oct. 2, 1978). Justice Powell has raised the issue of Stone's applicability to the claim of an unconstitutionally constituted grand jury, see Castaneda v. Partida, 430 U.S. 482, 508 n.1 (1977) (Powell, J., dissenting), as well as to fifth and sixth amendment claims, see Brewer v. Williams, 430 U.S. 387, 414 (1977) (Powell, J., concurring).
The Supreme Court, prior to its decision in *Chapman v. California*, 62 seemed to follow a per se rule requiring the automatic reversal of a defendant's conviction in criminal cases involving constitutional errors.63 Though retaining the per se rule for a limited number of trial errors,64 the Court in *Chapman* adopted a more flexible standard: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."65 Put another way, the *Chapman* standard mandates a reversal where it is "reasonably possible" that the trial court's error influenced the verdict of the trier of fact.66 The *Chapman* Court further held that the beneficiary of a constitutional error, rather than the defendant, has the burden of proof in a harmless error case.67

In applying the *Chapman* standard in subsequent cases, the Court has taken two approaches to evaluating a harmless error.68 Under the first approach, the Court asks whether, upon excluding the evidence tainted by constitutional error, the jury's verdict is still supported by "overwhelming evidence." This approach is illustrated by *Milton v. Wainwright*, 69 where the Court invoked the harmless-error rule to dismiss a habeas petition challenging on constitutional grounds the introduction at trial of a postindictment confession that was obtained by a police officer posing as an accused person confined with the petitioner. In denying relief without reaching the merits, the Court noted that

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63. *See* Saltzburg, *supra* note 61, at 999-1002.
64. In his majority opinion in *Chapman*, Justice Black noted that "our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23. To support this proposition, he cited three examples: Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); Tumey v. Ohio, 273 U.S. 510 (1927) (impartial judge). 386 U.S. at 23 n.8.
65. 386 U.S. at 24. The *Chapman* harmless error standard conforms with the due process requirement, enunciated in *In re Winship*, 397 U.S. 358 (1970), that the state prove beyond a reasonable doubt each element of a criminal offense. That is, insofar as the trier of fact must find beyond a reasonable doubt that a defendant is guilty of a criminal charge, an appellate court, in finding harmless error, should be no less certain that a trial court error did not affect the verdict. The appellate court, under a less stringent harmless error standard, would be able to uphold a conviction that, given the error of the trial court, no longer satisfied the standard of beyond a reasonable doubt. Thus, *Chapman* ensures that *In re Winship* is not undermined on appellate review. *See* Saltzburg, *supra* note 61, at 1014-15 n.89.
67. 386 U.S. at 24.
68. *See* Field, *supra* note 61, at 16-36; Saltzburg, *supra* note 61, at 1014-15 n.89. One commentator has suggested that the Court may be developing a third approach to harmless error. *See* note 74 *infra*.
“[t]he jury, in addition to hearing the challenged testimony, was presented with overwhelming evidence of petitioner’s guilt, including no less than three full confessions” that were constitutionally admissable. Thus, the Court focused not upon the prejudicial effect of the tainted evidence, but rather upon the sufficiency of the untainted evidence.

Under the second approach to harmless error, the Court inquires whether there is a “reasonable possibility” that the tainted evidence influenced the verdict of the jury. In Chapman, the Court held that a prosecutor’s comment upon the defendants’ failure to testify in their own behalf and a trial judge’s instruction to the jury that it could draw adverse inferences from such failure did not constitute harmless error. The Court reached its conclusion by resolving “whether there [was] a reasonable possibility that the evidence complained of might have contributed to the conviction,” rather than focusing, as the lower court had done, on whether the jury was presented with overwhelming evidence of the defendants’ guilt.

The obvious contrast between the two approaches to harmless error is that the former, as illustrated by Milton, focuses on the sufficiency of the untainted evidence, whereas the latter, as illustrated by Chapman, focuses on the possible prejudicial effect of the tainted evidence. As one commentator persuasively has argued, however, these two approaches will yield similar results under the “beyond a reasonable doubt” standard in Chapman. If the Chapman standard is met under the first approach (i.e., the untainted evidence of guilt is overwhelming beyond a reasonable doubt), “it is hard to believe,” so

70. Id. at 372.
71. 386 U.S. at 26.
72. Id. at 23 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)).
73. Id. at 23-24. The Court, however, did not focus entirely upon the tainted evidence. See, e.g., id. at 25-26 (“[T]hough the case in which this occurred presented a reasonably strong ‘circumstantial web of evidence’ against petitioners, . . . it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts.”) (citation omitted).
74. The cases do not reveal whether the Court clearly prefers one approach over the other. In addition to the conflict between Chapman and Milton, the Court in Harrington v. California, 395 U.S. 250, 254 (1969), apparently applied the “overwhelming evidence” test while claiming to reaffirm Chapman. This peculiar result has lead one commentator to conclude that Harrington may herald a third approach to harmless error “that focuses on whether the tainted evidence was ‘merely cumulative’—that is, whether untainted evidence that says the same thing as the excluded evidence remains in the case.” Field, supra note 61, at 37.
75. Saltzburg, supra note 61, at 1014-15 n.89.
76. See note 65 supra.
the commentator observed, "that the . . . test [for the second approach] would not also be met, i.e., that anyone could believe that the error contributed to the verdict, or that its contribution was significant enough to warrant reversal."77

For the purposes of this Article, however, it is less important to distinguish between the approaches to harmless error than it is to distinguish between harmless error and the other sources of authority that may be used to define "actual prejudice." Both approaches to the harmless error standard differ markedly from the "colorable showing of innocence" standard for actual prejudice. The "overwhelming evidence" approach varies from the "colorable showing of innocence" requirement in that the former examines only the sufficiency of untainted evidence introduced at trial, whereas the latter examines the sufficiency of all evidence—tainted or untainted, admitted or not admitted. That is, the former focuses on legal guilt based on the admissible portion of the trial record, while the latter focuses on factual guilt based on all the available evidence. The "reasonable possibility" approach differs from the "colorable showing of innocence" requirement because the former examines only the effect of tainted evidence, whereas the latter examines all available evidence. The "reasonable possibility" approach focuses exclusively on the effect of the constitutional error on the determination of legal guilt, while the "colorable showing of innocence" requirement examines factual guilt.

These distinctions are best illustrated in the context of a meritorious fourth amendment or Miranda claim that evidence admitted at trial should have been suppressed. Such claims often involve evidence that is both reliable and highly probative of guilt. Accordingly, a habeas court applying harmless-error analysis is apt to conclude either that it is reasonably possible that the tainted evidence contributed to the verdict or that exclusion of the tainted evidence leaves less than overwhelming evidence to support the verdict. Under the "colorable showing of innocence" test, a habeas court, now focusing on the entire record, is apt to conclude that the petitioner's factual guilt remains beyond dispute.

Harmless error also differs from the "truth-furthering right" requirement of Stone v. Powell.78 Both the "overwhelming evidence" and the "reasonable possibility" approaches measure the effect of a specific constitutional error in a particular factual setting. The classification of

77. Saltzburg, supra note 61, at 1014-15 n.89.
78. See notes 54-60 & accompanying text supra.
rights as "truth-furthering," however, distinguishes claims on the basis of the probable impact of the constitutional error on the accuracy of the guilt-determining process. Thus, a fourth amendment claim, which is a classic non-truth-furthering right, and hence insufficient to support a petition for collateral review under this test, may be prejudicial under harmless-error analysis if, for example, there is a reasonable possibility that introduction of illegally seized evidence may have influenced the jury's verdict.

In sum, the case law and commentary on habeas corpus suggest three possible interpretations of the actual prejudice standard. First, actual prejudice may refer to the possible factual innocence of the habeas petitioner—that is, whether the petitioner, based on all the available evidence, can make a colorable claim that he did not, in fact, commit the crime for which he was convicted. Second, the term may refer to whether the constitutional right allegedly violated bears a positive correlation to the reliability of the guilt-determining process. Third, actual prejudice may refer to whether the procedural foreclosure of the petitioner's claim is harmless error.

Judicial Interpretations of "Actual Prejudice"

Although reserving for future cases the precise definition of "actual prejudice,"79 the Supreme Court in Wainwright v. Sykes applied the term to the facts before it in a manner similar to, yet a variant of, the harmless-error doctrine. The similarity emerges in the passage where the Court, concluding that the state prisoner had not demonstrated prejudice arising from his Miranda claim, noted that "[t]he other evidence of guilt presented at trial . . . was substantial to a degree that would negate any possibility of actual prejudice resulting to the [prisoner] from the admission of his inculpatory statement."80 The variation lies in the fact that the Court required the petitioner to bear the burden of demonstrating the harm of the constitutional error,81

79. 433 U.S. at 87.
80. Id. at 91. See text accompanying notes 26-27 supra.
81. 433 U.S. at 84. This point did not escape the attention of Justice White who commented in his concurring Sykes opinion that he felt that the harmless error rule itself adequately protected the state's interests: "As long as there is acceptable cause for the defendant's not objecting to the evidence, there should not be shifted to him the burden of proving specific prejudice to the satisfaction of the habeas corpus judge." Id. at 98 (White, J., concurring).

Shifting the burden to the petitioner has resulted in the dismissal of many habeas petitions for want of any showing of actual prejudice. See, e.g., Spinkellink v. Wainwright, 578 F.2d 582, 620 (5th Cir. 1978); Frazier v. Czarnetsky, 439 F. Supp. 735, 738 (S.D.N.Y. 1977).
rather than the government. Thus, the Court in *Sykes* apparently concluded that, absent a showing that it was reasonably possible that the asserted error influenced the verdict of the trier of fact, the state prisoner had not made the requisite demonstration of actual prejudice to overcome his procedural default.

The vast majority of lower court decisions applying the actual prejudice standard have followed the approach suggested in *Sykes*. The "overwhelming evidence" approach to analyzing harmless error appears, for example, in *Thomas v. Estelle*, where a panel of the Court of Appeals for the Fifth Circuit concluded that a habeas petitioner had not demonstrated actual prejudice. The petitioner in *Thomas* was a state prisoner who upon his conviction for felony theft was given an enhanced sentence of life imprisonment pursuant to a state habitual offender statute. During the guilt phase of petitioner's bifurcated trial on the theft charge, the prosecutor read to the jury the indictment against petitioner which referred not only to the theft charge, but also to the habitual offender statute and to two earlier felony convictions. Petitioner's counsel failed to comply with a state contemporaneous-objection rule by neither objecting when the prosecutor read the indictment to the jury nor requesting an instruction limiting the jury's consideration of the prior conviction evidence to its determination at the punishment phase of the trial. On federal habeas review, petitioner successfully asserted in the district court that he had been denied a fair trial and was granted relief.

The Fifth Circuit in *Thomas* reversed the district court, holding

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82. See text accompanying note 67 supra.

83. Two members of the Court in *Sykes* observed that the majority had read a harmless-error standard into the definition of actual prejudice. Though suggesting in passing that *Stone v. Powell* might inform the meaning of actual prejudice, 433 U.S. at 110, Justice Brennan, in his dissenting opinion, concluded that "[t]he 'prejudice' inquiry . . . appears to bear a strong resemblance to harmless-error doctrine." Id. at 117. Reaching the same conclusion, Justice White chose to concur only in the judgment in *Sykes*, largely on the ground that the harmless-error rule applies by its own force in habeas cases. He reasoned: "It is thus of some moment to me that the Court makes its own assessment of the record and itself declares that the evidence of guilt in this case is sufficient to 'negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement'. . . . This appears to be tantamount to a finding of harmless error under the *Harrington* standard and is itself sufficient to foreclose the writ and to warrant reversal of the judgment." Id. at 97-98. See also Francis v. Henderson, 425 U.S. 536, 557 (1976) (Brennan, J., dissenting) (advocates a harmless error approach to defining "actual prejudice").


85. 587 F.2d 695 (5th Cir. 1979).
that petitioner was barred under Sykes from seeking collateral review in federal court. Finding that petitioner had not made the requisite showing of actual prejudice, the court of appeals noted:

Actual prejudice, or its absence, must be determined by the facts and circumstances of each case. See Wainwright v. Sykes . . . . The danger inherent in the admission of prior convictions is that juries may convict a defendant because he is a "bad man" rather than because evidence of the crime of which he is charged has proved him guilty . . . . No such prejudice is possible here. The evidence of petitioner's guilt is overwhelming. A store employee saw petitioner take the money from the cash register. After being pursed from the store and apprehended by another employee, petitioner was heard to exclaim, "Let me go. You have got the money. Let me go." The stolen funds and checks were found under the car next to which petitioner fell when captured. Therefore, we cannot say that the petitioner was actually prejudiced by this erroneous reading of two prior felony convictions to the jury without an accompanying limiting instruction.86

The reasoning and language of the court in Thomas are virtually identical to that appearing in harmless-error cases in which the "overwhelming evidence" test is applied.87

The "reasonable possibility" approach to harmless-error analysis which, unlike the "overwhelming evidence" test, focuses on the prejudicial effect of the tainted evidence, also has been widely used by the lower courts in defining actual prejudice. A good example is United States v. Underwood,88 a section 2255 proceeding involving the procedural default of a fourth amendment claim. In Underwood, the petitioner, who had been convicted of selling two ounces of cocaine, alleged that the police had made a warrantless search of his apartment resulting in the unlawful seizure of additional cocaine. At petitioner's trial for the sale of the two ounces, the only reference to the additional cocaine came during the testimony of a police officer who mentioned that he had sent a substance described by the petitioner as cocaine to a police lab for chemical analysis. That testimony, however, corroborated other admissible evidence contradicting petitioner's entrapment defense. Furthermore, petitioner's counsel failed to make a timely motion to suppress the officer's testimony.

The district court, denying collateral relief because of the procedural default interpreted the actual prejudice standard as "requir[ing] the petitioner simply to show that the suppressible evidence could have

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86. Id. at 698-99 (emphasis added).
87. See text accompanying notes 68-70 supra.
contributed to the jury verdict, thus incorporating the harmless error standard of *Chapman v. California*. Applying this standard to the facts at issue, the court concluded:

[P]rejudice in fact has not been shown: the courtroom procedure and testimony, at best, played a minor role in the jury verdict. Indeed, the jury might well have concluded that the allegedly illegally obtained evidence was not cocaine since no evidence to that effect was introduced.

Because the prejudice is harmless error beyond a reasonable doubt, the Court will not grant relief from petitioner's 'waiver' of his fourth amendment claim.

This case, therefore, is similar to *Thomas* insofar as both apply a variant of harmless error analysis, but different insofar as the former focuses on the prejudicial effect of the tainted evidence whereas the latter focuses on the sufficiency of the untainted evidence.

Not all courts, however, have applied harmless-error analysis. The court in *Robertson v. Collins* specifically held that the Black-Friendly "colorable showing of innocence" requirement and not a variant of the harmless-error test should govern the definition of actual prejudice. The court, after analyzing *Sykes* and Judge Friendly's seminal commentary on the scope of habeas corpus, stated that "[t]he prejudice standard adopted in *Davis, Francis*, and now [*Sykes*] serves to embody precisely the limited habeas review which Judge Friendly had in mind . . . to prevent the miscarriage of justice which results from convicting an innocent person." Reviewing in detail the evidence introduced at the petitioner's murder trial, the court held that the use of jury instructions inconsistent with *Mullaney v. Wilbur* had not created actual prejudice. The court concluded that, on the basis of the "weak testimony" presented on behalf of the petitioners and the testimony of two eyewitnesses who identified the petitioner as the murderer, the petitioner "failed to raise even a colorable showing of innocence."

The *Robertson* court not only employed the Black-Friendly test; it explicitly rejected use of harmless-error analysis as inconsistent with *Sykes* for two reasons: (1) the harmless-error test treats some claims as

89. Id. at 503.
90. Id. at 503-04.
per se harmful whereas the Sykes Court, in rejecting use of an “inherent prejudice” standard, emphasized the petitioner's factual guilt, and (2) the Chapman test focuses upon the effect of an error on the trial judgment whereas the “colorable showing of innocence test” “would permit habeas review in this case if petitioner could present evidence tending to support his innocence.” The habeas petitioner in Robertson would therefore be allowed to present evidence in support of his petition that was not presented to the trial court. By virtue of this reasoning, the Robertson court thus became the first lower federal court specifically to reject use of harmless-error reasoning in favor of the Black-Friendly approach.

This more rigorous definition of actual prejudice is not inconsistent with Sykes. In Sykes, the Court, without even having to consider the inculpatory statements challenged on Miranda grounds, was convinced that “[t]he other evidence of guilt presented at trial . . . was substantial to a degree that would negate any possibility of actual prejudice resulting to respondent from the admission of his inculpatory statements.” It was unnecessary on the facts in Sykes, absent a proffer of exculpatory evidence not adduced at trial, to decide whether the inquiry into actual prejudice might include an examination of all available evidence, even that which is assertedly tainted. To include such evidence in the actual prejudice inquiry would be to make it more difficult for habeas petitioners asserting non-truth-furthering rights (for example, Miranda and fourth amendment claims) to overcome a procedural default, inasmuch as the assertedly tainted evidence in such cases is often both reliable and highly probative of guilt. It is impossible to discern on the basis of the Sykes decision alone, however, whether the Supreme Court will agree with the more restrictive definition of actual prejudice suggested in Robertson.

Yet another way to narrow the scope of collateral relief in cases where the petitioner has failed to comply with a state procedural rule in raising a non-truth-furthering claim would be to define “actual prejudice” in terms of the distinction in Stone v. Powell between truth-

96. But see note 106 infra.
98. In Collins v. Auger, 577 F.2d 1107, 1110 (8th Cir. 1978), the court analyzed actual prejudice in terms of both harmless-error analysis and what it termed “a subjective evaluation of guilt by an appellate court based on an overall record.” The latter, like the Black-Friendly approach, focused on the petitioner’s factual guilt based on all available evidence. The court, finding an absence of actual prejudice under either approach, had no occasion to choose between them.
99. 433 U.S. at 91.
furthering and non-truth-furthering claims.\textsuperscript{100} That \textit{Stone} might potentially inform the meaning of actual prejudice is suggested not only by Justice Brennan’s passing comment to that effect in \textit{Sykes},\textsuperscript{101} but also by two lower court decisions, \textit{Sincox v. United States},\textsuperscript{102} and \textit{Graham v. Maryland}.\textsuperscript{103} In each case, the court concluded that on the basis of the claim asserted the petitioner had demonstrated actual prejudice. Moreover, each petitioner asserted truth-furthering rights: \textit{Sincox} involved a claim that petitioner had been convicted by a less than unanimous jury, and \textit{Graham} involved a claim that the trial court had unconstitutionally allocated to petitioner the burden of proving an alibi defense.\textsuperscript{104} Accordingly, if \textit{Stone} were to inform the meaning of actual prejudice, the petitioners in these two cases would be able to demonstrate actual prejudice attendant to the foreclosure of their claims.\textsuperscript{105}

\textit{Sincox} and \textit{Graham} may also be read as cases where courts, in defining actual prejudice in terms of harmless error, have concluded that the claims there presented were per se harmful.\textsuperscript{106} This analysis is consistent with \textit{Chapman v. California},\textsuperscript{107} where the Court noted that some constitutional rights are so basic to a fair trial that their infraction is intrinsically harmful.\textsuperscript{108} Both \textit{Sincox} and \textit{Graham} involved constitutional claims fundamental to the right to a fair trial. In \textit{Sincox}, the court noted:

\begin{enumerate}
\item \textsuperscript{100} See notes 54-60 & accompanying text supra.
\item \textsuperscript{101} 433 U.S. at 110 (Brennan, J., dissenting). See note 83 supra.
\item \textsuperscript{102} 571 F.2d 876 (5th Cir. 1978).
\item \textsuperscript{103} 454 F. Supp. 643 (D. Md. 1978).
\item \textsuperscript{104} The rights asserted in \textit{Sincox} and \textit{Graham} are truth-furthering in the sense that they increase the accuracy of the trier-of-fact’s determination that an individual in fact committed the crime for which he was convicted. See notes 57-59 supra.
\item \textsuperscript{105} The fact that the Court in \textit{Sykes} rejected the Fifth Circuit’s conclusion that prejudice was “inherent” in the state prisoner’s \textit{Miranda} claim is not inconsistent with this \textit{Stone} approach insofar as a \textit{Miranda} claim is not a truth-furthering right.
\item \textsuperscript{106} A per se approach to analyzing actual prejudice is not necessarily inconsistent with \textit{Sykes}, even though the Court there reversed the lower court which had found actual prejudice inherent in petitioner’s claim. It is significant that, while the lower court characterized petitioner’s claim as an involuntary statement, 528 F.2d at 524-25, the Supreme Court recharacterized it as a \textit{Miranda} violation, 433 U.S. at 74-75. Although an involuntary confession is probably per se harmful, see Mincey v. Arizona, 437 U.S. 385, 398 (1978), Chapman v. California, 386 U.S. 18, 23 n.8 (1967); \textit{but see} Milton v. Wainwright, 407 U.S. 371, 372 (1972) (Court applies harmless-error analysis to habeas petition alleging involuntary confession and violation of sixth amendment rights), it is doubtful that a \textit{Miranda} violation enjoys the same status. Accordingly, the fact that the lower court in \textit{Sykes} was reversed on its per se approach to actual prejudice may simply reflect the fact the Supreme Court took a different view of the type of claim there presented. \textit{But see} Robertson v. Collins, Civ. No. Y-78-1544 (D. Md. Feb. 23, 1979).
\item \textsuperscript{107} 386 U.S. 18 (1967).
\item \textsuperscript{108} \textit{Id.} at 23. See note 64 supra.
\end{enumerate}
Sincox had a fundamental right guaranteed by the Sixth Amendment that if convicted at all it would be a valid, unanimous jury verdict of guilt. He was adjudged guilty on the strength of an invalid, eleven out of twelve verdict. He had an absolute right to present that error on appeal and persistently asserted his desire to appeal, yet no appeal was taken. The "prejudice" hurdle is quickly overcome.\textsuperscript{109}

Moreover, the court in Graham expressly concluded that the harmless-error doctrine was inapplicable to the claim there presented, that is, an improper allocation of the burden of proof.\textsuperscript{110} Thus, Sincox and Graham represent cases where results are consistent with both the Stone distinction between truth-furthering rights and non-truth-furthering rights, and a per se harmless-error approach.

This survey of the lower court decisions reveals that the vast majority of courts have followed the lead of the Court in Sykes in applying a variant of harmless-error analysis to define actual prejudice. That the Sykes Court left open for future resolution the precise definition of actual prejudice, however, has permitted other courts to explore different approaches to defining the term. One court has applied the more rigorous "colorable showing of innocence" requirement. Still other courts have found actual prejudice in cases involving claims that may be viewed either as truth-furthering rights under Stone v. Powell or as per se harmful under the exception to Chapman v. California. None of these approaches is inconsistent with Sykes, but each may yield different results in a given case. It remains, therefore, for the Supreme Court to resolve this conflict among the lower courts.

Cause

The other prong of the Sykes waiver standard bars habeas review in a procedural default case unless the petitioner can show "cause" for not raising his claim in accordance with state procedural rules. The Sykes decision, however, offers scant guidance in defining cause. The Court's observation that "[r]espondent has advanced no explanation whatever for his failure to object at trial [to the testimony offered by the police officers],"\textsuperscript{111} reveals only that the habeas petitioner bears the burden of showing cause.

The concept of cause focuses on why the petitioner failed to raise his claim in accordance with state procedures and whether those reasons are sufficient to excuse the petitioner's procedural default. Thus,

\textsuperscript{109} 571 F.2d at 879.
\textsuperscript{110} 454 F. Supp. at 651.
\textsuperscript{111} 433 U.S. 72, 91 (1977).
one court has defined cause as "a reasonable and valid explanation [for failure to comply with a state rule] other than a tactical decision to forego the available avenue of redress." The classic example of cause is the situation in which a defendant could not have discovered the factual predicate for a legal claim at the time the claim should have been asserted. It is difficult to imagine a more reasonable and valid explanation for a procedural default than the unavailability of the evidence underlying a claim.

This section addresses a more complex issue: what, if any, attorney conduct will constitute a reasonable and valid explanation for a failure to abide by a procedural rule? That the lower federal courts have focused on this particular problem is a predictable outgrowth of Sykes, for a major foundation of the Court’s decision was the majority’s desire to deter “sandbagging,” that is, the reasoned decision of an attorney to delay raising a constitutional claim on behalf of his client for tactical purposes.

The majority did not explicitly address itself, however, to the question of whether an attorney’s excusable or inadvertent conduct should be treated in the same manner as a tactical decision or whether such conduct is a reasonable and valid explanation for the procedural default. A habeas petitioner will inevitably suggest that he is being treated unfairly unless such behavior is deemed to be cause for his failure to raise a claim. In resolving this issue, a court is compelled to address itself to the legal and policy reasons for “binding” a defendant to his attorney’s conduct.

113. Two Rule 12 cases illustrate the point. A panel in the Second Circuit held that a defendant did not waive his right to make a motion to suppress evidence where the prosecution had “failed to disclose to [the defendant] his intention to introduce the evidence required by [Rule 12d] and [had violated] the understanding that all evidence discoverable under Rule 16 would be turned over” to the defendant at the time the defendant’s motion should have been made. United States v. Reed, 572 F.2d 412, 417 n.2 (2d Cir. 1978). In dictum, another federal court excused a waiver of a claim based on grand jury proceedings where the defendant could not have raised the claim prior to trial because he had not yet received a transcript of the grand jury proceedings. But the court held that the defendant’s failure to raise the claim during trial once he received a copy of the transcript was a waiver under Rule 12. United States v. Kaplan, 554 F.2d 958, 970 n.7 (9th Cir. 1977), cert. denied, 434 U.S. 956 (1978).

Similarly, the Supreme Court in Shortwell Mfg. Co. v. United States, 371 U.S. 341, 362-63 (1963) held that cause did not exist because the “facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial.” See text accompanying notes 17-19 supra. See also Arnold v. Wainwright, 516 F.2d 964, 971 n.11 (5th Cir. 1975) (availability of information is a key factor in finding cause under Rule 12), cert. denied, 426 U.S. 908 (1976).
114. See text accompanying note 22 supra.
Policy Considerations

The opinions in *Sykes* reveal two rationales for so binding a habeas petitioner. The first views the criminal defendant as the principal responsible for the actions of his agent, the trial lawyer.\(^{115}\) The theory is that “the lack of skill and incompetency of the attorney is imputed to the defendant who employed him, the acts of the attorney becoming those of his client.”\(^{116}\) Although some courts continue to embrace this agency rationale,\(^{117}\) its applicability in a criminal context has been attacked by a leading commentator who has articulated two reasons why the rationale fails to portray accurately the relationship between a criminal defendant and his attorney. First, the basic tenet of agency law evolved in order to protect an innocent third party from an agent’s representations. In criminal cases, however, “there is no innocent beneficiary of the accused’s agency-born liability for the ineptitude of his retained attorney-agent,” and secondly, a criminal defendant is usually incapable of performing the normal role of the principal by supervising his agent, the attorney.\(^{118}\) Second, an agency relationship assumes the presence of a principal who is capable of supervising his agent. A criminal defendant, however, is usually not equipped to exert the requisite direction.\(^{119}\) The procedural posture of a procedural default case exacerbates the general inability of a criminal defendant to supervise his attorney. Even a defendant who participates in the formulation of his defense and who is cognizant of rights personal to him is less likely to be well acquainted with procedural rules mandating waivers due to attorney inaction.\(^{120}\) Thus, the agency rationale appears particularly inapplicable as a justification for binding a habeas petitioner to his attorney’s conduct.

The second rationale evidenced in *Sykes* for binding a criminal defendant to the acts of counsel focuses on the needs of the adversary system.\(^{121}\) That system is premised on the view that truth is best dis-


\(^{116}\) Tompsett v. Ohio, 146 F.2d 95, 98 (6th Cir. 1944), cert. denied, 324 U.S. 869 (1945).


\(^{119}\) Id.

\(^{120}\) Chief Justice Burger has noted that “it is because ‘[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law’” that we held it constitutionally required that every defendant who faces the possibility of incarceration be afforded counsel.” 433 U.S. at 93 (Burger, C.J., concurring).

\(^{121}\) Id. at 93-94 (Burger, C.J., concurring); id. at 114 n.13 (Brennan, J., dissenting).
covered and justice best meted out through a process in which each party bears the burden of investigating and presenting its case before an impartial tribunal. Accordingly, the Supreme Court has stated that trial-type decisions must be left in the hands of counsel who have the authority to make tactical decisions.\textsuperscript{122} In his \textit{Sykes} concurrence, Chief Justice Burger contended that a defendant’s inability to exercise the expertise provided by trial counsel and the practical difficulties of interrupting a trial to insure that a client fully agrees with each tactical decision support this grant of authority to trial counsel.\textsuperscript{123} Yet the conclusion that an attorney must be free to make tactical decisions at trial does not offer a full explanation of the reasons why a criminal defendant should always be held accountable for his attorney’s inadvertence or error.

The decision to hold that a criminal defendant must be bound to his attorney’s conduct cannot be separated from the larger issue of the availability of habeas corpus in federal courts to attack prior state convictions. If a civil defendant is found liable for money damages in a breach of contract action because of his lawyer’s negligence, the defendant can be made whole by instituting a successful malpractice suit. A criminal defendant who suffers from his lawyer’s negligence has no equivalent remedy because even a successful malpractice action will not result in his freedom. Any meaningful remedy derives from a collateral attack on the judgment. This too differs from the civil context, in which no collateral attack is available against a winning party because of error or misconduct engaged in by the losing party’s counsel. These obvious distinctions between civil and criminal litigation suggest that while the needs of the adversary system may predominate in one context, they may be outweighed by the need for collateral attack in another.

The primary concerns in defining the scope of collateral attack are the state interest in finality, judicial efficiency, and federalism, on the one hand,\textsuperscript{124} and the habeas petitioner’s right to vindicate his innocence, on the other.\textsuperscript{125} Consider the case of a habeas petitioner who demonstrates that his attorney, acting negligently but within the

\begin{itemize}
  \item \textsuperscript{123} \textit{See} \textit{Wainwright v. Sykes}, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring). \textit{See also id.} at 95 (Stevens, J., concurring).
\end{itemize}
bounds of constitutionally effective assistance of counsel, failed to adhere to a state procedural rule, and thus did not present a meritorious claim that the petitioner had been denied his constitutional right to a fair and impartial petit jury. Assuming that the petitioner has demonstrated actual prejudice, the question posed is whether the petitioner's interest in redressing unjust incarceration is outweighed by the need of the adversary system to bind clients to the conduct of their lawyers and the state interest in finality, judicial efficiency, and federalism. Whichever way the question is resolved, the cause test has suddenly become the fulcrum of deciding whether a possibly innocent person should be permitted to procure relief for violation of his constitutional rights.

The lower federal courts applying *Sykes* can resolve the tension between the defendant's interest and the combined demands of the adversary system and the state's interests in one of two ways. First, courts may ignore the defendant's interest and focus solely on whether the needs of the adversary system along with the state's interests are served by classifying a certain type of attorney conduct as cause. This approach treats the cause factor as an inquiry exclusively into whether the attorney's conduct is a valid and reasonable explanation for a procedural default. Such an inquiry would not take into account the defendant's interest no matter how compelling, relegating it instead to the actual prejudice portion of the cause-and-prejudice test. Second, courts may consider the defendant's interest along with the state's interests and the needs of the adversary system, and relax the preclusive effect of the cause requirement if the defendant may be unjustly incarcerated. This approach, although avoiding the possibility that an innocent person could be kept in prison because his attorney erred, transforms cause from half of a conjunctive test into a factor that assesses whether social justice would be served by barring consideration of the habeas petitioner's constitutional claims on the merits.

The Lower Court Decisions

The recent decisions of the lower federal courts applying the *Sykes* test generally speak the language of the first approach outlined above, but the results of the cases generally reflect the second approach. Court opinions treating cause as a factor that looks only to the needs of the adversary system and the state interest in finality have disagreed sharply over what, if any, constitutionally effective attorney conduct provides a reasonable and valid explanation for a procedural default. But the same decisions, when viewed from the vantage point of the second approach, which considers the defendant's interest in securing
relief from unjust incarceration, form a more consistent pattern. The decisions show that the types of attorney conduct that constitute cause significantly expand if a habeas petitioner presents the spectre of continuing unjust incarceration.

**Cause Defined Solely in Terms of Attorney Conduct**

A survey of the recent decisions that have applied *Sykes* reveals that a lawyer’s failure to raise a claim may constitute cause if the attorney’s conduct was (1) constitutionally ineffective assistance of counsel, (2) excusable because the lawyer either acted negligently or because no lawyer could reasonably have been expected to raise the claim, or (3) not in fact a strategic decision.

An attorney’s strategic or tactical decision not to raise a claim will not constitute cause, but a finding of ineffective assistance of counsel will. This issue arose in *Sincox v. United States*, where a federal prisoner sought to vacate his conviction on the ground that he had been denied the right to a unanimous jury trial. Trial counsel had neither raised this claim at trial nor filed an appeal in spite of the prisoner’s requests that he do so. The court in *Sincox* characterized the attorney’s actions as constituting denial of the right to effective assistance of counsel and found that *Sykes* cause existed. Similarly, in *Rinehart v. Brewer*, the Eighth Circuit found ineffective assistance of counsel one ground for its holding that the petitioner had shown cause for his failure to bring the claim of an involuntary guilty plea to the attention of the trial court.

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126. Satterfield v. Zahradnick, 572 F.2d 443, 446 (4th Cir. 1978); Rodriguez v. Estelle, 536 F.2d 1096, 1097 (5th Cir. 1976); United States v. Hearst, No. CR-74-364 (N.D. Cal. Nov. 7, 1978). In the two circuit court cases the courts found that the procedural error that constituted a *Sykes* waiver was also a deliberate by-pass under *Fay v. Noia*. These findings may support Justice White’s belief that “the deliberate by-pass rule of *Fay v. Noia* affords adequate protection to the State’s interest in insisting that defendants not flout the rules of evidence.” Wainwright v. Sykes, 433 U.S. 72, 98 (1977) (White, J., concurring).

127. 571 F.2d 876 (5th Cir. 1978).

128. *Id.* at 879-80.

129. 561 F.2d 126 (8th Cir. 1977).


A claim of ineffective assistance of counsel may therefore serve double duty, standing both as an independent claim of a constitutional violation and cause for failure to assert any other claim not raised due to ineffective counsel. However, not every ineffectiveness claim will establish cause—for example if the asserted ineffectiveness at trial was not raised on appeal by a different lawyer representing the defendant—and not every instance of cause
The eleven circuit courts of appeals have adopted different standards to define ineffective assistance of counsel. The First, Second, and Tenth Circuits continue to measure ineffectiveness claims by the traditional "mockery-of-justice" formula. The Fifth, Sixth, and Ninth Circuits have assured each criminal defendant counsel "reasonably likely to render and rendering reasonably effective assistance." The Third and Eighth Circuits have held that an attorney in a criminal trial must exercise "the customary skill and knowledge which normally prevails at the time and place."

These varying standards have made it difficult, in the abstract, to predict whether a single instance of lawyer failure to raise a claim pursuant to a state procedural requirement will constitute ineffective assistance of counsel. Under either the Third and Eighth Circuit's "community standards" approach or the Fifth Circuit's "reasonable lawyer" rule, courts review "all aspects of defense counsel's assistance to the accused." Thus, lawyer conduct that may constitute ineffective assistance in one context, may not in another. In United States v. Easter, where trial counsel failed to object to the legality of a police search of the defendant's home and the seizure of a shotgun found during the search, the court held that a single lawyer error amounted to ineffective assistance of counsel. Finding the attorney's conduct so "derelict" as to constitute ineffective assistance, the court noted that counsel must assert a claim that may be his client's only defense, particularly "when that defense has a factual basis and there is a recognized and obvious means to suppress evidence which has allegedly been ille-

due to attorney conduct demands a showing of constitutionally ineffective counsel. See text accompanying notes 141-179 infra.

131. See United States v. Taylor, 562 F.2d 1345, 1360 (2d Cir. 1978); United States v. Ramirez, 535 F.2d 125, 129-30 (1st Cir. 1976); United States v. Dingle, 546 F.2d 1378, 1385 (10th Cir. 1976).
132. Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977); Beasly v. United States, 491 F.2d 687, 693-96 (6th Cir. 1976); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974).
133. United States v. Johnson, 531 F.2d 169 (3rd Cir. 1976); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976), cert. denied, 433 U.S. 844 (1977). The remaining circuits use a variety of standards. See United States v. DeCosta, 487 F.2d 1197 (D.C. Cir. 1973) (reasonably competent assistance of an attorney acting as his client's conscientious advocate); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977) (whether defense counsel's representation is "within the range of competence demanded of attorneys in criminal cases"); United States v. Warden, 545 F.2d 21, 23-24 (7th Cir. 1976) (a minimum standard of professional representation).
136. Id. at 665.
A class of cases exists, however, in which attorney error does not constitute ineffective assistance of counsel. For example, the Fifth Circuit in *McDonald v. Estelle*,\(^\text{138}\) held that an attorney's failure to object to the introduction of prior uncounseled convictions at the punishment phase of a trial did not rise to the level of ineffective assistance of counsel, even though the introduction of such evidence did constitute reversible error.\(^\text{139}\) Similarly, the court in *Arnold v. Wainwright* found that although trial counsel had not been reasonably diligent in investigating a claim, their error did not constitute ineffective assistance.\(^\text{140}\)

Federal courts thus have evaluated whether constitutionally effective attorney conduct will provide cause for failure to raise a claim either based on whether it is excusable when compared to the behavior of other attorneys or because it is nonstrategic. The suggestion that certain attorney conduct may be "excusable," thereby allowing litigation of the constitutional claim, originates in the *Sykes* Court's citation with approval of Justice Powell's earlier concurrence in *Estelle v. Williams*.\(^\text{141}\) In *Williams*, a majority of the Court held that a state defendant's due process rights are infringed if he is compelled to appear at trial wearing prison clothes but not if he appears in prison garb without objection.\(^\text{142}\) Justice Powell took a different tack. He proposed that a state court conviction should be left standing if the defendant "has made an 'inexcusable procedural default' in failing to object at a time when a substantive right could have been protected."\(^\text{143}\) Applying the test to the facts under review, Justice Powell found that the due process claim had not been raised because Williams' attorney believed, incorrectly, that an objection would have been futile. In fact, the state trial court judge had allowed defendants to stand trial in civilian clothing if they wished, and both the state courts and the federal court of appeals for that state had recognized that trial in prison clothing could be considered constitutional error.\(^\text{144}\)

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\(^{137}\) *Id.* at 666.


\(^{139}\) *Id.* at 670-72.

\(^{140}\) 516 F.2d 964, 971 (5th Cir. 1975), cert. denied, 426 U.S. 908 (1976).


\(^{142}\) 425 U.S. at 512-13.

\(^{143}\) *Id.* at 513-14 (Powell, J., concurring).

\(^{144}\) *Id.* at 514 (Powell, J., concurring).
Justice Powell's "inexcusable procedural default" test was originally proposed by Professor Henry Hart prior to the Supreme Court's decision in *Fay v. Noia.* Professor Hart criticized the state of the law that allowed state prisoners to relitigate in federal habeas court constitutional claims that had been considered by state courts, but barred habeas review if an adequate and independent state procedural ground would have precluded review of the constitutional claim on direct appeal to the Supreme Court. Nevertheless, Professor Hart believed that the power of state courts to regulate their own procedure mandated that "[r]easonable consequences" flow from a failure to comply with "reasonable procedural rules." Accordingly, he suggested that "[t]here is room ... for a distinct doctrine of inadvertent loss of [federal constitutional rights] by inexcusable procedural default."

Use of the "inexcusable procedural default" formulation to define cause requires a definition of what sort of attorney conduct is excusable. The attempts of several courts to analyze an attorney's failure to raise a claim in terms of a reasonableness test suggests two possibilities. The first is that cause is shown where an attorney has acted unreasonably in not raising a claim. In *Jiminez v. Estelle,* a panel of the Fifth Circuit suggested in dicta that a habeas petitioner, by demonstrating that his lawyer knew of the facts underlying his claim and that any reasonable attorney so apprised would have raised the claim, could

146. "Apart from the difficulty of reconciling *Brown v. Allen* and *Daniels v. Allen* in terms of the felt sense of justice, the distinction between the two cases ... puts pressure on the state judicial systems in exactly the wrong direction. It tells the state courts that the more liberal they are in considering the federal constitutional claims of state prisoners on the merits the more freely they will be subjected to the delays and the indignity, as it is often felt to be, of federal-court review of their decisions, whereas the more astute they are to lay procedural traps for criminal defendants the surer they will be of immunizing their decisions from federal examination." *Id.* at 118.
147. *Id.*
148. *Id.*
149. Although the courts that have found certain attorney conduct to be excusable have not directly addressed the issue of whether strategic decisions may be excusable, the notion of a reasonableness test suggests that the distinction between strategic and nonstrategic behavior may not control the "excusable" issue. See 433 U.S. at 99 (White, J., concurring) (an attorney's decision not to raise a claim of which he is aware will not constitute a deliberate by-pass unless the failure to raise a claim "is sufficiently egregious to demonstrate that the services of counsel were not 'within the range of competence demanded of attorneys in criminal cases,' *McMann v. Richardson,* 397 U.S. 759, 771 (1970)"). But cf. *United States v. Hearst,* No. CR-74-364 (N.D. Cal. Nov. 7, 1978) (a defense counsel's tactical choice cannot serve as the basis for a claim of ineffective assistance of counsel).
150. 557 F.2d 506, 511 (5th Cir. 1977).
show *Sykes* cause for his lawyer's failure to object to the introduction at trial of prior uncounseled convictions. The court also noted that insofar as the lawyer had objected to the introduction of the evidence on other grounds, petitioner could demonstrate that counsel's failure to object was not strategic. The particularity with which the court detailed the course of such a claim indicates that the *Jiminez* court would hold it to satisfy the *Sykes* cause standard. At least two courts have read *Jiminez* in this fashion\(^\text{151}\) and two others have specifically stated that similarly unreasonable attorney conduct is cause.\(^\text{152}\)

The leading case to suggest that unreasonable attorney conduct will not constitute cause was handed down in *Arnold v. Wainwright*\(^\text{153}\) by a different panel of the Fifth Circuit. The court in *Arnold* held that a state prisoner who had failed to assert his right under state law to challenge the selection of the petit jury was barred from seeking habeas corpus relief on the waived claim. Although the court specifically declined to find that the prisoner's trial counsel had been constitutionally ineffective, the court affirmed the district court's finding that counsel did not exercise reasonable diligence in investigating the possibility of a claim based on unconstitutional jury selection procedures.\(^\text{154}\) Nevertheless, the court refused to accept the view that an attorney's failure to exercise reasonable diligence should relieve a petitioner from the effect of the error. The court justified its decision by explaining that enforcement of the state procedural default would (1) induce attorneys to pursue more vigorous investigations of their clients' legal claims,\(^\text{155}\) (2) encourage the litigation of all claims during a single judicial proceeding, and (3) further ensure the finality of criminal judgments.\(^\text{156}\)

Underlying the *Arnold* decision is the assumption that a judicially imposed forfeiture of constitutional rights, even for failure of an attorney to exercise reasonable diligence, will deter future attorney error. This assumption rests upon the familiar principle of tort law that a reasonable standard of care may impose a greater duty than the prevailing


\(^{152}\) Farrow v. United States, 580 F.2d 1339, 1356-57 (9th Cir. 1978) (en banc); Collins v. Auger, 451 F. Supp. 22, 28 (S.D. Iowa 1977), vacated and remanded, 577 F.2d 1107 (8th Cir. 1978), cert. denied, 426 U.S. 908 (1978). The court in *Arnold* applied the waiver standard of *Davis v. United States*, see text accompanying notes 11-13 supra, precursor of the *Sykes* test, to a habeas petition brought by state prisoners. *Id.* at 967.

\(^{153}\) Id. at 971.

\(^{154}\) Id. at 971 & n.12.

\(^{155}\) Id.
practice or custom. For example, Judge Learned Hand's opinion in The T.J. Hooper,157 cited in Arnold v. Wainwright,158 held that tugboat operators acted unreasonably in not carrying radio receiving equipment, even though such equipment was not commonly used at the time of the decision.159 Similarly, Arnold v. Wainwright may stand for the proposition that the Sykes test is designed not only to foreclose deliberate by-pass, but also to induce attorneys to act more carefully in assessing their clients' possible claims.

The deterrent effect assumed in Arnold has two corollary principles: that courts are not treating criminal defendants unjustly by refusing to hear habeas petitions in order to improve the performance of lawyers in general; and that courts, by so doing, will garner a level of deterrence higher than would otherwise be achieved. Justice Brennan, for one, disputes the second assumption. He suggested in his Sykes dissent that the forfeiture of state remedies and direct review in the United States Supreme Court sufficiently encourages attorneys to upgrade the quality of their representation without the need for forfeiture of habeas corpus relief.160

The second possibility for defining cause in terms of a reasonableness standard is found in cases holding that cause is shown when an attorney's failure to raise a claim conforms completely with the expected and reasonable behavior of the bar. The approach is similar to the classic formulation of cause enunciated in Rule 12 cases—cause is shown when a defendant could not be expected to have discovered the factual predicate for a legal claim at the time the claim should have been presented.161 Here, however, the factual predicate is clear, but the legal basis for the claim is not.

In Cole v. Stevenson,162 a state prisoner was convicted of second degree murder after a jury trial and his conviction was affirmed by the North Carolina Supreme Court in 1971. Three years later, the Supreme Court in Mullaney v. Wilbur163 held unconstitutional a state

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157. 60 F.2d 737, 740 (2d Cir.), cert. denied, 287 U.S. 662 (1932).
158. See 516 F.2d at 971 n.12.
159. Judge Hand wrote: "There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence . . . . Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices . . . . Courts must in the end say what it required; there are precautions so imperative that even their universal disregard will not excuse their omission." 60 F.2d at 740.
160. See 433 U.S. at 113 (Brennan, J., dissenting).
161. See note 113 & accompanying text supra.
law imposing on a criminal defendant the burden of proof in reducing a murder charge to manslaughter. In 1977, the Supreme Court in *Hankerson v. North Carolina* applied *Mullaney* retroactively. After both cases were decided, Cole filed a petition for habeas corpus relief alleging that he had been forced to shoulder evidentiary burdens inconsistent with *Mullaney*. The district court, assuming for the purposes of decision that Cole's objections to the burden of proof jury instructions should have been, but were not, raised on direct appeal, considered whether cause existed.

The court noted that Justice Powell, in his *Williams* concurrence, had emphasized that the policies underlying the availability of habeas corpus “need not be carried to the length of allowing counsel for a defendant deliberately to forego objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection, simply because he thought objection would be futile.” In the court’s view, Justice Powell’s concurrence “[could] be interpreted as necessitating an attorney have knowledge of his client’s right and purposefully or erroneously not except to its violation.” The court observed that at the time of Cole’s trial in North Carolina, the bar “had no inkling” that the state’s standard jury instructions were constitutionally invalid, and that “few, if any attorneys” would have seen reason to object. There was, therefore, “no deliberation, no awareness and no tactical choice” underlying failure to raise the *Mullaney* claim. Accordingly, the court held that cause exists where a constitutional violation “not perceived by the bar or bench” was foregone.

The district court’s opinion in *Cole v. Stevenson* is significant in two respects. First, it suggests that attorney conduct is not excusable under Justice Powell’s formulation if the lawyer knew of the claim but negligently failed to raise it. Second, it holds that an attorney’s reasonable lack of knowledge of a constitutional claim is cause. *Cole v. Stevenson* may not be compelled by Justice Powell’s concurrence, but it is at least not barred by it. Williams’ counsel, “fully aware” of the

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166. 447 F. Supp. at 1273.
prison clothes issue, did not raise it because he believed the claim would be unsuccessful.\textsuperscript{168} Cole's counsel, by contrast, apparently neither knew, nor should have known, of the \textit{Mullaney} claim.

Alternatively, some lower courts have focused not on whether the attorney's conduct, in a comparative sense, was excusable, but on whether, in fact, the attorney failed to raise a claim for nonstrategic reasons.\textsuperscript{169} These courts begin with the assumption that inadvertant attorney conduct is not at the heart of the Supreme Court's concern with "sandbagging." Attorneys who inadvertantly fail to raise a claim are, by definition, not taking "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."\textsuperscript{170} Further, two members of the \textit{Sykes} Court suggested that Sykes' counsel may have acted for strategic purposes.\textsuperscript{171} Accordingly, these courts have concluded that \textit{Sykes} does not preclude the possibility that inadvertant attorney conduct is cause.

For example, the court in \textit{Collins v. Auger}\textsuperscript{172} noted that the \textit{Sykes} court left "the impression that the possibility that defense counsel failed to object . . . as a part of trial strategy weighed heavily in the decision that there was no cause."\textsuperscript{173} In the \textit{Collins} case, the habeas petitioner alleged that he had been denied due process by the trial court's admis-

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\item \textsuperscript{168} See text accompanying notes 141-44 \textit{supra}.
\item \textsuperscript{169} A theoretical distinction exists between nonstrategic and inadvertant defaults because an attorney may make an advertant decision not to raise a claim for nonstrategic purposes. Thus, a decision not to raise a seemingly frivolous claim is clearly advertant, yet it is not expected to yield strategic benefits. \textit{See generally} Wainwright v. \textit{Sykes}, 433 U.S. 72, 98-99 (1977) (White, J., concurring). For the purposes of this Article, the terms "inadvertant" and "nonstrategic" are used interchangeably, because it appears that appellate court judges reviewing attorney conduct will search the trial record for strategic purposes that might have motivated the attorney conduct, rather than ask whether the attorney conduct was, in fact, advertant or inadvertant. \textit{See id.} at 96 (Stevens, J., concurring) ("The record persuades me that competent trial counsel could well have made a deliberate decision not to object to the admission of [Sykes'] in-custody statement."); Estelle v. Williams, 425 U.S. 501, 508 (1976) ("Instances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show, for example, that it is not an uncommon defense tactic to produce the defendant in jail clothes in hope of eliciting sympathy from the jury."); \textit{id.} at 514 (Powell, J., concurring) ("As is frequently the case with such trial-type rights as that involved here, counsel's failure to object in itself is susceptible of interpretation as a tactical choice.").
\item \textsuperscript{170} Wainwright v. \textit{Sykes}, 433 U.S. 72, 89 (1977).
\item \textsuperscript{171} \textit{See, e.g.}, \textit{id.} at 93 n.2 (Burger, C.J., concurring); \textit{id.} at 96-97 (Stevens, J., concurring). \textit{But see id.} at 104-05 (Brennan, J., dissenting).
\item \textsuperscript{173} \textit{id.} at 27 (footnote omitted).
\end{itemize}
sion of psychiatric testimony disclosing inculpatory statements made by petitioner. Although trial counsel had objected to the testimony on three grounds, he had not raised the due process objection. Neverthe- 
less, the court found the attorney's failure, which resulted from his ignorance of the possible constitutional objection, to be cause. Significantly, the Collins court, unlike the court in Cole v. Stevenson, did not inquire into the reasonableness of the attorney's conduct. The Collins test is accordingly a less stringent standard.

Several judges, however, have rejected the view that nonstrategic attorney conduct will constitute cause. To accept that view, the court in Porter v. Leeke noted, would mean "every time a defendant's attorney failed to object . . . the defendant could assert that his attorney's ignorance of the need for an objection was 'sufficient' cause to avoid the Wainwright v. Sykes bar. This Court does not feel that the exception should be allowed to swallow the rule." This position derives support from both the rationale of Arnold v. Wainwright that use of the cause test can prevent future forfeiture, and the observation of Professor Hart that some inadvertent forfeitures rightfully preclude review. The danger that the exception will vitiate the rule emphasizes the difficulty in administering a cause standard that depends on whether an attorney's behavior is, in fact, nonstrategic. Although the Porter court was apparently concerned that all attorney inaction could be characterized as nonstrategic, it is at least as likely that the opposite would be true. An attorney testifying at a habeas corpus hearing may well attempt to protect his professional reputation and foreclose incipient malpractice actions by justifying even truly nonstrategic actions as intentional. In the absence of attorney testimony the availability of

174. Trial counsel argued that introduction of the psychiatrist's testimony violated the doctor-patient privilege, Miranda, and the hearsay rule. Id. at 25.
175. Id. at 27-28. In affirming the district court's finding of cause, the Eighth Circuit specifically agreed that the trial counsel's failure "was not a matter of trial strategy, but was the result of counsel's unawareness of the due process violation," 577 F.2d at 1110 n.2, and met the test for cause. Id. at 1110. The court in Graham v. Maryland, 454 F. Supp. 643, 648 (D. Md. 1978), similarly found that cause existed for failure to raise a Mullaney claim where a state prisoner acting pro se was unaware of Mullaney's due process principle. The court stated that "tactical gamesmanship is certainly non-existent here. Petitioner had absolutely nothing to gain by holding this issue in reserve [during earlier post-collateral attacks on his state court conviction]." Id. at 649.
habeas corpus relief may turn on how a court assesses, on the basis of a written record, an attorney’s motivation for inaction. Either a reasonableness test, which compares attorney behavior to an accepted norm regardless of the individual attorney’s intent, or the exclusion of nonstrategic behavior from the definition of cause would avoid this judicial burden.

In sum, the lower federal courts apparently agree that ineffective assistance of counsel is cause for failure to raise a claim. The courts have split sharply, however, when they have considered what, if any, constitutionally effective assistance of counsel provides a reasonable and valid explanation for a procedural default. By comparing the behavior of the habeas petitioner’s attorney to the behavior of attorneys as a whole, some courts have suggested that cause exists when an attorney acts negligently or when he fails to raise a claim that no reasonable lawyer would have raised. Other courts have focused solely on whether the attorney’s behavior was nonstrategic, while both the reasonableness approach, similar in nature to the “inexcusable procedural default” test, and the nonstrategic analysis have been rejected by still other courts interpreting Sykes.

**Cause as a Balancing of Three Interests**

If cause is a factor that considers only the needs of the adversary system and the state interest in finality, judicial efficiency and federalism, then the lower court decisions applying Sykes are hopelessly irrec- oncilable. Two courts, however, have considered the defendant’s interest in securing release from unjust incarceration in defining the cause test even though the justice of continued confinement does not logically speak to the causes of a procedural default. Their decisions find precedent in two Rule 12 cases in which courts found “cause shown” where defendants presented ample evidence of prejudice but provided no explanation for their failure to abide by state procedures.

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178. See note 169 supra.
180. In United States v. Wasson, 568 F.2d 1214 (5th Cir. 1978), the court vindicated a defendant’s claim that she was prejudiced by joinder of her trial for possession of stolen property with co-defendants, even though the defendant gave no explanation for failing to ask for a severance prior to or during trial: “Under the circumstances of this case, co-defendant Littrel brought to the trial court’s attention the possibility of prejudice by his motion for severance and the trial court denied that motion as it would have Wasson’s. Because the trial court has a continuing duty to be on the lookout for possible prejudice, and the jury’s
In fact, a survey of the early cases analyzing what attorney conduct constitutes cause suggests that courts define cause expansively when they confront the possibility of "unjust incarceration," but define cause more narrowly when a habeas petition does not appeal to their sense of justice. Although it is difficult to define precisely the term "unjust incarceration," courts have found constitutionally effective attorney conduct to be cause in cases involving violations of due process under *Mullaney v. Wilbur*,181 the deprivation of the right to an impartial jury,182 the right to have uncounseled convictions excluded from use at a later trial,183 the due process assertion that, as a matter of state law, the petitioner is innocent,184 and the violation of due process by the introduction of inculpatory statements made to an examining psychiatrist.185 Courts apparently have defined cause more narrowly when the petitioner has not shown either actual prejudice186 or the existence of a constitutional violation,187 or when he has asserted the violation of a non-truth-furthering right.188

If the existence of possible injustice influences the showing necessary to establish cause, then it may be deceptive to view the cause-and-verdict in this case made the existence of actual prejudice apparent, we find that in the interests of justice, Wasson's judgment of conviction should be reversed and her case remanded for a new trial."

Id. at 1223. See also *United States v. Shackleford*, 180 F. Supp. 857 (S.D.N.Y. 1957) (where an indictment was duplicitous by charging more than one crime in the same count, and the defendant would be prejudiced by the duplicity, the court found no waiver even though the defendant failed to raise the duplicity issue before trial). See generally *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950) (in a trial for World War II treason, the court reached the merits of two claims without finding cause for failure to raise the claims at trial).


183. See *Farrow v. United States*, 580 F.2d 1339 (9th Cir. 1978) (en banc).

184. See *Canary v. Bland*, 583 F.2d 887 (6th Cir. 1978) (Merrit, J., concurring) (appellant innocent of charge of being a habitual offender because an earlier conviction violated due process and thus became unavailable for late enhancement purposes).


prejudice test as two independent inquiries. Justice Stevens' evaluation in *Sykes* of the cause-and-prejudice test suggests this conclusion:

> The notion that a client must always consent to a tactical decision not to assert a constitutional objection to a proffer of evidence has always seemed unrealistic to me. Conversely, if the constitutional issue is sufficiently grave, even an express waiver by the defendant may sometimes be excused. Matters such as the competence of counsel, the procedural context in which the asserted waiver occurred, the character of the constitutional right at stake and the overall fairness of the proceeding, may be more significant than the language of the test the Court purports to apply.\(^1\)

The cases collected by Justice Stevens\(^1^9\) to demonstrate the operation of *Fay*’s deliberate by-pass standard illustrate the same point. Courts have been willing to hold that failure to raise a claim constitutes deliberate by-pass where the habeas petitioner has not been harmed by the error,\(^1^9\) but have not been willing to preclude habeas corpus relief when the conviction rests on the basis of an illegal search,\(^1^9\) or when the attorney made a tactical, but constitutionally incorrect, decision not to allege that a confession had been coerced.\(^1^9\)

Notwithstanding the relevant Supreme Court language, the federal courts appear to be employing a variable cause standard that shifts as the courts weigh the defendant’s interest in securing relief from unjust incarceration, the state’s interest in finality, judicial efficiency and fed-

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\(^{190}\) *Id.* at 94 n.1 (Stevens, J., concurring).

\(^{191}\) In Whitney v. United States, 513 F.2d 326 (8th Cir. 1974), the court found that trial counsel conceded the validity of a consent search later challenged by a writ of habeas corpus and that counsel “could have believed that if they unsuccessfully objected to the searches at trial, they would have been admitting a possessory interest in the searched premises where the contraband was found.” *Id.* at 329. The court in United States v. Henderson, 462 F.2d 1125, 1129 (2d Cir. 1972), found that “it was the deliberate and consistent strategy of Terry’s counsel at his state murder trial not only not to question the voluntariness of his confession but to use it affirmatively to support Terry’s testimony of lack of any premeditated intent to kill.” In United States v. Rundle, 429 F.2d 791, 795 (3rd Cir. 1970), the court found that defense counsel did not object to the introduction of an allegedly coerced confession “because they had concluded that the statement was admissible. This conclusion was no doubt based in some measure on Broaddus’ statement to his lawyers that he ‘voluntarily gave information.'”

\(^{192}\) See Frazier v. Roberts, 441 F.2d 1224, 1229 (8th Cir. 1971) (in its petition for rehearing the state admitted that “the search warrants authorizing the searches . . . were invalid, that the evidence obtained by those searches should have been suppressed, and that without the unlawfully obtained evidence appellant could not have been convicted.”).

\(^{193}\) See Moreno v. Beto, 415 F.2d 154, 157 (5th Cir. 1969) (“A waiver could not result from a deliberate choice of trial strategy based on an unwillingness to expose appellant to the existent Texas procedure not then known to be unconstitutional” under Jackson v. Denno, 378 U.S. 368 (1964)).
eralism, and the needs of the adversary system. In so doing, the courts have perhaps reverted to the original use of the term "cause shown" provided by the Court in Shotwell. \(^{194}\) "It is entirely proper," the Shotwell Court instructed, "to take the absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of [Rule 12]." \(^{195}\) Use of a cause standard that considers the possibility of unjust incarceration explains why it is difficult, if not impossible, to predict whether a particular type of attorney conduct always will, or always will not, constitute cause. Although such results appear inconsistent when measured against any definition of cause that only looks to the reasonableness of the petitioner's explanation for failure to abide by a state rule, they may be entirely consistent with the balancing process that is involved in weighing the defendant's interest, the state's interest, and the needs of the adversary system. The results may also be consistent with the assurance of the court in Sykes that the application of the cause-and-prejudice test would not result in "a miscarriage of justice." \(^{196}\)

**Conclusion**

In Wainwright v. Sykes, the Supreme Court promulgated a new waiver standard to govern the procedural default of a habeas petitioner's Miranda claim. The Court's cause-and-prejudice test thus displaces, at least for certain claims, the deliberate by-pass standard adopted earlier by the Supreme Court in Fay v. Noia. Although the Sykes Court applied the cause-and-prejudice test to the facts before it, the Court did not elucidate the showing necessary to establish either actual prejudice arising from a constitutional violation or cause for failure to raise a constitutional claim in accordance with state procedure.

A survey of the lower federal court cases applying the cause-and-prejudice standard discloses substantial conflict in the definition and application of those terms. The vast majority of courts defining actual prejudice have used a variant of harmless-error analysis. One court, however, has explicitly rejected the harmless-error approach and has embraced the more rigorous "colorable showing of innocence" requirement. Still other courts have found actual prejudice in cases involving claims that may be viewed either as truth-furthering rights or as per se harmful error.

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194. See text accompanying notes 17-19 supra.
196. 433 U.S. at 91.
Virtually all of the discussion of the meaning of cause has centered on what, if any, attorney conduct will provide a habeas petitioner with a reasonable and valid explanation for his failure to abide by a procedural rule. Although courts have generally agreed that constitutionally ineffective assistance of counsel constitutes cause, they have split sharply over whether cause is shown in cases involving attorney conduct that is in some sense "excusable" (either because the attorney acted negligently or because he failed to raise a claim no attorney would have raised) or that is, in fact, nonstrategic. The cases may be more consistent than they appear, however, because the courts that read cause expansively have generally been confronted with facts that suggest the possibility of unjust incarceration. Even though unjust incarceration does not provide an explanation for failure to raise a claim, courts may be more sympathetic to petitioners who, but for the presence of the cause requirement, could vindicate their innocence.

In sum, promulgation of the Sykes cause-and-prejudice test has engendered considerable confusion and inconsistency among the lower federal courts. Although the contours of the shift in policy from Fay v. Noia to Sykes are clear, many of the details are not. In grappling with the unresolved issues after Sykes, the lower federal courts have created a substantial body of law that, while often contradictory, presents the alternatives available to the Supreme Court in completing the design of which Sykes is only one step.
Teacher Layoffs in California: An Update

By Nancy B. Ozsogomonyan

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