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Federal Courts - Habeas Corpus - State Prisoner - Waiver of Constitutional Right - Coerced Confession

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Recent Decisions

FEDERAL COURTS—HABEAS CORPUS—STATE PRISONER—WAIVER OF CONSTITUTIONAL RIGHT—COERCED CONFESSION—The United States Supreme Court has held that absent both a showing of cause for failure to make a timely objection and a showing of actual prejudice, a state prisoner's failure to comply with a state statute requiring that objections to the introduction of illegally obtained confessions must be raised at or prior to trial precludes federal habeas corpus relief on a subsequent claim that the confession was coerced.

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

John Sykes was convicted of murder in the third degree after a jury trial in Florida in which two policemen testified concerning incriminatory statements Sykes made after he had been arrested and given his *Miranda* warnings.[1] During the trial it was shown that Sykes had been intoxicated at the time of his arrest; however, Sykes' counsel raised no objection to the admissibility of the statements on grounds that his client failed to understand the *Miranda* warnings and gave them involuntarily.[2] It also appeared that this issue was not raised on direct appeal to the intermediate appellate court of Florida, where the conviction was affirmed.[3] Subsequently, in a petition for a state writ of habeas corpus, Sykes challenged the admissibility of his confession for failure to understand the *Miranda* warnings. After that petition was denied by state court, the identical claim was presented to the United States District Court for the Middle District of Florida in a petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254.[4] The district court found the

1. Wainwright v. Sykes, 433 U.S. 72, 74 (1977). Miranda v. Arizona, 384 U.S. 436 (1966), held that the constitutional prerequisites to the admissibility of confessions made while in police custody consisted of warning the suspect prior to questioning that he has the right to remain silent, that any statement made may be used as evidence against him, and that he has the right to the presence of either retained or appointed counsel.

2. 433 U.S. at 74-75.

3. There is some confusion on this point. In its denial of Sykes' petition for state habeas corpus, the Florida Second District Court of Appeals intimated that the issue had been raised on direct appeal. The federal district court, viewing the petition for a federal writ of habeas corpus, found it had not been so raised and Sykes did not challenge that finding. *See id.* at 75 n.3.

4. 28 U.S.C. § 2254 (1970), which confers jurisdiction upon federal courts for habeas corpus petitions by state prisoners, provides in part:

record in the state courts too meager to render a determination on the involuntariness claim. It therefore ordered a state evidentiary hearing on that issue[5] and stayed issuance of the writ pending such hearing.[6] The state appealed the interlocutory order to the Fifth Circuit Court of Appeals, where the district court was affirmed.[7] The court of appeals held that an evidentiary hearing on voluntariness was required, and further, that Sykes' failure to comply with a Florida "contemporaneous objection" rule[8] was not a bar to the issuance of a federal writ of habeas corpus. In its view, the state procedural default would act as a bar only if there had been a deliberate bypass of the objection at trial for tactical reasons.[9] *Davis v. United States,*[10] which barred federal habeas corpus to one who had failed to comply with federal procedural rules absent a showing of cause and proof that prejudice resulted, was distinguished. In *Davis,* there had been no prejudice to the defendant; however, prejudice was inherent in failure to object to admission of an incriminating statement as in *Sykes.*[11] After granting certiorari,[12] the United States Supreme Court reversed and remanded.[13]

Justice Rehnquist prefaced the majority opinion by noting that

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

5. The district court's order was made on the basis of Jackson v. Denno, 378 U.S. 368 (1964), which held that a federal habeas court, faced with an incomplete or unreliable state record regarding the voluntariness of a confession upon which the conviction was based, should return the case to state court for a full evidentiary hearing on that issue before determining the merits of the federal habeas corpus petition.

6. 433 U.S. at 75-76. The unpublished interlocutory order of the district court was also discussed by the court of appeals. Wainwright v. Sykes, 528 F.2d 522, 523-24 (5th Cir. 1976), *rev'd,* 433 U.S. 72 (1977).

7. 528 F.2d at 528.

8. FLA. R. CRIM. P. 3.190(i) provides in relevant part:

(1) *Grounds.* Upon motion of the defendant or upon its own motion, the court shall suppress any confession or admission obtained illegally from the defendant.

(2) *Time for Filing.* The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

9. This was the rule enunciated in Fay v. Noia, 372 U.S. 391 (1963). *See* text accompanying notes 39-44 *infra.*

10. 411 U.S. 233 (1973).

11. 528 F.2d at 526-27.

12. 429 U.S. 883 (1976).

13. 433 U.S. at 73.

in all major issues surrounding the use of federal habeas corpus as a vehicle for collateral review of state judgments[14] there had been an "historic willingness" by the Court to revise its prior views on the proper scope of availability of the writ.[15] With this groundwork laid, the majority addressed the issue of when a procedural default in state court should be a bar to issuance of a federal habeas corpus writ under 28 U.S.C. § 2254. The standard of *Fay v. Noia,*[16] which denied access to federal habeas only upon a finding that the petitioner had "deliberately bypassed"[17] the state rule and thus clearly waived his right to present the federal issue to state court, was rejected.[18] In its stead, the Court extended the double-edged test announced in *Davis v. United States,*[19] and followed in *Francis v. Henderson*[20] (barring habeas review in cases where an otherwise fatal procedural default had been committed unless there was "cause" shown to excuse the misstep and the petitioner had been "prejudiced" by the alleged constitutional violation[21]), to cases involving federal habeas petitioners who failed to abide by state procedural rules requiring objections to be made to allegedly involuntary confessions at the trial.[22] This restriction of federal habeas where state procedural rules, especially those requiring contemporaneous objections, had been violated by the petitioner was seen by Justice Rehnquist as advancing four worthwhile goals: encouraging federal respect for state procedural rules;[23] reinforcing the laudatory effects that contemporaneous objection rules have on the adminis-

14. *Id.* at 78-79. The major areas of controversy identified by the Court were: types of federal claims that a federal habeas court could consider, the extent to which the federal court had to defer to prior state findings on the constitutional issue, the requirement that state remedies be exhausted before seeking federal relief, and the extent to which adequate and independent state grounds would bar federal habeas review of otherwise cognizable constitutional issues. It was this latter controversy that was directly at issue in Wainwright v. Sykes.

15. *Id.* at 81. The Court acknowledged that this willingness to alter its previous views was not dependent upon any statutory change in federal habeas corpus laws.

16. 372 U.S. 391 (1963). *See* notes 39-44 and accompanying text *infra.*

17. 372 U.S. at 438-39. *Fay* defined a deliberate bypass in terms of the classic definition of waiver stated in Johnson v. Zerbst, 304 U.S. 458, 464 (1937), as "an intentional relinquishment or abandonment of a known right or privilege."

18. 433 U.S. at 87-88.

19. 411 U.S. 233 (1973). *See* notes 47-49 and accompanying text *infra.*

20. 425 U.S. 536 (1976). *See* notes 50-53 and accompanying text *infra.*

21. 425 U.S. at 542.

22. 433 U.S. at 87.

23. *Id.* at 88. Justice Rehnquist felt that Florida's contemporaneous objection rule, as the enactment of a "coordinate jurisdiction within the federal system," was entitled to more respect than *Fay* allowed.

tration of justice;[24] preventing "sandbagging" by defense attorneys in state criminal actions;[25] and insuring the integrity and finality of state proceedings.[26]

Justice Rehnquist emphasized that *Sykes* was in no way a curtailment of a state prisoner's right to a de novo determination by a federal court of the merits of his constitutional claim; rather, it was an attempt to limit federal habeas review of constitutional issues that had *not* been raised in state court.[27] The majority opinion expressly declined to define the meaning and scope of either "cause" or "prejudice."[28] Future cases were anticipated to undertake that task.[29] For the present, the Court would only say that the availability of federal habeas review of state convictions where the constitutional issues had not been raised due to procedural default was now "narrower" than it had been under *Fay's* "deliberate bypass" standard.[30] Confidence was expressed, however, that the new standard would not unduly restrict federal courts from considering the constitutional claims of defendants who would otherwise be the victims of miscarriages of justice in state courts.[31]

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24. *Id.* at 88-89. Among the advantages pinpointed as flowing from a viable contemporaneous objection rule were: allowing decision on the merits while witnesses' memories were fresh and by the judge who observed their demeanor; possibly gaining immediate exclusion of the challenged evidence which could lead to acquittal; forcing the prosecutor to reconsider his use of the evidence for fear of reversal on appeal; and providing guidance, through the state court's rendering of an opinion on the question, to a subsequent federal court considering the same issue.

25. *Id.* at 89. "Sandbagging" was defined as the practice of failing to raise the constitutional issue in state court and gambling on acquittal, with the intention of raising the issue in a later federal habeas corpus proceeding if the gamble failed.

26. *Id.* at 90. Justice Rehnquist sought to maximize the integrity of state criminal proceedings. All of society's resources had been marshalled for trial, and enforcement of a contemporaneous objection rule would ensure that the trial would be final—not just the warm-up for a later federal habeas petition.

27. *Id.* at 87. The rule that a federal habeas court was not bound by determinations of constitutional issues made in state proceedings was established in Brown v. Allen, 344 U.S. 443 (1953).

28. 433 U.S. at 87.

29. *Id.*

30. *Id.*

31. *Id.* at 90-91. The Court did not explain how they arrived at this optimistic outlook. Three justices concurred in the majority opinion. Chief Justice Burger stated that he felt *Fay's* deliberate bypass standard was appropriate only when the crucial decision was in the hands of the defendant himself, and hence, did not apply to trial situations where tactical decision-making responsibility was necessarily in the hands of counsel. Justice Stevens concurred with the majority on the basis that *Fay* had not been interpreted by the lower federal courts to require a deliberate bypass by the defendant himself, but had been extended to

Dissenting, Justice Brennan[32] would have affirmed the judgment below on the basis of *Fay v. Noia*. In his view, Sykes' failure to object timely was the result of his lawyer's inadvertent error and not the product of a deliberate, tactical decision in which Sykes joined; therefore it failed to constitute a "deliberate bypass" of the state forum that would bind Sykes under the standard of *Fay*.[33] Justice Brennan accepted none of the majority's arguments for seeking to deny federal habeas corpus review in situations of less than a "deliberate bypass" by the defendant himself.[34] In particular, Justice Brennan dismissed the majority's fear of "sandbagging" by defense attorneys as unfounded since state and federal adjudication of constitutional issues are not mutually exclusive—there could be no reason except inadvertence for not seeking vindication in the prior state proceedings.[35] Justice Brennan also identified two federal interests that argued for liberal availability of the federal writ. First, strict adherence to state procedural rules would frustrate congressional policy in favor of federal habeas review of state convictions by effectively placing the determination of available federal jurisdiction in the states.[36] Second, *Fay v. Noia* rightly required the same standards for procedural waivers of constitutional rights as governed substantive waivers.[37] In sum, the shift to the "cause and prejudice"

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cover cases, like Sykes', where the evidence permitted the inference that counsel had made a tactical decision not to object to the admission of the statements. Justice White concurred in the result on the grounds that the alleged error in the state court was harmless within the rule of Harrington v. California, 395 U.S. 250 (1969), where it was held that the admission of confessions of other defendants, that admittedly violated petitioner's constitutional rights, was not grounds for reversal when other evidence against the petitioner was so overwhelming that the Court could conclude beyond a reasonable doubt that the denial of constitutional rights was harmless error.

32. 433 U.S. at 99. Justice Brennan's dissenting opinion was joined in by Justice Marshall.

33. *Id.* at 104-05.

34. *Id.* at 102.

35. *Id.* at 103.

36. *Id.* at 106-07. Strict adherence by the Court to state procedural rules so as to block federal habeas review of alleged constitutional violations in state court would render fundamental rights subordinate to these procedural rules. The states could, therefore, through the enactment of rules of procedure, determine whether a petitioner will have access to a federal forum for his constitutional claims. Justice Brennan felt that 28 U.S.C. § 2254 represented a distinct congressional policy choice, in light of several available alternatives, in favor of liberal federal habeas corpus review of state convictions. Any judicial consideration of a policy regarding the consequences that should flow from the default of a state procedural rule had to take congressional intent into consideration and, therefore, uphold the broader "deliberate bypass" standard of *Fay* as more in keeping with congressional purpose.

37. 433 U.S. at 108-09. Judging both procedural and substantive waivers of fifth amend-

test would jeopardize the primacy of constitutional rights that had always been central to the American governmental system.[38] The dissent also dismissed the state interests advocated by the majority. Most state procedural defaults are inadvertent; thus there can be no realistically effective deterrent against them.[39] In addition, finality of state proceedings does not always represent the ultimate goal to be achieved.[40] Finally, Justice Brennan attacked the failure of the Court to define precisely the elements of the "cause and prejudice" test, insisting that in the absence of any persuasive alternative, the deliberate bypass standard of *Fay* should be retained.[41]

The significance of *Wainwright v. Sykes* becomes clear upon review of several recent federal habeas decisions rendered by the Supreme Court and their cumulative effect on the use of the federal writ by state prisoners. Originally, federal habeas, as a vehicle for collateral review of state judgments, was possible only in limited instances.[42] The evolution of the writ as a safeguard against possible invasions of constitutional rights in state courts was accomplished through gradual progression,[43] culminating in *Fay v. Noia*.[44] There,

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ment rights by the same standard was believed important since the result in both instances was the same—the introduction of defendant's own testimony to his prejudice.

38. *Id.* at 110-11.

39. *Id.* at 113. Even assuming that barring federal review for state procedural defaults due to inadvertent lawyer error would encourage more thorough trial preparation, the result is that the defendant is barred from any forum—a harsh result not justified by any agency relationship between attorney and client.

40. *Id.* at 115. Justice Brennan pointed to other areas where finality was undermined. For example, federal courts are unwilling to grant interlocutory review although such a course would foster finality of the lower court's ultimate decision. In addition, the holding in Brown v. Allen, 344 U.S. 443 (1953), that federal habeas courts are not bound by state determinations of constitutional issues, was antagonistic to the concept of finality.

41. 433 U.S. at 116-17.

42. State prisoners were given the right to seek federal habeas corpus by the Act of February 5, 1867, ch. 27, 14 Stat. 385, which permitted a federal writ to issue to any prisoner held in violation of the Constitution, laws, or treaties of the United States. Two judicially created doctrines, however, limited this right: state criminal convictions were originally held reviewable by federal habeas courts only if the state court lacked "jurisdiction," *Ex parte* Siebold, 100 U.S. 371 (1880), and federal habeas corpus could not be sought until state remedies had been exhausted, *Ex parte* Royall, 117 U.S. 241 (1886).

43. *Siebold*'s lack of jurisdiction requirement was stretched to a fiction to justify the granting of federal writs. *See* Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 660 n.33 (1948). The requirement was discarded in Waley v. Johnston, 316 U.S. 101 (1942) (federal habeas corpus available, regardless of whether the state court lacked jurisdiction, whenever conviction is in disregard of defendant's constitutional rights). The exhaustion of state remedies requirement retained its vitality, *see Ex parte* Hawk, 321 U.S. 114 (1944), and was codified in 28 U.S.C. §§ 2254(b)-(c) (1970). Two

federal habeas relief was granted to a defendant who had failed to appeal his state conviction for fear that a retrial could result in the death penalty. He petitioned for a federal writ of habeas corpus on grounds that the confession supporting his conviction had been unlawfully coerced. The decision in *Fay* limited the concept of exhaustion of state remedies[45] and, more importantly for the present discussion, dispersed previous uncertainty by holding that state procedural defaults that would bar *direct* federal review did *not* preclude federal habeas corpus consideration.[46] Federal relief could be denied the procedurally-defaulting state prisoner who had "waived" his right to federal review, but a valid waiver required that the petitioner had "deliberately bypassed" orderly state procedures.[47] A deliberate bypass was defined as an understanding and knowing refusal to raise the federal claim in state court for strategic or tactical reasons.[48] Noia's conduct, in the face of what was described as a "grisly choice" between a life sentence and an appeal that might have resulted in the death penalty, did not reach the level of a deliberate bypass.[49] The *Fay* standard, weighed as it was in favor of the petitioning prisoner, provoked a marked increase in the number of federal habeas petitions filed[50] and a storm of criticism in law reviews.[51]

The continued vitality of *Fay* was first rendered suspect in a case involving a federal prisoner's right of access to the federal writ. *Davis v. United States*[52] consisted of a constitutional challenge to

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subsequent decisions made clear, however, the power of the federal habeas court to make an independent determination on the merits after the petitioner had exhausted state processes. Brown v. Allen, 344 U.S. 443 (1953); Townsend v. Sain, 372 U.S. 293 (1963).

44. 372 U.S. 391 (1963).

45. *Id.* at 435. It was held that the petitioner was required to exhaust only those state remedies open to him at the time of application for the federal writ.

46. *Id.* at 399. Prior to the *Fay* decision, it was thought that a state procedural default would be adequate state grounds to bar federal habeas review, although such a holding had never been expressly stated by a majority of the Court. For a discussion of this point, see C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 53, at 243-44 (3d ed. 1976).

47. 372 U.S. at 438.

48. *Id.* at 439. The Court borrowed this definition directly from Johnson v. Zerbst, 304 U.S. at 464.

49. 372 U.S. at 440.

50. *See* Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 500 (1928) [hereinafter cited as Frankfurter].

51. *See, e.g.*, Doub, *The Case Against Modern Federal Habeas Corpus*, 57 A.B.A.J. 323 (1971) [hereinafter cited as Doub]; Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) [hereinafter cited as Friendly].

52. 411 U.S. 233 (1973).

the racial composition of an indicting grand jury—a challenge not raised at any time prior to the petition for federal habeas. Denial of federal collateral relief was upheld by the Supreme Court primarily through reliance on the language of rule 12(b)(2) of the Federal Rules of Criminal Procedure. The rule requires that any objection to an indictment be raised before trial, with failure to object being construed as a waiver unless cause is shown.[53] Thus, the Court found the deliberate bypass standard of *Fay* inapplicable to federal prisoners, holding that the federal writ could not issue unless cause was shown to excuse the failure to make a timely objection or, alternatively, unless there was a finding of prejudice to the petitioner in the court below that justified the granting of the writ.[54]

The *Davis* "cause and prejudice" standard was extended in *Francis v. Henderson*[55] to a state prisoner who failed to object timely to the composition of a grand jury. Absent showings of both "cause" for the noncompliance with state rules and "prejudice" to the petitioner in state court, the procedural default was held fatal.[56] The Court found the rule of *Davis* applicable to the *Francis* situation, despite legitimate distinguishing features.[57] Comity and federalism were said to be advanced by requiring that similar procedural defaults by federal and state prisoners be given the same import, particularly since both systems were found to have identical interests in protecting the integrity and finality of the trial process.[58] The *Fay* standard of deliberate bypass, developed to determine federal habeas availability for state prisoners, was emasculated by the *Francis* Court. Without expressly considering the applicability of *Fay, Francis* relied on the standards developed for federal prisoners in *Davis,* though Francis' status as a state prisoner made his situation much more analagous to that of the petitioner in *Fay.*

In addition to several other cases that appear in keeping with the

53. *Id.* at 242.

54. *Id.* at 244.

55. 425 U.S. 536 (1976).

56. *Id.* at 542. It appears that while the "cause" and "prejudice" requirements were viewed in *Davis* as alternative methods of justifying a granting of federal habeas review despite a procedural mistake in state court, the *Francis* Court, without explanation, viewed them as a dual requirement.

57. *Davis* involved a petition by a federal prisoner who had not shown any inadequacy on the part of his counsel to establish cause for the waiver, while in *Francis,* the Court was considering the petition of a state prisoner who had demonstrated the inadequacy of his counsel. 425 U.S. at 554 (Brennan, J., dissenting).

58. *Id.* at 541-42.

general trend towards more restricted availability of federal collateral relief,[59] the Supreme Court has most recently held that federal habeas is totally unavailable to state prisoners who seek to challenge their convictions under the exclusionary rule.[60]

Wainwright v. Sykes could be read narrowly to apply only to the specific factual situation involved: waiver of the admission of a confession through noncompliance with a state contemporaneous objection rule.[61] The current narrowing trend in the availability of federal habeas,[62] however, makes it likely that the case has a broader import. The probable effect is the establishment of the "cause and prejudice" standard as the appropriate measure of the availability of federal habeas relief whenever a state prisoner has failed to comply with *any* state procedural rule. As such, the impact of *Sykes* is much greater than the arguably limited holding of *Francis v. Henderson*[63] and amounts to a sub silentio overruling of *Fay*.[64]

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59. *See, e.g.*, Estelle v. Williams, 425 U.S. 501 (1976) (failure to object at trial to having to appear in prison garb held to constitute a waiver of such objection). *See also* Preiser v. Rodriguez, 411 U.S. 475 (1973) (state prisoner challenging fact or duration of his imprisonment has as his sole remedy the federal writ of habeas corpus—no suit may be brought under 42 U.S.C. § 1983 (1970)). In view of the now more limited availability of federal habeas, *Preiser* will drastically reduce the ability of state prisoners to obtain federal collateral review of their convictions.

60. Stone v. Powell, 428 U.S. 465 (1976). The Supreme Court held that state prisoners were precluded from seeking federal habeas to assert a claim that evidence produced by an unlawful search and seizure had been admitted at trial absent a showing that the state had failed to provide a full and fair opportunity to litigate the claim. The exclusionary rule was seen as designed primarily to deter future unlawful police conduct and not as a personal constitutional right for redress of the victim of an illegal search. The Court concluded that the societal costs of permitting federal habeas for fourth amendment claims far outweighed any deterrent effect that often long-delayed petitions would have on police conduct.

61. 433 U.S. at 86-87. The court's language dealt specifically with the situation of a waived objection to the admission of a confession at trial in state court. It declined to paint with the same broad brush that it found was used in *Fay*. *Id.* at 88 n.12.

62. *See* notes 42-57 and accompanying text *supra*.

63. 425 U.S. at 541-42. The result in *Francis* could arguably be justified exclusively on comity grounds. It presented the same factual situation as in *Davis* only it involved a *state* prisoner. The Court could have felt obligated to adopt similar standards for challenges to the racial compositions of both federal and state grand juries so as to prevent incongruous results based solely on the petitioner's status.

64. 433 U.S. at 87-88. The Court purported to overrule only the "dicta" in *Fay*—*i.e.*, the application of the deliberate bypass standard to fact situations other than the one specifically presented in *Fay*. There remains, however, the fact that the lower federal courts have followed the rule of *Fay* in a variety of differing factual situations and such applications have now been held improper. In *Sykes*, the Court also intimated that it might apply the "cause and prejudice" standard to a contemporary case presenting a factual situation identical to *Fay*. *Id.* at 88 n.12.

The majority opinion is subject to serious criticism on two fronts. First, the Court's justification for its retreat from *Fay's* high level of federal habeas intervention in state proceedings is not persuasive; second, the Court has not sufficiently articulated the new standard to provide cogent guidelines for decision-making by the lower federal courts.

The basis for the Court's decision in *Sykes* was a desire to promote the ideal of "finality" in the criminal process—an interest found incompatible with the extensive availability of federal habeas relief permitted by *Fay*.[65] However, the Court made no attempt to balance this societal interest with that of the individual litigant. The majority implied its preference for the collective versus the individual interest by this silence.[66] The Court also expressed a desire to advance "federalism" and lessen the federal-state friction emanating from collateral federal review of state criminal proceedings.[67] The fact seemingly overlooked by the majority, however, is that a federal system breeds conflict by its very nature,[68] and any reduction in availability of an important tool for the redress of constitutional violations should be based only upon a reasoned conclusion that the benefit to the system, through a lessening of tensions, will be significant enough to justify the change.[69]

Another basis for the result in *Sykes* may be the practical pressures on the Court and its belief that a retreat from *Fay* would help reduce the crushing workload of the federal courts.[70] While it is clear

65. *Id.* at 88. The leading argument for finality in the criminal process can be found in Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) [hereinafter cited as Bator]. For a critical response to Bator's thesis, see Carroll, *Habeas Corpus Reform: Can Habeas Survive the Flood?*, 6 CUM. L. REV. 363, 376-80 (1975) [hereinafter cited as Carroll].

66. Justice Brennan reminded the majority of the paramount importance of the constitutional rights of individuals in American life. 433 U.S. at 110-11 (Brennan, J., dissenting).

67. *Id.* at 88. For arguments that federal-state tensions are unreasonably and unnecessarily increased by broad federal habeas review of state convictions, see Doub, *supra* note 51, at 326-27, and Bator, *supra* note 65, at 504. For an opposing view, see Chisum, *In Defense of Modern Federal Habeas Corpus for State Prisoners*, 21 DEPAUL L. REV. 682, 693-95 (1972) [hereinafter cited as Chisum]. In light of the fact that so few petitions are found to be meritorious (Justice Clark, in his concurring opinion in *Fay*, placed the percentage at only 1.4%, 372 U.S. at 445 n.1), it is hard to justify the argument that tensions are being dramatically raised by federal habeas consideration.

68. *See* Frankfurter, *supra* note 50, at 500.

69. For a view that curtailment of the availability of federal habeas for state prisoners would only minimally reduce the tensions between state and federal courts and thus, not be worth the price, see Carroll, *supra* note 65, at 381.

70. Chief Justice Burger has expressed the opinion that the growth in the number of

that *Fay* resulted in an increase in the number of federal habeas corpus petitions filed,[71] it is not certain that this has caused an undue amount of judicial exertion, since the vast majority of such petitions are disposed of summarily.[72]

The failure to define either of the elements of the "cause and prejudice" standard is the major shortcoming of the majority opinion.[73] In the years since *Fay's* deliberate bypass standard was enunciated, it has been applied consistently and with little apparent difficulty.[74] The adoption of a new and imprecisely defined test will surely lead to uncertainty and variation in the lower federal courts, possibly resulting in an actual increase in federal habeas corpus litigation as the boundaries of the "cause and prejudice" test are sought.

Examining the probable meanings given both "cause" and "prejudice," it appears that the new standard will be exceedingly difficult to meet. The "cause" element was taken originally from the language of rule 12(b)(2) of the Federal Rules of Criminal Procedure.[75] The varying interpretations given the term make a precise definition impossible.[76] Failure of the Court to provide any indication of what will be held "cause" makes it difficult for prisoners to evaluate the potential merit of their claims and seems to ensure

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federal habeas petitions filed by state prisoners has significantly contributed to the overburdening of the federal courts. *See* Burger, *The State of the Judiciary—1970,* 56 A.B.A.J. 929 (1970).

71. In 1960, there were 871 federal habeas corpus petitions filed by state prisoners. In 1970, the figure had risen to 9,063. In 1973, 7,784 such petitons were filed. For a summary of the year by year increase, see Carroll, *supra* note 65, at 373 n.54.

72. *See* LaFrance, *Federal Habeas Corpus and State Prisoners: Who's Responsible?,* 58 A.B.A.J. 610, 612 (1972); Chisum, *supra* note 67, at 698-99; Note, *Federal Habeas Corpus Review: Alive or A Wake?,* 3 J. CONTEMP. L. 321, 345-46 (1977) [hereinafter cited as *Alive or A Wake*].

73. 433 U.S. at 87.

74. *Id.* at 102 n.4 (Brennan, J., dissenting).

75. *See* Davis v. United States, 411 U.S. 233 (1973).

76. *See, e.g.,* United States v. Amaral, 488 F.2d 1148, 1151-52 (9th Cir. 1973) (failure by defendant to make motion to suppress evidence of an out-of-court photographic identification held unexcused by any "cause" since defendant failed to show he lacked opportunity to move in timely fashion); Morris v. Sullivan, 497 F.2d 544 (5th Cir. 1974) (state prisoners seeking federal habeas corpus relief, who did not allege that their attorneys were incompetent or that alleged jury discrimination was covert and undiscoverable, did not show "cause" to justify their failure to raise the objections prior to trial as required by state law), *cert. denied,* 427 U.S. 905 (1976). In the *Davis* case, the Court stated that a petitioner's failure to use due diligence to uncover notorious and available facts will result in a finding that "cause" has not been shown for the failure to make a timely objection. 411 U.S. at 243.

inconsistent determinations among different federal courts. The element of "prejudice" appears to require actual prejudice to have occurred in the state court as a result of the constitutional violation.[77] While the precise meaning of actual prejudice is unclear, it appears that it constitutes more than a mere presumption of prejudice—rather, it is proof of prejudice in fact.[78] Such a standard seemingly requires a petitioner to prove that he would not have been convicted absent a violation of his rights in state court.[79] While certain applicants for federal habeas could probably show cause for their failure to comply with procedural rules, the requirement of proving actual prejudice erects an extremely high barrier to the granting of relief.[80] The Court has, through adoption of the "cause and prejudice" test, effectively reversed the basic tenet of *Fay* that violation of state procedural rules should not, absent exceptional circumstances, preclude the availability of federal habeas corpus.

An unanswered question arising from the majority opinion is the extent to which an attorney's negligence that results in a procedural default will be binding on his client. *Fay* focused on the deliberate bypass by the petitioner himself; a choice made by counsel without consultation did not automatically bar relief.[81] Nevertheless, the lower federal courts recognize the realities and pressures of trial; they have generally focused on the actions of the defendant's *attorney,* finding a deliberate bypass on his part if he could have

77. The Court gave an indication that "actual" prejudice was going to be required under the "cause and prejudice" test by stating that other substantial evidence of guilt presented at trial would bar a finding that the petitioner had been in any way prejudiced in the state court by the alleged constitutional violation. 433 U.S. at 91. In addition, the previous cases which established the "cause and prejudice" standard and which were relied upon in *Sykes* made clear that a finding of actual prejudice was to be required. *See* Francis v. Henderson, 425 U.S. 536, 542 (1976); Davis v. United States, 411 U.S. 233, 244-45 (1973).

78. *See* United States v. Marion, 404 U.S. 307, 325-26 (1971). The Court found that no actual prejudice had been shown to have resulted to the defendant solely from the fact that the government had delayed in prosecuting him for consumer fraud. The defendant did not show any real detriment to his defense, and his reliance upon possibilities of prejudice that accompany any such delay did not reach the level of actual prejudice.

79. In *Francis,* Justice Brennan stated that under the actual prejudice standard, the petitioner would have to prove that he would not in fact have been indicted absent the constitutional violations involved in the racial composition of the grand jury. 425 U.S. at 557 (Brennan, J., dissenting). For a view that petitioners *should* have to present a colorable claim of innocence in order to collaterally challenge their convictions, see Friendly, *supra* note 51, at 142.

80. Justice Brennan had reservations that a petitioner would ever be able to meet this burden of proof. 425 U.S. at 557 (Brennan, J., dissenting).

81. 372 U.S. at 439.

reasonably decided not to object at the trial level.[82] Such a finding binds the defendant to his attorney's act.[83] It is unclear under *Sykes* whether lawyer error will continue to bind the unconsulted defendant only if it reaches the level of a deliberate bypass by the attorney, or whether *all* attorney error will bind the defendant absent a showing of "cause and prejudice." Should it be the latter, the result will weigh heavily upon indigent defendants who are not assured of acquiring competent counsel.

The present standard set by the Court will make federal habeas available only in exceptional circumstances. This is in clear conflict with congressional policy in favor of federal post-trial review of state criminal convictions as enunciated in 28 U.S.C. § 2254.[84] In addition, responsibility for protecting vital constitutional rights will devolve upon the state courts which, it has been argued, have not always been zealous in preserving federal constitutional rights.[85] Even assuming the utmost integrity on the part of state courts, for other reasons it may still be preferrable to have federal constitutional issues weighed by a federal habeas court.[86]

The present Supreme Court has retreated from the expanded view of availability of federal habeas corpus set forth in *Fay* to an extent that, practically, it must be considered overruled. The adoption of the "cause and prejudice" test restricts the remedial power of the federal courts while it enhances the status of state courts as final arbiters of federal constitutional claims. A determination of the extent of deference to be afforded the state courts awaits the promulgation of some much needed guidelines as to the bounds of

82. *See* 433 U.S. at 94 n.1 (Stevens, J., concurring).

83. This approach was sanctioned in Henry v. Mississippi, 379 U.S. 443, 451-52 (1965), where an attorney's deliberate bypass of an objection at trial, in contravention of the state's contemporaneous objection rule, was held binding on the defendant under *Fay*.

84. 433 U.S. at 106 (Brennan, J., dissenting). *See also* note 36 and accompanying text *supra*.

85. *See Alive or A Wake, supra* note 72, at 347.

86. *See* Chisum, *supra* note 67, at 692 (the security of tenure afforded federal judges guarantees a more impartial and, generally, better qualified judge). *See also* Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1060-61 (1970) ("The federal habeas court . . . is lodged in a different institutional setting, with different loyalties and assumptions which may foster greater hospitality to constitutional goals. . . . [T]he state judge's allegiance to the Constitution may be weakened by his proximity to the state's enforcement of its criminal law.").

the "cause and prejudice" standard. One thing, however, is certain: the state courts have received a heavy burden of constitutional responsibility.

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